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WIRETAPPING AND NATIONAL SECURITY:  
NIXON, THE MITCHELL DOCTRINE, AND THE WHITE PANTHERS  
VOLUME I

A Dissertation

Submitted to the Graduate Faculty of the  
Louisiana State University and  
Agricultural and Mechanical College  
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requirements for the degree of  
Doctor of Philosophy

in

The Department of History

by

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August, 1995

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## Abstract

This dissertation discusses a modern version of a constitutional struggle which has characterized American democracy since the first days of the Republic: the citizen's right to privacy versus the government's need to guarantee "national security." It addresses the Supreme Court's landmark Fourth Amendment wiretapping decision of June 1972, U.S. v. U.S. District Court, which ruled unconstitutional the so-called "Mitchell Doctrine", the Nixon Administration's attempt to gain Judicial sanction for "national security" wiretaps without prior court order of suspected "domestic subversive" groups. In its unanimous Keith decision, the Court upheld the "primacy of warrants" in domestic intelligence investigations. Keith remains the citizen's primary protection against the "uninvited ear" of government eavesdroppers.

This study locates the origins of the Mitchell Doctrine in the Cold War struggle between the Executive Branch, which claimed expansive "national security" wiretapping powers, and the Judicial and Legislative Branches, which established "barriers" limiting the executive's domestic intelligence powers in response to revelations of surveillance abuses during the 1960s. The Mitchell Doctrine represented the

Nixon Administration's attempt to circumvent these "barriers" by taking advantage of escalating societal fears about social disorder.

This dissertation also examines the polarization of American society during the 1960s, through an analysis of the history of the White Panther Party of Ann Arbor, Michigan, a radical counterculture group whose inflammatory rhetoric led to considerable police and FBI surveillance. A model is proposed for future historical analysis of the clash between the "Movement" and the "conservative establishment" during the sixties, focusing on the effects of a widening "perception-reality gap" at both ends of the political spectrum.

This study concludes by analyzing cycles of wiretapping "reform" since the Keith decision. Concerns about government surveillance during the Watergate era resulted in the establishment of numerous reforms. However, the 1980s saw a partial dismantling of reforms, renewing the possibility of future domestic intelligence abuses. Recent "terrorist" bombings have resulted in draconian wiretapping proposals from both the Clinton Administration and the Republican-controlled 104th Congress, which, if enacted, would erode the citizen's right to privacy in the interest of domestic security.

## Introduction

The country doesn't give much of a sh\_t about bugging....Most people around the country think it's probably routine, everybody's trying to bug everybody else, it's politics. That's my view.  
-- President Nixon to H.R. Haldeman, June 21, 1972 (from White House tapes released June, 1993).<sup>1</sup>

On June 19, 1972, the United States Supreme Court handed down a unanimous decision in U.S. v. U.S. District Court, the so-called "Keith Case". Justice Lewis Powell refuted the Nixon Administration's claim of an "inherent Presidential authority" to wiretap without judicial warrant individuals suspected of being "national security" threats -- the so-called "Mitchell Doctrine," named after Attorney General John N. Mitchell. The Supreme Court's decision established the absolute requirement of securing judicial warrants prior to initiating wiretaps on U.S. citizens. It remains the citizen's primary protection against the "uninvited ear" of government eavesdroppers.<sup>2</sup>

June 19, 1972, however, was a poor day for Court publicity. The Watergate burglary, two days earlier, captured the public's attention. Nevertheless, the constitutional issues presented in U.S. v. U.S. District

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<sup>1</sup>New Orleans Times Picayune, May 18, 1993, A-1, A-6.

<sup>2</sup>407 U.S. 297, 92 S. Ct. 2125, 32 L. Ed. 752 (1972).

Court are as historically significant as any presented in Watergate. The case represented a powerful attempt by the Executive Branch to modify the Constitution's separation of powers by weakening the Judiciary. It is thus surprising that U.S. v. U.S. District Court has received relatively little attention from scholars.

Although the initiative to secure High Court sanction for virtually unlimited power to wiretap "domestic radicals" has become known as the "Mitchell Doctrine," it was very much a Nixon initiative. From his first days in office in January of 1969, President Nixon pursued policies -- public and private -- designed to increase the Executive's power to pursue "domestic subversives": anti-war demonstrators, New Left activists, Black nationalists, hippies, the media, college professors, and others who publicly opposed Nixon's policies. Elected in 1968 on a "law and order" platform, Nixon soon became obsessed with surveillance, in and of itself.

Restrained by several Supreme Court decisions pertaining to wiretapping, and unhappy over Lyndon Johnson's unwillingness to utilize the Title III wiretapping provisions of the 1968 Omnibus Crime Control Act, the Nixon Administration unveiled the Mitchell Doctrine in June, 1969 during the "Chicago Conspiracy" trial of New Left activists, including Jerry Rubin and Abbie Hoffman. Opposition from civil liberties groups forced the Administration to back down

until late 1970, when public hysteria over radical bombings presented a more favorable moment for anti-crime measures. The decision to renew the Mitchell Doctrine also may have been related to the failure of the so called "Huston Plan," in which the Administration sought to centralize the surveillance capabilities of U. S. intelligence agencies under White House control.

The case the Nixon Administration utilized to test the constitutional validity of the Mitchell Doctrine, U.S. v. Sinclair, Plamondon, and Forrest, involved a little-known Michigan radical organization, the "White Panther Party," -- a surprising choice for so important an initiative.<sup>3</sup> The group had at best twenty fully-operational "chapters" across the country; total active membership at its peak (1970) probably did not exceed 200.<sup>4</sup> However, the group's leadership included two relatively high-profile radicals: counterculture leader John Sinclair, who received a prison sentence of 9-10 years for possession of two marijuana cigarettes, and Lawrence Robert "Pun" Plamondon, one of the first white "political revolutionaries" to make the FBI's

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<sup>3</sup>321 F. Supp. 1074 (1971).

<sup>4</sup>Estimate based on White Panther documents in the John and Leni Sinclair Papers, Michigan Historical Collections, Bentley Historical Library, University of Michigan, box 17, file 31 [hereafter JLSC/BHL]; also FBI Report, dated October 23, 1970, entitled "RE: White Panther Party (WPP) National Convention September 23-25, 1970," 22-23, located in the John and Leni Sinclair "Red Squad Files."

"Ten Most Wanted" list.<sup>5</sup> The White Panthers gained national notoriety for: (1) their close association with the Youth International Party, or "Yippies," one of the Nixon Administration's least-liked New Left/counterculture groups; (2) their support for the Black Panthers, a principal target for Nixon Administration surveillance and counter-intelligence ("COINTELPRO") measures; and (3) Sinclair's management of the MC-5, a rock band that gained considerable prominence in 1968-1969.

Despite the White Panthers' notoriety, timing and chance explain the Administration's decision to use U.S. v. Sinclair, Plamondon, and Forrest to test the Mitchell Doctrine. When the original federal indictments were handed down against Sinclair and Plamondon in October, 1969 for conspiring to bomb a CIA office in Ann Arbor, Michigan, eleven months earlier, the White Panther Party did not interest the FBI or the Justice Department, although the group had been targeted for intensive Detroit "Red Squad" and Michigan State Police surveillance since the mid-sixties. Only after U.S. District Judge Damon Keith granted the defense's motion for discovery of electronic surveillance in October, 1970, did the Justice Department decide to make the case an Administration priority. Attorney General Mitchell's December 14, 1970, response to Keith admitted that the

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<sup>5</sup>Mark Sabljak and Martin H. Greenberg, Most Wanted: A History of the FBI's Ten Most Wanted List (New York: Bonanza Books, 1990), 180-81.

government had inadvertently picked up several of defendant Plamondon's conversations while conducting "national security" [warrantless] wiretaps of the Black Panther Party during the spring of 1969. Mitchell claimed that the Administration considered the wiretaps to be within the President's inherent constitutional powers, and therefore could not be disclosed to the defense.<sup>6</sup>

On January 25, 1971, Judge Keith issued his decision refuting the Administration's position and ordering the government to disclose the fruits of its illegal surveillance to White Panther defense attorneys William Kunstler, Leonard Weinglass, and Hugh "Buck" Davis. Keith did not disguise his anger:

The Government...argues that the President, acting through the Attorney General, has the inherent Constitutional power: (1) to authorize without judicial warrant electronic surveillance in 'national security' cases; and (2) to determine unilaterally whether a given situation is a matter within the scope of national security. The Court is unable to accept this position. We are a country of laws and not men.<sup>7</sup>

The case became a cause celebre. The Supreme Court decided 8-0 against the government on June 19, 1972, the lone abstention being newly-appointed Justice William Rehnquist,

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<sup>6</sup>Personal papers of White Panther Attorney Hugh M. "Buck" Davis, Jr. [hereafter "Davis Papers"]; I am grateful to Mr. Davis for allowing me access to his legal files. See also U.S. v. U.S.D.C., E. Dist., Mich., 444 F.2nd. (1971).

<sup>7</sup>U.S. v. Sinclair, 321 F.Supp. 1074 (1971).

who, as Assistant Attorney General the previous two years, had assisted in drafting the government's Keith briefs.

The Supreme Court's refutation of the Mitchell Doctrine dealt the Nixon Administration a major blow in its legal offensive against the New Left and selected Black nationalists. In nearly every pending case involving warrantless wiretapping, the Justice Department dismissed the charges rather than disclose the results of its surveillance. Whether Keith's decision resulted in fewer warrantless wiretaps against radicals, or merely forced the FBI and other intelligence agencies to keep such measures secret, is unclear, in spite of much partisan comment. A related issue is whether the primary motivation behind the Mitchell Doctrine was to bolster law enforcement at a time of increasing social disorder, or to institute, at the discretion of the Executive, dragnet-style wiretapping of political opponents, which might impose a "chilling effect" on all dissent.<sup>8</sup>

The Keith decision represented a modern version of one of the basic constitutional struggles characterizing American democracy since its inception: the citizen's right to privacy versus the government's responsibility to ensure "national

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<sup>8</sup>For one view of the "chilling effect" thesis, see Frank J. Donner, The Age of Surveillance: The Aims and Methods of America's Political Intelligence System, (New York: Vintage Books, 1981), 3-29.

security," addressed in the Fourth Amendment to the Constitution:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Previous presidents, starting with Franklin Roosevelt in 1940, had authorized "national security" wiretaps of U.S. citizens without court order, for political as well as justifiable domestic security reasons. Such U.S. intelligence agencies as the Federal Bureau of Investigation (FBI), Central Intelligence Agency (CIA), and National Security Agency (NSA) engaged in ever-greater surveillance of American citizens during the Cold War. A combination of secret Executive directives, Congressional disinterest, Supreme Court indecision, and the pervasive influence of FBI Director J. Edgar Hoover resulted in a substantial gap between wiretapping "law" and intelligence agency practice by the mid-sixties. Significant challenges to secret wiretapping surfaced in the mid-sixties, as revelations about FBI excesses prompted several Congressional investigations. In addition, an increasing number of Supreme Court decisions handed down by the Warren Court, particularly the Berger<sup>9</sup> and

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<sup>9</sup>Berger v. New York, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967).

Katz<sup>10</sup> decisions, firmly established that Fourth Amendment protections against unreasonable search and seizure pertain to telephone conversations involving U.S. citizens. Nixon was correct to insist that his administration was held to different standards than his predecessors in the areas of surveillance.

The Nixon Administration sought to go further in the area of warrantless surveillance than any previous President. The Administration's attempt, via the Mitchell Doctrine, to gain authorization to wiretap any citizen it unilaterally deemed a "national security" threat challenged one of the Constitution's most important checks upon the Executive: the requirement that the government secure warrants from a neutral third party -- the Judiciary -- in cases of Fourth Amendment intrusions for law enforcement purposes. This assault on the so-called "primacy of warrants"<sup>11</sup> was truly unique in the history of the United States, and represented an unparalleled threat to the average American's right to privacy. It also threatened to restrict political dissent.

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<sup>10</sup>Katz v. U.S., 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

<sup>11</sup>For an excellent history of the evolution of the "primacy of warrants" vis-a-vis searches and seizures under the Fourth Amendment, see Congressional Research Service, The Constitution of the United States of America, Analysis and Interpretation, (Washington, D.C.: U.S. Government Printing Office, 1973), in Senate Documents, 92nd Congress, 2nd Session, Document No. 42-82, 1039-1086 [hereafter "CRS"].

Making the Mitchell Doctrine a priority early in his Presidency, Nixon sought to take advantage of public fear of social turmoil -- especially campus unrest and radical bombings -- in order to secure Supreme Court approval. The politics of fear and division had characterized Nixon's entire political career. As Stanley Kutler points out, it was Nixon's combative, uncompromising personality, as well as his desire to bolster Executive power, that ultimately led to his downfall; the "Wars of Watergate" had many precedents from his first term in office, as he pursued his many "enemies" with a ferocity rarely surpassed by any American President.<sup>12</sup>

The Administration's argument in the Mitchell Doctrine initially focused upon the wiretapping provisions of the Omnibus Crime Control and Safe Streets Act of 1968, the first Congressional legislation in more than three decades on this much debated topic.<sup>13</sup> The Act's Title III outlawed wiretapping by private citizens, while enumerating procedures under which the government and law enforcement officials could initiate surveillance of U.S. citizens, including a court order for nearly all surveillance. However, it included a "brief and nebulous paragraph" outlining two circumstances under which a President could order

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<sup>12</sup>Stanley I. Kutler, The Wars of Watergate: The Last Crisis of Richard Nixon, (New York: Alfred A. Knopf, 1990).

<sup>13</sup>18 U.S.C., Pub.L. 90-351, Title III, Sec. 802, 82 Stat. 112.

surveillance of citizens without a warrant: (1) to protect the nation from external attack, and (2) to prevent the overthrow of the government by force.<sup>14</sup>

The details surrounding the origins of the paragraph remain unclear. President Johnson was satisfied with the warrant requirements of the Omnibus Act, and requested only the "external attack" exception. Neither he nor his Attorney General, Ramsey Clark, wanted wide "national security" powers for the Executive.<sup>15</sup> Documents recently uncovered by Alexander Charns suggest that FBI Director Hoover persuaded several friendly Congressmen and Senators to include the "overthrow" provision, so that the FBI could continue to conduct "national security" wiretaps.<sup>16</sup> Whatever the origin of the passage, the Nixon Administration's interpretation was expansive: domestic "national security" threats such as the Michigan White Panthers constituted as great a threat to the government as any external threat. The history of the U.S. v. U.S. District Court case demonstrates that neither Judge Keith, nor the Sixth Circuit Court of Appeals, nor the Supreme Court agreed.

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<sup>14</sup>Quoted in Edith J. Lapidus, Eavesdropping On Trial, (Rochelle Park, New Jersey: Hayden Book Company, 1974), 96.

<sup>15</sup>Ibid., 6-7, 13, 40, 93-96.

<sup>16</sup>Alexander Charns, Cloak and Gavel: FBI Wiretaps, Bugs, Informers, and the Supreme Court, (Chicago: University of Illinois Press, 1992), 91-93.

Although the Mitchell Doctrine's legal theories have become associated with the Nixon Administration, many of the constitutional issues presented by the Administration in U.S. v. U.S. District Court were not new. Executive claims of "inherent power" were made as early as 1807, when President Thomas Jefferson took actions to mobilize the nation for war against Britain without Congressional approval. The Nixon Administration's argument in Keith stressed that because "domestic subversives" are as dangerous to the nation's security as "foreign" threats, the Executive Branch possesses the constitutional power to utilize warrantless "national security" wiretaps to monitor their activities. Opposing the government's position, defense attorneys relied upon Youngstown v. Sawyer, a landmark case involving President Truman's unsuccessful attempt to utilize the "inherent power" argument as justification for seizing American steel mills during the Korean War. Justice Robert Jackson's opinion in Youngstown outlined an "outward-inward axis," whereby the Judiciary may properly grant the Executive wide latitude in areas of foreign affairs, but nonetheless should allow "no such indulgence" in domestic areas.<sup>17</sup>

The intellectual forebears of the Mitchell Doctrine were not Presidents. They included Supreme Court Justices Byron White and Abe Fortas, as well as FBI Director Hoover. The

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<sup>17</sup>Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952).

concept that a President has "inherent" powers under the Constitution to initiate surveillance of U.S. citizens in "national security" cases was first introduced by Justices White and Fortas in footnote 23 of the Katz decision in 1967, the decision which ruled that wiretapping without a warrant was a violation of the Fourth Amendment. With prophetic accuracy, Justices Douglas and Brennan realized the footnote's potential, calling it an "unwarranted green light for the Executive Branch to resort to electronic eavesdropping without a warrant in cases which the Executive Branch itself labels 'national security' matters."<sup>18</sup>

An important contributor to the Mitchell Doctrine was J. Edgar Hoover. At two trials of Justice Department employee and suspected spy Judith Coplon, 1949-1954, during which the FBI's wiretapping tactics were subjected to considerable public scrutiny for the first time, Congress debated legislation that required federal judges to issue court orders approving wiretaps. Throughout the crisis, Hoover maneuvered behind the scenes, urging an alternative bill that would allow the Attorney General, without a warrant requirement, to authorize wiretaps, and making the results admissible in court. Hoover insisted that many federal judges lacked sufficient credentials to be entrusted with "security matters," an argument that was not overlooked by Justice Department lawyers in the Keith case. As a result,

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<sup>18</sup>Quoted in Lapidus, Eavesdropping on Trial, 25.

no new laws were passed, effectively allowing the FBI to continue secretly wiretapping at will.<sup>19</sup> Two decades later, as Congress again drafted wiretapping provisions incorporated in the Omnibus Crime Control Act of 1968, Hoover's influence was again felt.

A number of complex and interconnected factors led the Nixon Administration to initiate the Mitchell Doctrine less than six months after taking office: (1) new legislative and judicial challenges to the "cult of Executive expertise" that had traditionally characterized Presidential direction of foreign affairs and domestic security matters;<sup>20</sup> (2) renewal of the "intelligence versus evidence" wiretapping debate, between law enforcement and intelligence agencies and civil libertarians, which pitted those who believed wiretapping should be "tactical" against those who supported long-term wiretapping for "intelligence" purposes;<sup>21</sup> (3) the increasing polarization of society, influenced by two highly visible ideological camps: the "Movement" (the increasingly militant New Left, Black nationalist, counterculture/youth, and anti-war groups) versus the "conservative establishment" (police, intelligence officers, and other conservative

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<sup>19</sup>Charns, Cloak and Gavel, 32-33.

<sup>20</sup>Quoted in Louis Fisher, Constitutional Conflicts Between Congress and the President, (Princeton, NJ: Princeton University Press, 1985), 26.

<sup>21</sup>James Q. Wilson, "Buggings, Break-Ins & the FBI," Commentary, vol. 65, no. 6, (June, 1978): 52-58.

Americans who supported the Nixon Administration's actions against the Movement);<sup>22</sup> and (4) elected in 1968 on a largely "law and order" platform, the Administration was under enormous pressure to utilize the full resources of government in the so-called "war on crime." These pressures, when combined with the fondness of the new Administration for "getting even" with perceived enemies, provided the backdrop for the illegal activities that would culminate in Watergate.

During the late sixties the American public's acceptance of the "cult of Executive expertise," and, by implication, its willingness to accept absolute secrecy surrounding intelligence agencies, was challenged for the first time. Two factors were responsible: an unpopular Vietnam War and increasing public awareness of widespread surveillance of U.S. citizens by secret intelligence agencies. More than any other issue, the Vietnam War seemingly exposed the folly of granting a President too much independence in foreign affairs. The ensuing "credibility gap" between what President Johnson told the American people about the conflict and the realities of U.S. involvement helped destroy his Presidency.

Americans supported their intelligence agencies and law enforcement officials until widespread revelations of

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<sup>22</sup>An amorphous term, the "Movement," as it is used here, refers to individuals and groups espousing a wide variety of principles and goals, who were nonetheless united in their radical opposition to traditional American values and mores, the Vietnam War, and the "conservative establishment."

intelligence abuses surfaced in the mid-sixties. Such support was grounded in Cold War orthodoxy, as well as the extreme secrecy that shrouded the surveillance activities of the intelligence community. In addition, most Americans were unaware that the FBI, CIA, NSA, and military intelligence were conducting widespread surveillance within the U.S. until the scope and purpose of these activities gradually became known.

Both Congress and the Supreme Court share some of the blame for these Executive Branch abuses. Together, they allowed a "cult of Executive expertise" to emerge, vis-a-vis foreign policy and national security. Congressional deference to the Executive in time of war has historically been the norm, largely because of the constitutional provision making the President "Commander in Chief" of military forces. In domestic security areas, the President heads the Executive Branch, which is responsible for enforcing laws. Thus, with few exceptions, Congress has allowed the Executive wide discretion over intelligence policy. As for the Supreme Court, beginning with the U.S. v. Curtis Wright decision in 1936, it has also generally deferred to the Executive in both foreign policy and domestic security areas.<sup>23</sup>

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<sup>23</sup>U.S. v. Curtis Wright Corp., 299 U.S. 304 (1936). See also Fisher, Constitutional Conflicts, 108-110.

Tensions in American society during the 1960s eroded the "cult of Executive expertise." Congress was slow to challenge the President over the Vietnam War. However, in the areas of wiretapping and surveillance, Congress did respond, despite the influence which J. Edgar Hoover exerted. Beginning with the Russell Long and Joseph McClellan Committees in the mid-1960s, and culminating with Title III of the Omnibus Crime Control Act of 1968, Congress assumed an increasingly important role in legislating the nation's surveillance policies.

Similar circumstances explain the role the Supreme Court assumed over domestic surveillance policy by the late sixties. After several decades of indecisiveness, the liberal Warren Court handed down two important decisions in 1967: Katz v. U.S. and Berger v. New York. The effect of these decisions can be summarized as follows: (1) the Fourth Amendment protects people as well as places; (2) electronic surveillance constitutes a search and seizure subject to the limitations of the Fourth Amendment; and (3) law enforcement agencies must have probable cause prior to seeking electronic surveillance, and should seek a judicial warrant for a limited and clearly specified time period. The Court was divided over these issues, Justice White in particular finding himself in the opposition. His dissent in Katz introduced the possibility that in "national security" cases, electronic surveillance might be instituted by the Executive

without prior court order. Despite the Court's divisions, Katz and Berger introduced the Supreme Court as a powerful force in regulating national surveillance policy. In fact, Katz provided Congress with much of the language used in the wiretapping provisions of Title III of the Omnibus Crime Act of 1968.

The divisiveness which characterized the Supreme Court in Berger and Katz centered upon the proper role that wiretapping and bugging should have in law enforcement, as well as the degree to which the Judiciary should intercede between the Executive and the public as a neutral third party. The split in the Berger decision was particularly bitter. In his dissent, Justice White charged that the Court was moving toward a position which would make all wiretapping unconstitutional. An important component in the Berger debate was the "intelligence versus evidence" issue. The case involved a New Jersey statute that permitted eavesdropping under the authority of court orders from state judges. In a 6-3 decision, the majority termed "odious" the law's sixty-day authorization period and lack of requirement for a specific termination date. Lawyers for the State of New Jersey claimed that wiretapping and other electronic surveillance are the most important law enforcement techniques available to fight "organized crime." They

defended long-term surveillance as necessary for obtaining adequate "intelligence" about criminal suspects.<sup>24</sup>

The positions expressed in Berger reflected the division of opinion between America's intelligence community and civil libertarians and privacy advocates since the end of World War I, over the "proper" duration of surveillance.<sup>25</sup> Privacy advocates, such as former Attorney General Clark and Justices Douglas and Brennan, believed that surveillance of U.S. citizens should be kept to an absolute minimum, and limited to specific tactical purposes such as investigating organized crime suspects. Privacy advocates argued that suspects are innocent until proven guilty; that agencies should have probable cause prior to initiating surveillance; and that when surveillance is instituted, it should be as brief as possible to minimize overhearing of conversations involving innocent people. The privacy invasion involved in lengthy surveillance far outweighs any possible law enforcement or "national security" benefits which might be derived from it. As Justice Clark's majority decision stated in Berger:

Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices....The Fourth Amendment...proscribes a

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<sup>24</sup>Lapidus, Eavesdropping on Trial, 20-23.

<sup>25</sup>James Bamford, The Puzzle Palace: A Report on America's Most Secret Agency, (Boston: Houghton Mifflin, 1982), 5-15. This outstanding study traces the history and evolution of the super-secret National Security Agency (NSA).

constitutional standard that must be met before official invasion is permissible.<sup>26</sup>

The opposing position was championed by law enforcement and intelligence agency officials. Their position commonly reflected conservative views popular in Cold War America. They argued that in the fight against crime, or struggle against communism at home and abroad, the preservation of social stability had to be an overriding priority. Law enforcement and intelligence agencies should be allowed to initiate long-term "strategic" surveillance in instances where "organized crime" is occurring or where the "national security" may be threatened. Surveillance, they insisted, is at worst a victimless crime; effective prevention of law breaking or protection of the nation from internal "subversion" and/or external attack justifies eavesdropping for extended periods of time. Supporters of this position commonly argued that neither politicians in Congress nor federal judges were qualified to recognize threats to the social order.

An additional factor which contributed to the timing of the Mitchell Doctrine was the social disorder of the sixties. Most important were the urban riots, starting with Watts (Los Angeles) in 1965 and, in particular, Detroit in 1967. The Detroit riots are historically important because they resulted in law enforcement initiatives sponsored by

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<sup>26</sup>Quoted in Lapidus, Eavesdropping on Trial, 21.

President Johnson and Attorney General Clark, which laid the groundwork for the significant expansion of intelligence agency abuses that occurred during the Nixon years. Shocked by the level of violence and destruction in Detroit, the Johnson Administration issued directives to the intelligence community, demanding more information concerning the underlying conditions that commonly lead to riots and information about future uprisings, so that local law enforcement could respond more effectively. An interagency task force was set up to coordinate domestic intelligence. Clearly, the "intelligence" side of the surveillance debate carried the day. However, the Supreme Court decisions in Katz and Berger that same year, combined with the Congressional restrictions on surveillance included in Title III of the 1968 Omnibus Crime Act, created a situation where Executive agencies secretly pursued surveillance policies at odds with both the Judicial and Legislative Branches. Neither President Johnson nor Attorney General Clark were fully aware of the enormous expansion in domestic surveillance that their own post-Detroit initiatives had created.<sup>27</sup>

By late 1968 many law enforcement and intelligence agency officers believed that they had been undermined by a liberal Supreme Court, a Democratically-controlled Congress,

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<sup>27</sup>Christopher H. Pyle, Military Surveillance of Civilian Politics, 1967-1970, (New York: Garland Publishing, Inc., 1986), 50-51.

and an Attorney General so loathe to wiretap that he refused to implement those provisions of the Omnibus Crime Act. In addition, the sheer expansion of the intelligence agencies, coupled with a more vigilant and less deferential media, meant that preserving secrecy was increasingly difficult. Such was the confusing state of intelligence affairs when Nixon took office in early 1969. An enormous gap separated wiretapping law and practice. All indicators pointed to increasing restrictions on surveillance and an end to the "cult of secrecy" that had characterized the intelligence community throughout the first two decades of the Cold War.

The relationship between the polarization of society during the sixties and the Mitchell Doctrine is both deceptively simple and extraordinarily complex. At the most elementary level, President Nixon, like his predecessor, sought improved intelligence concerning those radical groups that either committed or had the potential to commit violent acts. Finding an opening in the vaguely worded "national security" passage of the Omnibus Act, Justice Department lawyers, ostensibly led by William Rehnquist, researched and utilized the "inherent Presidential power" legal precedents available to them, particularly Justice White's dissent in Katz.<sup>28</sup> Attorney General Mitchell promoted a legal

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<sup>28</sup>The scope of then Assistant Attorney General Rehnquist's involvement in formulating the Mitchell Doctrine was first revealed in 1971, during his testimony before the "Ervin Committee," (Hearings on Federal Data Banks, Computers (continued...))

initiative which first sought to establish precedent in several U.S. District Courts, and later, in the White Panther case, advanced on appeal to the Supreme Court. There are at least three problems with this too simple scenario: (1) it ignores the enormous differences of opinion separating the Johnson and Nixon Administrations concerning wiretapping; (2) it ignores the complexity of the social and political divisions that divided America during Nixon's first term; and (3) it sidesteps the issue of Nixon's willingness to break the law for political purposes.

The historiography of the sixties has, more often than not, reduced the complex social divisions in American society to good guy-bad guy scenarios, in which extremists on both sides increasingly supported violence in response to each action of their opponents -- incrementally progressing towards "revolution." While these authors are correct in pointing to causal connections among events, perceptions, and actions on society's extremes, there is a need for a more substantive historical model that: (1) attempts to explain the internal dynamics as to why individuals acted and reacted as they did; (2) does not reduce the divisions in society to simplistic formulas; and (3) incorporates how the rest of

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<sup>28</sup>(...continued)

and the Bill of Rights, U.S. Senate, Committee on the Judiciary, chaired by Senator Sam J. Ervin). See Donner, The Age of Surveillance, 75. One year later, as a newly-appointed Supreme Court Justice, he disqualified himself from taking part in the U.S. v. U.S. District Court decision.

America responded to the social changes that occurred during the decade.

My working model begins with the premise that social disorder in the United States during the late sixties and early seventies was the worst of this century. Two parallel "Movements" moved 180 degrees in a few years, each progressing from a strictly nonviolent approach towards one that increasingly advocated violence as an acceptable option: the civil rights movement evolved into the Black Power movement, at the same time that a student-led anti-war protest movement turned into a widespread youth and counterculture rebellion. A vast majority of Americans did not march in demonstrations or join radical groups, but they did not have to take part to be affected by them. The actions of the radical minority received mass media attention, helping the passions of the decade influence nearly all of society. The impact of polarization was widespread.

The rate of change during the sixties far exceeded society's ability to comprehend it. The gap between participants' perceptions of events and reality widened enormously, propelled by the most powerful reform movement since the 1930s. As Arthur Schlesinger, Jr., states, America entered an "age of whirl."<sup>29</sup> Under the most tranquil of

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<sup>29</sup>Arthur M. Schlesinger, Jr., The Cycles of History, (Boston: Houghton Mifflin Company, 1986), xi.

conditions, perception and reality never correspond precisely. Instead, they interact in a two-way "recursive loop," in which some degree of separation exists between message and content. During the sixties the rapid pace of change, combined with the variety and scope of highly charged issues and events, created a widening of the perception/reality gap throughout American society, creating what George Soros has termed "far from equilibrium" conditions.<sup>30</sup> The era's passions and the biases extended into every community, with cultural battle lines defined by such seemingly innocuous aspects of lifestyle as length of hair, style of clothing, and music. It was the White Panthers' love for communal living, rock music, "hippie" clothing, long hair, and psychedelic drugs that irritated conservative Detroit residents, and led to near-constant police and FBI surveillance. In turn, this surveillance and harassment increasingly "radicalized" the group.

As the passions of the 1960s unfolded, two diverse but identifiable opposing groups -- the "Movement" and the "conservative establishment" -- developed a sense of self identity. As former Students For a Democratic Society (SDS) leader Todd Gitlin points out in The Sixties, as the decade progressed, student protest evolved into resistance,

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<sup>30</sup>George Soros, Underwriting Democracy, (New York: The Free Press, 1991), 23.

eventually resulting in calls for "revolution."<sup>31</sup> In response, law enforcement officials, supported by a large segment of society, heightened surveillance and increasingly utilized harsh -- occasionally illegal -- tactics against the Movement.

Each major event in the struggle brought significant responses and counter-responses. For example, Nixon's escalation of the Vietnam War into Cambodia in 1970 spawned the most widespread campus demonstrations in U.S. history, including Kent State, where four unarmed students were shot to death by Ohio National Guardsmen. For both sides the gap between perception and reality widened: the Movement became increasingly convinced that the existing political system (postwar liberalism) was bankrupt, while the conservative establishment became increasingly convinced that the Movement was bent on the violent overthrow of the U.S. Government. The result of this social division was two highly biased groups so threatened by their opposition that both increasingly supported extreme measures. By the early seventies violence was commonly viewed as an acceptable option, by both sides.

The election of Nixon in 1968 was clearly a victory for conservatives. The campaign's "law and order" slogans promised to get tough with the Movement on several fronts,

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<sup>31</sup>Todd Gitlin, The Sixties: Years of Hope, Days of Rage, (New York: Bantam Books, 1987), 378-408.

including increasing wiretapping and other surveillance. Therefore, the unveiling of the Mitchell Doctrine after only five months was, on one level, an attempt to keep campaign promises by initiating bolder law enforcement techniques against suspected criminals. It was also part of the Administration's attempt to differentiate its policies from those of the previous Democratic administrations. As John Mitchell stated a decade after leaving office:

The leaders before us...were too busy pandering to the crazies, the kooks trying for a counterrevolution. But we thought it was time to speak for people who weren't kooks, who weren't vitriolic....The country was coming apart....You had bomb-throwers on campus, their gutless teachers egging them on....So guess who had to quell the violence and disorder? We did. The American people expected their government to act....We tried to do as they wished."<sup>32</sup>

Nixon grappled with the Vietnam conflict at home and abroad, just as Johnson had. From his first days in office, he dedicated considerable White House and Justice Department resources to infiltrating the peace movement. Nonetheless, he remained frustrated with what he believed was a lack of substantive intelligence concerning planned demonstrations and other civil unrest. At his insistence, and supported by FBI Director Hoover, various intelligence agencies searched in vain for proof that the New Left was receiving monetary support and/or instructions from Communist nations.

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<sup>32</sup>Quoted in Curt Smith, Long Time Gone: The Years of Turmoil Remembered, (South Bend, Indiana: Icarus Press, 1982), 15, 18.

The combination of social disorder, an increasingly unpopular war, and concern about inadequate intelligence -- just as new Congressional and judicial barriers to surveillance were being erected -- created enormous frustration within the new Administration. It was Nixon's fate to enter the White House as all of these forces came together. He responded, in part, with the Mitchell Doctrine: a constitutional initiative intended to sidestep recent attempts by the Legislative and Judicial Branches to limit wiretapping. The Mitchell Doctrine was one of a series of Nixon/Mitchell initiatives intended to preserve the Executive's surveillance power over suspected "enemies," when faced with potent new challenges to this authority, challenges that previous Presidents had not been forced to deal with.

Being held to new standards concerning surveillance policy -- and being convinced that the nation's security was threatened from internal subversion -- did not justify widespread law breaking and subverting of constitutional rights and protections. There can be little doubt that Nixon's willingness to subvert ethical and legal principles in the interest of gathering intelligence was a primary reason for the failure of the Mitchell Doctrine, as well as for Watergate.

The history of U.S. wiretapping and domestic intelligence policy and practice since the June, 1972, Keith

decision has demonstrated that the debate concerning the citizen's right to privacy versus the government's right to self-preservation is far from over. The nation's interest in privacy issues such as domestic wiretapping has ranged from lethargy to long periods of gradually mounting concern (following revelations of substantial abuse) to brief periods of anger (when the scope of abuse and public uproar prompts congressional and Executive "reforms"), back to lengthy periods of lethargy, until further revelations of abuse begin a new cycle. By the early eighties, Americans returned to a state of lethargy, influenced by the backlash against Watergate era reform "excesses." The Reagan Administration even resurrected the use of "national security" to shield its surveillance and wiretapping policies from public view.<sup>33</sup>

The current atmosphere of extreme public concern over crime and security has underscored the public's disinterest in surveillance and privacy issues. For many Americans, the seriousness of the crime problem warrants granting law enforcement and U.S. government officials plenty of leeway to initiate wiretaps of suspected criminals and "terrorists." On a "rights versus security spectrum," a majority favor security, something the law enforcement community is fully

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<sup>33</sup>Ward Churchill and Jim Vander Wall, The COINTELPRO Papers, Documents from the FBI's Secret Wars Against Dissent in the United States, (Boston: South End Press, 1990), 23-32. See also Athan Theoharis and John Stuart Cox, The Boss: J. Edgar Hoover and the Great American Inquisition, (Philadelphia: Temple University Press, 1988), 432-434.

cognizant of.<sup>34</sup> The "terrorist" bombings of the World Trade Center and the Oklahoma City federal building parallel 1968, when Congress passed the nation's first wiretapping law: Title III of the Omnibus Crime Control and Safe Streets Act. Without the widespread public concern over crime that existed in the late sixties, the bill, authorizing the Justice Department to make sweeping privacy invasions, would not have received the support necessary for passage. By the same token, the Mitchell Doctrine -- a request that the Judicial Branch grant the Executive widespread surveillance powers -- was a Nixon Administration attempt to take advantage of public fears about crime. Such a request would have been impossible in a more stable era.

The combination of public lethargy over surveillance and privacy issues and anti-crime hysteria that currently exists in America has created an excellent opportunity for law enforcement and intelligence agency officials to promote extreme measures. The "Digital Telephony Act" was introduced in the spring of 1992 by the Justice Department under President Bush and, with the support of the Clinton Administration, became law during the fall of 1994.<sup>35</sup> This initiative will require U.S. telephone companies to install

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<sup>34</sup>Quoted in Marc Stickgold, "Yesterday's Paranoia is Today's Reality: Documentation of Police Surveillance of First Amendment Activity," University of Detroit Journal of Urban Law, vol. 55, no. 4, (Summer, 1978), 883, n. 58.

<sup>35</sup>New York Times, March 8, 1992, 22; April 19, 1992, E-2; April 30, 1992, D-1, D-5.

computer technology and software allowing the FBI to intercept digital communications. The Justice Department argues that criminals increasingly have been able to shield their communications from the government, using encryption devices and other sophisticated techniques. New fiber optics-based telecommunications systems, soon to be the industry standard, cannot be wiretapped by conventional methods. An FBI spokesman recently asserted: "we need a cop on the information superhighway to catch criminals."<sup>36</sup> Privacy advocates have responded by saying that Digital Telephony is unnecessary, and will provide the Executive Branch with instantaneous access to the nation's 140 million telephones -- a temptation, they predict, which will likely lead to future surveillance abuses.

Although funding for Digital Telephony has been stalled in Congress, the post-Oklahoma City atmosphere of fear has virtually assured implementation. Additional legislation has also been proposed; the Clinton Administration is currently lobbying Congress to pass its "Omnibus Counterterrorism Act of 1995," a package of anti-crime/terrorism measures that includes sweeping revisions of domestic intelligence guidelines and statutes. Supporters claim the expanded wiretapping authority will allow the government to better prevent future "terrorist bombings." Opponents fear the

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<sup>36</sup>Washington Post, March 12, 1994, p. C-7. On the Clinton Administration's revisions, see Washington Post, March 12, 1994, C-1, C-7.

Administration is reacting to events rather than proceeding with caution, in an area where serious abuses of constitutional rights have occurred in the past. The latest round concerning the citizen's right to privacy versus the government's right to protect domestic security suggests the folly of believing that wiretapping of "innocent" citizens is simply what persons such as Mitchell and Nixon did. Rapid technological innovation and overreaction to momentary crises suggest this problem is unlikely to benefit from a policy of benign neglect.

## Chapter One

### "Law and Order," the Sixties, and the Polarization of American Society

#### I.

The people of this country want an end to government that acts out of neutrality or beneficence or indulgence toward criminals. They want government that will set itself up as an irreconcilable enemy of crime, a government that will wield its full powers to guarantee that for the criminals....society's retribution will be ample and swift and sure.<sup>1</sup>

Richard M. Nixon's victory in the 1968 Presidential election owed a great deal to the social disorder of the sixties. Very early in his campaign, he began utilizing the theme of "law and order," accusing the Democrats of harboring a "permissive attitude" toward the rising level of crime and lawlessness in the nation. He criticized President Johnson's "War on Poverty," claiming that the initiative overemphasized the link between poverty and crime and underemphasized law enforcement as a deterrent to crime. He attacked Attorney General Ramsey Clark, for refusing to implement fully the wiretapping provisions of the Omnibus Act, as well as the Supreme Court, for granting criminal suspects additional

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<sup>1</sup>Excerpt from Richard Nixon's position paper entitled "The Crusade Against Crime," presented to the Republican Committee on Resolutions (the "platform committee"). Quoted in New York Times, August 1, 1968, 20.

rights against self-incrimination in the Miranda and Escobido decisions.<sup>2</sup>

The issue suited Nixon's conservative personality and background perfectly: his greatest political successes had come by taking advantage of divisive issues, and attacking his opponents relentlessly. His early political victories, first against Democratic Congressman Jerry Voorhis (1946), and then Democratic Senator Helen Gahagan Douglas (1950), both in his home state of California, were helped by his repeated accusations that they were "soft on Communism." He continued the tactic as a freshman Senator, acquiring national recognition by accusing former State Department official Alger Hiss of membership in the Communist Party. As Vice-President under Dwight D. Eisenhower, his career continued to make headlines only when he engaged in conflict -- be it the stoning of his car by leftist students in Latin America in 1958, or his celebrated "kitchen debate" with Soviet Premier Nikita Khrushchev in 1959.

As much as the successes of his early "red-baiting" tactics may have taught him, the political setbacks he suffered in the early sixties -- a narrow defeat in the 1960 Presidential race, followed by a surprising loss to Pat Brown in the 1962 California Gubernatorial election -- also contributed much to his divisive and combative personality. His bitterness over these back-to-back losses would influence

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<sup>2</sup>New York Times, May 9, 1968, 1, 32.

him for the remainder of his career. As he stated in his Memoirs: "Politics is battle, and the best way to fire up your troops is to rally them against a visible opponent...in the end it usually comes down to a contest between allies and enemies...Our fractious politics....is the price we pay for avoiding dictatorship, where enemies are ruthlessly eliminated."<sup>3</sup>

The social disorder of the sixties helped Nixon's astounding political comeback. He had retired from politics after the 1962 loss, moving to New York to practice law. Following Lyndon Johnson's landslide victory over Barry Goldwater in 1964, an enormous void existed in the national leadership of the Republican Party. Between 1964 and 1966 Nixon emerged as the G.O.P.'s elder statesman, campaigning tirelessly for a number of Congressmen and Senators. A frequent theme in his campaign speeches was that the Democratic Party coddled "Un-American" anti-war campus protestors, and their "gutless" college professors. Timing was in his favor: as the nation moved right in response to widespread social disorder, his political fortunes improved. Establishing a "Nixon For President Committee" as early as March, 1967, he formally entered the race February 2, 1968.

By early February crime had displaced civil rights as the top domestic issue, and was second only to Vietnam as the

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<sup>3</sup>Richard Nixon, In the Arena: A Memoir of Victory, Defeat, and Renewal (New York: Simon and Schuster, 1990), 245-46.

most important to the nation's voters.<sup>4</sup> However, law and order ultimately became the pivotal issue of the campaign, since neither the Republican opposition nor the Democratic nominee, Hubert H. Humphrey, was willing to present a significant challenge to President Johnson's handling of the war. Nixon, a staunch supporter of American involvement in Indochina, largely sidestepped the issue during the campaign, hinting that he had a "secret plan" to end the conflict.<sup>5</sup> Thus, the Vietnam War did not become a hotly contested campaign issue.

Nixon's opposition in the campaign also recognized the importance of addressing the issue of "crime in the streets," although with less success. Humphrey found himself hamstrung -- the Democratic Party's liberal wing opposed its usage (claiming it had racist overtones), while the remainder of the party was increasingly appalled by urban violence.<sup>6</sup> Nixon's other principal opponent, Governor George Wallace of Alabama, a Democrat running as an "American Independent," promised to utilize both police and federal troops to quell urban disorders. The two extremes represented by Humphrey and Wallace allowed Nixon to position himself as a moderate,

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<sup>4</sup>New York Times, February 28, 1968, 29.

<sup>5</sup>Dennis Wainstock, The Turning Point: The 1968 United States Presidential Campaign (Jefferson, NC: McFarland and Company, 1988, 38.

<sup>6</sup>New York Times, August 30, 1968, 13; see also September 13, 1968, 52.

which gave his candidacy broad appeal. Throughout the race, public opinion polls showed Nixon leading Humphrey by a wide margin, on the issue of crime.<sup>7</sup> Wallace's candidacy failed to make significant inroads outside of the South.

The public's increasing fixation with law and order during this election year paralleled, in almost direct proportion, declining interest in civil rights.<sup>8</sup> The reasons were many and complex. Most importantly, the urban race riots of 1965-1968 left many Americans, especially middle class whites, increasingly fearful about social disorder. At the same time, the coalition holding together the traditional civil rights movement had collapsed, with organizations such as the Student Non-violent Coordinating Committee (SNCC) no longer willing to adhere to strictly non-violent tactics. The combination of these factors created a "backlash" against civil rights among many whites, and contributed to the emergence of law and order as a potent political issue.<sup>9</sup> The

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<sup>7</sup>New York Times, February 28, 1968, 29; August 4, 1968, 45; September 8, 1968, 77; September 13, 1968, 52; September 15, 1968, 78; October 10, 1968, 51; October 30, 1968, 30.

<sup>8</sup>New York Times, February 11, 1968, sec. iv, 3.

<sup>9</sup>The issue of white voter "backlash" against blacks as a result of urban race riots and the "Black Power" movement, particularly in regard to the drop-off in white support for further civil rights gains, was a frequent theme in the New York Times throughout 1968: February 11, sec. iv, 3; August 18, sec. iv, 14; September 12, 46; September 15, sec. iv, 14; October 6, sec. iv, 38-39, 132-38; October 13, sec. iv, 2; October 15, 46. See also Harold Faber, ed., The New York Times Election Handbook, (New York: The New American Library, 1968), 21-22, 62.

Wall Street Journal editorialized: "Precisely because the issue touches such fundamental and even primeval fears, it is ripe for demagoguery."<sup>10</sup>

In the final analysis, Nixon's "law and order" message - - as well as his campaign's crafty use of the media -- were probably the most significant factors contributing to his election. During the 1960 Presidential campaign Nixon had learned the hard way about the value of television as a medium through which to communicate with potential voters. By late 1967 he assembled an advertising and public relations staff skilled in "packaging" political candidates. This team collaborated on what were undoubtedly the most effective television advertisements for political candidates up to that time. One such advertisement entitled "Woman," described in The Selling of the President, 1968, focused on the law and order issue:

This one was designed to scare people. It showed a woman walking down a lonely street late at night...There was an announcer....telling how a violent crime was committed in America every sixty seconds. Watching it, you were sure the woman would not make it to the end of the street, or the end of the commercial, without being mugged.<sup>11</sup>

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<sup>10</sup>Quoted in Wainstock, The Turning Point, 151.

<sup>11</sup>Joe McGinniss, The Selling of the President, 1968, (New York: Trident Press, 1969), 112.

The printed caption at the conclusion of the advertisement read: "THIS TIME VOTE LIKE YOUR WHOLE WORLD DEPENDED ON IT."<sup>12</sup>

Throughout the campaign, New York Times columnists Tom Wicker and James Reston issued warnings, first to the Republican Party and later to candidate Nixon, concerning the dangers of overdoing the law and order issue with such vehemence. Shortly after the G.O.P. convention, Reston termed law and order "a deliberate calculation...his best issue...a campaign strategy that will be hard to beat." He added a dire prediction: "He thinks he can tame the ghettos and then reconstruct them, and he may very well make reconciliation with the Negro community impossible in the process."<sup>13</sup> By mid-October, Wicker had similar predictions:

In this political climate that Nixon's tough talk helps to create...Nixon clearly risks making such a point of 'getting tough' that his election will be interpreted by every heavy-handed policeman in the country as a license to beat up somebody -- probably somebody poor, black or young...he really is taking dangerous political advantage of the country's undoubted concern about 'crime in the streets'.<sup>14</sup>

In politics, it is often impossible to precisely determine the degree to which a candidate genuinely believes in any given issue, as opposed to utilizing it for political

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<sup>12</sup>McGinniss, The Selling of the President, 1968, 253. This book contains verbatim scripts of "Woman" and several other Nixon television commercials in an appendix.

<sup>13</sup>New York Times, August 18, 1968, sec. iv, 14.

<sup>14</sup>New York Times, October 15, 1968, 46.

advantage. Nixon is a case in point. While some have stated that he merely reacted to the rebellious times, rather than initiating conflict,<sup>15</sup> others have pointed out the inherent contradiction between Nixon's repeated calls for national unity and his campaign statements that were clearly intended to foster social divisions.<sup>16</sup> John Dean, who followed the Nixon administration into office in 1969, leaves no doubt concerning his opinion on the matter:

The Republican Party was ripped to shreds in the 'sixty-four election just before I got to the Hill...I was with the Judiciary Committee looking at the politics. It looked to me like the Republicans had only two issues to make a comeback with: crime and defense. I didn't know anything about defense, so I became a crime expert. That's how I wound up in the Justice Department...I was cranking out that bulls\_\_t on Nixon's crime policy before he was elected. And it was bulls\_\_t too. We knew it. The Nixon campaign didn't call for anything about crime problems that Ramsey Clark wasn't already doing under LBJ. We just made more noise about it.<sup>17</sup>

## II.

The Republicans in 1968 did not create the national crisis that spawned the "law and order" issue. Nixon's election is a testimony to the fact that a majority of Americans were genuinely concerned with social instability,

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<sup>15</sup>Philip B. Kurland, Watergate and the Constitution, (Chicago: University of Chicago Press, 1978), 219.

<sup>16</sup>Kutler, The Wars of Watergate, 60-62.

<sup>17</sup>John W. Dean III, Blind Ambition, The White House Years, (New York: Simon and Schuster, 1976), 385-86.

and consequently supported candidates promising to "get tough" on crime. Although the Nixon campaign undoubtedly took advantage of the social disorder of the period, its rhetoric alone could not have created such a widespread national consensus for law and order. A recent study by political scientist John Gilliom points out that "crisis issues" rarely become national priorities without the twin influences of: (1) top-down political interest from nationally-prominent candidates and/or office holders (which, in turn, sets the agenda for the national media), and (2) "local manifestations of broad public problems."<sup>18</sup> By late 1968 most Americans believed they were witnessing lawlessness and/or other social disorder in their local communities and everyday lives. The media's election-year focus on the issue heightened these concerns.

Although a thorough historical analysis of nineteen sixties social disorder in America is beyond the scope of this study, an understanding of how the Nixon Administration

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<sup>18</sup>John Gilliom, Surveillance, Privacy, and the Law: Employee Drug Testing and the Politics of Social Control, (Ann Arbor: The University of Michigan Press, 1994), 77. This excellent study examines the anatomy of the "drug crisis" of the late 1980s: a crisis made possible by several factors: (1) the public's genuine concern over drugs in society, and specifically in the work-place; (2) the Reagan Administration's election year [1986] "War on Drugs"; and (3) the national press' fixation on the so-called "crack" epidemic. The net result of this partially-manufactured crisis was that within the span of a few years a majority of Americans agreed to "sacrifice" a considerable degree of their privacy to allow random, warrantless, drug-testing in the work-place.

rode "law and order" into the White House in 1969 requires some understanding of the key events and social themes of the period: most importantly, discontent among radical blacks and college-age whites that eventually coalesced in a "Movement" for change. This Movement took many forms: those opposed to the Vietnam War; those favoring increased social and economic justice for blacks; those angry at what they viewed as unnecessary U.S. influence over Third World nations; those anxious about living in a nation with a preponderance of the world's nuclear bomb arsenal; and those dissatisfied with the prevailing liberal Democratic "solutions" for society's ills. The two principal currents of the Movement most responsible for social disorder during the sixties were: (1) the Black Power movement that evolved out of the non-violent civil rights movement, and (2) an increasingly militant New Left/counterculture movement, in which the Michigan White Panthers played a role, that was the "cutting edge" of a larger youth revolt against authority.<sup>19</sup> An equally important factor was the reactionary response of the "establishment," particularly law enforcement and the intelligence agencies. As the decade progressed, these three

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<sup>19</sup>Clearly the "New Left" and the "counterculture" were separately occurring and very different movements: the former composed primarily of "political" college students and the latter of "cultural revolutionaries." They are grouped together here only for the purposes of a brief overview of sixties social disorder. They did have certain important commonalities: essentially middle-class white youth alienated with society, who became increasingly militant as the decade progressed.

strands of mutually-reinforcing discontent came together, to create the worst social disorder of this century. The three did not evolve independently: the New Left was heavily influenced by the civil rights/Black Power movement, while the "establishment" backlash against student activism increased in direct proportion to each new militant action.

Important antecedents can be found in earlier periods. Black Power evolved out of the "modern" civil rights movement, which began with the Brown v. Board of Education of Topeka, Kansas decision in 1954, outlawing segregation in public schools. In 1955, with the successful Montgomery, Alabama, Bus Boycott, which desegregated public buses, the movement adopted a Gandhian variety of non-violent civil disobedience, which became known as "direct action." This strategy, modified somewhat by the Reverend Martin Luther King, Jr., proved very successful over the following decade, in one historical civil rights victory after another.

The Second Reconstruction was successful due to a number of factors: King's non-violent approach, the determination of blacks to put their bodies on the line for civil rights, national media attention to Southern white brutality against non-violent blacks, and a developing middle-class Northern white consensus for keeping the century-old promises of full citizenship specifically guaranteed by the 13th, 14th, and 15th Amendments. National leadership also played a significant, albeit delayed, role. The election of liberal

Democrats (Kennedy and Johnson) in 1960 brought only gradual change in national civil rights policy. Elected by the narrowest of margins in 1960 -- with considerable Southern support -- President Kennedy paid lip service to civil rights while advocating a gradualist, "go slow" approach. He favored the use of executive orders when necessary and avoided a national civil rights bill. In this manner he hoped to make contributions to civil rights without alienating white Southerners. Discussing the conflict between the liberals' essentially amoral pragmatism and the overwhelmingly moral issue of civil rights, Charles Morris states:

As pragmatic liberals, they were prepared to accept, even embrace change. But their insistence that it proceed incrementally and at a pace that could be readily absorbed by the existing political structure seemed arid and unfeeling in the face of the pressing issues that were churning to the surface....in the South.<sup>20</sup>

However, events soon moved them to act. Southern white brutality and violence convinced Robert Kennedy, the President's Attorney General brother, to dispatch Federal Marshals to Alabama during the Freedom Rides of 1961, as well as to enforce the admission of black college student James Meredith to the University of Mississippi in 1962. 1963 was the turning point: nationally-televised scenes of white Birmingham police using high-pressure fire hoses and attack

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<sup>20</sup>Charles R. Morris, A Time of Passion: America 1960-1980, (New York: Penguin Books, 1986), 67.

dogs against non-violent black children stunned the nation. As Allen Matusow states, civil rights "came to seem no longer the program of zealots, but a policy of moderate men."<sup>21</sup> Following the assassination of Kennedy in November, 1963, President Johnson continued the liberals' support of civil rights. By 1965 civil rights had become the nation's top domestic priority. Responding to another nationally-televised episode of white police brutality against non-violent black protesters at Selma, President Johnson went on television to ask Congress for a sweeping voting rights bill -- which passed later that year.

Two events galvanized Northern white sympathy (and guilt) for civil rights legislation: the brutal confrontations between white police and non-violent black protestors at Birmingham (1963) and Selma (1965). It was during these clashes that King's strategy of non-violence, coupled with the presence of the national media and the willingness of "cracker" police chiefs to lose their self-control, allowed the nation to see black citizens being beaten, gassed, and clubbed for doing nothing more than attempting to hold public sit-ins on courthouse steps and/or to engage in peaceful marches. This national disgrace forced two reluctant Presidents (Kennedy and Johnson) to become genuine supporters of civil rights.

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<sup>21</sup>Allen J. Matusow, The Unraveling of America, (New York: Harper and Row, 1984), 88.

The modern civil rights movement that had been so successful under the leadership of Martin Luther King, Jr., for the decade following the Brown decision underwent significant changes during the 1965-1967 period. First, the universality of King's non-violent strategy failed to hold sway with a variety of black movement groups, most importantly SNCC. This organization of mostly college-age blacks had been in the forefront of "direct action" since the first sit-ins in Greensboro, North Carolina in 1960. It was mostly SNCC cadres in 1961 who, following CORE's lead, travelled South on the Freedom Rides, where they met with considerable white brutality. SNCC also made up a preponderance of the volunteers who travelled to Mississippi in the early sixties to register blacks to vote, again facing white violence and intimidation on an almost daily basis. By the time of the confrontations at Birmingham and Selma, SNCC leaders were openly critical of non-violence and increasingly advocated arming themselves for self-defense.

An additional factor that changed the overall direction of the civil rights movement was the urban violence that erupted in Northern cities, beginning with Watts, Los Angeles, in August of 1965, the first significant "race riot" of the sixties, where six evenings of violent uprisings resulted in thirty-four dead and almost four thousand arrested. Characterized by violence, burning, and looting (and occasionally even a festive atmosphere), the riots

symbolized the impotence of existing civil rights strategies in confronting de facto segregation, discrimination, and poverty -- problems that sit-ins and marches did little to alleviate. Harvard Sitkoff offers the following analysis:

Urban blacks chose to protest by rioting...because they had no other viable strategy of change...They rioted to protest the pervasiveness and depth of white racism in the supposedly racially egalitarian North...Most of all, they rioted to raise the economic questions which the civil rights movement had ignored...For the better part of the decade, Northern blacks watched their brethren in the South gain concessions by creating disorder...The movement shook the ghettos out of their lethargy...It proved that protest could succeed and it raised black consciousness.<sup>22</sup>

Watts was the prelude to four consecutive "long hot summers" of rioting in the ghettos of nearly every large American city. The net result of the disorder was the dissolution of the middle-class white consensus for further civil rights gains for blacks, which had supported liberal Democratic reform since Birmingham. Occurring just as non-violence was losing its mystique among young blacks, the riots also had the effect of speeding the destruction of the civil rights coalition of SCLC, CORE, and SNCC.

1966 was a turning point. In June, the coalition's leadership met for the last time to protest the shooting of James Meredith in Memphis, who had set out on a solo march from Tennessee to the Mississippi State Capital in Jackson to

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<sup>22</sup>Harvard Sitkoff, The Struggle for Black Equality, 1954-1980, (New York: Hill and Wang, 1981), 207.

encourage blacks to register to vote. As the nation's civil rights leaders converged in Memphis and proceeded to finish the march, internal divisions and conflicting goals surfaced. Martin Luther King's leadership was openly challenged by the newer and more militant leaders of CORE and SNCC. On June 16, 1966, SNCC President Stokely Carmichael abandoned the more moderate slogan of "freedom now," by angrily calling for "black power." This new slogan came to symbolize the abandonment of King's strategy of non-violence, as well as the movement's commitment to racial integration. When the march concluded in Jackson a few days later, the civil rights coalition was all but dissolved. Within a few months all white supporters were purged from SNCC's ranks.

The Black Power movement contained both political and cultural forms. The more positive and arguably longer-lasting aspects included an increasing cultural awareness and self re-evaluation by American blacks. In the first important study tracing the legacy of Black Power, William L. Van Deburg focuses on these more positive cultural forms:

The Black Power movement was not exclusively cultural, but it was essentially cultural...the movement raised both individual and group expectations, made black folk feel good about themselves, and steered them away from 'cultural homicide'...Afro-American culture was the central, irreducible, irreplaceable element in the ongoing struggle for psychological liberation and empowerment.<sup>23</sup>

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<sup>23</sup>William L. Van Deburg, New Day in Babylon: The Black Power Movement and American Culture, 1965-1975, (Chicago: University of Chicago Press, 1992), 9, 304.

However, popular memory focuses almost exclusively on the violent, separatist aspects of the movement: the words of Malcolm X and the occasionally-violent actions of the Black Panthers.

Black Power had its destructive side. Several aspects of the movement made significant contributions to the heightened social disorder of the late sixties. Most important, of course, were the urban riots. In addition, many young blacks, following the lead of "new" leaders such as Stokely Carmichael, and influenced by writers such as Malcolm X, Marcus Garvey, and Frantz Fanon, adopted highly militant positions, calling for complete separation from white society. A fringe minority of black nationalists, most notably the Black Panthers, advocated "revolution" against what they viewed as white imperialist domination of black "colonies," the urban ghettos. The negativity which characterized the black nationalist message was rooted in the disillusionment many young members of SNCC and CORE experienced during the 1960-1965 period.

