

FBI Independence as a Threat to Civil Liberties: An Analogy to Civilian Control of the Military

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ABSTRACT

At a time when the President is under investigation, and in the wake of a controversial dismissal of the FBI Director, the need for an “independent” FBI has appeared to many to be more important than ever. Indeed, the Senate would not have confirmed the new FBI Director, Christopher Wray, if he had not promised to be independent of the President and the Attorney General. This Article argues that calls for an independent FBI are misguided and dangerous. The Article analogizes presidential control of the FBI to civilian control of the military by demonstrating that, contrary to conventional wisdom, the FBI and the military share the same purpose. It then explores in depth how the FBI has often infringed on civil liberties in the same way that the framers worried an out-of-control military might do so, and it explains why the independence that the FBI has often enjoyed was a cause of those violations. Finally, it concludes that if it is necessary to preserve the FBI’s investigative independence, the solution is to split the FBI to reflect the model of many western democracies—creating an independent agency to investigate crime (like Britain’s New Scotland Yard) and a separate agency to continue the FBI’s national security functions (like Britain’s MI5).

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INTRODUCTION

When President Donald Trump fired Federal Bureau of Investigation (“FBI”) Director James Comey, a consensus quickly emerged that the next FBI Director must be “independent” of the President.¹ The new FBI Director, Christopher Wray, reflected this at his confir-

¹ See *infra* Section IV.A.

mation hearing when he promised “to lead an independent Bureau.”² In the time between Comey’s firing and Wray’s confirmation, there was little if any dissent from this consensus. But there should have been.

The case against an independent FBI begins with the framers’ fears of an independent military. The founding generation understood that out-of-control military forces throughout history have posed threats to civil liberties. This led some to oppose standing armies. But against the wishes of the anti-Federalists, the framers ultimately allowed an army, so long as it remained under strict civilian control.

The comparison between the FBI and the military may not seem obvious because many people think of law enforcement as the FBI’s primary purpose. But for most of the FBI’s history, its primary purpose has been the same as the military’s: national security against foreign enemies. That was true during World War II, when the FBI captured German spies, worked with British intelligence to ensure the success of the D-Day landings, and installed more than 6,000 wiretaps in the name of national security. It was also true during the Cold War against the Soviet Union, when the FBI uncovered Soviet espionage rings, spied on Soviet leadership, and even installed an anti-Soviet government in the Dominican Republic. And it again became true after the attacks of September 11, 2001 (“9/11”), when fighting al-Qaeda and similar terrorist groups became the FBI’s highest priority.

For much of that history, the FBI operated independently of the President and Attorney General, and it engaged in massive violations of civil liberties that confirmed the founders’ fears about an independent military. The FBI’s independence led to guilt-by-association arrests of thousands of innocent people, the reputation-destroying excesses and paranoia of the McCarthy era, the warrantless wiretapping of political minorities, brutal violence against civil rights activities, and the widespread harassment of civil rights leaders, including Dr. Martin Luther King Jr.

The history of those infringements on liberty shows why the FBI must not operate as an independent agency. It must be accountable to the President, who is accountable at the ballot box. Otherwise, it is accountable to no one—including and especially the people.

² *Full Text: Christopher Wray FBI Nomination Hearing Transcript*, POLITICO (July 12, 2017, 10:15 AM), <http://www.politico.com/story/2017/07/12/full-text-christopher-wray-fbi-nomination-hearing-transcript-240450> [<https://perma.cc/8LLE-KDZ8>] [hereinafter *Wray Hearing Transcript*].

Part I of this Article first explores the historical foundations of the Constitution's command for civilian control of the military. It then outlines the meaning of civilian control, clarifying that control is more than the mere absence of a military coup. Such control is violated when civilian orders are not obeyed, when civilian monitoring is insufficient, or when undue influence by the military is brought to bear against civilian policymakers. As this Article will show, the FBI has escaped civilian control by using each of those three mechanisms, with dangerous consequences.

Part II argues that the FBI is analogous to the military in two ways. First, its primary purpose is the military's primary purpose: "providing security from external threats."³ Second, it has infringed on civil liberties in ways similar to how the armies that informed the framers' thinking infringed liberty.

Part III examines five episodes of the FBI's infringements on civil liberties—many of them decades long—and argues that the FBI's independence greatly facilitated those infringements. It also explains how the reverse was also true, with the FBI's infringements on liberty often facilitating its independence.

Section IV.A brings this history into the current day, arguing that recent calls for an independent FBI are as dangerous as ever—despite the well-intentioned but misguided consensus in favor of independence. Section IV.B argues that to the extent a nonindependent FBI creates problems with regard to investigating criminality in the executive branch, the solution—consistent with the Constitution's text and the lessons of history—is for Congress to greatly expand the investigative capacities of its own oversight committees.

Finally, Section IV.C argues that if one believes that the FBI's law enforcement functions should be exercised with independence, the solution is to split the FBI, much like other western democracies split functions—for example, the United Kingdom's MI5 and police forces like New Scotland Yard.⁴ Under this scenario, the FBI's law enforcement investigations could be housed in an agency independent of politics, while its national security functions could be exercised by

³ Glenn Sulmasy & John Yoo, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror*, 54 UCLA L. REV. 1815, 1817 (2007).

⁴ See, e.g., Carmen Nobel, *How the FBI Reinvented Itself After 9/11*, HARV. BUS. SCH.: WORKING KNOWLEDGE (Apr. 27, 2016) <https://hbswk.hbs.edu/item/how-the-fbi-reinvented-itself-after-9-11> [<https://perma.cc/27XE-LBS4>] ("Many countries maintain two separate entities for law enforcement and national security: The United Kingdom has Scotland Yard and MI5, for example, and Canada has the Royal Canadian Mounted Police and the Canadian Security Intelligence Service.").

an agency that answers to the President, consistent with the principle of civilian control of the military.

The Article concludes with a summary of the Article's thesis that the history of the FBI shows the framers were right to fear a military free of civilian control, and that only by rejecting today's conventional wisdom that the FBI should be independent can we best protect our civil liberties.

I. CIVILIAN CONTROL OF MILITARY

The principle of civilian control of the military "has deep roots in our history."⁵ Colonial Americans knew from history and experience that armies could be "agents of oppression"⁶ that "terrorize a population, seize power, or perpetuate tyranny."⁷ "No principle of government was more widely understood or more completely accepted by the generation of Americans that established the United States than the danger of a standing army in peacetime."⁸

When drafting the Constitution, the framers recognized that a standing army may be a necessity, but they also recognized that the best protection against an out-of-control army that threatened civil liberties was "keeping military power subservient to civilian authority."⁹ That is why the "mandate of civilian control of the military pervades our constitutional structure."¹⁰

Civilian control, however, means more than the avoidance of a military coup. It is undermined when members of the military disobey orders, freelance without adequate monitoring by civilians, or exert excessive influence on the policymaking of elected officials. Such failures in turn flout our constitutional structure, frustrate democratic accountability, and often infringe on individuals' civil liberties.

⁵ Cf. *Laird v. Tatum*, 408 U.S. 1, 15 (1972).

⁶ Charles J. Dunlap, Jr., *Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military*, 29 WAKE FOREST L. REV. 341, 345 (1994).

⁷ RICHARD H. KOHN, *The Constitution and National Security: The Intent of the Framers*, reprinted in *THE UNITED STATES MILITARY UNDER THE CONSTITUTION OF THE UNITED STATES, 1789–1989*, at 82 (Richard H. Kohn ed., 1991).

⁸ RICHARD H. KOHN, *EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783–1802*, at 2 (1975).

⁹ *Reid v. Covert*, 354 U.S. 1, 40 (1957).

¹⁰ J. Bryan Echols, *Open Houses Revisited: An Alternative Approach*, 129 MIL. L. REV. 185, 200 (1990).

A. *The Foundations of Civilian Control*

The demand in the United States for civilian control of the military traces its ideological foundation to a “distrust of military power” and a “hostility to permanent standing armies” that predate the nation’s founding by centuries.¹¹ The armies of William the Conqueror “sacked and burned” English towns and “raped, robbed, and murdered” their inhabitants.¹² Likewise, the English armies of the Middle Ages were “notorious for their mistreatment of the civilian population” and “instilled in the English people a deep aversion to the professional army”—an aversion that intensified into an ideology in the 1600s.¹³

The 1600s saw a series of English civil wars, a military coup by Oliver Cromwell, and “abuses committed against the civilian population” by all sides of the conflicts.¹⁴ The “wrenching political struggle over the existence of an army, its control by Parliament or the Crown, its internal governance, and its relationship to the English people and society” led to a “radical Whig political ideology” that viewed an out-of-control army as “an acute and overbearing threat to liberty.”¹⁵

Colonial experiences reinforced that Whig ideology. The familiar soldier-civilian “friction, mutual disgust, and antagonism” arose from the British Army’s suppression of Bacon’s Rebellion in the 1670s and Leisler’s Rebellion in the 1680s.¹⁶ Then, in the French and Indian War of 1756–1763, “all the difficulties and antagonisms were replayed on a far wider scale than ever before.”¹⁷

After the war, as several thousand British troops¹⁸ “shifted . . . from the frontiers to the seacoast to maintain order and enforce British authority,”¹⁹ armies “unresponsive to the colonists’ assemblies”²⁰ increasingly infringed on civil liberties and “sparked fistfights, riots, and similar incidents.”²¹ For example, in 1766, they looted and destroyed homes along the Hudson River.²² More famously, in 1770,

¹¹ KOHN, *supra* note 8, at 3, 3–4.

¹² William S. Fields & David T. Hardy, *The Militia and the Constitution: A Legal History*, 136 MIL. L. REV. 1, 4–5 (1992).

¹³ *Id.* at 6, 12.

¹⁴ *Id.* at 10, 10–13; *see also* KOHN, *supra* note 7, at 81–82.

¹⁵ KOHN, *supra* note 8, at 3–4.

¹⁶ *Id.* at 4.

¹⁷ *Id.* at 4–5.

¹⁸ *Id.* at 5.

¹⁹ KOHN, *supra* note 7, at 82.

²⁰ Dunlap, *supra* note 6, at 345.

²¹ Fields & Hardy, *supra* note 12, at 25.

²² KOHN, *supra* note 8, at 5.

they killed five civilians in the Boston Massacre, an event that John Adams called “more important” to “American history” than “the battle of Lexington or Bunker’s Hill” or “the surrender of Burgoyne or Cornwallis.”²³

The Boston Massacre “permanently embedded the prejudice against standing armies into the American political tradition.”²⁴ Samuel Adams spoke for many when he wrote, “A Standing Army, however necessary it may be at some times, is always dangerous to the Liberties of the People.”²⁵ As demonstrated by the Declaration of the Independence, this sentiment “became central to the Revolutionary tradition, deeply interwoven with the language of independence and birth of the United States as a nation.”²⁶

The Declaration of Independence criticized King George III not only for his army’s “death, desolation and tyranny,” but also for its independence from, and unaccountability to, the people.²⁷ He had “affected to render the Military independent of and superior to the Civil power,” “kept among us, in times of peace, Standing Armies without the Consent of our legislatures,” and “protect[ed] them, by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States.”²⁸ State declarations of rights in 1776 made similar criticisms.²⁹ And after the war against Britain was won, it was little wonder that the Continental Congress reduced the army to fewer than one hundred soldiers in response to a motion by Elbridge Gerry, who declared that standing armies in peacetime are “dangerous to the liberties of a free people.”³⁰

By the time of the Constitutional Convention three years later, the need for a standing army was more obvious, with “the army and the defective policy which had created it as the very symbol of the inadequacy of government under the Articles of Confederation.”³¹ But the fear of a standing army still hung over the Convention.³² Concerns over a runaway army’s threat to civil liberties inspired “speeches

23 *Id.* at 5–6 (quoting John Adams).

24 *Id.* at 6.

25 *Id.* at 2 (quoting Samuel Adams).

26 *Id.* at 6.

27 THE DECLARATION OF INDEPENDENCE para. 27 (U.S. 1776).

28 *Id.* paras. 13, 14, 18; *see also* KOHN, *supra* note 8, at 6; Fields & Hardy, *supra* note 12, at 26.

29 Fields & Hardy, *supra* note 12, at 26 (quoting Maryland Declaration of Rights of 1776 and Pennsylvania Declaration of Rights of 1776).

30 SAMUEL P. HUNTINGTON, *THE SOLDIER AND THE STATE* 144 (1957).

31 KOHN, *supra* note 8, at 72; *see also id.* at 68.

32 *Perpich v. Dep’t of Def.*, 496 U.S. 334, 340 (1990); *see also* Dunlap, *supra* note 6, at 348.

and writings of the Framers of the Constitution” that “abound with statements that the military should be subordinated to the civil power.”³³

As with so many questions at the Convention, the framers delicately balanced liberty with order and security. On the one hand, the Constitution “invited”³⁴ Congress to create a standing army³⁵ and “ma[de] the government more effective in war-making” by placing a “strong executive” in charge of it.³⁶ On the other hand, it “enshrine[d] the notion” of “civil control over military affairs in the American political architecture”³⁷ to check infringements on the people’s liberties and make the military accountable to the people through their representatives.³⁸

The constitutional clauses establishing civilian control of the military begin in Article I. The people, through their elected representatives in Congress, are given the power “To declare War . . . ; To raise and support Armies . . . ; To provide and maintain a Navy; [and] To make Rules for the Government and Regulation of the land and naval Forces.”³⁹ The framers designed these provisions to ensure that “authority to create military institutions emanated from the people themselves.”⁴⁰

Two prohibitions in Article I work together to further ensure civilian control over the military. First, with regard to funding armies, “no Appropriation of Money to that Use shall be for a longer Term than two Years.”⁴¹ This “force[s] every new Congress to examine the need for an army and to certify its existence by appropriating the money.”⁴² Second, “no Person holding any Office under the United States, shall be a Member of either House during his Continuance in

³³ HUNTINGTON, *supra* note 30, at 164.

³⁴ KOHN, *supra* note 8, at 87.

³⁵ U.S. CONST. art. I, § 8.

³⁶ KOHN, *supra* note 7, at 79.

³⁷ Michael L. Kramer & Michael N. Schmitt, *Lawyers on Horseback? Thoughts on Judge Advocates and Civil-Military Relations*, 55 UCLA L. REV. 1407, 1411 (2008).

³⁸ *Id.* at 1411–12; MICHAEL C. DESCH, *CIVILIAN CONTROL OF THE MILITARY* 4 (1999) (“Civilian control of the military . . . was clearly a compromise between increased military or political effectiveness and the preservation of domestic liberty.”); KOHN, *supra* note 7, at 81 (describing framers’ desire “to check the military power, to make certain that those who would possess the tools of force would not use the power of coercion to overturn the Constitution and subvert republican government”).

³⁹ U.S. CONST. art. I, § 8, cls. 11–14; *see also* KOHN, *supra* note 8, at 84–85; KOHN, *supra* note 7, at 83–84; Echols, *supra* note 10, at 200.

⁴⁰ KOHN, *supra* note 8, at 85; *see also* KOHN, *supra* note 7, at 83–84.

⁴¹ U.S. CONST. art. I, § 8, cl. 12.

⁴² KOHN, *supra* note 7, at 83–84.

Office.”⁴³ The upshot is that no army can exist unless the most recently elected representatives of the people fund it through a Congress whose membership is free of military officers.

The constitutional provisions establishing civilian control of the military continue in Article II, which vests an elected President with “[t]he executive Power”⁴⁴ and makes him “Commander in Chief of the Army and Navy of the United States.”⁴⁵ Pursuant to these authorities and through the “appointment of military personnel, the issuance of executive orders and commands, and reliance upon the instrumentality of the civilian secretary,”⁴⁶ the President thus commands the army.⁴⁷ The military is therefore anything but independent; it has authority to do only what the people—through their President—command it to do.⁴⁸ The people, through Congress and the President, are—or, at least by the Constitution, should be—in complete control of the military.

During the debate over ratification, Federalists and anti-Federalists argued over whether the Constitution’s requirements for civilian control were sufficient protections against a standing army’s threat to civil liberties. Anti-Federalists called armies “‘dangerous,’ ‘the nursery of vice,’ ‘engines of despotism,’ the ‘grand machine of power,’ the ‘grand engine of oppression,’ and ‘restringent to the rights and liberties of mankind,’” as well as the “bane of freedom” and “the ‘rock on which’ American ‘liberties would suffer shipwreck.’”⁴⁹

⁴³ U.S. CONST. art. I, § 6, cl. 2; *see also* HUNTINGTON, *supra* note 30, at 165.

⁴⁴ U.S. CONST. art. II, § 1, cl. 1.

⁴⁵ U.S. CONST. art. II, § 2, cl. 1; *see* KOHN, *supra* note 7, at 84; Echols, *supra* note 10, at 200; John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 175–76 (1996).

⁴⁶ HUNTINGTON, *supra* note 30, at 179.

⁴⁷ To be sure, the President does not have total control over all aspects of the military. Presidential influence or control over courts-martial, for example, is considered inappropriate. *See* Tessa Berenson, *President Trump Says Bowe Bergdahl’s Sentence Is a ‘Disgrace.’ But It’s Partly His Fault*, TIME (Nov. 3, 2017), <http://time.com/5009387/donald-trump-bowe-bergdahl-sentence-discharge-disgrace/> [<https://perma.cc/GUM7-WRD8>] (explaining military judge would consider President Trump’s remarks about Bergdahl as mitigating evidence in sentencing); Jennifer Steinhauer, *Remark by Obama Complicates Military Sexual Assault Trials*, N.Y. TIMES (July 13, 2013), <http://www.nytimes.com/2013/07/14/us/obama-remark-is-complicating-military-trials.html> [<https://perma.cc/KQU7-N9F3>] (detailing how President Obama’s comments led to dismissal of charges due to unlawful command influence).

⁴⁸ *See* KOHN, *supra* note 7, at 84 (discussing the historical nature of the President’s Commander-in-Chief powers, such that “disobedience to his orders constituted mutiny, punishable by death”).

⁴⁹ KOHN, *supra* note 8, at 81 (emphasis omitted).

As the history of other nations since our founding has shown, the anti-Federalists' fears were not entirely unfounded. "Few nations on earth have lasted two centuries under one constitution, with civilian rule and civilian control of the military intact."⁵⁰ Indeed, it was not long ago that "[m]ore than a third of the member states of the United Nations [were] ruled by governments installed by military intervention."⁵¹ But at least with regard to the anti-Federalists' greatest fear of military coups and dictatorships, the Federalists' faith in the American system they designed proved correct. "[T]he American military has never made a single move to overthrow the government . . ."⁵²

But as Section I.B will show, civilian control of the military has been tested and has occasionally wavered, with "occasional episodes of real, and sometimes acute, civil-military tension."⁵³ And as Parts II and III will show, an FBI with many similarities to the military has often exercised a troubling degree of independence similar to the kind the founding generation worried an unmonitored or uncontrolled army might exercise—and with the consequences of civil liberty violations that have been, if not a "shipwreck," at least "restringent to the rights and liberties" of the people, especially the nation's racial and political minorities.⁵⁴

B. *The Meaning of Civilian Control*

"Civilian control of the military is . . . widely assumed,"⁵⁵ but analysis of it is "virtually nonexistent in the legal academic literature."⁵⁶ That is likely because the United States has never had a military coup.⁵⁷ "Most people think about civil-military relations strictly in terms of coups: if there are coups, then civil-military relations are bad, and if not they are good. But there are many other aspects to civil-military relations."⁵⁸ The assumption that the improbability of a coup equates with effective civilian control of the military is "on a par with

⁵⁰ KOHN, *supra* note 7, at 87.

⁵¹ Claude E. Welch, Jr., *Civilian Control of the Military: Myth and Reality*, in *CIVILIAN CONTROL OF THE MILITARY* 1, 34 (Claude E. Welch, Jr. ed., 1976).

⁵² KOHN, *supra* note 7, at 87.

⁵³ *Id.*

⁵⁴ KOHN, *supra* note 8, at 81.

⁵⁵ Sulmasy & Yoo, *supra* note 3, at 1845.

⁵⁶ *Id.* at 1824.

⁵⁷ Richard H. Kohn, *Out of Control: The Crisis in Civil-Military Relations*, NAT'L INT., Spring 1994, at 3, 15.

⁵⁸ DESCH, *supra* note 38, at 3.

evaluating airline performance exclusively in terms of the frequency of mid-air collisions.”⁵⁹

The real question of civilian control of the military is the question of “who calls the tune in military affairs.”⁶⁰ Do elected leaders and their civilian subordinates “reliably get the military to do what they want it to do” by deciding “the ends of government policy,” limiting the military to decisions about the means, and deciding “where the line between ends and means (and hence between civilian and military responsibility) is to be drawn”?⁶¹ Or does the military resist civilian authority by attempting to substitute its own policies “for those of the recognized civilian authorities”?⁶² When the former happens, civilian control is strong. When the latter happens, civilian control is weak.