More than any other group, the Black Panthers came to symbolize violent black militancy in America during the sixties. Originating in Oakland California during the fall of 1966 under the leadership of Louisiana's Huey Newton and Texas' Bobby Seale, two former students at Merritt College in Oakland, the group took the title "Black Panthers for Self

Defense."<sup>24</sup> Borrowing their ideas directly from Malcolm X, the fledgling organization adopted a "Ten Point Program," emphasizing such things as full employment for blacks, an end to white police brutality in black neighborhoods, and a United Nations-sponsored plebiscite to address the issue of whether black "colonies" (ghettos) should remain a part of the United States, or declare their sovereign independence. Taking advantage of a California State law allowing public display of non-concealed weapons, the early Panthers patrolled the streets of Oakland, keeping a watchful eye on the activities of local police. If a black person was stopped or questioned, the Panthers would assist the person by citing appropriate state laws for the edification of law officers.

The breakthrough year for the Black Panthers was 1967. On May 2 they made national headlines when Huey Newton sent a small, fully-armed contingent of Panthers into the California State Capital in Sacramento to protest the Legislature's consideration of a ban on carrying guns in public. The event that made them a household name was the October 28, 1967, shoot-out with Oakland police, which left one officer dead and another wounded. Also wounded in the

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<sup>24</sup>The theory behind the black panther symbol was that the cat rarely attacks unless it is cornered -- indicating the strictly defensive character of the early organization. The symbol was first used by an all-volunteer, all-black group formed in Lowndes County, Alabama, 1965-66, as part of SNCC's voter registration campaign.

gun battle was Huey Newton, who by now had become a national hero in the eyes of hundreds of black militants across the country. The image of young black militants wearing military-style clothing and openly carrying guns -- occurring simultaneously with the worst urban rioting of the century -- had the effect of galvanizing many of the nation's militants who, like Stokely Carmichael, were increasingly frustrated with the "gradualism" of the civil rights movement up to that time. After the Oakland shoot-out, the Panthers were swamped with calls and letters from young blacks across the nation, requesting information on how they could start their own local chapters. The incident also created the decade's first imprisoned revolutionary martyr, as Huey Newton was charged with murdering the slain Oakland policeman. During Newton's three-year imprisonment, the leadership of the party was in the capable hands of Eldridge Cleaver, an ex-convict who, at age thirty-two in 1967, had spent half of his life in jail. Cleaver is credited with saving the party, by utilizing a multifaceted strategy of (1) making Huey a hero for "the cause"; (2) concentrating the party's efforts on community organizing and assisting poor blacks; and (3) seeking alliances with other organizations, such as SNCC.<sup>25</sup>

One factor contributing to the Black Panthers' reputation as the "vanguard" of the Black Power movement was

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<sup>25</sup>The Black Panthers' community programs included free breakfasts for children, "liberation schools" that taught racial pride, and legal assistance centers.

the dissolution of SNCC. No longer the focus of young blacks' involvement in the struggle, the organization lacked a coherent strategy after the Meredith march, and its leadership was torn by dissention. Succeeding Carmichael as Chairman in 1967, Louisiana's H. Rap Brown called for open rebellion. One of his inflammatory speeches occurred at a black rally in Cambridge, Maryland, during the summer of 1967, as Detroit burned:

You'd better get you some guns. The Man's moving to kill you. The only thing the honky respects is force....I mean, don't be trying to love the honkey to death. Shoot him to death. Shoot him to death, brother, cause that's what he's out to do to you. Like I said in the beginning, if this town don't come around, this town should be burned down.<sup>26</sup>

By the end of 1967 the Black Panthers had chapters in dozens of cities across the nation, and Congress passed legislation making it a federal offense to cross state lines for the purpose of inciting riots (the so-called "H. Rap Brown law"). Of particular concern to J. Edgar Hoover and the intelligence community, however, was the possibility that Black Power would coalesce with a newer and, for the FBI, much more puzzling threat: the radicalization of white college students and former hippies.

The New Left and counterculture movements that emerged during the sixties followed very different evolutionary paths. However, they both evolved from the same raw

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<sup>26</sup>Quoted in Sitkoff, The Struggle for Black Equality, 217.

material: the so-called "Baby Boomers." Another important contributing factor to the emergence of white youth radicalism was the pervasive affluence of the era. More than ten million World War II veterans enjoyed an extraordinarily high standard of living, largely due to wartime savings and the "G.I. Bill." Geoffrey Perrett estimates that by 1950, the enormous scope of assistance offered to veterans and their families via the G.I. Bill "embraced approximately one-third of the total population" and brought about "the only basic redistribution of national income in American history."<sup>27</sup> Yet despite this affluence, many children growing up in fifties America came to differ with their parents as to the meaning of affluence. While their parents viewed the world around them from the perspective of the Great Depression and World War II -- both of which taught the value of sacrifice -- the children lacked such experiences. For a child growing up in a large suburban house with all of the creature comforts, adherence to the traditional American values of thrift and economy seemed ridiculous. The issue of the Cold War also widened the generational split. While their parents saw the "Bomb" as a weapon of salvation that brought victory against the Japanese, fifties children grew

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<sup>27</sup>Geoffrey Perrett, Days of Sadness, Years of Triumph: The American People 1939-1945, (Madison, WS: University of Wisconsin Press, 1985), 341, 11.

up with civil defense drills at school.<sup>28</sup> Lacking the experience that came from fighting an obvious foe, fifties children also struggled with the meaning of "Communist subversion" at home and abroad.

Growing up in fifties America, future members of the New Left and counterculture also experienced a unique form of alienation that David Riesman (The Lonely Crowd, 1950), William Whyte (The Organizational Man, 1956), and John Kenneth Galbraith (The Affluent Society, 1958) analyzed. Some of the themes they discussed included: (1) how "mass society" was replacing the social cement of community and tradition; (2) the homogenizing effect of society's overwhelming pressure to conform, which robbed people of their individuality; (3) how "progress" was overrated and often self-defeating (witness the continuation of poverty, DDT, smog, and the "throw-away plastic society"); and (4) how the dizzying pace of change rendered a parent's lifetime experiences utterly useless as a guide for dealing with the present. This may have meant little to teenagers: they nonetheless garnered plenty of alienation from television, James Dean, Mad Magazine, Elvis Presley, apocalyptic movies, and "Negro" rock-n-roll stations their parents knew nothing about. Future White Panther leader John Sinclair was a fifties youngster, growing up in working-class Davison,

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<sup>28</sup>Paul Boyer, By the Bomb's Early Light: American Thought and Culture at the Dawn of the Atomic Age, (New York: Pantheon Books, 1985), 175-77.

Michigan, not far from the huge General Motors plant in Flint, where his father assembled Buicks for forty-three years. As he would later recall, his early years were filled with conformity and fish every Friday, until:

I just turned the radio dial one day sitting in my little bedroom....and BOOM! There it was--the music that would turn my whole life around and shoot all of us into a totally new future...These dudes opened their mouths to sing and a whole new race of mutants leaped out dancing and screaming to the future, driving fast cars and drinking beer and bouncing around half-naked in the back seats, getting ready to march though the 60's...What was even stranger was that it was an outlaw world from the beginning...We were outlaws from the very start...These black singers....whispering their super-sensual maniac drivel into the ears and orifices of the daughters of Amerika, turning its sons into lust-crazed madmen and fools, breaking down generations and generations of self-denial and completely destroying the sanctity of the Euro-American home forever.<sup>29</sup>

The first sign of the youth rebellion that would eventually become the New Left occurred in 1960, when a group of college students from the University of California at Berkeley staged a demonstration on the steps of San Francisco's City Hall to protest the House Un-American Activities Committee (HUAC) hearings, and encountered police fire-hoses and clubs for their trouble. The tactics they employed -- the "sit-in" -- they borrowed from the civil rights movement. As Todd Gitlin explains, the country's universities and other "zones of negativity" were galvanized into action by the young black activists of SNCC and CORE,

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<sup>29</sup>John Sinclair, Guitar Army: Street Writings/Prison Writings, (New York: Douglas Books, 1972), 8-12.

who were literally putting their bodies on the line for social change.<sup>30</sup> As the sixties progressed, the phenomenon of white militants idolizing blacks in the Movement, always emulating but never quite catching up, would become one of the decade's important givens.

The fact that college campuses spawned the New Left was highly significant: the children of affluence possessed both the wealth and the leisure time to question the principles of the larger society. Beginning in the late-forties and continuing through the sixties, America's higher education system expanded at a previously unheard of pace, first to accommodate the enormous numbers of veterans pursuing degrees via the G.I. Bill, and later to house their Baby Boom offspring. By 1970, approximately 40 percent of all 17-21 year-olds were enrolled. Not so ironically, the "institutionalization" of higher education, as well as the "feel like a number" alienation it fostered, provided one of the first significant issues of contention for the New left.

The Students for a Democratic Society (SDS), organized during the early sixties at the University of Michigan in Ann Arbor by students Tom Hayden and Al Haber, was the organization that eventually came to define the New Left. The principles of the early SDS were concerned with what they viewed as contradictions between American principles and the actual practice of government. As an antidote to apathy and

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<sup>30</sup>Gitlin, The Sixties, 83.

alienation with modern society, SDS advocated "participatory democracy," whereby students would study controversial issues such as civil rights and atomic weapons, debate them in the open, and voice their opinions via actions, such as picketing and sit-ins. In Gitlin's words: "A 'movement' didn't simply demand, it did."<sup>31</sup> The hallmark treatise of the early SDS was the 1962 Port Huron Statement, written primarily by Tom Hayden:

We are a people of this generation, bred in at least modest comfort, housed now in universities, looking uncomfortably to the world we inherit...As we grew...our comfort was penetrated by events too troubling to dismiss. First...the Southern struggle against racial bigotry, compelled most of us from silence to activism. Second, the enclosing fact of the Cold War, symbolized by the presence of the Bomb, brought awareness that we...might die at any time.<sup>32</sup>

Hayden's analysis then discussed issues of poverty, peace, and the institutionalized "military industrial complex," and advocated that university students lead the debate over these issues, because the university "is the central institution for organizing, evaluating, and transmitting knowledge."<sup>33</sup>

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<sup>31</sup>Gitlin, The Sixties, 84. Gitlin joined SDS in 1962, having been involved in a Harvard peace organization called "Tocsin" during the previous two years. Moving to Ann Arbor in the fall of 1962, he was "elected" President of SDS for the 1963-64 year.

<sup>32</sup>Students for a Democratic Society, The Port Huron Statement, (New York: Students for a Democratic Society, 1964), 3. Quotations taken from the second printing of December, 1964, which was the first published edition; the previous edition was mimeographed.

<sup>33</sup>Ibid., 61.

He concluded with the statement: "If we appear to seek the unattainable, as it has been said, then let it be known that we do so to avoid the unimaginable."<sup>34</sup> Initially focused primarily on college campuses, SDS soon sent cadres into urban ghettos, to live among and assist the poor, and the South, to help SNCC and CORE with voter registration. Expansion was gradual until Vietnam gave thousands of previously-apatetic students adequate motivation to get involved.

Inherent in the title of "New Left" was a recognition that they were embarking on something totally novel: a new left. Locating a unique, unifying ideology that was divorced from the old left was a constant challenge. One way in which the New Left attempted to define itself was its general opposition to many of the policies of the Johnson Administration, reflecting the student movement's cynicism as to liberal beliefs. These differences can be summarized as follows: (1) while the liberals believed in politics as a means to solve social problems and resolve conflicts, the New Left saw politics as a conduit for creating a moral society; (2) while liberals had faith in the electoral process, the New Left was moving beyond mere elections to direct action; and (3) while post-war liberalism was staunchly anti-communist, the New Left was attempting to detach itself from the Cold War. Ward and June Cleaver of Leave it to Beaver

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<sup>34</sup>Ibid., 63.

may have been satisfied expressing their political beliefs in the ballot box, but the New Left "wanted decisions made by publics, in public, not just announced there."<sup>35</sup> What bothered members of the New Left the most about liberals was their willingness to compromise ("politics is the art of the possible") and their ability to detach themselves from moral issues such as civil rights. Carl Oglesby, SDS's 1965-66 President, termed this "managerial liberalism." Later writers such as Allen Matusow have termed it "corporate liberalism."<sup>36</sup> Both mean the same thing: an optimistic, "technocratic faith" that the world's problems can be solved -- gradually -- if the right minds are put to the task. Other features of liberalism that the New Left criticized included the liberals' support for big business, as well as their inability to see Third World nationalist movements as anything more than Soviet-inspired insurrections.

The New Left also possessed a self-fulfilling spirit, reflecting the youthfulness of its members. Marching in a protest or participating in a "teach-in" had the dual benefits of raising public awareness of issues, and making the participant feel good. Over time, as students enjoyed shared experiences of collective "actions," some believed that they were creating a totally unique "movement culture,"

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<sup>35</sup>Gitlin, The Sixties, 134.

<sup>36</sup>Matusow, The Unraveling of America, 32.

that was defined more by actions than words.<sup>37</sup> Unquestionably, the New Left's addiction to the feelings associated with "putting your body on the line" for social change was borrowed directly from the civil rights movement. Beginning in 1963, increasing numbers of white college students spent their summers in the South, assisting SNCC and CORE with voter registration of disenfranchised blacks. It was through these face-to-face encounters that many of the New Left's future leaders received their education in civil disobedience.

The desire to be expressive was something the New Left also had in common with the counterculture, the cultural radicals with whom they increasingly interacted as the issues of civil rights and Vietnam brought more and more young people into the streets by mid-decade. The counterculture remains something of an enigma -- both in the collective memories of contemporaries and in the grossly-distorted images portrayed by the popular media.<sup>38</sup> However, there is

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<sup>37</sup>The issue of a sixties "movement culture" will be addressed in later chapters. For a fascinating discussion of an earlier "movement culture," see Lawrence Goodwyn, The Populist Movement, (New York: Oxford University Press, 1978), vii - xxiii. Goodwyn argues that the Populist Movement was the United States' last genuine attempt to create a "movement culture"; that the struggle between a "cooperationist" society and a competitive one was fought only once -- and the competitive one emerged victorious. Many of Goodwyn's ideas also help us understand the 1960s.

<sup>38</sup>Any so-called "scholarly" analysis of the counterculture must begin with the acknowledgement that the historiography of this phenomenon is all but non-existent --  
(continued...)

general agreement over its origins: the black hipsters of the thirties and forties, and their white emulators of the fifties. In several cities across America, but especially Harlem, blacks created a totally unique cultural form, characterized by avant garde jazz, zoot suits, be-bop, and marijuana. In time, alienated whites, many of them intellectuals, emulated the black lifestyles. The best-known beatniks were Allen Ginsberg, William Burroughs, and Jack Kerouac, a talented group that produced poetry and fiction expressing profound alienation from fifties America. Implicit in the beat philosophy was a complete rejection of mass consumption and mass acquiescence, an absolute idolization of the black struggle, and a longing to strike out on the road to self-discovery. With the introduction of LSD (legal until 1966) into the counterculture scene by Timothy Leary and Ken Kesey in the early sixties, the path to self-discovery did not even require owning a car or leaving

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<sup>38</sup>(...continued)

and that which does exist is woefully inadequate. Most studies dismiss counterculture members as apathetic drug freaks who were incapable of sustained political argument. For example, both Matusow and Gitlin, writing from intellectual leftist perspectives, criticize the non-serious nature of the counterculture, which they believe damaged the New Left's credibility. Less radical writers have been even less kind. Charles DeBenedetti's An American Ordeal: The Antiwar Movement of the Vietnam Era, (Syracuse, NY: Syracuse University Press, 1990) goes so far as to blame the counterculture for damaging the credibility of the entire anti-war movement (p. 78). This is puzzling, particularly in light of the long-term influence the counterculture had on American society, including changes in sexual mores, activist concern for the environment and healthy eating, and the institutionalization of "hip" popular culture.

home. In short, LSD helped bridge the gap between beat and hippie.

Other technological advances made possible the enormous expansion of the counterculture. For example, the introduction of the 45 rpm record allowed for the inexpensive purchase of the latest rock and folk music. Bob Dylan was the hands-down favorite: an ultra-alienated Midwesterner with a whiny voice and songs that inspired a generation. At the Newport Jazz Festival in 1965 -- the first gigantic gathering of Movement people of the era -- Dylan took advantage of another technological advance, the electric guitar and amplification. By this time the innovative Mersey Beat sound of the Beatles had also become an enormous influence on the American youth culture. In 1966 the group discovered LSD, and began releasing records so innovative that they anticipated changes in the Movement by several years. In less than two years their lyrics went from "I want to hold to your hand" to "Turn off your mind, relax, and float down stream."<sup>39</sup> The Movement struggled to keep up: by 1967 the LSD-inspired "San Francisco Sound," led by the Grateful Dead, described the benefits of "tripping" on acid. Tens of thousands of white, middle, and working-class youth dropped acid, dropped out, and began gathering in small pockets of "liberated" communities across the nation. The lifestyle

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<sup>39</sup>The latter is "Tomorrow Never Knows" from the Beatles' 1966 "Revolver" album; a John Lennon composition.

they adopted commonly involved voluntary poverty, "underground" newspapers, egalitarian communal living, decentralized "community schools" for their children, and free clinics (that obviously complemented "free sex"). The White Panthers evolved out of one such community near Detroit's Wayne State University: "Trans-Love Energies."

During the so-called "summer of love" in 1967, San Francisco's Haight Ashbury district became, for the mainstream press, a focal point for the new cultural radicals: what one reporter called "hippies."<sup>40</sup> In fact, by mid-1967 this phase of the counterculture movement was already over, due to media overkill and police repression. As Matusow explains, peace and love were soon replaced by "the politics of rage," as the counterculture "became willing cannon fodder for the increasingly violent demonstrations of the New Left."<sup>41</sup>

The relationship between the New Left and the counterculture was complex. A second wave of New Left adherents who came of age during the mid-sixties related to the counterculture in ways that the "Old New Left" of Hayden, Gitlin, and others did not. On the other hand, by 1966 a majority of New Left faithful (old and new) were at least occasional users of marijuana and enjoyed listening not only

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<sup>40</sup>Few, if any, cultural radicals referred to themselves as hippies. Yet in almost every modern-day documentary, the word is used to label the entire movement.

<sup>41</sup>Matusow, The Unraveling of America, 303.

to Dylan, but also to the numerous forms of innovative rock and soul sounds carried into the SDS offices by new recruits. Thus, the New Left and counterculture influenced each other in a symbiotic, but not always harmonious, relationship. For better or worse, they marched together through the turbulence of the late sixties.

Black Power, the New Left, and the counterculture began to converge into a single "Movement" during 1967 and 1968. The increasing social disorder of this period owes much to this coalescence -- as well as to the conservative establishment's reaction to it. One of the most significant characteristics of these years was the dizzying pace of change, aptly described by Gitlin as "a cyclone in a wind tunnel."<sup>42</sup> Frustration and impatience propelled the Movement. Watching the civil rights coalition in Washington evaporate in the wake of urban riots (and in many areas turn to backlash), Black Power adherents became increasingly militant. The New Left and counterculture were obsessed with a Vietnam war that went on day after day, regardless of their protests. Contributing to the sense of frustration was the speed with which ideas, fashions, and trends came and went. For the Movement, what was "cool" and "hip" at any given moment was soon replaced. In an early 1969 article discussing the cultural influence of the Beatles, John Sinclair touched on this theme of rapid change:

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<sup>42</sup>Gitlin, The Sixties, 242.

The Beatles legitimized the dope scene for the popular media and have consequently been super-instrumental in bringing about the hugest change in a generation's consciousness in history. I mean, if you think things are the same now as before Sgt. Pepper [a Beatles record] and the all-American LSD year of 1967, and if you think the Beatles didn't do it, check out where you were at in 1966. Look in the mirror.<sup>43</sup>

The New Left responded to the changing times with ever-larger cadres of followers, as SDS chapters appeared on campuses across the nation. But expansion had its costs on the internal cohesion of the once tightly-knit organization. A policy of open admissions, combined with the rapidity of change and multiplication of "causes," brought a newer, more militant leadership, displaying "an alarming potential for mindless activism."<sup>44</sup> Gradually -- one radicalizing incident after another -- the New Left and counterculture moved from protest (staging a sit-in or publicly burning draft cards) to "resistance," (blocking access to a military induction center or seizing a university building to protest military research on campus) and finally, for some, to "revolution" (bombing police stations and other symbols of the establishment).<sup>45</sup>

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<sup>43</sup>(Ann Arbor Michigan) Argus, Vol. 1, No. 1, January 24 - February 7, 1969, 10. Underground newspaper in possession of author.

<sup>44</sup>Matusow, The Unraveling of America, 321.

<sup>45</sup>Isolated bombings do not cause revolutions. This is as close as America got to revolution during the sixties.

A review of key incidents during the 1967-68 period that became symbols of the New Left/counterculture's increasing militancy includes: (1) a summer (1967) of the worst race riots in U.S. history, especially Newark and Detroit; (2) the "martyrdom" of Argentine revolutionary fighter Che Guevara, killed in Bolivia in October, 1967, whose life-story inspired many radical students; (3) the bi-coastal "Stop the Draft Week" events, also in October, 1967, culminating in several days of radical students "street fighting" with police in Oakland,<sup>46</sup> and, in Washington, D.C., a demonstration by the "MOBE" (National Mobilization Committee to End the War in Vietnam) at the Pentagon, which united the counterculture and the New Left; (4) several days of campus rioting at the University of Wisconsin at Madison in late October, 1967, after police attacks upon peaceful demonstrations against campus recruiting by Dow Chemical, the makers of napalm; (5) the escalation of the Vietnam War, which reached a climax as U.S. troop levels peaked at over half a million during the winter of 1967-68; (6) the assassinations of Martin Luther King Jr. (April 4, 1968) and presidential aspirant Robert Kennedy (June 6, 1968), which symbolized a national rejection of non-violence and a heightening of social divisions; (7)

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<sup>46</sup>For Gitlin, who observed and took part in these street actions designed to delay the induction of new recruits into Oakland's military processing center, the fighting was "a watershed" for the movement. Matusow concurs, calling the street actions on October 20, 1967 "the Bastille Day of the New Left." See Gitlin, The Sixties, 252, and Matusow, The Unraveling of America, 328.

the Columbia University shut-down in late April, 1968, led by SDS leader Mark Rudd, to protest the university's disregard for the local black communities and military research on campus; (8) the coalition between the Black Power and white radical movements, forged by a short-lived presidential bid by Black Panther Eldridge Cleaver on the California "Peace and Freedom Party," and (9) a week of battles between police and protestors in Chicago during the Democratic National Convention in late August, 1968, which further radicalized the New left.

During this period SDS leaders and followers struggled with a growing feeling of frustration, stemming from several sources. Most importantly, there was a collective sense that, as black people were seizing control of their destinies -- via urban riots, the Black Panthers' facing down "the Man," and blacks everywhere expressing their African cultural heritage -- the previous tactics of the New Left were proving impotent. An additional concern was the lack of a central ideology, at a time when SDS membership was at an all-time high. A New Left that had prided itself on doing rather than talking, was suddenly relegated to wearing "Free Huey" buttons and watching in envy as black nationalists upped the ante with police and the conservative establishment. The question that was increasingly debated in New Left circles was, "what does whitey do" when Vietnam comes home and real

armed resistance to the establishment begins? Few had coherent answers.

The New Left's shift from protest to "resistance" was thus an attempt to overcome these feelings of powerlessness, as well as to remain relevant in a rapidly-changing Movement. When Gitlin crossed this threshold during the "street actions" against the Oakland draft induction center in October, 1967, his letters to friends spoke of an exhilaration that came from moving to the next level of "the struggle":

The white movement came into its own last week...It was not revolution, but it was insurrection in the legal sense and in the spirit...Now I take the idea of resistance damn seriously...I hear that some SNCC guys were saying after Washington [the Pentagon demonstration], OK boys, you've become men now, we're ready to talk. They're right.<sup>47</sup>

Once the path to resistance was entered upon, "revolution" did not seem far away. The actions of Mayor Richard Daley's Chicago Police during the so-called "Battle for Chicago" convinced many in the New Left that the "available channels" for dissent in America were gone, and that violence was the only message the "establishment" would listen to. Chicago was the watershed for the Movement -- and for the sixties. Here, representatives of the counterculture, led by the pseudo-organization Youth International Party (or Yippie), joined forces with the MOBE

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<sup>47</sup>Gitlin, The Sixties, 252.

and SDS to bring a "festival of life" to the Democrats' "convention of death." The demonstration had been planned as far back as the previous winter, by the newly politicized counterculture, under the non-direction of Jerry Rubin and Abbie Hoffman. The lifestyle and philosophy of Yippie were one in the same: that previously-apatetic cultural rebels should "live the revolution" by displaying their Movement lifestyles (sex in the streets, drugs, and rock music) in tandem with New Left "peace freaks" and other "politicos." Their favorite mode of expression was "guerrilla theater": disruptive and usually well-publicized street actions, whereby Movement people attacked conventional mores.<sup>48</sup>

Learning of the demonstration the following spring (1968), Mayor Daley refused the organizers permits to meet in "his" parks, and made no secret of his preparations to meet the demonstrators with force. This scared off much of the Movement, but not those, like Gitlin, who refused to allow their genuine fear of violence from depriving them of the chance to take part in so important an event -- even one where violence was quite likely. A representative sample of

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<sup>48</sup>One such "street theater" action which made Abbie Hoffman something of a legend within the movement involved the dropping of several hundred one dollar bills from the gallery of the New York Stock Exchange on the brokers below. As Abbie later described the event: "Pandemonium...Stock Brokers scrambled over the floor like worried mice, scurrying after the money. Greed had burst through the business-as-usual facade." See Abbie Hoffman, Soon to be a Major Motion Picture (New York: Perigee Books, 1980), 101.

the intensity of social disorder that Chicago represented is contained in this passage from David Farber:

At 11 P.M., Commander Lynsky formed a skirmish line of one hundred and twenty men...Most of the men were nervous and unenthusiastic...Almost all...were angry and worried about getting hurt...As the police approached, the crowd chanted over and over, 'Hell no, we won't go!' Hundreds of people screamed....'Pigs!' at the police in a kind of litany...the police kept coming...For a moment the two groups stood face-to-face...two thousand young people facing less than two hundred police...Then, suddenly, the police moved forward, some screaming, 'Get...out of here'...the skirmish formation dissolved. The police began to methodically club people, jabbing them in the back or chest...Some police beat people bloody. Some demonstrators fought back. They were beaten to the ground and then beaten some more.<sup>49</sup>

The following November, neither the New Left/counterculture nor the Black Power movements paid much attention to the election of Richard Nixon as President. By this time "establishment" politics was viewed as utterly meaningless and alien to most of the Movement -- just as Middle America came to view the radicals' increasing infatuation with violence. Many in the conservative establishment were convinced that the time was approaching when America would have to be defended from threats at home as well as abroad. Gitlin summarizes the mood as 1969 approached: "The movement emerged committed to an impossible revolution; the Right emerged armed for power and a more possible counter-revolution...no centers were going to hold,

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<sup>49</sup>David Farber, Chicago '68, (Chicago: University of Chicago Press, 1988), 181-82.

no wisdom was going to prevail."<sup>50</sup> It was as if there were two completely different versions of reality present in the nation.

### III.

The emergence of the "conservative establishment" explains Nixon's electoral majority in 1968. The most vocal and visible proponents were the so-called "forces of authority": the law enforcement community (local and state policemen, FBI agents, U.S. Attorneys, Justice Department officials, and intelligence agents), as well as conservative politicians at the local, state, and national levels. An analysis of their collective ideology, as well as their actions, will provide evidence concerning how individuals outside of the Movement influenced its development, and contributed to the worsening social disorder.

As was the case with the Movement, the conservative establishment also went through an evolutionary process during the sixties, characterized by the replacement of moderation with extremism. The internal dynamics propelling this "New Conservatism" included such things as: (1) disdain for the due process rulings of the liberal Warren Court -- widely criticized by not only law enforcement officials, but leading Republicans and Southern "Dixicrats" as well; (2)

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<sup>50</sup>Gitlin, The Sixties, 326

anger and fear of blacks, for the new assertiveness associated with Black Power, as well as urban rioting; (3) contempt for the New Left, viewed as ungrateful and spoiled pseudo-intellectuals who threw away the advantages and leisure their parents worked so hard for; (4) hatred for those in the Movement who opposed U.S. foreign policy to the point of advocating victory for the Vietcong (and other Third World nationalist revolutions); and (5) an overall disgust with the Democratic Party, which, they believed, exuded an "atmosphere of permissiveness" during the sixties by refusing to crack down on student subversives and their "pinko" professors; they also criticized the Democrats' for spending millions to "appease" lawless inner-city blacks in the "War on Poverty" which they viewed as "boondoggle."

The cornerstone of the conservative establishment's philosophy centered upon the issue of personal responsibility: briefly stated, blacks and young people must take responsibility for their actions; government should not support social programs unnecessary if people took responsibility for their own lives. Intolerance of most forms of dissent was another given: it was just plain wrong to evade the draft, burn draft cards and/or American flags, or engage in civil disobedience beyond the letter of the law.

What the conservative establishment prescribed to remedy the problems facing American society was a mixture of old and new. It emphasized traditional, "old-fashioned values," such

as hard work, respect for parents, and love of country; a favorite slogan was "America: love it or leave it." As for crime and dissent, there were regarded as one and the same, worthy of the latest surveillance techniques available, including wiretapping, hidden microphones, and the use of informers. Following the riots of 1967-68 and the violence at the Democratic National Convention in 1968, conservatives advocated fighting back with all available resources. The FBI unleashed two separate counter-intelligence (COINTELPRO) programs against the Movement, one targeting blacks and the other targeting the New Left. At the state and local levels, nearly every large city supported "special investigative" divisions or units ("Red Squads") devoted to surveillance of the Movement. Arrests (often for petty drug offenses) and harassment commonly occurred, as law enforcement officials became increasingly upset at being called "pig" and treated with contempt by political and cultural radicals.

It was common for both sides to attach differing symbolic meaning to the same events. Chicago '68 is a case in point. While the New Left emphasized unjustified police brutality ("The whole world is watching"), the conservative establishment saw evidence that student radicals sought the total destruction of the government.<sup>51</sup> Thus, the net effect of such incidents was to push both sides closer to extremism.

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<sup>51</sup>A vast majority of Americans sided with the conservative establishment, a step toward the creation of Nixon's "Silent Majority."

This much the Movement and the conservative establishment had in common. By the end of the decade a significant number of individuals on both sides came to see violence as entirely justifiable. Some -- more than will admit it today -- believed that the nation was approaching revolution.

In a revolution, almost anything is possible, and the perception of reality ceases to act as a constraining influence on the participants' imagination.<sup>52</sup>

The "revolution" was one of the most common sixties cliché words. Rare was the underground newspaper appearing after 1967 that did not carry at least one reference to it. Further confusing the matter is the fact that, for the Movement, the word had several very different meanings. Yippies, and those who followed them, were "living the revolution" simply by existing; Abbie Hoffman wrote a Movement best-seller entitled Revolution for the Hell of it. Others, such as the Black Panthers and "action factions" within SDS, were serious about their use of the word. By the same token, many in the conservative establishment believed whole-heartedly that armed insurrection was at hand. U.S. Appeals Judge Ralph Guy, the U.S. Attorney for Detroit during the late sixties, recently recalled:

Today it is easy to say that they [the police and FBI] must have been out of their minds to pursue this [warrantless wiretapping of radicals]...The anti-war movement was forming a coalition with the civil rights movement. The war made all of it seem more serious...I took it a lot more seriously

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<sup>52</sup>Soros, Underwriting Democracy, 173

once I became U.S. Attorney...I don't know if I ever thought that revolution was imminent, but they weren't college pranks either.<sup>53</sup>

Judge Guy's indecision concerning whether or not he actually believed that a revolution was near during the late sixties is a typical response among contemporaries looking back. Historians too have generally treated references to "the revolution" with great contempt. Typical of these viewpoints is Allen Matusow's The Unraveling of America, a successful survey of the period. Summing up the failure of the New Left, he condemns it for its "commitment to revolution in a nonrevolutionary situation."<sup>54</sup> Many less-scholarly works, including Todd Gitlin's The Sixties, say the same thing. Gitlin discusses the Movement's euphoria following the actions during "Stop the Draft Week" in October, 1967 as leading SDS toward "the mirage of 'the revolution'"; summing up his involvement in the New Left during the sixties, he concludes that, as the levels of militancy increased, he found himself "caught up in the collective hallucination (or was it) of 'the revolution'."<sup>55</sup> His words, like those of former U.S. Attorney Guy, indicate that: (1) he is still struggling with memories of the period, and (2) despite the cliché status accorded to "the revolution" in the years since

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<sup>53</sup>Interview with author, July 17, 1992, Ann Arbor, Michigan.

<sup>54</sup>Matusow, The Unraveling of America, 343.

<sup>55</sup>Gitlin, The Sixties, 286, 3.

(as well as the knowledge that no widespread armed rebellion actually occurred), he remains unconvinced that his beliefs concerning the revolution were, in fact, hallucinations.

The very fact that so many observers and participants who were on the front lines of the sixties used the word "revolution" with such frequency is significant. It indicates that some individuals were genuinely convinced that insurrection was at hand, or at least on the horizon. An excellent case in point for how otherwise reasonable people could see revolution where it did not exist is the story of Canadian journalist David Lewis Stein. An "establishment" reporter, Stein went to Chicago in 1968 to cover the Democratic National Convention, and ended up joining the Yippies. When he first encountered Rubin and Hoffman they concluded from his appearance (over thirty with short hair) that he was a police informant. By the following January he had joined the Movement, was increasingly committed to the idea of "revolution," and assumed an active role in the "street actions" protesting the inauguration of Richard Nixon in Washington, D.C. In the span of six months he progressed from a state of curious bewilderment with the Yippies to the position that street violence was "logical" and "the next....necessary step."<sup>56</sup> An historian attempting to make sense of this is faced with a dilemma. Knowing that American

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<sup>56</sup>David Lewis Stein, Living the Revolution: The Yippies in Chicago, (Indianapolis, IN: Bobbs-Merrill, 1969), 4.

society was never very close to actual armed rebellion during the sixties (at least not on a mass scale), it is easy to dismiss such references as "guerilla fantasy."<sup>57</sup> On the other hand, the frequency of such references, as well as the very real escalation of violence that occurred, culminating with Weatherman bombings, Chicago Police/FBI murders of Black Panthers, and National Guardsmen shooting unarmed protesters, warrants a closer look at the relationship between perceptions, rhetoric, and "reality" during the late sixties.<sup>58</sup>

Existing studies commonly explain the increasing militancy of the Movement, as well as the corresponding increase in reaction from the Right, as a simple matter of cause and effect: that each step in the escalation of militancy from the Movement generated a progressively harsher reaction from the conservative establishment which, in turn, created another cycle of escalation. This model is useful in several ways. First, its focus on the causal connections

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<sup>57</sup>Matusow, The Unraveling of America, 330.

<sup>58</sup>Ward Churchill and Jim Vander Wall, Agents of Repression: The FBI's Secret Wars Against the Black Panther Party and the American Indian Movement, (Boston: South End Press, 1988), 64-77. The assassinations of BPP leader Fred Hampton and associate Mark Clark occurred during a pre-dawn raid by Chicago Police at Hampton's apartment. The FBI's complicity, at minimum, involved providing (via an agent provocateur) police with a detailed diagram of Hampton's apartment, including where he slept. The court case involving the murders was settled in 1983 with a \$1.85 million settlement for the survivors and families of the deceased.

between perceptions and events is a good starting point. Second, it is useful for explaining the progression toward extremism on both sides; it makes sense that being beaten on the head by a police club might "radicalize" a student. It makes sense that a policeman spat on by long-haired demonstrators and repeatedly called a "pig" might feel continuing anger. This simplistic model, however, is insufficient for explaining the history of sixties social disorder. George Soros' "reflexive theory of history" provides an effective framework for explaining sixties social disorder.<sup>59</sup> The model's basic premises are summarized as follows: (1) there is always a divergence between thinking and reality -- called "bias" -- and therefore the participants' understanding of a given event in which they take part is "inherently imperfect"; (2) the perception-reality gap (bias), in turn, influences participants' actions, because decisions are based not on precise facts (reality), but on beliefs and expectations; (3) the resulting actions (which are based on an imperfect understanding of reality) also influence reality; thus, perception and reality are connected in a two-way "feedback loop"; (4) the extent of the divergence between perception and reality varies greatly, and is a "driving force of history,"; (5) situations can exist whereby events, either by chance or design, reinforce biases, which, in turn, further affects thinking (so

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<sup>59</sup>Soros, Underwriting Democracy, 165-74.

therefore reality); (6) if allowed to progress long enough without the intervention of a corrective mechanism, this widening of the perception-reality gap can contribute to social disorder.<sup>60</sup>

One of the principal tenets of Soros' theory is that "open societies" such as the United States possess "learning mechanisms" that prevent peoples' perception-reality gaps from widening too far: open societies are characterized by a relatively free flow of divergent ideas, which makes adherence to any one set of them (dogmatic thinking) less likely. Soros terms this "intellectual competition." In short, the participants' ability to recognize their own biases is critical to preventing instability. Lacking this ability, "closed societies" such as Stalin's Russia institutionalized a single set of dogmatic ideas -- which, for a time, were mutually-reinforcing. But only until the enormous divergence between perception and reality was exposed, via Mikhail Gorbachev's "Perestroika." The backlash against the old system, which Soros refers to as "boom/bust," was more swift and violent than anyone predicted: the former Soviet Union began a spiral into extreme social disorder that continues even now.<sup>61</sup>

Soros helps us explain how an advanced stage of instability occurred in the United States -- an open society

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<sup>60</sup>Ibid., xii, 152.

<sup>61</sup>Ibid., 169, 189.

-- during the sixties. There can be little doubt that the polarization of American society, with the Movement and the conservative establishment at polar extremes, represented a widening of the perception-reality gap for the participants of both camps. It is an error to assume that when the participants themselves claimed they believed revolution was upon them, that they were engaging in "collective hallucination." This viewpoint negates the value of beliefs that were, in fact, deeply-rooted. This simplistic view also goes a long way toward explaining why reflective persons from both sides of the sixties debate -- former U.S. Attorney Guy and former SDS President Gitlin -- continue to struggle with what they may or may not have believed at the time concerning "the revolution." When Gitlin states that the Movement's "collective euphoria" following the violence at Chicago '68 "masked a tremendous confusion about the nature of American reality, and our own impact upon it," he is only partially correct.<sup>62</sup> The Movement was losing touch with "American reality"; but in doing so it was also creating its own unique reality, just as the conservative establishment was doing.

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<sup>62</sup>Gitlin, The Sixties, 335; Matusow is even further wrong. He accuses the New Left of "totally misconceiving reality" and "lose[ing] touch with social realities," yet refuses to acknowledge that the movement had a coherent ideology of its own which could have created a world outside the mainstream. He also describes the New Left's increasing militancy after the Columbia University take-over of 1968 as the beginning of its "decline into madness." Such analysis hardly does justice to the New Left. See Matusow, The Unraveling of America, 335, 309.

These independent realities are no less valid than the larger American "reality."

As the sixties evolved, both of society's polar extremes increasingly came to see the actions of their adversaries as sinister and conspiratorial: simplistic cause and effect. The "learning mechanisms" within American society that, under normal circumstances, would have acted to correct the widening perception-reality gap failed to do so. The participants' beliefs concerning society (that social disorder was worsening) influenced their actions (increased militancy from the Movement and heightened surveillance/repression from the conservative establishment), which, in turn, further reinforced their perceptions of events, in a recursive "feedback loop." The participants lost their ability to recognize their own biases, resulting in increasing social disorder which led intelligent people on both sides of the debate to genuinely believe that armageddon was near.

How and when did the initial, irreversible perception-reality gap for both camps originate? Did both camps reach the point of no return at the same time? What healing forces and/or events effectuated a correction in the biases of the polar extremes, pulling each camp back under the influence of the corrective mechanisms ("intellectual competition") within American society? Did the conservative establishment ever truly give up on the system of American democracy to the

degree that the Movement did? After all, did they not participate in the election of Nixon, while the Movement largely ignored it? Is there a relationship between the conservative establishment's drift into dogmatic thinking and the law enforcement/intelligence community's increased willingness to "bend" or break the law to exact punishment? The answer to the latter question is found in Nixon's official and unofficial wiretapping policies, as they evolved from his first days in office -- the subject of the next chapter.

## Chapter Two

### Origins of the Mitchell Doctrine

#### I.

In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself...the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others...Ambition must be made to counteract ambition. -- James Madison, Federalist No. 51<sup>1</sup>

The history of wiretapping law and practice in the United States during the twentieth century has been accurately described as "torturous" and "intolerable."<sup>2</sup> The Mitchell Doctrine evolved out of our constitutional system of "checks and balances." It was a constitutional challenge: Nixon, in the Executive Branch, requested that the Judicial Branch (the Supreme Court) recognize an "inherent power" to

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<sup>1</sup>Clinton Rossiter, The Federalist Papers, (New York: New American Library, 1961), 321-22.

<sup>2</sup>President's Commission on Law Enforcement and Administration of Justice, "The Challenge of Crime in a Free Society," 1967, page 203, quoted in Standards Relating to Electronic Surveillance, Recommended by the Advisory Committee on the Police Function, (New York: American Bar Association Project on Minimum Standards for Criminal Justice, 1968), 13. (Hereafter "ABA Standards.")

bypass the Fourth Amendment's warrant requirements concerning "national security" surveillance of U.S. citizens. The Mitchell Doctrine was an Executive encroachment into the "neutral zone" separating the branches of government, which, as Louis Fisher claims, passed beyond a "threshold of common sense and prudence," triggering a revolt in the Judiciary.<sup>3</sup> Thus, the Keith decision can correctly be viewed as one of the first of a series of Supreme Court "corrective actions" in response to the Nixon Administration's assertions of expanded constitutional powers, of which 1974's U.S. v. Nixon is the most important.

The historical and constitutional factors which paved the way for the Mitchell Doctrine included the emergence of an increasingly large and powerful Executive Branch, characterized by an expansion in presidential powers and responsibilities, as well as a pattern of Congressional acquiescence to Executive encroachments, particularly in the areas of foreign affairs and "internal security." Supreme Court indecisiveness over the issue of wiretapping and its relationship with the Fourth Amendment was a secondary concern.

Recent historical scholarship, however, has uncovered a number of previously-unknown facts which, when studied in

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<sup>3</sup>Fisher, Constitutional Conflicts Between Congress and the President, 329. The potency of the constitutional rebuke in Keith was underscored by the unanimous 8-0 decision, written by Nixon appointee Justice Lewis Powell.

conjunction with the constitutional issues, provide a more complete picture of the evolution of U.S. wiretapping law and practice, and the potential for abuse which ultimately led to the Mitchell Doctrine. First, Congressional acquiescence in wiretapping by law enforcement officials was at least partially due to institutionalized barriers of secrecy in response to World War II and the Cold War, that precluded effective Congressional oversight. As the Church Committee reported, many in the intelligence network possessed "a general attitude that intelligence needs were responsive to a higher law" -- the "higher law" being anti-communism.<sup>4</sup> Second, beginning with the Presidency of Franklin Roosevelt, a number of secret and vaguely-worded Executive Orders granted the FBI exemption from both Congressional oversight and Judicial restrictions concerning "national security" wiretapping.<sup>5</sup> In addition, every President from FDR to Nixon utilized secret FBI wiretapping for political purposes, taking full advantage of a so-called "cult of executive expertise." Third, Congressional acquiescence was closely related to the extraordinary powers wielded by FBI Director

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<sup>4</sup>U.S. Senate, Select Committee to Study Government Operations with Respect to Intelligence Activities, Intelligence Activities and the Rights of Americans, (Books I-IV), 94th Congress, 2nd Session, (Washington, D.C.: U.S. Government Printing Office, 1976) [hereafter "Church Committee, Final Report, Book II"].

<sup>5</sup>By the same token, secret and/or vague charters were granted to other intelligence agencies, such as the National Security Agency and the Central Intelligence Agency.

J. Edgar Hoover. Some of the more notorious examples of Hoover's immunity from Congressional oversight include: (1) the FBI's virtual non-compliance with the ban on wiretapping included in the Federal Communications Act of 1934; (2) Hoover's common practice of influencing "friendly" Congressmen and Senators; (3) the FBI's "neutralization" of Congressional inquiries into illegal FBI surveillance practices; and (4) the establishment of secret FBI counterintelligence (COINTELPRO) programs in the wake of the Yates v. U.S. and Jencks v. U.S. decisions in 1957, directed primarily against political dissidents.<sup>6</sup> For much of his career, Hoover operated with little or no oversight from the Attorneys General, his superiors. Furthermore, he took advantage of Cold War fears to create a huge investigative agency more concerned with wiping out real or imagined "subversives" than with law enforcement and crime prevention.

Hoover's authority over "national security" wiretapping was threatened during the 1960s, on a number of fronts. Responding to the press disclosures and subsequent public uproar over illegal FBI surveillance in the Black v. U.S. case, Attorney General Nicholas Katzenbach assumed the first real authority over FBI surveillance practices in more than twenty years.<sup>7</sup> President Johnson sent a memorandum to all federal agencies, banning wiretapping except in instances

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<sup>6</sup>Yates: 354 U.S. 298; Jencks: 353 U.S. 657.

<sup>7</sup>385 U.S. 26.

where "national security" was threatened. In addition, decades of Supreme Court indecision concerning wiretapping came to an end with the Berger v. New York and Katz v. U.S. decisions. Congress investigated alleged abuses by the FBI. Executive, Legislative, and Judicial encroachments during a period of intense social disorder created the worst crisis of Hoover's career. However, several other factors worked to Hoover's advantage. First, the social disorder that created a conservative backlash against civil rights also led many Americans to demand stronger "law and order" measures. Public fears stemming from urban riots and radical rhetoric created considerable congressional support for legalized wiretapping.

A significant turning point occurred in 1968, with the passage of the Omnibus Crime Control Act. Title III of the Act authorized law enforcement officials to conduct wiretapping under carefully proscribed procedures that were intended to comply with the Katz and Berger decisions of 1967. The Act represented the first Congressional legislation on the subject since 1934, and was the first time that Congress recognized the legality of law enforcement wiretapping. The circumstances surrounding the Congressional debates and eventual passage of Title III were related to the social atmosphere of the era. The passage of a bill, by a nearly unanimous vote, authorizing wiretapping for a wide range of offenses -- and including a vaguely-worded

authorization for warrantless "national security" surveillance, section 2511(3) -- would scarcely have been possible during a calmer moment. But social disorder alone did not produce Title III. Recently declassified FBI documents reveal that the FBI's behind-the-scenes manipulation of the legislative process was a principal reason for the bill's passage. Hoover and his subordinates assisted in the drafting and amendment of several important passages in the final bill, including section 2511(3) -- which contained the legal justification for the Mitchell Doctrine.

The debate over the value of wiretapping as a law enforcement tool formed an undercurrent to the "law and order" debates during the election of 1968, and figured prominently in the first six months of Nixon's Presidency. The opposition of President Johnson and Attorney General Clark to section 2511(3) of Title III became a focal point for candidate Nixon's campaign. Once elected, he lost no time publicly declaring that his administration would expand the use of electronic surveillance in an anti-crime campaign. The Administration's unveiling of the Mitchell Doctrine on June 13, 1969, at the "Chicago Conspiracy Trial" of New Left, counterculture, and Black Panther activists was therefore very much in keeping with Nixon's promise to "crack down" on domestic radicals. It also demonstrated the Administration's staunchly "conservative establishment," anti-non-conformist

ethos, which favored the social tranquility of the "silent majority" over the constitutional freedoms of the radical minority. The constitutional issues involved in the Mitchell Doctrine were not immediately realized by a majority of Americans. However, a series of newspaper editorials, as well as a well-publicized ACLU lawsuit against the government, forced Nixon and Mitchell to back down temporarily. Chicago Conspiracy Trial Judge Julius Hoffman delayed ruling on the Mitchell memo, and the long duration and overall complexity of the trial effectively buried the issue. Shortly after the ACLU announced its lawsuit, the Nixon Administration's public statements concerning wiretapping policy incorporated a new-found moderation, though secret memoranda circulating among the Justice Department, FBI, and its field offices told a different story. Refusing to give up on the Mitchell Doctrine, the Nixon Administration waited for a more opportune moment.

## II.

Eavesdropping on electronic communications has been practiced in the United States since the mid-nineteenth century, when Union and Confederate spies listened in on each other's telegraph messages. With the rapid introduction of telephones by the turn of the century, the potentialities for eavesdropping on public and private communications increased considerably. In the wake of World War I the U.S. Army's

secret eavesdropping unit, the "Black Chamber," established the precedent of illegally eavesdropping on trans-Atlantic cable communications.<sup>8</sup> Soon thereafter, the technology for wiretapping telephones became available to state and federal law enforcement officials.

The first Supreme Court case addressing the constitutionality of wiretapping was Olmstead v. U.S., in 1928. Federal agents argued that their wiretaps of suspected bootlegger Roy Olmstead in Seattle, Washington, were legal, and that evidence garnered from them was admissible in court, despite a state law making the interception of telephone transmissions a crime. In accordance with the police techniques of the period, the wiretap had been installed without a court order. The Supreme Court upheld Olmstead's conviction in a five-to-four decision. One of the central issues in Olmstead concerned whether eavesdropping on electronic communications by law enforcement officials constituted search and seizure under the Fourth Amendment. The majority opinion, drafted by Chief Justice William Howard Taft, stated that because no physical trespass had occurred, "The [Fourth] Amendment does not forbid what was done here." He added that the Fourth Amendment provides protection from

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<sup>8</sup>Bamford, Puzzle Palace, 4-9. The eavesdropping was in violation of the Radio Communications Act of 1912, which had been temporarily suspended for the duration of World War I; it also violated the agreements signed at the International Radio-telegraph Convention of 1912.

the seizure of tangible items, not conversations.<sup>9</sup> In a strongly-worded dissenting opinion, Justice Louis D. Brandeis argued that the seizure of conversations in a wiretap constitutes an invasion of privacy more heinous than the interception of mail; he warned of how such investigative techniques by government "breeds contempt for law" among citizens.<sup>10</sup>

The Court's divided opinion in Olmstead reflected several very different interpretations of the Fourth Amendment. Taft's opinion was in keeping with the Court's traditional interpretations concerning the Fourth Amendment: that the amendment was primarily intended to protect a citizen's home from unlawful intrusion. Because wiretapping was not deemed "search and seizure," the issues of whether the search was "reasonable," and/or subject the requirement of a court order (warrant) were not addressed. Brandeis' dissent spoke of a citizen's "right to be let alone," foreshadowing the increasing importance that Americans would place on privacy rights later in the century.

The first Congressional attention to the subject of electronic surveillance was the Federal Communications Act of 1934, which provided that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect

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<sup>9</sup>277 U.S. 438, 48 S. Ct. 564, 72 L. Ed. 944, page 464.

<sup>10</sup>Ibid., 475. Quoted in CRS, page 1068, note 2.

or meaning of such intercepted communications to any person."<sup>11</sup> The language of the legislation indicated that Congress may have been responding to a passage in Justice Taft's opinion in Olmstead: "Congress may...protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in Federal criminal trials, by direct legislation."<sup>12</sup> Three years later, the Supreme Court responded in kind, with Nardone v. U.S., ruling that evidence obtained via wiretapping without the consent of the sender was inadmissible in Federal Court. A second Nardone decision was handed down in 1939, stating that under section 605 of the Federal Communications Act, evidence was barred from federal trials not only if obtained directly via wiretapping, but also through the use of leads obtained in the course of the surveillance -- the so-called "fruit of a poisoned tree."<sup>13</sup> As Edith Lapidus points out, the Nardone decisions did not overturn Olmstead; rather, they "began the slow process of eroding the principle laid down in that case which encouraged wiretapping by placing it outside the restrictions of the Fourth Amendment."<sup>14</sup> However, not until the Katz decision of 1967 would the Court overturn Olmstead.

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<sup>11</sup>47 U.S.C. sec. 605.

<sup>12</sup>Quoted in Charns, Cloak and Gavel, 21.

<sup>13</sup>302 U.S. 379, 58 S. Ct. 275, 82 L. Ed. 314 (1937); 308 U.S. 388, 60 S. Ct. 266, 84 L. Ed. 307 (1939).

<sup>14</sup>Lapidus, Eavesdropping, 17.

During the intervening period a confused state of affairs existed with respect to wiretapping law and practice: the practices of the Executive Branch were in direct contradiction to the statutes of the Legislative Branch and rulings of the Judicial Branch.

By the time of the first Nardone decision, J. Edgar Hoover had held the office of Director of the Federal Bureau of Investigation for thirteen years. Under his leadership, a pattern of FBI selective adherence to laws concerning surveillance of U.S. citizens had been firmly established. Before 1931, the FBI had taken the official position that wiretapping "will not be tolerated by the Bureau," while secretly condoning it, particularly in prohibition cases.<sup>15</sup> Throughout the 1930s, the policies of two Attorney Generals allowed the FBI to continued limited use of wiretapping. The response of the nation's top law enforcement officials to the first Nardone decision was indicative of their selective adherence to laws they did not agree with. Focusing on the precise wording of the Federal Communications Act -- specifically the passage prohibiting the interception and dissemination of electronic surveillance interceptions -- they decided the ruling did not apply to the FBI, because federal agents did not disseminate information outside of the government. Eleven days after the Nardone decision, Hoover informed all "Special Agents In Charge" in the field offices

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<sup>15</sup>Quoted in Charns, Cloak and Gavel, 20.

that Bureau policy would remain unaffected by the decision. The second Nardone decision brought a similar response.<sup>16</sup>

An additional dispensation which the FBI utilized to justify and expand its wiretapping policies owed its existence to concern about possible subversives and sabotage. On May 21, 1940, President Franklin Roosevelt issued, via a secret memorandum, the first "national security" authorization for warrantless wiretapping of U.S. citizens. Interpreting the Nardone decisions expansively, he asserted that the Supreme Court did not intend the decisions "to apply to grave matters involving the defense of the nation." Accordingly, he authorized the Justice Department and FBI to initiate "counterintelligence investigations" utilizing electronic surveillance. The memorandum further stipulated that the Attorney General's approval was required for each installation, and requested that the technique be limited as much as possible to "aliens."<sup>17</sup>

The long-term constitutional crisis resulting from Roosevelt's 1940 memorandum was also significant. What began as a limited granting of authority eventually expanded to such a degree that by 1947 Hoover's FBI possessed virtually unlimited authority to wiretap U.S. citizens. The original

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<sup>16</sup>Ibid., 23. See also Athan Theoharis, ed., From the Secret Files of J. Edgar Hoover, (Chicago: Ivan R. Dee, 1991), 131-33.

<sup>17</sup>Quoted in Athan Theoharis, "FBI Wiretapping: A Case Study of Bureaucratic Autonomy," Political Science Quarterly, vol. 107, no. 1, (1992): 104-5.

Roosevelt memorandum called for Attorney General Robert Jackson's personal authorization and subsequent supervision of wiretapping practices, in accordance with the Justice Department's chain of command. Yet, as Athan Theoharis points out, Jackson "willingly ceded considerable latitude to his subordinate Hoover, fully expecting the FBI director to act as his and the president's servant." Within a week of Roosevelt's May 21 memorandum, Jackson and Hoover came to a mutual agreement that the FBI Director, and no one else, would keep all records of electronic surveillance, so as to minimize the risk of public exposure. "In effect," Theoharis adds, "Jackson's decision created a situation ripe both for political use and bureaucratic independence...[which] effectively negated the intended restrictions of Roosevelt's directive."<sup>18</sup>

Finally, Hoover's secret authority to wiretap Americans at will was further increased by President Truman in July, 1946, after Attorney General Tom Clark sent an edited version of Roosevelt's 1940 memorandum to the new President and requested a renewal of authority.<sup>19</sup> The Truman authorization expanded the range and scope of potential crimes subject to the FBI's warrantless electronic

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<sup>18</sup>Ibid., 105.

<sup>19</sup>Clark's July 17, 1946 letter to Truman reproduced most of Roosevelt's 1940 wiretapping authorization, but omitted FDR's request that such surveillance be limited, as much as possible, to "aliens."

surveillance. Removing references to "sabotage" and "fifth column activities," which would have conveyed the special wartime character of the Roosevelt memorandum, Clark acquired Truman's authority to utilize wiretapping against anyone suspected of "subversive activities," the definition of which he did not provide.<sup>20</sup> As Alexander Charns states, "Oversight was virtually nonexistent, and Hoover was the attorney general in charge of wiretapping."<sup>21</sup>

The vast expansion of Hoover's investigative authority owed a great deal to Cold War American society: specifically the nation's overwhelming concern with both domestic subversion, the "Red Scare," and the containment of communism abroad. For the first time in U.S. history the military-industrial complex was not dismantled immediately following a major war. At home, the enormous intelligence network created during the conflict was further expanded, for the purpose of rooting out Communists and those sympathetic with their cause.<sup>22</sup> The FBI underwent a major expansion, the

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<sup>20</sup>Athan Theoharis, Spying on Americans: Political Surveillance from Hoover to the Huston Plan, (Philadelphia: Temple University Press, 1978), 99-100.

<sup>21</sup>Charns, Cloak and Gavel, 23.

<sup>22</sup>Both the Central Intelligence Agency (CIA) and National Security Agency (NSA) were created in 1947. Although their secret charters authorized them to focus their investigations abroad (or in the NSA's case, to limit eavesdropping to international communications), they frequently engaged in surveillance of U.S. citizens within the Continental United States. See Church Report, Book II, 102-4.

number of agents growing from 4,886 in 1944 to 7,029 in 1952.<sup>23</sup>

The all-encompassing fears of the Cold War era further increased the hesitancy of Congress and the Supreme Court to initiate oversight of the Executive in foreign affairs and "national security" areas. A "cult of executive expertise" had been recognized by the Supreme Court as early as 1936, in the landmark U.S. v. Curtiss-Wright Corp. case, in which Justice George Sutherland stated that in foreign affairs, a President should be allowed "a degree of discretion and freedom from statutory restrictions which would not be admissible were domestic affairs alone involved."<sup>24</sup> Although the decision was clearly limited to foreign affairs, it was later cited by presidents attempting to establish the concept of "inherent power" in domestic "national security" areas as well.<sup>25</sup> Congressional acquiescence was reflected in several ways, from allowing President Truman to commit large numbers of U.S. troops in Korea in 1950 without their prior authorization, to its failure to establish precise standards governing domestic intelligence gathering.<sup>26</sup>

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<sup>23</sup>Theoharis, "FBI Wiretapping," 101.

<sup>24</sup>299 U.S. 304.

<sup>25</sup>Fisher, Constitutional Conflicts, 108. See also Philip B. Kurland, Watergate and the Constitution, 172-74.

<sup>26</sup>Church Committee, Book II, 28-30, 277-79. The Committee established that the intelligence agencies affectively concealed the full scope of their illegal domestic surveillance from Congress, beginning in 1939.

Louis Fisher argues that the Founding Fathers neither anticipated nor intended the Legislative Branch to cede so much power to the Executive in the areas of national security and foreign affairs.<sup>27</sup> Nor could the Executive Branch resist wiretapping political enemies. Both Roosevelt and Truman secretly requested FBI wiretaps of their political adversaries, setting another dangerous precedent.

What were the constitutional implications for Executive oversight of the FBI?<sup>28</sup> Armed with vaguely-worded directives authorizing sweeping powers to wiretap, and soon able to blackmail Presidents, Hoover consolidated his position within the Executive Branch to such a degree that by 1947 he was virtually untouchable. How he utilized this power during the next quarter-century will surely remain a subject of much historical debate and partisan commentary for years to come. However, the overwhelming weight of available evidence, including a number of recently-declassified FBI documents, supports Frank Donner's conclusion that Hoover's actions helped institute "the surveillance of dissent....[as]

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<sup>26</sup>(...continued)

domestic surveillance from Congress, the FBI, beginning in 1939, provided the House Appropriations Committee with a limited amount of information concerning these activities, which the Church Committee believed should have influenced Congress to exercise greater oversight.

<sup>27</sup>Fisher, Constitutional Conflicts, 220, 330.