As this Section’s examples from U.S. history will show, military resistance to civilian control can take many forms. Toward the extreme end of the spectrum (though not nearly as extreme as a coup) is a military official’s disobedience of direct orders, as illustrated in Section I.B.1. A second category is the rogue conduct of a military force insufficiently monitored by civilian authority, as shown in Section I.B.2. And a third category concerns military resistance to civilian authority achieved through unwarranted influence over policymaking, outlined in Section I.B.3. As Parts II and III will show, the FBI has employed each and every one of these forms of resistance to, and independence from, the national security policies of presidents and attorneys general, with disastrous consequences for the civil liberties that civilian control of the military was designed to protect.

1. *Insubordination*

The first and only time an American army “considered open insubordination” was in 1783, at the end of the Revolutionary War.⁶³ Congress had promised pay and pensions to Continental Army officers, but the near-penniless Congress had thus far failed to keep its promise.⁶⁴ One officer circulated a petition among the officer corps

⁵⁹ A.J. Bacevich, *The Paradox of Professionalism: Eisenhower, Ridgway, and the Challenge to Civilian Control*, 1953–1955, 61 J. MIL. HIST. 303, 304 (1997).

⁶⁰ Richard H. Kohn, *The Erosion of Civilian Control of the Military in the United States Today*, NAVAL WAR C. REV., Summer 2002, at 9, 16.

⁶¹ DESCH, *supra* note 38, at 4; Kenneth W. Kemp & Charles Hudlin, *Civil Supremacy over the Military: Its Nature and Limits*, 19 ARMED FORCES & SOC’Y 7–9 (1992).

⁶² S.E. FINER, *THE MAN ON HORSEBACK: THE ROLE OF THE MILITARY IN POLITICS* 23 (1962) (emphasis omitted).

⁶³ Kohn, *supra* note 60, at 31.

⁶⁴ *See id.* at 10.

calling for a mutiny—in the form of either resignation from duty or a revolt against Congress.⁶⁵ This “declaration of independence from the nation by the military” would likely “have precipitated a major political and constitutional crisis.”⁶⁶ It would certainly “have eroded the tradition of civilian control.”⁶⁷ In the end, a personal appeal from George Washington at army headquarters in Newburgh, New York, “persuaded them not to march on Congress or refuse orders.”⁶⁸

Although the army has not “ever again considered open insubordination,”⁶⁹ individuals in that army have. “The most famous case of military disregard for the principle of civilian control is, of course, the MacArthur case.”⁷⁰

During the Korean War, General Douglas MacArthur refused to accept the strategic decisions of President Harry Truman, who prohibited MacArthur from invading China and disagreed with the General over how to employ nuclear weapons.⁷¹ The wildly popular MacArthur took his case to the press and to allies in Congress, hoping to pressure Truman into changing his policies.⁷² After being fired by Truman for insubordination, MacArthur said,

I find in existence a new and heretofore unknown and dangerous concept that the members of our armed forces owe primary allegiance or loyalty to those who temporarily exercise the authority of the Executive Branch of Government rather than to the country and its constitution which they are sworn to defend.⁷³

Of course, the concept was neither “new” nor “unknown,” and centuries of Anglo-American tradition and the structure of the U.S. Constitution suggest it is only its converse that is “dangerous.”

⁶⁵ *Id.* at 10, 31; see also Mary Stockwell, *Newburgh Address*, GEO. WASH.’S MOUNT VERNON, <http://www.mountvernon.org/digital-encyclopedia/article/newburgh-address/> [https://perma.cc/UZ34-BQRG].

⁶⁶ KOHN, *supra* note 8, at 38.

⁶⁷ *Id.*

⁶⁸ See Kohn, *supra* note 60, at 31.

⁶⁹ *Id.*

⁷⁰ Kemp & Hudlin, *supra* note 61, at 16.

⁷¹ See Peter Karsten, *Volume Introduction* to THE MILITARY AND SOCIETY, at x–xi (Peter Karsten ed., 1998).

⁷² FINER, *supra* note 62, at 26; Dunlap, *supra* note 6, at 346; Sulmasy & Yoo, *supra* note 3, at 1823–24; cf. Karsten, *supra* note 71, at x–xi.

⁷³ FINER, *supra* note 62, at 26.

2. *Insufficient Monitoring*

A military insufficiently monitored by civilian authorities is also dangerous. The President and his civilian subordinates have the authority to “decide detailed strategies, battle plans, tactics, and logistics for a war.”⁷⁴ They can also “choose officers for promotion who agree with civilian preferences.”⁷⁵ And they “can rely on third parties . . . to provide ‘fire alarms’ of agent deviations from policy.”⁷⁶ President Lincoln, for example, exercised all of those monitoring authorities during the Civil War.⁷⁷ In contrast, “[t]he greatest failure of civilian oversight occurred under Woodrow Wilson” from 1917 through 1920, with dire consequences for the civil liberties of political minorities.⁷⁸

During those three years, without supervision from President Wilson (at first consumed with World War I and later “incapacitated by a stroke”) or his Secretary of War Newton Baker, the military embarked on a domestic operation “to destroy radical unionism.”⁷⁹ Civilian oversight was absent when the military conducted “surveillance, harassment, and arrest of labor radicals.”⁸⁰ It was absent when the military “occupied the copper mining regions of Arizona and Montana” and “sent troops to strike-plagued Washington state.”⁸¹ It was absent when the military “quashed major strikes in Gary, Indiana, Butte, Montana, and Seattle, Washington, and patrolled strike regions in ten different states.”⁸² And it was absent when the military’s “response to race riots was to turn loose its agents in search of Bolshevik agitators among the country’s black population.”⁸³

As a consequence of the civilian authorities’ failure to monitor it, the military “substantially slowed unionization for a decade.”⁸⁴ Many of those civilian authorities were elected with the support of labor unions. But without their supervision and control, the military took actions not entirely dissimilar from those that the anti-Federalists feared when they warned that a “Standing Army, however necessary it may

⁷⁴ Sulmasy & Yoo, *supra* note 3, at 1829.

⁷⁵ *Id.*

⁷⁶ *Id.* “[M]ore intrusive monitoring options” include “investigations, oversight hearings, and budget processes.” *Id.*

⁷⁷ See generally DAVID HERBERT DONALD, *LINCOLN* (1995).

⁷⁸ KOHN, *supra* note 7, at 136, 136–37.

⁷⁹ *Id.* at 137–38.

⁸⁰ *Id.* at 136.

⁸¹ *Id.* at 137.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

be at some times, is always dangerous to the Liberties of the People.”⁸⁵

3. *Undue Influence*

In addition to refusing to obey orders or conducting rogue operations unmonitored by civilian authorities, the military can also violate the principle of civilian control when it exercises “unwarranted influence” over civilian policymaking.⁸⁶ In the United States, this has been the most common threat to civilian control.

Of course, there is nothing untoward about military influence within the “normal constitutional channels,” such as when a service member responds to a civilian’s request for information or advice made within the chain of command.⁸⁷ But “the relative weight or influence of the military in the decisions the government makes,”⁸⁸ which is the “real problem of civilian control,”⁸⁹ becomes troubling when military influence is achieved by (1) intimidating or threatening civilian officials;⁹⁰ (2) slow rolling implementation of orders;⁹¹ (3) inflating estimates of troops or funds needed for a policy the military dislikes;⁹² (4) “pitting . . . Congress and President against each other, in pursuit of its own ends, particularly larger budgets and newer weapons”;⁹³ or (5) being “publicly resistant to civilian policy in the midst of policy making” either openly or through anonymous leaks to the media.⁹⁴ When the military brings these forms of pressure to bear on civilian authorities, it frustrates a “purpose of civilian control: ‘to ensure that defense policy and the agencies of defense policy are subordinated to other national traditions, values, customs, government policies, and economic and social institutions.’”⁹⁵

One of the most notorious “open propaganda” campaigns employed by the army to put pressure on civilians occurred in the mid-1950s when Army Chief of Staff Matthew Ridgway disagreed with

⁸⁵ KOHN, *supra* note 8, at 2 (quoting Samuel Adams).

⁸⁶ Dunlap, *supra* note 6, at 343 (emphasis omitted).

⁸⁷ FINER, *supra* note 62, at 140.

⁸⁸ Kohn, *supra* note 57, at 16.

⁸⁹ *Id.*

⁹⁰ FINER, *supra* note 62, at 86–87, 140.

⁹¹ Sulmasy & Yoo, *supra* note 3, at 1828.

⁹² *Id.*

⁹³ Kohn, *supra* note 57, at 6.

⁹⁴ Russell F. Weigley, *The American Military and the Principle of Civilian Control from McClellan to Powell*, 57 J. MIL. HIST. (SPECIAL ISSUE) 27, 30 (1993).

⁹⁵ Dunlap, *supra* note 6, at 344 (quoting ALLAN R. MILLETT, *THE AMERICAN POLITICAL SYSTEM AND CIVILIAN CONTROL OF THE MILITARY* 2 (1979)).

President Dwight Eisenhower's national security policy.⁹⁶ Eisenhower wanted to save money by cutting the size of the army, while relying on nuclear weapons and a strategy of "massive retaliation."⁹⁷ Ridgway's opposition began within the normal constitutional channels through arguments to the other Joint Chiefs and to the National Security Council.⁹⁸ But when that failed, he took the Army's disagreement public in "a determined effort aimed at overturning the national security policies promulgated by [the] President."⁹⁹

Ridgway and the Army's campaign was designed "to undermine the credibility of the Eisenhower Administration's declared strategy of massive retaliation."¹⁰⁰ He leaked criticism of the strategy to reporters for newspapers like the *New York Times*.¹⁰¹ The Army sponsored journals that "welcomed expressions of dissent."¹⁰² Ridgway advocated for his alternative policies in appearances before Congress, military service schools, the national security industry, and the Council on Foreign Relations.¹⁰³ And at his urging, the Army made his strategy, not the President's, official doctrine by publishing a field manual that "represented an explicit rejection of [the President's] doctrine and a brief on behalf of traditionalist concepts of war that the nation's civilian leadership had consciously discarded."¹⁰⁴

In the end, Eisenhower retired Ridgway rather than appointing him to a second term as Army Chief of Staff.¹⁰⁵ But that was a decision that only a President confident in his authority over the military and relatively popular with the public could easily make.

Four decades later, President Bill Clinton did not have that luxury when Chairman of the Joint Chiefs of Staff Colin Powell and other generals waged a similar open propaganda campaign to pressure Clinton to adopt policies they favored. Their first campaign against Clinton came almost immediately after the President's inauguration when they responded to his campaign pledge to allow gays and lesbians to serve openly in the military "by resisting, floating rumors of their own and dozens of other resignations, encouraging their retired brethren

⁹⁶ Bacevich, *supra* note 59, at 307.

⁹⁷ *Id.* at 195, 195–96, 200–01.

⁹⁸ *Id.* at 200, 206–08.

⁹⁹ *Id.* at 195.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 210–11.

¹⁰² *Id.* at 210.

¹⁰³ *Id.* at 211–13, 217.

¹⁰⁴ *Id.* at 215.

¹⁰⁵ *Id.* at 218.

to arouse congressional and public opposition, and then more or less openly negotiating a compromise with their commander in chief.”¹⁰⁶ The result was the policy of “Don’t Ask, Don’t Tell.”¹⁰⁷

Likewise, in debates over whether to send troops Somalia, Haiti, and Bosnia, often “the military exercised a veto over the use of American force, or at least an ability so to shape the character of American intervention that means determined ends—a roundabout way of exercising a veto.”¹⁰⁸ In the case of Bosnia, General Powell opposed intervention there by writing an op-ed in the *New York Times* and speaking on the record to its reporters.

This open propaganda likely “delayed U.S. invention in the Balkans by four years.”¹⁰⁹ Military opposition also “prevailed over President Clinton’s desire to support the treaty banning land mines and significantly impeded his signature of the treaty creating the International Criminal Court.”¹¹⁰

During the Clinton Administration, military officials also fed leaks to reporters intended to undermine Secretary of Defense Les Aspin, which “led directly” to his “ultimate dismissal.”¹¹¹ Then they torpedoed the nomination of his successor.¹¹²

In short, “a highly politicized military establishment” showed “no compunction whatsoever about inserting itself into the partisan arena when it [saw] its own interests at stake.”¹¹³ In opposition to policies favored by their civilian authorities, the Clinton-era generals “paralyz[ed] national security policy” and “obstruct[ed] and in some cases sabotag[ed] American ability to intervene in foreign crises”¹¹⁴ by

¹⁰⁶ Kohn, *supra* note 60, at 10; *see also* Sulmasy & Yoo, *supra* note 3, at 1832 (describing “military’s efforts to involve Congress in the 1993 controversy over gays in the military”).

¹⁰⁷ *See* Jim Hoagland, Editorial, *Colin Powell: The Debate Is Over*, WASH. POST, July 27, 1993, at A17.

¹⁰⁸ Kohn, *supra* note 60, at 14.

¹⁰⁹ Sulmasy & Yoo, *supra* note 3, at 1822. Of course, it is appropriate for military professionals to sometimes disagree with civilian superiors. However, acting on those disagreements similarly to General Powell is inappropriate. When a disagreement concerns a matter of high importance, like a military intervention, if a general in Powell’s position felt that he could not support and serve President Clinton’s policy decision, he should resign before going public with his criticisms. When a disagreement concerns a matter of less importance, if he is asked a direct question in public that he cannot answer honestly without criticizing the president, he should refuse to answer the question. In any case, an acting military official should not openly criticize or contradict the president’s position.

¹¹⁰ *Id.* at 1823.

¹¹¹ Kohn, *supra* note 60, at 18.

¹¹² *See* Sulmasy & Yoo, *supra* note 3, at 1823.

¹¹³ Bacevich, *supra* note 59, at 305.

¹¹⁴ Kohn, *supra* note 60, at 12.

threatening civilian authorities with resignations, providing civilians with only unacceptable alternatives to policies the generals preferred, encouraging congressing opposition, leaking to the press, and publicly criticizing the policy preferences of the President and the Secretary of Defense.¹¹⁵

* * *

Of course, never once in the Clinton era, or in any era since the creation of our Constitution, was the military even close to overthrowing civilian authorities. But the point is that civilian control of the military requires more than just the absence of a coup. It requires the military to obey orders. It requires civilians to closely monitor the military. And it requires the nation's elected civilians to maintain control over policymaking. At times, from General MacArthur's defiance, to President Wilson's neglect, to General Powell's heavy-handed pressure tactics, the answer to the question of "who calls the tune in military affairs"¹¹⁶ has not always been the President.

II. WHY THE FBI IS ANALOGOUS TO THE MILITARY

History suggests that an independent FBI is just as dangerous to civil liberties as an independent military. The FBI's history demonstrates (1) that it shares the military's primary purpose and (2) that it has frequently violated civil liberties in ways the founders feared a military might.¹¹⁷

¹¹⁵ Army Chief of Staff General Eric Shinseki wielded a combination of those same tactics in the run-up to the Iraq War when he told Congress that the war would cost far more money and require far more troops than his civilian superiors at the Pentagon were planning for. See Thom Shanker, *New Strategy Vindicates Ex-Army Chief Shinseki*, N.Y. TIMES (Jan. 12, 2007), <http://www.nytimes.com/2007/01/12/washington/12shinseki.html> [<https://perma.cc/9KXZ-PWHR>]; Eric Schmitt, *Threats and Responses: Military Spending; Pentagon Contradicts General on Iraq Occupation Force's Size*, N.Y. TIMES (Feb. 28, 2003), <http://www.nytimes.com/2003/02/28/us/threats-responses-military-spending-pentagon-contradicts-general-iraq-occupation.html> [<https://perma.cc/VL5Q-RK7E>]. Shinseki's prediction proved prescient.

¹¹⁶ Kohn, *supra* note 60, at 16.

¹¹⁷ The analogy to civilian control of the military is not limited only to FBI. Although it is beyond the scope of this Article, independence of other executive branch agencies, such as CIA, DHS, and NSA, also represents a threat to civil liberties. The nature of that threat deserves further exploration in subsequent articles.

A. *The FBI's First Similarity to a Standing Army: A Primary Purpose of Security Against the Nation's Enemies*

The primary purpose of the military is “providing security from external threats.”¹¹⁸ That is also the primary purpose of today’s FBI. And that has been the case for most of the FBI’s history.

This may seem surprising in light of the FBI’s image as a domestic police force famous for taking on mobsters, bank robbers, white collar criminals, and other domestic criminals.¹¹⁹ But beginning on the eve of World War II, “Presidents and their attorneys general increasingly turned to the FBI in a quest to anticipate foreign-directed threats to the nation’s internal security.”¹²⁰ In the biggest international conflicts since the FBI’s creation—World War II, the Cold War, and the war on terror—the FBI’s primary purpose has been to conduct “secret intelligence operations against America’s enemies.”¹²¹ At times it has “devoted more than 80 percent of its money and people to national security,” with responsibilities including “intelligence collection, counterintelligence, and counterterrorism.”¹²²

Although external threats have ranged from the Axis powers, to the Soviet Union, to al-Qaeda and the Islamic State of Iraq and Syria (“ISIS”), the FBI’s mission of providing security against foreign enemies “is the Bureau’s first and foremost mission today, and that has been true for most of the past hundred years.”¹²³ That is what distinguishes the FBI from other police forces, like New Scotland Yard in Great Britain, whose responsibilities do not include intelligence collection, which is instead done by MI5 domestically and MI6 around the world.¹²⁴ And that is also why one President told his successor that if it had not been for the FBI Director, “I couldn’t [have carried] out my responsibilities as Commander in Chief—period.”¹²⁵

118 Sulmasy & Yoo, *supra* note 3, at 1817.

119 See, e.g., CURT GENTRY, J. EDGAR HOOVER 168–77 (1991); NICHOLAS DEB. KATZENBACH, *SOME OF IT WAS FUN: WORKING WITH RFK AND LBJ* 184 (2008).

120 ATHAN G. THEOHARIS, *THE FBI & AMERICAN DEMOCRACY* 2 (2004).

121 TIM WEINER, *ENEMIES: THE HISTORY OF THE FBI* 75 (2013).

122 *Id.* at 126; Anne Joseph O’Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CALIF. L. REV. 1655, 1670 (2006).

123 WEINER, *supra* note 121, at xv.

124 RAYMOND J. BATVINIS, *HOOVER’S SECRET WAR AGAINST AXIS SPIES* 3 (2014).

125 WEINER, *supra* note 121, at 276. The FBI derives its authority to investigate federal crimes, unless they are “assigned exclusively to another federal agency,” from section 533 of title 28, U.S. Code. *Where Is the FBI’s Authority Written Down?*, FBI, <https://www.fbi.gov/about/faqs/where-is-the-fbis-authority-written-down> [<https://perma.cc/R4DN-KJAW>]. This statute “authorizes the attorney general to appoint officials to detect and prosecute crimes against the United States.” *Id.* Section 3052 of title 18, U.S. Code gives FBI agents the authority to “make arrests,

1. *World War II*

The FBI's war against the Axis powers began even before the bombing of Pearl Harbor. Beginning nearly two years before then, the FBI transformed "from a small continental law enforcement force into a counterespionage service, a counterintelligence agency, and then a worldwide intelligence service."¹²⁶ As described in greater detail below, its intelligence gathering captured Axis spies, helped ensure the success of the D-Day landings, and spurred the development of the atomic bomb—an indication that, like the military's, the FBI's primary mission during World War II (and after) was protection against foreign foes.

This kind of intelligence gathering has always been a crucial element of warfare against foreign military threats, whether the war is conventional (like World War II) or asymmetric (like the Cold War and the war on terror).¹²⁷ The leading military strategist of his age, Carl von Clausewitz,¹²⁸ wrote, "War is the realm of uncertainty; three quarters of the factors on which action in war is based are wrapped in a fog of greater or lesser uncertainty. A sensitive and discriminating judgment is called for, a skilled intelligence to scent out the truth."¹²⁹

carry firearms, and serve warrants." *Id.* The FBI also has statutory authority to investigate specific violations and, in certain circumstances, even violations of state law. *Id.* In addition to this statutory scheme, the FBI also relies on guidelines promulgated by attorneys general. The FBI itself states that it "has authority to investigate threats to national security pursuant to presidential executive orders, attorney general authorities, and various statutory sources." *Id.* The guidelines put forth by attorneys general "establish standards and procedures for FBI investigations conducted under this broad statutory authority, as well as pursuant to claims of presidential power to order investigations without statutory authorization." John T. Elliff, *Attorney General's Guidelines for FBI Investigations*, 69 *CORNELL L. REV.* 785, 786 (1984).