<sup>28</sup>Theoharis, "FBI Wiretapping," 107-115.

an institutional pillar of our political order."<sup>29</sup> Having studied the FBI Director's life for many years, Athan Theoharis states that Hoover "appears to have been a fearful and compulsive maverick...[who] exhibited an obsession with power...[and] identified political radicalism with filth and licentiousness, neither of which ever failed to arouse in him almost hysterical loathing."<sup>30</sup> Under Hoover's direction, the FBI expanded its surveillance and counterintelligence actions against suspected "subversives," most of whom were guilty of little more than ideological non-conformity. Warrantless wiretapping was only one of a host of official and unofficial Bureau techniques against suspected radicals, including breaking and entering ("black bag jobs"), bugging, and using informers as agent provocateurs. Because a majority of Hoover's "enemies" were political, he relied on the Smith Act of 1940, which made advocacy of violent overthrow of the U.S. Government a federal offense. The FBI's use of the Smith Act represented an additional example of how extreme "national security" measures passed during the crisis atmosphere of World War II were later utilized during the Cold War to stifle political dissent.

Hoover faced the first significant challenge to his unlimited wiretapping power during the two trials of Justice Department employee Judith Coplon, who was accused of spying

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<sup>29</sup>Donner, Age of Surveillance, xviii.

<sup>30</sup>Theoharis and Cox, The Boss, 16-17.

for the Soviet Union. Information revealed by Justice Department and FBI officials during the trials brought to light the existence of warrantless FBI wiretaps of Ms. Coplon, both prior to and after the original indictment was handed down. Publicity surrounding the case resulted in the first sustained public debate over the potential benefits and drawbacks of wiretapping as a law enforcement tool. The National Lawyers Guild and the Washington Post led the opposition to FBI wiretapping practices, while Hoover and the Justice Department issued press statements attempting to defuse the crisis. Not surprisingly, Hoover charged the Guild with attempting to subvert the internal security. The Justice Department also released the text of President Roosevelt's 1940 wiretapping memorandum; Truman's 1946 renewal letter was kept secret.<sup>31</sup>

Responding to the public debate over wiretapping, Congress began several hearings on the subject. Attempting to take advantage of the situation, the FBI sponsored a bill by Representative Emmanuel Celler that would allow the introduction of information garnered via wiretaps in court, in instances where the Attorney General had previously approved their installation. Other bills were more restrictive toward FBI practices. The one of most concern to the FBI proposed authorizing U.S. District Court Judges to

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<sup>31</sup>Charns, Cloak and Gavel, 32-33; Theoharis, Spying on Americans, 100-105.

approve "technical surveillance" via court orders, or "warrants." Hoover and his assistants lobbied vigorously against the bill. An FBI memorandum distributed throughout Congress contained derogatory information on eight federal judges, and argued that "no one Federal judge possesses sufficient information on the nation's security upon which he can base a decision."<sup>32</sup> The FBI's involvement in the legislative process between 1951 and 1954 effectively blocked all potential wiretapping bills, including one requiring judicial warrants that had passed in the House of Representatives. These illegal actions prevented Congressional oversight of federal law enforcement and preserved Hoover's unchallenged authority. Hoover's power to initiate microphone surveillance of U.S. citizens was further expanded in 1954, via a memorandum from Attorney General Herbert Brownell.<sup>33</sup>

The fact that Congress gave serious consideration to empowering federal judges to oversee FBI wiretapping reflected a shift in constitutional thought concerning the relationship between electronic surveillance and the Fourth Amendment since the Olmstead decision of 1928. Central to

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<sup>32</sup>Quoted in Charns, Cloak and Gavel, 33. Twenty years later, the Justice Department argued essentially the same point in their Keith briefs.

<sup>33</sup>Ibid., 34. "The effect of Brownell's sweeping authorization...was that the highest ranking federal law enforcement official gave Hoover carte blanche to burglarize and bug."

this shift was a change in the conception of Fourth Amendment warrants. The Amendment contains two clauses, the first stating that no unreasonable searches and seizures shall occur against the peoples' "persons, houses, papers and effects"; the second states that "no warrants shall issue but upon probable cause." Considerable debate has centered on the issue of whether the two clauses are to be read independent of one another, implying that "reasonable" searches do not require warrants -- or in conjunction with one another, implying that searches are only "reasonable" if they meet the requirements of the second clause. The Supreme Court wavered on the issue for decades, particularly in cases involving "the scope of the right to search incident to arrest."<sup>34</sup> However, Justice Jackson's majority opinion in Johnson v. U.S. in 1948 signaled an emerging shift in interpretation, with the following passage:

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's

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<sup>34</sup>CRS, 1043-44.

homes secure only in the discretion of police officers.<sup>35</sup>

Yet at the time of the Johnson decision, the so-called "primacy of warrants" had not yet been established in basic criminal investigations, let alone wiretapping cases.

Hoover enjoyed another decade of unchallenged authority. In 1954, and again in 1960, in two important cases involving the use of "bugging," the Supreme Court refused to restrict FBI practices.<sup>36</sup> During the same period the Court remained silent on the issue of wiretapping.<sup>37</sup> Even where the Court did act to restrain the FBI's anti-subversive campaigns, Hoover devised ingenious methods of circumventing their decisions. The 1957 Yates and Jencks decisions are a case in point. The rulings held that, absent a specific plan of action, the Smith Act of 1940 does not prohibit theoretical advocacy and/or the teaching of the principles of violent overthrow of government.

A year earlier, in anticipation of the Court's rulings, Hoover had initiated "COINTELPRO-Communist Party," a sweeping series of extra-legal FBI initiatives "designed to promote

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<sup>35</sup>Ibid., 1050; 333 U.S. 10, 13-14.

<sup>36</sup>Irvine v. California, 347 U.S. 128; Goldman v. U.S., 316 U.S. 129.

<sup>37</sup>Alexander Charns' criticism is appropriate: "For half a century the Supreme Court might as well have been writing rhyming couplets about eavesdroppers and wiretappers"; Cloak and Gavel, 76.

disruption within the ranks of the Communist Party."<sup>38</sup> Some of the methods utilized included wiretapping, bugging, break-ins, anonymous letter-writing campaigns, politically-motivated I.R.S. audits, the use of informers as agent provocateurs, and "bad jacketing": the practice of falsely and anonymously labelling targets as government informants. The premise underlying COINTELPRO was that although the FBI could not arrest and convict suspected Communist Party members for their non-conformist views, it could nonetheless "neutralize" their organizations. By the late sixties, similar COINTELPROS were conducted against the Socialist Workers Party, white hate groups (e.g. the Ku Klux Klan), the Puerto Rican Independence Movement, the civil rights movement, and the New Left.<sup>39</sup> Not all COINTELPRO actions were aimed at leftist groups. For example, the COINTELPRO-White Hate Groups program of the mid-sixties, initiated in the wake of the brutal murders of civil rights workers Andrew Goodman, Michael Schwerner, and James Chaney in Mississippi, proved enormously successful against the Southern KKK. However, a vast majority of COINTELPRO actions were directed against targets whose non-conformist politics were bitterly opposed by Hoover. Senator Frank Church condemned the FBI's

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<sup>38</sup>Churchill and Vander Wall, The Cointelpro Papers, 41.

<sup>39</sup>In his 1992 study, Alexander Charns argues that an additional, previously undiscovered, FBI COINTELPRO was initiated against the Warren Court, with its overall purpose to "remake the Court in Hoover's image."; Cloak and Gavel, xiii-xiv.

COINTELPRO tactics as "indisputably degrading to a free society."<sup>40</sup>

Executive branch duplicity involving wiretapping for political purposes continued throughout the Eisenhower and Kennedy years.<sup>41</sup> Interestingly, the historical record of wiretapping abuses during the less than three years of the Kennedy Administration is significantly larger than for Eisenhower's eight years in office.<sup>42</sup> Although the evidence clearly demonstrates the extent to which Attorney General Robert Kennedy initiated illegal wiretaps -- often with the advice and approval of the President -- the FBI tried to deflect criticism of its "national security" wiretapping practices during the crisis surrounding the Fred Black case in 1965 and 1966; part of their strategy was placing the blame for the wiretaps on Robert Kennedy. The Kennedys were strong supporters of utilizing electronic surveillance for investigative purposes, particularly against suspected organized crime "bosses." During all three years of his Presidency, John F. Kennedy introduced legislation to

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<sup>40</sup>Church Committee, Book II, 10.

<sup>41</sup>Ibid., 51-53, 63-65.

<sup>42</sup>For example, while the Church Committee's Final Report (Book II, pp. 63-65) mentions only a single wiretap ordered by the Eisenhower Administration for political purposes, it covers in detail a "pattern" fourteen separate Kennedy political wiretaps. The voluminous nature of "evidence" concerning Kennedy-era wrongdoing is described in detail in Victor Navasky, Kennedy Justice, (New York: Atheneum Publishers, 1971).

Congress that would have authorized federal agencies to wiretap in cases of national security, organized crime, and other serious crimes. While the historical record confirms that the Kennedys' anti-organized crime efforts were genuine, it is unclear to what degree their motivations for proposing wiretapping legislation were political, as opposed to strictly law enforcement-related. Also unclear is whether Hoover's influence in Congress played a role in preventing the passage of the Kennedy wiretapping bills.<sup>43</sup>

The most significant changes in U.S. wiretapping policy and practice since the late-1940s occurred between 1965 and 1968, during the Presidency of Lyndon Johnson, as the FBI faced potent challenges to its unilateral control over "national security" surveillance from all three branches of government. First, Attorneys General Nicholas Katzenbach and Ramsey Clark began to exercise Justice Department oversight of the Bureau, largely absent since the late forties. In addition, President Johnson, while continuing to support "national security" wiretapping in principle, moved toward a position in which he believed that such surveillance should be limited to foreigners and their agents operating within the United States. This position put him at odds with Hoover, who had taken full advantage of the vagueness of the term "national security" for decades, and sought to preserve his authority to wiretap U.S. citizens, as well as

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<sup>43</sup>Lapidus, Eavesdropping, 12.

foreigners, without warrants. The primary challenge Hoover faced from the Legislative Branch consisted of hearings before the Senate Judiciary Committee's Subcommittee on Administrative Practice and Procedure, chaired by Senator Edward V. Long, an ardent opponent of wiretapping. Finally, the Judicial challenge to the status quo developed in the Katz and Berger decisions. Hoover was able to preserve considerable control over his fourth branch of government, thanks to the social disorder that increased simultaneously with the challenges to his authority. Congressional passage of Title III of the Omnibus Crime Act of 1968, containing a vague and open-ended "national security" passage, preserved the FBI's ability to wiretap without warrant.

Public debate on the wiretapping issue, largely dormant during the Kennedy years, increased dramatically after 1965, due in part to revelations of illegal FBI electronic surveillance in the case of Fred B. Black, a Washington, D.C., lobbyist. From February through June of 1963 the FBI bugged Black's hotel room, reportedly to investigate whether he had ties to racketeers. Having been convicted in 1964, and also losing the appeal, Black filed a writ of certiorari with the Supreme Court in February of 1966, alleging that his conviction be overturned because of government wiretapping of conversations between him and his lawyer. The Court voted against hearing the case. However, during preparations for a possible Supreme Court argument, the Justice Department

discovered the existence of the FBI's 1963 surveillance of Black. Attorney General Katzenbach ordered Solicitor General Thurgood Marshall to disclose not only the existence of the bugging, but also that the surveillance had picked up a series of attorney-client conversations. Hoover's reaction was utter shock. Katzenbach's refusal to back down to Hoover remains a mystery. He stated that he felt an "inescapable duty" to report such a serious constitutional affront. But Katzenbach also realized that illegal FBI electronic surveillance was coming under increasing public and congressional scrutiny, and acted to shield the Justice Department.<sup>44</sup> Katzenbach had already issued the most stringent guidelines concerning electronic surveillance since the thirties, reminding Hoover of the Federal Communication Act's ban on wiretapping and stating "we should not make illegal use of electronic devices."<sup>45</sup>

Hoover tried to counterattack. First, he blamed the Kennedys for the Fred Black surveillance.<sup>46</sup> Second, Hoover

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<sup>44</sup>Charns, Cloak and Gavel, 36-40.

<sup>45</sup>Quoted in Theoharis, Secret Files, 149-50. This remarkable compilation of previously-secret documents contains a number of revealing Justice Department and FBI memorandum surrounding the Black crisis. It is unmatched as a compilation of primary sources concerning the Justice Department-FBI relationship at a time when Hoover's unquestioned authority was challenged for the first time.

<sup>46</sup>Charns, Cloak and Gavel, 70, 77-78. Charns points out that in December of 1966, as the Black crisis peaked, "the fight over who had authorized illegal FBI buggings during the years 1961 to 1964 -- Hoover or Robert Kennedy -- was  
(continued...)

sought out an informer on the Supreme Court, to keep him aware of developments in the Black v. U.S. case; Alexander Charns believes that Justice Abe Fortas filled this role, with the knowledge and support of President Johnson.<sup>47</sup> Third, in the fall of 1966, Hoover enacted significant reforms over FBI electronic surveillance (and other) practices. The results were successful: the Supreme Court refused to censure him, merely sending the Black case back to the District Court for a new trial. Katzenbach resigned as Attorney General, ostensibly to take up a new position as Under Secretary of State. Yet Hoover was clearly damaged by the incident, and had to enact such "reforms" as barring "black bag jobs," limiting all electronic surveillance to cases related to national security, requiring specific Attorney General approval of all such surveillance, and

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<sup>46</sup>(...continued)

splashed on the front pages of the nation's newspapers. To prepare his case for the media, Hoover declassified a number of documents pertaining to microphones and wiretaps that had been shown to Attorneys General Kennedy and Nicholas Katzenbach. Hoover accused Kennedy, and Kennedy accused Hoover, of lying about his role." This battle was renewed in 1969, following revelations that the FBI had illegally wiretapped and bugged the Reverend Martin Luther King, Jr. for several years prior to his assassination in 1963. See Kenneth O'Reilly, Racial Matters: The FBI's Secret File on Black America, 1960-1972, (New York: The Free Press, 1969), 341-42, 417 (note 62). Robert Kennedy was unable to defend himself during the 1969 debate, due to his assassination the previous year. One additional point: this smear campaign was secretly supported by President Johnson, who worried about the potential threat Robert Kennedy posed in the 1968 presidential race.

<sup>47</sup>Charns, Cloak and Gavel, 52-63, 69-75.

instituting the first thorough record keeping system for electronic surveillance.

In 1965 Hoover also defused a potent threat from Congress. Concerned about the Edward Long Committee's investigation of governmental surveillance, Hoover sent Assistant Director Cartha "Deke" DeLoach to speak with Senator Long. Following the meeting, DeLoach informed his boss that the threat had been effectively "neutralized." Just how DeLoach silenced a ranking member of the U.S. Senate, whose Subcommittee had been investigating the FBI's electronic surveillance techniques for two years, is not absolutely clear.<sup>48</sup>

Hoover had correctly viewed the crisis surrounding the Black affair with extreme seriousness. By the early sixties American society was becoming less deferential to governmental wrongdoing justified by appeals to "national security." Americans realized that individual privacy was threatened by the expanding bureaucratization of government, and the Warren Court responded to these concerns. In 1967 the Court turned its attention to surveillance issues in Katz v. U.S. and Berger v. New York, establishing a new interpretation of the relationship between wiretapping and the Fourth Amendment. The decisions ultimately brought about the most significant changes in U.S. wiretapping law and practice since the end of World War II.

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<sup>48</sup>Theoharis, Spying on Americans, 361-67.

During the sixties the Warren Court took up the cause of criminal justice reform. In the Mapp v. Ohio (1961) and Gideon v. Wainwright (1963) decisions, the Court enacted due process reforms, applying the exclusionary rule to evidence obtained by unreasonable search and seizure, and guaranteeing a defendant the right to counsel.<sup>49</sup> Neither decision received significant national criticism. In fact, the Court's rulings demonstrated the national government's desire to professionalize law enforcement at the state and local levels. However, by the time of the Court's decisions in Escobedo v. Illinois (1964) and Miranda v. Arizona (1966), the national consensus for due process reform was threatened by an anti-reform, "law and order" sentiment, fueled by white backlash against urban rioting.<sup>50</sup> In Escobedo the Court ruled that "a confession obtained during police questioning of a suspect in custody following their denial of his request to consult counsel was inadmissible as evidence against him."<sup>51</sup> The Miranda decision further expanded a suspect's rights, ruling that police were required to issue pre-interrogation warnings to suspects of their rights to remain silent and to have counsel present during questioning; lawyers were to be provided to indigent suspects only if they

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<sup>49</sup>Mapp: 367 U.S. 643; Gideon: 372 U.S. 335.

<sup>50</sup>Escobedo: 378 U.S. 478; Miranda: 384 U.S. 436.

<sup>51</sup>John T. Eliff, Crime, Dissent, and the Attorney General: The Justice Department in the 1960's, (Beverly Hills, CA: Sage Publications, 1971), 30.

requested them. The timing of these decisions, as crime rates rose and the anti-war and Black Power movements played in the nightly news, increased public opposition to the Warren Court. John T. Eliff's study of the Justice Department during the sixties points out that the Warren Court's unwillingness to moderate decisions or slow down the pace of reform, coupled with the Johnson Administration's failure to estimate the backlash against the rulings, made "law and order" a potent political issue.<sup>52</sup>

In 1967 the Court turned its attention to the subject of electronic surveillance, with the Katz and Berger decisions. Because the architects of the Omnibus Crime Act in 1968 would later claim that Title III had been drafted in compliance with these decisions, they merit close examination.<sup>53</sup> In its six-to-three decision in Berger, the Court examined New York's newly-enacted statute permitting court-ordered wiretapping and ruled it unconstitutional, finding fault with several of its provisions. In a decision that demonstrated how far the Court's thinking on the issue of warrants and electronic surveillance had evolved since Olmstead, Justice Tom Clark, writing for the majority, stated that the New York statute was "a blanket grant of permission to eavesdrop...without adequate judicial supervision or

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<sup>52</sup>Eliff, Crime, 28-49.

<sup>53</sup>The issue of whether the provisions of Title III of Omnibus were "in harmony" with the Berger and Katz has been the subject of considerable historical debate.

protective procedures," and thus violated the Fourth and Fourteenth Amendments.<sup>54</sup> For sixty consecutive days, New York authorities had wiretapped Chicago businessman Ralph Berger, and later charged him with conspiracy to bribe the Chairman of the New York State Liquor Authority. The primary evidence used to convict him were wiretaps. Of particular concern to the Court were several of the New York statute's provisions, including: (1) the lack of a probable cause requirement prior to the issuance of a judicial warrant; (2) the absence of a requirement of "particularity" in the warrant process, as to what specific crime had been committed and the persons, places, or things to be seized, as is required by the Fourth Amendment; (3) the excessive duration of the surveillance [two months], which amounted to a series of intrusions pursuant to a single showing of probable cause; (4) the failure to require specific termination dates; and (5) the lack of a notice requirement, whereby the target(s) of surveillance would be informed of the government's wiretaps prior to trial. The Court also found the State of New York's arguments concerning the importance of wiretapping as a law enforcement technique to be unpersuasive.<sup>55</sup>

The seven-to-one decision in Katz centered upon the issue of microphone surveillance of suspected criminal

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<sup>54</sup>"Wiretapping and Electronic Surveillance -- Title III of the Crime Control Act of 1968," Rutgers Law Review, vol. 23, no. 2, (Winter, 1969), 326.

<sup>55</sup>Lapidus, Eavesdropping on Trial, 20-21.

Charles Katz in a public location [telephone booth], where no physical trespass of a home or office had occurred.<sup>56</sup> Charging Mr. Katz with illegal wagering via telephone across state lines, the government submitted as evidence in court only six conversations, averaging three minutes each, a minuscule amount of eavesdropping in comparison with the Berger case. Nevertheless, the Supreme Court ruled the bugging unconstitutional, arguing that surveillance and recording constitutes search and seizure under the Fourth Amendment. Justice Potter Stewart's majority decision focused on the issue of a citizen's right to privacy, echoing the words of Justice Brandeis' dissent in Olmstead:

The Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection....But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.<sup>57</sup>

Prior to Katz the Court had regarded physical trespass as the basis for an unconstitutional search; afterwards, the test for a constitutional search became the concept of privacy.<sup>58</sup> However, the decision did not support any absolute right to privacy. Justice Stewart argued that the Fourth Amendment

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<sup>56</sup>Justice Thurgood Marshall did not take part in the Katz decision, having been Solicitor General during the Johnson Administration.

<sup>57</sup>Quoted in Lapidus, Eavesdropping on Trial, 24.

<sup>58</sup>Richard E. Morgan, Domestic Intelligence: Monitoring Dissent in America, (Austin, TX: University of Texas Press, 1980), 121.

protects individual privacy only against certain kinds of governmental intrusion, suggesting that the type of surveillance used against Katz might have been constitutional, had a judicial warrant been acquired. He suggested several "safeguards" that were lacking in Katz's surveillance: (1) showing probable cause to a neutral magistrate before the search; (2) observing precise limits during the search, which could have been fixed in advance via a court order; and (3) notifying the judge of what had been seized, once the search has been completed.<sup>59</sup> These restrictions implied not only that eavesdropping falls within the protections of the Fourth Amendment, but also that in order for an electronic surveillance "search and seizure" to be deemed "reasonable," it must be preceded by a court order, in accordance with the Amendment's "probable cause" requirement. The Court simply meant to underscore the "primacy of warrants."

The Berger and Katz decisions contained suggestions which invited Congressional legislation. The two decisions also contained a number of alternate concurring opinions and, in the case of Berger, three powerful dissents, which demonstrated deep divisions within the Court. The only constant throughout both decisions was Justice Hugo Black's vehement dissents, in which he espoused two basic points: (1) that the Founding Fathers would have outlawed eavesdropping

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<sup>59</sup>Ibid., 25.

in the Bill of Rights had they desired to do so, and (2) that the majority's decisions placed such unrealistic restrictions upon the use of electronic surveillance by law enforcement officials that it would be "completely impossible for the State or Federal Government ever to have a valid eavesdropping statute." Black worried about the implications of the Court venturing into "broad policy discussions and philosophical discourses on such nebulous subjects as privacy."<sup>60</sup> In direct opposition, Justice John Harlan's concurring opinion in Katz emphasized that when using the public telephone, Mr. Katz had a reasonable expectation of privacy. This position was further supported by Justice William Douglas' concurring opinion in Berger, in which he described wiretapping as "the greatest of all invasions of privacy."<sup>61</sup>

Katz was, in part, a response to the dissenting opinions in Berger. Justice Stewart's decision made clear that where law enforcement officials followed "appropriate safeguards," wiretapping would be entirely constitutional. Essentially, the Court established a test for determining whether a wiretapping statute would meet its approval, and indicated that it would only support laws that closely followed the principles of "precision and narrow circumscription."<sup>62</sup>

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<sup>60</sup>Ibid., 22, 26.

<sup>61</sup>Ibid., 25, 22.

<sup>62</sup>CRS, 1071, n. 16.

Precisely which combination of statutory requirements the Court would require to meet its "appropriate safeguards" threshold immediately became a subject of considerable debate, and influenced the Congressional deliberations surrounding Title III of the Omnibus Act. Privacy advocates and civil libertarians believed that the restrictions laid down by the Court in both decisions were necessary to protect citizen rights. "Law and order" advocates agreed with Justice Black that the Court had once again overstepped its authority by handing down two overly restrictive decisions, further "tying the hands" of law enforcement.

The issue of "precision and narrow circumscription" enunciated by the Court in the Berger and Katz decisions, brought into the public discussion the so-called "intelligence versus evidence debate" concerning the nature and purposes of domestic surveillance of U.S. citizens, a debate previously limited to a small segment of the general population: intelligence officers, law enforcement officials, and intelligence policy-makers and oversight officials. Hoover considered surveillance without court order in cases potentially threatening to the nation, for non-prosecutorial purposes, as entirely legal. The vagueness of the term "national security" further clouded the issue. Flagrant use of the term by government agencies during the Cold War also raised important constitutional questions, such as: (1) who should be allowed to define the scope of what constitutes a

"national security" threat?; (2) should the definition be limited to foreign nations and their agents operating within the U.S.?; (3) is the mere existence of electronic surveillance an abridgement of constitutional rights?; and (4) can electronic surveillance by intelligence agencies and/or law enforcement entities for the purpose of protecting "national security" be effectively conducted under the restrictions outlined in the Supreme Court's "narrow circumscription" theory? These were a few of the surveillance-related questions some debated during the 1967-1968 period, as Congress drafted the nation's first comprehensive wiretapping statute: Title III of the Omnibus Crime Act. Because the debate occurred within an atmosphere of increasing social disorder, and because of Hoover's manipulation of the legislative process, section 2511(3) of the Omnibus Act was included in the final version of the bill, and became law. The section's vague passage, asserting the Executive Branch's "inherent powers" to wiretap in instances where the "national security" was threatened, represented a significant departure from the "narrow circumscription" guidelines of Berger and Katz -- and a became primary justification for the Mitchell Doctrine.

Throughout Hoover's career he supported surveillance for "investigative" or "strategic" purposes. He felt that electronic surveillance was a necessary component to effective law enforcement, and that the collection of

surveillance data in no way abridges a citizen's rights. He objected to the "probable cause" requirement in regard to wiretapping, due to the fact that intelligence gathering "is not ordinarily based on the belief that a crime has occurred or is about to occur"; instead, "it seeks, among other things, to find out if there are grounds for believing a crime is in the offing."<sup>63</sup> As Frank Donner notes, the Bureau "insisted that it wore two separate and quite different hats: a general investigative hat for probing violations of law and, far more important, an internal security intelligence hat" [not measurable by] "such workaday yardsticks as arrests and convictions."<sup>64</sup> Justices Brennan and Douglas argued otherwise: law enforcement agencies should be restricted to "tactical" surveillance: short-term wiretapping under court order for the purposes of generating evidence for a trial. They found that the practice of long-term warrantless surveillance violated First, Fourth, and Fourteenth Amendment rights. This side of the debate did not receive significant public support until the sixties. Between the passage of the Federal Communications Act of 1934 and the issuance of President Truman's secret Executive Order regarding wiretapping in 1947, Hoover formulated the basic FBI domestic surveillance policies that would remain in effect through the mid-sixties. He began with the premise

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<sup>63</sup>Wilson, "Buggings, Break-Ins & The FBI," 53-54.

<sup>64</sup>Donner, Age of Surveillance, 69-73.

that the Federal Communications Act's ban on the interception and divulgence of wiretaps did not pertain to the FBI's "national security" wiretaps, conducted for strictly investigative purposes, and not to be used for prosecutorial purposes. This assumption received the tacet approval of FDR and Truman, but was kept secret from both the Supreme Court and Congress for decades.<sup>65</sup> Hoover's interpretation of the Nardone decisions of 1937 and 1939, which banned wiretapping and ruled all evidence resulting from it inadmissable in trials, was equally innovative; he maintained that wiretapping was permissible when used strictly for "intelligence" purposes. This policy had the advantage of allowing agents to conduct electronic surveillance of U.S. citizens, as long as the information was not disseminated outside of the Bureau and Justice Department.<sup>66</sup> The major drawback was the inability to use openly wiretap information in criminal proceedings. The Nardone decisions ruled that information acquired by federal agents via illegal wiretaps

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<sup>65</sup>The issue of the legality of the FDR and Truman memorandums has never been definitively settled. Athan Theoharis leaves no doubt concerning his position on the matter: "under existing law and court rulings, between 1934 and 1968 wiretapping was illegal." See Theoharis, "FBI Wiretapping," 102.

<sup>66</sup>From the late forties through the mid-sixties the FBI was not required to seek Attorney General approval for most wiretaps.

was subject to the Fourth Amendment's exclusionary rule.<sup>67</sup> However, the government commonly hid the existence of wiretaps from the defense, rendering them powerless to challenge it.

The flaws in FBI wiretapping policy became evident during the Judith Coplon crisis of the early fifties and the Fred Black crisis of the mid-sixties. The public debate during both cases revealed that Hoover's assumptions regarding the propriety of secret wiretapping for "investigative" purposes was not an opinion shared by all. The legality of FBI "national security" wiretapping was seriously challenged by both the Supreme Court and Congress - - although neither entity acted forcefully to curtail it.<sup>68</sup>

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<sup>67</sup>e.g. "the fruit of the poisoned tree." The exclusionary rule regarding general evidence brought fourth by law enforcement officers was extended to the States in Mapp v. Ohio in 1961. In regard to wiretapping evidence (a la Nardone), the Court did not extend the exclusionary rule's protections to the States until 1968 in Lee v. Florida.

<sup>68</sup>Charges of Supreme Court and Congressional "acquiescence" and "indecision" in regard to FBI wiretapping practices have been overblown. The Court's inaction is understandable: (1) their rulings from the late thirties onward consistently adhered to the Nardone decision's ban on wiretapping; yet the primary method at their disposal for enforcing oversight was excluding from trials any evidence attained via wiretaps, an admittedly weak "stick"; (2) because of the FBI's policy of keeping the existence of all wiretaps secret, the Court could only act when the FBI's taps were revealed via "leaks," such as occurred during the Coplon and Black cases; and (3) faced with the decision of the Executive Branch's principal law enforcement division (FBI) to not adhere to the Nardone rulings, the Court waited for Congress to legislate on the subject. Under normal circumstances of constitutional "give and take," this probably would have happened. The failure of Congress to  
(continued...)

Hoover was undeterred. Instead of modifying FBI policy, he lobbied Congress for legislation that would allow the FBI to introduce the fruits of "national security" wiretaps in court. He also lobbied to keep Congress from enacting legislation that would limit FBI wiretapping practices. He was able to weather the occasional "leak" regarding FBI surveillance activities by putting up a multi-phased defense: (1) leaning on the presidential directives from FDR and Truman; (2) stressing "his" interpretation of the Federal Communications Act of 1934; and (3) reasoning that the Nardone decisions were not intended to apply to federal law enforcement agencies, or areas involving the protection of "national security."

The numerous restrictions the Court placed on surveillance practices in Katz and Berger posed a challenge to existing FBI policy.<sup>69</sup> Yet Katz contained two items which might preserve the FBI's appeal to "national security."

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<sup>68</sup>(...continued)  
take action wasn't due to a lack of interest in the issue; Edith Lapidus estimates that between 1934 and 1967 at least sixteen sets of Congressional hearings were held, "aimed largely at filling the gaps and blocking loopholes in existing Federal law banning eavesdropping" [emphasis in original] (Eavesdropping on Trial, 11). The primary reason Congress failed to act was Hoover's manipulation of the legislative process, in opposition to bills that would have limited his wiretapping authority.

<sup>69</sup>Alexander Charns argues that after Berger, the FBI "saw the writing on the wall" and began thinking about putting pressure on Congress to amend the Federal Communications Act to "allow wiretapping under appropriate safeguards" see Cloak and Gavel, 84-85.

In footnote 23 of his majority opinion, Justice Stewart stated: "Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented in this case."<sup>70</sup> Justice Byron White's concurring opinion went a step further, stating that the warrant requirement should not be required if the President or the Attorney General authorized electronic surveillance for reasons of national security. White's opinion spoke of an "inherent presidential authority," flowing from the Constitution, which empowered the Chief Executive to "protect the security of the Nation."<sup>71</sup>

The involvement of Justice Fortas in the drafting of the two "national security" passages was recently revealed in FOIA documents, included in Alexander Charns' book. In two separate letters to Justices Stewart and White, both dated November 11, 1967, Fortas urged them to limit the scope of their decisions to non-national security surveillance; his letter to Stewart urged that the Justice "insert something reserving national security cases in which maybe the Constitution would permit electronic espionage on authorization by the President or the Attorney General." While Stewart omitted any reference to presidential

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<sup>70</sup>Quoted in "Wiretapping and Electronic Surveillance," Rutgers Law Review, 334.

<sup>71</sup>Lapidus, Eavesdropping on Trial, 25; Charns, Cloak and Gavel, 86, [quotes from Charns].

authority, his footnote responded to Fortas' request.<sup>72</sup> Since Fortas had acted as liaison for both the Johnson White House and the FBI during the Fred Black case, these two letters raise the possibility of Hoover's involvement.<sup>73</sup> Justices Douglas and Brennan vehemently disagreed with the dictum, arguing that it represented "a wholly unwarranted green light for the Executive Branch to resort to electronic surveillance without a warrant in cases which the Executive Branch itself labels 'national security' matters." Douglas added that the Fourth Amendment's protections of citizens are negated when the Executive Branch assumes "both the position of adversary-and-prosecutor and disinterested, neutral magistrate."<sup>74</sup> The FBI concluded that Katz had "no effect on eavesdropping in national security cases".<sup>75</sup> Therefore,

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<sup>72</sup>Charns, Cloak and Gavel, 86.

<sup>73</sup>The Fortas-Johnson-FBI relationship was rooted in the long-time friendship of Johnson and Fortas, dating back to LBJ's first Senate race in 1948. When Johnson appointed Fortas to the Supreme Court in 1965, he enlisted the support of FBI White House liaison Cartha "Deke" DeLoach to ensure that minimal opposition would be offered in Congress. The Johnson-Fortas friendship continued throughout the remainder of Johnson's presidency, eventually involving the use of Fortas as an informer for both the White House and the FBI. Charns terms this arrangement a "separation of powers squaredance that Hoover had choreographed"; see Cloak and Gavel, 55.

<sup>74</sup>389 U.S. 347, 359-60.

<sup>75</sup>Letter from Fred M. Vinson, Jr., Assistant A.G. Criminal Division to Hoover, January 23, 1968; quoted in Charns, Cloak and Gavel, 87.

the Berger and Katz decisions had little immediate effect on FBI surveillance practices.

### III.

Congress turned to the subject of wiretapping and privacy in the fall of 1967. The end result was Title III of the Omnibus Crime Control Act of 1968, the first significant Congressional legislation on the subject since 1934. Title III banned most forms of electronic communications eavesdropping, including both bugging and wiretapping, but for the first time authorized electronic surveillance under carefully circumscribed procedures.<sup>76</sup>

Senator John McClellan, the Democrat from Arkansas who was floor manager for the final bill, stated during the debates that the "'first major purpose of the Title III is to protect privacy of communication....[The bill] has been carefully drafted to meet the letter and spirit of the constitutional tests set out in Berger and Katz.'"<sup>77</sup> In accordance with Berger and Katz, the Act required: (1) a court order for nearly all interceptions, but listed a wide array of offenses for which a warrant could be obtained; (2) probable cause be presented to a judge upon written

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<sup>76</sup>The Act required that states first pass legislation "harmonious" with the federal statute.

<sup>77</sup>Quoted in Athan Theoharis, "Misleading the Presidents: Thirty Years of Wire Tapping," The Nation, June 14, 1971, 748.

application for the surveillance(s); (3) each warrant authorize surveillance for a maximum of thirty days, subject to an indefinite number of renewals; (4) notice of the interception be given to person(s) targeted within ninety days after termination; and (5) federal judges report periodically to Congress. The Act allowed warrantless surveillance under two circumstances: during a forty-eight-hour emergency and to protect "national security," under the "inherent authority" of the President.

The latter provision, outlined in section 2511(3), came directly from Justices Stewart and Whites' "national security" passages in the Katz decision, and closely resembled several private statements Hoover had made concerning the propriety of "national security" wiretapping, since the early fifties:

Nothing contained in this chapter or in section 605 of the Communications Act of 1934...shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was

reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.<sup>78</sup>

A long and somewhat complicated passage, section 2511(3) quickly became a source of controversy, and helped stimulate the election year "law and order" debate. Its vague language allowed the FBI to continue "national security" wiretapping. More importantly, the "brief and nebulous paragraph" paved the way for the Nixon Administration to assert an "inherent authority" to wiretap U.S. citizens, via the Mitchell Doctrine.<sup>79</sup>

The circumstances surrounding how section 2511(3) became included in Title III involved several historical forces, all of which converged during the spring of 1968: (1) the Berger and Katz decisions provided Congress with the strongest possible invitation to correct the "intolerable" state of U.S. wiretapping law; (2) an atmosphere of mounting social disorder, combined with election year politics, led increasing numbers of Americans to support "law and order" initiatives, including wiretapping; and (3) Hoover decided to support Title III -- with the "national security" loophole he helped draft.

Congress began considering sweeping new wiretapping legislation in 1967, and by the spring of the following year two very different bills were under consideration: Senator

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<sup>78</sup>Quoted in Lapidus, Eavesdropping on Trial, 256.

<sup>79</sup>Ibid., 96.

McClellan's, which eventually became Title III, and Senator Edward Long's "Right of Privacy Act."<sup>80</sup> As its title indicates, the latter bill called for strictly limited wiretapping in national security cases involving foreign powers and/or their agents. It was supported by the Johnson Administration and twenty-two additional Senators, including co-leader Philip Hart. The failure of the Long bill seems something of an historical anomaly. One might wonder how a bill in sympathy with the Supreme Court's decisions, and which enjoyed the support of the President, Attorney General, and nearly half of the Senate, could have been defeated in favor of McClellan's bill.<sup>81</sup> One part of the equation, the relative impotency of the President and Attorney General, is easily explained. By the spring of 1968 the Congressional "law and order" critics of the Administration were openly attacking Johnson and Clark for "coddling criminals" by refusing to support such initiatives as expanded wiretapping and a legislative attempt to overthrow the Miranda

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<sup>80</sup>Ibid., 40, 13, 15. The so-called "McClellan bill" which became Title III, (S 675), was actually an amalgamation of Senator Hruska's bill, (S 2050), which had been introduced in mid-1967 in response to the Berger and Katz decisions, and McClellan's January 1967 bill; Long's bill, (S 928), was very similar to one introduced at approximately the same time in the House, (HR 5386), by Representative Celler.

<sup>81</sup>For example, with twenty-three Senators in opposition, the McClellan bill could not have overridden a Presidential veto -- had one been delivered.

decision.<sup>82</sup> Despite President Johnson's repeated calls for sweeping anti-crime legislation, including support for wiretapping in national security areas, his administration was linked with the liberal Warren Court.<sup>83</sup> The situation worsened following Attorney General Clark's July 8th testimony in front of the Senate Appropriations Committee, in which he reiterated his opposition to wiretapping as a law enforcement tool.<sup>84</sup> Even the "President's Commission on Law Enforcement and the Administration of Justice" abandoned Johnson; in a January, 1967 report entitled "The Challenge of Crime in a Free Society," the Committee supported wiretapping for law enforcement purposes as well as in areas of national security.<sup>85</sup>

The degree to which public concern over lawlessness overshadowed the Congressional debates on the Omnibus Act was discussed in a New York Times editorial of June 7th:

A spectator listening to the debate...would have reason to doubt whether the Bill of Rights could get fifty votes if it were up for consideration...Members...were more intent on demagoging against crime and putting themselves on

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<sup>82</sup>The anti-Miranda offensive soon became a "red meat" issue for the G.O.P.

<sup>83</sup>In his "State of the Union" address in 1967, Johnson stated "'we should outlaw all wiretapping, public and private...except when the security of the nation itself is at stake.'" Quoted in Lapidus, Eavesdropping on Trial, 13.

<sup>84</sup>New York Times, July 9, 1968, 25.

<sup>85</sup>Lapidus, Eavesdropping on Trial, 14.

record in favor of law and order than they were in analyzing....this bill.<sup>86</sup>

In this political environment, the opportunity for thoughtful debate was limited. The assassination of Martin Luther King, Jr., on April 4 led to a wave of urban rioting. Only in the Senate did any significant debate over Title III occur. Senators John McClellan and Spessard Holland favored the wiretapping provisions; Senators Philip Hart and Edward Long were opposed. Athan Theoharis claims "Congress failed to fulfill its legislative responsibilities" by including section 2511(3) in the final bill.<sup>87</sup> Senators Long and Hart stated that section 2511(3) "gives the President a blank check to tap or bug without judicial supervision, when he finds, on his own motion, that an activity poses a 'clear and present danger to the Government.'" Hart later amplified his position on the floor of the Senate, asserting that the President could unilaterally declare the Black Muslims or even civil rights advocates "clear and present dangers," and initiate wiretaps on them; he worried about the extension of warrantless surveillance into "areas that do not come within our traditional notion of national security."<sup>88</sup> McClellan claimed that if the President believed there were an organization "whether black, white or mixed, whatever the

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<sup>86</sup>New York Times, June 7, 1968, 38.

<sup>87</sup>Theoharis, "Misleading the Presidents...", 745.

<sup>88</sup>Ibid., 748.

name and under whatever the auspices -- that was planning to overthrow the government, I would think we would want him to have the right." McClellan clearly believed that the bill limited surveillance to groups planning overt acts, as opposed to those merely exposing radical or unpopular programs. Yet he was willing to go along with the open-ended wording of section 2511(3), leaving to the President the task of defining it.<sup>89</sup> Undeterred, Hart argued:

If, in fact, we are here saying that so long as the President thinks it is an activity that constitutes a clear and present danger to the structure and existence of the government, he can put a bug on without restraint, then clearly I think we are going too far.<sup>90</sup>

Senator Holland attempted to assuage Hart's concerns, stating that he believed the Senator was "unduly concerned about this matter." He added that "nothing affirmative in the statement" would expand the President's powers in internal security areas. Hart concluded with a prophetic statement:

As a result of this exchange, I am now sure no President, thinking that just because some political movement in this country is giving him fits, he could read this as an agreement from us that, by his own motion, he could put a tap on.<sup>91</sup>

Despite Hart's assurance, the majority report on Title III, written by McClellan, was also vague as to whether a

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<sup>89</sup>Ibid., 749.

<sup>90</sup>Ibid., 749.

<sup>91</sup>Ibid., 749.

President's powers to initiate surveillance extended to both domestic and foreign threats:

It is obvious that whatever means are necessary should and must be taken to protect the national security interest. Wiretapping and electronic surveillance techniques are proper means for the acquisition of counterintelligence against the hostile action of foreign powers. Limitations that may be deemed proper in the field of domestic affairs of a nation become artificial when international relations and internal security are at stake.<sup>92</sup>

The passage certainly implies that domestic groups could reasonably be considered within the scope of the President's statutory authority. However, its language was as ambiguous as section 2511(3) itself, leaving no definitive answer to the question of whether Congress considered "internal security" synonymous with "national security."

The ambiguity of section 2511(3) may have been intentional. Although the passage was included in McClellan's bill as early as January of 1967, evidence exists that Hoover was behind it. During the debate on the Senate floor, McClellan said the language of section 2511(3) "was approved and, in fact, drafted by the Administration, the Justice Department."<sup>93</sup> When one considers that both President Johnson and Attorney General Clark vehemently opposed McClellan's bill -- and in fact sponsored opposing

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<sup>92</sup>"Wiretapping and Electronic Surveillance," 343.

<sup>93</sup>Quoted in Theoharis, "Misleading the Presidents...", 748.

bills in both the House and Senate -- it seems unlikely that they drafted the language of section 2511(3).

Recently-released FBI documents indicate that Hoover and his assistants concluded by early 1967 that, in light of the Supreme Court's intentions of restricting warrantless wiretapping, they had to support Congressional legislation on the matter. Alexander Charns, who unearthed these files, argues that by 1968, the combination of Congressional probes and Court decisions "forced Hoover to support legislation that would require him to ask a neutral and detached judicial official to do what Hoover had been doing on his own for decades."<sup>94</sup> Reviewing a series of FBI memos and other correspondence, Charns points out that as early as 1966 the Bureau had corresponded with Senator James Eastland, the powerful Chairman of the Judiciary Committee, on the subject. Hoover's strategy was two-fold: (1) ensuring that any proposed wiretapping and bugging provisions would allow for such devices to be used against non-national security targets, and that the fruits of the surveillance be admissible as evidence in court, and (2) leaving open the availability for the FBI to continue its traditional warrantless "national security" eavesdropping against anyone, whether a U.S. citizen or not. Although the FBI considered the warrant requirement of Title III to be "cumbersome," they believed it would provide excellent intelligence concerning

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<sup>94</sup>Charns, Cloak and Gavel, 91.

organized crime activity that would be usable in court.<sup>95</sup> Hoover's reluctant approval of warrants for some types of surveillance did not represent as significant a shift in his thinking as Charns intimates. During the Congressional debate he focused his energies on ensuring that section 2511(3) was included in the final bill -- essentially providing another vague statutory grant of authority allowing the FBI to continue "national security" wiretapping at will.

Yet, as Charns explains, Hoover did not get all of what he wanted:

The FBI had argued that authority to place electronic intercepts 'to protect the United States against the overthrow of the Government by force or other unlawful means' should be expanded by adding the phrase, 'from domestic groups or individuals whose activities he deems inimical to the national security of this country.'"<sup>96</sup>

Whether or not McClellan refused to include Hoover's suggested wording, it was a shrewd maneuver. The "domestic groups or individuals" passage would surely have encountered enormous opposition -- quite possibly enough to doom the entire bill, or at least section 2511(3), to failure. By keeping the wording vague, the McClellan bill left open the question of interpretation, in the meantime allowing the FBI to continue widespread "national security" surveillance. In the end, both of Hoover's strategies proved successful. Yet he was concerned that the two sections of section 2511(3)

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<sup>95</sup>Ibid., 91-92.

<sup>96</sup>Ibid., 93.

would only "fulfil the Bureau's needs in the security field...[if they]...are held constitutional by the Supreme Court."<sup>97</sup> He undoubtedly recognized that future revaluations of illegal FBI "national security" wiretaps could prove as disastrous as the Coplon and Black cases had been, and therefore looked forward to a positive legal determination as to the constitutionality of section 2511(3).

By early June the bill had become virtually unstoppable, due to the public's clamor for "law and order" which intensified following the assassination of Robert Kennedy on June 6. Attempts by Senators Hart and Hiram Fong to limit Title III to "national security" areas and to strike section 2511(3) from the final bill were quickly defeated.<sup>98</sup> Debate in the House of Representatives was almost non-existent, and the few critics who spoke against the bill expressed their opposition in general terms, ignoring the Senate's debate surrounding section 2511(3) altogether.<sup>99</sup> Signing the Omnibus Crime Control Act into law on June 19, 1968, President Johnson expressed "strong reservations" concerning Title III's "unwise and potentially dangerous" sanctioning of

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<sup>97</sup>Ibid., 93.

<sup>98</sup>New York Times, May 24, 1968, 1. The final vote in the Senate was 72 to 4.

<sup>99</sup>Theoharis, "Misleading the Presidents...", 749. The final vote in the House was 368 to 17. The New York Times also ignored the Senate debate concerning section 2511(3), discussing the McClellan-Hart exchange as related to their differing opinions concerning Title III's constitutionality. See, for example, May 9, 1968, 29.

law enforcement surveillance power in "an almost unlimited variety of situations," and urged Congress to consider its repeal.<sup>100</sup> Coming from a lame duck President, the words had little effect.

Between the passage of the Omnibus Act and the election, the Justice Department refused to enact Title III. Attorney General Clark continued to block FBI requests for "national security" wiretaps, believing the statute was unconstitutional.<sup>101</sup> Candidate Nixon assailed Johnson and Clark as "soft on crime." Liberals stood discredited on Vietnam, the economy, and "law and order," even before the violence at the Chicago Democratic Convention made a Nixon victory seem inevitable.

One example of national dissatisfaction with the Johnson Administration was the American Bar Association's June, 1968 report entitled "Standards Relating to Electronic Surveillance," released by the ABA's Advisory Committee on the Police Function. Drafted during the Congressional debates concerning the Omnibus Act, the report demonstrated the ABA's opposition to the Administration's ban on wiretapping in all but national security areas. In fact, several of the report's passages resembled positions that Hoover had taken on the subject. Defending the FBI's interpretation of the Federal Communications Act, the report

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<sup>100</sup>New York Times, June 20, 1968, 1, 23.

<sup>101</sup>Church Committee, Book II, 106.

stated "Whether it is 'right' or 'wrong,' it is probably 'too late' to change it now."<sup>102</sup> The first Nardone decision was described as "a judicial exhortation without as yet majority legislative support and no executive backing at the level of prosecution," -- a situation which "reduced respect for the law."<sup>103</sup> Turning to the Berger and Katz decisions, the ABA report opined that "not everything that is constitutional is necessarily desirable," and then proceeded to use New York State's new wiretapping statute (which the Supreme Court eventually found unconstitutional) as evidence that "The fear that authorized electronic surveillance techniques might seriously impair free communication thus appears unfounded."<sup>104</sup> Finally, the report intimated that when the Court supports bad laws, such as "a policy of prohibition rather than regulated use" of wiretapping, it is not surprising that they "have not been successful in controlling the use of these techniques."<sup>105</sup> Such assertions would be understandable, had they originated from the FBI, or even a "conservative establishment" citizen's anti-crime group,

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<sup>102</sup>ABA Standards, 16, n. 15.

<sup>103</sup>Ibid., 17, n. 19.

<sup>104</sup>Ibid., 87-88.

<sup>105</sup>Ibid., 97.

rather than a division of the chief policy-making entity for the nation's legal profession.<sup>106</sup>

#### IV.

Turning to the 1968 campaign in his Memoirs, Nixon notes "I was especially intent on getting across my stark differences with Humphrey on the issue of crime and justice."<sup>107</sup> Two weeks after the election, official "leaks" from the Nixon transition team made clear the Administration's intent to use wiretapping as part of a broad anti-crime offensive.<sup>108</sup> By mid-December the House Republican Task Force on Crime, convinced that the new Administration would move immediately to implement Title III, urged Nixon to work out eavesdropping guidelines prior to initiating his law enforcement surveillance policies.<sup>109</sup>

Nixon's selection of former law partner and campaign manager John N. Mitchell as Attorney General indicated the importance he placed on this position, as well as his desire to supervise closely the activities of the Justice

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<sup>106</sup>The Advisory Committee on the Police Function did contain a former Assistant U.S. Attorney for the Southern District of New York, as well as a "Retired Inspector" with the FBI. See ABA Standards, ix.

<sup>107</sup>Richard Nixon, RN: The Memoirs of Richard Nixon, (New York: Grosset and Dunlap, 1978), 321.

<sup>108</sup>New York Times, November 24, 1968, 80.

<sup>109</sup>New York Times, December 16, 1968, 1. See also December 17, 1968, 46.

Department. Mitchell possessed the two qualities that Richard Nixon demanded of his closest advisors: absolute loyalty and a "goal-oriented approach" to the law. As a recent study by Nancy V. Baker indicates, the practice of appointing a friend or political advocate to the post of Attorney General has been common: since 1933 every President except Johnson "named either a campaign manager or national party chairman as attorney general sometime during his administration."<sup>110</sup> Yet the combination of Mitchell's inexperience in public office, his intense loyalty to Nixon, and his results-oriented approach to the law meant that the Justice Department was prepared to vehemently pursue "law and order." Testifying before the Senate Judiciary Committee on January 14, 1969, Mitchell asserted that his Justice Department would utilize Title III wiretapping "not only in national security cases but against organized crime and other major crimes." Responding to Senator Fong's reminder that Title III surveillance represented "a new road that we are taking," Mitchell insisted the new power would be used "carefully and effectively." Finally, Mitchell responded to Senator Sam Ervin's comment concerning the frequent use of attorneys general as political "advisors and agitators": "my

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<sup>110</sup>Nancy V. Baker, Conflicting Loyalties: Law and Politics in the Attorney General's Office, 1789-1990, (Lawrence, KS: Univ. Press of Kansas, 1992), 21.

activities of a political nature....have ended with the termination of the political campaign."<sup>111</sup>

The new Administration portrayed an overall tone of moderation during its first few weeks in office. New York Times legal correspondent Fred P. Graham, who closely followed Administration wiretapping policies, reported that "in fact the Nixon Administration will use the power sparingly."<sup>112</sup> Press releases from the Justice Department in January and February claimed Title III was proving effective against "organized crime" and "suspected racketeers." Mitchell also encouraged states without wiretapping statutes to enact them, so that they could acquire evidence not otherwise obtainable.<sup>113</sup>

The Administration's tone changed virtually overnight, as a result of the Supreme Court's March 10, 1969, decision in Alderman v. U.S.<sup>114</sup> In a five-to-three ruling, the Court held that criminal defendants have a right to inspect the logs of unlawful FBI surveillance against them. The ruling established procedures for federal district courts to follow in determining whether criminal convictions were "tainted" by illegal FBI surveillance. The government argued that trial

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<sup>111</sup>New York Times, January 15, 1969, 1, 22.

<sup>112</sup>New York Times, January 19, 1969, sec. iv, 3.

<sup>113</sup>New York Times, February 12, 1969, 1, 22; March 9, 1969, 32.

<sup>114</sup>394 U.S. 165.

judges should be authorized to screen the contents of wiretaps in their chambers, or in camera, to determine whether the information tainted the prosecution's case; whenever a judge found this to be the case, he could disclose only those portions of the logs to the defense. It also argued that disclosure of "sensitive" electronic surveillance information concerning foreign embassies and suspected spies would endanger the national security by exposing "counterespionage" methods to foreign governments.<sup>115</sup> Solicitor General Erwin N. Griswold warned that if the decision went against the government, it would have to dismiss important pending cases rather than disclose the surveillance transcripts. Writing for the majority, Justice White rejected the Justice Department's argument that defendants' rights would be adequately protected if trial judges conducted in camera reviews, adding that if such hearings were "to be more than a formality and petitioners not left entirely to the reliance on Government testimony," the defendant and his lawyer must be allowed to inspect transcripts of bugged or wiretapped conversations.<sup>116</sup> In his dissenting opinion, Justice Fortas favored in camera

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<sup>115</sup>New York Times, January 9, 1968, 14; January 30, 1968, 26; March 6, 1968, 19; May 3, 1968, 15; March 11, 1969, 1, 22. Solicitor General Erwin N. Griswold, a Johnson appointee whose position was renewed by Nixon, had argued against disclosure of surveillance logs to defendants since early in 1968.

<sup>116</sup>New York Times, March 11, 1969, 1, 22.

inspections in cases involving "national security material," which he narrowly defined as "those specifically directed to acts of sabotage, espionage, or aggression by or on behalf of foreign states."<sup>117</sup>

Although the government's position in Alderman had been formulated during the Johnson Administration, Nixon and Mitchell fully supported it. In response to the setback, Mitchell took several steps to undermine the Court's ruling. First, he criticized the decision in testimony before the Senate Judiciary Committee's Subcommittee on Criminal Laws and Procedures, on March 18.<sup>118</sup> Second, Solicitor General Griswold petitioned the Court to reconsider part of its ruling, so that eavesdropping by federal agents to gather "foreign intelligence" information would be constitutional. Referring to section 2511(3) of Title III, Griswold stated that the Fourth Amendment's prohibition against unreasonable searches and seizures did not apply to "foreign intelligence" surveillance -- and that the Court should recognize the legality of warrantless surveillance in this narrow category. Griswold cited the case of Cassius Clay, [Muhammed Ali], who had been overheard in wiretaps on a foreign embassy in 1965. The government's case against him for draft evasion was delayed because the government acknowledged the

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<sup>117</sup>Quoted in New York Times, March 16, 1969, sec. iv., 15.

<sup>118</sup>New York Times, March 19, 1969, 18.

interceptions, and Clay's defense demanded disclosure. Submitting the logs of the Clay surveillance to the Supreme Court with his petition, Griswold asserted that the interceptions did not taint Clay's trial. He added that an examination of the logs would make it clear that the wiretap was instituted for the purpose of gathering sensitive foreign intelligence information. Griswold then presented a thinly-veiled threat: the government was prepared to discontinue informing the Court about the existence of illegal wiretaps.<sup>119</sup>

The Court's response of March 24, 1969, delivered in two unsigned opinions and a concurring opinion by Justice Stewart, rejected the government's petition, but held that the legality of warrantless "foreign intelligence eavesdropping" had not yet been decided.<sup>120</sup> The Court's response left open the possibility that section 2511(3) of the Omnibus Act might be constitutional -- in cases involving "foreign intelligence." Some twenty cases involving illegal government surveillance, including those of Clay and Teamster leader Jimmy Hoffa, were sent back to the lower courts, where the judges were to conduct hearings to determine if the eavesdropping was illegal and second, whether the appellants

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<sup>119</sup>New York Times, March 20, 1969, 29.

<sup>120</sup>The Court's March 24, 1969 clarification of issues addressed in Alderman became known as Giordano v. U.S.: 394 U.S. 310. The Giordano case had originally been included as part of the Alderman decision.

had Fourth Amendment standing. Where the judges so decided, the full transcripts were to be disclosed to the defense.<sup>121</sup>

The impropriety involved in the Mitchell Justice Department's response to Alderman went far beyond public criticism of the Court. Immediately following the decision, according to Alexander Charns, Mitchell sent the Justice Department's Director of Public Information, Jack C. Landau, to meet with Justice Brennan, to relay Mitchell's message that the FBI and CIA conducted electronic surveillance of some 125 foreign embassies in Washington, D.C. Landau also informed Chief Justice Warren that Mitchell "wanted to assure the Court that he would do everything in his power to stop congressional moves to limit the Supreme Court's jurisdiction concerning national security surveillances." Warren interpreted the message as a threat: reverse Alderman or face future legislative action. In his memoirs, the Chief Justice related that this was the only incident he was aware of in which the Executive Branch had tried to influence the Supreme Court in such a ham-handed manner. Justice Douglas believed that during this period his chambers were bugged.<sup>122</sup>

Nixon was appalled by the Alderman decision. The Administration wanted to prosecute high-profile anti-war cases against Cassius Clay, Dr. Benjamin Spock, and others indicted during Johnson's Presidency. Mitchell also realized

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<sup>121</sup>New York Times, March 25, 1969, 1, 26.

<sup>122</sup>Charns. Cloak and Gavel, 98-100.

the ruling's impact on future cases involving electronic surveillance prior to the passage of Title III. For example, by the time of the Alderman decision, it was rumored that the Justice Department would seek indictments against several organizers of the demonstrations in Chicago during the Democratic National Convention in August of 1968, and that their cases would rely upon information from warrantless wiretaps.<sup>123</sup> In fact the government's indictments against the so-called "Chicago Eight" (later reduced to seven) were handed down on March 20th, alleging conspiracy to cross state lines for the purpose of inciting a riot, the so-called "H. Rap Brown Law" which Congress had passed in 1968.<sup>124</sup> The indictment involved a "who's who" of anti-war and counterculture leaders, including Jerry Rubin, Abbie Hoffman, Bobby Seale, Tom Hayden, Rennie Davis, John Froines, Lee Weiner, and David Dellinger. Just as the violence in Chicago

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<sup>123</sup>New York Times, March 12, 1969, 20. The previous December the Justice Department had disclosed in a different case that Jerry Rubin "had been overheard as the result of electronic surveillance directed against others in the interests of national security." See Eliff, Crime, Dissent, and the Attorney General, 205. The issue of how the Government's case against domestic radicals pertained to their request in the Alderman appeal that the Court recognize as constitutional warrantless "foreign intelligence" wiretaps, was not raised until the unveiling of the Mitchell Doctrine on June 13th.

<sup>124</sup>The Johnson Administration had conducted the first high-profile conspiracy trials against the anti-war movement beginning in late 1967, with a case against noted child psychologist Dr. Benjamin Spock, for counseling draft resistance; the following year the "Oakland Seven" were indicted for conspiracy to conduct anti-draft "riots." The Nixon Administration expanded the use of these trials.

in 1968 was a watershed of sixties social disorder, the "Chicago Eight" case symbolized the degree to which the conservative establishment was prepared to counterattack, utilizing the full powers of the government and legal system.<sup>125</sup>

The primary danger the Alderman decision posed to the Administration involved the discretion it granted to federal judges to determine the legality of a given wiretap.<sup>126</sup> In addition, Judges could decide whether surveillances involved the national security, regardless of what the government argued. The consequences were revealed in early June at the Clay trial in Houston, Texas, where U.S. District Judge Joe Ingraham ruled that four of the government's wiretaps were clearly illegal, and ordered their disclosure -- despite the opposition of a team of Justice Department officials. Upon the defense's cross-examination of FBI officials who had been

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<sup>125</sup>The best sources on the case are as follows: John Schultz, The Chicago Conspiracy Trial, Revised, Updated Edition, (New York: Da Capo Press, 1993); Jason Epstein, The Great Conspiracy Trial, (London: Faber and Faber, 1970); Arthur Kinoy, et. al., Conspiracy on Appeal: Appellate Brief on Behalf of the Chicago Eight, (New York: Center for Constitutional Rights, 1971); J. Anthony Lukas, The Barnyard Epithet and Other Obscenities: Notes on the Chicago Conspiracy Trial, (New York: Harper and Row, 1970); Judy Clavir and John Spitzer, The Conspiracy Trial, (Indianapolis, IN: The Bobbs-Merrill Company, 1970); and Ramsey Clark, et. al., Contempt: Transcript of the Contempt Citations, Sentences, and Responses of the Chicago Conspiracy 10, (Chicago: Swallow Press, 1970). This important trial deserves a scholarly reappraisal.