¹²⁶ BATVINIS, *supra* note 124, at 268–69.

¹²⁷ Anne O'Connell summarizes "intelligence" and "counterintelligence" as follows: Formally, the term "intelligence" includes foreign intelligence, which "means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities," and counterintelligence, which "means information gathered, and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities."

O'Connell, *supra* note 122, 1661 n.24 (quoting National Security Act of 1947, § 3(1)–(3), 50 U.S.C. § 3003(1)–(3) (2012)).

¹²⁸ See generally James A. Warren, *How Clausewitz Invented Modern War*, *DAILY BEAST* (Nov. 24, 2014, 5:45 AM), <https://www.thedailybeast.com/how-clausewitz-invented-modern-war> [<https://perma.cc/28QF-U3WE>].

¹²⁹ GARRETT M. GRAFF, *THE THREAT MATRIX* 431 (2011) (quoting Carl von Clausewitz); see also *id.* at 262 (quoting SUN TZU, *THE ART OF WAR* (n.p., n.d.)) (expressing a similar sentiment).

In more recent years, a consensus has emerged that “the effort to secure America against terrorist attacks requires better intelligence” because while the United States has the capability to deter, capture, or kill almost any terrorist it finds, it cannot do so without the intelligence required to find the target.¹³⁰ Intelligence is, in short, “America’s first line of defense.”¹³¹

The World War II–era FBI gathered intelligence at home and abroad.¹³² Outside the United States, with a focus on South America,¹³³ the FBI’s 360 Special Intelligence Service agents¹³⁴ “worked with local police officials, recruited penetration agents in local governments, collected secret political, economic, military, and industrial information, ran locally recruited surveillance teams, and for the first time established its own clandestine communication system with Washington, often in violation of local law.”¹³⁵ And in the United States, over the course of the war, “the FBI installed at least 6,769 warrantless wiretaps and 1,806 bugs in the name of national security,”¹³⁶ obtained copies of telegraphs and cables from Western Union, RCA, and ITT,¹³⁷ and opened mail to and from Axis embassies and consulates,¹³⁸ as well as mail coming into and out of New York City and Washington, D.C.¹³⁹ The FBI’s victories included the rounding up of a German spy ring in New York City that had been in existence for eight years.¹⁴⁰

Driven by its new “focus on intelligence investigations,” the FBI’s size grew to 4,370 agents by the end of World War II, up from 391 agents a decade before—an elevenfold increase.¹⁴¹ By 1941, J. Edgar Hoover, the first director of the FBI, had more agents for national

130 Seth F. Kreimer, *Watching the Watchers: Surveillance, Transparency, and Political Freedom in the War on Terror*, 7 U. PA. J. CONST. L. 133, 133 (2004).

131 O’Connell, *supra* note 127, at 1661–62 n.24 (quoting LOCH K. JOHNSON, SECRET AGENCIES 7 (1996)).

132 THEOHARIS, *supra* note 120 at 49–50.

133 RICHARD GID POWERS, *SECRECY AND POWER: THE LIFE OF J. EDGAR HOOVER* 251 (1987).

134 RONALD KESSLER, *THE BUREAU* 69 (2002).

135 BATVINIS, *supra* note 124, at 269.

136 WEINER, *supra* note 121, at 88.

137 KESSLER, *supra* note 134, at 64.

138 *Id.*

139 WEINER, *supra* note 121, at 93, 109.

140 THEOHARIS, *supra* note 120, at 50.

141 DOUGLAS M. CHARLES, *J. EDGAR HOOVER AND THE ANTI-INTERVENTIONISTS: FBI POLITICAL SURVEILLANCE AND THE RISE OF THE DOMESTIC SECURITY STATE, 1939–1945*, at 174 (2007).

defense than he had *total* agents a few years before.¹⁴² The FBI's caseload of national security cases approached 100,000.¹⁴³

During that time, the FBI Director became the chair of an inter-departmental committee on intelligence.¹⁴⁴ This made him “an American intelligence czar.”¹⁴⁵ Meanwhile, the FBI “established a formal relationship with British intelligence” in 1940, “highlighting the development of the FBI as a national security apparatus.”¹⁴⁶ Its relationship with British intelligence would become a “hallmark of the Second World War, Cold War, and War on Terrorism.”¹⁴⁷

The FBI's “intimate intelligence relationship”¹⁴⁸ with Britain played a significant role in ensuring the success of the D-Day landings.¹⁴⁹ Through an Allied operation called Double Cross, five FBI double agents, as well as British double agents, “sen[t] intelligence to the enemy, both useful and worthless and laced with reports designed to confuse the Germans as to the date, place, and time of the invasion of Europe.”¹⁵⁰ They also confused the Germans with regard to Allied ship movements, contributing to victory in the Battle of the Atlantic.¹⁵¹ The five FBI double agents “amassed nearly a dozen imaginary sources” and “feigned complete loyalty to the Nazi cause, all the while pestering them for more and more funds to finance their work and pay their sources.”¹⁵² And at the same time, they “altered the course of history forever” by alerting the United States to Germany's nuclear ambitions—“startling intelligence that tipped the balance . . . in favor of urging the president to move forward on the unprecedented and world-changing project” to build an atomic bomb.¹⁵³

2. *The Cold War*

As soon as World War II ended, the Cold War began—and with it, a decades-long continuation of the FBI's military purpose.¹⁵⁴ During the Cold War, the FBI was “by far the strongest force dedicated to

142 KATHERINE A.S. SIBLEY, *RED SPIES IN AMERICA* 57 (2004).

143 *Id.* at 2.

144 THEOHARIS, *supra* note 120, at 49.

145 WEINER, *supra* note 121, at 82.

146 CHARLES, *supra* note 141, at 2.

147 *Id.* at 175.

148 *Id.*

149 BATVINIS, *supra* note 124, at 5.

150 *Id.*; see also MARK RIEBLING, *WEDGE: FROM PEARL HARBOR TO 9/11*, at 46 (2002).

151 RIEBLING, *supra* note 150, at 46.

152 BATVINIS, *supra* note 124, at 5.

153 *Id.* at 5–6.

154 See *id.* at 275 (“[O]ne war had ended, and now [Hoover] faced another.”).

fighting the Communist threat.”¹⁵⁵ It was during the height of the Cold War against the Soviet Union that the FBI “abandoned prosecutions in favor of secret and illegal programs . . . to disrupt and contain its targets.”¹⁵⁶ And it was then that it said its “most important goal” was spying on Soviet leadership.¹⁵⁷

Although the Cold War was unconventional and more complex than just a military conflict between the United States and the Soviet Union,¹⁵⁸ it would be improper to ignore its military character when considering the FBI’s role in it, particularly because that was how decisionmakers viewed it. President Franklin Roosevelt¹⁵⁹ and FBI Director J. Edgar Hoover both believed that the Soviet Government was attempting to overthrow the U.S. Government as part of a global communist revolution.¹⁶⁰ Speaking to the Attorney General, Hoover said of the Soviets, “They have set out to conquer not only America but the world.”¹⁶¹ He warned Secretary of Defense James Forrestal about “the smuggling into the United States of an atomic bomb, or parts thereof which could be later assembled in this country” and later warned of “suicide planes with atom bombs” and “armed insurrection in the U.S. by communist party members or persons under Soviet direction.”¹⁶² In response, Forrestal created a War Council and called for “the very closest cooperation between our organizations.”¹⁶³

Although estimates of the Soviet threat were sometimes exaggerated,¹⁶⁴ there was good reason for the view that the Soviet Union was waging an unconventional war against the United States. The Moscow-directed Comintern provided funding for organizations to train people in the United States, in its words, “for . . . the seizure of the state by the Communist party.”¹⁶⁵ By the height of the Cold War, hundreds of Soviet spies had provided diplomatic, economic, and political

155 WEINER, *supra* note 121, at 126.

156 CHARLES, *supra* note 141, at 2.

157 WEINER, *supra* note 121, at 190 (quoting Hoover).

158 See Joseph L. Votel et al., *Unconventional Warfare in the Gray Zone*, 80 *JOINT FORCES Q.*, Jan. 2016, at 101, 102 (explaining that wars like the Cold War are “characterized by intense political, economic, informational, and military competition more fervent in nature than normal steady-state diplomacy, yet short of conventional war”).

159 GENTRY, *supra* note 119, at 206–07; KESSLER, *supra* note 134, at 58.

160 RIEBLING, *supra* note 150, at 64.

161 WEINER, *supra* note 121, at 49 (quoting Hoover).

162 *Id.* at 154, 172, 190.

163 *Id.* at 154.

164 See *CIA Releases Secret Cold War Documents About Soviets*, L.A. TIMES (Mar. 10, 2001), <http://articles.latimes.com/2001/mar/10/news/mn-36003> [<https://perma.cc/JVB6-SQ5X>] (discussing documents that “show[] how U.S. analysts overestimated Soviet power”).

165 WEINER, *supra* note 121, at 27 (quoting Comintern); see also JOHN EARL HAYNES, HAR-

intelligence, as well as scientific intelligence that allowed the Soviets to “deploy jet planes, radar, sonar, artillery proximity fuses, and many other military advances.”¹⁶⁶ Its sources included agents in manufacturing firms, defense plants, the chemical industry, and the U.S. military.¹⁶⁷

One example of Soviet espionage was the infiltration of the Manhattan Project. The Soviets had two dozen spies at Los Alamos,¹⁶⁸ including several senior physicists.¹⁶⁹ They provided the Soviet Union with thousands of pages of nuclear information with enormous military consequences.¹⁷⁰ The Soviets were able to build an atomic bomb quickly and relatively cheaply.¹⁷¹ This nuclear capacity led to the Korean War by emboldening the Soviet Union to authorize North Korea to attack South Korea.¹⁷²

Another example of Soviet espionage was the extensive spy network of dozens of federal officials in the 1930s and 1940s.¹⁷³ For example, a Soviet spy named Elizabeth Bentley “carried classified documents to the KGB from U.S. government employees in the OSS, the War Department, the War Production Board, the Air Force, and the departments of Treasury, Agriculture, and Commerce.”¹⁷⁴ Her eighty sources included a presidential counselor, an Assistant Secretary of the Treasury, and the head of the State Department’s postwar planning.¹⁷⁵

This espionage was only one front in the Cold War. Other fronts ranged from Korea to Vietnam to Afghanistan. For more than half a century, Soviet funds, arms, and sometimes troops supported military forces adverse to American interests and allies in those countries and elsewhere.¹⁷⁶

In this conflict, the FBI Director, who sat on the National Security Council, “saw himself as the commander in chief for anticommun-

VEY KLEHR & ALEXANDER VASSILIEV, *SPIES* 547 (2009) (“A substantial portion of the KGB’s success came from the sources and agents handed to it by the [Communist Party USA].”).

¹⁶⁶ HAYNES, KLEHR & VASSILIEV, *supra* note 165, at 545.

¹⁶⁷ SIBLEY, *supra* note 142, at 2.

¹⁶⁸ *The Enormous Kleenex Box: The Soviets Steal the Atomic Secrets*, PBS, http://www.pbs.org/redfiles/kgb/inv/kgb_inv_ins.htm [<https://perma.cc/NE9Z-8T5Z>].

¹⁶⁹ HAYNES, KLEHR & VASSILIEV, *supra* note 165, at 33–34.

¹⁷⁰ *Id.* at 143.

¹⁷¹ *Id.*

¹⁷² *See id.*

¹⁷³ *Id.* at 195.

¹⁷⁴ KESSLER, *supra* note 134, at 75.

¹⁷⁵ *Id.*

¹⁷⁶ *See generally* JOHN LEWIS GADDIS, *THE COLD WAR* (2006).

ism in America. The FBI, in partnership with the military, would protect the nation as it projected its power around the world.¹⁷⁷ Its efforts often “had nothing to do with law enforcement” and extended “into every corner of the ever-expanding national security establishment,” including direct cooperation with Allied foreign intelligence agencies,¹⁷⁸ as well as “the White House, the Pentagon, the Office of the Secretary of Defense, the Joint Chiefs of Staff, the National Security Agency, the CIA, the State Department, Congress, six American embassies, army intelligence bases in Germany and Austria, and a dozen more centers of America’s global power.”¹⁷⁹

Among the FBI’s first major efforts were the Palmer Raids, when it organized the arrest of as many as 10,000 people¹⁸⁰ in response to bombings of Attorney General Mitchell Palmer’s house and eight other locations¹⁸¹ that media outlets¹⁸² and the FBI (then called the Bureau of Investigation¹⁸³) blamed on communists.¹⁸⁴ For most of the next seven decades, the FBI broke into the homes and offices of suspected communists, employed double agents, bugged and wiretapped without warrants, and ran thousands of operations against suspected Soviet agents and sympathizers through an Intelligence Division that was “the most powerful force within the Bureau, commanding the most money, the most manpower, and the most attention from the director.”¹⁸⁵

The results of those operations were hugely significant from a national security perspective. For example, an FBI burglary of a front for Soviet espionage led to the Venona project, which broke Soviet ciphers and “was one of America’s most secret weapons in the Cold

177 WEINER, *supra* note 121, at 126.

178 *Id.* at 157, 179.

179 *Id.* at 179.

180 CHARLES, *supra* note 141, at 21.

181 KENNETH D. ACKERMAN, *YOUNG J. EDGAR: HOOVER, THE RED SCARE, AND THE ASSAULT ON CIVIL LIBERTIES* 11–15 (2007); KESSLER, *supra* note 134, at 14 (“Palmer . . . heard a heavy thump on his front door. A blast came immediately afterward Within an hour, similar explosions occurred in eight other cities.”); *id.* at 15 (“A month earlier, explosive devices had been mailed to thirty-six prominent men . . .”).

182 GENTRY, *supra* note 119, at 76.

183 KESSLER, *supra* note 134, at 11 (“Palmer . . . created within the bureau a Radical Division—later renamed the General Intelligence Division . . .”).

184 See Gregory Dehler, *Palmer Raids: United States History*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Palmer-Raids> [<https://perma.cc/J52N-XSTV>]; see also KESSLER, *supra* note 134, at 14 (“Newspapers like the *New York Times* assumed that the Bolsheviks or other Communist-related groups were responsible.”); *id.* at 15 (“[T]he crimes were never solved.”).

185 WEINER, *supra* note 121, at 192.

War.”¹⁸⁶ It made the decryption of 2,900 secret Soviet messages possible.¹⁸⁷ In another operation, Solo, an FBI agent infiltrated the highest levels of Soviet leadership. The operation included fifty-two international missions over two decades¹⁸⁸ and produced a treasure trove of intelligence on matters like “the Sino-Soviet split, Nikita Khrushchev’s speech documenting Josef Stalin’s mass murders, and the Soviet invasion of Czechoslovakia.”¹⁸⁹

Perhaps no FBI action during the Cold War better demonstrates its military and foreign policy influence—and shows how far it often strayed from law enforcement—than its machinations in the Dominican Republic. In an operation known as DOMSIT,¹⁹⁰ the FBI sent more than twenty agents to the Dominican capital, selected an FBI informant to succeed the country’s deposed dictator, approved his Cabinet and top generals, and provided him with “training and facilities to help create a new Dominican national intelligence force, a Department of Special Operations, a secret police to combat subversives,” which served the anticommunist dictator for the next two decades.¹⁹¹

In short, the FBI’s Cold War history shows that its primary purpose, like the military’s, was national defense against external threats, rather than law enforcement.¹⁹²

3. *The War on Terror*

Like the Cold War, the war between the United States and al-Qaeda and ISIS is asymmetric and includes elements beyond merely the military.¹⁹³ But also like the Cold War, it is a struggle against external threats defined largely by its military aspects. Those aspects were invoked by Osama bin Laden in 1998 when he issued a fatwa

¹⁸⁶ *Id.* at 156, 155–57.

¹⁸⁷ KESSLER, *supra* note 134, at 80; *see also* SIBLEY, *supra* note 142, at 4 (noting that the Venona project “would eventually decrypt more than two thousand Soviet cables”).

¹⁸⁸ WEINER, *supra* note 121, at 208–09.

¹⁸⁹ KESSLER, *supra* note 134, at 139.

¹⁹⁰ “DOMSIT” is short for “Dominican Situation.” WEINER, *supra* note 121, at 257.

¹⁹¹ *See* WEINER, *supra* note 121, at 262, 257–63.

¹⁹² *Cf. id.* at 231; Kreimer, *supra* note 130, at 139.

¹⁹³ *Remarks by Secretary of Defense Donald Rumsfeld on the U.S. Retaliation Against the Taliban*, WASH. POST (Oct. 22, 2001), http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/rumsfeldtext_102201.html [<https://perma.cc/3BUL-F52M>] (statement of General Richard Myers) (noting that the “asymmetric” strategy in the war on terror “include[d] almost every agency and department in th[e] government . . . interconnected in ways that . . . [they hadn’t] been”).

urging war against the United States¹⁹⁴ and by the American Government when Congress authorized the use of force after 9/11.¹⁹⁵ After that date, fighting terrorism became the FBI's first priority.¹⁹⁶

Even before 9/11, the FBI was central to U.S. efforts against al-Qaeda. In the 1990s, the FBI foiled an al-Qaeda plot to attack a host of New York City landmarks, including the United Nations building; the Holland Tunnel; the Lincoln Tunnel; the George Washington Bridge; the Waldorf-Astoria, St. Regis, and U.N. Plaza hotels; a heliport; and the FBI's office.¹⁹⁷ Later, in 1995, the FBI sent teams of agents to Pakistan where they worked with Pakistani and U.S. forces to successfully capture Ramzi Yousef, the mastermind of the 1993 World Trade Center bombing and a high-ranking al-Qaeda terrorist.¹⁹⁸ All told, from 1993 to 1999, the FBI prevented forty terrorist attacks.¹⁹⁹

By the end of the decade, the FBI and al-Qaeda "were locked in an international cat-and-mouse game,"²⁰⁰ with an entire FBI unit designated the Osama Bin Laden Unit.²⁰¹ President Clinton had directed the FBI to take the lead in counterterrorism and spearhead a policy to "deter, defeat and respond vigorously to all terrorist attacks on our territory and against our citizens."²⁰² His Presidential Decision Directive 39 "ordered the Bureau to analyze secret intelligence on terrorist threats, and to create strategies to disrupt and destroy them before they struck again."²⁰³ And "[a]cross the Maghreb, across southern Africa, [and] Europe," according to one FBI agent, "there probably wasn't a country [the FBI] didn't touch."²⁰⁴

194 Bernard Lewis, *License to Kill: Usama bin Ladin's Declaration of Jihad*, FOREIGN AFF., Nov.–Dec. 1998, at 14, 14–15.

195 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

196 SIBLEY, *supra* note 142, at 1.

197 GRAFF, *supra* note 129, at 171; Fred Burton & Ben West, *From the New York Landmarks Plot to the Mumbai Attack*, STRATFOR WORLDVIEW (Dec. 3, 2008, 8:35 PM), https://worldview.stratfor.com/weekly/20081203_new_york_landmarks_plot_mumbai_attack [<https://perma.cc/K5MZ-GLKT>].

198 GRAFF, *supra* note 129, at 182–84.

199 KESSLER, *supra* note 134, at 430.

200 GRAFF, *supra* note 129, at 256.

201 THEOHARIS, *supra* note 120, at 7.

202 GRAFF, *supra* note 129, at 192 (quoting Presidential Decision Directive 39, U.S. Policy on Counterterrorism (June 21, 1995), <https://www.fas.org/irp/offdocs/pdd39.htm> [<https://perma.cc/Z88A-WTDC>]).

203 WEINER, *supra* note 121, at 391.

204 GRAFF, *supra* note 129, at 241.

Nevertheless, although the FBI had declared terrorism its “number-one priority,”²⁰⁵ and although its counterintelligence budget had risen from \$118 million to \$423 million between 1993 and 2001,²⁰⁶ it was not until after 9/11 that the FBI’s actions matched its words and its primary mission became again what it had been during World War II and for most of the Cold War—defense against external threats.²⁰⁷

President Bush insisted on that mission after 9/11, vowing to hold the FBI accountable for any future attacks.²⁰⁸ “I told [FBI Director Robert Mueller] I wanted the Bureau to adopt a wartime mentality,” he later said.²⁰⁹ According to Mueller, his goal was “transforming the Bureau into an intelligence agency.”²¹⁰ By law, the FBI was required to create “an institutional culture with substantial expertise in, and commitment to, the intelligence mission.”²¹¹

This time, those words were not empty. The FBI Director’s Chief of Staff said Mueller “started each day for almost ten years . . . with two hours of briefings on terrorism.”²¹² Those mornings began at the Bureau’s Strategic Information and Operations Center and ended with the President in the Oval Office—an unprecedented level of access by an FBI Director to the President.²¹³ At each meeting, the FBI Director and the President, along with other intelligence officials, reviewed the “Threat Matrix,” a compilation of intelligence on potential terrorist attacks—a question of national security, not law enforcement.²¹⁴

As in the Cold War, the FBI prioritized surveillance and undercover operations designed to thwart threats from external enemies. In part through nearly a thousand orders sent each week to institutions like banks and telecommunications providers to share records,²¹⁵ the FBI enjoyed “an authority almost as strong” as the authority President Roosevelt gave Director Hoover “to monitor all telecommunications traffic in and out of the United States” during World War II.²¹⁶

²⁰⁵ *Id.* at 272.