<sup>126</sup>However, granting authority to judges was in keeping with the Berger and Katz decisions, as well as the letter of the law in Title III of the Omnibus Act.

involved in the surveillance, it was revealed that wiretaps had been kept on Dr. Martin Luther King, Jr. and Nation of Islam leader Elijah Muhammad long after President Johnson's June 30, 1965, ban on non-national security surveillance. Judge Ingraham did prevent disclosure of a single wiretap log which Mitchell had claimed involved "foreign intelligence" that might "prejudice the national interest"; he refused to rule on Mitchell's assertion that the authorization was legal.<sup>127</sup> The timing of the disclosure of the King and Muhammad wiretaps, just as the Justice Department was implementing Title III and assuring the public that it was proceeding "cautiously and carefully," had a significant impact within the Administration.

The Administration's dissatisfaction with the Alderman decision, as well as the Court's rejection of a petition for a rehearing, was revealed in mid-June, in Justice Department initiatives that seem to have been coordinated. On June 10 the Justice Department released some two thousand pages of wiretap transcripts of suspected New Jersey Mafia members that had been collected between 1961 and 1965 as part of a federal racketeering investigation. The public release shocked the defense lawyers in the case, who had requested disclosure, but neglected to specify only to the defense.

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<sup>127</sup>New York Times, June 7, 1969, 29. See also Eliff, Crime, Dissent, and the Attorney General, 205-206.

The disclosures also doomed the government's case against several suspected crime bosses.

The reasons for the Justice Department's unprecedented disclosures were unclear at the time: the New York Times was content to reprint excerpts, in violation of the privacy rights of the individuals who were overheard.<sup>128</sup> Within three weeks, the ulterior motive behind the FBI's public disclosures became increasingly apparent; New York Times reporter Bernard Collier quoted an anonymous FBI agent as follows:

You're going to see more of it...And its authentic stuff...Organized crime is deeper than almost anybody realizes, but we are convinced that if the public is shown what is going on...there will be a kind of public reaction we need so we can get in there and clean the situation up.

Collier argued that the FBI hoped to prove that the Alderman decision prevented the government from utilizing incriminating evidence in court. In Collier's view, the government was gambling that the public would be more disgusted with the contents of the wiretaps and the fact that the government's "hands were tied" regarding their use than with the knowledge that the FBI had instituted them illegally.<sup>129</sup>

The Justice Department's next step was the introduction of the Mitchell Doctrine on June 13, 1969, at the Chicago

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<sup>128</sup>New York Times, June 11, 1969, 1, 34; June 14, 1969, 1, 16.

<sup>129</sup>New York Times, June 22, 1969, sec. iv, 16.

Conspiracy Trial. On May 9 defense lawyers William Kunstler and Leonard Weinglass filed a "Motion for Disclosure of Electronic Surveillance, for a Pretrial Hearing, to Suppress Evidence and to Dismiss the Indictment," inquiring if the government had instituted electronic surveillance against any of the defendants. In accordance with the Alderman decision, the motion specifically requested that a pre-trial taint hearing be held, and, if the facts warranted, the government's evidence be suppressed, or the case dismissed. The motion was no "shot in the dark"; in mid-March, press coverage of the government's request for a rehearing of the Alderman decision contained intentionally-leaked information that the government planned to indict the Chicago conspirators, introducing transcripts of electronic surveillance concerning several of the defendants. The New York Times reported that the Chicago case was one of several that the government would likely drop rather than disclose the sensitive nature of its wiretapping operations.<sup>130</sup> Thus, the Kunstler motion was delivered in expectation that the government had in fact conducted illegal surveillance against one or more of the defendants.

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<sup>130</sup>New York Times, March 12, 1969, 20. Jason Epstein concludes that the Justice Department's "hint" that it might be forced to drop the charges against the Chicago conspirators if the Supreme Court did not modify its Alderman decision was an attempt "to provoke an expression of public outrage against the Court for jeopardizing the case against the Chicago radicals." See The Great Conspiracy Trial, 102-103.

Attorney General Mitchell responded with a two-page affidavit, supported by a thirty-two page legal opinion and five sealed exhibits of wiretap transcripts, outlining one of the most sweeping assertions of Executive power in the history of the United States.<sup>131</sup> The principal components of what became known as the "Mitchell Doctrine" were as follows: (1) the government admitted that it had conducted electronic surveillance affecting seven of the eight defendants: Dellinger, Davis, Hayden, Seale, Rubin, Hoffman, and Weiner; (2) Mitchell was willing to turn over a small quantity of transcripts involving Weiner and Seale, but only under a "protective order" forbidding public disclosure; (3) as for the much larger quantity of material concerning Davis, Dellinger, Hayden, Rubin, and Seale, the government claimed that the intrusions were legal, based on the following dictum:<sup>132</sup>

This affidavit is submitted in connection with the government's opposition to the disclosure to the defendants of information concerning the overhearing of conversations of certain of the defendants which occurred during the course of electronic surveillances which the government contends were legal...On various occasions the defendants Davis, Dellinger, Hayden, Rubin and Seale participated in conversations which were

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<sup>131</sup>One of the most accurate and detailed discussions of the Mitchell Doctrine is contained in Arthur Kinoy, et. al., Conspiracy on Appeal, 300-331.

<sup>132</sup>Mitchell's June 13, 1969, affidavit made no mention of surveillance of Abbie Hoffman; during the Chicago Conspiracy Trial the Government submitted additional sealed exhibits of transcripts which concerned Hoffman. See Kinoy, Conspiracy on Appeal, 302.

overheard by government agents who were monitoring wiretaps which were being employed to gather foreign intelligence information or to gather intelligence information concerning domestic organizations which seek to use force and other unlawful means to attack and subvert the existing structure of the government. The records of the Department of Justice reflects that in each instance the installation of the wiretaps involved had been expressly approved by the then Attorney General...I certify that it would prejudice the national interest to disclose the particular facts concerning these surveillances other than to the court in camera...copies of those exhibits are not being furnished to the defendants;<sup>133</sup>

(4) in support of his assertion, Mitchell presented a lengthy legal brief, reportedly prepared by Assistant U.S. Attorney William H. Rehnquist, of the Justice Department's Office of Legal Counsel, which stated:<sup>134</sup>

There can be no doubt that there are today in this country organizations which intend to use force and other illegal means to attack and subvert the existing forms of government. Faced with such a state of affairs, any President who takes seriously his oath to 'preserve, protect and defend the Constitution' will no doubt determine that it is not 'unreasonable' to utilize electronic surveillance to gather intelligence information concerning those organizations which are committed to the use of illegal methods to

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<sup>133</sup>The Papers of Justice William O. Douglas, Manuscript Division, Library of Congress, Container 672, Subject Files: "Wiretapping, 1954-1970."

<sup>134</sup>Rehnquist's involvement in the preparation of the Mitchell Doctrine opinion is mentioned, without documentation, in Lapidus, Eavesdropping on Trial, 96. However, On October 10, 1972, in a memorandum concerning the Laird v. Tatum case, Justice Rehnquist admitted that he had "assisted in drafting the brief," although he was "not officially responsible" for the handling of the case. See "Memorandum of Mr. Justice Rehnquist," in The Papers of Justice William A. Brennan, Manuscript Division, Library of Congress, Case Files for October, 1971 Term, No. 71-288, "Laird v. Tatum," Container 284, pages 5-6.

bring about changes in our form of government and which may be seeking to foment violent civil disorders;<sup>135</sup>

(5) perhaps the boldest assertion of the Mitchell/Rehnquist initiative was the wholesale rejection of the role that neutral magistrates had been assigned by both the Supreme Court and Congress as to the necessity of warrants in electronic surveillance cases:

The question of whether it is appropriate to utilize electronic surveillance to gather intelligence information...is one that properly comes within the competence of the executive and not the judicial branch,<sup>136</sup>

(6) in support of the dictum, Rehnquist's brief relied upon two principal arguments: first, that section 2511(3) of the Omnibus Act authorizes the Attorney General, as the President's representative, to conduct warrantless "national security" surveillance against groups that seek the overthrow of government, and second, that the President possesses "inherent power," both as Commander in Chief and as protector of the Constitution, to utilize such surveillance as he deems necessary to prevent the overthrow of government by force; (7) the case law which the Justice Department relied upon in their brief involved instances where the Supreme Court had recognized certain "special powers" of the Executive in foreign affairs, such as U.S. v. Curtiss-Wright; and (8) to support his position, Mitchell attached the various

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<sup>135</sup>Quoted in New York Times, June 14, 1969, 1, 34.

<sup>136</sup>Ibid., 34.

Presidential directives regarding electronic surveillance, from Franklin Roosevelt's 1940 memorandum to President Johnson's 1965 restriction of surveillance to "national security" cases.

Many immediately recognized the constitutional significance of the Mitchell Doctrine. Reviewing the past "national security" wiretapping practices of every Attorney General since 1940, Sidney Zion asked whether it was unfair to condemn Mitchell's latest initiative. He received two responses, the first from an unnamed "Federal judge not known for softness on criminals," who stated:

The department's position is arrogant as hell...Among other things, they seem to be urging an end to Marbury vs. Madison, which would be a joke, son, if it wasn't so shocking.

A second response came from Professor Yale Kamisar of the University of Michigan Law School:

There are significant differences [between Mitchell's actions and those of his predecessors]...None of the other guys had the chutzpah to tell the courts they had no competence to decide eavesdrop questions. In fact, they tried to get Congress to set up a court-order system. Now, having sold the system by emphasizing the protections of judicial scrutiny, Mitchell claims the power to eavesdrop at will on 'domestic subversives,' whatever that means...Beyond that, there is a great symbolic difference between quietly tapping in violation of the law and achieving the imprimatur of the courts.

In response to Zion's inquiry as to why the Attorney General was no longer satisfied with secret wiretaps, Kamisar added: "I suspect....that he simply smells blood. He knows the

Supreme Court is wounded, and he wants to exploit the wounds before the healing process sets in."<sup>137</sup> A New York Times editorial on June 21 was even more critical, warning that the Fourth Amendment itself was threatened by the Mitchell Doctrine, and concluding that "any attempt to bypass constitutional rights is in itself a form of subversion and a threat to the existing structure of government."<sup>138</sup>

The Mitchell Doctrine was occasioned by the Chicago Conspiracy case, which, in mid-June, remained in the pre-trial stage. The timing of Mitchell's affidavit underscored how critical prosecuting the Chicago Eight was for the Administration. The Alderman decision required that the government submit the transcripts of all electronic surveillance to U.S. District Judge Julius Hoffman, so that a pre-trial hearing could be conducted. The Judge would then rule as to the legality of the surveillance; if he decided any of it was illegal, he would be required to disclose all pertinent transcripts to the defense, unless he believed that surveillance had been conducted for the purpose of "foreign intelligence," as had occurred with one of the five transcripts reviewed in Judge Ingraham's Houston court the week before.

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<sup>137</sup>New York Times, June 22, 1969, sec. iv., 16.

<sup>138</sup>New York Times, June 21, 1969, 26. The next day the Times reported that thirteen law professors had sent a letter to Mitchell on June 21, expressing their opposition to his wiretapping doctrine. See June 22, 1969, 53.

In Chicago, the Justice Department faced a dilemma: the enormous discretionary powers the Alderman decision granted to judges in cases involving electronic surveillance. The Justice Department was looking for ways to prevent future disclosures. One method would have been to attempt convincing the judge that the surveillance was only to gather "foreign intelligence" information.<sup>139</sup> Justice Stewart's March 24 decision in Giordano indicated that the Supreme Court had not yet ruled on this issue. Judge Ingraham had given tacit recognition to Nixon's premise by refusing to disclose one transcript that Mitchell claimed involved "national security." Even with a conservative judge such as Hoffman, it was unlikely that the government would have been able to prove that all of the transcripts concerning the Chicago defendants represented "foreign intelligence" information. Johnson and Nixon had ordered the CIA and FBI to search for evidence of "foreign" financial and other support for the various protest movements, with no success.<sup>140</sup>

The Justice Department could have dropped the charges against the Chicago conspirators. However, the case seemed too important for the Administration to abandon. It represented a public forum to silence anti-war protesters, so

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<sup>139</sup>Hiding the existence of the Jerry Rubin surveillance would have been difficult at best, after reports that surfaced in December, 1968.

<sup>140</sup>Donner, Age of Surveillance, 259-63.

that Nixon and Kissinger could have a free hand to conduct their Vietnam strategy.<sup>141</sup> By backing down after so much pre-trial publicity, the Administration would have sent a message of weakness to radical dissenters it wished to avoid at all costs. Thus, the trial took on an unmistakably political character. The Administration carefully selected "leaders" from the entire dissent spectrum, including the Yippies (Rubin and Hoffman), the "MOBE," (Hayden, Dellinger, and Davis), and the Black Panthers (Seale). The charges, conspiracy to cross state lines for the purpose of inciting rebellion, were also designed to spread fear among potential dissenters: by the logic of conspiracy law, any two people discussing the possibility of going to another state for a rally or peace march would be liable for prosecution, and face up to five years in prison. Attorney General Clark reportedly favored indicting only the Chicago Police, following the President's Commission Report, which characterized the affair as a "police riot."<sup>142</sup> Yet the Nixon Administration decided to make the case a priority, sending a team of Justice Department officials to Chicago to coach U.S. Attorney Thomas Foran, and to assist with the

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<sup>141</sup>Nixon considered the anti-war movement to be an encouragement to the North Vietnamese and detrimental to his negotiating stance. As he stated in his memoirs, "I considered that the practical effect of their activity was to give encouragement to the enemy and thus prolong the war." See Nixon, Memoirs, 350-51.

<sup>142</sup>Epstein, The Great Conspiracy Trial, 31-34. See also Farber, Chicago '68, 205.

coordination of "expert" prosecution witnesses, including informers and agents provocateurs from the full spectrum of U.S. intelligence agencies.<sup>143</sup>

Unwilling to drop the charges, and determined not to chance any more damaging public disclosures of surveillance transcripts, the Nixon Administration opted for the Mitchell Doctrine -- a strategy asserting the Executive's power to completely bypass the role of the independent magistrate in any area(s) deemed important to the "national security." By asserting that the wiretaps of the defendants' conversations were legal, the Administration hoped that Judge Hoffman would rule on their legality in camera, which would prevent the disclosure of transcripts to the defendants.

The Nixon Administration's decision to introduce the Mitchell Doctrine on June 13 was motivated by other important long-term concerns. The Administration's request for a rehearing in the Alderman case probably had little to do with their concern over the possible exposure of FBI and CIA wiretapping operations against foreign embassies.<sup>144</sup> If the Justice Department really wanted authority to conduct warrantless eavesdropping to gather "foreign intelligence"

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<sup>143</sup>Schultz, The Chicago Conspiracy Trial, 388-92. See also Pyle, Military Surveillance of Civilian Politics, 183-88.

<sup>144</sup>If foreign embassy staffs were not aware of U.S. surveillance practices prior to the Alderman decision, they were certainly tipped off by the numerous press accounts concerning the Government's petition for a rehearing in the case.

information, and that transcripts be reviewed by judges in camera to prevent full disclosure, as Griswold had argued, it should have been content with the Court's clarification of the ruling in Giordano.<sup>145</sup> Justice Stewart's assertion that the Court had not yet decided on the legality of "foreign intelligence eavesdropping" left open the possibility that the Court might recognize the constitutionality of section 2511(3) of the Omnibus Act -- but only in cases involving "foreign intelligence." In short, the government received almost all of what it asked for, short of a definitive ruling on the legality of warrantless surveillance for the purpose of conducting "foreign intelligence." And there were indications, in addition to Stewart's rather blunt "hint," that such a ruling was not far off; for example, Judge Ingraham's decision in the Clay case to prevent disclosure of the one transcript which Mitchell had said involved "foreign intelligence."<sup>146</sup> Yet the Administration was clearly not satisfied with this, opting instead to assert, via the Mitchell Doctrine, that section 2511(3) of the Omnibus Act pertains to domestic as well as foreign "threats."

In fact, the likelihood that the Court would recognize the legality of warrantless surveillance only involving "foreign intelligence" may explain the decision to propose the Mitchell Doctrine. By the late sixties, the process of

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<sup>145</sup>See New York Times, March 20, 1969, 29.

<sup>146</sup>See New York Times, June 7, 1969, 29.

narrowing the boundaries of permissible "national security" eavesdropping was underway. However, the open-ended nature of "national security" was essentially preserved, thanks to Johnson's failure to define the parameters of "national security," Justice Stewart's footnote in the Katz decision, and section 2511(3) of the Omnibus Act. The Alderman decision, as well as the clarification in Giordano, altered the situation by narrowing the definition of "national security" to mean "foreign intelligence." Regardless of what the Administration intended, its utilization of the words "foreign intelligence" backfired. As Justice Stewart wrote:

The Court has not...addressed itself to the standards governing the constitutionality of electronic surveillance relating to the gathering of foreign intelligence information -- necessary for the conduct of international affairs, and for the protection of national defense secrets and installations from foreign espionage and sabotage. Mr. Justice White has elsewhere made clear his view that such surveillance does not violate the Fourth Amendment...the issue remains open.<sup>147</sup>

Stewart's words made clear that the Court was moving toward a narrow definition of "national security," which threatened the Administration's planned prosecution of domestic radicals.<sup>148</sup>

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<sup>147</sup>Quoted in Rutgers Law Review, "Wiretapping and Electronic Surveillance," 348.

<sup>148</sup>As Frank Donner states, if the Government was forced to reveal the transcripts of warrantless surveillance in court, "the entire national security game, with its dubious claims of linkages between domestic targets and foreign principals so substantial as to justify executive intervention, would be exposed." See Donner, Age of Surveillance, 246.

Had they been willing to abide by a completely new set of rules concerning electronic surveillance, Nixon and Mitchell might have been satisfied with Stewart's clarification of the Alderman decision. However, preserving -- in fact expanding -- their access to surveillance was high on the Administration's domestic policy agenda. Title III of the Omnibus Act offered a legal method whereby both the Justice Department and the States could utilize electronic surveillance against suspected criminals. True, the court-order requirement was, in the FBI's view, "cumbersome," requiring such things as probable cause, thirty-day extensions, particularity as to the types of criminal activity expected, and eventual notice to the target(s). Title III left open the question of whether long-term "investigative" surveillance, much preferred by law enforcement and intelligence agency officials, could pass constitutional scrutiny.

The Administration could also have continued to pursue the policy of secretly wiretapping and preventing disclosure. But this option was no longer tenable: (1) by the end of the sixties public opinion had changed regarding wiretapping and privacy, thanks to numerous revelations of illegal FBI wiretapping and bugging, from an increasingly-aggressive national media; (2) by 1969, both the Supreme Court and Congress generally opposed warrantless wiretapping in domestic areas; and (3) another scandal involving illegal FBI

surveillance of U.S. citizens would likely be more damaging to the aging Director, because the defenses that he had traditionally relied upon, including open-ended Presidential directives and Judicial and Congressional silence, were no longer present.

The Nixon Administration's unwillingness to play by the new rules was made clear in the Mitchell Doctrine. Yet the doctrine represented much more than an attempt to preserve the Executive Branch's traditional powers of surveillance; it also claimed the power to utilize any "national security" surveillance in court, which was sweeping in its implications. Theoretically, the FBI could now legally initiate a wiretap against any and all, listen for as long as it liked, and submit in court whatever incriminating information it came across. As Frank Donner states, this "prosecutive option" had always been considered "highly important" by the FBI and other law enforcement entities:

A point is reached in the intelligence process when...the need for sanctions and publicity takes precedence over the secret collection of information.<sup>149</sup>

Traditionally, the FBI had been prohibited from utilizing the "national security" surveillance in court, thanks to the Federal Communications Act of 1934, interpreted as banning the interception and divulgence of warrantless surveillance. The Mitchell Doctrine, therefore, promised a way out of this

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<sup>149</sup>Donner, Age of Surveillance, 245.

dilemma. Donner suggests another possible benefit which the Administration hoped to gain from the Mitchell Doctrine: the so-called "chilling effect." If the government possessed the power to eavesdrop at will, the net result would be less dissent, which of course, is precisely what Nixon desired.

Several components of Mitchell's affidavit and Rehnquist's supporting brief were virtually identical to positions Hoover had taken during the Coplon and Black cases, as well as during the Omnibus Act debates: (1) the preservation of the Justice Department's free hand to wiretap at will and without court order all persons deemed "national security" threats; and (2) the ability to utilize the fruits of these surveillances in court, as per section 2511(3) of the Omnibus Act. Hoover was unable to convince Senator McClellan to authorize specifically warrantless surveillance of "domestic groups or individuals whose activities he [the President] deems inimical to the internal security of this country." Thus, he made it clear that he would only be satisfied that section 2511(3) fulfilled "the Bureau's needs in the security field" if "these portions of the Act are held constitutional by the Supreme Court."<sup>150</sup> In the Alderman decision the Court gave notice that it may concede the constitutionality of only half of section 2511(3): the portion dealing with strictly "foreign" threats. The Mitchell Doctrine was therefore a temporary fulfillment of

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<sup>150</sup>Charns, Cloak and Gavel, 93.

Hoover's wishes, predicated upon the hope that the courts would eventually accede to it. Though the Supreme Court might ultimately find it unconstitutional, the government would have a free hand during the intervening period, which meant continuing the use of warrantless "national security" wiretaps against any person(s) or groups(s) it desired.

V.

Regardless of whether the Mitchell Doctrine was originally put forward as a short-term strategy focused on the Chicago Conspiracy Trial or a long-term initiative intended to preserve the FBI's unchecked "national security" surveillance powers, the Nixon Administration backed away from it within a month of its introduction.<sup>151</sup> On June 26, the American Civil Liberties Union (ACLU) filed a lawsuit in U.S. District Court in Washington, D.C., charging that the Mitchell Doctrine was unconstitutional. The suit was filed on behalf of nine anti-war and Black Power organizations, as well as the "Chicago Eight," and claimed that the government's doctrine violated the First Amendment protection of free speech, as well as the Fourth Amendment's guarantee

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<sup>151</sup>In fact signs that the Administration would back down came as early as June 19th, when Nixon stated: "our attitude toward electronic surveillance is that it should be used very sparingly, very carefully -- having in mind the rights of those who might be involved -- but very effectively to protect the internal and external security of the United States." See New York Times, June 20, 1969, 20.

against unreasonable searches and seizures. The complaint continued:

By announcing a policy of unfettered searches and seizures, the defendants have created a chill and a pall on all those who would desire to associate with those persons and groups caught within the dragnet of the announced policy in violation of the associational rights protected by the First Amendment.<sup>152</sup>

Christopher Lyndon's New York Times article on the lawsuit concluded that the Justice Department's new policy "would provide retroactive justification of the surveillance of Mr. [Elijah] Muhammad and Dr. King...[and] also implies the department's intention to continue its eavesdropping on black militants and other radicals, without going through the procedures established by the crime control act."<sup>153</sup> Immediately, the Nixon Administration adopted a much more moderate stand. On July 14th, Mitchell played down the government's surveillance practices, claiming that the Justice Department had actually reduced the number of wiretaps and bugs since the Nixon Administration took office, and noting that a number of "national security" wiretaps had been discontinued, because they were "not productive." Responding to charges by Senators Ralph W. Yarborough (D) of Texas and Carl T. Curtis (R) of Nebraska that many Congressional and Executive Branch telephones were tapped, Mitchell stated that "It would be inconceivable beyond any

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<sup>152</sup>Quoted in New York Times, June 27, 1969, 1, 17.

<sup>153</sup>Ibid., 17.

consideration to place a tap to a member of Congress or on anyone else in Government." He added that popular concern over the government's surveillance practices was "exaggerated."<sup>154</sup>

An additional factor that may have influenced the Administration's decision to retreat from the Mitchell Doctrine was the delayed ruling on Mitchell's affidavit in the Chicago Conspiracy Trial. Judge Hoffman was silent until September 9th, on the eve of the trial, when he declared "I have determined....that the most appropriate procedure would be to conduct a hearing after the jury trial."<sup>155</sup> This ruling was in direct contradiction with the Alderman decision, which had ordered pre-trial hearings be held in all electronic surveillance cases. The ruling effectively allowed Hoffman to delay deciding both the legality of the specific wiretaps and the constitutionality of the Mitchell Doctrine, until at least the following spring.<sup>156</sup> He

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<sup>154</sup>Quoted in New York Times, July 15, 1969, 1, 25.

<sup>155</sup>In fact, Judge Hoffman did not rule on the matter until immediately following the verdicts in the trial: February 20, 1970.

<sup>156</sup>Judge Hoffman's loyalty to the Mitchell Justice Department was discussed by one of the Judge's law clerks. Sometime in July, after the Mitchell affidavit had been filed and the defense requested access to additional transcripts, the clerk asked Hoffman to "dwell upon the fourth amendment implications" of his denial of the defense's motion. In response, Hoffman gestured toward his desk and said "There's the Attorney General's affidavit." Soon thereafter, the clerk's constitutional concerns led to his dismissal. See Schultz, The Chicago Conspiracy Trial, 6.

therefore impounded all of the surveillance transcripts presented by the government and began the trial on September 26.<sup>157</sup>

Rather than continuing its direct judicial assault against the Alderman decision, the Justice Department, throughout 1969, attempted to overturn the decision via Senator McClellan's Judiciary Committee.<sup>158</sup> Title VII of a proposed organized crime bill required that before FBI transcripts of illegally-obtained surveillance be turned over to a defendant, the trial judge would have to determine that its disclosure was in the "interest of justice."<sup>159</sup> As John Eliff asserts, this action "placed the Executive Branch firmly on the side of an assertion of Congressional power to overrule constitutional decisions by simple legislation."<sup>160</sup> Although the anti-Alderman component of McClellan's bill was later dropped from what became the Organized Crime Control

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<sup>157</sup>Epstein, The Great Conspiracy Trial, 113.

<sup>158</sup>During the Government's appeal to the Supreme Court for a rehearing in the Alderman case, Mitchell had sent a Justice Department representative to threaten this very action, if the Court refused to modify its decision. See note 122.

<sup>159</sup>Quoted in Eliff, Crime, Dissent and the Attorney General, 77. This position was virtually identical to Griswold's argument in the Government's petition for a rehearing, following the Alderman decision.

<sup>160</sup>Ibid., 77-78. Citing the Supreme Court's "near unanimity in requiring disclosure of electronic surveillance records without judicial screening," in Alderman, Eliff is particularly critical of Mitchell's blatant Executive Branch-directed Legislative maneuver to circumvent the Court's constitutional ruling.

Act of 1970, the Senator remained an ardent defender of the Administration's wiretapping policies.<sup>161</sup>

Having pursued the Mitchell Doctrine "in the open" during the first six months of 1969, culminating with the June 13 Mitchell affidavit, the Nixon Administration suddenly became virtually silent on the subject of wiretapping and surveillance.<sup>162</sup> This silence masked an increasing willingness to conceal surveillance activities under the mantle of "national security." As early as April of 1969, Special White House Counsel John Erlichman hired ex-New York policeman John Caulfield to set up a special White House "investigations unit" to conduct various political surveillance and "dirty tricks" campaigns against "enemies" of the Administration, such as Senator Edward Kennedy.<sup>163</sup> Before long the unit took the title of "plumbers," due to their primary responsibility: locating "leaks" within the government's bureaucracy concerning foreign policy and other secrets. Illegal (warrantless) wiretapping was a favorite

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<sup>161</sup>In a series of statements on the floor of the Senate during the Summer and Fall of 1969, McClellan extolled the successes of Title III of the Omnibus Act, which he had been so instrumental in achieving the passage of. He carefully avoided any references to "national security" surveillances. See Theoharis, "Misleading the Presidents," 748.

<sup>162</sup>A Gallup Poll released in mid-August indicated that the American public was almost evenly divided on the issue of wiretapping as a way to obtain criminal evidence: 46 percent supported its use, while 47 percent opposed. Seven percent were undecided. See New York Times, August 21, 1969, 21.

<sup>163</sup>J. Anthony Lukas, Nightmare: The Underside of the Nixon Years, (New York: The Viking Press, 1976), 13-16.

plumbers tactic, and by the end of the year seventeen wiretaps were instituted against Pentagon officials, journalists, and others -- beginning what Mitchell would later call the "White House horrors."<sup>164</sup> At the same time, the Justice Department began a series of warrantless wiretaps on a number of New Left, counterculture, anti-war, and Black Power movement groups. The most popular target was the Black Panthers, whose importance to the FBI and Justice Department had escalated rapidly under the New Administration.<sup>165</sup> These wiretaps were instituted prior to the Justice Department's issuance of any specific guidelines to the FBI concerning the proper procedures to conduct electronic surveillances under Title III; in short, they were patently illegal.<sup>166</sup> An important corner had been turned.

Mitchell's May 6, 1969 memorandum to Hoover outlined the Administration's interpretation of Title III, and presented the FBI with guidelines for the use of electronic surveillance. The memo began with an assertion that section 2511(3) of the Omnibus Act "recognizes the constitutional power of the President to authorize interceptions in certain

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<sup>164</sup>Kutler, The Wars of Watergate, 116-120. These initial Nixon Administration wiretaps included Department of Defense employee Morton Halperin.

<sup>165</sup>O'Reilly, Racial Matters, 298-99.

<sup>166</sup>The first such guidelines were issued on May 6, 1969, in a memorandum from Mitchell to Hoover. Hoover disseminated the guidelines to his field offices on June 3rd. See the next two notes below.

specified instances involving the security of the nation." No attempt was made to differentiate between foreign and domestic targets. Mitchell then outlined a clear delineation between surveillance for "investigative" purposes, which, he believed, did not require a court order, and surveillance for the purposes of criminal prosecution, in which he advocated requesting a warrant only in certain situations. Implicit in the memo was the Administration's position that in "most national security cases" in which no immediate prosecution was perceived, the FBI need not seek a court order. Mitchell's overall contempt for the discretionary powers granted to judges in the Omnibus Act and the Alderman and Giordano decision was also made clear in the memo:

Although in the court order procedure, the Act provides a means for safeguarding from public disclosure, prior to prosecution, the existence of an electronic eavesdropping device...enforcement of these provisions is left to the discretion of the judge...Moreover, Section 2518(8) (d) provides that within 90 days the judge shall advise the subject of the court order and, in his discretion, make available part or all of the intercepted communications...In these circumstances, there can be little assurance that sensitive data, in a case not brought to prosecution, can be protected from public disclosure.

Mitchell then focused on the issue of how evidence obtained via "national security" surveillance could be introduced as evidence in court where such interception was "reasonable":

The requirement that the interception be "reasonable" applies only where the Government seeks to introduce at trial evidence obtained through the interception. In those instances

where authority to intercept for non-prosecutive purposes is requested, the "reasonableness" standard would not, it appears, have to be met [emphasis in original].<sup>167</sup>

On June 3, 1969 Hoover issued "SAC Letter 69-31" to the FBI's field offices, passing-on Mitchell's instructions. Although the Omnibus Act had been in effect for nearly a year, this letter contained the first set of Title III guidelines sent to the field. The six-page document outlined Mitchell's requirements almost to the letter, but added Hoover's advice that "extreme caution" be taken in disseminating electronic surveillance outside of the Bureau, if "evidence of possible criminal conduct" were discovered in the surveillances. Hoover conceded that the instructions presented "certain serious problems....such as the manner of identifying information as coming from an electronic surveillance when disseminating information of a possible criminal conduct," but added that the Department of Justice's Criminal Division was preparing a "'Manual for Conduct of Electronic Surveillance,'" which would undoubtedly be of much use to the field offices.<sup>168</sup>

The overall message of Mitchell's memo and Hoover's instructions to the FBI field offices was that the Nixon Administration refused to recognize the Alderman and Giordano

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<sup>167</sup>Mitchell Memorandum to Hoover, May 6, 1969, Davis Papers.

<sup>168</sup>Hoover Memorandum to all Special Agents in Charge, "SAC Letter 69-31," June 3, 1969, Davis Papers.

decisions; specifically, the Administration rejected the Court's suggestion that "national security" (warrantless) surveillances be narrowed to instances involving "foreign intelligence." Choosing to ignore the will of both the Judiciary and Congress, the Administration was simply not willing to part with the freedom to wiretap anyone it wished. For both Mitchell and Hoover, the primary concern was with preventing "leaks" of warrantless electronic surveillance in cases being considered for criminal prosecution.

The Mitchell Doctrine offered a way out of the dilemma, in several ways: (1) rather than narrowing the definition of "national security" as the Supreme Court suggested, the Administration boldly proposed an expansion, asserting that both foreign and domestic individuals and/or groups may fall under its rubric; (2) the doctrine declared that only the President and the Executive Branch were qualified to determine what constituted a "national security" threat, thereby sidestepping the considerable discretionary powers which both Congress, in Title III, and the Court, in Alderman and Giordano, imparted to judges; and (3) as if to answer Mitchell and Hoover's primary concern, the doctrine asserted that evidence obtained via warrantless "national security" surveillances could be used in court. A recipe for unlimited, unsupervised wiretapping at the whim of the Executive Branch had been unveiled in Chicago, and until the federal courts could get around to addressing its

constitutionality, the legal "grey area" within section 2511(3) of the Omnibus Act and Justice Stewart's decisions in Katz and Giordano provided the Administration with adequate justification to secretly proceed as if the Mitchell Doctrine were constitutional.

There is no small irony in the fact that on November 26, 1969, in the same courtroom that Mitchell issued wiretapping's Declaration of Independence, "Chicago Eight" defense attorney Leonard Weinglass sought expert testimony on the nation's "youth culture" from White Panther leader John A. Sinclair.<sup>169</sup> Neither Sinclair nor Mitchell could have realized it at the time, but their paths would soon intersect. Thirteen months later, Mitchell would issue virtually the same affidavit in Judge Damon J. Keith's Detroit courtroom, at the CIA conspiracy trial of Sinclair and two other White Panther leaders, setting the stage for the landmark U.S. v. U.S. District Court case. How Sinclair and the White Panthers came to interest Mitchell and the Justice Department is the subject of the next chapter.

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<sup>169</sup>Clavir and Spitzer, The Conspiracy Trial, 239-40. At the time of Weinglass' request, Sinclair was in Marquette Prison in Michigan. Judge Hoffman denied the defense's request.

## Chapter Three

### Michigan's White Panther Party

#### I.

Our culture, our art, our music, newspapers, books, posters, our clothing, our homes, the way we walk and talk, the way our hair grows, the way we smoke dope and f\_k and eat and sleep -- it is all one message, and the message is FREEDOM!...Our program of rock and roll, dope, and f\_king in the streets is a program of total freedom for everyone...We breathe revolution. We are LSD-driven total maniacs in the universe. We will do anything we can to drive people out of their heads and into their bodies. Rock and roll music is the spearhead of our attack...With our music and our economic genius we plunder the unsuspecting straight world for money...and revolutionize its children at the same time...We don't have guns yet -- not all of us anyway -- because we have more powerful weapons: direct access to millions of teenagers is one of our most potent, and their belief in us is another. But we will use guns if we have to -- we will do anything -- if we have to. We have no illusions...we have taken the White Panther as our mark to symbolize our strength and arrogance and to demonstrate our commitment to the program of the Black Panther Party as well as to our own -- indeed, the two programs are just part of the same whole thing. The actions of the Black Panthers in America have inspired us and given us strength...we're as crazy as they are, and as pure. We're bad.  
-- John Sinclair, "White Panther State/meant," 1968<sup>1</sup>

The White Panther Party, located in Detroit and Ann Arbor, was one of the leading white counterculture

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<sup>1</sup>Sinclair, Guitar Army, 103-05.

"revolutionary" groups during the sixties.<sup>2</sup> The evolution of the group from the "Artists Workshop" (1964-1967) through "Trans-Love Energies" (1967-1968) and finally to the White Panther Party (1968-1971) was influenced by a combination of local events in southeastern Michigan, as well as a number of national forces and events, which affected the entire spectrum of "the Movement." Beginning shortly after John Sinclair's arrival in Detroit in 1964, the group went through several very different incarnations: first, as the "Artist's Workshop" collective, a small tightly-knit and multi-racial group of beatnik poets, jazz musicians, and avant-garde artists, living in the vicinity of Detroit's Wayne State University (WSU); then, as "Trans-Love Energies," an attempt at coalition from Detroit's radical and counterculture

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<sup>2</sup>The following factors made the White Panthers a "leading" radical organization: (1) John Sinclair's July, 1969 imprisonment on marijuana charges -- nine and a half to ten years for giving two "joints" to an undercover police officer -- became a cause celebre for the counterculture movement and New Left during the two and a half years that he was incarcerated; (2) the White Panther Party (WPP) also gained national notoriety in 1969 and 1970 for its militant rhetoric, spearheaded by Lawrence Robert "Pun" Plamondon, one of the first "mother country white radicals" to go underground during the sixties; (3) the WPP developed a national organization, with chapters located across the country and in England; (4) by mid-1970, as most other national radical organizations underwent fragmentation and bitter internal factionalism, the WPP's organizational structure remained intact, leading several groups such as the Youth International Party (YIP) and Tom Hayden's "Red Family Commune," to seek an alliance.

groups<sup>3</sup>; and finally, as the White Panther Party, a politically-focused counterculture organization, described by "Minister of Defense" Pun Plamondon as "the hippie counterpart to the Black Panthers, and the armed counterpart to the Yippies"<sup>4</sup> Local events, such as the hippie "Love-in" and the Detroit riots of 1967 -- as well as events of national significance, such as the widespread availability of LSD in 1966, and the overall movement from "resistance" to "revolution" in radical circles following the Chicago demonstrations -- combined to create the White Panthers.

Increasing police surveillance and harassment of the group influenced its development. And with each major organizational change came increasing militancy. The White Panthers' evolution occurred in Detroit, a city with: (1) an historical influx of a wide variety of races and nationalities, all competing for the "American Dream"; (2) a prevalence of progressive/pro-labor organizations, dedicated to wresting power from Detroit's corporate elites; (3) "white flight," a rapidly-advancing demographic shift of middle and upper-class whites away from an increasingly poor

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<sup>3</sup>Inspiration for the name "Trans-Love Energies" came from the rock and roll band Jefferson Airplane; specifically the song "Trans-Love Airways."

<sup>4</sup>Kathleen Stocking, "A Personal Remembrance: Ann Arbor's Famous Radicals, Then and Now," Monthly Detroit, vol. 5, (February, 1992), 80. The group underwent yet another shift in ideological focus in late 1971, renaming itself the "Rainbow People's Party" (RPP); the organization lasted until 1973.

inner-city; and (4) an ultra-conservative, white Police Department, which included a notorious Special Investigation Bureau (SIB), or "Red Squad." Originating in the 1930s, the Detroit Red Squad conducted widespread surveillance of non-conformist groups in the city, and often operated in collusion with wealthy automobile industry executives, and other white corporate elites. By the Cold War era the Red Squad's mission became overwhelmingly political, its officers focusing on organized labor, civil rights, and Socialist/Communist groups. A pattern of overt intimidation to stifle dissent was established. With the dramatic increase in social disorder during the 1960s, the Red Squad, working closely with special units of the State Police, amassed thousands of files on individuals and groups.

The ultra-conservative ideology characterizing the state and local police forces in southeastern Michigan accurately reflected the larger white community, as well as the mainstream media.<sup>5</sup> In this environment, the cultural revolt presented by the Artists Workshop/Trans-Love Energies was viewed with hostility. A wide array of surveillance tactics were employed, including undercover informants, physical surveillance ("tailing"), photography/video-taping, and

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<sup>5</sup>In the American Historical Review, 99, (April, 1994), 450-52, Leo Ribuffo observes, "the 'sixties' was not a radical era, but a polarized era." As was the case with nearly every major American city during the decade, the radical fringe in southeastern Michigan comprised a very small minority.

harassment -- John Sinclair, for example, was arrested for marijuana possession three times within a span of twenty-eight months. As the sixties progressed and the numbers of so-called "hippies" expanded, the resulting escalation of police surveillance and intimidation contributed to the increasing level of militancy and radical rhetoric (e.g. "posturing") from groups such as Trans-Love Energies. At the same time, the increasing friction between the New Left, Black Power, and anti-war movements and the forces of the conservative establishment resulted in an atmosphere of increased polarization. Local Detroit underground newspapers, such as the Fifth Estate and Trans-Love's Warren-Forrest Sun carried the news of each flash-point in the expanding national and international confrontation. In addition, as Sinclair and the "MC-5" toured America, they encountered other counterculture organizations and revolutionary incidents.

From the earliest days of the Artists Workshop, the group emphasized cultural rebellion from "straight" society, as opposed to political revolt. Unlike the New Left and anti-war movements, whose tactics included picketing, demonstrations, and "teach-ins," the Artists Workshop demonstrated its dissent in the isolated lifestyles of its members: the poetry they wrote, the music they performed and listened to, the underground psychedelic press they contributed to, the clothes they wore, and the drugs they

consumed. In accordance with the speed of change during the sixties, ideology and tactics underwent sweeping changes in haste. After 1965, what was considered militant at any given time was quickly criticized as trivial and pointless. The Artists Workshop, a tightly-knit group of jazz aficionados and beatnik poets who isolated themselves from the larger society, was almost elitist in orientation, as had been the case with "beat" groups since the fifties; their small numbers and self-imposed exile from "straight" society contributed to feelings of superiority over those unaware of society's meaninglessness. Change came in 1966, when the group created Trans-Love Energies, an organization with an open recruiting policy, which actively sought new converts to the counterculture. One of the primary catalysts for this change was the introduction of LSD, which, by many accounts, turned large numbers of disaffected Detroit youth into "hippies" virtually overnight, and convinced individuals such as John Sinclair of the potential for a widespread counterculture/youth revolt.

Additional changes during 1967 and 1968 resulted in the creation of a political wing of Trans-Love Energies: the White Panther Party. Prior to this time, the focus had been strictly cultural; in fact, part of their ethos contained a strong dislike for New Left and anti-war "politicos" who spoke of militant change but refused to live outside of the established culture. Several incidents explain the decision

to embrace both cultural and political tactics. First, after repeated marijuana busts and expanding police harassment, the group saw a need to organize for self defense. The experience of living through the Riots of 1967, as well as the police crack-down that followed (which ultimately drove them from Detroit to Ann Arbor in the Spring of 1968), had an impact. Participation in the "Battle of Chicago," in 1968, convinced them of several things. Jerry Rubin and Abbie Hoffman of the Youth International Party lacked rudimentary organizational skills; Sinclair recognized the need for the counterculture to become better organized. The Chicago police's violent response to the demonstrators had the effect of "radicalizing" a previously pacifist counterculture; many counterculture "freeks" who had previously shed all allegiance to "politics" decided that in order to preserve their culture, they would defend themselves through political activism.

The origins of the White Panthers owed a great deal to the heroic status which white radicals accorded the Black Panther Party during the mid to late-sixties. The willingness of Huey Newton, Bobby Seale, and other Black Panthers to face down police, even engaging in gun battles, brought feelings of "white guilt" and envy throughout the New Left and counterculture. Both Sinclair and Plamondon were heavily influenced by the vanguard status of the Black Panthers. In 1968, when Eldridge Cleaver and Huey Newton

advised white radicals that the best way to demonstrate support for the BPP was to create white support groups, Trans-Love responded by forming the White Panther Party. In doing so, they acted forcefully to answer one of the central questions facing the entire white movement after 1967: "What will whitey do?"

The White Panthers do not fit neatly into any precise historical definition of counterculture group.<sup>6</sup> They shared much in common with the Youth International Party (YIP), particularly an overwhelmingly cultural focus.<sup>7</sup> They also shared with the Yippies a preference for tongue-in-cheek "street theater," rather than anti-war speeches and other political activities, although they recognized the Vietnam War's influence on the overall polarization of society. The group was dedicated to "living the revolution," via a counterculture lifestyle. However, the White Panthers' organizational skills were antithetical to the ideas espoused by Yippie gurus Rubin and Hoffman, with whom the WPP enjoyed close relations. The organizational structure of the WPP, like the Black Panthers, featured a "Central Committee" of high-ranking Ministers, to provide overall leadership and

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<sup>6</sup>Theodore Roszak claims "the counter culture...possesses all of the liabilities which a decent sense of intellectual caution would persuade one to avoid like the plague." See his The Making of a Counter Culture, (Garden City, NJ: Anchor Books, 1969), xi.

<sup>7</sup>In fact, a WPP-YIP merger was experimented with during 1970.

planning, as well as Deputy Ministers, and Secretaries. Although they paid lip service to a "no leaders" concept, a central feature of the counterculture, the White Panthers relied upon leaders for direction and inspiration. The WPP leadership, which included John and Leni Sinclair, Pun and Genie Plamondon, "Skip" Taube, Gary Grimshaw, Ken Kelley, and David Sinclair, possessed skills not typically associated with counterculture groups, including several years of experience publishing newspapers and books and creating a wide variety of avant-garde art, managing several commune houses, and organizing large rock and roll concerts and tours. In addition, the group was adept at distributing information, not only through publishing, but also via the music of the MC-5. The WPP recruited young converts, first in high schools and colleges across Michigan, and later on a national scale. By mid-1970 there were several dozen WPP chapters, scattered in cities and college towns across America, with varying degrees of loyalty to the National Headquarters in Ann Arbor.

The issue of perception versus reality was central to the White Panther Party's evolution. Borrowing from both the Black Panthers and Yippies, Sinclair and Plamondon constructed a myth: namely, that the group was a leading national radical organization, ready to take on the State to prevent it from destroying their way of life. They sought to provide harassed hippies across the country with the means to

defend themselves against the "pig onslaught." This posture found realization in the group's rhetoric, as well as local and national events which, they believed, would transform it into reality. In doing so, they responded to the teachings of Black Panther Huey Newton: "Power is the ability to define phenomena and make them act in a desired manner."<sup>8</sup> The national prominence of the MC-5, the expansion of the WPP across the country, and the increasing interest of the FBI in stifling the group's activities reveals that this small number of "politicized freaks" did partially succeed in making posturing accord with reality.

Sinclair and Plamondon utilized overblown and exaggerated rhetoric, seeking radical acceptance from "white movement heavies" and Black Panthers. The WPP issued press releases and held press conferences, attempting to spread its gospel to as many potential recruits as possible -- serving notice that if attacked, it would respond in kind. Pun Plamondon, in particular, cultivated the image of a white revolutionary who was not afraid of moving the struggle to the next level -- violence against the police and/or other symbols of the establishment. The degree to which Plamondon and the White Panthers actually contemplated or carried out acts of violent revolution, as opposed to merely expressing

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<sup>8</sup>Quoted by WPP leader Genie Plamondon in the Ann Arbor Argus, August 5, 1970, 2. From the Underground Newspaper Archives, Labadie Collection, Hatcher Library, University of Michigan, Ann Arbor. [Hereafter Labadie MSS, UM.]

a desire to see them happen, is difficult to determine. Few Ann Arbor White Panthers went beyond occasional target practice sessions with hunting rifles, and posing with weapons for photographs. The only violent act for which any of the WPP leadership was ever convicted was an assault charge, levelled against John Sinclair, for allegedly attacking an Oakland [Michigan] County police officer at an MC-5 concert in 1968.<sup>9</sup> However, the image the WPP sought to portray, from the organization's inception in 1968 through mid-1970, was that of a "vanguard" revolutionary group, dedicated to striking back at the "pigs."

The rhetoric and posturing which brought the White Panthers the attention of the radical left also led to increased police surveillance. A lack of proper training, as well as an ultra-conservative, "praetorian" ideology, meant that local police forces in southeastern Michigan were unable (or unwilling) to differentiate between radical posturing and actual revolutionary actions. For many Detroit and Michigan State police, the White Panthers' rhetoric justified not only increased surveillance, but also COINTELPRO-like initiatives designed to harass and intimidate. WPP rhetoric also brought the group to the attention of Detroit's FBI Field Office by the end of 1968. Within a year, John Sinclair was in prison

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<sup>9</sup>The facts concerning the incident raise doubts concerning the legitimacy of the charges. Sinclair claims that the charge was falsely brought in an attempt to damage the band's growing popularity. Fifth Estate, August 1-14, 1968, 2.

for ten years. Plamondon, Detroit WPP member Jack Forrest, and Sinclair also faced federal indictments for allegedly plotting to blow up a clandestine CIA recruiting office in Ann Arbor.<sup>10</sup> At least one FBI COINTELPRO action, intended to promote dissention with other white radical groups in Ann Arbor, was also directed against the group during the fall of 1969. Simultaneously, several other WPP leaders were arrested on drug and other offenses, as Federal, State, and local authorities cooperated closely to harass the group.

Following the CIA indictments, the White Panthers began to take themselves more seriously. Pun Plamondon went underground, occasionally sending messages to the Movement, urging that the struggle against oppression advance to a more violent level. These writings, combined with the nationally-organized "Free John Sinclair" movement, gave the White Panthers international notoriety. Police and FBI surveillance and repression -- brought about, in part, by Sinclair and Plamondon's outrageous rhetoric and posturing -- served to reinforce the White Panther myth, seemingly basing it in reality. For the White Panthers, every day brought increasing evidence that an all-out war with the U.S. Government was approaching. Local events, such as the repeated arrests and police harassment, were reinforced by reports of police violence and pending revolution in other

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<sup>10</sup>The available evidence suggests that the charges in both cases were politically motivated.

areas of the country, which filled the pages of the underground press. Popular music also carried the message of pending apocalypse. The White Panthers refused to recognize that the situation in most areas of the country was decidedly non-revolutionary. By the same token, the police and FBI who witnessed first-hand the escalation of social disorder on a daily basis, became increasingly convinced that the threat of armed revolt presented by the "long-hairs" was indeed real. The "perception-reality gap" widened, as both sides concluded that violence was necessary for survival.

By late 1969, Hoover's FBI had targeted the White Panthers for intensive surveillance and COINTELPRO actions. However, declassified FBI files make clear that the White Panthers were not a top priority for the Bureau until mid-1970, when a series of events brought the WPP face-to-face with the Mitchell Justice Department over the issue of national security wiretapping.

## II.

The American Midwest and the FBI have traditionally enjoyed a special relationship in which each has tacitly exempted the other from prevalent suspicions...the FBI implicitly recognized that the ideological threats to the nation -- Nazi sympathizers of the thirties, Communist subversion in the forties and fifties, radical war protesters of the sixties -- never took root in the rich soil of America's heartland. There were stubborn ingrown and imported heresies in the East and wild ideological lurches in the West, but the geographic center, for the most

part, held. -- Neil Welch, FBI Special Agent in Charge, Detroit Office<sup>11</sup>

The history and evolution of the White Panthers is, in many respects, synonymous with the life of John Alexander Sinclair, one of America's lesser-known radical leaders during the sixties.<sup>12</sup> He was born on October 2, 1941, in the small Midwestern town of Flint, Michigan, the birthplace of General Motors. His father was a career employee at the local Buick plant, starting on the assembly line in 1928 and eventually advancing to a mid-level management position; Elise, his mother, was a homemaker. John, brother David, and sister Kathy enjoyed a comfortable middle-class upbringing in Davison, a small town located a few miles from Flint. The

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<sup>11</sup>Neil J. Welch and David W. Marston, Inside Hoover's FBI: The Top Field Chief Reports, (Garden City, NJ: Doubleday and Company, 1984), 35. Welch was SAC in the Detroit Field Office from 1970 through 1976.

<sup>12</sup>The information concerning John Sinclair's early life and the origins of the Artists Workshop comes primarily from the following sources: Sinclair, Guitar Army, 7-9; Bret Eynon, "John Sinclair: Hipster," unpublished biography, November, 21, 1977, Hunter College, NY, American Social History Project, 9-18, located at the Michigan Historical Collections, Bentley Historical Library, University of Michigan, "Contemporary History Project Papers: John Sinclair," box 1, topical file: John Sinclair [hereafter cited as "ASHP-Sinclair Biography"]; and John Sinclair Interview with Bret Eynon, 1977, Hunter College, NY, American Social History Project, 1-7, located at the Michigan Historical Collections, Bentley Historical Library, University of Michigan, "Contemporary History Project Papers: Interviews," box 239-J [hereafter cited as "ASHP-Sinclair Interview"]. Bret Eynon's work with the American Social History Project in Ann Arbor during the late seventies resulted in extremely thorough oral history documentation of the White Panthers. I am grateful to him for allowing access to these documents.

closest thing to radicalism that John experienced growing up was drinking beer on Friday nights, listening to rock and roll on a "black" Detroit radio station, and occasionally "crashing" all-black rock and roll shows in Flint with his friends. He graduated from Davison High with good grades, and attended Albion College, a small Methodist institution in southern Michigan. It was at Albion that he first came into contact with the beatnik culture that would define his later life:

I was a D.J. My theme song was 'School Days,' by Chuck Berry. And this guy -- he became a very close friend -- accosted me with some records, and sat me down to listen to them, and he took me to his room and made me sit down and listen to Miles Davis -- sitting around, listening to [John] Coltrane, that was in '59. And he was also into Allen Ginsberg, the City Lights books, [Lawrence] Ferlinghetti, Gregory Corso, the whole beatnik thing. He was the campus beatnik, he rode a bike. He was the only one...He brought colored girls to the homecoming dance.<sup>13</sup>

Motivated by his beatnik friend, John began writing poetry and consuming "speed" (dexadrine and methadrine), so that he could stay up all night immersing himself in decades of American jazz. He became so enthusiastic about John Coltrane's music that he earned the nickname "Coltrane." After two years at Albion College, Sinclair dropped out and moved back to Flint, where he explored black culture in the jazz clubs located on the town's North Side ghetto. While working at various record stores in Flint, he completed a

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<sup>13</sup>ASHP-Sinclair Interview, 3.

bachelor's degree at the local branch of the University of Michigan, in the spring of 1964. It was during this period that he discovered marijuana, which had been part of the black urban jazz scene in America since the twenties.

When Sinclair moved to Detroit in 1964, it was his drug connections in Flint, as well as his beatnik sensibilities, that led to rapid acceptance in the city's small and exclusive "hipster" community, located near Wayne State University (WSU).<sup>14</sup> Here, at beatnik hangouts like the "Red Door Gallery," John first came into contact with jazz musician Charles Moore, poets George Tysh and Allen Van Newkirk, and other hipsters. Their mutual obsessions were avant-garde jazz, marijuana, and beatnik poetry. Befriending Charles Moore, John moved into an apartment with him in September, 1964, in "The Castle," a so-called "medieval" structure near WSU, the center for Detroit's expanding beatnik community. Here, in 1965, he met his future wife: Magdalene "Leni" Arndt.

Born March 8, 1940, in Koenigsberg, East Prussia [today part of the former Soviet Union], Leni was the third of six children of a father who spent World War II as an engineer on the Western Front.<sup>15</sup> Following the war, her family lived as

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<sup>14</sup>Sinclair enrolled in graduate school at Wayne State University, but failed to complete a masters degree in English.

<sup>15</sup>The information concerning Leni's upbringing and early years with the Artists Workshop is from a personal interview, on July 21 and 23, 1992, in Detroit, Michigan.

refugees, eventually settling in a small village in what became East Germany. Her parents worked a local farm collective, on the land of a wealthy farmer who had fled to the West in 1949. Leni recalls being a good student, as well as a "Young Pioneer," East Germany's equivalent of the Girl Scouts. In 1951, she was selected as the representative from her village to attend the World Youth Festival in Berlin, an experience which changed her life. Here she came into contact with young people from around the world, and developed both a love for different cultures and an obsession about geography. At age fourteen she was accepted into a teacher training program, from which she graduated in four years. She quickly left for West Germany, motivated by resentment of the stifling creative environment in the East.<sup>16</sup> She stayed only long enough to acquire some English. After a relative in Detroit offered to sponsor her, she crossed the Atlantic in 1959, on the United States. She found employment as a live-in maid and housekeeper in the affluent, mostly white Detroit suburbs of West Bloomfield and Grosse Point, as did many young German girls in the late 1950s.

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<sup>16</sup>A primary reason for her decision to leave was the East German Government's decree that the young teachers refrain from membership in any religious faith. Although she was not a practicing member of any church, the decree angered her. She and a fellow teacher-trainee refused to sign statements regarding the decree. Leni Sinclair personal interview, July 21, 1992, Detroit, Michigan.

Leni's entrance into Detroit's beatnik community began with her riding the bus into the city on days off. One of her favorite haunts was the Detroit Art Institute; she recalls meeting a hipster there, who, recognizing the copy of Allen Ginsberg's "Howl" clutched in her hand, invited her to visit the beatnik community near WSU.<sup>17</sup> She was intrigued by the campus environment, as well as the easy accessibility to a university education that the United States offered. By 1961, she had saved enough money and learned enough English to enroll as an undergraduate, first as a journalism major, later switching to geography. She befriended a number of beatniks and artists, including Nancy and James Worley, who later formed the rock band "Big Brother and the Holding Company," best known for its lead vocalist, Janice Joplin. In time, she became a member of the inner circle of the Detroit's beatnik community, a group which numbered somewhere between fifty and 250 individuals, most of whom were white.<sup>18</sup>

In direct contrast with John Sinclair and a majority of the Artists Workshop circle, Leni spent several years in the New Left, as a member of the early Students for a Democratic

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<sup>17</sup>Recalling her attachment to Ginsberg's tract, she stated "I read that like a Bible....so many times." Leni Sinclair personal interview, July 21, 1992, Detroit, Michigan.

<sup>18</sup>John estimates 200-250; Leni 50-100. See Leni Sinclair personal interview, July 21, 1992, Detroit, Michigan and ASHP-Sinclair Interview, 5.

Society (SDS). In 1962, she attended the SDS's National Convention with future Fifth Estate editor Peter Werbe; at the time, the two were the organization's only Detroit representatives.<sup>19</sup> At the National Student Conference in Bloomington, Indiana in 1963, she met Tom Hayden, Stokely Carmichael, Al Haber, and other student leaders. She was particularly impressed with Hayden's fundraising speeches and Carmichael's radical rhetoric. Attending the civil rights "March on Washington" later that summer, she associated with a fringe group of ultra-militants who protested the censorship of SNCC Chairman John Lewis' speech.<sup>20</sup> Her brief involvement in the New Left ended soon thereafter, when she discovered she was pregnant. With legalized abortion unavailable, she travelled to New York City, where a Park Avenue doctor performed the operation -- without anesthesia -- for \$500. The incident left her physically and emotionally scarred.<sup>21</sup> Needing a change, she embarked on an extended trip to Europe, living with a poet friend on Majorca Island in the winter of 1963-1964.

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<sup>19</sup>The Fifth Estate was Detroit's first regularly-published alternative "underground" newspaper. Under Peter Werbe's continuing editorship, the paper is still in publication, as a monthly.

<sup>20</sup>A detailed discussion of censorship incident is located in David J. Garrow, Bearing the Cross; Martin Luther King, Jr., and the Southern Christian Leadership Conference, (New York: Vintage Books, 1986), 281-86.

<sup>21</sup>"The worst thing that would ever happen to me," she recalls; Leni Sinclair personal interview, July 21, 1992, Detroit, Michigan.

Returning to Detroit and WSU the following Spring, she met John Sinclair through mutual friend Charles Moore.<sup>22</sup> John would regularly visit Charles to borrow his record player, so that he could review albums for Jazz and Downbeat magazines. His attraction to Leni was immediate; initially, she was more interested in having John escort her to the various jazz clubs in Detroit. Yet there was more: "He was already the kingpin of the whole crowd...as soon as he arrived on campus," Leni recalls.<sup>23</sup> Sinclair's eagerness to grant favors for friends and associates resulted in his first marijuana arrest on October 7, 1964. He and friends Charles Moore and Danny Spencer were "set up" in a Detroit Police sting operation by a black associate from Flint, who had been arrested for marijuana possession a few days earlier, and faced prison unless he cooperated.<sup>24</sup> Sinclair was fined \$250 and given two years probation; the hipsters at WSU took up a collection for him. The City's "Red Squad" opened files on him and his associates, and began to take special interest in the beatnik community.<sup>25</sup>

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<sup>22</sup>Leni became a naturalized U.S. citizen in 1964, prior to meeting John.

<sup>23</sup>Leni Sinclair personal interview, July 23, 1992, Detroit, Michigan.

<sup>24</sup>Leni recalls the racial dynamics of law enforcement in Detroit at the time. Discussing the black informer's decision to cooperate with the police, she asserts "John, he knew, would not go to jail. No white boys ever went to jail [for first-time marijuana offenses]." See Ibid.

<sup>25</sup>John and Leni Sinclair Red Squad Files.

During the fall of 1964, the group with which John and Leni associated began discussing the possibility of starting an organization of area poets, musicians, and other artists, with the overall purpose of providing a meeting place outside of the WSU campus. A manifesto ("document of self-determination") was drawn up, asserting the virtues of not succumbing to the dominant "square" culture. From these humble beginnings, the Detroit Artists Workshop was created. The group established the Workshop on the ground floor of a two-story house on the corner of John Lodge and Warren Avenue. The rent was paid by the upstairs apartments, occupied by several poets. Every Sunday, the Workshop held an open house, with poetry readings, jazz performances, exhibitions of photographs and original art, and screenings of avant-garde films. John and Charles Moore performed together in an experimental jazz band, known as the "DC-4" (sometimes "DC-5"), and Leni began experimenting with photography and film-making.<sup>26</sup>

Over the next several years, the Artists Workshop flourished. After attending the Berkeley Poetry Conference in 1964 with cohorts Charles Moore and Robin Eichele, Sinclair realized that the Artists Workshop was as "hip" as many of the other beatnik "scenes" in the country. The Midwest may have lacked the "stubborn ingrown and imported

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<sup>26</sup>Her enormous collection of photographs documents the evolution of Detroit's beatnik and counterculture community during the sixties.

heresies in the East and wild ideological lurches in the West," but it did "swing." The Artists Workshop Press, started in 1964 when several members "borrowed" a mimeograph machine from nearby Monteith College, developed into an alternative publishing house, eventually producing first books by John Sinclair, George Tysh, Bill Hutton, J.D. Whitney, Ron Caplan, and John Kay.<sup>27</sup> Members of the Artists Workshop collective also published some of the first underground newspapers in the Midwest, including Guerilla, a journal whose masthead read "A newspaper of cultural revolution."<sup>28</sup> Other Artists Workshop projects included the alternative "Free University of Detroit," offering night classes in a variety of unusual subjects, and a WSU outreach project, "The Friends of the Artists Workshop," which coordinated the rental of campus facilities for concerts and poetry readings. In addition, Sinclair and the other Workshop leaders began managing several area houses, such as the "Castle." Through all of this diverse labor, the core group developed a number of organizational and managerial skills that would characterize their later activities.

The Artists Workshop of 1964-1965 was decidedly pre-hippie. The stereotypical long-haired freak with wild bell-

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<sup>27</sup>Nationally-known author and National Public Radio commentator Andre Codrescu, now a professor at Louisiana State University in Baton Rouge, frequented the Artists Workshop as a student at WSU in the mid-sixties.

<sup>28</sup>ASHP-Sinclair Interview, 5.

bottom blue jeans had not yet invaded the nation's interior. Most importantly, the ideology of the hipsters during this early stage reflected an isolation from and utter contempt for the outside society. As John recalls:

Jazz, its all we did. We used to sit around and smoke dope. There wasn't anything else to do. You didn't want to go out too much, because, you know, people were a drag. They might see you. (Laughs) You weren't a pleasant sight to them. There weren't too many places you wanted to go...Besides, this was what was happening.<sup>29</sup>

In their belief that they were on the cutting edge of an ultra-hip cultural phenomenon, Sinclair and the other Detroit hipsters exhibited elitist tendencies as well. John recalls passing out flyers to WSU students "that looked hip." He adds: "We didn't want finger poppers or dilettantes or suburbanites or any kind of squares to be there."<sup>30</sup> While the Artists Workshop was not necessarily off limits to "squares," the hipsters did not go out of their way to recruit them. The idea of turning on the masses of American youth to a cultural revolt -- the White Panther credo -- was not yet part of their ideology.

Events of 1966 brought considerable change to the Artists Workshop. On February 22, Sinclair was convicted a second time for marijuana possession, and sentenced to six months in the Detroit House of Corrections (commonly known as

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<sup>29</sup>Ibid., 6.

<sup>30</sup>Ibid., 7.

"DEHOCO"), as well as three years of probation.<sup>31</sup> The Detroit scene underwent a radical transformation. First, a number of core members of the original Artists Workshop moved away from the city. The national media coverage of San Francisco's burgeoning hippie community was a powerful attraction for many beatniks. Inside DEHOCO, John advised against abandoning Detroit:

You have it in your power now to create a vital living situation here in Detroit -- if you have the will and commitment to such a situation. If you don't care if Detroit ever gets to be such a place, it won't. It will stay just as it is now -- a burgeoning police state with isolated groups of people fighting each other but never working together...we are all going to have to start working with each other and take advantage of what our local possibilities [are].<sup>32</sup>

After his release from DEHOCO on August 6th, Sinclair renewed his commitment to creating a "new society" in Detroit. Having lost a number of original Artists Workshop members, he looked to the younger counterculture "hippie" types who were making their first appearance in the area. A social and ideological transformation was underway in Detroit, uniting the corps of alienated young people who searched out the well-known Artists Workshop, as well as the Workshop's remaining leadership. In addition, other forces were at work: (1) the arrival of the high-energy "British Invasion" music from such groups as the Beatles, Rolling

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<sup>31</sup>Sinclair's second arrest occurred on August 16, 1965.

<sup>32</sup>ASHP-Sinclair Biography, 18-19.

Stones, and Kinks; (2) America's increasing involvement in the Vietnam conflict; and (3) the expansion of college campuses, reflecting the coming of age of the "Baby Boomers."

An additional catalyst for change in 1966 was the arrival of LSD-25, usually distributed in sugar cubes. While the drug's specific effects differed from person to person, many experienced an increased awareness of the world around them, a feeling which they often found difficult to describe in words. For the beatniks and hipsters, LSD ended pessimism concerning the possibility that American society would ever break out of its state of cultural stagnation. As Sinclair explained:

When beatniks started taking acid, it brought us out of the basement -- the dark place, the underworld, the fringes of society -- and just blew us apart. From being cynical and wanting to isolate yourself forever from the squares -- not ever have anything to do with them and just hope that they'd leave you alone -- one was suddenly filled with a messianic feeling of love and brotherhood...LSD made you realize that you had ties with the rest of humanity...It gave you connections.<sup>33</sup>

Beatnik elitism disappeared. For alienated white kids growing up in the suburbs, LSD provided near-instantaneous admission to Detroit's "forbidden" inner-city hipster community. Wayne State University was transformed from a "square" to a "hippie" environment, and many inquisitive young people found something new and different at Sinclair's Artists Workshop.

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<sup>33</sup>Ibid., 19-20.

With so many new arrivals to the WSU scene, the number and variety of youth and/or student-directed organizations in the Warren-Forest area near the Artists Workshop expanded rapidly. One such organization, led by Sinclair, was LEMAR, the Organization to Legalize Marijuana. Sinclair had been one of the first white "Movement" leaders in the U.S. to receive a jail sentence for marijuana, and thus had become something of an advocate for marijuana reform. Also active was the Detroit Committee to End the War in Vietnam (DCEWVN), which developed close relations with the Artists Workshop. Underground publications such as the Fifth Estate, Warren-Forest Sun, and CREEM became profit-making enterprises, with paid advertisements from national record companies and local vendors of counterculture wares. The Plum Street Book Store sold posters, candles, and drug paraphernalia, in addition to a wide selection of alternative media. The hippies near WSU were creating a culture, as well as an economy, outside of mainstream American society.

By the spring of 1967, Detroit's youth community featured a wide diversity of hippies, anti-war/New Left/student activist types, and hundreds of curious onlookers. Sinclair recognized the potential of linking these diverse entities. While the national media focused upon San Francisco's "flower children" and the "summer of Love," he remained dedicated to creating an alternative society in Detroit, as well as to preventing the further loss

of the city's talented young people to Haight Ashbury or New York's Greenwich Village.

The creation of Trans-Love Energies during the spring of 1967 represented an attempt to unify Detroit's student and hip community groups into an umbrella organization, or "tribal council." Sinclair and Detroit Artist Gary Grimshaw, who founded the group, attempted to get representatives from all of the area's hip organizations to meet on a regular basis, for the purpose of discussing how better to utilize their talents and services for the benefit of the hundreds of young people converging on the Detroit/WSU area. Some of the support services the members provided for the "freak" community included free housing, job information services, concerts, transportation in and around Detroit, and a cooperative booking agency for performers and organizations. Because the interests of the organizations, as well as the personalities of the leaders were so diverse, Trans-Love never became the united model of inter-organizational cooperation that Sinclair and Grimshaw desired. However, as a corporate, cooperative entity, Trans-Love Energies, Unlimited became enormously successful, organizing cultural events and continuing the Artists Workshop Press. Through their free booking service for nationally-known rock bands and poets, Trans-Love brought Allen Ginsberg, the Grateful Dead, and the "Fugs" to Detroit, boosting Trans-Love's reputation outside the area.

The period between his release from DEHOCO in August of 1966 to the Detroit Riots a year later, was one of great optimism for Sinclair, despite a third arrest for marijuana possession.<sup>34</sup> He exhibited endless energy and enthusiasm, immersing himself in project after project. He began writing a regular column for the Fifth Estate, and also contributed to the sporadic issues of the "official" Trans-Love newspaper, the Warren-Forest Sun. In addition, he formed a close relationship with Rob Tyner, Fred Smith, Wayne Kramer, and Michael Davis, members of a local rock and roll band called the "MC-5" [Motor City Five]. Under Sinclair's management, the band's trademark hard-driving sound made it popular locally by the end of 1967.<sup>35</sup> MC-5 concerts became a regular fixture of Detroit's hip scene after the opening of Russ Gibb's "Grande Ballroom," a large rock club modelled after the Fillmore West in San Francisco. It was also during this period that John and Leni, who had lived together since 1965, decided to get married. Soon after his release from prison in August of 1966, John's probation officer informed

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<sup>34</sup>Sinclair, along with dozens of WSU students and Artists Workshop members, was arrested in a huge police raid on January 24, 1967. Sinclair was charged with distribution and possession of marijuana, after allegedly giving two marijuana "joints" to an undercover policewoman the previous month. By contesting the legality and severity of Michigan's marijuana laws, Sinclair's lawyers Justin "Chuck" Ravitz and Sheldon Otis delayed the case for two and a half years.

<sup>35</sup>An additional local Trans-Love band was the "Stooges," featuring the outrageous antics of lead vocalist Iggy Pop. Both Iggy and the Stooges are still performing today.

him that there was some discussion at Detroit Police Headquarters about setting John up for another bust, based on the state's cohabitation law. Therefore, the couple got married in a tongue-in-cheek ceremony behind the "Castle" where they lived -- for what Leni describes as "political reasons." At the time, Leni was pregnant with Sunny, their first child.

The peak of this optimistic period for Sinclair and Trans-Love Energies came on June 30, 1967, when they staged a "Love-in" at the large metropolitan park on Belle Isle, on the Detroit River.<sup>36</sup> Trans-Love promoted the event as a gathering of "peace and love," where hippies and "straights" could come together to celebrate a new vision of society. The Detroit News and Detroit Free Press gave the event significant coverage, providing tens of thousands of local readers with their first exposure to Sinclair and Trans-Love; the conservative News proclaimed him Detroit's "King of the Hippies." On the day of the event, several thousand hipsters were in attendance, smoking marijuana, dropping LSD, singing, chanting, and enjoying themselves with minimal disturbances. In addition, some 6000 spectators showed up, thanks to such good press coverage. Although the police were out in significant numbers, they kept a low profile until dusk, when the arrest of a motorcyclist encouraged taunting and rock-throwing. The result was a full-scale riot, with numerous

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<sup>36</sup>This park was the scene of the 1943 race riots.

arrests, ostensibly for "damaging police vehicles." Approximately fifty people, including three policemen, required medical attention. The resulting press coverage was almost unanimously on the side of the police, portraying Sinclair and Trans-Love as mindless hedonists, more interested in picking a fight with police than with "peace and love."

The Belle Isle experience had a profound impact upon the later development of Trans-Love Energies. The hippie philosophy of getting high and waiting for the capitalist machine to rust away proved far too simplistic. The degree to which the conservative establishment in Detroit opposed their ideology and lifestyle was made apparent, and police surveillance and harassment of the group increased. The bloody Detroit riots of July 24-31, the worst in America's history, proved that the days of "peace and love" were over. Trans-Love responded to the social disorder in several ways. First, they posted a Black Panther banner on the roof of one of their buildings that read "Burn Baby Burn." In addition, they provided assistance with storage and distribution of food that had been "liberated" from city stores. Sinclair gave serious consideration to printing fliers, urging rioters to storm the Wayne County Jail to free the prisoners ("Bastille Day in Detroit," he declared), but backed down at the last minute. The National Guard responded by raiding the

Trans-Love houses, claiming they had received reports that the hippies were harboring "snipers."<sup>37</sup>

The twin blows of the failed "Love-in" and the riots marked a significant turning point in the ideological development of Sinclair and the Trans-Love clan. Previously, they had written off political organizing as useless -- part of the "straight" world's tactics. Their attack on society had been strictly cultural. Seeing the U.S. Army and Michigan National Guard battling blacks in the streets of the city had a profound impact, as Sinclair recalls:

We had thought there was going to be a cultural revolution. We hadn't thought that there was any reasonable chance of a political revolution. All of a sudden, after the riots....you started to feel like there had to be one, cause this sh\_t had to stop.<sup>38</sup>

This recognition of the political characteristics of the emerging struggle led to a modification in Trans-Love's tactics. Most importantly, Sinclair dedicated himself to a propaganda campaign on several fronts. Trans-Love representatives began distributing printed information at MC-5 concerts, warning of police surveillance and hassles. In addition, Sinclair and others began making personal appearances at local high schools and colleges, urging youth to join in a "total assault against the culture." A third initiative involved assisting high school students and others

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<sup>37</sup>ASHP-Sinclair Biography, 39-40.

<sup>38</sup>ASHP-Sinclair Interview, 32.

with publishing alternative newspapers. Through these activities, Trans-Love Energies hoped to boost the number of young people willing to join the struggle. The basic philosophy underlying the missionary activity was that youth everywhere were showing signs of unhappiness with the current state of society, but lacked a creative outlet for working out their frustrations. By making themselves known, Trans-Love members believed they were liberating the "straight" youth from the stifling suburban environments in which they lived, opening their minds in the process.

As Trans-Love underwent expansion, its core leadership changed. John's brother David signed on, having passed up a full football scholarship at Dartmouth; his organizational skills would prove essential to the White Panthers, particularly after John went to prison. Two additional 1967 arrivals who would later assume leadership positions in the White Panthers were Pun and Genie Plamondon. Lawrence Robert "Pun" Plamondon was born in Traverse City, Michigan, the illegitimate son of a "half-breed Ottawa [Indian] and a long-distance operator." He was adopted at eighteen months by upper middle-class foster parents, who were well respected in Traverse City. Despite his comfortable upbringing and excellent academic potential, he exhibited a rebellious streak from an early age. At sixteen he ran away from home, hitchhiking across the country, and eventually working with migrant farm workers in California. He came to Detroit in

1967, was introduced to the Artists Workshop, befriended Sinclair, and joined the group just in time to take his first LSD trip at the "Love-In." With Trans-Love he found an appropriate outlet for his enormous energy and increasing social consciousness. He and Sinclair soon became close friends, eventually comprising the top two positions in the White Panther organization. Yet his radicalism would remain one step ahead of Sinclair's throughout the period.<sup>39</sup>

Genie Parker, the daughter of a Army Colonel with Vietnam combat experience, arrived at the Trans-Love house shortly after the "Love-in." She was an "army brat," raised in Texas, Georgia, and New Jersey. Her attraction to the Sinclairs was immediate, and she moved in with the group her first day in Detroit. Within a few months, she and Pun became inseparable, and the two of them went on to become a well known radical couple of the sixties.<sup>40</sup>

As the Trans-Love clan made its transition from a strictly cultural orientation to an increasingly political one, the New Left, anti-war, Black Power, and counterculture movements across the country influenced its ideological development. The overall pattern of increased resistance to

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<sup>39</sup>Stocking, "A Personal Remembrance," 78.

<sup>40</sup>Genie Parker Interview with Bret Eynon, 1977, Hunter College, NY, American Social History Project, 1-5, located at the Michigan Historical Collections, Bentley Historical Library, University of Michigan, "Contemporary History Project Papers: Interviews," box 239-J [hereafter cited as "ASHP-Genie Plamondon Interview"].

the establishment on all levels of the Movement, reflected in the Black Panther shoot-outs with police, the campus revolts, and a growing anti-war movement, provided Sinclair and the Trans-Love people with a larger context in which to view Detroit. Sinclair had been aware of the ideas of Malcolm X since before his arrival in Detroit, and endorsed the self-defense message communicated by Black Panther founders Huey Newton and Bobby Seale. Trans-Love members also loved the pre-Yippie theatrics of Jerry Rubin and Abbie Hoffman; the Yippies' attempt to levitate the Pentagon during "Stop the Draft Week" in October of 1967 received front-page coverage in the Fifth Estate. As far as the national anti-war movement went, Trans-Love had a cooperative relationship with the Detroit Committee to End the War in Vietnam (DCEWVN).

Of all the major "Movement" groups undergoing rapid expansion during the mid-sixties, the New Left had the least in common with Trans-Love Energies. As Sinclair states:

Our thing wasn't really a protest thing, which was the main thrust of the political movement nationwide...We weren't interested in taking over administration buildings. We were interested in blowing people's minds, basically. Making them confront the idea that there was a crazy alternative to the straight way of life...We were coming from the point of view that said 'It doesn't do any good to protest against these people. They're the ones that made it like this'...So the idea was to expose how crazy and irrational and repressive they were, and call for people who could make it something different.<sup>41</sup>

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<sup>41</sup>ASHP-Sinclair Interview, 22-23.

While short-haired student leaders in organizations like SDS delivered speeches concerning the ills of society, and afterwards returned to their middle-class apartments or dorm rooms, the members of Trans-Love Energies believed that they were living the struggle, not just talking about it. They viewed their everyday counterculture existence as a symbolic refusal to conform to societal norms.

### III.

None of the law meant anything at all to John Sinclair. It became a question of whether he was to have impunity over the law or not. He not only didn't pay attention to the law himself, but he constantly cited himself as an example of how to break the law. He would say: 'Look, I don't go to jail and I smoke marijuana.' It had finally gone on long enough. He begged to be made a martyr of and finally we made one of him. -- Wayne County Records Court Judge Robert J. Colombo.<sup>42</sup>

Certainly entrapment would not have been unusual behavior at that time on the part of the [Detroit] authorities. It would have been consistent with their general approach to 'long-haired radicals.' The authorities believed that both they and the entire country were under attack by people determined to destroy 'the American Way.' They saw those people as so dangerous as to be not entitled to the protection of the law. They saw themselves as...perhaps the only chance to save the country. It was in effect a declaration of martial law. -- Former Detroit Public Defender Quenda Behler-Story<sup>43</sup>

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<sup>42</sup>Quoted in Detroit News, January 26, 1970, 32.

<sup>43</sup>Letter to author, March 22, 1993.

The Detroit Police Department's surveillance and harassment of Trans-Love Energies led to increased militancy, as well as the decision to pursue a political agenda following the 1967 riots. The tactics which the police utilized against the group -- informants, physical surveillance, photography, and various forms of intimidation -- reflected an overall conservative (or "praetorian") law enforcement ethos, rooted in the city's unique social, economic, and political history. As was the case with Trans-Love Energies, the police's collective ideology, shared by the majority of Detroit's white citizenry, as well as the city's legal system, is partly explained by a combination of local and national historical forces. On the national level, the search for Communists and other "subversives," beginning in the thirties and continuing through the Cold War years, resulted in the establishment of the Detroit's Special Investigative Bureau (SIB), or "Red Squad," which carried out widespread political surveillance of pro-labor, civil rights, and other non-conformist groups. In addition, national demographic shifts, particularly during the two World Wars, resulted in an influx of African American and poor Appalachian whites into the city, where they competed for employment with "native" groups, creating a strained economic and racial environment. Police operations in Detroit were also influenced by the enormous expansion of intelligence gathering at all levels of government that occurred in

response to the heightened social disorder of the sixties. Several local factors were equally important in contributing to the conservative police ideology: (1) the antagonistic historical relationship between Detroit's elites and "reformist" forces, such as trade unions; (2) the devastating social, economic, and political effects of "white flight" from the inner city; (3) the prevalence of ultra-right-wing groups; and (4) the worsening social polarization in the city following the 1967 riots.

Much of Detroit's history during this century has been synonymous with the automobile industry. Industrial expansion brought increased demand for skilled and unskilled labor, which attracted large numbers of workers, both from overseas and from the South. Beginning in 1914, Henry Ford's well-publicized offer of an eight-hour, \$5 day, initiated the first of two huge waves of demographic influx; World War II brought the other.<sup>44</sup> By 1920, the total population of Detroit had more than doubled, while the number of blacks increased seven-fold.<sup>45</sup> The largest groups emigrating to Detroit during the two waves were Southern whites from the

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<sup>44</sup>Dan Georgakas and Marvin Surkin, Detroit: I Do Mind Dying, (New York: St. Martins Press, 1975), 105; Geoffrey Perrett, Days of Sadness, Years of Triumph: The American People, 1939-1945, 312.

<sup>45</sup>Peter K. Eisinger, The Politics of Displacement: Racial and Ethnic Transition in Three American Cities, (New York: Academic Press, 1980) 57; James A. Geschwender, Class, Race, and Worker Insurgency: The League of Revolutionary Black Workers, (Cambridge, UK: Cambridge University Press, 1977), 18, 58-64.

Appalachian region, Eastern Europeans (especially Poles), and Southern blacks. By World War II, the city's social and economic development was increasingly characterized by fierce competition between the three principal working class groups. Often, the competition had racial overtones, with Poles and Appalachian whites combining in opposition to black hiring and promotion, particularly during recessions. The issue of whether this antagonistic situation may have been engineered or encouraged by Detroit's power elites, such as Henry Ford, in attempt to keep labor costs down and prevent unionization, has received attention from several Marxist historians.<sup>46</sup> Whatever the cause of this racially antagonistic situation, there is no question that the city's elites benefitted from it; the auto industry was among the last in the nation to unionize. The 1943 race riots, the worst in the nation's history up to that time, were a direct result of what Geoffrey Perrett has termed the city's "venomous" racial environment.<sup>47</sup>

An additional local factor which contributed to the evolution of Detroit's conservative law enforcement ethos was the preponderance of progressive social and political groups. During the 1890s, Detroit's "social reform" model of municipal management, characterized by improved urban service

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<sup>46</sup>Georgakas, Detroit: I Do Mind Dying, 186-7; Geschwender, Class, Race, and Worker Insurgency, 25.

<sup>47</sup>Perrett, Days of Sadness, Years of Triumph, 312.

delivery and heightened City control over utilities and public transportation, made Mayor Hazen S. Pingree (1890-1897) one of the nation's most popular and imitated Progressive municipal reformers.<sup>48</sup> The liberal tradition continued during World War I, as the city attracted leftist organized labor groups such as the International Workers of the World (IWW) and the Union of Russian Workers.<sup>49</sup> The Great Depression and World War II brought another major increase in progressive labor organizations, such as the United Auto Workers (UAW), Socialist Worker's Party (SWP), and Communist Party (CP). By the end of the war, Socialists and Communists held a number of the local UAW's top positions.<sup>50</sup> By the forties Detroit also had a large number of civil rights organizations, the largest and most active of which was the NAACP, whose local branch was established shortly after World War I. A large minority of Detroit's blacks, more so than in other cities of similar size, were attracted to left-of-center groups. Within the UAW, significant numbers of blacks were attracted to factions of the Socialist Workers Party and the Communist Party. The SWP and CP were the first (and only) white UAW groups that

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<sup>48</sup>Arthur S. Link and Richard L. McCormick, Progressivism, (Arlington Heights, IL: Harlan Davidson, Inc., 1983), 29-30.

<sup>49</sup>Frank Donner, Protectors of Privilege: Red Squads and Police Repression in Urban America, (Berkeley, CA: University of California Press, 1990), 42.

<sup>50</sup>Geschwender, Class, Race, and Worker Insurgency, 46-49, 77-84.

actively recruited blacks. They also broke with tradition by placing many blacks in positions of leadership. Thus, the frustrations and feelings of powerlessness which characterized the city's black working class had the effect of splintering the black community, some factions adopting leftist philosophies and others following the moderate NAACP line. Following the virtual elimination of SWP and CP leadership from UAW ranks during the late forties, a majority of black workers expressed dissatisfaction with the supposedly-liberal UAW. Some black workers continued to adhere to a class-based Marxist analysis; for them, the capitalist "American Dream" appeared to be unreachable, as long as racist whites controlled both the means of production and organized labor.<sup>51</sup>

Evolving simultaneously with the expansion of progressive groups in Detroit were a variety of ultra-right-wing organizations, dedicated to combating organized labor and keeping blacks "in their place." During World War I, a pattern was established, whereby right-wing vigilante groups, assisted by sympathetic police and local media, succeeded in associating organized labor with "foreign radicalism." A local chapter of the American Protective League (APL) was established by the city's industrial elites, with the overall purpose of fighting attempts by the IWW and other unions to influence workers. In addition, industrialists such as Henry

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<sup>51</sup>Ibid., 46-49, 77-84.

Ford established the precedent of hiring undercover "goon squads" to harass and intimidate pro-union workers; by the early thirties, similar tactics were regularly employed by all of the "big three" auto makers. In the twenties and thirties, Detroit experienced a proliferation of organized ultra-right activity, highlighted by one of the nation's largest Ku Klux Klan chapters. The notorious "Black Legion," a KKK spin-off group, committed more than fifty murders in five years, beginning in 1931; cross burnings and gang-style attacks on civil rights and other progressive groups became commonplace. An additional "100 percent American" group was the American Legion, which boasted of a membership of "one thousand Bolshevik bouncers."<sup>52</sup> During this period, Detroit's large Polish community, centered in the township of Hamtramck (site of "Dodge Main," Chrysler's largest plant), acquired a reputation for racism paralleling that of the transplanted "red neck" Appalachians.<sup>53</sup> During the anti-Communist hysteria of the McCarthy years, the city initiated a crack-down on progressive organizations, effectively purging Communists and Socialists from the ranks of the UAW. Widely-publicized hearings of the House Committee on Un-American Activities (HUAC) were held in Detroit in 1951; a

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<sup>52</sup>Quoted in Donner, Protectors of Privilege, 54.

<sup>53</sup>Geschwender, Class, Race, and Worker Insurgency, 64, 77.

primary focus was the alleged linkage between the city's black civil rights leadership and the Communist Party.<sup>54</sup>

In a city almost totally dependent upon the automobile industry, it is not surprising that the local police usually acted in accordance with the wishes of the industrial elites. As the "guardians of the establishment," Detroit's police were painfully aware of the racial volatility which existed just beneath the surface of local society. In the interest of preserving "law and order," they became the city's most powerful anti-reform institution.

The Detroit "Red Squad," or Special Investigative Bureau (SIB), was created in 1930, ostensibly to "work on the Bolshevik and Communistic activities in the city." In 1927, the nation's leading red-hunter, Jacob Spolanski, went undercover in Detroit's auto industry, collecting information concerning the activities of leftist individuals and groups; his employer was the Metal Trades Association, a national industry group which included all automobile manufacturers. The "evidence" he collected, much of which was supplied by the Detroit Police Department, was presented to the infamous "Fish Committee," during their hearings in Detroit in 1930. At the hearings, Detroit Police Detective Albert Shapiro unveiled the SIB, a special division of the Department that would have a variety of duties, including the monitoring of radical activities. Progressive Mayor Frank L. Murphy

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<sup>54</sup>Ibid., 41.

initially supported the SIB, in the interest of curbing police abuses through increased professionalism and training. However, he soon became disillusioned with his new creation, as incident after incident of anti-labor violence, some of it perpetuated by the Black Legion, were linked with the SIB. Following Murphy's retirement in May 1933, incoming Police Commissioner Heinrich Pickert unleashed the Red Squad, making it little more than an anti-union arm of the establishment. As Frank Donner states, "the SIB became a scourge of picket lines of all kinds."<sup>55</sup>

In 1939 the Red Squad was abolished for a brief period, following revelations of high-level police corruption. However, following President Franklin Roosevelt's September, 1939 order for stepped-up surveillance of "subversive" groups -- the same carte blanche "national security" authorization that J. Edgar Hoover used to justify warrantless domestic wiretapping -- the Red Squad was reestablished with a somewhat modified mission: hunting Nazis and saboteurs. In 1947, the SIB returned to its pre-war mission, concentrating on rooting out "subversive elements" within organized labor. During the forties and early fifties, the nativist-patriotic impulses within Detroit's white community led to the establishment of a state-level Un-American Activities Committee and the "Detroit Loyalty Committee," an

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<sup>55</sup>Ibid., 53-58 [quote 54]. Donner claims that by the fifties, the UAW had become a "silent partner" in the SIB's anti-subversive campaigns.

organization empowered to conduct its own background investigations of all city employees suspected of being disloyal. A longer-term ally for the SIB appeared in 1950, with the establishment of the Subversive Activities Investigation Division, soon renamed the "Security Investigation Squad" (SIS) a State Police countersubversive unit, whose primary objective was discouraging employers from hiring suspected radicals.<sup>56</sup> Soon the SIB and the SIS established a close collaborative relationship, characterized by unprecedented information sharing and joint intelligence operations. Another important collaborative endeavor for the revitalized SIB was its role as the FBI's primary "operational resource" agency in Michigan.<sup>57</sup>

The decade of the sixties had a profound impact on the development of law enforcement attitudes in Detroit. Although the administration of reform-minded Mayor Jerome P. Cavanagh brought in tens of millions of dollars in federal assistance, the city's black majority remained near the poverty level. The primary problems facing inner-city blacks -- high rates of unemployment, job discrimination, poor housing and schools, and terrible police-community relations

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<sup>56</sup>A second Detroit Police Department intelligence division, the Criminal Investigation Bureau (CIB), was created during the early sixties, for the specific purpose of monitoring civil rights groups and events. In a glaring example of bureaucratic overlap, the SIB and the CIB employed separate informers, had separate file systems, and dealt independently with outside agencies. See Ibid., 292.

<sup>57</sup>Ibid., 56-59.

-- were hardly touched by Lyndon Johnson's "War on Poverty." In fact, the Liberals' highly-touted "urban renewal" program became one of the most hated "reforms" among black city-dwellers, thanks to the long delays in construction and demolition and the realization that most of those forcibly removed were black. One of the primary causes of the underlying economic crisis was a disappearing tax base, brought about by middle and upper-class "white flight" away from the city and into the suburbs. While the city's population declined by 100,000 during the sixties, the suburbs experienced phenomenal growth, from 2.4 to 4.2 million total inhabitants.<sup>58</sup>

According to the city's NAACP leadership, the "single most important problem," facing Detroit residents during the sixties was poor police-community relations. Burton Levy, Director of the Community Relations Division of the Michigan Civil Rights Commission, summed up the situation in 1968:

[The police department] recruits a significant number of bigots, reinforces the bigotry through the department's value system and socialization with the other officers, and then takes the worst of the officers and puts them on duty in the ghetto, where the opportunity to act out the prejudice is always available.<sup>59</sup>

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<sup>58</sup>Georgakas and Surkin, Detroit: I Do Mind Dying, 189; Sidney Fine, Violence in the Model City: The Cavanagh Administration, Race Relations, and the Detroit Riot of 1967, (Ann Arbor, MI: Univ. of Michigan Press, 1989), 17, 32-3, 39-57. Fine's exhaustive study presents a detailed analysis of what remains the bloodiest riot in U.S. history.

<sup>59</sup>Quoted in Fine, Violence in the Model City, 95.

Blacks comprised less than 5 percent of the police force, but 35 percent of the city's population. Attempts to increase the overall professionalism of Detroit's police and hire larger numbers of minorities, financed by both federal and state funding programs, were offset by a new assertiveness of the city's under class. Two-thirds of the police force were from blue-collar families. As Sidney Fine points out, "poorly educated for the most part, poorly trained, and living in 'relative isolation' from the rest of society, the police did not understand and were not prepared to deal with the law enforcement problems stemming from the black revolt of the 1960s."<sup>60</sup>

Following the 1967 riots, the attitudes of Detroit police moved farther to the right, reflecting the growing "siege mentality" prevalent among many whites. The principal "lesson" that top-ranking police officials derived from the riot was that the department needed more men and equipment, so that they would be better prepared for the next clash. The primary federal investigative body looking into the riots, the so-called "Kerner Commission," commented that the police were interested in stockpiling enough weaponry to wage "'a moderate-size war.'"<sup>61</sup> A 1968 Detroit Free Press survey of the police department showed that more than half of the white officers believed that housing and job opportunities

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<sup>60</sup>Ibid., 96.

<sup>61</sup>Ibid., 96-98, 392-394.

for both races in the city were equal, and that blacks were favored in the public school system; among black officers, 8 percent believed that job opportunities were equal and 3 percent thought that housing opportunities were equal.<sup>62</sup>

Believing that they had been unfairly criticized for overreaction in the face of a near-revolutionary situation on the streets, the police became increasingly isolated from the rest of society -- a phenomenon that further poisoned their attitude regarding blacks and other non-conformists. Membership in support groups and organizations such as the Detroit Police Officers Association (DOPA) increased. In addition, many police officers actively supported "Breakthrough," a far-right John Birch Society splinter group, led by Donald Lopsinger. Sidney Fine comments on a Breakthrough meeting:

At meetings in Detroit and the suburbs attended by 'enthusiastic and revivalistic whites,' many of them middle-aged, many of them of East European extraction, Breakthrough leaders contended that the riot had been a 'Communist-inspired insurrection,' whose purpose was to 'terrorize' blacks to join the 'black power movement,' after which the 'entire Negro community' could 'move in on the whites.' Breakthrough urged its followers to purchase weapons, told them what supplies to store in preparation for the next 'much more terrifying' riot, and...advised whites to establish a 'block-to-block home defense system' for protection against 'bands of armed terrorists.'<sup>63</sup>

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<sup>62</sup>Georgakas and Surkin, Detroit: I Do Mind Dying, 190.

<sup>63</sup>Fine, Violence in the Model City, 383-84.

The heightened social disorder in Detroit during the sixties resulted in a significant expansion of the Red Squad (SIB), as well as a widening of its scope of targets for surveillance. Files on suspected radicals expanded exponentially, as did the practice of sharing information among the SIB, SIS, FBI, Military Intelligence, and a host of other federal agencies. Campus police departments and security details were quickly allowed access to the computerized, on-line subversive information superhighway. One of the unique characteristics of Detroit's SIB, as compared with the rest of the nation's Red Squads, was the routine photographing (and sometimes videotaping) of organizations, individuals, and events. A "typical practice" involved stationing a police photographer outside of a targeted group, where he or she photographed anyone entering or leaving. Members of the SIB were also aware, however, of the benefits of overt -- as opposed to covert -- surveillance, as an effective form of intimidation.<sup>64</sup> Other tactics employed by the SIB and the SIS included utilization of paid informers, garbage searches, and stealing documents. A common practice involved jotting down the license plate numbers of all vehicles at or near targeted groups, and tracing the plate numbers (with the assistance of state and/or federal computers). Hundreds of files and

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<sup>64</sup>Donner, Protectors of Privilege, 290-94, 293. See Figure 3-1 on page 233.

investigations were opened on "innocent bystanders."<sup>65</sup> Master files were created on each subject, comprised of three principal categories of materials: (1) Master Index Cards, conventional four-by-six-inch index cards, with personal and organizational information on the face card and chronologically-arranged entries (press stories, references to arrest reports, etc.) on subsequent cards; (2) Intelligence Exchange Cards, eight and a half by ten inch cards, also indexing a target's history and activities; and (3) Dossiers, one or more eight-by-eleven-inch folders, possessing an organizational name and/or code number, with: newspaper clippings, inter-office memoranda, interviews, photographs, criminal histories, completed IRS tax forms, and statements of informers.<sup>66</sup>

The variety and scope of the Detroit (SIB) and Michigan State Police (SIS) Red Squads' surveillance practices were made public for the first time in Benkert, et. al. v. Michigan State Police et. al.<sup>67</sup> In 1974, the Michigan

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<sup>65</sup>Ibid., 295.

<sup>66</sup>Examples of Master Index and Intelligence Exchange Cards, mug shots, and Criminal Record Indexes from John and Leni Sinclairs' Red Squad Files are included in the Appendix, Figures A-1 - A-7.

<sup>67</sup>No. 74-023-934-AZ (Wayne County Circuit Court, Michigan). The Benkert case was settled on April 23, 1990, when the Detroit City Council agreed to a \$750,000 settlement -- which was earmarked for the exclusive use in an unprecedented "Red Squad Notification and Distribution Compliance Program." The plaintiffs in a case involving police spying were given some say regarding the disposition  
(continued...)

Association for Consumer Protection, a "modest grass-roots consumer group" filed suit against the State Police, charging that it had been illegally investigated and monitored. The next year, following an admission by the State Police that the SIS had indeed broken the law, the case expanded into a class action suit, with numerous individuals and organizations, including the UAW, joining. The resulting litigation, lasting until 1990, unearthed evidence that Detroit's SIB had amassed dossiers on between 60,000 and 110,000 individuals and organizations, from the thirties through the early seventies; the SIS had accumulated files on

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<sup>67</sup>(...continued)

of the files. On May 10, 1990, Wayne County Circuit Judge Lucile Watts approved a court order placing the files under the supervision of a three-member Board of Trustees, for a period of sixteen months. From May 10, 1990 through September 10, 1991 the "files disbursement program" publicized the existence of the surveillance material in the local and national media and made the contents of individual files available to persons and/or groups who submitted written requests. Hundreds responded with file requests. During the two years following the program's expiration, 1991-1993, considerable debate took place within Detroit concerning whether the records should be destroyed or placed in an archive. It was rumored that Mayor Coleman Young, concerned about the economic costs of possible lawsuits, wished them destroyed, even though he had been a top target of SIB surveillance during the fifties and sixties. However, the courts eventually voted for their preservation, placing them in the custody of the Detroit Public Library, Burton Historical Collection. Access to the files once again became available, on a restricted, case by case basis, during the summer of 1994. Ironically, as of December 6, 1994, not a single person had yet requested a file search from the DPL. For a detailed discussion of the history of the files disbursement program, see Detroit Free Press Magazine, November 4, 1990, 8-10, 16-21; see also Detroit Free Press, September 14, 1990, 20.

approximately 38,000 subjects.<sup>68</sup> As Frank Donner finds, the case also uncovered that the Red Squad units operated without any restrictions concerning the types of dissident activities that could be surveilled:

One unit chief testified that investigations were conducted against 'any organization or individual that would tend to appear a potential police problem,' including 'super super liberals' or any targets that 'by action, statements or ideology present an actual or implied threat to city, state or national government, their representatives or citizenry.' Another claimed the unit's mission to be the investigation of 'militant activity' or, for targets falling short of a militant rating, 'subversive activity.'<sup>69</sup>

In a detailed study of ten Detroit Red Squad file dossiers, totalling over 700 pages, Attorney Marc Stickgold found that a vast majority (86.4 percent) of all surveillance focused on "constitutionally-protected political activity."<sup>70</sup>

The various surveillance (and other) tactics utilized by the Detroit City and Michigan State Police against the

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<sup>68</sup>Donner, Protectors of Privilege, 294-95. A total of over 1.5 million Metro Detroit residents were monitored. See "The History of the Detroit Red Squad Files," [four page unpublished document] and "They Were Spying On Us: The Detroit Police Red Squad Surveillance Program, 1945-1974," [one-page unpublished pamphlet] Red Squad Notification and Distribution and Compliance Program, 1990. Copies in the author's possession.

<sup>69</sup>Donner, Protectors of Privilege, 295.

<sup>70</sup>Stickgold, "Yesterday's Paranoia is Today's Reality...", 921-22. The files used in the study, representing ten of the fourteen named plaintiffs, were made public during the early stages of the litigation in the Benkert case, under a protective order intended to protect third parties. Stickgold acknowledges the limitations of generalizing with so small a sample.

Artists Workshop and Trans-Love Energies between 1964 and 1968 demonstrated the seriousness with which they viewed John Sinclair and his group.<sup>71</sup> Informers infiltrated the Artists Workshop in 1965 and 1966, gathering information that resulted in two "dragnet"-style police operations, in which many were arrested on drug charges. The sting operations also brought about Sinclair's second and third offenses for marijuana possession -- eventually earning him a ten year prison sentence. The principal informant in both operations was the same person: Detroit Police Detective Vahan Kapagian of the Narcotics Bureau.

On August 16, 1965 a detail of 25 officers from the Narcotics Bureau raided the Artists Workshop house at 4825 John Lodge, arresting seven people, including newlyweds John and Leni Sinclair. The operation was the culmination of a month-long investigation into allegations that the group was regularly using and dispensing illegal drugs. Officer Kapagian's infiltration was facilitated by the group's open invitations to the public for their Sunday poetry readings. As Leni Sinclair recalls, "Anybody who came around was a friend. You didn't question anyone."<sup>72</sup> When Kapagian first started "making the scene," he claimed to be a "friend of a

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<sup>71</sup>The bulk of the primary source material utilized in the rest of Section III is from the John and Leni Sinclair Red Squad files.

<sup>72</sup>Leni Sinclair personal interview with author, July 23, 1992, Detroit, Michigan.

friend" -- good enough for the trusting individuals in the Artists Workshop. Calling himself "Eddie," Kapagian sometimes acted like a "junkie" in order to be convincing in his role as an out-of-work "street person." Kapagian repeatedly sought to make "a big score" of marijuana, but with no luck. According to Leni, the Artists Workshop group had never used marijuana in public during the Sunday sessions; their fears concerning police surveillance increased after John's first pot bust in October, 1964. However, John eventually relented in the face of Kapagian's constant pestering, as Leni explains:

John was paranoid. After he got busted he did not sell another joint...He took it so hard that he did not deal anymore...But this guy was bugging John so much...and John got sick and tired of him sitting around for two weeks, so he did finally relent, in order to get rid of him...[he would] try to get him some garbage [low quality marijuana]....and then he would never come back.<sup>73</sup>

Sinclair drove Kapagian to a house of a friend, took \$25 from him and went inside to make the "big score." He then returned to the car, gave the marijuana to Kapagian, and drove back to the Artists Workshop. Leni explains what happened next:

John let him out [of the car], went back to the house, and two minutes later all hell broke loose. The cops came in through the front door, through the front window, through the back door, through the back window.<sup>74</sup>

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<sup>73</sup>Ibid.

<sup>74</sup>Ibid.

At the police station where she was booked, Leni was visited by an officer of the Immigration and Naturalization Service. Even after discovering that Leni was a naturalized U.S. citizen, as well as married to one, the INS officer nevertheless threatened to send Leni back to East Germany if she refused to cooperate. After entering a plea of not guilty, John Sinclair's only statement to police was "Why are you after me? I just did a favor for Eddie."<sup>75</sup>

Kapagian's second infiltration of the Artists Workshop began on October 18, 1966, only two months after Sinclair was released from the Detroit House of Corrections (DEHOCO). According to official police documents, the Narcotics Division had received "numerous complaints of narcotic activity" at the Artists Workshop; the police were also concerned about reports that Sinclair was "conducting immoral readings and showing pornographic films."<sup>76</sup> Although Sinclair was the primary target, the overall scope of the 1966 sting operation was wider than the previous year's, including the Plum Street Candle Shop, where John and Leni worked part-time, and other counterculture businesses and New Left organizations located close to the Wayne State

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<sup>75</sup>John and Leni Sinclair Red Squad files, Detroit Police Department, Narcotic Division, Interrogation Record, August 16, 1965, page 2. Although seven people were arrested for possession and/or sale of marijuana, the charges were later dropped against everyone except John Sinclair.

<sup>76</sup>John and Leni Sinclair Red Squad files, Detroit Police Department, Detective Division, Narcotics Bureau, Arrest Report, January 27, 1967.

University campus. "Disguised" by a beard and beret, Kapagian, now known as "Louie," and fellow undercover officer Jane Mumford ("Peg") attended numerous meetings and poetry readings, eventually gaining the confidence of the Workshop's membership. Leni recalls how helpful "Louie" was:

This guy was very skillful, a very good actor...Nobody recognized him...He hung around Plum Street, helping out in the candle shop, always trying to get to know everybody...At Sunday "pot-luck dinners" he brought a girlfriend...beautiful...wearing a miniskirt [who was also]...very helpful.<sup>77</sup>

As helpful and friendly as "Louie" and "Peg" were, they remained unable to purchase any marijuana for several months. They were, however, able to take photographs of the inside rooms of the Artists Workshop, as well as to construct a drawing of the floor-plan, identifying the rooms of specific individuals (see Figure A-7 in the Appendix). Ultimately, only two marijuana purchases were made, both from Wayne State University students who were only casually associated with the Artists Workshop. Even so, as Leni explains, the police found a way to "get" John:

One time, shortly before Christmas, she [Officer Mumford] comes over, just passing through, and asked John if he had any more joints. And so John rolls her a couple of "jays" and sends her on her way.<sup>78</sup>

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<sup>77</sup>Leni Sinclair interview with author, July 23, 1992, Detroit, Michigan.

<sup>78</sup>Ibid.

The police "raid" of January 24, 1967 involved 34 officers, representing a spectrum of local, state, and federal agencies: the Detroit Police Narcotics Bureau, the Federal Narcotics Bureau, the Michigan State Police, the U.S. Customs Bureau, the U.S. Bureau of the Census, and even the U.S. Food and Drug Administration. Fifty-six persons were arrested, including thirteen WSU students. Leni recalls being upstairs in the house when the police came in:

The officer came upstairs, recognized me from a John Coltrane concert two days previously...He was very friendly...He said 'we're holding your husband downstairs...he did something terrible, and if you just show us what you've got and give it to me, we won't do anything to him'...So....I go to the underwear drawer and pick out my little film can...my little stash....and give it to him, and so [I was arrested for]...possession of marijuana [laughs]...The charges were later dismissed by Judge Crockett, for illegal search and seizure.<sup>79</sup>

The Arrest Report of January 27 lists John Sinclair's name first, while the names of the two WSU students who had actually sold marijuana to the undercover cops were listed third and eleventh.<sup>80</sup> As had been the case with the 1965 raid, the charges against all but a handful of those arrested were later dropped.

On June 1, 1967 Police Officers Kapagian and Mumford received "Detroit News Policeman of the Month" awards from

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<sup>79</sup>Ibid.

<sup>80</sup>John and Leni Sinclair Red Squad files, Detroit Police Department, Detective Division, Narcotics Bureau, Arrest Report, January 27, 1967.

Police Commissioner Ray Girardin, at a public ceremony held at the Detroit Historical Museum. Sinclair and approximately 100 Artists Workshop members and "hippie" supporters protested outside. The Detroit Police arrested Sinclair on an old traffic warrant.<sup>81</sup>

An additional police tactic employed against Trans-Love involved intimidating the print shops that the group hired to publish the Warren-Forest Sun, the irregularly published Trans-Love newspaper. In a May, 1968 article in the Fifth Estate, John Sinclair and Gary Grimshaw lamented the fact that locating printers was becoming next to impossible in Detroit. A similar fate befell the Inner City Voice, a Marxist, pro-labor publication billed as "Detroit's Black Community Newspaper."<sup>82</sup> Leni Sinclair recalls having to utilize a different printer for each of the seven-odd issues of the Warren-Forest Sun, because "sometimes," the printers would receive threats; on other occasions the explanation was more mundane: not paying the printing bill.<sup>83</sup>

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<sup>81</sup>Detroit News, June 2, 1967, 18-A. See Figures 3-2 and 3-3 on pages 234 and 235.

<sup>82</sup>Georgakas and Surkin, Detroit: I Do Mind Dying, 22. The authors also state that in the rare instances when a press agreed to publish the ICV, the FBI usually convinced the typographers' union to call a strike to prevent its publication. As a result, the paper "was never printed in the same shop more than twice."

<sup>83</sup>The printing situation for Trans-Love in Ann Arbor did not improve appreciably. Editions of the Ann Arbor Sun were usually mimeographed.

Numerous examples of Detroit City and Michigan State Police surveillance and harassment of the Artists Workshop and Trans-Love Energies are located within the "Red Squad" files of John and Leni Sinclair, made available for the first time as a result of the Benkert case. Four examples provide a glimpse into the types of surveillance. A February 8, 1966 "Complaint Report" from the Michigan State Police SIS unit, investigates the "Free University of Detroit," an Artist Workshop creation. Second, an internal Detroit SIB memorandum, dated April 26, 1967, details police preparations for the Trans-Love "Love-in." The memorandum discusses the dozens of units that will take part in the affair, as well as the fact that a "prisoner bus" and "Tactical Mobile Unit" will be held in reserve. Third, a Detroit Police Criminal Intelligence Bureau (CIB) inter-office memorandum of May 22, 1967, explains the details surrounding the arrest of Trans-Love Energies co-founder Gary Grimshaw. Apparently, a squad car driving by the Trans-Love house noticed, through an open door, a large red, white, and blue kite, bearing the inscription "F\_k the United States -- Go Fly a Kite." Although not in actual possession of the kite, Grimshaw -- the lone occupant of the house -- was "conveyed" to the police station and booked on obscenity charges. Fourth, a December 19, 1967, DPD inter-office memorandum with the heading "INFORMATION RE: HARBORING RUNAWAY JUVENILES" contains information from an informer, alleging that John

Sinclair and the Artists Workshop have "harbored many teenage runaways, mostly girls," and that Sinclair "sells drugs to the teenagers and permits them to engage in sexual activities on his premises."<sup>84</sup>

Some Detroit Records Court and Wayne County Circuit Court judges "knew" of the threat to society posed by John Sinclair. They expressed their agreement with police in a number of ways, including tacit support for illegal surveillance and harassment practices. On the eve of the 1967 riots, a task force panel of the President's Commission on Law Enforcement and Administration of Justice characterized the Detroit's Records Courts as "'unseemly, disreputable, inadequate and unfair [with] no regard for justice.'" "Movement" lawyers commonly spoke of an "unholy trio" -- consisting of police, prosecutors, and judges -- which, they believed, were in collusion with one another for the purpose of "railroading" black and white radicals.<sup>85</sup> Typical of Detroit's ultra-right judiciary members was Records Court Judge Robert J. Colombo, a former attorney for the Detroit Police Officers Association. In July of 1969, he sentenced Sinclair to nine and a half to ten years in prison for giving two marijuana "joints" to undercover

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<sup>84</sup>Three of the documents referred to in this paragraph are included as Figures A-8 through A-10 in the Appendix.

<sup>85</sup>Quoted in Sidney Fine, Violence in the Model City, 102.

policewoman June Mumford, actually an obvious instance of entrapment.

During the winter and spring of 1968, the situation in Detroit became unbearable for Trans-Love Energies. Sinclair summarizes his feelings during the period:

Nothing was happening but the police. They had everything covered, and if you moved after dark you were snatched up and taken to jail without bail. If you stayed inside they came in after you, kicking down the doors and ransacking everything in sight. Where they knew that the occupants were armed for self-defense they moved with more caution; police cars would cruise up and down the streets outside such houses issuing threats over their loudspeakers and shining their super-charged spotlights into the windows, returning every half hour or so to repeat their vicious tricks until you were afraid to go to sleep. Detroit was Police City baby, and you never forgot it -- not for a minute.<sup>86</sup>

Right-wing terrorism had also arrived, in the form of a series of fire-bombings of Trans-Love houses. The first occurred early on the morning of October 29, 1967, setting fire to the headquarters of the Detroit Committee to End the War In Vietnam, located next door to Trans-Love on 1101 West Warren. Files were ransacked and papers were strewn all over the floor. Official police documents indicate that the most likely suspects in the bombing were members of the ultra-right group "Breakthrough."<sup>87</sup> Four months later, on

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<sup>86</sup>ASHP-Sinclair Biography, 48.

<sup>87</sup>John and Leni Sinclair Red Squad files, Detroit Police Department, Detective Division, Special Investigation Bureau, "PROGRESS REPORT ON THE INVESTIGATION OF BREAKING AND ENTERING AND FIRES SET IN THE OFFICE OF THE DETROIT COMMITTEE TO END THE WAR IN VIET NAM (DCEWVN)," November 3, 1967.

February 6, "unknown persons" threw four fire-bombs at the main Trans-Love house on 499 West Forest Avenue; three landed on the roof, causing what the police report termed "minor damage." The Detroit Board of Zoning Appeals quickly condemned the building, refusing to allow the inhabitants to continue living there. The attack came as all Trans-Love members were attending an MC-5 concert at the Grande Ballroom. Finally, in early April, an additional Trans-Love house, formerly known as the "candleworks," was also fire-bombed.<sup>88</sup>

The assassination of Dr. Martin Luther King, Jr. on April 4, 1968, provided another occasion for intimidation. Detroit's Police, fearing another major riot, established a "protective curfew" in the city after dark. Since Trans-Love earned most of its operating funds promoting rock concerts and related events, most of which took place during the evenings, the curfew threatened their very livelihood. Therefore, in May, 1968 Trans-Love Energies relocated some forty-five miles to the west, to the college town of Ann Arbor, moving into a twenty-room house at 1510 Hill Street, immediately adjacent to the campus of the University of Michigan.

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<sup>88</sup>Fifth Estate, June 4-18, 1968. See Figure A-11 in the Appendix.



(Figure 3-1)  
Detroit Police Department, Special Investigation Bureau (SIB)  
Video Surveillance of a Demonstration

Source: Leni Sinclair Personal Photography Archives

**WANTED!!**

**FOR MASS RAPE OF THE NEW  
SPIRIT OF DETROIT.**




**VAHAN KAPEGIAN ALIAS "LOUIE."**  
**OFFICER, DETROIT NARCOTICS SQUAD.**

IMAGINE THIS MAN WITHOUT THE BEARD. IMAGINE HIM WITH HIS HAIR CUT SHORT. IMAGINE HIM IN A SUIT AND TIE. THAT'S HOW HE LOOKS AT WORK, IN THE DETROIT NARCOTICS BUREAU, OR IN RECORDERS COURT TESTIFYING AGAINST INNOCENT MARIJUANA SMOKERS. THIS MAN IS A POLICE OFFICER. HE DOESN'T LOOK LIKE THIS NOW. OTHERS DO. DON'T LET THEIR "HIP" APPEARANCE FOOL YOU — THEY WANT TO PUT YOU IN JAIL! BEWARE THEM!

**REWARD: ONE POUND, U.S. GRASS FOR ANYONE WHO CAN DROP 1000 MICROGRAMS OF LSD INTO THIS MAN'S LIVE BODY.**

**TRANS-LOVE ENERGIES WARNS YOU: "YOU BETTER FIND SOMEBODY TO LOVE!"**

POSTER: GRIMSHAW-WARLOCK STUDIOS

(Figure 3-2)

Trans-Love Poster by Gary Grimshaw/Warlock Studios  
Warning of Undercover Policeman Vahan Kapagian

Source: John and Leni Sinclair Red Squad Files.

18-A—THE DETROIT NEWS—Friday, June 2, 1967



—News Photo

**ON THE INSIDE**—After receiving their awards as The Detroit News Policemen of the Month, Patrolman Vahan Kapagian (left) and Jane Mumford are congratulated by Police Commissioner Ray Girardin at the Detroit Historical Museum. While the awards were being presented inside, a demonstration was being staged outside by about 100 hippies. The police pair had infiltrated their ranks to break up a narcotics ring.

## Hippies Protest Awards to 2 Undercover Police

As nearly 100 hippies chanted the Hindu religious words "Hare Krishna" outside the Detroit Historical Museum, two policemen inside were receiving The Detroit News Policemen of the Month awards.

The hippies were there because the two policemen, Jane Mumford, of the women's division, and Patrolman Vahan Kapagian, of the narcotic bureau, had posed as hippies to break up a narcotics ring last January.

Their undercover work led to the arrest of 24 persons on charges of violating state narcotics laws.

THE AWARDS and \$100 each were presented by Herbert M. Boldt, Detroit News police reporter, as Police Commissioner Ray Girardin and other top-ranking police officials looked on.

The hippies began filtering into the museum about an

hour before the ceremonies yesterday, but they were barred from entering the auditorium in the basement.

Police explained to them that there was room only for invited guests.

Soon they took up the "Hare Krishna" chant introduced into Detroit last February by poet Allen Ginsberg with its meaning deeply embedded in the Hindu religion.

Police then ordered them to be silent or the museum officials would sign a complaint against them.

They carried flowers of all sorts, including two funeral wreaths that one hippie explained were for "Louie," the name Kapagian used in his undercover assignment.

They went outside to wait for Kapagian and Miss Mumford and were joined by others carrying placards denouncing the police as "dull, low IQ types" and "low educated, military minded men."

At the Woodward entrance to

the museum, they formed two lines, continued their chanting and prepared to throw rice on Kapagian and Miss Mumford.

Instead, only a handful of police officials left by the front door.

KAPAGIAN, Miss Mumford, Girardin and several others left by a Kirby entrance, but before they got away a handful of hippies rushed over and presented a floral wreath to Kapagian and a T-shirt bearing the words "Smoke Marijuana."

Later, self-styled hippie leader John Sinclair, 24, of 4853 John Lodge, was taken to Police Headquarters on an old traffic warrant.

He was one of those arrested last January as the result of Miss Mumford's and Kapagian's undercover work.

Sinclair, a hippie poet with long hair festooned with flowers, was arraigned earlier yesterday in Recorder's Court on another narcotics charge.

(Figure 3-3)

Detroit News Article, June 2, 1967

Award Ceremony for Undercover Police Officers  
Vahan Kapagian and June Mumford

Source: John and Leni Sinclair Red Squad Files.

## IV.

The pigs hate you, us, yes they do, they hate us enough to bash our heads, and they hate us enough to shoot us...They hate our Black Brothers who want freedom and they hate the White Brother who wants freedom. They've been shooting our Black Brothers who fight for freedom, and they'll shoot our White Brothers who fight for freedom, yes they will. But our Black Brothers got a plan. They got the Black Panthers...to defend themselves against the pigs...So get a gun brother, learn how to use it. You'll need it, pretty soon. Pretty soon. You're a White Panther, act like one.  
-- Pun Plamondon, White Panther Minister of Defense, 1968<sup>89</sup>

When Trans-Love Energies arrived in Ann Arbor late in the spring of 1968, the conservative college town was already undergoing significant changes. The same forces of radicalization in the New Left movement that fueled the campus take-over at Columbia University in New York that fall were present on the campus of the University of Michigan (UM). The most visible "Movement" presence was the Students for a Democratic Society (SDS), which had originated in Ann Arbor six years earlier, when Tom Hayden, Al Haber, and a handful of UM students declared their independence from the "Old Left" organization, the League for Industrial Democracy. In 1968, the local SDS chapter was by far the largest of all student organizations. Nationally, SDS had tens of thousands of members.

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<sup>89</sup>Fifth Estate, October 31 - November 13, 1968, 9.

By 1968, the local SDS had little in common with the "Port Huron" period. University of Michigan student Kathleen Stocking witnessed the tremendous changes in the local SDS during the fall and winter of 1968 -- changes which transformed student protest leaders into radicals advocating violence against the U.S. war machine. Late that summer, she moved into a house on Felch Street with future Weathermen Bill Ayers and Diana Oughton, and future White Panther Milton "Skip" Taube. During the fall semester their house became a regular meeting place for "endless streams of SDSers," as national and local occurrences brought heightened tensions and excitement to the Movement.<sup>90</sup> Bill Ayers became a national organizer, travelling to colleges across the country. Diana Oughton went from diligent college student to would-be Third World revolutionary. Stocking recalls the changes her roommate underwent that fall:

I watched in uncomprehending horror as Diana became more and more radical...she cut her blonde hair and started dressing like Che Guevera, wearing army fatigues and a rolled red bandanna around her forehead and tied in the back.<sup>91</sup>

By the end of the year, following the violence at Chicago, Ann Arbor's SDS split into two factions: the "Radical Caucus" and the "Jesse James Gang." Ayers, Oughton, and Taube were leaders in the latter group, which would eventually form the

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<sup>90</sup>Stocking, "A Personal Remembrance," 73.

<sup>91</sup>Ibid., 74.

genesis of the Weathermen.<sup>92</sup> The splintering of the UM chapter of SDS foreshadowed the break-up of the national SDS the following year. The post-Chicago New Left was clearly moving in the direction of "taking the war to the war-makers."