²⁰⁶ THEOHARIS, *supra* note 120, at 6.

²⁰⁷ GRAFF, *supra* note 129, at 268 (“[T]errorism up until 9/11 was always secondary . . . to standard FBI investigations . . .”).

²⁰⁸ KESSLER, *supra* note 134, at 429–30.

²⁰⁹ GRAFF, *supra* note 129, at 319 (quoting George W. Bush).

²¹⁰ WEINER, *supra* note 121, at 428 (quoting Robert Mueller).

²¹¹ *Id.* at 437–38.

²¹² GRAFF, *supra* note 129, at 339 (quoting Lisa Monaco).

²¹³ *Id.* at 11, 395.

²¹⁴ *Id.* at 11.

²¹⁵ WEINER, *supra* note 121, at 437.

²¹⁶ *Id.* at 432.

Meanwhile, the FBI ran operations—often sting operations²¹⁷—that helped bring down al-Qaeda or similar cells in Lackawanna, Portland, Northern Virginia, Minneapolis, the Bronx, Raleigh, Dallas, Springfield, Denver, Baltimore, and Berlin. The Bureau also foiled plots intended to bomb subways, a Christmas tree lighting, military recruiting stations and bases, and fuel tanks near airports.²¹⁸

In addition to surveillance and stings, another traditional source of wartime intelligence comes from the interrogation of detainees, and the FBI has played a leading role in the collection of that intelligence as well. In places like Afghanistan, Iraq, Yemen, Guantanamo Bay, as well as in the United States, the FBI has interrogated high-value detainees in the war against al-Qaeda, the Taliban, and Iraq—including Saddam Hussein, Abu Zubaydah (third- or fourth-ranking in al-Qaeda leadership), Ramzi bin al-Shibh (liaison between the 9/11 mastermind and hijackers), Ibn al-Shakhyh al-Libi (commander of al-Qaeda's biggest training camp), Mohammed al-Qahtani (the would-be 20th hijacker for 9/11), al-Safarini (a Pan Am Flight 73 hijacker), Abu Jandal (bin Laden's personal bodyguard), Jamal Ahmad Mohammad al-Badawi (a bomber of *U.S.S. Cole*), Faisal Shahzad (who attempted to set off a bomb in Times Square), Ali al-Bahlul (bin Laden's propagandist), Fahd al-Quso (videographer of *U.S.S. Cole* bombing and courier of money for 9/11 attacks), Salim Hamdan (bin Laden's driver), and L'Houssaine Kherchtou (bin Laden's pilot).²¹⁹

These and other FBI interrogations were a key element of many of the United States' most significant victories over al-Qaeda. For example, al-Libi's FBI interrogation helped thwart as many as seven al-Qaeda plots and provided the military's Operation Anaconda with crucial intelligence.²²⁰ Similarly, Abu Zubaydah's interrogation thwarted a terrorist attack,²²¹ identified al-Qaeda's third in command,²²² and helped lead to the capture of 9/11 mastermind Khalid

²¹⁷ *Id.* at 444.

²¹⁸ GRAFF, *supra* note 129, at 577, 596–97; WEINER, *supra* note 121, at 444–45, 447.

²¹⁹ See GRAFF, *supra* note 129, at 342, 356–65, 455–56, 588, 594; ALI H. SOUFAN, *THE BLACK BANNERS*, at xv, 294, 306, 373, 378, 381, 439, 452, 459, 472, 493, 529, 545–68 (2011); WEINER, *supra* note 121, at 423–24; Deborah N. Pearlstein, *Finding Effective Constraints on Executive Power: Interrogation, Detention, and Torture*, 81 *IND. L.J.* 1255, 1283 (2006).

²²⁰ See GRAFF, *supra* note 129, at 357–58. At the time of its execution, Operation Anaconda was the largest military operation in Afghanistan in the war on terror. Adam Geibel, *Operation Anaconda, Shah-i-Khot Valley, Afghanistan, 2-10 March 2002*, *MIL. REV.*, May–June 2002, at 72.

²²¹ See SOUFAN, *supra* note 219, at 378.

²²² See *id.* at 381.

Sheikh Mohammed²²³ and the alleged dirty bomber Jose Padilla.²²⁴ On another occasion, FBI interrogators obtained actionable intelligence to stop a pending al-Qaeda plot.²²⁵

In addition to collecting military intelligence through surveillance, stings, and interrogations, the FBI has collected valuable intelligence in the Afghanistan and Iraq warzones, where the FBI has dispatched more than 1,500 personnel.²²⁶ As one agent said of Afghanistan, “There was going to be a tremendous amount of intelligence out of the war. When a site is cleared, we need to be there. We want that pocket litter, that stuff coming out of the caves.”²²⁷

The FBI was even more involved in Iraq. It helped rescue hostages, went on raids with special forces, analyzed captured documents, investigated Iraqi intelligence officials, helped train the Iraqi police, joined them in finding enemy combatants, and (as described above) interrogated detainees for actionable intelligence about threats to U.S. forces and the homeland.²²⁸

In fact, Afghanistan and Iraq are hardly the only areas where the FBI has an overseas presence. Beginning in World War II and extending through the Cold War, the FBI’s foreign intelligence service has collected intelligence on friends and foes alike and exerted subtle (and sometimes not-so-subtle) influence on allied police forces through a legal attaché system with permanent offices at U.S. embassies around the globe.²²⁹ Today, the FBI operates in over eighty countries on six continents, with profound implications for U.S. military and foreign policy.²³⁰ And at times, even the FBI Director himself has personally projected American power abroad: FBI Director Louis Freeh visited sixty-eight countries and met with some 2,000 international leaders in the 1990s, and his successor Robert Mueller “was one of the only U.S. leaders respected enough within Pakistan to try to broker peace.”²³¹

Of course, this Article’s contention that the FBI’s primary purpose is its military purpose of protecting against external military

223 See GRAFF, *supra* note 129, at 361–65; SOUFAN, *supra* note 219, at 387; WEINER, *supra* note 121, at 423–24.

224 See SOUFAN, *supra* note 219, at 407.

225 See *id.* at 499.

226 See WEINER, *supra* note 121, at 429.

227 GRAFF, *supra* note 129, at 349.

228 See *id.* at 441, 448–49, 464; WEINER, *supra* note 121, at 423, 429.

229 GRAFF, *supra* note 129, at 209; WEINER, *supra* note 121, at 117–18, 446.

230 GRAFF, *supra* note 129, at 17, 558.

231 *Id.* at 584; WEINER, *supra* note 121, at 411.

threats is not meant to suggest that the FBI does not have other, secondary purposes. But so does the military itself.²³² After the country's founding, military personnel "served as explorers, built roads and bridges, and gave the nation its cadre of trained engineers. Further, the military countered civil disturbances at various times, and engaged in law enforcement duties in the South during Reconstruction."²³³ More recently, it has provided disaster relief on numerous occasions and is involved "in local schools, the provision of medical care to underserved communities, infrastructure construction and repair projects, environmental restoration, youth programs, and more."²³⁴ With as many as 5,000 troops at a time patrolling the border for drugs and fighting crime,²³⁵ it is likely that in recent decades the military has had more personnel than the FBI committed to law enforcement rather than national defense from external threats—but that does not mean that the primary military purpose of either organization should be ignored.

B. The FBI's Second Similarity to a Standing Army: A Threat to Civil Liberties

As described above,²³⁶ the founding era's skepticism toward standing armies and insistence on civilian control of such an army arose from a history of armies that were notorious for infringing on populations' civil liberties.²³⁷ That is why so many states' declarations of rights called standing armies "dangerous to liberty."²³⁸ But when Attorney General (and future Chief Justice) Harlan Fiske Stone²³⁹ described a "lawless" organization of "agents engaged in many practices which are brutal and tyrannical in the extreme," he wasn't describing an army; he was describing the early FBI.²⁴⁰

²³² Sulmasy & Yoo, *supra* note 3, at 1817 ("[T]he Department of Defense's responsibilities have grown since the Cold War to include disaster relief, responding to civil disturbances, and assisting in drug interdiction.").

²³³ Dunlap, *supra* note 6, at 358 (footnotes omitted).

²³⁴ *Id.* at 359–60 (footnotes omitted).

²³⁵ *Id.* at 358–59.

²³⁶ *See supra* Section I.A.

²³⁷ *See, e.g.,* KOHN, *supra* note 8, at 3–4; Dunlap, *supra* note 6, at 345; Fields & Hardy, *supra* note 12, at 5–6.

²³⁸ Fields & Hardy, *supra* note 12, at 26.

²³⁹ ATHAN THEOHARIS, FROM THE SECRET FILES OF J. EDGAR HOOVER 2 (1993).

²⁴⁰ GENTRY, *supra* note 119, at 124; *see also* KESSLER, *supra* note 134, at 16 ("With no hiring standards, Burns and Daugherty recruited political hacks as agents . . ."); *id.* at 16–18.

The early FBI was so corrupt that it was known as “the Department of Easy Virtue,”²⁴¹ and Stone’s 1924 description of FBI “men with bad records” and often “convicted of crimes”²⁴² would have sounded all too familiar to founders raised on a centuries-old hostility to medieval armies “made up largely of tramps, beggars, [and] criminals” let loose to terrorize civilian populations.²⁴³ And although the FBI would soon clean out agents with unsavory pasts and replace them with “G-men” of squeaky-clean backgrounds and images,²⁴⁴ its “standard conduct” for the next half century included illegal and warrantless wiretaps, buggings, burglaries, destruction of files, and harassment of political minorities, the gay community, and African Americans.²⁴⁵ On occasion, its tactics also included warrantless and illegal arrests on a massive scale.²⁴⁶ And for a quarter century, the FBI looked for espionage by opening hundreds of thousands of pieces of mail.²⁴⁷ In short, beginning in the 1910s, accelerating in the 1930s, and continuing through the mid-1960s, the FBI frequently “violated the freedoms of the Bill of Rights to enforce the president’s powers as commander in chief.”²⁴⁸ In the words of a former chair of the House Judiciary Committee, the FBI’s surveillance power gave it the “power of control over the lives and destinies of every man in the nation.”²⁴⁹ And the FBI did not always use that power judiciously.

The point is not to suggest that the FBI has been bad for the country. To the contrary, its accomplishments have been phenomenal, in terms of its primary mission of national security as well as its secondary mission of crime fighting. And for most of its recent history, it has shown a healthy respect for civil liberties.²⁵⁰ But like the history of most armies,²⁵¹ the FBI’s history—from the late 1910s through the

²⁴¹ GENTRY, *supra* note 119, at 117.

²⁴² KESSLER, *supra* note 134, at 17.

²⁴³ Fields & Hardy, *supra* note 12, at 6.

²⁴⁴ GENTRY, *supra* note 119, at 127–28, 180; *see also* KESSLER, *supra* note 134, at 21 (“In contrast to the corrupt standards of the previous director, Hoover told his SACs that even the appearance of improper conduct was to be avoided.”); *id.* at 20–23.

²⁴⁵ WEINER, *supra* note 121, at 165; *see also* THEOHARIS, *supra* note 120, at 2 (“[I]nvestigators similarly had to rely on inherently intrusive and invariably illegal investigative techniques (wiretaps, bugs, break-ins, mail opening).”).

²⁴⁶ ACKERMAN, *supra* note 181, at 113–23, 180–86.

²⁴⁷ WEINER, *supra* note 121, at 269.

²⁴⁸ *Id.* at xvi, 48, 77, 269.

²⁴⁹ THEOHARIS, *supra* note 239, at 73 (quoting Emanuel Celler).

²⁵⁰ *See generally* GRAFF, *supra* note 129, at 3–28. For exceptions, *see id.* at 60 (regarding 1972 break-in of offices of Palestinian American groups), and WEINER, *supra* note 121, at 313–14 (same, as well as break-ins of acquaintances of Weather Underground).

²⁵¹ *E.g.*, Fields & Hardy, *supra* note 12, at 5–6.

mid-1960s—including numerous infringements on civil liberties similar to those the founders worried an out-of-control army would commit. This Section describes that history. Then, Part III argues that instances of the FBI’s independence have often made possible or exacerbated those infringements.

1. *Illegal Wiretaps, Bugs, and Break-Ins*

“Wiretapping, bugging, and break-ins became a holy trinity for FBI intelligence operations from the 1930s onward.”²⁵² In the run-up to World War II, President Roosevelt authorized the FBI “to secure information by listening devices . . . of persons suspected of subversive activities against the Government of the United States, including suspected spies.”²⁵³ It thereafter “employed illegal surveillance tactics and actively sought noncriminal intelligence on the anti-interventionists for bureaucratic and political purposes.”²⁵⁴ It was during this time

that FBI officials acquired increased investigative authority and resorted to sensitive investigative techniques, like wire-tapping, and violated investigative restrictions—all in the name of combating “subversive activity,” but too often, in reality, with the prime objective and end result being the monitoring of domestic political activity while violating the civil liberties of foreign policy critics.²⁵⁵

Then, during American involvement in World War II, its surveillance activity increased. “[T]he FBI installed at least 6,769 warrantless wiretaps and 1,806 bugs in the name of national security.”²⁵⁶ In those years and the years after, subjects of surveillance included Presidents, presidential candidates, First Ladies, Cabinet officials, Members of Congress, Supreme Court Justices, civil rights leaders, reporters, anti-war organizations, labor unions, ethnic minorities, political minorities, and almost anyone else whom FBI Director J. Edgar Hoover deemed suspicious.²⁵⁷ By the time of Hoover’s death, he personally had more than 17,750 pages of files that

²⁵² WEINER, *supra* note 121, at 77; *see also* GENTRY, *supra* note 119, at 208 & n.* (describing possible FBI intelligence sources as “physical and technical surveillances, mail openings, and ‘black bag jobs’ or burglaries”).

²⁵³ GENTRY, *supra* note 119, at 232 (alteration in original) (quoting Roosevelt’s memorandum).

²⁵⁴ CHARLES, *supra* note 141, at 3.

²⁵⁵ *Id.* at 15–16.

²⁵⁶ WEINER, *supra* note 121, at 88.

²⁵⁷ *See id.* at 55, 64, 75–77, 106, 133–134, 144, 178, 211, 249.

included blackmail material on the patriarch of an American political dynasty, his sons, their wives, and other women; allegations of two homosexual arrests which Hoover leaked to help defeat a witty, urbane Democratic presidential candidate; the surveillance reports on one of America's best-known first ladies and her alleged lovers,

and much more.²⁵⁸

Many if not most of the taps, bugs, and break-ins were warrantless and illegal. Congress banned warrantless wiretaps in 1934 and prohibited illegally wiretapped conversations from being admitted as evidence in court.²⁵⁹ But the FBI nevertheless wiretapped at will based on the misguided rationale that if the recorded conversations were not used in court, they were not illegal.²⁶⁰

The same justification was applied to burglaries in which bugs were often placed and documents were often stolen. As early as the 1920s, the FBI was breaking into the headquarters of suspected communists,²⁶¹ as well as into the offices of unfriendly Members of Congress.²⁶² During World War II, FBI Agent Morton Chiles stole an address book during an illegal burglary, which led to the detention of 114 suspected German sympathizers.²⁶³ Later in the war, an unproven suspicion that Chase National Bank was collaborating with Germany led the FBI to illegally burglarize its main office.²⁶⁴ After the war, the FBI's Program C, created for just such activity, broke into the embassies and consulates of the Soviet Union and its satellite states.²⁶⁵ A separate outfit called Squad 47 was responsible for at least 800 break-ins.²⁶⁶ Between 1960 and 1966, the FBI burglarized the Socialist Workers Party ninety-four times.²⁶⁷

Although such surveillance may sound less drastic than the infringement on civil liberties by the British armies that inspired the

²⁵⁸ GENTRY, *supra* note 119, at 50, 51.

²⁵⁹ See Communications Act of 1934 § 605, 48 Stat. 1064, 1103–04 (codified as amended at 47 U.S.C. § 605 (2012)); see also HOWARD J. KAPLAN ET AL., *THE HISTORY AND LAW OF WIRE-TAPPING* 3 (2012), https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac_2012/29-1_history_and_law_of_wiretapping.authcheckdam.pdf [<https://perma.cc/YU5C-S9H9>].

²⁶⁰ See KESSLER, *supra* note 134, at 53, 77; WEINER, *supra* note 121, at 76–77.

²⁶¹ See WEINER, *supra* note 121, at 49.

²⁶² See THEOHARIS, *supra* note 239, at 2.

²⁶³ WEINER, *supra* note 121, at 109.

²⁶⁴ *Id.* at 115.

²⁶⁵ *Id.* at 193.

²⁶⁶ *Id.* at 314.

²⁶⁷ NELSON BLACKSTOCK, *COINTELPRO: THE FBI'S SECRET WAR ON POLITICAL FREEDOM*, at ix (1975).

founders' hostility to standing armies and insistence on civilian control of the military, the harm to liberty by illegal surveillance was significant. It led to political blackmail,²⁶⁸ purges from academic faculties,²⁶⁹ and the extensive harassment of minorities (political and racial) described below.²⁷⁰ "Uncontrolled surveillance may be effective in repressing dissent even where dossiers are not deployed to achieve any concrete results."²⁷¹ It has "a chilling effect in important public debate over national policy."²⁷² As the Supreme Court has stated,

[i]n a democratic society privacy of communication is essential if citizens are to think and act creatively and constructively. Fear or suspicion that one's speech is being monitored by a stranger, even without the reality of such activity, can have a seriously inhibiting effect upon the willingness to voice critical and constructive ideas.²⁷³

2. *Illegal Detentions*

The FBI's history of mass detentions began in World War I with the arrest of hundreds of members of the Industrial Workers of the World, a labor organization that opposed the war.²⁷⁴ It followed up with an arrest of at least 5,000 people suspected of opposing the war.²⁷⁵ For example, one man was imprisoned until the end of the war because he had "belittled the United States, talked against the war, spread pacifist propaganda, and wrote against conscription"—all of which was protected by the First Amendment.²⁷⁶ Likewise, a German was imprisoned because he "engaged in a conversation with a Negro

268 See BETTY MEDSGER, *THE BURGLARY: THE DISCOVERY OF J. EDGAR HOOVER'S SECRET* FBI 7 (2014).

269 SIBLEY, *supra* note 142, at 207.

270 See THEOHARIS, *supra* note 239, at 87.

271 Kreimer, *supra* note 130, at 151.

272 CHARLES, *supra* note 141, at 177.

273 *Bartnicki v. Vopper*, 532 U.S. 514, 533 (2001) (quoting approvingly PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 202 (1967)); see also Kreimer, *supra* note 130, at 151 ("I cannot say that our country could have no central police without becoming totalitarian, but I can say with great conviction that it cannot be totalitarian without a centralized national police," which "will have enough on enough people, even if it does not elect to prosecute them, so that it will find no opposition to its policies." (quoting ROBERT H. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 70–71 (1955))).

274 ACKERMAN, *supra* note 181, at 69–70.

275 See *id.* at 180.

276 KESSLER, *supra* note 134, at 15 (quoting J. Edgar Hoover); see *id.* at 55 ("Hoover never understood the difference between criticism of the government and illegal conduct aimed at subverting the government.").

in which he indulged in pro-German utterances and in derogatory remarks regarding the United States government.”²⁷⁷

The controversy from the mass arrests led to the resignations of the Attorney General and the FBI Director.²⁷⁸ But those resignations did not deter future mass arrests, beginning with the warrantless arrests of between 6,000 and 10,000 people in the Palmer Raids of 1920, described earlier in Section II.A.²⁷⁹ Planned and led by the FBI’s Radical Division,²⁸⁰ the raids “resulted in mass violations of many people’s civil liberties.”²⁸¹ Most of them innocent of any wrongdoing,²⁸² many detainees “were held for months in cramped, filthy, makeshift prisons, beaten, brutalized, railroaded, denied lawyers or access to family members, then released with no explanation, never charged with a crime.”²⁸³ A reviewing judge later wrote, “a mob is a mob, whether made up of government officials acting under instructions from the Department of Justice, or of criminals, loafers, and the vicious classes.”²⁸⁴

During World War II, the FBI once again arrested as many as 10,000 innocent civilians wrongly suspected of being foreign subversives.²⁸⁵ The arrests were inspired by the FBI’s Custodial Detention Index, which was started immediately after Germany invaded Poland in 1939.²⁸⁶ Names were added “not from knowledge about individuals’ subversive activities but primarily from the subscription lists of German, Italian, and communist newspapers; from membership lists of organizations; and from informant and agent reports on who attended meetings and demonstrations.”²⁸⁷ In Director Hoover’s words, the FBI’s test for inclusion on the list was whether there was “the *possibility but not the probability* that they will harm the national interest.”²⁸⁸

After World War II, during the Cold War, the FBI maintained and expanded its list for two decades, growing it to 26,500 “potentially

277 *Id.* at 15 (quoting J. Edgar Hoover).