Trans-Love moved into two houses at 1510 and 1520 Hill Street, in the heart of UM's fraternity row. The group of twenty-eight people included three children, and the MC-5 rock band.<sup>93</sup> Ken Kelley, editor of the local underground newspaper Argus, recalls the impact that Sinclair and Trans-Love had on the campus:

John was probably the most exotic thing Ann Arbor had ever seen. He came with a pre-fab reputation. And he was the weirdest looking thing anybody's seen. He brought his whole entourage of weird musicians; the [MC] Five were just starting to happen.<sup>94</sup>

The initial focus for Trans-Love in Ann Arbor was music, which, by the spring of 1968 had become a local source of conflict. Large free concerts had been held in Ann Arbor

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<sup>92</sup>Milton "Skip" Taube Interview with Bret Eynon, 1977, Hunter College, NY, American Social History Project, 14, located at the Michigan Historical Collections, Bentley Historical Library, University of Michigan, "Contemporary History Project Papers: Interviews," box 239-J [hereafter cited as "ASHP-Taube Interview"].

<sup>93</sup>Eve Silberman, "The Hill Street Radicals," Ann Arbor Observer, May, 1991, 45-53.

<sup>94</sup>Ken Kelley Interview with Bret Eynon, 1977, Hunter College, NY, American Social History Project, 3, located at the Michigan Historical Collections, Bentley Historical Library, University of Michigan, "Contemporary History Project Papers: Interviews," box 239-J [hereafter cited as "ASHP-Kelley Interview"].

since 1966, and the MC-5 had taken part in several of the 1967 shows. But during the winter of 1967-8 the local City Council had passed an ordinance banning amplified music from the City's parks. When Sinclair decided to hold a concert in defiance of the law, the small local Ann Arbor Police force, under Lieutenant Eugene Staudemire, threatened to arrest all involved. Sinclair did not back down. Thanks to press coverage from the Michigan Daily, the campus community got involved. Two weeks later, following an additional attempt to hold a concert, the City Council relented, granting Trans-Love permission to hold a series of free concerts at Gallup Park, on the outskirts of town. This was a turning point. Sinclair had stood up to the police and other "forces of authority" and won. For the remainder of the summer, and over the years that followed, the free concerts became very popular with both UM students and local high school-age youth. Trans-Love used the events to distribute propoganda about their counterculture philosophy and programs.<sup>95</sup> Typical of these programs was a course offered by Sinclair at the Trans-Love house, entitled "Total Assault on the Culture," which had been advertised in the Michigan Daily.

One of those who decided to attend Sinclair's "free university" was 19 year-old Ken Kelley, a UM student from Ypsilanti, Michigan. He recalls walking to the Trans-Love

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<sup>95</sup>ASHP-Sinclair Biography, 48-49.

house with a "hippie" friend, whose curiosity had also been peaked by the advertisement:

We go traipsing up to Hill Street, when the class was supposed to be held, and the door was open. I tried knocking. He [Sinclair] said 'Hey, you don't knock on the door of a hippie house; you just go in.' We go in and there's Sinclair, stark naked, with his daughter Sunny, who was then about a year old or less...He was the biggest thing I'd ever seen, with his hair and all that...He was committed to doing this class once a week. He would usually start out by passing out the latest MC-5 and White Panther pamphlets and see where that led us...Everyone from my co-op came to see him; they were all squares...[John] was like a one-ring circus.<sup>96</sup>

Ken Kelley came to the University of Michigan in 1967 a supporter of William F. Buckley and the National Review. Joining the staff of the campus newspaper Michigan Daily, he was exposed to the paper's "muckraking" expose style, which had a big impact on him. Within a year, his left-leaning articles were refused for publication by the paper's Liberal editor, so, with the assistance of Fifth Estate editor Peter Werbe, he started the Argus, which soon became Ann Arbor's best-known underground newspaper. Contributing to his radicalization was LSD ("Nothing was ever the same again"), the overall Liberal/left campus environment, and the violence at Chicago ("that was the great divider...why all those kids got too radical").<sup>97</sup> With an interest in journalism, Kelley joined Trans-Love during the fall of 1968, assisting in the

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<sup>96</sup>ASHP-Kelley Interview, 2.

<sup>97</sup>Ibid., 4.

production of their newspaper, the Ann Arbor Sun. Soon thereafter, he became an important member of the group.

Completing the Trans-Love leadership that fall was Skip Taube, who had become disillusioned by the direction that his friends in the SDS Jesse James Gang were moving. A Detroit native, Skip arrived at UM on a scholarship in the fall of 1965, and quickly became involved with the small student movement on campus. Although the campus received national attention that fall, for its anti-Vietnam War "teach-ins," in reality, the vast majority of UM students were conservative, considering anti-war protestors "un-American." Dropping out of school after a few semesters, he became a volunteer in the "Children's Community School," (CCS) an alternative institution focusing on "experiential" education. There he met Bill Ayers and Diana Oughton. Through them he also became involved in the local SDS Voice office, where he came into contact with future SDS President Carl Oglesby.

One afternoon in the fall of 1968, Taube, handing out anti-war leaflets on the UM campus, met Trans-Love members Pun and Genie Plamondon, who invited him to attend one of their meetings. He recalls his initial reaction to the group:

In Ann Arbor, at that time, you didn't see many people with full beard[s] and long hair. It was really straight. The Trans-Love people looked different...They were the same age, and they were by nature sociable people. Music brought people together. We started to affiliate on a practical, personal basis, producing propaganda. Sit around

smoking joints, reading stories and bullsh\_t.  
They got to be real close friends.<sup>98</sup>

Joining Trans-Love that fall, Taube became their initial link to the larger Ann Arbor community. He did not completely dissolve his relationships with Ayers and Oughton until the following year, when the SDS Jesse James Gang turned into the ultra-radical Weathermen.

The MC-5 best characterized Trans Love Energies' overall message that fall. Under the management of John Sinclair, the group had become something of a local sensation while giving free concerts in Gallup Park. In addition, the group began touring nationally, bringing their message of "total assault on the culture" to thousands of young people. Trans-Love's entire operation, including two communes and several dozen people, was financed by the money the band received for their tours.

Each MC-5 show was a radical multi-media event, with psychedelic lights, rear-screen projection, plus the "ravings" of Master of Ceremonies Jesse Crawford. The supercharged electric music of the MC-5, considered by rock historians to be the precursor to modern "punk rock," was underscored by Sinclair's political speeches at the start and during breaks. The effect that this combination of high energy and "revolution" had on high school-age youth was often dramatic. The MC-5 proved an effective recruiting

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<sup>98</sup>ASHP-Taube Interview, 15-16.

device. On September 26, 1968, Elektra Records took notice, signing the band to record a "live" album at the Grande Ballroom in Detroit, on the evenings of October 30 and 31. Elektra's young Publicity Director, Danny Fields, recognized the potential commercial value of youth in revolt.<sup>99</sup>

The MC-5's growing popularity did not escape the attention of the local Ann Arbor police, the Washtenaw County Sheriff's Office, or the State Police. Beginning in the summer, what Sinclair called "creep scenes" occurred, in which police surveillance of MC-5 shows led to arrests, near-arrests, and a general culture of surveillance. Sinclair's biweekly Fifth Estate articles, entitled "Rock and Roll Dope" chronicled both the MC-5's growing national following and the escalating counterattack from the forces of the conservative establishment. Some police responses included marijuana

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<sup>99</sup>Sinclair, Guitar Army, 98-100; 109-11. The MC-5's debut album, entitled "Kick Out The Jams," as well as a 45-rpm single (same title, with reverse "B side" entitled "The Motor City is Burning") were released in early 1969, and immediately entered the "Billboard Hot 100." The original album cover's liner notes, written by Sinclair, applauded the togetherness of the White Panthers' official band, and added: "The MC-5 is the revolution...The music will make you strong...and there is no way it can be stopped now." Controversy also surrounded the first single, which began with the cry "Kick our the jams, motherf\_ ker!" Within weeks of the record's release, Elektra -- apparently under pressure from industry executives -- removed Sinclair's liner notes from all future editions of the album and forced the MC-5 to re-record the offensive opening section of the single, replacing "Motherf\_ kers" with "Brothers and Sisters." The album went to number 20 on the charts; the single to number 82. See Joel Whitburn, Top Pop Artists and Singles, 1955-1978, (Menomonee Falls, WI: Record Research, Inc., 1979), 277.

busts in the parking lots; pressure on club owners thanks to the MC-5's desecration of American flags on-stage; and a steadily increasing police presence. On several occasions, the police turned off the electricity at clubs to prevent the band from playing; in one bizarre incident, the MC-5 was issued a ticket for being "a noisy band." The craziness of the summer of 1968 peaked on July 23, when Sinclair and MC-5 guitarist Fred "Sonic" Smith were arrested by Oakland County Sheriffs in Leonard, Michigan, and charged with "assault and battery on a police officer." While in prison, the Oakland County authorities cut off most of Sinclair's long hair. Three days later, the MC-5 were arrested by Ann Arbor Police, charged with "disturbing the peace," for playing at a free concert in West Park.<sup>100</sup>

The police response to Sinclair and the MC-5 had as much to do with Sinclair's provocation -- in person, on stage, and in the pages of the Fifth Estate -- as with any of the band's allegedly criminal activities. Sinclair consciously sought "to expose the repressive nature of the mother-country system," by encouraging MC-5 lead vocalist Rob Tyner to inform the crowds of hyped-up youth about the various police (and club owner) hassles the group faced before each show. The crowd's reaction often bordered on riot. In addition, Sinclair attacked the police in article after article of the Fifth Estate. He realized that the

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<sup>100</sup>Sinclair, Guitar Army, 73-95.

newspaper was required reading for many local police officers, as part of their intelligence gathering. The following passage is typical of Sinclair's invective that summer:

We matched our magic against the pigs' brute tactics and it worked -- any respect any of the people there might have had for 'law and order' as represented by the Ann Arbor police just disappeared, and their futile tricks were exposed to the light. All this bullsh\_t was totally unnecessary -- we just wanted to dō our thing and let the people do their thing with us, but the police just won't let that happen without trying to stomp us out one way or the other...People are getting hip to all of the old people's lies and perversions, and they aren't going to stand for it much longer. We sure aren't.<sup>101</sup>

The explicitly political message of Sinclair's defiance was intentional. He recognized that "our culture itself represented a political threat to the established order, and that any action which has a political consequence is finally a political action."<sup>102</sup>

Sinclair hoped his tactics would prove successful. By challenging the Ann Arbor authorities over the free concert issue, he made the city back down, allowing Trans-Love weekly access to Gallup Park. And, on more than one occasion, Sinclair's public chastisement of police resulted in their backing down in the face of angry crowds. Most importantly, Trans-Love and the MC-5 were actually getting away with quite a bit: screaming obscenities over an amplified public address

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<sup>101</sup>Ibid., 86.

<sup>102</sup>Ibid., 74.

system in the heart of conservative Ann Arbor, in front of hundreds of youths on a weekly basis, and burning and/or destroying American flags on stage, to the hysterical cheers of the audience. Sinclair's overconfidence in his ability to continue "getting away with it" was also bolstered by the fact that a national record label was interested enough in the revolutionary rock sounds of the MC-5 to sign them to a multi-record contract.

The August 7, 1968 edition of the Ann Arbor Sun, the new Trans-Love newspaper, announced that Sinclair and the MC-5, at the request of Youth International Party (YIP) Music Coordinator Ed Sanders, would perform at the "Chicago Festival of Life" on August 25.<sup>103</sup> Prior to this, Trans-Love's relationship with Yippie "non-leaders" Jerry Rubin and Abbie Hoffman had been minimal; they had known Ed Sanders and the East Greenwich Village counterculture community for several years, largely through the poetry and avant-garde music scene, as well as the performances of Sanders' group "The Fugs" at the Artists Workshop in Detroit. Trans-Love and the rest of the Detroit/Ann Arbor radical scene had watched with great excitement as the Yippies became notorious during the October, 1967, "Stop the Draft Week" action at the Pentagon. Their infusion of counterculture youth rebellion with tongue-in-cheek "politics of fantasy" was very much in synch with Trans-Love's ideology and focus. Both the Artists

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<sup>103</sup>Quoted in Ibid., 97.

Workshop and the early Trans-Love Energies were known for a variety of "street theater" antics that resembled those of the 1967-1968 Yippies.<sup>104</sup> However, by mid-1968, the "street actions" of counterculture groups were taking on an increasingly radical tone, as the former "flower children" came face-to-face with the increasing polarization of American society, reflected in an overall darkening mood of frustration.

The combination of Trans-Love Energy's youth-culture orientation and the MC-5's growing national reputation for "revolutionary" music made them a natural choice to participate in the Chicago "Festival of Life." To finance the trip, Sinclair booked the band into a club in southern Wisconsin, driving them into Chicago during the day on August 25. Although Sanders had attempted to sign a wide variety of performers for the event, Chicago Mayor Richard Daley's refusal to grant any permits, as well as his well-publicized preparations for violence, making the city an "armed camp," scared all of them off -- except the MC-5. Sinclair recalls the band's performance, and the fiasco that followed:

As it turned out, we were the only ones in the country who showed up to play...The Fugs wouldn't even come...They were terrified!...They didn't want to get involved with these crazy

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<sup>104</sup>Examples include the Gary Grimshaw "Go Fly a Kite" incident, the hoisting of the "Burn Baby Burn" banner during the Detroit Riots, and the sponsorship of a "Bitch-in" on the campus of Wayne State University, where students, street people, and even undercover police were invited to step up to the podium to complain about whatever was bothering them.

motherfuckers who didn't have their shut together. They didn't have a stage. They didn't have a permit. They didn't have power...So we set up on the grass. We plugged into a hot dog stand. And as we were setting up, this police lieutenant calls me over and says 'Who's in charge here?' I told him that I was just the manager of the band. 'Well,' he says, 'is that your equipment?' I say yeah. 'Well, let me tell you something,' he says. 'If they use that PA system to stir up the crowd in any way, there's no way that I can guarantee the safety of your equipment.' In other words, we'll smash every bit of it...But finally...We played one set on the grass, just like in Ann Arbor at the free concerts...And....[afterwards] Abbie Hoffman decides that this is the time to start the shut. He had this big flat bed wagon that was going to be used for the stage, but they wouldn't let him bring it in. So he decides, 'Fuck it, I'm going to bring it in .' He knows that this is going to provoke a confrontation...he started to bring this wagon through and that attracted thousands of people. Then he comes up and takes the mike between sets and starts ranting and raving. I was just aghast. 'What is this idiot doing?'...the police were already starting to advance on the park...So I just got my equipment men and started to take down the equipment and pack it in the van...the police were getting closer and closer...When we pulled out, the police were swarming all over the area, and that's when the shut really started. We just drove straight back here [Ann Arbor]. We thought they were nuts. I felt terrible about the whole thing. They had laid down this rap about the Festival of Life, but that wasn't what they really had in mind. They really wanted a confrontation.<sup>105</sup>

Sinclair came away from the Chicago experience convinced of several things. The police responded vastly out of proportion to the real threat. This meant that the Movement -- both the counterculture "freaks" and the New Left -- would

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<sup>105</sup>ASHP-Sinclair Interview, 41-42. This statement was made during a 1977 interview. Sinclair's negativism toward Abbie Hoffman and the Yippie organizers was not what he spoke about after returning from Chicago.

have to get organized for self defense. By contrast, the Yippies' utter lack of organizational skills made clear to him that Trans-Love was more than a group of stoned hippies playing music. The result was the creation of the White Panther Party as the political wing of Trans-Love Energies, formally announced by Sinclair on November 1, 1968, whose name reflected an enthusiasm for the Black Panther Party.

The Black Panthers' most ardent supporters in the White Panthers were Pun and Genie Plamondon. Pun had spent much of the summer of 1968 in Ingham County Jail in Traverse City, Michigan, on an old marijuana charge.<sup>106</sup> While in jail, he read of Black Panther leaders Huey Newton and Eldridge Cleaver; the latter was running for President of the United States on the "Peace and Freedom Party" ticket in California, with SDS alumnus Tom Hayden as his running mate for Vice President. At this time the Black Panthers were actively seeking alliances with "white mother country radicals" in the New Left and counterculture. The response from some whites, particularly those in the New Left, was a mixture of gratification and paralysis. Many were still stinging from their eviction from SNCC in 1966. Others stood in awe of the Black Panthers and considered them the "vanguard" of the Movement's struggle, because of their willingness to shoot it

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<sup>106</sup>Sinclair, in Guitar Army, [page 73] states that Plamondon was charged with giving away a marijuana "roach" [partially smoked cigarette] to a police officer during a trip to his hometown three months earlier. For this, he was held on \$20,000 bond, and given eighty days in jail.

out with the forces of authority. Todd Gitlin refers to this experience within the New Left as an ongoing debate over "what will whitey do" when the struggle reached the violent phase. This debate was one of the central focuses of the white youth, student, and counterculture movements -- especially after Chicago.

For Plamondon, the Black Panthers' call for white allies -- white Black Panthers -- was a revelation. The specific document was an interview with Huey Newton, in which he suggested that the best way for whites to support the struggle would be to form their own groups. Reading this, Plamondon simply thought: "Wow! Of course!"<sup>107</sup> When he returned to Ann Arbor in September, he immediately urged Sinclair to form a white support group for the Black Panthers.<sup>108</sup> Sinclair was also thinking a great deal about the necessity of forming some sort of political wing to Trans-Love. Sinclair recalls:

Eldridge Cleaver in Soul on Ice, turned the trick. He had the whole thing: 'These white mother country revolutionaries,' and so on. F\_\_k, we thought, 'He's talking about us! We must be all of the other stuff too.'...They called for someone

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<sup>107</sup>Quoted in ASHP-Sinclair Biography, 57.

<sup>108</sup>In fact, Sinclair had also been deeply moved by a 1968 Huey Newton interview, in which the Black Panther leader mentioned that whites should support the BPP by organizing their own revolutionary "White Panther" cadres. Genie recalls that, on John's recommendation, she took this newspaper article to Pun in prison. Nonetheless, it was Pun's fervent support for the White Panther idea that convinced John to go along with the new title. See ASHP-Genie Plamondon Interview, 9.

to start the White Panthers, and we felt like we were the ones who understood all of what they were talking about. We guessed that it might as well be us.<sup>109</sup>

Therefore, the Black Panther model was adopted. "Whether you know it or not, YOU are the White Panthers," Sinclair related in his "Rock and Roll Dope" Fifth Estate column in mid-October, within a few weeks of Plamondon's return.<sup>110</sup>

Despite the alleged influence the Black Panthers had on the white movement, Trans-Love Energies in Ann Arbor, Michigan, was the only white radical group to act on Newton's suggestion. Throughout the evolution of the Artists Workshop and Trans-Love Energies, Sinclair and his group rarely emphasized the national black struggle. They also ignored the leftist labor organizing that was building in Detroit's black community during the sixties. However, their worship of black music and culture, especially jazz, was one of their defining characteristics, and black jazz artists such as Charles Moore had been leaders in the Artist Workshop. The 1966-1967 "flower power" period found the white counterculture moving in one direction ("peace and love"), while elements of the Black Power movement advanced in another ("armed self defense").

Events of the late sixties -- particularly the heightened police interest in both white radicals and Black

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<sup>109</sup>ASHP-Sinclair Interview, 44.

<sup>110</sup>Fifth Estate, October 17-30, 1968, 20.

nationalists -- created the belief among white leaders that their plight was similar to that of the blacks whom they envied.<sup>111</sup> Thus, the Black Panther model was available at a critical moment in the evolution of Trans-Love Energies. Chicago convinced it of the need to organize more effectively than the Yippies. The Black Panthers had a viable revolutionary organizational structure to imitate. Trans-Love's adoption of the name "White Panthers" demonstrated the group's total support for self defense in the face of increased police and establishment harassment.<sup>112</sup> "White Panthers" gave the group radical certification and, they hoped, credibility as a "vanguard" revolutionary organization.

At first, the White Panther Party for Self Defense was little more than a name. The organization's "Ten Point Program," unveiled in Sinclair's "White Panther State/meant" of November 1, might have been distributed by a Yippie:

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<sup>111</sup>By mid-1970, Sinclair turned to similarities between Third World colonies struggling for freedom from imperialism and the "youth colony" in America struggling for self-realization alongside of the "black colonies" in U.S. cities. See "Report to the Central Committee of the Youth International Party (White Panthers), By John Sinclair," 1970, JLSC/BHL, Box 17, Folder 19, "White Panther Ideology" [unpublished series of Sinclair's prison writings].

<sup>112</sup>For an excellent analysis of how "deference to the black left degenerated into White Pantherism," see Michael W. Miles, The Radical Probe: The Logic of Student Rebellion, (New York: Atheneum, 1971), 258-71. Miles, on page 270, laments the New Left's essentially bourgeois origins and criticizes the youth movement as "not an alternative to bureaucratic capitalism, but a symptom of it."

1. Full endorsement and support for the Black Panther Party's 10-point program and platform.
2. Total assault on the culture by any means necessary, including rock and roll, dope, and f\_\_king in the streets.
3. Free exchange of energy and materials -- we demand the end of money!
4. Free food, clothes, housing, dope, music, bodies, medical care -- everything free for every body!
5. Free access to the information media -- free the technology from the greed creeps!
6. Free time and space for all humans -- dissolve all unnatural boundaries!
7. Free all schools and all structures from corporate rule -- turn the buildings over to the people at once!
8. Free all prisoners everywhere -- they are our comrades!
9. Free all soldiers at once -- no more conscripted armies!
10. Free the people from their phony "leaders" -- everyone must be a leader -- freedom means free every one! All Power to the People!<sup>113</sup>

In fact, the tongue-in-cheek nature of the early White Panther Party is something that few people -- most importantly the police and FBI -- realized. The naming of a "Central Committee" demonstrated Sinclair's penchant for Yippie-like theatrics, with positions such as "Minister of Religion" and "Minister of Demolition."<sup>114</sup> The White Panthers wanted to have fun; any analysis must note that the principals were all in their twenties and viewed much of what

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<sup>113</sup>Sinclair, Guitar Army, 105.

<sup>114</sup>In fact, the WPP was originally conceived as "'an arm of the Youth International Party.'" See Sinclair, Guitar Army, 101.

was going on around them -- the music, partying, and togetherness of "youth rebellion" -- as plain and simple fun. As Theodore Roszak states, the counterculture in America during the sixties had few historical models of leftist rebellion and organizing to draw upon, as their European peers did. American counterculture radicals, he claims, assumed positions that were "more flexible, more experimental, and....more seemingly bizarre" than any of their historical predecessors.<sup>115</sup> By declaring that rock music, marijuana use, and sex in the streets would bring about revolution, the White Panthers introduced something new in American utopian radicalism. They took a pre-rock and roll model of beatnik hedonism, added LSD and high-energy electric music, and concluded that the simple act of liberating young white people from all of the inhibitions of American society would bring about a new society. No historical models existed to guide them; while looking for something new, they made many mistakes.

Much of the conservative establishment in Ann Arbor, including the local police and FBI, ascribed intentions to Sinclair and his group that they clearly did not possess. The police believed that the White Panthers had united black and white revolutionary forces, even though evidence could not be found. Police authority took the inflated White

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<sup>115</sup>Rozsak, The Making of a Counter Culture, 4.

Panther rhetoric at face value, and equated their advocacy of violent acts with the commission of specific crimes.<sup>116</sup>

In 1970 Sinclair admitted that the WPP "was not an organization when it was formed, but a bourgeois paper construct or media myth based on the image of the Black Panther Party."<sup>117</sup> In constructing the White Panther myth, Sinclair and Plamondon sought to portray their organization as truly revolutionary in character, a workable model for organizing the nation's politically ignorant counterculture. However, over the next three years, as a result of heightened police and FBI interest in the group, as well as the Nixon Administration's decision to utilize the White Panther CIA Conspiracy Trial as a vehicle through which to test the constitutionality of the Mitchell Doctrine, the WPP myth acquired a more potent basis in reality.

Central to Sinclair's concept of the White Panther myth was his appreciation for the power of the national "straight" media to deliver the WPP message to thousands of alienated youth. He was impressed with how the Yippies, lacking a viable organizational structure, were able to generate international media attention for their "Chicago Festival of Life." Although he viewed the straight media as part of the old "pig death culture" that would someday be replaced by the

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<sup>116</sup>Discussing the initial police reaction to the WPP, Sinclair states "They took us a lot more seriously than we did ourselves." See Guitar Army, 205.

<sup>117</sup>"Report to the Central Committee..."

"life culture" he espoused, he hoped to "co-opt" the national media into spreading WPP propaganda. "We can work within those old forms, infusing them with our new content and using them to carry out our work," he asserted.<sup>118</sup> He understood the risks associated with attracting the "straight" media, having received exclusively negative coverage from the Detroit dailies during 1967's Belle Isle "Love-in." Yet he was willing to run the risks of bad publicity and one-sided journalism in the interest of turning on the "straight" youth of America to the possibilities of the White Panther program. He believed that by utilizing the straight media, the White Panthers could force their own definition of reality on the larger society which the media served. He also believed that by exposing the police repression, he could convince others of the political nature of the struggle.

Sinclair's vision of the White Panther Party was audacious, to say the least. As he explained in a 1970 interview:

We used to make it a point to smoke joints on stage at the Grande every time we played there in those days, to show the kids that the pigs weren't sh\_t, and we constantly pushed the outlaw thing so they could understand our culture, this thing we were all engaged in, was a political phenomenon above all. That's how so many 'non-political' kids, like thousands and thousands of them, were able to get into the White Panther thing in 1968, because we based all our propaganda on rock and roll, dope, and f\_king in the streets, and we said, dig, this is the revolution, people, this is what they're attacking us for....but that ain't

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<sup>118</sup>Sinclair, Guitar Army, 116.

nothin, we can smoke dope and get high any time we wanna, we might have to fight for it but if that's what we gotta do then that's what we'll do.<sup>119</sup>

At first, Sinclair had reason to be optimistic: under his management, the MC-5 had evolved from an average "garage band" into a nationally-recognized group with a recording contract on a major label. In clash after clash with police, Sinclair and the MC-5 were still on the streets and in the high schools, and WPP membership grew at a steady pace. After the inauguration of the WPP in November, 1968, Sinclair began devoting increasing amounts of his time to cultivating press coverage of the MC-5 and the White Panthers, issuing press statements, telephoning radio and television stations, and utilizing the underground press whenever possible. He helped found the Underground Press Syndicate (UPS), a national news-sharing organization intended to be the equivalent of an underground Associated Press.

Sinclair had learned from the Yippies that there was a direct relationship between the level of sensationalism in the press/media message and the degree and intensity of coverage. Early White Panther press releases and propaganda were intentionally overstated. "If you make it outrageous enough," Plamondon later recalled, "the networks will pick it up."<sup>120</sup> The degree to which Sinclair was conscious of the impact that his propaganda might have via the "straight"

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<sup>119</sup>Quoted in Ibid., 200.

<sup>120</sup>Quoted in Silberman, "The Hill Street Radicals," 49.

media is revealed in a July 4, 1969 letter to Leni, in which he laid out his ideas for a re-statement of the WPP's ten-point program. In a handwritten note following the proposed restatement, he wrote:

Try this -- I don't know if it sounds too pompous or not, but I tried to cover everything...When addressing people this should be read...People might not agree with it, but it's there to be dealt with...I wanted to cover the questions the straight people always ask and still be comprehensible to the kids...The whole thing should go together in one pamphlet with symbols, photos of me, Pun, etc.<sup>121</sup>

Bret Eynon believes that by adopting the Yippie tactics of "outrageous sensationalism," the White Panthers reduced their message to simplistic slogans attacking the police and other forces of authority, a strategy which, he argues, did not do justice to the richness of the group's thinking or its significant cultural accomplishments. Eynon contends that just as Sinclair's vision of personal liberation was reaching its "clearest articulation," with the origins of the White Panthers, his radical posturing invited police repression, ultimately robbing him of his personal freedom.<sup>122</sup> Eynon's analysis overlooks (or devalues) two important considerations. The same radical posturing that invited police surveillance also created a national following, and gave White Panthers radical certification among other

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<sup>121</sup>Draft of revised "White Panther Party 10-Point Program; What We Want/What We Believe," July 4, 1969, JLSC/BHL, box 17, folder 19, "White Panther Ideology."

<sup>122</sup>ASHP-Sinclair Biography, 68.

Movement groups. The MC-5's popularity was rooted in their radical message. Also, the overblown White Panther rhetoric reflected an incremental radical progression, rather than a sudden surge to the left -- an evolution which mirrored national trends for the Black Power, anti-war, and New Left movements.

During the eight month period following the unveiling of the White Panther manifesto, the social polarization of American society increased at a rapid pace. The FBI initiated a COINTELPRO specifically designed to disrupt and destroy the New Left. Following Nixon's election, many college campuses saw the use of undercover agents, employed by various federal and state law enforcement agencies. In the spring of 1969 came the fragmentation of SDS and the first incident of National Guardsmen shooting unarmed hippies and students: the People's Park riots at the University of California, Berkeley. Other campus confrontations paralyzed universities across the country. Beatnik poet Allen Ginsberg, a favored speaker on the college circuit, claimed that the police and National Guard across the country were gassing and beating so many students "its like they're manufacturing violent radicals by the milliard."<sup>123</sup> Todd Gitlin sums up the social disorder of period:

In the year after August 1968, it was as if both official power and movement counterpower, equally

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<sup>123</sup>Michael Schumacher, Dharma Lion: A Critical Biography of Allen Ginsberg, (New York: St. Martin's Press, 1992), 541.

and passionately, were committed to stoking up 'two, three, many Chicagos,' each believing that the final showdown of good and evil, order and chaos, was looming...All across the country Black Panthers shot it out with police, with more police dying than Panthers, but the list of martyrs piled higher...Cleaver was a folk hero...The Justice Department wheeled out conspiracy charges and created the Chicago 8...Journalists recognized the movement as a running story, like Vietnam...[the] underground press recorded arrests, trials, police hassles, and brutalities...The once-solid core of American life -- the cement of loyalty that people tender to institutions, certifying that the current order is going to last and deserves to -- this loyalty, in select sectors, was decomposing...underneath [it all] grew a sublime faith that the old sturdy-seeming ways [of the ancien regime] might be paper-mache and that the right trumpet blast -- the correct analysis, the current line, the correct tactics -- might bring them crashing down.<sup>124</sup>

The excessive White Panther message of "revolution" was undoubtedly influenced by the increased militancy characterizing both sides of the struggle on the national level -- the Movement and the conservative establishment -- during the 1968-1969 period. The campus of the University of Michigan in Ann Arbor became one of Gitlin's "select sectors," in which young people were abandoning old institutions at a rapid pace. Working from their two commune houses on the outskirts of the university, the White Panthers delivered the message that the radical white youth of America were a persecuted "colony," not unlike that of America's urban blacks or such Third World anti-imperialist movements as the Vietcong (National Liberation Front) in South Vietnam.

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<sup>124</sup>Gitlin, The Sixties, 342-45.

"Our culture is a revolutionary culture" Sinclair wrote in June of 1969, adding "we have to realize that the long-haired dope-smoking rock and roll street-f\_\_king culture is a whole thing, a revolutionary international cultural movement which is absolutely legitimate and absolutely valid." In opposition to a "youth colony" movement, Sinclair saw a "pig power structure," reflecting the "low-energy death culture" of American capitalist society. Lamenting that the "honkie power structure" was cracking down on the youth movement by employing such tactics as drug busts, expensive and time-consuming court litigation, and wrongful imprisonment, Sinclair believed it would even resort to "kill[ing] us if they can get away with it." Events of 1968-1969 confirmed his suspicions, as police surveillance increased, and the White Panthers faced a staggering number of arrests.

The local police and FBI response to the White Panthers was directly related to the level of threat which they perceived. The escalating social disorder of the period affected the police's interpretation of the perceived threat from John Sinclair and the White Panthers. Upon leaving office in early January, 1969, Attorney General Ramsey Clark stated that one of the greatest challenges facing the incoming Attorney General, and the law enforcement community in general, would be "keeping a sense of balance in law enforcement attitudes toward the very great tensions and anxieties that exist in the country today....[and]

maintaining a fair and effective enforcement of the law that is neither repressive nor permissive."<sup>125</sup> State and local police Departments in the Detroit/Ann Arbor area during the late sixties struggled with trying to maintain objectivity. A majority of officers from within the "conservative establishment" viewed the White Panthers as a genuine threat to society. These officers were able to act out their attitudes through surveillance and arrests. Their dislike for radicals was reinforced when groups like the White Panthers distributed anti-police rhetoric in the pages of their underground newspapers, at MC-5 shows, and even in the "straight" media. Although a minority of police officers clearly took pleasure in hassling Sinclair and the White Panthers, the majority probably recognized that their primary duty in conducting surveillance of individuals and groups suspected of being radical was to identify those who were breaking the law, or inciting others to do so. As former Detroit U.S. Attorney Ralph Guy asserts:

Initially, you can't tell the difference between the drug users, the hippies, and the hard-core radicals who meet in Canada to plot acts of violence. Erring on the side of caution is what the Government did...At the time I felt the Government was justified in this surveillance.

Guy has a point. But the police often erred in equating the mere advocacy of violence and "revolution" with actual criminal acts -- and treating those who engaged in radical

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<sup>125</sup>Quoted in New York Times, January 7, 1969, 18.

rhetoric as though they were criminals. The Yates and Jencks decisions of the late fifties extended the First Amendment's free speech protections to include the advocacy of violence, absent any overt criminal act(s).<sup>126</sup>

The local Detroit and Ann Arbor police might have acted with greater restraint if radical rhetoric and posturing had been all they were up against in their daily duties. However, beginning in the fall of 1968, a wave of violent anti-establishment bombings took place across Southeastern Michigan, targeting unmanned police cars and other symbols of the establishment. David Joseph Valler, an individual with a bizarre history, demonstrating that peace-loving hippies occasionally turned militant, was responsible for a majority of the bombings. Born on August 12, 1944, in a Detroit slum, Valler grew up on the concrete streets of the city. Between jobs at General Motors and elsewhere, he attended Wayne State University for a year and a half, coming into contact with the "alternative" crowd along the way; he recalls believing that the long-hairs were "noble souls working for the abolition of the war."<sup>127</sup> By 1966 he was an occasional

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<sup>126</sup>Ralph Guy personal interview with author, July 17, 1992, Ann Arbor, Michigan. For information regarding the Yates decision, see Donner, The Age of Surveillance, 21.

<sup>127</sup>Quoted in Big Fat, June, 1970, 20. [Ann Arbor, Michigan underground newspaper, Davis Papers]. Bob Hippler and Bill Benoit's article, based on interviews with several former associates and Valler's own writings, outlines Valler's transformation from peace-loving hippie to "mad bomber."

member of the local SDS chapter, as well as a regular member of the Detroit Committee to End the War in Vietnam (DCEWVN). He contributed to the Fifth Estate, and knew several of the Artists Workshop members on a casual basis. Dropping out of WSU in 1966, he became a full-time drug dealer, usually consuming his profits in marijuana, speed, and LSD (200+ "trips," he asserts). Over the next two years he consumed ever-increasing amounts of drugs, lived in several Detroit communes, and acquired a reputation as a "freak" among the hippies who were gathering in the WSU area. During one of his trips to California during the winter of 1967-1968 he decided to return to Detroit and run for President of the United States, on a platform of peace, love, and legalized LSD. By all accounts, he approached his candidacy with evangelistic fervor, printing and distributing thousands of fliers in Detroit, New York, and San Francisco. His candidacy earned him the title of "President Dave" in Detroit's alternative community, and the Detroit News did a story concerning his write-in campaign. Editors of the Fifth Estate allowed him access to their mimeograph machine, and Trans-Love member David Sinclair (John's brother) assisted him with preparing and handing out campaign materials. During the spring of 1968, two events shattered his dedication to peace and love: a motorcycle gang beat up his entire commune, allegedly over a drug deal that had gone sour, and later fire-bombed the commune building, known as

the "White House." In addition, he witnessed a riot in Berkeley, California, in which the police randomly beat and gassed student protestors. He later recounted his turn to violence:

On a sleepless night in Frisco I made up my mind to buy some dynamite and blow up my draft board. I returned to Detroit and saved up enough money to buy 50 sticks of dynamite. While most of my friends went to Chicago to cause trouble and get tear-gassed, I went to Northern Michigan and purchased dynamite...Thus the bombings began.<sup>128</sup>

Between August 30 and October 14, eight different "Valler bombings" took place across Southeastern Michigan, either perpetrated by Valler himself, usually with a friend or two, or by close associates who had requested dynamite from him. The targets included: police cars parked at Detroit's 10th and 13th Precinct Stations, the McComb County Draft Board, the South Lake School Administration Building, a U.S. Army recruiting office in Detroit, a clandestine CIA recruiting office in Ann Arbor, and the Institute of Science and Technology Building on the campus of the University of Michigan.<sup>129</sup> Although no individuals were injured in any of the explosions, Valler reportedly made several aborted

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<sup>128</sup>Ibid., 21.

<sup>129</sup>The I.S.T. was targeted due to widely-circulated reports that military research utilized in Vietnam (long-range aerial reconnaissance) was being conducted there.

attempts to deliver a large bomb to a restroom in the Federal Building on Beaubien Street in downtown Detroit.<sup>130</sup>

The bombings created an enormous amount of stress within the ranks of the Police Department, because of the seemingly random nature of the targeting, as well as the fact that police cars and stations were hit. During the height of the bombings, a task force of some fifty local, state, and FBI officials were assigned to the case. Yet, despite this huge commitment in resources, as well as numerous anonymous "leads," no major arrests were made until November 9, more than three weeks after Detroit News reporter Steve Cain wrote a front-page article on Valler, complete with a posed photograph, in which he all but admitted being the mastermind behind the bombings.<sup>131</sup> The indictments of November 9 charged Valler and eighteen others, including two "Jane Does" and four "John Does," with "wickedly, maliciously, and

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<sup>130</sup>Press reports in the Detroit News and Detroit Free Press concerning the bombings occurred on an almost daily basis during September, October, and November. Some of the more useful articles are as follows: Detroit News, September 2, 1-A; September 10, 1-A; September 12, 17-A; September 20, 1-A; September 30, 1-A; October 15, 3-A; November 12, 1-A and 18-A; November 20, 2-A; November 22, 4-A; November 24, 2-A; and November 27, 3-B.

<sup>131</sup>See Detroit News, September 20, 1968, 1-A. Cain's investigative work involved visiting the hippie communities in the WSU area and interviewing anyone who would talk to a "straight" reporter concerning the bombings. His front-page story on Valler, appearing on September 20, was an enormous embarrassment to the Detroit Police Department. Cain asserts Deputy Inspector Roy Chlopan of the SIB criticized him, claiming the article made his office look bad. See personal interviews with Stephen Cain, July 22, 1992, and March 29, 1993. Currently, Cain is a reporter for the Ann Arbor News.

feloniously" conspiring to blow up the various establishment targets.<sup>132</sup> Within a few weeks of the indictments, the charges were dropped against several of the defendants, and only Valler and one other person remained behind bars. Valler eventually received a seven to ten year sentence on the marijuana charge (his second offense), and two to five years for possession of an explosive device, to be served concurrently.<sup>133</sup>

Relations between Detroit's white radicals and the forces of the establishment reached a breaking point during the initial Conspiracy Trial proceedings in November of 1968. Both the atmosphere surrounding the case, and the day-to-day proceedings foreshadowed the Chicago Conspiracy Trial of the following year. On the first day of the trial ultra-

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<sup>132</sup>No Trans-Love members were named in the indictment. However, one of the alleged co-conspirators was John W. Forrest of Detroit, a future White Panther who, at the time, knew Sinclair and Plamondon on a casual basis only. See Figure A-12 in the Appendix.

<sup>133</sup>Acting on several anonymous tips, the Detroit Police Department's Special Investigative Bureau (SIB), assisted by members of the Michigan State Police Special Investigation Unit (SIU), initiated 24-hour physical surveillance of Valler on September 6 [see Figure A-13 in the Appendix]. After repeated attempts, an undercover police officer purchased marijuana from him on September 27, leading to his arrest on October 9 for marijuana possession and distribution. At the time of the State bombing indictments, November 9, Valler was already in Wayne County Jail, held in lieu of a \$35,000 bond. See State of Michigan Case No. A-149570, People of the State of Michigan v. David J. Valler, et. al, Wayne County Courthouse Records Division, 3rd Floor, [microfilm files]. See also John and Leni Sinclair Red Squad files, Detroit Police Department, Special Investigation Bureau, Inter-Office Memorandum, "Information on Recent Bombings Occurring in the Detroit Area," September 18, 1968, 2-3.

conservative Judge Thomas J. Poindexter declared that the special circumstances surrounding the case meant that he would "not be bound by the normal rules of procedure." After listening to several of the prosecution's witnesses -- and refusing to let the defense cross-examine any of them -- he stated: "This court is going to rule at this point that a conspiracy exists, that not all members [of the conspiracy] are in custody, and Mr. Valler is a member." Nearly all of the motions made by the team of defense lawyers, which included some of the best-known attorneys in Detroit, were denied by Poindexter. At one point during the hearing, a police officer assaulted a defendant in clear view of the Judge.<sup>134</sup>

The tensions surrounding the "Valler State Conspiracy Bombing Case" reflected the increasing social polarization between white radicals and the conservative establishment in the Detroit/Ann Arbor area, at precisely the time when the White Panther Party was formed. In fact, the agenda for the first WPP Central Committee meeting in early December included a discussion of the conspiracy trial, as well as a threat that the group would not tolerate police harassment of "young brothers and sisters" much longer.<sup>135</sup> In this atmosphere, it is not surprising that the local and state

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<sup>134</sup>Detroit News, November 22, 1968, 4-A.

<sup>135</sup>Sinclair, Guitar Army, 107.

police forces viewed the newly-formed group with great seriousness.

There were other problems as well: (1) the MC-5 was blacklisted by several major east coast clubs following an incident in December of 1968 at the Fillmore East in New York City;<sup>136</sup> (2) controversy surrounding the group, as well as bitter disagreement over the censorship issue, caused Elektra Records to drop the MC-5 by May; (3) WPP members were arrested on a variety of charges, including illegal drug use during the free concerts, indecent exposure, and the printing and distribution of obscene materials; (4) Sinclair was arrested on April 19 at the Canadian border, on route to an MC-5 show, for failing to register as a convicted narcotics user before entering a foreign country;<sup>137</sup> and (5) Sinclair was sentenced on June 10 to thirty days in jail for assaulting an Oakland County police officer at an MC-5 show

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<sup>136</sup>The incident occurred during an MC-5 performance at the Fillmore, when Sinclair allowed an anarchist group known as the "Motherf\_kers," to deliver speeches advocating violence against the show's promoter, Bill Graham. The influential rock promoter was so incensed that he had the group "blacklisted" at many important east coast clubs. This incident, combined with the problems at Elektra Records, essentially stalled the sales of their initially-successful debut album. In later years, the band members would blame Sinclair's radicalism for ruining their one big chance at superstardom. See Goldmine, April 17, 1992, 16-22, 106; and Rolling Stone, June 11, 1992, 35-36.

<sup>137</sup>None of the White Panther lawyers had heard of the obscure law. Attorney Justin Ravitz called the case "an oddity in the annals of jurisprudence." However, in 1967 Federal authorities had used the same statute against LSD guru Timothy Leary, after he attempted to enter Canada from Detroit. See Sinclair, Guitar Army, 166.

the previous year. Despite these incidents, the WPP remained viable and largely intact through the fall of 1969, when the group's heightened militancy, as well as a series of violent local events, brought them to the attention of Hoover's FBI.

The so-called "Ann Arbor Riots" of June 16-18, 1969, marked a turning point in the relationship between the college town's radical community and the police. For weeks prior to the incident, tensions in the town had been increasing, fueled by the presence of several radical motorcycle groups -- as well as ever larger numbers of local and State Police.<sup>138</sup> Three days of chaos began when a group of "freeks" closed off a section of South University Avenue (adjacent to the campus) to traffic, declaring the area a "free and liberated zone" for hippies to get together and party. It was widely reported that one hippie couple engaged in sexual acts on the street, in full view of passersby. Nonetheless, this first evening's events were generally peaceful, as the White Panthers later recalled:

More people gathered, a few more police cars were called to the scene...The police then retreated entirely from the area, and the people felt that they had won a rare victory in the continuous 'war' with the police. So the people threw a spontaneous 'street party' -- dancing in the streets, passing wine bottles around, making music and generally having a good time for two or three

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<sup>138</sup>See "The White Panther Report: Youth Culture, the South University 'Disorders,' and the Community Interaction Project in Ann Arbor," November 17, 1969, JLSC/BHL, box 17, folder 19, "White Panther Ideology"; see also ASHP-Taube Interview, 18.

hours...and when the people left the area...they cleaned up the street.<sup>139</sup>

The following day, Washtenaw County Sheriff Douglas J. Harvey, incensed that his men had been forced to "retreat" in the face of a "mob," requested reinforcements from the surrounding counties, and readied them at the outskirts of town.<sup>140</sup> Oakland County Sheriffs Department helicopters flew across the city during the afternoon, leading many local residents to feel "something ominous" was about to occur. The stage had been set for confrontation, and a small group of "adventuristic youths" created the "spark" by entering South University, raising red flags, and yelling threats at policemen. What happened next was a full-scale riot. Dozens of police, in full riot gear, approached South University from one end of town, while an estimated crowd of 1500-2000 students, professors, and onlookers filled the other end of the avenue. One of Sheriff Harvey's officers announced, via a bullhorn, that in five minutes the police would arrest anyone still standing on the street. Before five minutes had passed, a number of students started running, police in full pursuit. As had been the case during the Chicago demonstrations some ten months before, many innocent

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<sup>139</sup>"The White Panther Report," 18.

<sup>140</sup>Responding to rumors of the police build-up, WPP leader Leni Sinclair travelled to the Holy Ghost Seminary, where several squads were allegedly encamped. Carrying a camera, she was quickly chased out of the area by officers, several of whom pointed guns at her vehicle. See Ibid., 19.

bystanders were clubbed and beaten. Horrified by this, angry youths began hurling rocks and bottles at the police. What transpired next was predictable: "The police had swung into their battle formations and started marching down the streets in a wedge...the effect was terrifying and increased the people's hostility a hundred fold."<sup>141</sup> Dozens of arrests followed, and the scene was repeated for the next several days. WPP member Taube recalls one incident during the riots that had a big impact on him:

There were hundreds and hundreds of state troopers...Military formations marching in front of our house on Hill Street...It was funny -- I walked down the line [of police]...They were lined on S. University, arm in arm, full battle gear. I said 'Why are you out here?' to one guy and he said 'Well, I don't really care about the dancing and all the music and even the dope, but (in an outraged whisper) f\_\_king in the streets!' As a father and a citizen and a decent human being, he was so offended by 'sex in the streets'...He was willing to get out there, man, and just -- Pow! -- shoot these motherf\_\_kers if necessary...And that's a contradiction that I never understood. People get outraged at your form, but their response is so out of shape.<sup>142</sup>

The White Panthers often played the role of peacemakers during the three days -- on several occasions walking through the streets with university professors, urging people to refrain from further provocations. Nonetheless, "official" press accounts of the rioting implicated the WPP as

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<sup>141</sup>Ibid., 20.

<sup>142</sup>ASHP-Taube Interview, 19.

responsible for egging on the crowds.<sup>143</sup> Without question, this negative press was responsible for bringing them to the attention of J. Edgar Hoover.

Prior to the riots, the FBI apparently had very little interest in Sinclair and the White Panthers.<sup>144</sup> The first reports concerning the WPP sent to the Bureau's Washington Headquarters, dated December 31, 1968, and January 14 and 28, 1969, were from the New York field office. They primarily dealt with the MC-5's appearance there in late December.<sup>145</sup> The January 28 memorandum referred to the group as a "minuscule left-wing organization."<sup>146</sup> Hoover's first communication to the Detroit field office concerning the

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<sup>143</sup>Detroit News, June 19, 1969, 1-A.

<sup>144</sup>No Trans-Love members were implicated or charged in the "Valler bombings" during the fall of 1968.

<sup>145</sup>SAC, New York to Hoover, 62-112678-2, 62-112678-3, and 62-112678-4. The first FBI communication concerning the group occurred on December 12, 1968, an "urgent" teletype from the Detroit office to New York (62-112678-1). Nearly all of this document -- as well as most of the several thousand additional pages of White Panther materials the author acquired from the FBI via the Freedom of Information Act (FOIA) -- has not been released, thanks to two of the FBI's widely-used FOIA exemptions under Title 5 of the U.S. Code, section 552, subsections (b)-7-c and (b)-7-d: "Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information...could reasonably be expected to constitute an unwarranted invasion of personal privacy [subsection c]...[and] could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis...[subsection d]." See Figure 3-4 on page 288.

<sup>146</sup>SAC New York to Hoover, January 28, 1969, 62-112678-4.

group, dated January 21, 1969, indicated that he was more concerned with their possible support for the Black Panther Party than with the MC-5's revolutionary potential; referring to a December, 1968, interview with Eldridge Cleaver in the Los Angeles underground newspaper "Open City," in which the interviewer mentioned the Detroit-based White Panther Party's support the Black Panthers, Hoover requested that both the Detroit and New York offices "obtain information concerning this organization" and promptly submit it to Headquarters.<sup>147</sup> Detroit's initial report to Hoover, dated February 25, 1969, was little more than a re-statement of a Time article of January 3, 1969, which described the MC-5's concert at New York's Fillmore East in late December.<sup>148</sup> And on May 21, 1969, Detroit's SAC made the following highly-unusual request:

The White Panther Party...lacks a definite membership, has no meetings, espouses no specific action, does not sponsor any activities and lacks concrete form. Due to the inspecific [sic] nature of the group, it is felt that continued investigation....would be unproductive and unwarranted.<sup>149</sup>

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<sup>147</sup>Hoover to SAC, Detroit, January 21, 1969, 62-112678-5.

<sup>148</sup>SAC, Detroit to Hoover, February 25, 1969, 62-112678-7. See Figure A-14 in the Appendix.

<sup>149</sup>SAC, Detroit to Hoover, May 21, 1969, 62-112678-14. See Figure 3-5 on page 289. The memorandum did state that several individual members of the WPP would later be recommended for inclusion on the FBI's infamous "Security Index." Without question, some of the Detroit SAC's information regarding the WPP was incorrect: the group was definitely holding semi-regular meetings by the early spring, (continued...)

Hoover's response, dated June 6, reflected his enthusiasm for long-term surveillance, even in the absence of specific criminal acts and/or probable cause. Referring to the fact the WPP and its "rock and roll" band continued to be in the national spotlight, he added "Detroit is instructed to continued [sic] to follow activities of this group."<sup>150</sup> However, the Ann Arbor riots left no doubt in Hoover's mind concerning the dangers to society posed by the White Panthers. An "urgent" teletype from Detroit's SAC on June 18 stated "Apparent leadership to rally and disruption coming from WPP, Ann Arbor, and Trans-Love Energies."<sup>151</sup> Hoover responded by suggesting that there might be some way to prosecute the WPP with "conspiracy to commit violence" -- a suggestion that the Detroit SAC ultimately deemed impossible. For good measure, Hoover also castigated the Detroit SAC for trying to discontinue surveillance the previous month; "Your

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<sup>149</sup>(...continued)

and by this time thousands of WPP buttons and propaganda sheets had been distributed to youth through Southeastern Michigan, and beyond. Whether the SAC's comments were made due to a lack of credible intelligence -- or perhaps purposefully understated the group's radicalism -- is a matter of conjecture. Evidence exists that several field office chiefs were unhappy about Hoover's fixation with the New Left and counterculture.

<sup>150</sup>Hoover to SAC, Detroit, June 6, 1969, 62-112678-17.

<sup>151</sup>SAC, Detroit to Hoover, June 18, 1969, 62-112678-78, page 9. Interestingly, the same Detroit report includes a Detroit Free Press story on the WPP, which states: "By the end of the hostilities, it was the White Panther leaders -- walking alongside U-M faculty members -- who convinced the young rowdy crowd to surrender the blockaded street."

informant coverage of the WPP is obviously inadequate...Premature closing of cases will not be tolerated." He added: "The importance of vigorously investigating and developing information on this organization can not be overemphasized and the Bureau will be closely following this matter.<sup>152</sup> From this point forward, the Detroit office of the FBI began covering all White Panther events, and copies of all memoranda were also circulated to "G-TWO" military intelligence offices in Detroit, as well as "local agencies."<sup>153</sup>

During the four months following the Ann Arbor riots, the White Panthers were subjected to local, state, and federal surveillance at unprecedented levels.<sup>154</sup> This led to the loss of the WPP's top leadership, as well as a dramatic increase in the group's militancy. It also laid the foundation for the Nixon Administration's decision to "use" the government's case against the group to acquire legal sanction for the Mitchell Doctrine. The White Panthers

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<sup>152</sup>Hoover to SAC, Detroit, June 25, 1969, 62-112678-22. See Figure 3-6 on page 290.

<sup>153</sup>Hoover to SAC, Detroit, June 25, 1969, 176-1558; SAC, Detroit to Hoover, August 21, 1969, 180-84-2. These documents were filed separately from the bulk of the WPP files, for unknown reason(s). One possibility is their strictly legal focus: searching for a valid "federal prosecutive effort" against the group (e.g. Hoover's suggestion of a conspiracy charge for the Ann Arbor riots).

<sup>154</sup>In fact, local and state police authorities had been conducting 24-hour surveillance of Sinclair for several months prior to the riots. See Figure A-15 in the Appendix.

suffered their worst setback on July 28, 1969, when Detroit Recorder's Court Judge Robert J. Colombo sentenced Sinclair to nine and a half to ten years in jail for his third marijuana offense (dating back to January, 1967).<sup>155</sup> In addition to issuing the draconian sentence, Judge Colombo refused to set bond because, he argued, Sinclair displayed "a propensity and a willingness to further commit the same type of offenses while on bond."<sup>156</sup> The impact of the loss of Sinclair on the White Panthers was considerable, a fact of which the local authorities were undoubtedly aware. "Skip" Taube later described the effect of Sinclair's imprisonment on the group:

The judge said it, and everybody just stood up on the verge of just lunging right into them [the police]...They hustled John out of the room as quick as possible...The next thing we knew we were just sitting on the steps of the court building

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<sup>155</sup>Although Churchill and Vander Wall's The COINTELPRO Papers states that "the Bureau provided considerable assistance to the local red squad in setting Sinclair up to receive an all but unprecedented...sentence," the evidence they rely upon, Charles Goodell's Political Prisoners in America, provides no documentary support for the allegation. Credible evidence linking the FBI and/or Federal authorities to Judge Colombo's sentencing has not been found by the author, and none of the released FBI documents obtained via the Freedom of Information Act make reference to the July, 1969 sentencing. In light of the sentence which "anti-establishment bomber" David Valler received in May of 1969, for second-offense marijuana possession, from the same Detroit Recorder's Court (7-10 years), Judge Colombo would probably not have needed FBI influence to deliver so harsh a sentence to Sinclair. See Churchill and Vander Wall, The COINTELPRO Papers, 191; and Charles Goodell, Political Prisoners in America, (New York: Random House, 1973), 199-206.

<sup>156</sup>Quoted in Sinclair, Guitar Army, 169.

just like we were all alone...It was too heavy to sink in somehow.<sup>157</sup>

Sinclair had been the central creative force behind the group from the first days of the Artists Workshop, through the Trans-Love period, and on to the White Panther era. In addition, despite his penchant for posturing, his age (27) and experience (twice imprisoned) made him something of a moderate -- if judged within the boundaries of the increasingly militant New Left and counterculture movements. Lacking his day-to-day leadership and guidance, the White Panthers pursued a course which brought them close to acting out their radical rhetoric.

One example involved the newly-formed Detroit chapter. The chapter's leadership included John "Jack" Forrest, a native of the city who had been indicted in the Valler Bombings Conspiracy case in November of 1968. During the fall of 1969, Forrest and several members of the newly-formed chapter resided in a second-floor apartment above the offices of the Fifth Estate newspaper. Peter Werbe, the paper's Editor, recalls that one afternoon Forrest came running into the ground-floor offices, in near panic:

He told me that the police were all around the building. So I locked the reinforced door (protection from right-wing groups, who had made many threats), and took the rifles off the gun racks on the wall. Forrest looked at me with a gleam in his eye and said 'Are we gonna shoot it out?' I proceeded to lecture him on the suicidal nature of the suggestion and hid the guns so that

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<sup>157</sup>ASHP-Taube Interview, 20.

the police would not charge me for them. After a very tense few minutes of waiting for armageddon, I opened the door to find that the police had disappeared. Later I learned that several Panthers had been on the roof posing with guns and topless women for photographs...they were posturing idiots.<sup>158</sup>

The situation for the militant White Panthers went from bad to worse during the summer and fall. Several members began openly brandishing rifles and other firearms, engaging in target practice at rural locations on the outskirts of Ann Arbor. When Michigan State Police (in full riot gear) raided a WPP-sponsored meeting of the nation's underground press editors on a nearby farm, Pun Plamondon and others armed themselves and began guarding the roads leading to the encampment.<sup>159</sup> In his best-selling book Woodstock Nation, released late that fall, Yippie leader Abbie Hoffman discussed how the event contributed to the White Panthers' increased militancy:

When the Pigs left we had a heavy rap session about self-defense...there were White Panthers guarding the road with shotguns...There were about thirty of us on defense patrol ready to put into operation Plan B to fight the Pigs if they returned. We had about twenty or so weapons...Skip Taub[e] laid out a heavy rap about what was coming down in the Ann Arbor area like Pigs shaving longhairs, searching cars at drive-ins, hassling young people in a whole lot of ways

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<sup>158</sup>Peter Werbe personal interview, July 19, 1992, Detroit, Michigan.

<sup>159</sup>Leni Sinclair's photograph of Genie and Pun holding sentry duty at the media conference was later made into a White Panther poster. Widely distributed, the poster reinforced the WPP myth and association with violence. See Figure 3-7 on page 291.

and not allowing rock music in the park. I listened to Skip more careful than I had listened to anyone in a long time. In Ann Arbor they were working out the mixing of revolutionary outlaws and cultural nationalists.<sup>160</sup>

Years later, Taube recalled that during this period the Black Panther myth of heroic guerrilla warfare against the establishment was increasingly part of the WPP credo:

I could see my politics altering my basic character...Because we were an imitation of the Black Panther Party...What they said was right. The police are your enemy and they got guns. You gotta protect yourself...I never, and I doubt if anybody else ever really sat down and thought what does this ultimately lead to? What are the consequences?<sup>161</sup>

Before long some of the "consequences" became apparent. The group's leadership was targeted for intense surveillance on a national level, while the tactics employed by the police and FBI bordered on outright repression. In August, while driving home from the Woodstock Festival in Bethel, New York, Leni Sinclair and Pun and Genie Plamondon were arrested in New Jersey for possession of marijuana.<sup>162</sup> The next month,

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<sup>160</sup>Abbie Hoffman, Woodstock Nation, (New York: Vintage Books, 1969), 56-57.

<sup>161</sup>ASHP-Taube Interview, 21.

<sup>162</sup>Two factors concerning this "bust" merit close scrutiny: (1) the fact that this relatively insignificant arrest, for very small amount of marijuana, made headlines in newspapers across Michigan indicates that someone deemed the incident worthy of a major press release, and (2) an "Interview Report Form" on the arrest, located in Leni Sinclair's Detroit Red Squad file, demonstrates that the source -- either New Jersey police or (more likely) the FBI -- considered the individuals of enormous importance. The source recorded the names, addresses, and telephone numbers  
(continued...)

Pun and Ken Kelley were arrested in Chicago for possession of a Boy Scout knife.<sup>163</sup> Detroit's FBI was now fully participating in the no-holds-barred offensive against the WPP. An August 28, 1969 memorandum from Detroit's SAC to Hoover mentioned the possibility of initiating a counter-intelligence action against the "Detroit Coalition Committee," a newly-formed local chapter of the National Mobilization Committee to Stop the War in Vietnam (or "Mobe").

In order to foster division between Detroit and Ann Arbor's white and black movements -- a time-tested COINTELPRO tactic -- the SAC recommended that a "fraudulent letter" be sent from the national offices of the Black United Front, a militant black nationalist group, to the Ann Arbor headquarters of the White Panthers, "to help the BUF collect the just and modest sum of \$25,000.00 from the NMC by making a direct overture" to an NMC leader in Ann Arbor.<sup>164</sup> The

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<sup>162</sup>(...continued)

of every person who signed a petition in favor of freeing John Sinclair; Detroit was urged to "Please index the names on these petitions if they are at all readable." The two occurrences indicate that federal authorities were interested in doing as much damage as possible to the WPP. See Leni Sinclair Red Squad File, "Interview Report Form," undated document, [incomplete, because Leni Sinclair was only allowed access to the two pages in which her name appears], late August, 1969.

<sup>163</sup>Fifth Estate, October 2-15, 1969, 18.

<sup>164</sup>At the time, the FBI had an informant among the BUF's national leadership in Washington, D.C. Sending an anonymous letter from the BUF offices would therefore have been relatively easy.

suggested COINTELPRO action was directed primarily at the local Mobe chapter, because of the organization's involvement in the planned "Moratorium" against the Vietnam War, scheduled for Washington, D.C. that fall.<sup>165</sup> Nonetheless, the White Panthers were an important secondary target, as the following passage from the memorandum made abundantly clear:

Such a letter would also be a disruptive factor to the amicable relations between the WPP and Black Nationalist supporters and groups in Ann Arbor, inasmuch as WPP would be forced to make a choice between BUF cause and the position of the white liberals in Ann Arbor who have been critical of the war and have to this point supported the WPP.<sup>166</sup>

Although it is unknown whether the initiative was ever approved by Hoover and/or carried out in Detroit/Ann Arbor,

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<sup>165</sup>The Nixon Administration went to great lengths to investigate the leadership of the planned demonstration. The President equated anti-war protest with providing aid to the enemy, and, as H.R. Haldeman recalled, usually favored "no concession to the left." See H.R. Haldeman, The Haldeman Diaries: Inside the Nixon White House, (New York: G.P. Putnam's Sons, 1994), 100; see also Stephen E. Ambrose, Nixon: The Triumph of a Politician, vol. 2, (New York: Simon and Schuster, 1989), 302-304. Nixon's desire to do damage to the Mobe resulted in increased pressure on the FBI and other intelligence agencies to demonstrate the group's socialist ties; failing to uncover these supposed links, the agencies cooperated to inflict as much damage as possible upon the Mobe's leadership. See Churchill and Vander Wall, The COINTELPRO Papers, 208-11.

<sup>166</sup>SAC, Detroit to Hoover, August 28, 1969 [unnumbered document]. Reproduced in Churchill and Vander Wall, The COINTELPRO Papers, 192-93. See Figure 3-8 on pages 292-93. This already publicly-available FBI memorandum was not provided to the author as a result of a detailed FOIA request, which specifically asked for all materials pertaining to the WPP.

a September 9, 1969, memorandum from the FBI's Washington, D.C, field office (WFO) stated:

During a recent meeting of the National Mobilization Committee to End the War in Vietnam (NMC), the Black United Front (BUF) demanded a sum of money from the NMC for allowing the NMC to hold a demonstration in WDC on 11/14/69 - 11/15/69. BUF warned that if the money was not forthcoming, they would prevent the NMC from demonstrating.

The memorandum also contained the following statement:  
"Efforts also will be made to further the rive [sic] in the black-white movements."<sup>167</sup>

The White Panther leadership also experienced the negative effects of their self-created myth as "revolutionaries" while attending the Woodstock Festival. Leni, Pun, and Genie travelled to Woodstock to raise awareness of the imprisonment of John Sinclair, and to ask for support from within the Movement. With the assistance of Abbie Hoffman, they hoped to utilize the festival as a platform through which to politically educate the emerging legions of the youth culture, just as Trans-Love/WPP had been

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<sup>167</sup>SAC, WFO to Hoover, September 9, 1969, [unnumbered document], Bret Eynon Collection, American Social History Project, Hunter College, NY, located in the Michigan Historical Collections, Bentley Historical Library, University of Michigan, Ann Arbor, box 1, topical file: "COINTELPRO, 1969-1970" [hereafter "Eynon Collection/BHL"]. See Figure A-16 in the Appendix. The short period of time separating the issuance of this memorandum from the similar one in Detroit indicates that the BUF action in Washington might have been the inspiration for Detroit's SAC. Hoover required that successful COINTELPRO actions of this variety be shared with other field offices, in an effort to provide the SACs with innovative ideas for inflicting damage upon targeted individuals and groups.

doing at MC-5 concerts for years. They wanted to make Woodstock a gigantic "Free John Sinclair" rally. Instead, they were greeted with hostility. Leni recalls being told by several Movement "heavies" that they did not want to associate with people who advocated violence. The White Panthers' degree of visibility in the nation's underground press now backfired on them -- among the very people with whom they most wanted to associate. Nor did concert promoter Michael Lang allow them access to the microphones between acts. At one point, Yippie leader Abbie Hoffman, incensed by the "hip capitalist," climbed on-stage as the rock band "The Who" were about to begin. Seizing the microphone, Hoffman stated:

The politics of the event is pot. Dig it! John Sinclair's in f\_kin prison ten years for two f\_kin joints. We ought to bust John out of prison or all this place and music don't mean...

Hoffman was not allowed to finish the sentence, as the promoters turned off the microphone. He waited until the band came on-stage, and repeated the act, but this time only was able to get out the words "Free John Sinclair," because the band's guitarist, Peter Townshend, clubbed him over the head. There would be no "Free John Sinclair" rally at Woodstock.<sup>168</sup>

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<sup>168</sup>Leni Sinclair personal interview, July 23, 1992, Detroit, Michigan. See also Abbie Hoffman, Woodstock Nation, 140-43 [quote 142]. Not surprisingly, the Hoffman-Lang controversy was omitted from the enormously successful documentary motion picture on the Woodstock festival. The  
(continued...)

From his prison cell, Sinclair also witnessed the effects of the police/FBI offensive. In September, his first bond hearing was denied, and he was transferred from nearby Jackson State Prison to a penitentiary on Michigan's upper peninsula, in the town of Marquette. Visitors from Detroit would have to spend an entire day driving one-way to see him. In addition, Sinclair's popularity in prison, as well as his attempts to conduct political education classes for inmates, earned him time in "isolation," or solitary confinement. However, his departure from the local Ann Arbor "scene" did not prevent him from continuing to make a contribution. Working with radical attorneys from the National Lawyers Guild, Sinclair directed the "Free John Sinclair" movement, a national media campaign which generated tens of thousands of signatures, calling for his immediate release and the reform of Michigan's marijuana laws.

For the White Panthers, the cycle of radical militancy peaked on October 7, 1969, when a Federal Grand Jury in Detroit indicted Sinclair, Pun Plamondon, and Jack Forrest on conspiracy charges stemming from the September 29, 1968, bombing of a clandestine CIA recruiting office in Ann Arbor. "Count One" of the indictment charged that the three individuals, in conjunction with David Valler, "wilfully and

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<sup>168</sup> (...continued)

1994 retrospective compact disc history of the Who, entitled "The Who, Maximum R & B," contains a recording of the Hoffman-Townshend scuffle.

knowingly did combine, conspire, confederate and agree together and with each other....to wilfully and knowingly and by means of dynamite to injure property of the United States thereby causing damage in excess of \$100.00; in violation of Section 1361, Title 18, United States Code." Count Two charged Plamondon with the actual bombing. The indictment further listed the following "Overt Acts": (1) several alleged conversations between Sinclair, Valler, and Plamondon; (2) an alleged transfer of dynamite from Valler and Forrest to Plamondon; and (3) Plamondon's alleged carrying out of the bombing.<sup>169</sup> The CIA bombing had been one of eight listed in the state Conspiracy case the previous winter, the so-called "Valler Bombings." Yet of the three defendants, only Forrest had been originally charged in the State case. The inclusion of David Valler as an unindicted co-conspirator in the October 7 indictment against those who would become known as the "Ann Arbor Three," demonstrated that the former anti-establishment bomber was going to be the government's "star witness."<sup>170</sup> However, the U.S. Attorney

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<sup>169</sup>U.S. v. John Sinclair, Lawrence Robert "Pun" Plamondon, and John Waterhouse Forrest, Case No. 71-1105, October 7, 1969, National Archives and Records Administration, Federal Records Center, Chicago, IL, Accession No. 276-77-0002, Location No. 563-472, box No. 2.

<sup>170</sup>This was confirmed in a series of interviews between the author and former Detroit U.S. Attorney Robert Grace. See Robert Grace personal interviews, July 20, 1992 and April 1, 1993, Ann Arbor, Michigan. Currently in private practice, the former U.S. Attorney spoke at length about the "CIA Conspiracy case."

would have to wait more than a year to start the trial; Plamondon quickly went "underground" to allude capture. Soon after his arrest in July of 1970, the White Panther "CIA Conspiracy Case" acquired a new importance for the Justice Department: the Nixon Administration decided to use it in a legal maneuver designed to revive the Mitchell Doctrine. The White Panthers' significance was now to be seen in how the government collected its evidence.



OPTIONAL FORM NO. 10  
MAY 1962 EDITION  
GSA FPMR (41 CFR) 101-11.6  
UNITED STATES GOVERNMENT

# Memorandum

TO : DIRECTOR, FBI

DATE: 5/21/69

FROM : SAC, DETROIT (157-3554) (C)

SUBJECT: WHITE PANTHER PARTY  
INFORMATION CONCERNING  
(OO: Detroit)

ALL INFORMATION CONTAINED  
HEREIN IS UNCLASSIFIED  
DATE 3/2/82 BY SP5

Re Detroit letter and LHM dated 2/25/69.

Enclosed for the Bureau are 11 copies of a LHM concerning captioned matter. One copy of the LHM is being furnished Houston, New York and San Francisco inasmuch as investigation has been conducted by those divisions regarding captioned organization.

Enclosed for the information of Houston and San Francisco is one copy of referenced Detroit airtel and LHM.

Investigation into captioned group indicates that the White Panther Party is a loosely knit conglomeration of white hippies who believe in cultural revolution. AS pointed out in the enclosed LHM the group lacks a definite membership, has no meetings, espouses no specific action, does not sponsor any activities and lacks concrete form.

Due to the inspecific nature of the group, it is felt that continued investigation of the White Panther Party would be unproductive and unwarranted. However, cases have been opened on each of the national officers of the White Panthers and immediately upon completion of investigation several of those persons will be recommended for inclusion on the Security Index because of their individual activities.

- 2 - Bureau (Enc. 11) (RM)
- 1 - Houston (Enc. 2) (Info) (RM)
- 1 - New York (100-164951) (Enc. 1) (Info) (RM)
- 1 - San Francisco (157-3975) (Enc. 2) (Info) (RM)
- 2 - Detroit (157-3554) (1 - 100-33198)

REC-38 62-112678-14

MAY 23 1969

5 MAY 26 1969 Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

(7) b7c

DATE FORW: 6/5/69

BY: MS

67c

(Figure 3-5)

FBI Memorandum, SAC Detroit to Hoover

May 21, 1969 (62-112678-14)

SAC Detroit Requests Discontinuance of WPP Surveillance

Source: Freedom of Information Act Files on WPP

1 - [redacted]  
(Field Supervision)  
1 - [redacted]  
1 - [redacted]

b7C

SAC, Detroit (157-3554)

6/25/69

Director, FBI (62-112678)

PERSONAL ATTENTION

0 WHITE PANTHER PARTY (WPP)  
IS - MISCELLANEOUS

JUN 23 3/3/69 [redacted]

Reurlet dated 5/21/69 and Bulet dated 6/6/69 both captioned as above.

Your letter recommended closing instant matter indicating that captioned organization was a loosely knit conglomeration of white hippies who believed in cultural revolution; further, that the WPP lacked a definite membership, had no meetings, espoused no specific action, did not sponsor any activities and lacked concrete form. ReBulet denied authority to close this case.

Your letter appeared less than completely accurate inasmuch as according to your office captioned organization led a recent "hippy happening" in the Ann Arbor, Michigan, area during which numerous arrests were made, police officers and civilians injured and extensive property damage resulted. Premature closing of cases will not be tolerated;

MAILED 4  
JUN 24 1969  
COMM-FBI

In view of the above, you should immediately intensify your investigation of this group to identify leaders and activists in accordance with existing Bureau instructions. As these individuals are identified, you should submit information developed concerning them under individual caption in a form suitable for dissemination with appropriate recommendations relative to their inclusion on the Security Index.

Your informant coverage of the WPP is obviously inadequate. You should review this matter thoroughly and by return mail advise what coverage exists and what steps are being taken to improve this situation. It is extremely important that we be fully aware of all activities, meeting places, finances and other aspects of the operations of captioned group.

REC 28 62-112678-22

You should submit timely letterhead memoranda on the activities of this organization as they occur; in addition, within 45 days of the receipt of this communication you should submit a current report and follow with an up-to-date report each 90 days thereafter.

JUN 25 1969

JUN 25 1969  
MAIL ROOM  TELETYPE UNIT

b7C

SEE NOTE PAGE TWO

(Figure 3-6)

FBI Memorandum, Hoover to SAC Detroit  
June 25, 1969 (62-112678-22)

Hoover Orders Expansion of WPP Investigation  
Castigates SAC for Recommending "Premature closing" of Case

Source: Freedom of Information Act Files on WPP



(Figure 3-7)  
"Pun" and Genie Plamondon with Shotgun  
WPP-Sponsored Ann Arbor Media Conference  
Summer, 1969

Source: Leni Sinclair Personal Photography Archives

UNITED STATES GOVERNMENT

Memorandum

TO : DIRECTOR, FBI (100-449698)

DATE: 8/28/69

FROM : SAC, DETROIT (100-35108)

~~Confidential~~

SUBJECT: COINTELPRO - NEW LEFT  
BUDED: 8/29/69

ReBuairtel dated 8/21/69.

Following the National Anti-War Conference in Cleveland, Ohio, 7/4-5/69, a coalition of anti-war groups in the Detroit area began meeting and an ad hoc committee called the Detroit Coalition Committee was formed. The Detroit Coalition Committee meets on Monday nights at 5703 Woodward Avenue, Detroit, Michigan, and [redacted]. One of the leaders of the Detroit Coalition is [redacted], who resides in Ann Arbor, Michigan, and who is believed to be a member of the [redacted] of the New Mobilization Committee to End the War in Vietnam (NMC). Detroit feels that the present conditions as they exist on the Detroit Coalition Committee do not make it advisable for [redacted] (WPP) to permit the anti-war demonstration in Washington, D. C. on 11/15/69.

[redacted]

One situation that seems to lend itself to the suggestions in referenced Bureau airtel would be some counter-intelligence action directed against [redacted], who resides at [redacted], Ann Arbor, and who is a manufacturers representative in this area. Since [redacted] appears to be on the [redacted] of the NMC and one of the [redacted] of the Detroit Coalition Committee, Detroit feels that a counterintelligence program directed against him would have a beneficial effect.

- 2 - Bureau (RM) REC-15
- 2 - Washington Field (RM)
- 2 - Detroit

~~Confidential~~

SEP 2 1969

wmn/cfc  
(6)

EX 104



54 SEP 16 1969

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

(Figure 3-8)  
 FBI Memorandum, SAC Detroit to Hoover  
 August 28, 1969  
 Request for COINTELPRO Action Against WPP

Source: Churchill, et. al. The COINTELPRO Papers, 192-93

(fig. con'd.)

DE 100-35108

~~Confidential~~

The specific suggestion is that a letter could be written from the BUF at Washington, D. C. to the White Panther Party (WPP), 1510 Hill Street, Ann Arbor, and also to the "Michigan Daily", University of Michigan student newspaper at Ann Arbor, pleading the BUF cause. The letter which could possibly be initiated by an informant in the BUF in Washington, D. C., or which could be a fraudulent letter could ask the WPP, a white militant group that strongly supports the Black Panther Party (BPP), to help the BUF collect the just and modest sum of \$25,000.00 from the NMC by making a direct overture to [redacted], an NMC leader in Ann Arbor. The letter could state that the BUF realizes that a substantial part of this sum could be easily raised by the NMC in Michigan because of the many professional and academic supporting the anti-war demonstration scheduled for Washington, D. C. The letter could also state that a copy is being directed to the University of Michigan student newspaper to further publicize the very just nature of the BUF request.

Detroit feels that the "Michigan Daily" would be delighted to publish this type of a letter. It is felt that such a letter would be of a disruptive nature if presented to the Detroit Coalition Committee by [redacted] and could develop into a situation where [redacted]

Such a letter would also be a disruptive factor to the amicable relations between the WPP and Black Nationalist supporters and groups in Ann Arbor, inasmuch as WPP would be forced to make a choice between BUF cause and the position of the white liberals in Ann Arbor who have been critical of the war and have to this point supported the WPP. The issue in the letter would be that the BUF knows that the white liberals, who are identified with the NMC, have unlimited sums of money available through their contacts and the sole issue is whether or not they want to give the \$25,000.00 to the BUF.

Comments of WFO are requested. If the Bureau approves of this suggestion, a draft of such a letter will be prepared by Detroit.

~~Confidential~~



(Figure 3-9)  
Group Photo: WPP Without Leaders Sinclair and Plamondon  
[Leni Sinclair is Front Left, Next to Daughter "Sunny"]  
Circa 1970 or 1971

Source: Leni Sinclair Personal Photography Archives



WIRETAPPING AND NATIONAL SECURITY:  
NIXON, THE MITCHELL DOCTRINE, AND THE WHITE PANTHERS  
VOLUME II

A Dissertation

Submitted to the Graduate Faculty of the  
Louisiana State University and  
Agricultural and Mechanical College  
in partial fulfillment of the  
requirements for the degree of  
Doctor of Philosophy

in

The Department of History

by  
Jeff A. Hale  
B. A., University of Southern Maine, 1984  
M. A., Louisiana State University, 1987  
August, 1995

## Chapter Four

### 1970: Year of Convergence

#### I.

The Nixon Administration's willingness to break the law in its effort to silence the anti-war movement rendered entirely reasonable the otherwise preposterous fear that we were on the verge of an out-an-out police state or some terrible kind of civil war. -- Carl Oglesby<sup>1</sup>

Nineteen-seventy was a year of convergence for the Nixon Administration and the White Panther Party over the issue of "inherent Presidential power" to wiretap domestic radicals. By the end of the year the White Panther Party's "CIA Conspiracy Case" had evolved from a relatively insignificant New Left bombing trial into a test case for the Administration's reassertion of the Mitchell Doctrine. On December 14, Attorney General Mitchell issued a memorandum in U.S. District Judge Damon Keith's Detroit courtroom, outlining essentially the same argument as he had presented in the "Chicago Conspiracy Trial" before Judge Hoffman eighteen months earlier. The Nixon Administration specifically selected the White Panther case as most likely to bring Supreme Court agreement with the Mitchell Doctrine.

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<sup>1</sup>Quoted in Schultz, The Chicago Conspiracy Trial, xii.

Nineteen-seventy was marked by heightened social disorder. Near hysteria concerning crime and lawlessness in the streets flourished in response to the actions and rhetoric of a small number of far-left fringe groups, such as the "Weathermen," an SDS splinter organization. Hundreds of bombings took place in cities across America, often targeting symbols of the establishment, such as police stations, banks, and courts. In early May, the wave of campus revolts in response to President Nixon's decision to invade Cambodia brought about the most intense sustained period of violent American protest since the Civil War. The year was also characterized by a peak in the conservative establishment's counter-reaction against the Movement. Bolstered by a President and Vice President who were clearly on the side of "law and order," the far right struck back with previously unheard of ferocity. The National Guard shootings of unarmed student protestors at Kent State University symbolized the level of frustration felt by the conservative majority, as well as their determination not to remain silent any longer.

Nineteen-seventy was a Congressional election year, and partisan politics played an increasingly significant role in the worsening polarization of society. Anti-crime hysteria provided political advantages for President Nixon, as it had during his successful election bid in 1968. He and Vice President Spiro Agnew portrayed the Democratic opposition as "soft on crime." Unwilling to reach out to such disaffected

minorities as youth, blacks, and the poor, Nixon's political strategy throughout the year centered on appealing to the increasingly conservative "silent majority." Nixon knew that a clear majority of American voters favored not conciliation with anti-war protestors and radicals, but cracking down on them. Responding to this call for action, and attempting to keep his 1968 "law and order" campaign promises, Nixon sponsored a barrage of anti-crime bills in Congress, including preventative detention, "no knock" laws, the death penalty for bombers, and "Title VII." This last bill boldly attempted to overturn the Alderman decision, by providing a wide exception to the requirement in Alderman that the government turn over to defendants the surveillance logs of illegal (warrantless) wiretaps. By mid-September, the GOP clearly dominated the crime issue, forcing the Democrats onto the defensive, and preventing them from effectively taking advantage of the issue with which a majority of Americans were most concerned: the worsening economy. Determined to prevent the GOP from outflanking them on the crime issue, Democrats passed most of the Administration's anti-crime package in October, on the eve of the election.

The atmosphere of fear and polarization in American society during 1970 influenced the Nixon Administration's wiretapping policies, both public and secret, in several ways. Bolstered by public opinion polls stating that a clear majority favored the curtailment of protestors'

Constitutional rights, the Administration displayed increasing boldness in its public statements regarding surveillance practices. By early summer, the Justice Department had initiated a public relations campaign aimed at increasing support for heightened surveillance of radicals and "organized crime," and promoting the benefits of long-term investigative surveillance as a tool to prevent future bombings and violence. With public opposition to wiretapping limited to a small minority of liberal organizations and newspapers, Attorney General Mitchell was confident enough to report in mid-July that court-approved wiretaps had increased 100 percent over the previous year. However, he continued to remain all but silent concerning the Administration's claim of legal authority to utilize warrantless "national security" wiretaps against suspected domestic radicals.

The Administration's secret surveillance policies advanced at a much more rapid pace, best symbolized by the establishment of the "Huston Plan," an attempt to centralize and expand the domestic surveillance operations of the entire U.S. intelligence agency network, under the direction of the White House. Including such illegal tactics as break-ins ("black bag jobs"), political kidnapping, and vastly expanded warrantless wiretapping and bugging, the plan demonstrated the Nixon Administration's obsession with acquiring intelligence about New Left radicals, anti-war protestors, and political opponents in general. Since his first days in

office, Nixon's desire for expanded intelligence had been frustrated by a combination of "barriers," including a privacy-minded Supreme Court, a powerful bloc of liberal Congressman and Senators, and a press corps dedicated to exposing governmental surveillance of citizens.

In 1970, Nixon encountered an additional, albeit unlikely, obstacle in the person of J. Edgar Hoover. Nearing retirement and concerned about his reputation, Hoover shocked the intelligence community (and Nixon) by vetoing the Huston Plan in late July. The Administration lost no time mending fences with the powerful Director, however, and by the fall he agreed to vastly expand warrantless wiretapping of student radicals and others.<sup>2</sup> This expansion of warrantless wiretaps signaled a bold shift in FBI surveillance practices, and demonstrated both the law enforcement community's concern with the high level of social disorder in America, as well as Nixon's willingness to gamble that this surveillance would ultimately be deemed legal, via the Mitchell Doctrine.

The Administration's reinstatement of the Mitchell Doctrine took place gradually. On February 20, 1970, at the conclusion of the Chicago Conspiracy Trial, Judge Julius Hoffman ruled in favor of the doctrine -- the first such decision from a U.S. District Court Judge. Although the ruling was precedent-setting, the Administration made no

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<sup>2</sup>One of the domestic radical groups eventually included in this expanded web of surveillance was the White Panthers.

public statements regarding it. The media's response to the ruling was also minimal. Only after a series of incidents during the fall and early winter did the Administration make the decision to support publicly the reintroduction of Mitchell's "inherent right" memorandum.

During 1970 the White Panthers became an internationally-known radical organization, with leaders Sinclair and Plamondon regularly appearing in both the underground and "straight" press. The Party also became known for the two high-profile legal cases involving its leaders, Sinclair's marijuana case and the pending "CIA Conspiracy" trial against Sinclair, Plamondon, and Forrest. The "Free John Sinclair movement" gained national recognition, with a number of celebrities pledging their support. In addition, the CIA bombing case became something of a cause celebre in the Movement, particularly after Chicago Conspiracy Trial attorneys William Kunstler and Leonard Weinglass agreed to represent the defendants.

The White Panther myth that had been created largely for media effect during the fall of 1968 -- that the group possessed genuine revolutionary potential -- came closer to realization during the year, as Pun Plamondon remained "underground," eluding Hoover's FBI. On May 5 he earned the distinction of being among the first so-called "white revolutionaries" to make the "Ten Most Wanted" list. Other White Panthers also displayed a heightened radicalism,

engaging in armed posturing and continuing virulently to attack the forces of authority in underground newspapers. Throughout the winter and spring, the WPP published Plamondon's "messages from the belly of the beast," which boasted of the romantic life of an American underground revolutionary, and occasionally advocated violence against the State. By late summer, a regular feature of WPP "self-defense" training was target practice with rifles and handguns. In this manner, the White Panthers' evolution mirrored the overall shift toward increasing militancy which characterized the radical fringe of the New Left and counterculture movements during 1970.

With the increasing polarization of American society and the hardening of positions on both extremes of the political spectrum, the WPP myth brought the group a level of acceptance among radical peers in the Movement that had been largely absent in previous years. In addition, the organization's ability to survive with its internal structure intact, at a time when SDS and many other national groups were splintering through factional infighting, gave it a degree of radical acceptance. WPP chapters continued to spread across the U.S.A. and even to Europe. Throughout the spring and summer, YIPPIE leaders Hoffman and Rubin worked closely with WPP members in an unsuccessful attempt to merge the two organizations. An all-female White Panther-YIP delegation, which included Pun's wife Genie Plamondon,

received media coverage in May, when it visited Hanoi and Moscow on behalf of America's new radical Movement. WPP leaders also talked with the Weathermen, particularly before they went "underground" during the late winter.

Local forces of authority responded in kind to the White Panthers' heightened militancy and national prominence. By this time, the Detroit and Ann Arbor offices of the FBI had already demonstrated their desire to inflict as much damage as possible on the organization by such tactics as COINTELPRO actions; and by convincing former Detroit "Mad Bomber" David Valler to implicate John Sinclair in the September 29, 1968, bombing of the Ann Arbor CIA office. Valler's allegations effectively kept Sinclair in prison by convincing Michigan's legal authorities that he was a danger to society and should not be granted bond. In May, the FBI's Detroit field office received a new "Special Agent in Charge" -- Neil J. Welch, a career agent with a reputation for getting results. Although Hoover assigned Welch to Detroit primarily for the purpose of locating the fugitive Weathermen radicals, the new SAC soon set his sights on the White Panthers as well. Within six weeks of his arrival, Welch requested (and was denied) permission to install a warrantless wiretap on the WPP's telephone at 1520 Hill Street in Ann Arbor.

On July 23, the FBI captured Plamondon on Michigan's Upper Peninsula, bringing to an end his nine months underground. Within two months, the FBI elevated the White

Panthers to the status of a dangerous second-tier "revolutionary anarchist" organization. Materials found in the vehicle in which Plamondon was travelling at the time of his arrest indicated to the FBI the probable existence of an international underground support network for fugitives. With the FBI under increased pressure from the Nixon Administration to locate and bring to justice members of the elusive "Weather Underground," the White Panthers appeared to represent an excellent potential lead. On August 10, Welch again requested permission for the installation of a warrantless wiretap on the WPP's headquarters, and this time Hoover consented. Installed on September 9, the White Panther wiretap remained in operation through January 26, 1971, one day after Judge Keith issued his famous rebuttal of the Mitchell Doctrine.<sup>3</sup>

During September and October the White Panthers became a prime target for the nation's forces of authority. Timing was once again critical: the White Panthers' radicalism peaked at precisely the time when Hoover's FBI was searching hardest for evidence of the violent intentions of the New Left and counterculture movements. The FBI prepared a detailed 107-page report concerning the capture of fugitive

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<sup>3</sup>It is important to note that the Government deliberately hid the existence of this wiretap throughout the Keith case, in defiance of a U.S. District Judge's order. In fact, the FBI did not disclose its existence until 1978, some six years after the Supreme Court decision in the Keith case, and five years into Sinclair, Plamondon, and Forrest's counter-suit against the Government.

Plamondon, promptly circulated to other local, state, and federal law enforcement agencies. On September 22, 1970, the White Panthers were discussed in a White House meeting between Nixon, Hoover, Mitchell, and a number of prominent GOP Congressmen. Three days later, the WPP was the focus of hearings by the Senate Judiciary Committee's Subcommittee on Internal Security, as part of its ongoing investigation of "the extent of subversion in the New Left." And on October 12, in a speech delivered to the editors and writers of United Press International, Assistant FBI Director William Sullivan singled out the White Panthers as one of a handful of the nation's most dangerous radical organizations. The White Panthers had arrived, at least according to the FBI.

Despite the FBI's growing interest in the White Panthers during the fall of 1970, there is little evidence that the organization was a primary concern for the Nixon Administration and/or the Justice Department until the late fall, as the government's "CIA Conspiracy Case" against the WPP entered the final pre-trial phase in Detroit. On October 5, White Panther defense attorney William Kunstler entered a motion for the government to disclose all electronic surveillance involving the defendants. Shortly thereafter, Judge Keith granted Kunstler's motion. Mitchell responded on December 14, formally reintroducing the Mitchell Doctrine.

During the weeks before Mitchell's response, the Justice Department made several key decisions. First, it decided to

admit that several of Plamondon's conversations had inadvertently been overheard in their warrantless "national security" wiretaps of the California Black Panther Party during the spring of 1969. It claimed that the wiretaps were investigative in nature and aimed at protecting the nation from "internal subversion." Second, Mitchell made the conscious decision to conceal the existence of the warrantless White Panther wiretaps that had been in operation since September 9, although Mitchell himself had originally authorized the WPP surveillance on August 19, and had regularly approved of its continuance at thirty day intervals ever since.

The Nixon Administration chose to fight the legal showdown over the Mitchell Doctrine in Judge Keith's Detroit courtroom sometime between October and mid-December of 1970. The wording of Mitchell's memorandum was purposefully blunt and belligerent, shocking not only Keith, but also Detroit U.S. Attorney Ralph Guy, who had apparently not been privy to the government's last minute maneuvering. Knowing Keith's race [black] and overall liberal record, the Justice Department gambled that he would reject the Mitchell Doctrine, providing the shortest possible route to the Federal Appeals Court in Cincinnati, and possibly to the Supreme Court, where a final determination on the legality of the Mitchell Doctrine would ultimately have to be made.

Why did the Nixon Administration choose to re-initiate the Mitchell Doctrine? Previously secret FBI and Justice Department documents make clear that while the Administration was publicly silent on the Mitchell Doctrine, it secretly instituted internal wiretapping policies which permitted, and in some cases encouraged, warrantless wiretaps on domestic radical groups -- though such wiretaps could not be admitted in court. Initially limited to a few groups, warrantless wiretapping eventually was expanded to include a large number of New Left and anti-war groups during the fall of 1970, as the urgency with which the Nixon Administration sought increased surveillance of the anti-war movement increased. However, the Alderman and Giordano decisions remained a formidable barrier for the Administration, preventing Nixon from acquiring the Constitutional power to wiretap domestic radicals without warrant and to utilize the fruits of this surveillance selectively in criminal proceedings. The two decisions dictated that, in any case involving warrantless "national security" wiretapping, the government must disclose to defendant(s) the transcripts of such surveillance, rather than relying upon a judge's in camera determination of the surveillance's relevance to the case. They also narrowed the definition of "national security" wiretapping to include only "foreign intelligence" surveillance. The Administration's attempts to circumvent the Supreme Court's wiretapping decisions via Title VII legislation were unsuccessful. By

late fall, there was a substantial difference between the Administration's publicly stated wiretapping policies and its actual practice.

However, the anti-crime hysteria in American society created an excellent atmosphere in which to debate wiretapping and internal security. Congress approved much of Nixon's anti-crime package, including several provisions of questionable constitutionality. Evidence that the Justice Department recognized, and was fully prepared to take advantage of, the nation's shift toward the security end of the rights-security spectrum is contained in a Hoover-Mitchell memorandum of August 18, 1970, in which the former boldly stated that he anticipated being able to utilize evidence obtained from warrantless wiretaps in court. By late fall, the Administration clearly was searching for an opportunity to re-institute the Mitchell Doctrine.

The decision to use the White Panther CIA conspiracy case had more to do with the timing of the trial than with any alleged "national security" risk the group posed. The WPP case offered the Administration what it most desired: speed. Because the defense's motion for disclosure of electronic surveillance was entered during the pre-trial phase, a mandamus appeal of Keith's order for disclosure would immediately send the case to the appeals level. Rather than waiting for the conclusion of the trial, which might last months, the government would now be able to get an

immediate determination on the constitutionality of the Mitchell Doctrine.

Other factors may have been involved as well. Soon after the GOP's lackluster showing in the November elections, Nixon formulated much of his campaign strategy for the upcoming 1972 Presidential race. A critical component of his political strategy was the gradual de-escalation of U.S. troop levels in Vietnam, a process known as "Vietnamization." This strategy required time, which meant a prolongation of the war, and therefore a continuation of the anti-war movement. Thus, Nixon's desire to silence New Left radicals was stronger than ever. The Mitchell Doctrine, if approved by the Supreme Court, would have offered a nearly perfect weapon to use against Nixon's opponents. The measure would have granted the Executive Branch virtually unlimited surveillance power, which the Justice Department would certainly have utilized against the full spectrum of New Left organizations. Equally important, the doctrine would have empowered the FBI to listen in on suspected radicals' telephones for as long as it liked, without justifying each wiretap before federal judges.

The law enforcement feature of the Mitchell Doctrine most desired by the Administration was the ability to selectively utilize information from warrantless wiretaps in court. By the winter of 1970-1971, a large number of cases involving "national security" wiretaps were either already in

the courts, or pending. Supreme Court acceptance of the Mitchell Doctrine would have significantly boosted the government's chances of obtaining convictions -- and the net effect would surely have been a chilling of dissent.

The public's growing concern about the threat of individual privacy in the approaching age of computerization may have also motivated the Administration to act hastily. By late spring, revelations concerning the Army's widespread practice of spying on college campuses and its storage of intelligence dossiers on tens of thousands of Americans made headlines across the country. By the end of the year, Senator Sam Ervin's Subcommittee on Constitutional Rights focused on the citizen's right of privacy versus the government's right to collect, analyze, store, and distribute information concerning citizens, in the interest of "national security." Additional revelations concerning the degree to which law enforcement and other agencies were collecting and sharing information on Americans' personal lives appeared in the national media on an increasing basis. There can be little doubt that increased public concern with privacy, combined with revelations of wrongdoing by law enforcement officials, did not portend well for the Administration's overall anti-crime offensive -- or for the Mitchell Doctrine. Nixon, Mitchell, and Hoover may have recognized that the crisis atmosphere of September and October, which had allowed

them to push through Congress nearly their entire anti-crime package, would not be long lasting.

## II.

It is the executive, not the judiciary that possesses the background and expertise to make a determination if national security is involved...This court does not believe it can question the decision of the executive department on what does and what does not constitute a national threat. -- U.S. District Judge Julius J. Hoffman<sup>4</sup>

During the early months of 1970, the Nixon Administration's public position on wiretapping remained low-key, as it had been since the introduction of the Mitchell Doctrine in Judge Hoffman's Chicago courtroom the previous June. On February 20, the Administration scored a major victory when Hoffman sentenced five of the original eight "Chicago Conspiracy Trial" defendants to five years in prison, for conspiracy to cross state lines to incite a riot. On the same day, Judge Hoffman shocked the defense lawyers by issuing a brief oral opinion, in which he ruled that the government's wiretaps were, in his judgement, entirely lawful. He then ordered the defense to proceed with a taint hearing concerning the small number of wiretap logs which the government had released during the course of the trial. Completely unprepared for the Judge's surprise order, the

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<sup>4</sup>Quoted in New York Times, February 21, 1970, 50.

defense requested two days to prepare. Hoffman promptly denied the request and sealed all wiretap logs for submission to the U.S. Court of Appeals.<sup>5</sup> Hoffman's oral opinion was wonderful news for Nixon: a federal judge had ruled that the Executive Branch possesses an "inherent Constitutional power" to engage in unfettered surveillance of U.S. citizens, without first getting judicial warrants. The ruling must have been particularly pleasing for J. Edgar Hoover, who had consistently sought an Executive exception to the limitations of the Fourth Amendment regarding "national security" wiretapping since the early days of the Cold War -- and who was largely responsible for the vague language of section 2511(3) of Title III of the Omnibus Crime Act of 1968, which provided the Nixon Administration with one of the primary legal channels by which it sought the Mitchell Doctrine.<sup>6</sup>

Despite the importance of the ruling, neither the Justice Department nor the White House sought publicity concerning Hoffman's decision. Several factors mitigated against the Administration's seizing the initiative. First,

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<sup>5</sup>Kinoy, Schwartz, and Peterson, Conspiracy on Appeal, 302.

<sup>6</sup>Press coverage of the Hoffman ruling was negligible, particularly in comparison with the uproar that had occurred over the government's introduction of Mitchell's memo the previous June. Tom Wicker's editorial, appearing on February 22, termed the ruling "of far greater consequence" than the guilty verdicts for the five defendants. However, neither he nor any other New York Times reporter followed-up on the issue for months. See New York Times, February 22, 1970, section iv, 13.

even with a federal judge on record in support of the doctrine, the Administration still faced the enormous legal challenges posed by the Supreme Court's Alderman and Giordano decisions.<sup>7</sup> Until these decisions could be overturned, the Justice Department would not be able to take full advantage of the Hoffman ruling. Second, the Administration was still facing a highly publicized ACLU law-suit, which alleged that the government's assertion of "inherent right" violated the First, Fourth, and Ninth Amendments to the Constitution, as well as the Federal Communications Act of 1934 and the Omnibus Act.<sup>8</sup> Following Hoffman's ruling, attorneys for the plaintiffs in the ACLU suit filed a request with the U.S. District Court of the District of Columbia for an immediate hearing on the legality of the wiretaps; they hoped to convince the court to grant this separate hearing before the Court of Appeals considered their Chicago Conspiracy case appeals.<sup>9</sup> Therefore, despite Hoffman's ruling in its favor, the Nixon Administration undoubtedly recognized that a long

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<sup>7</sup>On two occasions during the Chicago trial, Judge Hoffman had recognized the Executive's right to exceptions from the Alderman/Giordano rulings: first, by preventing the defense from having access to the logs, and second, by agreeing to the Mitchell Doctrine. See Eliff, Crime, Dissent and the Attorney General, 211.

<sup>8</sup>David Dellinger, et. al. v. John N. Mitchell, et. al., Civil Action No. 1768-69, U.S. District Court for the District of Columbia, June 26, 1969.

<sup>9</sup>The court refused their motion, however, stating that the legality of the government's wiretapping dictum was one of the issues which the Court of Appeals would decide in the original Chicago Conspiracy case.

legal battle over the Mitchell Doctrine -- on at least two fronts -- was pending.

An additional factor influencing the Administration's reticence regarding electronic surveillance policy was its ongoing struggle with Congress over anti-crime legislation. By the spring of 1970, the Nixon Administration had been in office for a full year, and not a single piece of its promised "law and order" legislation had been passed by Congress, despite the continuing increase in social disorder. The legislation proposed by the Administration contained measures of questionable legality, such as: (1) the right for police to detain suspects, without charging them, prior to conducting a hearing; (2) a so-called "no knock" law, which would allow police to enter the home of a suspected criminal without prior notice; and (3) a sweeping wiretapping law for the District of Columbia, which would allow the use of court-approved electronic surveillance for "virtually the entire range of offenses contained in the D.C. criminal code."<sup>10</sup> Additional measures proposed in early 1970 included a bill granting the Justice Department the right to appeal U.S. District Judges' decisions on motions that terminate cases in favor of the defendants; another which would limit the immunity of Federal Grand Jury witnesses, and one that would grant judges the power to tack-on additional thirty-year sentences to "special offenders." There was also a proposal

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<sup>10</sup>Quoted in the Washington Post, December 6, 1969, A-14.

to give the Secret Service expanded crowd control powers by making it a federal crime to "use loud or abusive language or to disrupt proceedings" near the President's residences. These measures were so offensive that on March 10 conservative Democratic Senator John L. McClellan, Chairman of the Senate Judiciary Committee's Subcommittee on Criminal Laws and Procedures, urged Assistant Attorney General Will R. Wilson to re-think the Administration's anti-crime strategy. Though termed "one of the Senate's most aggressive crimebusters," McClellan warned Wilson that even if the more draconian measures passed, the Supreme Court would very likely strike them down, "and all of our efforts....[would be] in vain."<sup>11</sup>

The Nixon Administration's public silence on the issue of "national security" wiretapping during the spring of 1970 might also have been influenced by its bold attempt to reverse the Alderman decision, via Title VII of the Organized Crime Control Act. Title VII was the Justice Department's most important legislative "law and order" initiative concerning electronic surveillance. It required that, in court cases involving warrantless electronic surveillance, a judge must first conduct an in camera review of the logs, prior to disclosing any surveillance to the defense, in order to determine if information contained therein is relevant to

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<sup>11</sup>Quoted in New York Times, March 11, 1970, 19. See also Eliff, Crime, Dissent and the Attorney General, 73-76.

the case, and thus if disclosure is "in the interest of justice'." The measure also declared that if the government's wiretaps were more than five years old, the evidence could not be challenged by the defense.<sup>12</sup>

According to John Eliff, Title VII "placed the Executive Branch firmly on the side of an assertion of Congressional power to overrule constitutional decisions by simple legislation." The most telling aspect of the Mitchell Justice Department's sponsorship of the initiative was the fact that the Alderman decision had been accepted by a clear majority of the Supreme Court (5-3), and that two of the three dissenters, Justices Fortas and Harlan, did not challenge the majority's basic ruling, but only urged an exception for "sensitive" foreign intelligence information. In essence, Title VII represented Mitchell's clear challenge to the Supreme Court's role as the final authority on constitutional standards for criminal justice. The initiative died in the House Judiciary Committee, due to constitutional objections similar to those raised by Senator McClellan. However, the fact that the Justice Department fought hard for its passage demonstrated the position which

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<sup>12</sup>Eliff, Crime, Dissent and the Attorney General, 77. Only the latter provision survived in the final bill, which passed both houses of Congress in October of 1970.

warrantless wiretapping had within the Administration's larger anti-crime offensive.<sup>13</sup>

New violence across America in the spring of 1970 provided the Nixon Administration with an excellent opportunity to begin publicly supporting the expanded use of wiretaps against "organized crime" and "terrorists." By mid-April, the nation was shocked by a series of well-publicized anti-establishment bombings, which occurred across the country.<sup>14</sup> On March 6, several members of the Weathermen blew themselves up in a Greenwich Village townhouse, allegedly while constructing anti-personnel bombs for use against various establishment targets. Five days later, bombs exploded at the Manhattan corporate offices of IBM, Mobile Oil, and GTE. On April 2 the Justice Department handed down highly-publicized indictments against twelve

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<sup>13</sup>Title VII was only one of a series of Mitchell anti-crime initiatives which either were directly in opposition to Supreme Court rulings, or else exploited "gray areas" in the law for political advantage. For example, in August of 1969, Mitchell ordered all federal prosecutors to ignore the Miranda decision by allowing voluntary confessions to be admitted as evidence, even when defendants had not been informed of their rights. Mitchell later justified the initiative as an attempt aimed not at putting more criminals in jail, but rather to "demonstrate our support for law enforcement." In addition, during the spring of 1969 the Justice Department gave serious consideration to lobbying Congress for Constitutional amendments to reverse the Miranda and Wade decisions. See Ibid., 73.

<sup>14</sup>Substantial documentation of the level of fear and anger which characterized American society during 1970 can be found in the New York Time Cumulative Index (for 1970), under the heading "Bombs and Bomb Plots" (pages 220-225). Approximately fourteen and a half eight-inch columns are dedicated to this topic.

"underground" Weathermen fugitives in Chicago, charging them with conspiracy and violation of the Federal Anti-riot Act, for their violent assault on people and property in the streets of Chicago the previous fall (the so-called "Days of Rage").

"Weathermen hysteria" also provided the pretext for a thinly-veiled pro-wiretapping public relations campaign, initiated by "anonymous" White House aides on April 11, in a New York Times interview. Referring to the March 6 Weatherman bombing, one aide asserted that if Justice Department officials had acquired advance knowledge of the bomb-making operation (presumably via warrantless wiretaps), they might have been able to arrest the persons involved before they blew themselves up. Another aide stressed the need for "broader public awareness" of the potential benefits of expanded electronic (and other) surveillance techniques. This New York Times article contained several important points. First, the Administration was moving toward a public position that long-term "investigative" surveillance should be legal, on the basis that it would have a preventative role in stopping crime before it happens. One aide asserted that the President was "less interested in prosecuting individuals than he was in gathering information to 'prevent the perpetuation of an act of violence.'"<sup>15</sup> Prior to the

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<sup>15</sup>New York Times, April 12, 1970, 1, 69. Commenting on this article, Donner states that "The scene was set for basic  
(continued...)"

sixties, this position was rarely expressed outside of intelligence circles.<sup>16</sup> And yet by 1970, the violence and polarization characterizing American society convinced even members of the Judiciary of the relevancy of "investigative" surveillance. A case in point was Anderson v. Sills, a June, 1970, ruling by the New Jersey Supreme Court, which held that because police have both a preventive as well as a prosecutorial role, intelligence collection need not be limited only to information which constitutes the basis of the criminal charge itself.<sup>17</sup> Another of the article's important implications concerned the types of surveillance that the Administration was seeking. Discussing the special challenges posed by modern radical organizations, such as the fact that they often exist in small and very decentralized

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<sup>15</sup>(...continued)

alterations in intelligence structure, coverage, and operations under White House control." See Frank J. Donner, The Age of Surveillance, 264. The Administration's initiative did not go unanswered by the media: an editorial in the New York Times warned of the historic relationship between "political terrorism and political repression." See New York Times, April 11, 1970, 42.

<sup>16</sup>An excellent description of the intelligence community's traditional belief in an "intelligence exception to the Fourth Amendment" is provided by Richard E. Morgan: "According to this theory, the Fourth Amendment was interpreted as a rule of criminal procedure that prohibited searching for and seizing potential evidence in the course of criminal investigations. When no prosecutorial purpose -- no prospective use of materials as evidence in court -- was involved, no Fourth Amendment violation took place." See Richard E. Morgan, Domestic Intelligence, 92.

<sup>17</sup>106 N.J. Super. 545 (Ch. Div., 1969); Supreme Court of New Jersey, A-79, September Term, 1969 (June 1, 1970).

groups, the aides complained about how the FBI's outmoded techniques, which had been effective against "Communists" over the previous three decades, were now proving woefully inadequate. Their message was clear: electronic surveillance should be in the forefront of law enforcement. That spring Justice Department officials stated that wiretapping was proving to be one of the most effective techniques ever used against "organized crime."<sup>18</sup>

By proposing these public initiatives, the Administration was undoubtedly aware of the changing tide of public opinion regarding surveillance. Public opinion polls consistently showed crime and lawlessness to be among the top issues on the voters' agenda. In mid-April, CBS News released the results of a random telephone survey of Americans, concerning the issue of constitutional rights for protestors. Some 76 percent of respondents favored restricting the First Amendment rights of those who "organize protests against the Government," even when there was "no clear danger of violence." A majority of respondents also supported preventative detention, and favored restrictions on freedom of the press for anti-war protestors.<sup>19</sup> Yet overall, the Administration's public position on wiretapping

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<sup>18</sup>Washington Star, April 5, 1970; Human Events, May 16, 1970, 376. Both of these articles describe Assistant Attorney Will Wilson's assessment of wiretapping as a law enforcement tool.

<sup>19</sup>New York Times, April 16, 1970, 31.

remained cautious during the spring and summer. On May 6 a Congressional report revealed that policemen in the two states of New York and New Jersey had used nearly six times as many wiretaps as had the Mitchell Justice Department during 1969.<sup>20</sup>

From its first days in office, the Nixon Administration had encountered a number of "barriers" that prevented it from fully implementing the full scope of electronic and other surveillance it considered necessary to combat crime. Federal law regarding court-approved wiretapping, Title III, did not allow for the long-term "investigative" surveillance desired by the Justice Department and the intelligence community. In addition, the Administration was frustrated in its attempts to circumvent the Supreme Court's Alderman and Giordano decisions. For example, Congress had refused to pass Title VII of the Organized Crime Act, which effectively would have overturned Alderman. In addition, U.S. v. Dellinger, the Administration's attempt to secure a "national security" exemption from the warrant requirements of Title III for both domestic and foreign targets (the Mitchell Doctrine) remained on appeal in the courts. Despite its many public statements applauding the effectiveness of court-approved wiretapping, the Justice Department was clearly unwilling to go along.

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<sup>20</sup>New York Times, May 7, 1970, 48. Fred Graham's article did point out that the government's admitted totals did not include warrantless "national security" surveillance.

On April 30, President Nixon announced that U.S. combat troops in Vietnam had entered Cambodia, further escalating the Indochina War. This pronouncement set off violent disturbances at hundreds of college campuses across the nation, and effectively brought the anti-war movement out of the state of dormancy it had been in since November of 1969. Throughout the month of May, the nation remained in shock, as the number of anti-war protestors reached the millions.<sup>21</sup> Unlike the protests of previous years, which rarely had featured significant levels of violence, the post-Cambodia uprisings were unique in their ferocity. The anger came from both sides of the barricades. At Ohio's Kent State University, four consecutive days of near constant confrontations between rock-throwing students and tear-gas wielding police climaxed on May 4, when the National Guard fired into a crowd of unarmed students, killing four of them. For many in the Movement, the incident at Kent State meant that the evolution from "protest to resistance to revolution," which had characterized the sixties, now had come full cycle.<sup>22</sup>

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<sup>21</sup>Todd Gitlin estimates that "between 50 and 60 percent" of American college students actively took part in anti-war demonstrations during May, and that "at least a million students probably demonstrated for the first times in their lives." See Todd Gitlin, The Sixties, 410.

<sup>22</sup>The contemporary reader who is skeptical about the frequency in which the word "revolution" was used by educated individuals during 1970 would be well served to read a feature story which appeared in The New York Times Magazine  
(continued...)

The prevailing atmosphere in the White House was best described by Henry Kissinger: "The very fabric of government was falling apart. The Executive Branch was shell-shocked."<sup>23</sup> Nearly paralyzed as a result of the social disorder erupting across America, Nixon pursued several public relations initiatives, including establishing yet another commission to study the attitudes of youth (the so-called "Scranton Commission"), inviting representatives of academia to the White House, and even walking out to the Lincoln Memorial to meet personally with anti-war protestors. None of these initiatives had any discernable impact.

While presenting a public persona favoring conciliation, Nixon remained steadfast in its determination to punish and discredit the leaders of the anti-war movement.<sup>24</sup> The tremendous surge of opposition in May convinced the Administration that the various legislative and judicial "barriers" denying the Justice Department full access to wiretapping and other surveillance resources would have to be circumvented, in the interest of protecting the nation from

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<sup>22</sup>(...continued)

two weeks after the Cambodia invasion: "Are We in the Middle of the 'Second American Revolution'?" See New York Times, May 17, 1970, section vi, 26-27, 112-14.

<sup>23</sup>Quoted in Gitlin, The Sixties, 410.

<sup>24</sup>A majority of Americans were clearly in agreement with Nixon. A Gallop Poll, released one month after the Kent State shootings, revealed that an astounding 82 percent of those questioned opposed student strikes as a protest method. New York Times, June 4, 1970, 36.

"internal subversion." The end result of this decision was the creation of the so-called "Huston Plan." Tom Charles Huston was originally hired by the Nixon Administration in early 1969 to assist speech writer Patrick Buchanan. A former President of the Young Americans for Freedom, an ultra-conservative college student association, Huston was hired mainly for his youthful insight into the hopes and desires of "patriotic" young Americans -- that is, the ones not protesting. Soon thereafter, he was assigned the primary responsibility of coordinating a White House effort to bolster the intelligence community's surveillance of domestic radicals and anti-war groups. In April of 1969, John Ehrlichman told Huston to locate "foreign" linkages with American anti-war groups. Like his predecessor, Nixon was convinced that the Communists were somehow behind the escalating domestic unrest; it was Huston's job to gather the evidence Nixon needed to expose publicly this conspiracy. By the time of the post-Cambodia uprisings, Huston had already entered into a dialogue with high-ranking representatives of the FBI, CIA, NSA, and DIA. He soon discovered their overall unhappiness with J. Edgar Hoover, because of the Director's restrictions on break-ins, the use of younger informants, and other questionable tactics. The intelligence agency bureaucrats took advantage of this new White House line of communication to complain about Hoover's "obsolete priorities

and methods." Huston was shocked by the lack of cooperation between the FBI and the rest of the intelligence community.

Hoover's unwillingness to engage in the types of "aggressive intelligence" tactics which had characterized his earlier campaigns against the Communists was rooted in the revelations of FBI wrongdoing that had surfaced during the late sixties. Nearing the government's mandatory retirement age, Hoover had undergone a considerable amount of public humiliation and embarrassment concerning the FBI's intelligence-gathering methods. As a result, he banned all FBI agents from engaging in the more objectional and illegal methods. He also curtailed the scope of warrantless "national security" wiretaps, and dictated that FBI informers must be at least twenty-one years of age. These restrictions remained in place after Nixon's election; as a result, they served as yet another "barrier" to his desired crack-down on domestic radicals.<sup>25</sup>

Huston was assisted in his role of coordinating intelligence activities by William Sullivan, the Director of the FBI's Domestic Intelligence Division, and the mastermind of COINTELPRO. During Sullivan's long career with the FBI, he had always remained in the shadow of the omnipotent

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<sup>25</sup>Theoharis, Spying on Americans, 13-21. Theoharis' 1978 study of the Huston Plan remains unequalled. He was a key staff member on the famous "Church Committee," the only Congressional probe in U.S. history to acquire significant numbers of super-secret documents from the entire spectrum of the nation's intelligence community.

Director, a situation which he increasingly came to dislike during the late sixties and early seventies. He was angered by Hoover's continuing obsession with the Communist Party, an organization that, Sullivan believed, had been all but wiped out during the late forties. The "number-two man" in the FBI, Sullivan was also critical of Hoover's cautionary restrictions on Bureau activities. Sullivan believed the threat posed by New Left and Weathermen-type groups more than justified a significant expansion of surveillance and harassment techniques. Like Huston, Sullivan also recognized the potential benefits to be gained by centralizing the collection and evaluation of all domestic intelligence gathering under White House control. As the weeks passed, Sullivan entered into a close relationship with the Nixon Administration, via Huston. A large majority of Administration officials, including the President himself, were soon in complete agreement that the aging Director's cautiousness could not have come at a worse time.<sup>26</sup>

On June 5, amid the post-Cambodia crisis atmosphere, an historic meeting took place at the White House, attended by the heads of the intelligence agencies, as well as a number of Administration officials, including Huston, Haldeman, and Nixon. Reading from a "talking paper" drafted by Huston and Sullivan, Nixon opened the meeting by stressing the "magnitude of the internal security problem" facing the

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<sup>26</sup>Donner, The Age of Surveillance, 262-64.

United States. He emphasized the pressing need for greater knowledge concerning the possible foreign influence on organized domestic dissent, and then, as Haldeman later recalled, he "ordered them to set up a cooperative system, with Tom Huston."<sup>27</sup> Thus, Nixon authorized the creation of the "Inter-Agency Committee on Intelligence (Ad Hoc)," comprised of the heads of the intelligence agencies. The committee was chaired by Hoover, while its day-to-day operations were directed by Huston.

The first task assigned to the "ICI" was to prepare a draft document of recommendations concerning how the agencies, working together, might boost the efficiency and coverage of domestic surveillance of New Left radicals and anti-war groups. In the weeks that followed, most of the work was done by Huston and Sullivan. The recommendations of the ICI were delivered to Nixon on June 25. They included boosting the number of warrantless wiretaps and microphone surveillances, broadening the NSA's ability to intercept international communications made by American citizens, relaxing restrictions on so-called "mail covers" (FBI agents opening a target's mail); modifying Hoover's ban on break-ins, lifting the minimum age limitations for FBI informants, and establishing a White House controlled interagency intelligence coordinating unit. Although Nixon formally consented to the Huston Plan in mid-July, he refused to sign

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<sup>27</sup>Haldeman, The Haldeman Diaries, 172.

the document -- in order to absolve himself of any possible culpability.

Hoover's sabotaging of the Huston Plan in late July can be summarized as follows: the Director's unwillingness to shoulder the responsibility for initiating the sweeping illegal actions led Nixon to abandon a plan that he himself had authorized. However, Nixon's desire for increased surveillance did not end with the Huston Plan. Nor did the breach between Hoover and the Administration last very long. By the end of July, the Director personally responded to an Administration request for the FBI's surveillance logs of foreign embassies operating in the U.S.<sup>28</sup>

The high level of social disorder continued into the summer and fall of 1970, pushing the American electorate farther and farther to the right. A "conservative backlash" against the reforms and excesses of the sixties continued to grow, characterized by "hardhat" vigilante actions against anti-war protestors, a right-wing sponsored "Honor America Day" on July 4, and a series of anti-protestor/student speeches given by Vice President Agnew. Polls showed that Americans supported Agnew's unique brand of "positive polarization" by a five to three margin.<sup>29</sup>

Recovering from the post-Cambodia domestic crisis, Nixon fought back against his detractors on several fronts. First,

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<sup>28</sup>Theoharis, Spying on Americans, 21-34.

<sup>29</sup>New York Times, June 21, 1970, 39.

he initiated a campaign to attack the Democrats in Congress for their refusal to pass his "law and order" package. Assisting him in this offensive was none other than Hoover. At a meeting with the Director on June 2, Nixon pointed out that a recent poll had indicated that crime, not the Cambodian crisis, was uppermost on the minds of most Americans. Complaining about congressional foot-dragging on his anti-crime bills, Nixon requested that the Director supply Vice President Agnew with intelligence information concerning the violent intentions of the New Left. Hoover agreed to help, adding that in his opinion, the Vice President "should take a particularly strong position against Congress on inaction in this field."<sup>30</sup> Nine days later, Nixon denounced House Democrats for delaying his thirteen anti-crime initiatives; he also issued a stern warning that the public might "retaliate at the polls" during the fall elections, if immediate action was not taken on the bills. Claiming that "crime, respect for law, [and] dealing with crime" were issues that "are above partisan politics," Nixon urged Congress to enact the bills quickly, so the Justice Department would "have the tools to do the job."<sup>31</sup>

Anxious to crack down on crime, and frustrated by the legislative and other "barriers" preventing it from utilizing all of the resources at its disposal, the Administration

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<sup>30</sup>Quoted in Theoharis and Cox, The Boss, 411.

<sup>31</sup>Quoted in New York Times, June 12, 1970, 23.

decided to escalate its secret wiretapping operations, by mid-summer. A new boldness soon characterized the FBI's secret internal policies concerning "national security" surveillance. In addition, the Administration convinced Hoover to institute unilaterally one of the central components of the original Huston Plan: a vast expansion of warrantless wiretaps against New Left, counterculture, Black Power, and anti-war groups. The FBI's expanded coverage would now include individuals and groups that had not previously met the requirements or criteria of the "Security Index." Hoover boldly justified the institution of warrantless surveillance against tens of thousands of Americans with an argument that had always been popular in intelligence circles: in order to discover whether these individuals and/or groups have a "propensity for violence," a wide net would have to be cast.<sup>32</sup>

Additional evidence of the FBI's increasing audacity concerning its surveillance practices is found in an August 18, 1970, memorandum from Hoover to Mitchell, in which the former requests the installation of a warrantless wiretap on an organization suspected of providing support for the Weather Underground -- the White Panthers. The memo states: "It can be expected that....[targeted] individuals....may

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<sup>32</sup>Donner, The Age of Surveillance, 267-68; Theoharis, Spying on Americans, 36. Donner feels long-term "investigative" surveillance has self-reinforcing characteristics.

become subjects of either local or Federal criminal violations." Hoover then asserts:

It is also anticipated, based on the above information, that results of a telephone surveillance at this address will be introduced as evidence in court or that leads to evidence may be obtained; therefore, this request is being made not only for the purpose of obtaining intelligence-type information, but also on the basis that evidence will be obtained that will be used in court.<sup>33</sup>

Hoover's statement demonstrated that a dramatic shift had taken place in the FBI's internal wiretapping policies during the fifteen months which had passed since Mitchell's May 6, 1969, memorandum, outlining the Administration's "official" interpretation of Title III. The original Mitchell memo stated the Justice Department's opinion that in "most national security cases" in which no prosecution was planned, a court order was not necessary. Mitchell added that section 2511(3) of Title III required that "the contents of any communication intercepted pursuant to the Presidential powers may be received in evidence at any trial or other proceeding where such interception was reasonable [sic]." He then discussed how the issue of "reasonableness" had recently been addressed in the Alderman and Giordano decisions, and stressed the need for extreme caution, in order to "insure that all approvals for permission to intercept private conversations rest upon a sound foundation sufficient to

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<sup>33</sup>Hoover to Mitchell, August 18, 1970. Davis Papers. This document was withheld from the author by the FBI, without explanation.

enable us to justify such coverage under the terms of the Act."<sup>34</sup> The implications of Hoover's memo were clear: (1) field agents need not request court orders for cases in which no prosecution is planned (in direct violation of Alderman and Giordano); (2) because of Alderman, the courts may not allow the introduction of evidence from warrantless wiretaps found to be "unreasonable"; and (3) to be safe, agents should seek court orders in instances where prosecution is planned.