278 WEINER, *supra* note 121, at 16.

279 CHARLES, *supra* note 141, at 21; THEOHARIS, *supra* note 120, at 26–27; *see also* GENTRY, *supra* note 119, at 82.

280 ACKERMAN, *supra* note 181, at 67.

281 CHARLES, *supra* note 141, at 21.

282 ACKERMAN, *supra* note 181, at 389.

283 *Id.* at 6; *see also* GENTRY, *supra* note 119, at 83–84.

284 *Colyer v. Skeffington*, 265 F. 17, 43 (1920).

285 WEINER, *supra* note 121, at 122.

286 MEDSGER, *supra* note 268, at 251–52. The name of the list later changed from the Custodial Detention Index to the Security Index. *Id.* at 254–55.

287 *Id.* at 252.

288 *Id.*

or actually dangerous” political suspects.²⁸⁹ In the event of an emergency, it planned to imprison them in stockades and a secret prison system, while suspending the writ of habeas corpus.²⁹⁰ Unlike the mass arrests of World War I and World War II,²⁹¹ the mass arrests of the Cold War never materialized, but the Custodial Detention Program still “affected almost everything Hoover did in domestic intelligence during the Truman administration.”²⁹² It required “complicated legal, logistical, and political arrangements” that constituted “the thread that connects the seemingly unrelated parts of Hoover’s wide-ranging domestic security operations during the cold war.”²⁹³

3. *Targeting Minorities*

In 1924, Attorney General Stone declared, “The Bureau of Information is not concerned with political or other opinions of individuals.”²⁹⁴ But for most of the rest of the century, that was not true. Just as distinct religious, political, and ethnic groups were often targeted by the armies whose abuses in Britain and the colonies caused the founders’ skepticism of standing armies,²⁹⁵ so too for individuals and groups targeted by the FBI.

Political minorities have borne the brunt of the FBI’s infringements on civil liberties: “Even mild dissent, in the eyes of the FBI, could make an American worthy of being spied on and placed in an ongoing FBI file, sometimes for decades.”²⁹⁶ The infringements began during the Wilson Administration, when the FBI dug for dirt on political activists²⁹⁷ and lawyers²⁹⁸ who criticized the Palmer Raids and when it put together more than 200,000 dossiers on political dissidents.²⁹⁹ Later, purportedly looking to foil subversion by the Soviet

²⁸⁹ See WEINER, *supra* note 121, at 190.

²⁹⁰ *Id.* at 160.

²⁹¹ See *id.* at 34, 122, 161.

²⁹² POWERS, *supra* note 133, at 283.

²⁹³ *Id.*

²⁹⁴ WEINER, *supra* note 121, at 59.

²⁹⁵ Cf. Fields & Hardy, *supra* note 12, at 10, 12–13, 24–30 (describing abuses committed by the British army against civilians and regimes in seventeenth- and eighteenth-century Europe and the American colonies, and the resulting distrust of America’s founders toward standing armies).

²⁹⁶ MEDSGER, *supra* note 268, at 7.

²⁹⁷ ACKERMAN, *supra* note 181, at 298.

²⁹⁸ THEOHARIS, *supra* note 120, at 28 (The FBI “closely monitored the activities of the legal scholars[,] . . . sought to discredit . . . Harvard Law professor Felix Frankfurter, by questioning his loyalty,” and “covertly attempted to assist the efforts of the Harvard overseer Austin Fox to have Harvard trustees dismiss . . . Harvard Law professor Zechariah Chafee.”).

²⁹⁹ THEOHARIS, *supra* note 239, at 1.

Union,³⁰⁰ the FBI's COINTELPRO campaigns again targeted citizens based on their political ideas—"Black activists, antiwar leaders, socialists, and others"³⁰¹—in violation of their rights to privacy and to free speech.³⁰²

The COINTELPRO program included 2,340 operations to destroy lives through wiretaps, bugs, break-ins, anonymous hate mail, IRS audits, and documents forged to create distrust among targeted groups.³⁰³ Those operations included secret acts to influence elections and criminal sentencing,³⁰⁴ as well as

planting newspaper stories, whether true or not, about misuse of party funds by Communist officials; placing anonymous calls or sending anonymous letters to start rumors that party officials were homosexuals or sexual deviants; and assigning agents to conduct lockstep surveillance, intrusive photography, or make hang-up calls to telegraph to associates of Communists that they were under investigation.³⁰⁵

The FBI also took steps to get party officials fired or arrested based on false evidence.³⁰⁶ COINTELPRO files totaled more than 20,000 pages.³⁰⁷

Similarly, looking for Soviet spies, the FBI's Federal Loyalty and Security Program investigated the private lives of government employees, as well as their political views.³⁰⁸ (It found no spies.³⁰⁹) And seeking to sustain support for the Vietnam War, its VIDEM program spied on antiwar groups like Students for a Democratic Society, tracked down the names of protesters, and harassed them.³¹⁰

One of the agents involved in VIDEM explained the extent of the harassment. "Not kill them per se," he said, "but anything went. If we suspect somebody's involved in this, put a wiretap on them. Put a microphone in. Steal his mail. Do anything!"³¹¹

³⁰⁰ Cf. OVID DEMARIS, *THE DIRECTOR: AN ORAL BIOGRAPHY OF J. EDGAR HOOVER* 320–21 (1975) ("Two Cointelpro efforts were aimed at 'hostile foreign intelligence services' and 'foreign Communist organizations and individuals connected with them.'").

³⁰¹ BLACKSTOCK, *supra* note 267, at vii.

³⁰² THEOHARIS, *supra* note 120, at 12.

³⁰³ WEINER, *supra* note 121, at 195–97.

³⁰⁴ DEMARIS, *supra* note 300, at 322.

³⁰⁵ KESSLER, *supra* note 134, at 96.

³⁰⁶ *Id.*

³⁰⁷ BLACKSTOCK, *supra* note 267, at viii.

³⁰⁸ THEOHARIS, *supra* note 239, at 87.

³⁰⁹ WEINER, *supra* note 121, at 149.

³¹⁰ *Id.* at 270.

³¹¹ *Id.* at 285 (quoting Bill Dyson).

Like the out-of-control armies that inspired the founders' insistence on civilian control of the military,³¹² FBI Director Hoover was particularly adept at intimidating "people whose political opinions [he] opposed."³¹³ He began as early as the Palmer Raids: "When prominent lawyers signed a petition condemning the Justice Department's 'continued violation of the Constitution,' Hoover opened a file on each of them."³¹⁴ In later years, the FBI used illegally obtained intelligence as blackmail against President Roosevelt's closest advisors, on President John F. Kennedy, and on Dr. Martin Luther King Jr.³¹⁵

In addition to political minorities, members of the lesbian, gay, bisexual, and transgender ("LGBT") community drew special surveillance from the FBI. Its investigation of Undersecretary of State Sumner Welles ruined his career and frightened other members of the Roosevelt Cabinet after the FBI outed him as gay.³¹⁶ Likewise, it spread false rumors that Democratic Party presidential nominee Adlai Stevenson had once been arrested for sodomy.³¹⁷ And over twenty-five years it compiled a 300,000-page file on countless LGBT Americans in an attempt to drive them out of government and academia.³¹⁸

In addition to targeting political and LGBT minorities, the FBI also targeted racial minorities and advocates for their civil rights, often on the national security grounds (or pretext) of investigating their ties to the Soviet Union.³¹⁹ From Dr. Martin Luther King Jr. to his closest advisor, to future Supreme Court Justice Thurgood Marshall, to the primary organizer of King's famous March on Washington, if you were a famous civil rights leader, the FBI spied on you.³²⁰ At times, in the FBI's words, its goal was to "disrupt, misdirect, discredit, or otherwise neutralize the activities of black nationalist hate type organizations," which it defined to include King's Southern Christian Leadership Conference.³²¹

The FBI's campaign against Dr. Martin Luther King Jr. had public and private fronts. Publicly, the FBI blamed him for inciting riots

³¹² See KOHN, *supra* note 8, at 3–4.

³¹³ MEDSGER, *supra* note 268, at 7.

³¹⁴ KESSLER, *supra* note 134, at 16.

³¹⁵ *Id.* at 77; WEINER, *supra* note 121, at 133, 211, 232–33, 438.

³¹⁶ WEINER, *supra* note 121, at 106.

³¹⁷ KESSLER, *supra* note 134, at 93.

³¹⁸ THEOHARIS, *supra* note 239, at 357–58.

³¹⁹ WEINER, *supra* note 121, at 197–98.

³²⁰ *Id.* at 197–98, 200.

³²¹ *Id.* at 271.

and violence, and it released a report accusing him of associating with communists.³²² Privately, it sent him sex tapes it had recorded of King with mistresses, along with a note vowing to expose him. The note threatened, “There is but one way out for you. You better take it before your filthy, abnormal fraudulent self is bared to the nation.”³²³

* * *

In short, like the military’s primary purpose, the FBI’s primary purpose is to protect the nation against external enemies. And like the British armies that inspired the constitutional command of civilian control of the military, the FBI has at times made significant infringements on civil liberties. As Part III shows, those infringements were often caused by an independence that has proven as dangerous in the hands of the FBI as the framers believed it would prove in the hands of an army.

III. THE FBI’S INDEPENDENCE HAS FACILITATED ITS VIOLATIONS OF CIVIL LIBERTIES.

For the middle half of the twentieth century, FBI Director J. Edgar Hoover “operated autonomously,”³²⁴ maintaining the FBI as “an independent . . . agency with its own political agenda, capable of influencing public opinion and national politics.”³²⁵ As the *Washington Post* reported upon his death, “Few, if any, men in the history of the United States have accumulated so much power and wielded it for so long as did J. Edgar Hoover.”³²⁶ His was a “principality with absolutely secure borders,”³²⁷ as shown by (among many other possible examples³²⁸) Hoover’s order that his agents in Latin America burn their files instead of sharing them with the CIA.³²⁹ To my knowledge, not since the days of Oliver Cromwell³³⁰ has anyone in Anglo-American history responsible for military operations or their rough equivalent operated so independently of his elected superiors.

322 *Id.* at 235–36.

323 KESSLER, *supra* note 134, at 144.

324 CHARLES, *supra* note 141, at 1.

325 THEOHARIS, *supra* note 239, at 11.

326 Editorial, *J. Edgar Hoover*, WASH. POST, May 3, 1972, at A20.

327 KATZENBACH, *supra* note 119, at 184.

328 WEINER, *supra* note 121, at 145–46 (“Hoover’s refusal to work with the fledgling CIA approached insubordination. His defiance of the State Department neared rebellion. . . . He had all but declared war on the White House.”).

329 RIEBLING, *supra* note 150, at 75.

330 See Fields & Hardy, *supra* note 12, at 10–11.

Hoover's independence began in the 1920s when he orchestrated the Palmer Raids in an unmonitored manner that allowed the Attorney General to deny responsibility, and his independence accelerated in the 1930s and early 1940s when he defied two Attorneys General. By the late 1940s, Hoover was in open conflict with President Truman over Cold War policy disagreements as profound as any at issue in the infamous Truman-MacArthur conflict.³³¹ By the 1960s and 1970s, multiple Presidents had wanted to fire Hoover, but Hoover had made it too politically difficult to do so. As one reporter quipped upon Lyndon Johnson's accession to the presidency, "President Johnson has declared that he does not intend to replace J. Edgar Hoover. However, J. Edgar Hoover has not disclosed whether he plans to replace President Johnson."³³²

As this Section will explain, Hoover wielded his independence through tactics like those of the American generals described in Section I.B: insubordination;³³³ insufficient monitoring;³³⁴ and undue influence through intimidation,³³⁵ pitting Congress against the President,³³⁶ and rallying public opinion, either openly or through leaks.³³⁷ And as this Section will also explain, a consequence of Hoover's independence was the infringement of civil liberties the founders worried would result from a breakdown of civilian control of the military.

To be specific, among the twentieth century's more egregious violations of American civil liberties were (1) mass arrests of thousands of innocent people during panics over communism and World War II; (2) the excesses of the McCarthy era; (3) the warrantless wiretapping of thousands based on their political views and the purges from academia and government that accompanied it; (4) violence against

³³¹ See *supra* notes 70–73 and accompanying text.

³³² GRAFF, *supra* note 129, at 38 (quoting David Frost of the satirical British news show *That Was the Week that Was*); see also GENTRY, *supra* note 119, at 215 (“[N]one of [Attorney General Frank Murphy’s] successors dared challenge the FBI director.”); KESSLER, *supra* note 134, at 135 (“As far as Johnson was concerned, ‘I would rather have him inside the tent pissing out than outside the tent pissing in.’”); WEINER, *supra* note 121, at 228 (“RFK began to grasp the ubiquity of Hoover’s power. He saw that Hoover had wired the national security establishment of the United States. The director had more information and power than the attorney general.”); *id.* at 280 (“‘Attorneys General seldom directed Mr. Hoover,’ Nixon said. ‘It was difficult even for Presidents.’”).

³³³ KARSTEN, *supra* note 71, at x–xi; Kemp & Hudlin, *supra* note 61, at 15–17.

³³⁴ KOHN, *supra* note 7, at 136–37; Sulmasy & Yoo, *supra* note 3, at 1829.

³³⁵ FINER, *supra* note 62, at 86–87, 140.

³³⁶ Kohn, *supra* note 57, at 7.

³³⁷ Weigley, *supra* note 94, at 30.

civil rights protesters; and (5) the harassment of the civil rights movement's leaders. Of course, the century also saw other significant domestic violations of liberty. But the common thread that connects the five listed above is that they were all facilitated or exacerbated by the FBI's independence from the President and Attorney General.

A. *The Link Between Mass Arrests and FBI Independence*

The FBI's independence contributed to its largest arrests of mass numbers of innocent people. It involved independence from three Attorneys General nominally in charge of the FBI: Mitchel Palmer, Robert Jackson, and Francis Biddle. And the aspects of independence included insufficient monitoring, undue influence, and insubordination.

Insufficient monitoring of the FBI was a problem as early as 1920, when Hoover orchestrated the mass arrest of between 6,000 and 10,000 people (most of them innocent of any crime) in the wake of a bombing that was blamed on communists.³³⁸ Although the press called the arrests the Palmer Raids, Attorney General Palmer was derelict in his duty to monitor Hoover; "Palmer neither organized nor directed them. Hoover did."³³⁹

Hoover's independence from Palmer allowed Palmer, a candidate for the Democratic presidential nomination later that year,³⁴⁰ to deny being aware of some of the raid's details.³⁴¹ When he was asked about the number of search warrants by a Senate committee, Palmer replied, "I cannot tell you, Senator If you would like to ask Mr. Hoover, who was in charge of this matter, he can tell you."³⁴²

President Wilson was also guilty of insufficient monitoring of the Bureau during the Palmer Raids. "Wilson either did not ask or did not listen, being too preoccupied with world affairs, his League of Nations, or his imagined place in history."³⁴³ Although it is not the President's job to micromanage the FBI, the Palmer Raids show what can

338 GRAFF, *supra* note 129, at 23; THEOHARIS, *supra* note 120, at 26–27.

339 WEINER, *supra* note 121, at 34; *see also* GENTRY, *supra* note 119, at 82.

340 GENTRY, *supra* note 119, at 101–03.

341 WEINER, *supra* note 121, at 44.

342 *Id.* (quoting Palmer). Hoover also (falsely) denied a role in the arrests. ACKERMAN, *supra* note 181, at 7 ("Edgar himself would spend a lifetime denying any major role in the raids."); KESSLER, *supra* note 134, at 16–17 ("Hoover claimed he had not participated in their planning, but testimony before Federal Judge George W. Anderson in Boston established that Hoover and another Justice Department official had devised them with immigration officials. The spurious information about the suspects came from Hoover's index cards.").

343 ACKERMAN, *supra* note 181, at 393–94.

happen to civil liberties when the President and the Attorney General give the FBI a blank check for mass detentions.

Nearly two decades later, in the late 1930s, the FBI again designed a program for mass detentions, at first without the Attorney General's knowledge.³⁴⁴ Hoover compiled a list of thousands of individuals, mostly suspected communists, "to be rounded up and placed in concentration camps"³⁴⁵ in the event of war with the Axis powers.³⁴⁶ "Those on the list consisted of 'both aliens and citizens of the United States [who were of] German, Italian, and Communist sympathies,' along with radical labor leaders, journalists critical of the administration, and some members of Congress."³⁴⁷ Their inclusion on the list depended not on crimes they had committed in the past but on crimes they might commit in the future. The plan would come to include "military stockades, a secret prison system for jailing American citizens, and the suspension of the writ of habeas corpus."³⁴⁸

When Attorney General Robert Jackson later learned of the program, he was horrified and ordered Hoover to abandon the program and destroy the list.³⁴⁹ But Hoover defied him. Like Pentagon generals who predict unrealistically dire consequences if their preferred policy goals are not embraced by their civilian superiors, Hoover warned Jackson that Jackson's opposition would require the FBI "to abandon its facilities for obtaining information in the subversive field."³⁵⁰ Although Jackson was "no fan of J. Edgar Hoover,"³⁵¹ he was outmaneuvered, and he relented.³⁵²

Hoover tried to keep the Custodial Detention Program secret from Jackson's successor, Attorney General Francis Biddle. When Biddle learned of the program two years after assuming office, Biddle

³⁴⁴ WEINER, *supra* note 121, at 122.

³⁴⁵ KESSLER, *supra* note 134, at 55.

³⁴⁶ WEINER, *supra* note 121, at 83–85, 123.

³⁴⁷ KESSLER, *supra* note 134, at 55 (alteration in original); *see also* GENTRY, *supra* note 119, at 213.

³⁴⁸ WEINER, *supra* note 121, at 160; *see also* KESSLER, *supra* note 134, at 55 ("After Hoover told Congress that he had reestablished the General Intelligence Division abolished by Stone in 1924, Representative Vito Marcantonio of New York charged that Hoover's system of 'terror by index cards' smacked of the Gestapo. It was, he said, 'a general raid against civil rights . . . very similar to the activities of the Palmer days.'" (alteration in original)).

³⁴⁹ This was not the only battle between Hoover and his titular superior, Attorney General Jackson. GENTRY, *supra* note 119, at 224.

³⁵⁰ WEINER, *supra* note 121, at 85 (quoting Hoover).

³⁵¹ GENTRY, *supra* note 119, at 223.

³⁵² WEINER, *supra* note 121, at 85; *see also* GENTRY, *supra* note 119, at 229 (suggesting Hoover's defiance was sneakier and more subtle); KESSLER, *supra* note 134, at 63–64 (same).

was, like Jackson before him, “deeply disturbed.”³⁵³ In a letter to Hoover, Biddle called the program “impractical, unwise, and dangerous.”³⁵⁴ And like Jackson, Biddle issued an “express prohibition” of the program.³⁵⁵ This time, Hoover did not bother coercing the Attorney General; instead, Hoover just disobeyed the order.³⁵⁶ “Cunning as always, Hoover merely changed the name of the list to the Security Index and retained it.”³⁵⁷

The ruse worked because of Biddle’s insufficient monitoring of the FBI.³⁵⁸ The program continued in secret, without the Attorney General or the President knowing of its continued existence.³⁵⁹ The FBI’s independence in the service of mass arrests had gone from insufficient monitoring, to undue influence, to insubordination.³⁶⁰ And in the process, Hoover “demonstrated to everyone inside the bureau that he, not the attorney general, set the rules” and that Hoover was “a law unto himself.”³⁶¹

B. The Link Between McCarthyism and FBI Independence

The FBI’s independence contributed to the witch hunts of the McCarthy era. It involved independence from President Harry Truman and his Attorneys General. And the aspects of independence included insubordination and undue influence.

The late 1940s and early 1950s saw a very real threat of espionage and subversion by the Soviet Union. But the era also saw a tragic overreaction to that threat with excesses that ruined lives and careers.³⁶² Today it is called the McCarthy era, after Senator Joseph McCarthy. But “[w]ithout Hoover’s help, it might never have happened.”³⁶³ He was at the center of the witch hunts against often-imaginary communists, leaking information to McCarthy³⁶⁴ and even providing speechwriters for McCarthy and his aides.³⁶⁵ “The FBI kept

353 MEDSGER, *supra* note 268, at 254.

354 *Id.* (quoting Biddle).

355 SIBLEY, *supra* note 142, at 7.

356 MEDSGER, *supra* note 268, at 254.

357 KESSLER, *supra* note 134, at 64.

358 MEDSGER, *supra* note 268, at 254.

359 WEINER, *supra* note 121, at 122.

360 *See id.*

361 MEDSGER, *supra* note 268, at 255.

362 *See* KESSLER, *supra* note 134, at 96–97.

363 *Id.* at 91.

364 THEOHARIS, *supra* note 239, at 254.

365 KESSLER, *supra* note 134, at 92.

McCarthy in business,” one of Hoover’s closest associates later explained.³⁶⁶

President Truman opposed these efforts. He privately wrote, “We want no Gestapo or Secret Police [The] FBI is tending in that direction.”³⁶⁷ But neither Truman nor his Attorney General was able to restrain the FBI Director, in part because Hoover had used congressional and media allies to insulate himself from control by his titular superiors.

Hoover had cultivated alliances with conservative Members of Congress since his earliest days as Director.³⁶⁸ He “never forgot that Congress controlled the purse strings. Because of that, it could be more powerful than the president and could come in handy as Hoover moved up the ladder.”³⁶⁹ To ingratiate himself with committee chairs who controlled his funding, Hoover assigned agents to their investigative staff, providing them with free expertise.³⁷⁰

With regard to the press, Hoover quickly learned that he could count on positive press coverage from reporters if he leaked them secret FBI files that gave them good scoops over their competitors.³⁷¹ Hoover went even further with reporter Walter Winchell, ensuring positive coverage by providing him with an FBI driver, bodyguards, and a Naval Reserve commission.³⁷² As a result, in the words of Attorney General Nicholas Katzenbach, “[a]bsent strong and unequivocal proof of the greatest impropriety on the part of the director, no attorney general could have conceived that he could possibly win a fight with Mr. Hoover in the eyes of the public, the Congress or the President.”³⁷³

³⁶⁶ ACKERMAN, *supra* note 181, at 406 (quoting William Sullivan); *id.* (“We gave McCarthy all we had”) (same).

³⁶⁷ WEINER, *supra* note 121, at 134; *see also* KESSLER, *supra* note 134, at 70 (“If I can prevent [it], there’ll be no NKVD [a predecessor of the KGB] or Gestapo in this country. Edgar Hoover’s organization would make a good start toward a citizen spy organization. Not for me.” (alteration in original)). Truman added, “They are dabbling in sex-life scandals and plain blackmail . . . *This must stop.*” WEINER, *supra* note 121, at 134. But it did not. For the rest of his presidency, Truman remained, in the words of his White House Counsel, “[v]ery strongly anti-FBI.” *Id.* at 151.

³⁶⁸ CHARLES, *supra* note 141, at 25 (“The director, furthermore, lobbied conservative Democrats and appointed over one hundred FBI agents from the South—Roosevelt relied upon southern Democrats for New Deal support.”).

³⁶⁹ KESSLER, *supra* note 134, at 16.

³⁷⁰ THEOHARIS, *supra* note 239, at 73.

³⁷¹ KESSLER, *supra* note 134, at 68.

³⁷² GENTRY, *supra* note 119, at 218.

³⁷³ MEDSGER, *supra* note 268, at 4 (quoting Katzenbach).

Hoover's independence depended in part on using friendly journalists and Members of Congress to perpetuate an image of the FBI as indispensable to American security—and of Hoover as indispensable to the FBI. For example, during World War II, Hoover lied to the media by telling them that the FBI was responsible for the capture of eight German saboteurs who landed by U-boat in New York and Florida; in fact, defections by the saboteurs had been responsible, and moreover, it is unlikely that most of the men really were saboteurs.³⁷⁴ Similarly, after the war, Hoover leaked information (and misinformation) to political allies and media outlets giving the impression that Hoover was all that stood between the United States and a Soviet takeover.³⁷⁵

To maintain this impression, “Hoover opened a public relations division within the bureau” that “became nearly the largest and most productive such operation in the federal government.”³⁷⁶ It helped to “create books, movies, television and radio shows, and newspaper and magazine articles lauding Hoover and the FBI.”³⁷⁷ It also ghostwrote hundreds of articles for Hoover, making him “the go-to government man for thoughts on crime, communism, war, religion, childrearing, and even on how to make the best popovers.”³⁷⁸ As Attorney General Katzenbach later wrote, the FBI “took pains to cover up any errors and did so effectively,” which meant its Director “was in essence untouchable and thus out of effective control.”³⁷⁹

With the President unable to control, fire, or even publicly criticize Hoover, Hoover used his independence to fight communism at the expense of civil liberties. He flexed his undue influence to pressure Truman to authorize the FBI to investigate two million government employees, with particularly extreme invasions into the privacy of 14,000 employees Hoover deemed especially suspicious.³⁸⁰ But his biggest act of independence in this area concerned his public and clandestine support for the House Un-American Activities Committee.³⁸¹

374 MICHAEL DOBBS, *SABOTEURS: THE NAZI RAID ON AMERICA* 144–45, 152 (2005); LOUIS FISHER, *NAZI SABOTEURS ON TRIAL* 5–6, 28, 38–39 (2003); Justin Walker, *Execution of the Innocent in Military Tribunals: Problems from the Past and Solutions for the Future*, 119 W. VA. L. REV. 1, 16–17 (2016).

375 WEINER, *supra* note 121, at 152–54.

376 MEDSGER, *supra* note 268, at 259.

377 KESSLER, *supra* note 134, at 61.

378 MEDSGER, *supra* note 268, at 259.

379 KATZENBACH, *supra* note 119, at 184.

380 WEINER, *supra* note 121, at 149.

381 *See id.* at 159 (“Truman derided Red-hunters like Nixon, and he denounced the pursuit of Hiss. But he never once criticized Hoover in public. He would not have dared.”).

The Committee was full of Republican legislators who believed President Truman was too soft on communism.³⁸² It was “rabidly anti-New Deal and anti-Truman.”³⁸³ In a “tirade” to the Committee on March 26, 1947, Hoover told the story of the Truman Administration retaining a communist federal employee even after it learned that the employee was deeply involved in the Communist Party, and Hoover called out the Administration for firing only 101 people out of 6,193 investigated for being communists.³⁸⁴ He told the Committee, “I would have no fears if more Americans possessed the zeal, the fervor, the persistence and the industry to learn about this menace of Red fascism. I do fear for the liberal and progressive who has been hoodwinked and duped into joining hands with the communists.”³⁸⁵

Hoover’s speech was a direct political attack on his superiors, just as General MacArthur’s insubordinate speech to Congress attacking Truman’s policies would be a few years later. It “announced his alliance with the antiadministration Red hunters.”³⁸⁶ The testimony was “unprecedented and effective.”³⁸⁷

A year after “he had cast himself loose from the administration,”³⁸⁸ Hoover once again used the House Un-American Activities Committee (“HUAC”) for his own ends, against the President’s wishes. He leaked to the Committee the names of two Soviet spies who had become informants for the FBI, Elizabeth Bentley and Whittaker Chambers, who implicated other spies who had worked in government.³⁸⁹ By using Bentley, Chambers, and the Committee to create the impression that the Soviet Union was successfully infiltrating the Truman Administration, Hoover poured gas on the flames of anticommunist paranoia, with its attendant invasions of privacy, false accusations, and smear campaigns.³⁹⁰ In short, Hoover’s insubordination toward Truman “furnished a powerful weapon to the Republicans and

382 See POWERS, *supra* note 133, at 286–87.

383 *Id.* at 286.

384 *Id.* at 288–89.

385 *Testimony of J. Edgar Hoover Before HUAC (Excerpts)*, DIGITAL HISTORY, http://www.digitalhistory.uh.edu/dispatch_textbook.cfm?smtID=3&psid=3632 [<https://perma.cc/75SC-UHKJ>] (Hoover testified on March 26, 1947).

386 POWERS, *supra* note 133, at 289.

387 SIBLEY, *supra* note 142, at 207.

388 See POWERS, *supra* note 133, at 290; WEINER, *supra* note 121, at 157–58.

389 See WEINER, *supra* note 121, at 158–59; see also KESSLER, *supra* note 134, at 74–75, 78–79.

390 See WEINER, *supra* note 121, at 164.

the Red-hunters in Congress, who in turn delivered a hammer blow against the president and the Democrats.”³⁹¹

If FBI Director Hoover had not enjoyed so much independence from President Truman, Truman could have fired or controlled him, which would have curbed some of the excesses of the McCarthy era. Instead, Hoover was able to exacerbate those excesses because he was functionally independent of the President. In the words of one White House adviser, Hoover “wasn’t taking orders from Truman or anybody else, least of all the Attorney General of the United States.”³⁹² Instead, with his testimony to HUAC, Hoover had shown he could be openly insubordinate without adverse consequences to himself. “For the next quarter of the century, until the day he died, he would obey executive orders when he saw fit.”³⁹³

C. The Link Between Warrantless Wiretapping and FBI Independence

The FBI’s independence contributed to the warrantless wiretapping of thousands based on their political beliefs. It involved independence from Presidents Roosevelt, Truman, Eisenhower, Kennedy, Johnson, and Nixon, as well as from their Attorneys General. And the aspects of independence included undue influence and monitoring so insufficient it amounted to “independence of any significant oversight.”³⁹⁴

In the 1940s, Robert Jackson was the first Attorney General to try to curb the FBI’s illegal wiretapping program,³⁹⁵ which Hoover had initiated on his own several years earlier without receiving the Attorney General’s required approval.³⁹⁶ After the U.S. Supreme Court rejected the FBI’s argument that wiretapping was legal if evidence of it was not used in court, Jackson ordered the FBI to cease wiretapping.³⁹⁷

³⁹¹ *Id.* at 158; *see id.* at 158–59.

³⁹² *Id.* at 160 (quoting Stephen Spingarn).

³⁹³ *Id.* at 148.

³⁹⁴ THEOHARIS, *supra* note 239, at 86–87, 87; WEINER, *supra* note 121, at 149 (discussing how Hoover pressured President Truman into creating a program that allowed the FBI to conduct background checks on millions of federal government employees).

³⁹⁵ GENTRY, *supra* note 119, at 231.

³⁹⁶ THEOHARIS, *supra* note 120, at 47 (“Only belatedly, on September 10, 1936, did he inform [Attorney General] Cummings of his meeting with Roosevelt and Hull Sharing the president’s desire for secrecy, Cummings verbally directed Hoover to proceed”).

³⁹⁷ KESSLER, *supra* note 134, at 59.

While complaining to Jackson that “the Bureau cannot cope without wiretaps,”³⁹⁸ Hoover pretended to obey Jackson, but he waged an opposition campaign in the media and within the Roosevelt Cabinet.³⁹⁹ He told one journalist “that FBI agents had overheard German agents plotting to blow up the *Queen Mary* but, because of Jackson’s prohibition, had to stop listening in on the plot.”⁴⁰⁰ He also appealed to Treasury Secretary Henry Morgenthau, who argued Hoover’s case to the President.⁴⁰¹ In addition, Hoover “sought support from his political allies at the War Department and the State Department. He personally and pointedly warned that the fate of the nation rested on wiretaps”⁴⁰²

Hoover’s attempt to exert undue pressure on the decisionmaking process—a “coup d’etat[]by memorandum”⁴⁰³—was like General Colin Powell’s later attempts to prevent the use of force in the Balkans through the use of leaks, political allies in the Cabinet or Congress, and dire warnings of disastrous consequences. And like Powell’s coercion campaign against his superiors, Hoover’s was successful. He received secret authorization from President Roosevelt to wiretap without a warrant people “suspected of subversive activities”⁴⁰⁴ in the context of “national defense” investigations,⁴⁰⁵ despite the Communications Act of 1934⁴⁰⁶ and the Fourth Amendment.⁴⁰⁷

As Hoover saw it, this authorization survived President Roosevelt and World War II. He interpreted it to authorize warrantless wiretapping until a President expressly withdrew the authorization. None did.⁴⁰⁸

Having already exerted undue influence, Hoover now exercised an independence that fed on insufficient monitoring by Attorney General Jackson, who “tried to wash his hands of the whole matter.”⁴⁰⁹ “Appalled that he was being forced to participate in a circumvention

398 SIBLEY, *supra* note 142, at 59 (quoting Hoover).

399 KESSLER, *supra* note 134, at 59–60.

400 GENTRY, *supra* note 119, at 231.

401 *Id.*

402 WEINER, *supra* note 121, at 85.

403 GENTRY, *supra* note 119, at 211.

404 KESSLER, *supra* note 134, at 60 (quoting Roosevelt); *see also* WEINER, *supra* note 121, at 88, 192.

405 THEOHARIS, *supra* note 239, at 131 (quoting Roosevelt).

406 Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151–622 (2012)).

407 U.S. CONST. amend. IV.

408 WEINER, *supra* note 121, at 75.

409 GENTRY, *supra* note 119, at 232.

of a Supreme Court ruling, Jackson told Hoover he did not want to authorize specific wiretaps and did not even want to know who was being tapped.”⁴¹⁰ That was just fine by Hoover. He “presumed that he had the authority to investigate *any* groups or individuals whom *he* suspected of engaging in subversive activities.”⁴¹¹ And he told no Attorney General that he was keeping a secret set of surveillance records.⁴¹²

Hoover’s independence with regard to warrantless wiretapping grew during the Truman Administration. He tricked Truman into expanding the scope of the illegal powers Roosevelt had granted him by obtaining Truman’s signature on a reauthorization document that, unbeknownst to Truman, dropped what few wiretapping limits Roosevelt had imposed.⁴¹³ Hoover then went out of his way to keep Truman in the dark about the surveillance powers Hoover was exercising, and he was abetted by Attorney General Tom Clark’s strategic decision not to adequately monitor Hoover.⁴¹⁴ Clark “chose a course of willful ignorance when it came to wiretaps, bugs, and break-ins by the FBI. He did not want to know what Hoover was doing beyond the boundaries of the law.”⁴¹⁵

The failure to monitor Hoover’s warrantless wiretapping continued in the Eisenhower Administration.⁴¹⁶ In effect extending Hoover’s “blank check in the use of wiretaps,”⁴¹⁷ Attorney General Herbert Brownell allowed Hoover to wiretap anyone he chose—or bug them, burglarize them, or open their mail—with just one condition: Brownell had to be able to maintain plausible deniability.⁴¹⁸ He did not want to know what Hoover was up to, and Hoover was happy to not tell him.⁴¹⁹

Brownell was accountable to Eisenhower, who was accountable to the American people. But at Brownell’s insistence, the FBI Direc-

⁴¹⁰ KESSLER, *supra* note 134, at 60; *see also* GENTRY, *supra* note 119, at 232 (“In a memorandum for the files, Hoover wrote, ‘The Attorney General decided that he would have no detailed record kept concerning the cases in which wiretapping was utilized. It was agreeable to him that I maintain a memorandum book in my immediate office, listing the time, places and cases in which this procedure is to be utilized.’”).

⁴¹¹ GENTRY, *supra* note 119, at 208.

⁴¹² *Id.* at 230.

⁴¹³ KESSLER, *supra* note 134, at 71–72.

⁴¹⁴ *See* WEINER, *supra* note 121, at 135.

⁴¹⁵ *Id.*

⁴¹⁶ THEOHARIS, *supra* note 239, at 131.

⁴¹⁷ *Id.*

⁴¹⁸ *See* WEINER, *supra* note 121, at 192.

⁴¹⁹ *See id.*

tor was acting independently of all of them, and that independence was facilitating his widespread infringements on Americans' civil liberties.⁴²⁰ "This unwillingness to monitor FBI bugging practices was continued by Brownell's immediate successors, Republican Attorney General William Rogers and Democratic Attorney General Robert Kennedy."⁴²¹

Not only did Hoover's superiors fail to monitor the installation of wiretaps and bugs, they also failed to monitor how long the surveillance lasted. Once Hoover approved a wiretap, the wiretap was approved until Hoover decided to end it, which could theoretically last years or decades.⁴²² It was a continuation of the long-standing see-no-evil-hear-no-evil approach of Attorneys General who exercised control over Hoover in theory only.

On the relatively rare occasions when Hoover informed an Attorney General about the installation of a wiretap, it was often only after his agents had illegally broken into the home or office to install the bug.⁴²³ That practice allowed for plausible deniability by the Attorney General in the event that the agents were caught breaking in. Once again, independence through a failure to monitor facilitated invasions of citizens' privacy and violations of civil liberties. In the words of the Church Committee formed to investigate illegal intelligence gathering, which uncovered much of the history of the FBI's abuses, a "long line of Attorneys General, Presidents, and Congresses [gave] power and responsibility to the FBI, but . . . failed to give it adequate guidance, direction, and control."⁴²⁴

⁴²⁰ THEOHARIS, *supra* note 239, at 131 ("Hoover alone authorized break-ins, and without the prior knowledge and approval of his superiors, notably the attorney general but also the president.").

⁴²¹ *Id.* at 132.

⁴²² WEINER, *supra* note 121, at 265.

⁴²³ *See id.* "Hoover had installed 738 bugs on his own authority since 1960; the Justice Department's attorneys had been informed about only 158 of them, roughly one in five." *Id.* "Hoover told attorneys general what he was doing if and when he wanted." *Id.* at 89.

"He put before me a piece of paper asking my authority for the installation of a wiretap without court order and he waited for my approval."

"You're going to have to let me think about it," Levi said. "The agents might get caught going in."

"It's already in," Daly replied. "The microphone's in." The was the time-honored procedure: first break-in to install the tap, then the approval to turn it on.

Id. at 338.

⁴²⁴ *Id.* at 335 (quoting Church Committee).

D. The Link Between Violence Against Civil Rights Protesters and FBI Independence

The FBI's independence contributed to violence against civil rights protesters. It involved independence from Attorney General Robert Kennedy—an independence that in this instance was defined primarily by outright insubordination.

Attorney General Robert Kennedy's approach to the civil rights movement was far from entirely supportive, but it was much more supportive than that of FBI Director Hoover, who "hated the civil rights movement and its leaders."⁴²⁵ According to multiple associates, Hoover believed black Americans were inferior to white Americans,⁴²⁶ and he resisted hiring black FBI agents for decades.⁴²⁷ In addition, as a practical matter, Hoover risked alienating his conservative base of support in Congress if he enforced civil rights laws.⁴²⁸ Like many white Southern conservatives of the era, he argued civil rights were local matters.⁴²⁹

Moreover, Kennedy was the first Attorney General in decades to attempt to command and control the FBI Director.⁴³⁰ For example, in what might seem an ordinary gesture in most contexts but was considered outrageous to Hoover, Kennedy required Hoover to walk to Kennedy's office for meetings. It was not a long walk—they worked in the same building—but Hoover saw it as an indignity and assault on his independence.⁴³¹ Other curbs on Hoover's independence included requirements "to submit his speeches and FBI press releases in advance for approval," as well as calls from the Attorney General directly to FBI agents, "rather than going through Hoover."⁴³²

Despite Kennedy's efforts, Hoover remained largely independent, especially with regard to civil rights in the early 1960s.

One illustration of Hoover's independence concerned the Freedom Riders. In 1961, civil rights advocates rode buses through the South. In violation of unconstitutional segregation laws, black Freedom Riders sat at the front of the bus, and interracial pairs of Free-

⁴²⁵ KATZENBACH, *supra* note 119, at 185.

⁴²⁶ DEMARIS, *supra* note 300, at 201.

⁴²⁷ GENTRY, *supra* note 119, at 39.

⁴²⁸ DEMARIS, *supra* note 300, at 209–10; *see also* POWERS, *supra* note 133, at 290 (noting conservatives were Hoover's power base).

⁴²⁹ KESSLER, *supra* note 134, at 132.

⁴³⁰ *Id.* at 122 ("With Robert's brother in the White House, Hoover had a real boss to contend with.").

⁴³¹ WEINER, *supra* note 121, at 223, 225.

⁴³² KESSLER, *supra* note 134, at 122.

dom Riders sat together.⁴³³ Hoover learned Birmingham's police chief Bull Connor "had told the Ku Klux Klan that he would turn a blind eye if the Klan engaged in violence" and that if Freedom Riders entered a bus station's segregated bathroom, "the Klan should follow them, strip them naked, and beat them to 'look like a bulldog got hold of them.'"⁴³⁴

Upon learning this information, Hoover did not inform Attorney General Kennedy. Instead, he disobeyed Kennedy's order to protect the Freedom Riders.⁴³⁵ As a result, white mobs were unimpeded when they threw homemade grenades through bus windows, blockaded a bus door while the bus was on fire in an attempt to burn the Freedom Riders to death, and used iron clubs and chains to severely beat them when they managed to escape.⁴³⁶ Similar scenes were repeated throughout the Freedom Rides.

Hoover's insubordination reached new heights when bus drivers refused to keep driving the Freedom Riders' bus through the South. Kennedy ordered Hoover to send an FBI agent to drive the bus. Hoover refused.⁴³⁷

The next year, Hoover was once again insubordinate toward the Attorney General on the question of protecting civil rights proponents in the South. This time, the issue was violence by white mobs opposed to James Meredith's attempt to enroll at the University of Mississippi, where no black student had previously attended. Attorney General Kennedy personally ordered an FBI agent named Fred Woodcock to arrest the Klan members behind the violence. Woodcock replied, "I think I can speak for Director Hoover and say that we would not do that without a basis for an arrest. We would not make these arrests."⁴³⁸ Woodcock was right about Hoover, who subsequently supported the insubordination.⁴³⁹

⁴³³ Terry Gross, *Get on the Bus: The Freedom Riders of 1961*, NPR (Jan. 12, 2006, 5:29 PM), <http://www.npr.org/2006/01/12/5149667/get-on-the-bus-the-freedom-riders-of-1961> [https://perma.cc/L5QQ-76KE].

⁴³⁴ KESSLER, *supra* note 134, at 133 (quoting Connor).

⁴³⁵ WEINER, *supra* note 121, at 227.

⁴³⁶ Gross, *supra* note 433.

⁴³⁷ WEINER, *supra* note 121, at 227–28.

⁴³⁸ *Id.* at 234.

⁴³⁹ Several years later, when Hoover's FBI finally did go after the Klan, it was only because President Lyndon Johnson curbed Hoover's independence in this area. "The FBI would pursue the Klansmen, penetrate their ranks, subvert them, and sabotage them, so long as Lyndon Johnson commanded that it be done." *Id.* at 244; *see also id.* at 241 ("Burke Marshall, the chief of the civil rights division at the Justice Department, remembered LBJ saying that 'three sovereignties' were involved in the battle: 'There's the United States and there's the State of Mississippi and

E. The Link Between Government Harassment of Civil Rights Leaders and FBI Independence

The FBI's independence contributed to the federal government's harassment of civil rights leaders. It involved independence through undue influence over Attorney General Robert Kennedy. And it was largely motivated by the hatred of one man—FBI Director Hoover—of African Americans in general and Dr. Martin Luther King Jr. in particular.⁴⁴⁰

Hoover's hatred of King was exacerbated by three factors. The first was King's "repeated criticism of the FBI and its alleged lack of interest in the civil rights movement";⁴⁴¹ this was, in Hoover's mind, "the world's greatest sin."⁴⁴² The second was Hoover's jealousy of King's fame and renown.⁴⁴³ And the third was King's sex habits, which Hoover called "obsessive degenerate sexual urges."⁴⁴⁴ According to one FBI agent, Hoover was prone to go on tirades about "how awful King was, what a hypocrite he was and how his concern was that the movement that King was leading, the Southern Christian Leadership Conference, was infiltrated by Communists."⁴⁴⁵ During one tirade, Hoover shattered a glass desk by slamming his fist into it in anger.⁴⁴⁶

As described above, Hoover's FBI harassed King by bugging his hotel rooms, sending audio sex tapes to King's house, and writing him threatening notes.⁴⁴⁷ He also played the tapes or showed transcripts to politicians and officials at the Justice Department.⁴⁴⁸

Hoover's independence made this harassment possible. For example, like generals who use leaks to members of Congress to pressure civilian superiors to decide on a certain course of conduct, Hoover sent members of Congress a report on King and communism that then-Deputy Attorney General Nicholas Katzenbach called "politically explosive."⁴⁴⁹ He said Attorney General Kennedy "thought it

there's J. Edgar Hoover.' To handle all three required a combination of brute force and great finesse. LBJ made it work.").

440 See WEINER, *supra* note 121, at 199.

441 KESSLER, *supra* note 134, at 141 (quoting William C. Sullivan, an associate of Hoover's).

442 KATZENBACH, *supra* note 119, at 186.

443 See KESSLER, *supra* note 134, at 141.

444 WEINER, *supra* note 121, at 236.

445 *Id.* at 234 (quoting Wayne G. Davis).

446 *Id.* at 236. When Hoover died, King's deputy, Ralph Abernathy, quipped, "With the passing of J. Edgar Hoover, I am reminded that almighty God conducts the ultimate surveillance." GENTRY, *supra* note 119, at 34 (quoting Abernathy).

447 KESSLER, *supra* note 134, at 142–44.

448 *Id.* at 143.

449 WEINER, *supra* note 121, at 235.

was absolute blackmail. . . . But he felt he could not, with all of the flood of memos about his Communist associations, then turn the Bureau down on a [wire]tap.”⁴⁵⁰

Although there had already been some surveillance of King and his associates, Hoover’s report gave him the leverage over Attorney General Kennedy to receive authorization for extensive surveillance.⁴⁵¹ Then, exploiting yet another Attorney General’s insufficient monitoring, Hoover “ignored Kennedy’s stipulation of a follow-up review in thirty days; then he interpreted the original authorization as permitting FBI wiretapping and bugging of King’s hotel rooms and temporary residences around the country.”⁴⁵² Hoover was so unmonitored by Kennedy that by the time Kennedy left the Justice Department, he said, “I have no dealings with the FBI anymore. . . . It’s a very difficult situation.”⁴⁵³

F. *The Link Between Surveillance of Political Opponents and FBI Independence*

Thus far, Part III has argued that the FBI’s independence *facilitated* infringements on civil liberties. But the FBI’s desire for independence also *motivated* its infringements on civil liberties. FBI Director Hoover built up his independence in part by infringing on civil liberties, in particular by spying on his superiors and rivals in order to give him information he could use as leverage over them.⁴⁵⁴ One of the main reasons that no President or Attorney General felt comfortable firing J. Edgar Hoover is that many suspected Hoover would punish them by disclosing damaging information.⁴⁵⁵ As President Truman wrote to his wife, “all congressmen and senators are afraid of him,” and they were not the only ones.⁴⁵⁶

⁴⁵⁰ *Id.*

⁴⁵¹ *See id.* at 235–36.

⁴⁵² THEOHARIS, *supra* note 239, at 87.

⁴⁵³ WEINER, *supra* note 121, at 241.

⁴⁵⁴ *See* GENTRY, *supra* note 119, at 57 (listing Hoover’s files on political opponents a source of his power, though not the only one); *see also* KESSLER, *supra* note 134, at 57.

⁴⁵⁵ *See* GENTRY, *supra* note 119, at 51.

⁴⁵⁶ KESSLER, *supra* note 134, at 70. Hoover also spied on superiors’ political enemies in order to curry favor with his superiors. For example, “Hoover became a valued source of information on Roosevelt’s political enemies and useful in occasional attempts to undermine them. For Roosevelt’s part, his long personal interest in secret intelligence, in part, explains his receptiveness to Hoover’s political intelligence reports.” CHARLES, *supra* note 141, at 3; *see also* GENTRY, *supra* note 119, at 237 (“During the 1940 presidential campaign, the FBI conducted more than two hundred full or partial investigations of Roosevelt’s political enemies.”).

For example, even though President Truman and his Attorney General Tom Clark would have preferred a different FBI Director, Clark knew that Hoover had dirt on him. Hoover searched for, and eventually found, evidence that Clark had accepted bribes from Chicago mobsters.⁴⁵⁷ “Whenever any derogatory information about me would come into the Department, why, they would put it in that file,” Clark said. ‘It was outrageous.’”⁴⁵⁸

It was outrageous, but not new. Hoover had kept files on previous Attorneys General that “were a source of potential blackmail.”⁴⁵⁹ His file on Attorney General Frank Murphy “noted that Murphy was a lifelong bachelor and a ‘notorious womanizer’ who was as likely to bed a married woman as a single one.”⁴⁶⁰ And his file on Attorney General Robert Jackson contained evidence of a long affair between Jackson and his secretary; when Jackson died, Hoover leaked to the press that he had died in her apartment.⁴⁶¹ Little wonder that even though President Nixon told his advisors he wanted Hoover out at the FBI, he said “he’s got to go of his own volition” because “[w]e may have on our hands here a man who will pull down the temple with him, including me.”⁴⁶²

Attorneys General were hardly the only political adversaries or rivals on whom Hoover spied. His “interest in the personal indiscretions of national leaders called for the FBI’s Washington, D.C., field office to report derogatory personal information about diplomats, congressmen, and high-level government officials.”⁴⁶³ This frequently led to a subtle form of blackmail designed to protect Hoover’s independence. As his former Assistant Director explained,

The moment [Hoover] would get something on a Senator he would send one of the errand boys up and advise the Senator that we’re in the course of an investigation and by chance happened to come up with this—we realized you’d want to know. . . . Well, Jesus, what does that tell the Senator? From that time on, the Senator’s right in his pocket.⁴⁶⁴

457 GENTRY, *supra* note 119, at 334–35.

458 WEINER, *supra* note 121, at 144.

459 KESSLER, *supra* note 134, at 55.

460 *Id.*

461 *Id.* at 60, 62.

462 WEINER, *supra* note 121, at 300–01 (quoting Nixon).

463 THEOHARIS, *supra* note 239, at 66.

464 *Id.* at 72 (alteration in original) (quoting William Sullivan); *see also* KATZENBACH, *supra* note 119, at 184 (“He became feared by politicians for the information he either possessed or they feared he might possess, as well as admired for accomplishments the Bureau in fact brought off.”).

The FBI's most notorious blackmail of a President concerned the sex life of President John F. Kennedy, whose family had been "an obsession" of Hoover's for decades.⁴⁶⁵ "Almost every month" of the Kennedy presidency, "Hoover sent one of the Kennedy brothers some new, embarrassing revelation about his personal life."⁴⁶⁶

For example, Hoover discovered that the President had been having an affair with a woman named Judith Campbell.⁴⁶⁷ Campbell was also having an affair with a Mafia boss named Sam Giancana.⁴⁶⁸ And Giancana had been involved with the CIA and Attorney General Robert Kennedy in plots to assassinate Fidel Castro.⁴⁶⁹ When Hoover learned of these connections, he used a lunch with President Kennedy to make sure Kennedy knew that Hoover was aware of the potential scandal. After the lunch, Kennedy wanted to fire Hoover, but he did not because he could not.⁴⁷⁰ Not without Hoover, in Nixon's words, "pull[ing] down the temple with him." As Deputy Attorney General Katzenbach said, "Firing J. Edgar Hoover? Jesus Christ! . . . I seriously question whether President Kennedy could have made a firing stick."⁴⁷¹

* * *

To sum up, when the FBI has enjoyed independence from the President or Attorney General, the independence has led to significant violations of civil liberties. Those violations include mass arrests of innocent people, witch hunts of phantom communists, warrantless wiretapping, violence against civil rights advocates, and harassment of civil rights leaders. At the same time, the desire for independence also motivated violations of civil liberties, particularly the FBI's widespread surveillance of political rivals and opponents. This history shows that the kinds of independence that threaten liberty when exercised by the military—insubordination, insufficient monitoring, and undue influence—also threaten liberty when exercised by another

⁴⁶⁵ THEOHARIS, *supra* note 239, at 52; *see also id.* ("In his office he kept two massive folders containing derogatory personal and political information on John Kennedy, two folders on Robert Kennedy (the second pertaining to the autopsy following his assassination), two folders on their father Joseph, and one folder on their sister Patricia.").

⁴⁶⁶ KESSLER, *supra* note 134, at 122.

⁴⁶⁷ WEINER, *supra* note 121, at 232.

⁴⁶⁸ *Id.*

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.*

⁴⁷¹ *Id.* at 226.

part of the executive branch that has usually had a military purpose: the FBI.

IV. RECENT CALLS FOR FBI INDEPENDENCE AND BETTER SOLUTIONS TO CURRENT PROBLEMS

A. *Recent Demands for an Independent FBI*

The question of FBI independence rocketed into the news when President Donald Trump fired FBI Director James Comey on May 9, 2017.⁴⁷² The White House at first suggested that the dismissal was due to Comey's handling of the FBI's investigation of Hillary Clinton's email server.⁴⁷³ But days later, the President stated that he had fired Comey at least partly because of Comey's handling of the investigation into Russia's interference in the 2016 presidential election.⁴⁷⁴ Because that investigation was looking into whether the Trump campaign colluded with the Russian government to influence the election, many questioned the propriety or even legality of Comey's firing.⁴⁷⁵

In the wake of the firing, there was "intense pressure" on President Trump to replace Director Comey with "a leader who will be seen as independent of the White House."⁴⁷⁶ Those demands for an independent FBI came from all quarters—Democrats and Republicans, politicians and editorial boards, and countless commentators:

The next FBI director must be strong and independent
—Senator Dianne Feinstein, D-CA⁴⁷⁷

⁴⁷² Michael D. Shear & Matt Apuzzo, *F.B.I. Director James Comey Is Fired by Trump*, N.Y. TIMES (May 9, 2017), <https://www.nytimes.com/2017/05/09/us/politics/james-comey-fired-fbi.html> [<https://perma.cc/3DAE-BPB3>].

⁴⁷³ *Id.*

⁴⁷⁴ David G. Savage, *Trump's Statements Linking Russia Investigation to Comey Firing Could Lead to Political Problems*, L.A. TIMES (May 13, 2017, 6:39 AM), <http://www.latimes.com/politics/washington/la-na-essential-washington-updates-trump-s-statements-linking-russia-1494682462-htmlstory.html> [<https://perma.cc/6TSE-2DM3>].

⁴⁷⁵ *Id.*; see also Andrew McCanse Wright, Justice Department Independence and White House Control (Feb. 18, 2018) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3125848 [<https://perma.cc/TP43-FJB7>] (thoughtfully discussing the possible illegality of Comey's firing and arguing that the Take Care Clause should constrain White House–DOJ contacts).

⁴⁷⁶ Rory Carroll, Lauren Gambino & Lois Beckett, *FBI Director Job: The Four People Being Interviewed on Saturday*, GUARDIAN (May 12, 2017), <https://www.theguardian.com/us-news/2017/may/13/fbi-director-job-the-four-people-being-interviewed-on-saturday> [<https://perma.cc/366P-UU39>].

⁴⁷⁷ David Lauter & Michael A. Memoli, *Trump Drops Ax on FBI's Comey: Administration Cites Clinton Probe Errors, but Dems Call Firing 'Nixonian,'* CHI. TRIB. (May 10, 2017), http://digitaledition.chicagotribune.com/tribune/article_popover.aspx?guid=D3589f5f-ab70-4d72-ac1a-6f5ac3db92ac [<https://perma.cc/8AWY-SDLS>].

[The Director must] protect the FBI from improper political influence from the White House.

—Senator Patrick Leahy, D-VT⁴⁷⁸

[The Director should] maintain true independence from President Trump.

—Senator Mazie Hirono, D-HI⁴⁷⁹

[T]he FBI is independent

—Representative Anthony G. Brown, D-MD⁴⁸⁰

Now more than ever the country needs a well-credentialed, independent FBI director.

—Senator John Cornyn, R-TX⁴⁸¹

[It is] vitally important for the FBI director to be independent.

—Senator Charles Grassley, R-IA⁴⁸²

The next director of the FBI, like Comey, must be an independent voice for the bureau.

—Senator Cory Gardner, R-CO⁴⁸³

The American people must have faith in a strong, independent FBI.

—Senator Rob Portman, R-OH⁴⁸⁴

We now need a top-notch, independent FBI director

—Representative Ed Royce, R-CA⁴⁸⁵

⁴⁷⁸ Responses to Questions for the Record from Christopher A. Wray, Nominee to Be Dir., Fed. Bureau of Investigation, to Senators Charles Grassley & Dianne Feinstein 12 (July 17, 2017), <https://www.judiciary.senate.gov/imo/media/doc/Wray%20Responses%20to%20QFRs.pdf> [<https://perma.cc/TMX2-73EK>] [hereinafter Responses to Questions for the Record].

⁴⁷⁹ *Id.* at 50.

⁴⁸⁰ Arelis R. Hernández, *Brown: Limit Power to Fire FBI Chief*, WASH. POST, May 19, 2017, at B5.

⁴⁸¹ Press Release, Senator John Cornyn, Cornyn Statement on FBI Director Vacancy (May 16, 2017), <https://www.cornyn.senate.gov/content/news/cornyn-statement-fbi-director-vacancy> [<https://perma.cc/H4ZQ-F8S6>].

⁴⁸² Del Quentin Wilber & Aruna Viswanatha, *FBI Chief Nominee Pledges to Ignore Politics*, WALL ST. J., July 13, 2017, at A1.

⁴⁸³ Audrey Carlsen et al., *How Law Makers Have Reacted So Far to Trump's Firing of the F.B.I. Director*, N.Y. TIMES, May 11, 2017, at A17.

⁴⁸⁴ Press Release, Senator Rob Portman, Portman Statement on FBI Director James Comey (May 10, 2017), <https://www.portman.senate.gov/public/index.cfm/press-releases?ID=6C52ECE7-8F7B-4578-AB14-3595BF9777B5> [<https://perma.cc/PY3C-M9E7>].

⁴⁸⁵ *Republican Ed Royce: Timing of FBI Director's Firing 'Raises Many Questions Which Deserve Answers'*, L.A. TIMES (May 10, 2017), <http://www.latimes.com/politics/essential/la-pol->

[T]he FBI needs “an independent leader”

—Representative Brian Fitzpatrick, R-PA⁴⁸⁶

I believe that a public servant with unimpeachable credentials and a career of independence . . . serving as FBI Director is critical to affirming the public’s trust.

—Representative Dan Donovan, R-NY⁴⁸⁷

Moving forward, it is imperative that a qualified, independent, and respected individual be nominated in a timely manner to lead the FBI.

—Representative John Katko, R-NY⁴⁸⁸

I have always advocated for an independent and non-political FBI.

—Representative Fred Upton, R-MI⁴⁸⁹

Current and former officials said that Trump either lacks an understanding of the FBI’s role as an independent law enforcement agency or does not care about maintaining such boundaries.

—*Washington Post* article⁴⁹⁰

I explained why it was so important that the FBI and Department of Justice be independent of the White House.

—Former FBI Director James Comey⁴⁹¹

ca-essential-politics-updates-california-s-gop-members-largely-silent-1494446567-htmlstory.html [https://perma.cc/HY4Y-V4TS].

⁴⁸⁶ Jonathan Tamari, *Some Pa., N.J. Republicans Raise Questions About Comey Firing*, PHILLY.COM (May 10, 2017), <http://www.philly.com/philly/blogs/capitolinq/Nixonian---Dems-blast-Trump-decision-to-fire-FBIs-Comey.html> [https://perma.cc/NHB7-EF4Z].

⁴⁸⁷ Press Release, Representative Dan Donovan, Statement from Congressman Dan Donovan on FBI Director James Comey (May 10, 2017), <https://donovan.house.gov/media-center/press-releases/statement-congressman-dan-donovan-fbi-director-james-comey> [https://perma.cc/TC6V-ADF6].

⁴⁸⁸ Press Release, Representative John Katko, Statement from U.S. Rep John Katko Regarding FBI Director James Comey (May 10, 2017), <https://katko.house.gov/media-center/press-releases/statement-us-rep-john-katko-regarding-fbi-director-james-comey> [https://perma.cc/BL9K-3GAG].

⁴⁸⁹ Press Release, Representative Fred Upton, Upton Statement on Firing of FBI Director Comey (May 10, 2017), <https://upton.house.gov/news/documentsingle.aspx?DocumentID=398798> [https://perma.cc/H26H-ZQSU].

⁴⁹⁰ Adam Entous & Ellen Nakashima, *President Asked Intelligence Chiefs to Deny Collusion*, WASH. POST, May 23, 2017, at A1.

⁴⁹¹ Del Quentin Wilber & Aruna Viswanatha, *Comey Details Pressure from Trump—Ex-FBI Chief to Testify President Wasn’t Target, but Was Told at White House ‘I Need Loyalty,’* WALL ST. J., June 8, 2017, at A1.

[T]he FBI's new acting director, Andrew McCabe, appears just as determined and independent-minded as Comey.

—Chicago Tribune Editorial Board⁴⁹²

[T]he nomination of a qualified and politically independent new FBI director[] would help reestablish credibility.

—Washington Post Editorial Board⁴⁹³

A new FBI director will have an uphill battle in trying to convince the American people that he is completely independent of the president

—Barbara McQuade, Washington Post Op-Ed Columnist⁴⁹⁴

One way to restore credibility—and quickly—is to find an FBI director who is unimpeachable and clearly independent.

—Boston Globe article⁴⁹⁵

Congress Must Demand an Independent FBI Director to Replace James Comey.

—Reason Hit & Run Blog⁴⁹⁶

President Trump owes it to the country to replace the fired James Comey with a director who is fiercely independent and who has a proven career of objectivity.

—Washington Examiner Editorial Board⁴⁹⁷

The conventional wisdom was so overwhelming that research did not reveal a single example of a member of Congress, administration official, or major editorial board disagreeing with the calls for an “independent” FBI Director.

The consensus was reaffirmed when the President’s nominee to replace Comey, Christopher Wray, testified at his confirmation hearing. Over and over again, Senators asked Wray whether he would be

⁴⁹² Editorial, *Protecting the FBI's Vital Mission: McCabe's Sober Pledge*, CHI. TRIB. (May 11, 2017, 5:40 PM), <http://www.chicagotribune.com/news/opinion/editorials/ct-fbi-trump-mccabe-comey-edit-0512-jm-20170511-story.html> [<https://perma.cc/38GD-3DKZ>].

⁴⁹³ Editorial, *How to Clean Up the Comey Mess*, WASH. POST, May 11, 2017, at A18.

⁴⁹⁴ Barbara McQuade, *Trump is Threatening the Idea of Independent Federal Investigations*, WASH. POST, May 14, 2017, at B1.

⁴⁹⁵ Annie Linskey & Matt Viser, *Trump Says Comey Firing 'My Decision': Contradicts White House Staff on Rationale; Says He Asked About Probe*, BOS. GLOBE, May 12, 2017, at A1.

⁴⁹⁶ Eric Boehm, *Congress Must Demand an Independent FBI Director to Replace James Comey*, REASON.COM: HIT & RUN BLOG (May 9, 2017, 11:59 PM), <http://reason.com/blog/2017/05/09/trump-fired-comey-now-what> [<https://perma.cc/KU5Y-SQYU>].

⁴⁹⁷ Opinion, *GOP Senators Must Demand an Independent FBI Director*, WASH. EXAMINER (May 9, 2017, 8:18 PM), <http://www.washingtonexaminer.com/gop-senators-must-demand-an-independent-fbi-director/article/2622622> [<https://perma.cc/E4ZJ-87NN>].

“independent.”⁴⁹⁸ For four hours, from the beginning of his testimony to the end,⁴⁹⁹ now—FBI Director Wray assured them, “I pledge to be the leader that the FBI deserves—and to lead an independent Bureau that will make every American proud.”⁵⁰⁰

B. Resisting a Culture of Independence

As Part III argued, an “independent Bureau”⁵⁰¹ is a dangerous one. It threatens civil liberties in ways similar to how an independent military threatens civil liberties. The history of the FBI shows that it should be controlled by the President, like the military whose purpose it shares. But the history of civil-military relations shows that it is not just important for the President to exercise control over the FBI. It is also important for the FBI’s culture to embrace such control.

The culture of an institution matters. “Violation of the principle [of civil supremacy over the military] can too easily become a habit that would subvert principles far more important than whatever might be at stake in a particular controversy.”⁵⁰² Military officers must “think of these principles not only as structural features of the constitution, but as individual moral obligations.”⁵⁰³ The President and the Secretary of Defense should ensure that “the ends of government policy are . . . set by civilians” and that members of “the military are . . . policy implementers, not policymakers.”⁵⁰⁴

Likewise, the FBI Director should not think of himself as the Nation’s Protector; instead, he must think of himself as an agent of the President. Of course, like any military officer, he should give candid advice, and like any military officer, he should not obey illegal orders. But he must not make the mistake of Director J. Edgar Hoover and view himself as an independent force who can decide for himself what practices to pursue, what politics to embrace, and which commands from the President or Attorney General to obey. He must not build power bases among the President’s political opponents, manipulate

⁴⁹⁸ See, e.g., Responses to Questions for the Record, *supra* note 478, at 1 (Question of Senator Feinstein) (“[W]hat specific and concrete steps will you take to ensure the FBI remains independent and free from political interference?”).

⁴⁹⁹ Kevin Johnson, *Running the FBI Under Trump Won’t Be Easy. Five Takeaways from Chris Wray’s Confirmation Hearing*, USA TODAY (Jan. 12, 2017), <http://www.usatoday.com/story/news/politics/2017/07/12/5-takeaways-chris-wrays-nomination-hearing-fbi-director/472610001> [<https://perma.cc/72RJ-37MK>].

⁵⁰⁰ *Wray Hearing Transcript*, *supra* note 2.

⁵⁰¹ *Id.*

⁵⁰² Kemp & Hudlin, *supra* note 70, at 22–23.

⁵⁰³ *Id.* at 22.

⁵⁰⁴ *Id.* at 8.

the press to undermine the President's policies, or coerce his superiors into adopting his preferences. And those prohibitions should be at the heart of a culture both within the FBI and beyond it—a culture in which Members of Congress do not demand that the FBI Director be an “independent voice” and the FBI Director does not promise “to lead an independent Bureau.”

In short, the FBI should answer to the President, who answers to the people. When the FBI is independent of the President, it is independent of the people. Numerous scholars who embrace the unitary executive theory have argued that such independence is problematic in the context of independent regulatory agencies.⁵⁰⁵ But the history of the FBI, as well as the history of out-of-control armies, shows such independence is much more problematic and dangerous to liberty in the context of an FBI whose military purpose is its primary purpose.

Those who have not embraced the unitary executive theory may instead support more congressional control of the FBI. Congress does have some authority to enforce accountability, even on executive branch members. “Congress may use its legislative authorization power as leverage . . . to obtain oversight materials.”⁵⁰⁶ Or, it may utilize its “control over the nation’s purse against resistant executive branch entities.”⁵⁰⁷ “[T]he Senate can threaten to hold up executive nominees with its advice and consent power or try impeachments approved by the House.”⁵⁰⁸

However, there are limits to the benefits of congressional oversight. First, Congress is susceptible to capture by an independent

⁵⁰⁵ See, e.g., STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 3* (2008); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 *YALE L.J.* 541, 544–46 (1994); David P. Currie, *The Distribution of Powers After Bowsher*, 1986 *SUP. CT. REV.* 19, 23; Gary Lawson, *The Rise and Rise of the Administrative State*, 107 *HARV. L. REV.* 1231, 1242–43 (1994); Lee S. Liberman, *Morrison v. Olson: A Formalist Perspective on Why the Court Was Wrong*, 38 *AM. U.L. REV.* 313, 315 (1988); Geoffrey P. Miller, *Independent Agencies*, 1986 *SUP. CT. REV.* 41, 56. *But see, e.g.*, Martin S. Flaherty, *The Most Dangerous Branch*, 105 *YALE L.J.* 1725, 1744 (1996); A. Michael Froomkin, *The Imperial Presidency’s New Vestments*, 88 *NW. U. L. REV.* 1346, 1348–49 (1994). Other highly respected scholars neither completely endorse nor completely oppose the theory. See, e.g., Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 *COLUM. L. REV.* 1, 2–3 (1994); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 *COLUM. L. REV.* 573, 641–42 (1984).

⁵⁰⁶ Andrew McCanse Wright, *Constitutional Conflict and Congressional Oversight*, 98 *MARQ. L. REV.* 881, 937 (2014).

⁵⁰⁷ *Id.*

⁵⁰⁸ *Id.*

FBI.⁵⁰⁹ Second, too much congressional interference may blur the lines of political accountability. After all, the President, like Congress, answers to the American people. If they are unhappy with the direction of the FBI, they can hold the President accountable. It would be confusing to expect them to look to Congress when it is the President, not Congress, who has the authority to appoint, direct, and remove executive branch officials.⁵¹⁰

C. Solutions to Investigating the President

Even though I believe the FBI should not be independent of the President, I acknowledge that presidential control of the FBI is not cost-free. A significant cost arises when the President is suspected of wrongdoing. After all, if a President is abusing power, one would hardly expect him to allow an FBI that he controls to conduct an effective investigation of him. A skeptic of this Article's thesis might argue that FBI independence is necessary in order to investigate presidential wrongdoing—and perhaps, even more broadly, necessary to conduct criminal investigations in general.

That argument is wrong for two reasons. First, Congress can investigate suspected criminality by the President or his Administration. It has the means and the constitutional responsibility to do so. And second, if one believes that, as a general matter, federal crime should be investigated by an agency independent of the President, the solution is to split the FBI, reserving its national security functions for one agency and its criminal investigative functions for another. This is the model that many democracies have adopted.⁵¹¹

⁵⁰⁹ For examples, see the discussion above regarding Hoover's exploitation of HUAC and Senator McCarthy, *supra* Section III.B.

⁵¹⁰ See Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1158 (1992); cf. *Printz v. United States*, 521 U.S. 898, 922–23 (1997).

⁵¹¹ See James Burch, *A Domestic Intelligence Agency for the United States? A Comparative Analysis of Domestic Intelligence Agencies and Their Implications for Homeland Security*, 3 HOMELAND SEC. AFF. J., June 2007, at 1, 4–5 (describing the domestic intelligence agencies of the United Kingdom, Australia, and India); Nobel, *supra* note 4 (“Many countries maintain two separate entities for law enforcement and national security: The United Kingdom has Scotland Yard and MI5, for example, and Canada has the Royal Canadian Mounted Police and the Canadian Security Intelligence Service.”); John Yoo, *Break Up the FBI*, L.A. TIMES (Mar. 21, 2007), <http://www.latimes.com/la-oe-yoo21mar21-story.html> [<https://perma.cc/FWQ5-PBMW>] (describing the domestic intelligence agencies of the United Kingdom, France, and Israel).

1. *Congressional Investigations*

There can be little doubt that an investigation free of presidential interference is necessary when there is a suspicion of wrongdoing by the executive branch. After all, the Constitution's Impeachment Clause makes clear that no President is above the law,⁵¹² and when the possibility of presidential wrongdoing arises, the President cannot be expected to investigate himself.

Fortunately, that is not necessary. Instead, Congress should be expected—and required by voters at the ballot box—to investigate executive branch malfeasance. “This is in many respects the option that flows most naturally from the language of the Constitution.”⁵¹³

Since the First Congress in 1790, Congress has conducted investigations. Some investigations have saved reputations, like the first congressional investigation, which concerned the handling of public finances of the founding father Robert Morris.⁵¹⁴ Other investigations have ruined careers, such as inquiries into the strategic decisions of unsuccessful Civil War generals.⁵¹⁵ In more recent years, the topics of congressional investigations have included Watergate, Iran Contra, Abu Ghraib, and Benghazi.⁵¹⁶ Today, there are no fewer than three government investigations (two congressional) into Russian interference with the 2016 election.⁵¹⁷

Perhaps most famously, the events leading to President Nixon's resignation demonstrate the power that Congress wields to hold the President accountable. When the House Judiciary Committee adopted Articles of Impeachment, it referred to its discovery that Nixon had used the FBI and IRS for partisan purposes.⁵¹⁸ The second article

⁵¹² U.S. CONST. art. II, § 4.

⁵¹³ Thomas W. Merrill, *Beyond the Independent Counsel: Evaluating the Options*, 43 ST. LOUIS U. L.J. 1047, 1060 (1999).

⁵¹⁴ See CHARLES RAPPLEYE, ROBERT MORRIS 176 (2010).

⁵¹⁵ See JEFFREY W. GREEN, MCCLELLAN AND THE UNION HIGH COMMAND, 1861–1863, at 81 (2017) (pressure from committee members soured Lincoln's view of General McClellan, who was eventually removed).

⁵¹⁶ See Margaret Hartmann, *Before Benghazi: Congress's Most Controversial Investigations*, N.Y. MAG. (May 22, 2014) <http://nymag.com/daily/intelligencer/2014/05/congresss-most-controversial-investigations.html> [<https://perma.cc/RNZ9-F6NH>]; Seymour M. Hersh, *The General's Report*, NEW YORKER (June 25, 2007) <https://www.newyorker.com/magazine/2007/06/25/the-generals-report> [<https://perma.cc/7JNX-UM79>].

⁵¹⁷ See Erin Kelly, *Congress Struggles to Figure Out Which Russia Investigation Trumps the Others*, USA TODAY (Sept. 14, 2017) <https://www.usatoday.com/story/news/politics/2017/09/14/congress-struggles-figure-out-which-russia-investigation-trumps-others/659879001/> [<https://perma.cc/MC9V-CAGM>] (explaining that three congressional committees and Special Counsel Robert Mueller are currently investigating Russian interference in the 2016 election).

⁵¹⁸ Joel Gerhrke, *Flashback: Nixon's Articles of Impeachment Included IRS Scandal*, WASH.

charged Nixon with “unlawfully obtaining confidential information from the Internal Revenue Service and causing audits and investigations to be conducted in a ‘discriminatory manner,’”⁵¹⁹ as well as “directing the Federal Bureau of Investigation . . . to conduct unlawful electronic surveillance.”⁵²⁰

The accountability resulting from Congress’s oversight worked. Nixon, facing impeachment, resigned the presidency, and his improper use of executive branch agencies was exposed. Furthermore, public pressure soon forced Attorney General Edward Levi, appointed by President Gerald Ford, to put forth a set of regulations reigning in and reforming the FBI.⁵²¹ Today, those reforms are overseen in part by the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence—two congressional committees established upon the recommendations of the Church Committee, which in the 1970s investigated abuses like the FBI’s targeting of political enemies.⁵²²

Although no congressional investigative committee has as much money or as many seasoned investigators as the FBI to investigate high-level executive officials, that is not a problem with a solution. Congress can simply spend more as the need arises. It can hire away former or current police detectives, private security consultants, or even former FBI agents. It can “expand the staff of the House Judiciary Committee on an ad hoc basis whenever it [becomes] aware of the need to initiate a possible impeachment investigation, or conceivably could permanently expand the committee staff to include field investigators.”⁵²³

Among Congress’s investigative powers is the power to subpoena witnesses and papers, just as the FBI can.⁵²⁴ Defiance of a congres-

EXAMINER (May 13, 2013, 12:00 AM), <http://www.washingtonexaminer.com/flashback-nixons-articles-of-impeachment-included-irs-scandal/article/2529560> [<https://perma.cc/76SZ-GLUP>].

⁵¹⁹ H. LOWELL BROWN, *HIGH CRIMES AND MISDEMEANORS IN PRESIDENTIAL IMPEACHMENT* 84 (2010).

⁵²⁰ *Id.* According to John Ehrlichman, Nixon’s chief domestic advisor, “the Nixon White House . . . had two enemies: the antiwar left and black people.” Dan Baum, *Legalize It All: How to Win the War on Drugs*, *HARPER’S MAG.* (Apr. 2016), <https://harpers.org/archive/2016/04/legalize-it-all/> [<https://perma.cc/SS56-MT9D>]. Nixon used his war on drugs as a means to target these groups: “We knew we couldn’t make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities.” *Id.* (quoting Ehrlichman).

⁵²¹ See MEDSGER, *supra* note 268, at 492.

⁵²² Marshall Silverberg, *The Separation of Powers and Control of the CIA’s Covert Operations*, 68 *TEX. L. REV.* 575, 595 (1990).

⁵²³ Merrill, *supra* note 513, at 1061.

⁵²⁴ See, e.g., *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 504 (1975) (“Issuance of

sional subpoena can result in contempt of Congress, which in turn can result in the House or Senate Sergeant at Arms arresting the contemptuous individual and even imprisoning him in the Capitol jail.⁵²⁵ “The power to punish a private citizen for a past and completed act was exerted by Congress as early as 1795; and since then it has been exercised on several occasions.”⁵²⁶

In short, there is nothing in the Constitution or in the practical capacities of Congress to prevent it from adequately investigating presidential malfeasance—and impeaching any President who has committed “high Crimes and Misdemeanors.”⁵²⁷ To the extent Congress declines to do so, that is a political problem with a political solution—the election of Members of Congress willing to investigate and impeach.

2. *Splitting the FBI*

The prospect of congressional investigations may leave skeptics of a nonindependent FBI unsatisfied—either because they do not trust Congress to investigate the executive branch (perhaps especially when Congress is controlled by the President’s party) or because they believe, even outside the context of political investigations, that all federal criminal investigations should be conducted by an agency with independence from political controls. In that case, the solution is not to make the FBI independent of the President. Instead, the solution is to split the FBI into two agencies—one for criminal investigations and one for national security.

This solution would be consistent with the principle of civilian control of the military. It would allow the FBI’s primary purpose to be carried out by an agency under the control of the President. This reduces the potential for violations of civil liberties that inspired the framers to make an elected President commander in chief of the army. It also avoids the potential for such violations that has been borne out by the historical link between the FBI’s violations of civil liberties and its independence, as described in Part III.

subpoenas . . . has long been held to be a legitimate use by Congress of its power to investigate.” (citation omitted)).

⁵²⁵ DAVID M. MCINTOSH ET AL., *MAYER BROWN, UNDERSTANDING YOUR RIGHTS IN RESPONSE TO A CONGRESSIONAL SUBPOENA* 4 (2014), <https://www.mayerbrown.com/files/Publication/ec1203b2-a787-44ac-8344-5d5fab374ffa/Presentation/PublicationAttachment/11509b8b-df81-4db6-9e89-1d1b16c20856/White-Paper-Congressional-Subpoena.pdf> [<https://perma.cc/BB23-85BZ>].

⁵²⁶ *Jurney v. MacCracken*, 294 U.S. 125, 148 (1935) (footnote omitted).

⁵²⁷ U.S. CONST. art. II, § 4.

This solution would also be consistent with the practice of other western democracies. For example, in the United Kingdom, MI5 is responsible for counterterrorism, counterintelligence, and domestic intelligence,⁵²⁸ whereas New Scotland Yard is responsible for the investigation of crime.⁵²⁹ After the 9/11 attacks, many commentators⁵³⁰ responded to the FBI's intelligence failures by calling for a similar structure in the United States—the abolition of the FBI and the creation of an American version of MI5 and an American, nationwide version of New Scotland Yard.⁵³¹ The 9/11 Commission came close to recommending such a reform but declined to after extensive lobbying by FBI Director Robert Mueller.⁵³²

To be clear, this Article does not argue that the FBI should be split. But that is because its author does not see presidential control over any FBI functions as problematic. However, if one disagrees and believes that its secondary purpose of investigating crimes should not be influenced by the President, the proper solution is not to make the entire agency independent and thereby violate the principle of civilian control of the military. Instead, the solution should be to maintain presidential control of the FBI's primary purpose of protecting the country from foreign security threats, while allowing a new agency to investigate crimes independent of presidential control.

⁵²⁸ See Security Service Act 1989, c. 5, § 1 (U.K.); *Law and Governance*, SEC. SERV. MI5, <https://www.mi5.gov.uk/law-and-governance> [<https://perma.cc/H77Y-UKYU>].

⁵²⁹ See Police Reform and Social Responsibility Act 2011, c. 13, § 7(1) (U.K.); *Governance, METRO. POLICE*, <https://www.met.police.uk/about-the-met/governance/> [<https://perma.cc/MH6M-TRDE>].

⁵³⁰ See Press Release, Fed. Bureau of Investigation, We Don't Need Our Own MI5 (Oct. 16, 2006), <https://archives.fbi.gov/archives/news/pressrel/press-releases/we-dont-need-our-own-mi5> [<https://perma.cc/QQP4-58GQ>] (“Lately people have been calling on Washington to create a new domestic intelligence agency, without police powers—like Britain’s MI5—to take over from the FBI and be the lead in gathering and analyzing intelligence as it relates to terrorism.”); see also, e.g., Yoo, *supra* note 511 (“Britain has MI5; France has its Direction de la Surveillance du Territoire; Israel has Shin Bet. We can learn from their experiences, dividing the FBI into a traditional law enforcement arm and a separate, independent counter-terrorism unit.”); cf. Letter from Coleen Rowley, Special Agent, Fed. Bureau of Investigation, to Robert S. Mueller III, Dir., Fed. Bureau of Investigation (Feb. 26, 2003), <https://www.nytimes.com/2003/03/05/politics/full-text-of-fbi-agents-letter-to-director-mueller.html> [<https://perma.cc/6Y9H-DXA2>] (“You have made it clear that the FBI is perilously close to being divided up and is depending almost solely upon the good graces of Attorney General Ashcroft and President Bush for its continued existence.”).

⁵³¹ GRAFF, *supra* note 129, at 419–20.

⁵³² *Id.* at 419–22.

CONCLUSION

At a time when political parties and ideological commentators appear unable to agree on anything, almost everyone seems to agree on the importance of an “independent” FBI. But that independence is a dangerous threat to civil liberties. The framers understood this danger when they wrote civilian control of the military into the Constitution. Further history demonstrates this danger by showing how the independence of the FBI, whose primary purpose is the same as the military’s, has often facilitated and exacerbated widespread violations of free speech, privacy, and other vital civil liberties. We should not repeat the mistakes of the twentieth century by granting the FBI the independence it once enjoyed and abused.