In contrast to the obvious cautiousness espoused in Mitchell's 1969 memo, Hoover's of August, 1970, indicated that he expected to be able to utilize in court evidence gathered as a result of a warrantless wiretap. His optimism was based on the belief that the laws concerning admissability of "national security" surveillance would soon be changed. And since the Attorney General approved of Hoover's request the very next day, the Director's re-interpretation of U.S. wiretapping policy undoubtedly reflected the Nixon Administration's new "go for broke" surveillance strategy. This strategy would remain secret until events during the fall had convinced the Administration that the American public, as well as the Federal Judiciary, was ready for the reintroduction of the Mitchell Doctrine.

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<sup>34</sup>Mitchell to Hoover, May 6, 1969. Davis Papers.

## III.

I read the stuff that I wrote and it sounded like the ravings of a lunatic. We were under a lot of pressure. We got caught up in their game...you knew what Nixon was going to do...And that was the only facet of politics that we could relate to -- the sensational facet. Guerilla, fight back...ultimately you had to fight them. That was what revolution was all about, armed struggle...It is not a dinner party. -- John Sinclair, 1977<sup>35</sup>

The White Panthers and the Black Panthers both had the same problem, they believed the government's propaganda, and the government believed theirs. You jump out on a god damned corner and shout "kill a pig," something's gonna happen. And since they got all the guns, likely you gonna lose.  
-- White Panther Attorney Hugh M. Davis<sup>36</sup>

The evolution of the White Panther Party during the spring and summer of 1970 put it on a collision course with the Nixon Administration. The "White Panther myth" concerning the group's revolutionary potential came very close to realization -- just as Hoover and Mitchell expanded the government's web of surveillance in search of new targets. The group's history since the mid-sixties had been characterized by a close relationship between heightened radicalism and punitive responses from the local police and FBI, step-by-step.<sup>37</sup> During the late sixties, the two

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<sup>35</sup>ASHP-Sinclair Interview, 43.

<sup>36</sup>Hugh M. Davis interview with author, November 10, 1991, Detroit, Michigan.

<sup>37</sup>The White Panthers did not arrive at their increased militancy due to frustration over the Vietnam War. Anti-war  
(continued...)

phenomena became interdependent: the White Panthers justified armed self defense and radical posturing as a response to police "repression," while the FBI and local police justified increased surveillance as an appropriate response to the White Panthers' stated intentions of fomenting disorder. By 1970, the State of Michigan's continued imprisonment of Sinclair, the government's bombing conspiracy indictments against Sinclair, Plamondon, and Forrest, and the heightened day-to-day police surveillance and harassment all contributed to the group's progression toward the fringes of the far-left.

Beginning to believe in their own myth, the White Panthers openly discussed taking the struggle to the next level; which, as they clearly recognized, meant violence against the State. The White Panther myth also caught on nationally, bringing the Ann Arbor-based leadership a degree of radical certification within the larger counterculture/anti-war movement. However, the consequences of the flowering of the White Panther myth were soon to be felt, as Hoover's FBI also started to accept fully the organization's revolutionary potential. By fall, the WPP became a primary target for the FBI and Justice Department.

"He is a vicious criminal," stated an FBI spokesperson on June 5, 1970, in a prepared statement announcing that

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<sup>37</sup>(...continued)  
protest remained secondary to an overall emphasis upon "cultural revolution."

Lawrence Robert "Pun" Plamondon was being placed on the FBI's "Ten Most Wanted List." The fugitive White Panther Minister of Defense had been underground since the CIA conspiracy/bombing indictments of October, 1969. While "underground," Pun travelled extensively, taking on assumed names and living in communes, such as the "Up Against the Wall Motherf\_\_ckers" of California. After hiding out on the West Coast for a few months, he travelled to Canada, Northern and Central Europe, and finally to Algeria, North Africa, where he met with Eldridge Cleaver, the exiled Black Panther leader, whose philosophy of black-white cooperation in the Movement had been instrumental in the creation of the White Panthers. Returning to the U.S. during the late spring of 1970, Plamondon hid-out in the woods of northern Michigan, collecting weapons and writing inflammatory articles.<sup>38</sup>

In his voluminous writings from the underground, as well as his actions, Plamondon saw in himself the White Panther myth becoming reality. His evolution from cultural to political revolutionary was apparent by May, when he wrote:

The revolution is about bringing about a political consequence, the revolution is about power...Political power. And that comes from a couple of things...from guns....from dicks....from pussies....from babies...I don't want to make it

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<sup>38</sup>Detroit Free Press, May 5, 1970, 1; Stocking, "A Personal Remembrance," 81; Sabljak and Greenberg, Most Wanted, 180-81. The Detroit Free Press article claimed that Plamondon was the 2nd "white revolutionary" to earn Top Ten distinction; it alleged that Cameron Bishop, an SDS member charged with several Colorado bombings in 1969, was the first.

sound like all you got to do is kill people, kill pigs, to bring about revolution...it is up to us to educate the people to the fact that it is war, and a righteous revolutionary war...its up to the vanguard to start taking on activity...to a higher stage...these more advanced elements have no place to go except to the next stage, they can't turn back...The only direction they can move is to righteous revolutionary violence...I just found out that I was put on the 10 most wanted list, which makes this decision all the more easier [sic] for me.<sup>39</sup>

Just how close Plamondon came to committing acts of "righteous revolutionary violence" remains unclear. Some evidence exists that he may have had both the tools and the intent to move from rhetoric to action during the days immediately preceding his July 23 capture. According to an FBI report, materials found in his possession at the time of his arrest included two cases of dynamite, several weapons, and drawings of the interior of a Traverse City, Michigan bank. The same report contains a copy of a letter, dated July 21, 1970, in which Plamondon allegedly wrote:

I think we are going to see a big repression drive all across Babylon as soon as school starts in the fall...BUT IF WE ARE IN FOR SOME SH T, WAIT TILL THE PIGS SEE WHAT WE GOT WAITING FOR THEM!...The Black Colony is moving, but the Youth Colony isn't that far advanced yet, but we are trying to push, pull & shove everyone along the road to revolution...you know what I'm sitting on to write this letter? A 50 pound box of dynamite!<sup>40</sup>

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<sup>39</sup>Quoted in (Ann Arbor, Michigan) Argus, vol 2, no. 4, May 23, 1970.

<sup>40</sup>FBI Report, September 3, 1970, "RE: Lawrence Robert Plamondon, White Panther Party," John and Leni Sinclair Red Squad Files [hereafter "FBI Plamondon Report"], 66-67. This 107-page report was instrumental in elevating the WPP to the  
(continued...)

Plamondon's advanced revolutionary ideology was shaped not only by his background with the White Panthers, but also by the months he spent eluding the FBI. Having entered the underground several months in advance of the Weathermen, Plamondon's experiences were wholly unique to the white radical movement. In addition, his travels to West Germany, Denmark, Holland, and Algeria provided him with an internationalist perspective on the world-wide youth and counterculture revolt, a perspective which most American radicals lacked. One of the aspects of the Movement in Europe and North Africa that most surprised him was the degree to which radicals of every description identified with the Black Panther struggle in the United States. His title as "Minister of Defense" for an organization so obviously suggestive of the Black Panthers provided credibility with many radicals he met. In Europe, he was frequently asked to deliver public addresses concerning the state of "The Revolution" in America, and the role which the White Panthers were playing in making it happen. In this manner, he increasingly came to see himself as a "people's hero," explaining, at least in part, his extreme rhetoric in the weeks prior to his capture.<sup>41</sup>

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<sup>40</sup>(...continued)  
status of a top radical organization, during the fall of 1970. Plamondon was never charged with possession or transportation of explosives.

<sup>41</sup>Ibid.; Stocking, "A Personal Remembrance," 81.

During the spring and summer of 1970, much of the energy and resources of the Ann Arbor and Detroit chapters of the WPP were used up in the legal effort to secure John Sinclair's release from prison. However, by early spring, the "Free John" movement became nationally-known, and support for Sinclair's release started pouring in to the White Panther house on 1520 Hill Street. Over the weekend of January 24-25, 1970, Movement organizers in New York, Detroit, Chicago, Berkeley, and other cities held "Free John Sinclair" rallies, focusing attention not only on Sinclair's draconian sentence for marijuana, but also on the need for like-minded individuals and groups to support all "political prisoners" in America. A press release announcing the rallies urged supporters to "get together for John Sinclair to demonstrate the unity of the cultural revolution to the narcotics police," and added that "for every insane act of repression and injustice that occurs a thousand people are won over to the life culture." It also announced the formation of "The International Committee to Free John Sinclair," and listed both New York and Detroit addresses.<sup>42</sup>

An additional "Free John" initiative, held on the eve of the Cambodian invasion, demonstrated the White Panther's continuing penchant for comedic theatrics. The initiative

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<sup>42</sup>"Free John Sinclair" mimeographed handbill, dated January 8, 1970. John and Leni Sinclair Red Squad Files. The Detroit Police Department's "Special Investigation Bureau" (the so-called "Red Squad") followed the progress of the weekend's events very closely.

had two components. Several dozen White Panthers from across Michigan demonstrated for Sinclair's release on the Michigan State Capital steps in Lansing on April 30. They also entered the Senate Gallery, but were quickly ejected when they began cheering a speech that was critical of the enormous police presence. The same day, the entire membership of the Michigan State Legislature received letters, carrying Wayne State University logos. Each letter contained a marijuana cigarette with an instruction sheet, requesting that in order to help build "a better America," the recipient should "smoke at least two of these every day for one year." The instruction sheet also carried both the White Panther and the "Woodstock Nation" symbols, indicating that it was part of a YIPPIE-sponsored national effort to bring about marijuana law reform, known as the "First Annual Marijuana Mail-In and Cross Country Toke-Down." The stunt brought the White Panthers considerable media coverage, although not all of it was focused on Sinclair's plight.<sup>43</sup>

Local support for the "Free John" movement also increased, with assistance coming from some unlikely quarters. On the evening of July 24, "several dozen" University of Michigan faculty members held a cocktail party to raise money for Sinclair's legal defense fund, at the home

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<sup>43</sup>Detroit Free Press, May 1, 1970, 1; Detroit News, May 1, 1970, 3; (Bad Axe) Michigan Huron Tribune, May 1, 1970, 1; "Help Build A Better America," mimeographed handbill [and associated documents], John and Leni Sinclair Red Squad files. See Figure 4-1 on page 374.

of a Dr. Fred Shure. Invitations, duly filed by the Detroit Red Squad, stated that "John Sinclair has little money but many friends...Freeing him from the consequences of Gestapo 'Justice' would be a small step toward the liberation of countless other...political prisoners in our country." It also warned that "if it can happen to him today, it can happen to us tomorrow."<sup>44</sup>

A fascinating "snapshot" of the White Panther commune during the spring of 1970 is contained in a twenty page study, conducted by Kenneth L. Wright of the "Merrill-Palmer Institute," prepared as part of a larger sociological analysis of communal living in the U.S. Wright spent a weekend living with the White Panthers, studying their social habits and internal relations. Expecting to find only a few varieties of "non-traditional living arrangements," he identified nine separate and distinct "structural units," most of which had more to do with the business and propaganda efforts of the WPP than with the interpersonal relations of its members. Impressed by the degree of political awareness espoused by the WPP membership, Wright noted that "There is structure and organization to every facet of the living arrangement." Management of financial affairs was placed in the capable hands of John's brother, David, who somehow always managed to get the rent and utilities paid. Education

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<sup>44</sup>Detroit News, July 25, 1970, 2-A. Invitation, dated July 20, 1970, located in John and Leni Sinclair Red Squad Files.

of the membership was an ongoing process, featuring a small degree of "traditional" instruction from the Central Committee, supported by self-directed study, via the commune's diverse library of books, pamphlets, and records. The official WPP band, the "Up," was the commune's "main source of income," and comprised the "music unit." Drug use, particularly marijuana, was noted as a frequent occurrence, assisting the members with better "tuning into" the "acid rock" music, as well as the overall political message. Temporarily lacking the facilities and equipment required to publish their own newspaper, the WPP collaborated with the Ann Arbor Argus collective, located two blocks away. As the "overall focal point of communal energies....[and] the mainstay of the commune's existence," the political unit remained firmly under the direction of John Sinclair, whose voluminous correspondence to the commune was required reading. Wright was impressed by the remarkable degree of adoration which a majority of commune members felt for their imprisoned leader.<sup>45</sup>

For the bulk of the Party's membership in Detroit and Ann Arbor, the trend toward violent rhetoric and militant

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<sup>45</sup>Kenneth L. Wright, "A Communal Living Arrangement: Exploratory Study of the Trans Love, White Panthers, Youth International Party Commune," unpublished paper, dated May 20, 1970, carrying the inscription: "Family: The Merrill-Palmer Institute." Located in JLSC/BHL, box 17, folder 19, "WPP Ideology." The nine "units" described were as follows: household, marriage, unmarried, educational, business management, music, light show, photography, and political.

posturing that had characterized the group since the fall of 1968, reached new heights during the spring and summer of 1970. In late June, the inaugural edition of Sun Dance, the "White Panther Information Service," was published. Featuring articles by Tom Hayden, Eldridge Cleaver, and Rennie Davis, as well as Pun and John, the thick multi-color newspaper represented the best propaganda the organization could offer. Cleaver's article commented that the "repression" brought down on the Black Power movement by "pigs" may have driven the movement's leaders to "madness," but, he promised, "madness is the black man's hydrogen bomb...we are in a position to implement head-up murder...We can guarantee the total destruction of Babylon." The same newspaper also carried Pun Plamondon's latest message from the underground, which stated "all I can say about the Weathermen, man, is power to 'em, I think they're a great inspiration to everyone in the mother country." Published on the very day that pro-Nixon cadres were celebrating "Honor America Day," the first Sun/Dance remains a testimony to the polar extremes which divided American society at mid-year in 1970.<sup>46</sup>

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<sup>46</sup>Sun Dance, July 4, 1970 [quotes 12, 20]. This issue represented the peak in the artistic creativity of WPP media specialists Gary Grimshaw and Ken Kelley. The variety of colors, graphics, cartoons, photo-inlays, and other highly-technical features make it an excellent example of sixties art.

Rhetoric aside, several White Panthers demonstrated their willingness to prepare for -- if not carry out -- armed self-defense. Target shooting forays occurred with increasing frequency, particularly in the late summer, after the arrival of Dennis Marnell, the self-appointed "Deputy Minister of Defense," who was probably an FBI or Red Squad agent provocateur. Allegedly a Vietnam veteran, Marnell assumed his new role with gusto, conducting one-on-one sessions on the art of weaponry for the Ann Arbor chapter. Members of the new Detroit chapter also regularly conducted target practice.<sup>47</sup>

The impact which the White Panthers' increasingly-militant rhetoric and posturing had on the youth of southeast Michigan undoubtedly depended upon the individual(s) in question. Some, undoubtedly, turned away from the White Panthers after they had abandoned their strictly "cultural" approach, or after their leaders were portrayed as violent criminals via the government's CIA bombing case. However, Ken Kelley recalls an incident which sheds some light on the issue of whether militant rhetoric, by itself, can sometimes lead to incitement:

I remember right after the Chicago Seven got convicted, they had a TDA -- The Day After -- a big demonstration. It was big on campus...I had a show on WCBN then, called the Arguism. Excerpts from the Argus. After they got convicted, I figured it was my cosmic duty to go on and

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<sup>47</sup>Genie Plamondon personal interview with author, March 31, 1993, Detroit, Michigan; Sun/Dance, July 4, 1970.

proclaim, 'take to the streets.' Which I did...Anyway, that night I came back to my house after doing the show, and everybody is just poised for the kill. They were all young kids...sixteen, seventeen...Local radicals from Ann Arbor High...I walk in and I just know something is going on. I go in and sit down at my desk drawer and open the drawer....full of Molotov cocktails. Boy, did I freak out. 'You get these babies out of this house, immediately!...dump them in the trash'...I just couldn't believe it...Molotov cocktails. Real professional jobbies...That night they trashed everything.<sup>48</sup>

The White Panthers' rhetoric helps explain the group's mounting national and international reputation. Official membership in the Party peaked during 1970, with an estimated fifteen to twenty fully operational chapters, and up to fifty "potential tribes," spread across the U.S.A. and into Europe.<sup>49</sup> The daunting job of keeping in contact with chapters from the Ann Arbor headquarters was handled by Genie Plamondon, with some assistance by Skip Taube. Each chapter was instructed to organize a Central Committee, along the lines of both the Black and White Panthers, as well as to make every effort to publish a local newspaper or distribute mimeographed handbills. Chapters were asked to submit

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<sup>48</sup>ASHP-Kelley Interview, 10-11.

<sup>49</sup>This estimate is based on three sources: (1) FBI Report, dated October 23, 1970, entitled "RE: White Panther Party (WPP) National Convention September 23-25, 1970," 22-23, John and Leni Sinclair Red Squad Files; (2) various lists of WPP chapters, circa 1970-1971, located in JLSC/BHL, box 17, folder 31, "Chapters"; and (3) ASHP-Genie Plamondon Interview, 20. The "potential tribes" list, located in number 2 above, seems to have been little more than a list of addresses of individuals who had contacted the national headquarters in Ann Arbor, possibly requesting chapter information.

reports concerning their overall progress. Press releases concerning the activities of the Detroit and Ann Arbor chapters, as well as their continuing legal battles, were sporadically mailed to the chapters, in an effort to keep them informed. On rare occasions, members from the national headquarters in Ann Arbor visited fledgling chapters, occasionally providing a written evaluation of their successes and failures.

While SDS and several other national New Left and anti-war organizations were coming apart under the strain of factional disputes, the White Panthers enjoyed their greatest success in reaching out to like-minded individuals and organizations. As Kelley recalls:

SDS had disappeared...But we were always a constant thing...We were the only white thing around that had any kind of reputation. John was a cause...we were being recruited by all the left...Lots of people were looking to us.<sup>50</sup>

Throughout the first half of 1970, a number of serious discussions were held between WPP leaders and representatives of the Youth International Party (YIPPIES), concerning a possible merger of the two organizations. The style and antics of Yippies Jerry Rubin and Abbie Hoffman had influenced the origins and development of the White Panthers since their inception in the fall of 1968. The relationship between the two groups improved during 1969, particularly as a result of Hoffman's frequent visits to Ann Arbor, as well

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<sup>50</sup>ASHP-Kelley Interview, 7.

as Sinclair's trips to New York with the MC-5. In Woodstock Nation, Hoffman described the White Panthers as "the most alive force in the whole Midwest."<sup>51</sup> As Hoffman would later write, "Sinclair had become our Huey Newton -- an imprisoned leader. 'Free John Sinclair!' became synonymous with militancy."<sup>52</sup> For several months, the White Panthers referred to themselves on their stationery and publications as a division of the "Youth International Party."<sup>53</sup>

During the late spring, Genie Plamondon joined YIP women Judy Gumbo and Nancy Kurshan-Rubin in a visit to Stockholm, Hanoi, and Moscow, as part of what Genie later described as "an all-woman hippie delegation." The visits earned the women, and the two organizations, international media attention.<sup>54</sup> However, a formal YIP-WPP merger was never

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<sup>51</sup>Abbie Hoffman, Woodstock Nation, 62.

<sup>52</sup>Hoffman, Soon to Be a Major Motion Picture, 176. Writing from the perspective of the late seventies, Hoffman referred to the WPP as "a YIP affiliate."

<sup>53</sup>See Figure A-17 in the Appendix for a WPP/YIP flyer from the spring of 1970.

<sup>54</sup>There were two trips: (1) in April the group visited an anti-war conference in Stockholm, where they spent several days in the company of North Vietnamese officials -- who were very interested in the Yippies, and (2) the trip to Hanoi and Moscow took place in late May and early June. An incident which took place during the second trip provides another example of the YIP/WPP penchant for posturing and "street theater." Upon their arrival in Moscow, the three women held an impromptu anti-war demonstration and news conference in front of the U.S. Embassy. Dressed in Vietcong pajamas and conical hats, the group issued a statement claiming that they were in Hanoi attempting to seek diplomatic recognition for the "Yippie-White Panther 'Americong' coalition." Genie  
(continued...)

attained, and relations between the leadership of the two organizations varied from close friendship to bitter hostility. In a letter to John Sinclair, dated February 27, 1970, David Sinclair outlined his view the nature of the disagreement which separated the two groups:

We had a great CC [WPP Central Committee] meeting...A consensus was reached...We will go back to operating under the name of White Panther Party. We discussed this point for close to three hours...there is a fairly large group of people who have congregated around the image of 'Yippie!'...who aren't into what we're into, and who resent our use of the name...'merger' is not a correct term in the first place, because you can't really have a merger between a political party and an image...The fact is there are fundamental differences between ourselves and our politics and those of Abbie and Jerry and their 'followers.'<sup>55</sup>

Genie Plamondon's assessment was similar:

We had a big contradiction with the Yippies about organization versus non-organization...They were anarchists, essentially, and they didn't want to have to worry about paperwork, actual organization, actual community work. They were almost strictly media-oriented...It really got to be a super-ego fighting type thing...They promised that John and Pun could be major parts of the thing...but they majorly [sic] wanted more PR for Yippies.<sup>56</sup>

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<sup>54</sup>(...continued)

Plamondon personal interview with author, March 31, 1993, Detroit, Michigan; ASHP-Genie Plamondon Interview, 21-22; Detroit Free Press, June 10, 1970, 11; New York Times, June 10, 1970, 51.

<sup>55</sup>"Report to the Chairman on the Central Committee Meeting of 27 February 1970, Prepared by Chief of Staff," February 27, 1970, JLSC/BHL, box 17, folder 21, "WPP Ideology."

<sup>56</sup>ASHP-Genie Plamondon Interview, 19-20.

In the end, the failure of the YIP-WPP merger was due to the Yippies' central philosophy, which abhorred traditional organizational structure and "top-down" hierarchy. Nonetheless, John Sinclair continued to pursue a closer working relationship with Rubin and Hoffman throughout the year, as he worked on the concept of a united "Woodstock Nation." As late as May 5, Sinclair was still attempting to resolve the contradictions in organizational philosophies separating the two groups.<sup>57</sup> Rubin and Hoffman also continued to make public appearances in support of the "Free John" movement.

An additional radical group which attempted to recruit the White Panthers during the summer of 1970 was the "Red Family," a small San Francisco-based ultra-left-wing cadre, which included Tom Hayden, the well-known "Chicago Seven" defendant who had undergone a significant number of changes since his famous "Port Huron Statement" in 1962. Hayden entered into discussions with the White Panthers concerning the Red Family's desire to forge a national organization, united around the principles of Korean-style Marxism. In early August, Ken Kelley and Leni Sinclair travelled to the

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<sup>57</sup>Michigan State police, Special Investigation Unit, "Confidential Report," dated July 7, 1970, written by Detective Clifford Murray; John and Leni Sinclair Red Squad Files. Murray's report borrows from excerpts of a May 5, 1970 personal letter, from John Sinclair to his wife Leni. Numerous Red Squad documents reveal that the police carefully read all of Sinclair's mail, and frequently shared it with other law enforcement agencies.

West Coast, with the dual purpose of meeting Hayden's Red Family and witnessing Black Panther Huey Newton's release from prison. According to Kelley, discussions with the Red Family didn't get very far, because of the group's constant bickering and factional disputes. For him, the one positive aspect of the trip was finally getting to meet one of the Black Panther leaders who had most inspired the White Panthers.<sup>58</sup>

The White Panthers' continuing support for the Black Panther struggle during 1970 did not coincide with many of their actions. In late June, the Party's revised "Ten Point Program" dropped all references to the Black Panthers, and by the end of the year, Leni Sinclair publicly stated that the White Panthers no longer "go along with all of their programs, like 'kill the pigs.'"<sup>59</sup> Relations with the Detroit chapter of the "National Committee to Combat Fascism," an arm of the Black Panthers, were polite, but not particularly friendly. As early as December of 1968 the Detroit Black Panthers criticized Sinclair and the newly-formed White Panthers, calling them "silly, irresponsible,

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<sup>58</sup>Ken Kelley, "Black Panther/White Lies, A Personal Memoir by Ken Kelley," California Magazine [Oakland, CA Tribune], volume 15, (August, 1990), 86-93, 122-25. This article chronicles Kelley's relationship with the BPP leader through the seventies and eighties, as Newton drifted into a life of drugs and violence.

<sup>59</sup>Sun/Dance, July 4, 1970, 31; Michigan Daily, January 6, 1971, 25.

and an obstacle to the revolution."<sup>60</sup> Relations thereafter did not improve, as is evident from Ken Kelley's later statement:

The Panthers in Detroit were thugs and gangsters. Lots of Panthers were thugs and gangsters all over the country, which is not to -- I mean, I love Huey Newton. I remember going through three different transitions with [Black] Panthers in Detroit: each time a new group would take over, the other ones would come running into our house saying 'protect us'...They didn't have any reputation in Detroit; they never had a presence except when they got busted.<sup>61</sup>

Skip Taube provides an alternate view:

[Our] relationship with their Detroit chapter...got to be weird because they were infiltrated with all kinds of pigs and shooting each other...Most people were discouraged from associating with a black organization for fear of their lives.<sup>62</sup>

Yet the White Panthers did continue to support the Black Panthers in limited ways, such as distributing their newspaper and mailing to California the funds collected. A major breakthrough occurred when the Black Panthers sent the editor of their national newspaper, Raymond "Masai" Hewitt, to Ann Arbor for the national underground newspaper media conference.<sup>63</sup> And Pun Plamondon continued to advocate close

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<sup>60</sup>Fifth Estate, December 12-25, 1968. See also the article by BPP member William Spencer Leach in the following issue (January 9-22, 1969).

<sup>61</sup>ASHP-Kelley Interview, 12.

<sup>62</sup>ASHP-Taube Interview, 24.

<sup>63</sup>See photograph of Pun Plamondon and "Masai" at the conference, in Figure 4-2, on page 375.

support for the BPP in his frequent messages from the underground.<sup>64</sup>

White Panther relations with the Weathermen were complex, fluctuating from open support for their violent actions (Plamondon), to tacit support for their goals (Taube and Forrest), to open criticism of their violent "adventurism" (John Sinclair). The two organizations initially had much in common, including a penchant for radical rhetoric and a love for the counterculture forms of communal living, open sex, and psychedelic drug use. Skip Taube's former friendship with Weathermen leaders Bill Ayers and Diana Oughton was also a factor. During the summer and fall of 1969, the Detroit Weather Collective, the largest in the nation, approached selected members of the White Panther leadership, attempting to recruit them. On a few occasions, White Panthers and Weathermen appeared at the same local political events. Ken Kelley states that the attraction was a strange, yet alluring one: "We liked them, some of us did. Some of us thought they were crazy. They were crazy. Everybody was crazy."<sup>65</sup>

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<sup>64</sup>The labor-based "The League of Revolutionary Black Workers," the largest black radical organization in Detroit during the late sixties, also expressed little support for the White Panthers, believing the counterculture to be a vastly inferior organizational model. See Georgakas and Surkin, Detroit, I Do Mind Dying, 91, 153-55.

<sup>65</sup>ASHP-Kelley Interview, 10.

By the time of the Weathermen's "War Council" in Flint, Michigan, held in December of 1969, the White Panthers were surprised by the degree of militancy being espoused by Ayers, Oughton, and the rest of the Weathermen. The White Panthers had suggested bringing the MC-5 to perform, but the Weathermen leadership was no longer interested in rock and roll as an instrument of revolution; violence against the "pigs" was now their sole focus. Shortly thereafter, the Weathermen went underground, breaking in to small, elite "cells." In their minds, they were completing the "inevitable" leap from revolt to revolution. One final attempt at attaining conciliation between the two organizations was made during the winter of 1970. The local Weathermen had criticized the White Panthers for having a benefit focused solely on John Sinclair's imprisonment, instead of the recent Chicago police murder of BPP leader Fred Hampton. Skip Taube invited Ayers and Oughton to a meeting, in order to provide them with an opportunity to express their views face-to-face, as well as to allow the White Panthers an opportunity to explain the reasons behind the "Free John" events. As Taube recalls, "It was real interesting to see a sincere meeting between people operating in the cultural arena who had good politics and people who were really 'committed revolutionaries.'"<sup>66</sup> The meeting did

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<sup>66</sup>ASHP-Taube Interview, 17. A photograph of this meeting appears as Figure 4-3, on page 376.

not change the overall relationship between the groups: the Weathermen were clearly approaching a stage of revolutionary violence, while most White Panthers, with the possible exception of Pun Plamondon, stood on the sidelines thinking, as Kelley recalls, "'they're doing what we want to do, but we're too afraid to do it.'"<sup>67</sup>

The White Panthers, like the Weathermen, believed that a revolution was pending in America; in fact, they both believed that a cultural revolution of sorts was already underway. They differed, however, over what Todd Gitlin terms the "fundamental problem" facing the New Left and counterculture during the late sixties:

If morality and eschatology agreed that there had to be a revolution, then there had to be someone to make it. The New Left's torment -- the torment of all radical student movements -- was that relatively privileged people were fighting on behalf of the oppressed blacks, Vietnamese, the working class. Committed to a revolution it did not have the power to bring about, the movement cast about for a link with forces that might have that power.<sup>68</sup>

Firmly committed to Marxist-Leninist doctrine, the Weathermen conjured up the fantasy of a working-class proletarian revolt. They believed that the workers of America had been coopted, by a decent standard of living, into going along with corporate capitalism at home and heartless, bloody

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<sup>67</sup>ASHP-Kelley Interview, 13.

<sup>68</sup>Gitlin, The Sixties, 381.

imperialism abroad.<sup>69</sup> Thus, they concluded that the revolution would have to be forced, bringing down the government's repression. These excesses, in turn, would gradually open the eyes of the working class, exposing the deceit of the ruling class, the duplicity of "establishment" politicians, and the overall implosion of capitalism. It was this core philosophy which motivated the Weathermen's "Days of Rage" in Chicago during the fall of 1969, when they attempted to convince working class youth and street thugs to join in their violent rampage against the oppressive State.

By the time of the Flint War Council, several hundred Weathermen true believers had given up on direct face-to-face appeals to potential recruits. Retreating underground and initiating selected "strikes" against establishment targets, such as the March 11, 1970 bombing of IBM and GTE in Manhattan, the Weathermen believed that they were helping to initiate a spontaneous revolt, which would usher in the larger revolution. With a leadership comprised of many experienced Movement people from the mid-sixties, the Weathermen were the embodiment of the completed "revolutionary loop." For individuals like Ayers and Oughton, militancy in 1966 had meant protest marches and emotional speeches. In 1967 it had meant demonstrating at the Pentagon, staring down National Guardsmen's bayonets. In 1968 it had meant battling with police in the streets of

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<sup>69</sup>Carl Oglesby quoted in Ibid., 384.

Chicago. By late 1969 it had come to mean armed revolt against the machinery of capitalism and the State. As Gitlin relates, "On the Movement's breakneck timetable, they could claim to have tried everything short of revolutionary violence."<sup>70</sup>

A majority of Michigan White Panthers interpreted the dilemma facing American "revolutionaries" over the issue of violence in a somewhat more balanced manner, best epitomized by the writing of John Sinclair. From the vantage point of his prison cell in Marquette, Michigan, Sinclair struggled to interpret the rapidly changing movement, corresponding with dozens of participants on the outside, devouring any current reading materials he could get his hands on, and producing lengthy letters and treatises on an almost daily basis. He also acquired an understanding of the works of Mao Tse Tung, particularly those pertaining to China's "Cultural Revolution." Sinclair's prime focus was the concept of a "Woodstock Nation," a coalition of youth movement groups which could, in time, bring about a completely new society. The starting point for Sinclair's analysis was the enormous success Trans Love Energies had experienced in recruiting, and subsequently politicizing, Michigan's youth. Unlike the Weathermen and other small, elitist revolutionary groups of the period, the White Panthers had evolved out of this regionally-successful organization, which had attracted

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<sup>70</sup>Ibid., 387.

thousands of young fans into politically-charged MC-5 concerts. This phenomenon had eventually expanded to the point where a major recording company recognized that "revolutionary rock" enjoyed a national following.

In short, Sinclair had a track record of helping to politicize thousands of youth. This experience had taught him several things. First, most white youth are decidedly apolitical, preferring the cultural forms of rock music, drugs, and sex to the "straight" political messages delivered by most New Left and anti-war groups. Second, Sinclair was convinced that the hundreds of thousands of counterculture youth coming of age in America every year remained largely unaware of the fact that their lifestyles carried an explicitly political message: they were part of an emerging "life culture" which, in his view, carried the potential to revolutionize society. Third, Sinclair knew better than most that there were powerful reactionary forces in America, united in their determination to wipe out the new counterculture lifestyle, through drug busts, imprisonment, intimidation, and a variety of other tactics. Finally, he believed that youth could be made to recognize the political nature of their lifestyles, via an intensive and varied campaign of propaganda, rock music, and other cultural forms that had proven successful in Detroit and Ann Arbor: free concerts, the underground press, and community radio.

Sinclair's analysis included an historical review of three of the defining events of the era: the Chicago Democratic Convention, the "People's Park" protest at Berkeley, as well as Woodstock. According to his explanation, police over-reaction at both Chicago and People's Park convinced members of the counterculture of the inherently political nature of their lifestyles. It also demonstrated to both the counterculture and the New Left that they had several important things in common, the most important of which was a clear understanding of the conservative establishment's intention of destroying their movements. Turning his attention to Woodstock, Sinclair saw the festival as a powerful and positive expression of his new vision of society -- as well as a great "might have been." In his view, the festival presented a previously unheard-of opportunity to combine music and culture with politics, before hundreds of thousands of eager youth. A large part of his master plan included holding similar events, with the addition of a political component

While the Weathermen believed that the vanguard of the revolution would be the working class, Sinclair advanced the idea that an awakened "youth colony" could lead the masses to a new society. Both theories proceeded from the Marxist premise that a only a revolt of the proletariat had any chance of success -- and they both took leaps of faith concerning the composition of the revolutionary proletariat.

The Weathermen overlooked or ignored the basic fact that a vast majority of middle and lower-class workers in America were inherently conservative, hardly the stuff of revolution. By the same token, Sinclair's "youth colony" thesis equated young white people in the U.S. with Third World peasant revolts, as well the "black colony," from which the Black Panthers had evolved. Recognizing that "If we are going to make a revolution here...we have to develop a class analysis," Sinclair recommended looking at social factors, rather than economic ones, to gauge "who our friends are and who our real enemies are." He then outlined his main thesis:

The youth of America....are not members of their parents' classes but constitute a new social subclass of their own, which is a subclass of the proletariat rather than of the bourgeoisie [furthermore]...the vast (mis-called) 'Middle class' is really just another subclass of the proletariat rather than of the bourgeoisie. These are important distinctions to make, because if we can interpret the objective conditions in America in these terms then we can see that revolution is possible; if we can't accept these terms, then we will have to conclude that revolution is not possible.

Sinclair openly admitted that his theory differed from the "rigid dogma" of classical Marxist-Leninist thought, but asserted that he was merely adapting classical revolutionary theory and practice to the "objective conditions" of American society.<sup>71</sup>

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<sup>71</sup>"Report to the Central Committee of the Youth International Party (White Panthers), By Chairman John Sinclair," unpublished series of prison writings, dated January-February, 1970, JLSC/BHL, box 17, folder 21, "WPP (continued...)"

The proposed merger between the Youth International Party and the White Panthers was a reflection of Sinclair's "youth colony" thesis, as well as the focus of Abbie Hoffman's Woodstock Nation. Aware of the power of symbols, the two organizations came up with a design featuring an electric guitar, a Native American peace pipe, and a rifle. All three components were crossed to form a peace-symbol, and were surrounded by a ring of fire, which symbolized the sun. Explaining the symbol, Sinclair asserted "We can't have the guitar without the gun or we won't survive....and without the sacrament that gives us our vision [marijuana] neither the guitar or the gun would amount to anything worthwhile."<sup>72</sup>

The weapon which figured prominently in the Woodstock Nation symbol was itself indicative of the White Panthers' internal struggle over what role, if any, "revolutionary violence" should play in the organization's tactics. A dominant issue in the Movement since at least the fall of 1968, it became the central dilemma facing the entire left

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<sup>71</sup>(...continued)

Ideology," 1-24 [quote 24]. This document provides a far more detailed exposition of Sinclair's ideas, circa early 1970, than either Guitar Army or the published pamphlet Message to the People of the Woodstock Nation, (Ann Arbor: Sun/Dance Publications, 1970). It is important to note that when Guitar Army was being prepared for publication in 1971 and 1972, John and Leni Sinclair significantly edited and revised the more radical writings from 1969 and 1970, deleting "a lot of 'Off the Pig' rhetoric and similarly heavy 'radical' bullsh\_t that isn't of much use to anybody" [page 59 of the "Preview"].

<sup>72</sup>Sinclair, Guitar Army, 223.

during 1970. By disappearing underground, and committing specific acts of violence, the Weathermen had proven their mettle by becoming the very revolutionaries that the far left had been dreaming (and worrying) about ever since Chicago. As Gitlin states, the Weathermen "had run off the with the cutting edge," leaving the rest of the Movement afflicted with "Weatherguilt."<sup>73</sup> Between September, 1969 and May, 1970, there were more than 250 major bombings in America, only a handful of which were committed by the Weathermen. Yet the organization's tactics, as well as its extreme media presence, undoubtedly influenced a number of other bombers.

The ongoing national debate over the issue of "revolutionary violence" as a tactic was also played out locally within the ranks of the White Panthers' Central Committee during 1970. The debate generally took place within a narrow framework, centered upon the relevancy and desirability of spontaneous acts of violence against such popular targets as the police stations, banks, draft boards, induction centers, and ROTC buildings. On one side of the debate was Sinclair, who remained adamantly opposed to spontaneous acts of violence, which he termed "adventurism":

There seems to be no one speaking of concrete social, political and cultural change except in terms of smashing the state, ending racism, avenging Fred Hampton, freeing all political prisoners, ending the war in Vietnam, smashing imperialism, etc...the emphasis overwhelmingly seems to be on mounting some kind of instant

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<sup>73</sup>Gitlin, The Sixties, 396-98.

elitist insurrection just like in the movies, with people running through the streets smashing windows, throwing molotov cocktails, waving machine guns in the air, etc.<sup>74</sup>

While refusing to oppose categorically the use of violence as a tactic, Sinclair stated that it should only be used as part of a long-term revolutionary social and cultural program.<sup>75</sup> Sinclair's position remained the "official" policy of the White Panthers.

However, by the spring of 1970, several other White Panther leaders, including Skip Taube, Jack Forrest, and Pun Plamondon, entered into an ongoing debate with Sinclair, through the mail and in the underground press, concerning the value of "terrorist" tactics. Plamondon's advocacy of violence peaked during the weeks immediately preceding his capture on July 23. At the same time, Taube was gradually moving toward a similar position. In a June 30, 1970 letter to Sinclair, he stated:

So far you have given us no definition of 'adventurism'....yet you are constantly using the term to define actions and individuals you are criticizing. Now I am not in favor of mindless adventurism, but I think you must give more consideration to the need for revolutionary violence at this juncture in history...I don't think we ever realize it (as opposed to understanding it) until we are put in the position of people like Pun or the Weathermen...the outlaw cannot go back, she or he is forced by

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<sup>74</sup>Sinclair, "Report to the Central Committee," 22.

<sup>75</sup>In fact, during the fall and winter of 1969, Sinclair's rhetoric was nearly as militant as Plamondon's. His position became increasingly moderate over the next year.

history....to go onward to higher forms of struggle.<sup>76</sup>

Thus, the positions taken by Plamondon and Taube by the summer of 1970 closely resembled the standard Weatherman credo, which asserted "nothing we could do in the mother country could be adventurist."<sup>77</sup> For Taube, Forrest, Plamondon, and other White Panthers the "White Panther myth" was becoming a self-fulfilling prophecy.

The familiar tension between the White Panthers' rhetoric and the local police and FBI response reached new heights during the year and a half after Sinclair went to prison in July, 1969. Surveillance increased, characterized by "tailing" of WPP members and their automobiles, frequent police harassment, and routine censoring of John Sinclair's incoming and outgoing mail at Marquette Prison. The local Detroit and Ann Arbor offices of the FBI became increasingly involved in targeting the White Panthers for a variety of COINTELPRO actions. The arrival of Neil J. Welch as Detroit's new Special Agent-In-Charge (SAC) -- combined with the Top Ten status of fugitive Plamondon -- resulted in the elevation of the White Panthers, in the eyes of Hoover and other top-ranking FBI officials, from an obscure Michigan radical group to a leading white revolutionary organization.

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<sup>76</sup>Quoted in "FBI Report RE: Plamondon," September 3, 1970, 89-90.

<sup>77</sup>Gitlin, The Sixties, 392.

With the establishment of a Detroit chapter of the White Panthers during 1969, the local and state police in southeastern Michigan expanded their surveillance of both the Ann Arbor and the Detroit chapters. On March 6, 1970, the same day as the Weathermen's New York City townhouse explosion, a very large unexploded bomb was found in a women's restroom at Detroit's 13th Precinct Station. Shortly thereafter, the Detroit Police Department's "Red Squad," in cooperation with a variety of local and State units, initiated "Project Eagle," an intensive, round-the-clock physical surveillance of local radical groups, including the Detroit Chapter of the White Panther Party. One focus of the investigation was apparently Jack Forrest, who, along with Sinclair and Plamondon, had been charged with conspiracy to bomb the Ann Arbor CIA office the previous September. In addition, Forrest had been one of the original defendants in the so-called "Valler Bombings" during the fall of 1968. When "Project Eagle" was initiated, Forrest's attorneys had so far been able successfully to delay his trial date in the Valler bombings case. They were also able to get his bond lowered on the Federal charge, allowing him to remain "on the streets." Recently released Red Squad documents provide a detailed look at the nuances of the surveillance under "Project Eagle," which included "tailing" Forrest throughout the day, whether he was on foot or in a vehicle, as well as "staking out" his residence at the Detroit White Panther

house. The officers involved in the surveillance were able to utilize Detroit's computerized motor vehicle registration system to immediately ascertain the names in which all targeted vehicles with Michigan license plates were registered.<sup>78</sup>

While "Project Eagle" may have been part of a larger FBI-directed effort to locate fugitive Plamondon, an incident which occurred on March 12 indicates that the primary purpose of the surveillance was to locate the individual(s) or group(s) who placed the huge cache of dynamite inside the 13th Precinct on March 6. On the day in question, three members of the Detroit WPP Chapter -- Charles Booker, David Gaynes, and Glenn Davis -- were on their way to a target-shooting "self-defense" class at "a state recreation area," when they were pulled over by an unmarked police car and taken into custody at gun-point, without being charged with any offense. After arriving at the 13th Precinct station on Woodward Avenue, they found out the reason that they were stopped and detained:

One officer said they were going to have to start kicking in some white boys' doors...Another officer stated that the police were going to keep arresting members of the community until they found out who had planted the bomb in the ladies room of the station. We were held for a number of hours and interrogated about our political beliefs, called communists and told to leave the

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<sup>78</sup>John and Leni Sinclair Red Squad Files, Detroit Police Department, Intelligence Bureau, Inter-Office Memoranda, March 13-20, 1970. See Figure A-18 in the Appendix.

country...At no time were we informed as to the charges against [us].<sup>79</sup>

The statement makes clear the "siege mentality" that existed within the 13th Precinct, as well as its consequences for the local radical establishment. A detailed diagram of the inside of the White Panther house on John Lodge Avenue, located in the files of the Red Squad, indicates that the Detroit Police Department might also have had an informer inside the local White Panther Chapter. Hand-written notations on the diagram carefully detail the locations of all doors, hallways, and corridors; also indicated is the location of "Jack's Room."<sup>80</sup>

The arrival of Neil J. Welch as the new SAC indicated the importance which the Detroit office now had for Hoover and other top FBI officials. Arriving in May of 1970, Welch's primary responsibility involved locating the fugitive Weathermen and bringing them to justice. Detroit was selected as the site for a Federal Grand Jury investigation of the Weathermen, due to several factors. First, the December, 1969 Flint War Council had been held just north of

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<sup>79</sup>John and Leni Sinclair Red Squad Files, typed statement from Charles J. Booker, David Gaynes, and Glen Davis, March 16, 1970.

<sup>80</sup>John and Leni Sinclair Red Squad Files, hand-written diagram of the Detroit Chapter's house, undated [probably early 1970]. See Figure 4-4 on page 377. John Waterhouse Forrest was commonly known as "Jack." Police and FBI diagrams of radicals' homes and offices were frequently utilized in raids. See Churchill and Vander Wall, The COINTELPRO Papers, 139.

Detroit. Second, during 1969, the southeast Michigan area had provided the largest concentration of Weathermen in the country, including Bill Ayers and Diana Oughton. By the time of Welch's arrival in Detroit, Oughton had been identified as one of the Weathermen bombers who had been killed in the New York townhouse explosion on March 6. Ayers, however, remained underground.<sup>81</sup>

Welch was sent to Detroit because of his reputation for getting results. His background with the FBI dated to the early fifties, and he had worked in a wide variety of cities across the country, including New Haven, Boston, and Buffalo. It was during his four years as SAC of the Buffalo office that he gained a reputation within the Bureau for innovative tactics that resulted in the arrests of several high-ranking mobsters. The Detroit assignment was not an attractive one for Welch; referred to as a "career graveyard," the office had gone through nine different SACs in less than seven years.<sup>82</sup> However, the new SAC took charge of the 175-odd agents at his disposal, and soon gave Hoover what he wanted. Working closely with the Grand Jury, in mid-July Welch rolled out a high-profile series of indictments against thirteen

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<sup>81</sup>Taube recalls a secret meeting with his "best friend" Ayers shortly after the townhouse explosion had killed their mutual friend from the days at the University of Michigan. Ayers refused to tell Taube who had been involved. His paranoia shocked Taube. See ASHP-Taube Interview, 25-26.

<sup>82</sup>Welch and Marston, Inside Hoover's FBI, 148; see also Sanford J. Ungar, FBI, (Boston: Little, Brown and Company, 1975), 196.

Weathermen leaders, charging them with conspiracy to commit acts of violence against the U.S.A. during their "War Council" in Flint.<sup>83</sup>

Within a month of his arrival in Detroit, Welch had set his sights on the White Panthers. On June 22, he requested permission from Hoover to install warrantless wiretaps on the White Panther house at 1520 Hill Street in Ann Arbor.<sup>84</sup> In his request, Welch stated that the "specific information being sought" was as follows:

1. Advance information concerning proposed acts of violence;
2. Assist in identifying leaders and associates;
3. Determine source of financial support;
4. Determine relationship with other YIP-WP chapters and white and black extremist organizations on a national and international basis;
5. Details concerning YIP-WP activities and operation;
6. Information concerning the whereabouts of LAWRENCE ROBERT "PUN" PLAMONDON, Bureau Fugitive and Top Ten.<sup>85</sup>

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<sup>83</sup>Welch and Marston's self-serving account of the former's adventures with the FBI takes the position that although he generally disagreed with "internal security" investigations of New Left and other radical groups, Hoover and Asst. Director William Sullivan allegedly made it clear to him that either he would deliver the radicals or face the ruination of his career.

<sup>84</sup>SAC, Detroit to Hoover, June 22, 1970, 62-112678-61. See Figure A-19 in the Appendix.

<sup>85</sup>Ibid., 2.

The focus of Welch's investigation appears to have been the Youth International Party, as well as the alleged YIP-WPP merger; locating Plamondon appears to have been a secondary concern. Also worthy of note is the fact that Welch made no reference to the Weathermen in his request. Interestingly, Hoover rejected Welch's request on June 30, in a memorandum that dressed down the SAC for failing to follow Bureau procedures when requesting wiretaps. The Director criticized Welch for discrepancies in his request, such as referring to an "impending merger" of YIP and WPP in one place and then using the caption "YIP-WP" in another, indicating that the merger had already taken place. Hoover's concluding statement was that the "overall commitments of the Bureau" would not permit him to go along with the wiretap.<sup>86</sup>

The White Panthers would not remain a low priority for the FBI Director much longer. On July 23, 1970, the Michigan State Police captured Plamondon near Cheboygan, Michigan, in the northernmost section of the state. He had been riding in a vehicle with Skip Taube and "Jack" Forrest, and one of them had carelessly tossed a beer can onto a highway, attracting the attention of a highway patrolman. Not recognizing Plamondon due to his fake identification, the officer allowed the group to continue on its way, after issuing a warning. Only after the response to the policeman's radio check on Taube and Forrest came in did he realize whom he had just

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<sup>86</sup>Hoover to SAC, Detroit, June 30, 1970, 62-112678-62.

stopped. Within minutes, the three White Panthers were in custody, offering no resistance. Press reports at the time of the arrests quoted FBI agents as stating that Plamondon had a .38 caliber Derringer pistol, a rifle, a shotgun, and "two cartons of dynamite" in his possession. Judge Lawrence Gubow set Plamondon's bail at \$100,000. Taube and Forrest were each charged with harboring a fugitive, and held in lieu of \$25,000 bond. The media focused upon Plamondon's appearance, which included short hair and no beard.<sup>87</sup>

The specific intention(s) of Taube and Forrest's meeting with Plamondon in northern Michigan remain unclear. Since his return to the U.S. from abroad in late May or early June, a very small circle of White Panthers had arranged secret meetings with him every two to three weeks, delivering food and other materials, and taking possession of his recorded and written messages for the media. Genie Plamondon had made a majority of the previous trips, but on this occasion was visiting WPP chapters in California. Immediately following the arrests, rumors circulated in Ann Arbor and Detroit that the three may have been plotting to free Sinclair from prison in Marquette, located not far from where they were captured. The FBI's report of September 3 intimated that the group's intended target may have actually been a bank in Traverse

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<sup>87</sup>Detroit Free Press, July 24, 1970, 1; Detroit News, July 24, 1970, 3-A. See Figure 4-5 on page 378 for a rare photograph of Plamondon, Taube, and Forrest while underground.

City.<sup>88</sup> In an interview during the late seventies, Skip Taube stated that at the time of their capture, he and Jack were merely assisting Pun with moving his camp, because Plamondon had been living in a tent and "wanted to move 'cause winter was coming." After being asked specifically about the rumor of the prison break, Taube added:

I can't speak for Pun or Jack, man, no telling what thoughts may have crossed their minds sometimes. As a group, we had no plans other than to take Pun and stash him. Now Pun, all he had time to do was to make plans. And, I'm sure, if we wouldn't have got busted, it could have only gotten worse. 'Cause you don't sit around with a bunch of dynamite and a bunch of rifles plotting the revolution without getting yourself into some trouble.<sup>89</sup>

The shock of having three additional high-ranking officials in jail devastated the White Panthers, as Genie recalls:

It was like an eye-opener to where we were at. That we had not been as serious as we thought we were. That we had not been as on top of the situation as we thought we were. It was like this sudden shock of what fools we were in a lot of ways to have presented ourselves as being militant, organized, and serious and then to have our Minister of Defense, who was underground on this charge of bombing the CIA office, caught for throwing a beer can...how stupid...It was embarrassing.<sup>90</sup>

The materials found in the Volkswagen van in which the three were travelling would ultimately have much greater

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<sup>88</sup>FBI Report Re: Plamondon, September 3, 1970, 64.

<sup>89</sup>ASHP-Taube Interview, 28-30 [quote 30].

<sup>90</sup>ASHP-Genie Plamondon Interview, 28.

long-term consequences for them. For the FBI, the confiscated materials provided valuable information concerning Plamondon's time spent underground, as well as address books and correspondence. Under Welch's direction, the Detroit office of the FBI carefully reviewed each and every one of the 700-odd sheets of paper, and prepared a 107-page report, completed on September 3. The report was clearly intended not only for Hoover and Sullivan at FBI Headquarters, but also for local and state-level law enforcement agencies. Within three months of the report's issuance, Hoover elevated the White Panthers to the status of one of the most dangerous militant organizations in America, and brought them to the attention of the Nixon Justice Department.<sup>91</sup>

Welch did not wait for the conclusion of the report to re-submit his request for a warrantless wiretap on the White Panther house. On August 10, 1970, four weeks after Plamondon's capture, he issued a second request to Hoover, this time focusing on the illusive "underground apparatus" to which Plamondon's materials had alluded. Welch's request stated:

It is believed that coverage of this address may produce further pertinent information concerning that "underground" system which may lead to the

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<sup>91</sup>FBI Report Re: Plamondon, September 3, 1970.

location of other wanted Bureau New Left Fugitives.<sup>92</sup>

The manner in which Welch completed the required application for surveillance indicates the importance of the Plamondon/Taube/Forrest materials. The "information being sought" category was revised, as follows:

- (a) Advance information concerning proposed acts of violence.
- (b) Assistance in identifying leaders and associates in 'revolutionary violence['] which is advocated by WPP leaders.
- (c) Assistance in determining source of financial support for this group.
- (d) Determination of the relationship with other YIP-WP Chapters and white and black extremist organizations on a national and international basis.
- (e) Information concerning whereabouts of "Underground" Bureau Fugitives.

Item "(b)" of the above demonstrated Welch's close reading of the correspondence which passed between Sinclair, Plamondon, and Taube.

Several statements made by Welch merit attention. First, he admitted that information used in the request had come from "Detroit informants," as well as from the Plamondon materials, and concluded that the White Panthers and Youth International Party were in fact "working out an alliance." Second, his request mentioned, for the first time, Genie Plamondon's trips to Hanoi and Moscow, as well as Taube's

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<sup>92</sup>SAC Detroit to Hoover, August 10, 1970, 62-112678-83, 2.

former relationship with Weathermen Ayers and Oughton. Third, Welch stressed the urgency of his request, stating that "the need is greatest in the immediate future inasmuch as Detroit's vigorous prosecutive efforts against the WPP leadership [are ongoing]." Fourth, in anticipation of similar procedural complaints, Welch reminded Hoover that the "data set forth herein concerning cost and feasibility" were similar to a request Detroit had made during the spring of 1970 for a warrantless wiretap on suspected Weathermen, which "was authorized by the Bureau at that time." Finally, he boasted that "The YIP-WP in its emerging coalition is developing as a leading revolutionary white organization in the country."<sup>93</sup>

The new information provided via Welch's revised request more than persuaded Hoover that the surveillance was warranted, and the Director promptly sent a memorandum to Mitchell, arguing, in somewhat less detail, several of Welch's main points. However, Hoover's memorandum contained a few passages referring to information which was not included in Welch's request, indicating that he had personally inspected either the materials captured with Plamondon, or a was given a preliminary report on them:

Plamondon noted in this material that conditions in this country must escalate to 'revolutionary violence' where battles will not be on police level of law and order but on war level which will

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<sup>93</sup>Ibid., 1-3; SAC Detroit to Hoover, August 10, 1970, 62-112678-84, 1-6.

force the calling out of the Army. Plamondon refers to this new level of violence as involving 'bombs and sabotage.' He further states that financial problems are severe and that 'they' are going to have to get into 'ripping off banks like our brothers in South America.' He also suggested that the example of 'the brothers in South America' who kidnap American ambassadors to trade off for prisoners should be followed.

Hoover's memorandum also claimed that information gathered from the warrantless wiretap "will be introduced as evidence in court."<sup>94</sup> In fact, both Welch and Hoover had the same opinion; this signified a major shift in the FBI's internal surveillance policies.

On August 19, 1970, Attorney General Mitchell approved the installation of a warrantless wiretap on the headquarters of the White Panther Party in Ann Arbor. Much had changed in the two months since Welch's initial unsuccessful request. Plamondon, Taube, and Forrest had given the White Panther myth an appearance of reality, by means of their rhetoric, as well as their actions. The Director of the FBI was now referring to the White Panthers as "a leading revolutionary white group in the United States."<sup>95</sup> However, when Mitchell signed Hoover's request, there is no evidence that he had any prior knowledge of the group. It would take a sequence of events, occurring over the next few months, to ultimately lead him to select the White Panthers' CIA conspiracy case for the re-institution of the Mitchell Doctrine.

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<sup>94</sup>Hoover to Mitchell, August 18, 1970, 62-112678-82, 1-2.

<sup>95</sup>Ibid., 1.



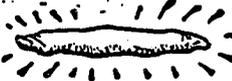
# HELP BUILD A BETTER AMERICA!

OFFICE OF THE ATTORNEY GENERAL  
STATE OF MICHIGAN  
RECEIVED  
APR 30 1970  
9:30 11 12 1, 2, 3

NOW, YOU DON'T NEED A "SHRINK"  
TO FLUSH OUT KARMIC CONGESTION!  
**GET STONED!** *A. Modano!  
Miraculo!*

*Here's  
How!*

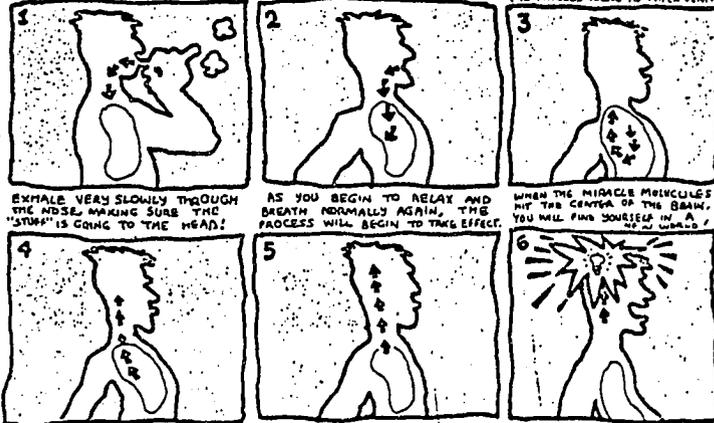
SMOKE AT LEAST TWO OF  
THESE EVERY DAY FOR ONE  
YEAR! THIS METHOD CAN'T FAIL!!



FIRST, TAKE A  
GOOD LONG "DRAG" ON  
YOUR "JOINT" OR "MIGGLE".

PULL ALL THAT GOOD SMOKE  
DOWN INTO YOUR LUNGS.  
DO NOT EXHALE!!

HOLD THE SMOKE DOWN  
THERE IN YOUR LUNGS, USING  
THE PROCESS KNOWN AS HYPERVENTILATION.



EXHALE VERY SLOWLY THROUGH  
THE NOSE, MAKING SURE THE  
"STUFF" IS GOING TO THE HEAD!

AS YOU BEGIN TO RELAX AND  
BREATHE NORMALLY AGAIN, THE  
PROCESS WILL BEGIN TO TAKE EFFECT.

WHEN THE MIRACLE MOLECULES  
HIT THE CENTER OF THE BRAIN,  
YOU WILL FIND YOURSELF IN A  
STATE OF EUPHORIA!



(Figure 4-1)  
WPP Flyer Mailed to Michigan Congressmen and Senators  
on April 30, 1970

Source: John and Leni Sinclair Red Squad Files



(Figure 4-2)

"Pun" Plamondon with Black Panthers, 1969

Source: Leni Sinclair Personal Photography Archives



(Figure 4-3)  
White Panther/Weathermen Meeting, circa 1970:  
"Skip" Taube (striped pants), Bill Ayers (w/cigarette),  
and Diana Oughton (seated in wooden chair next to Taube)

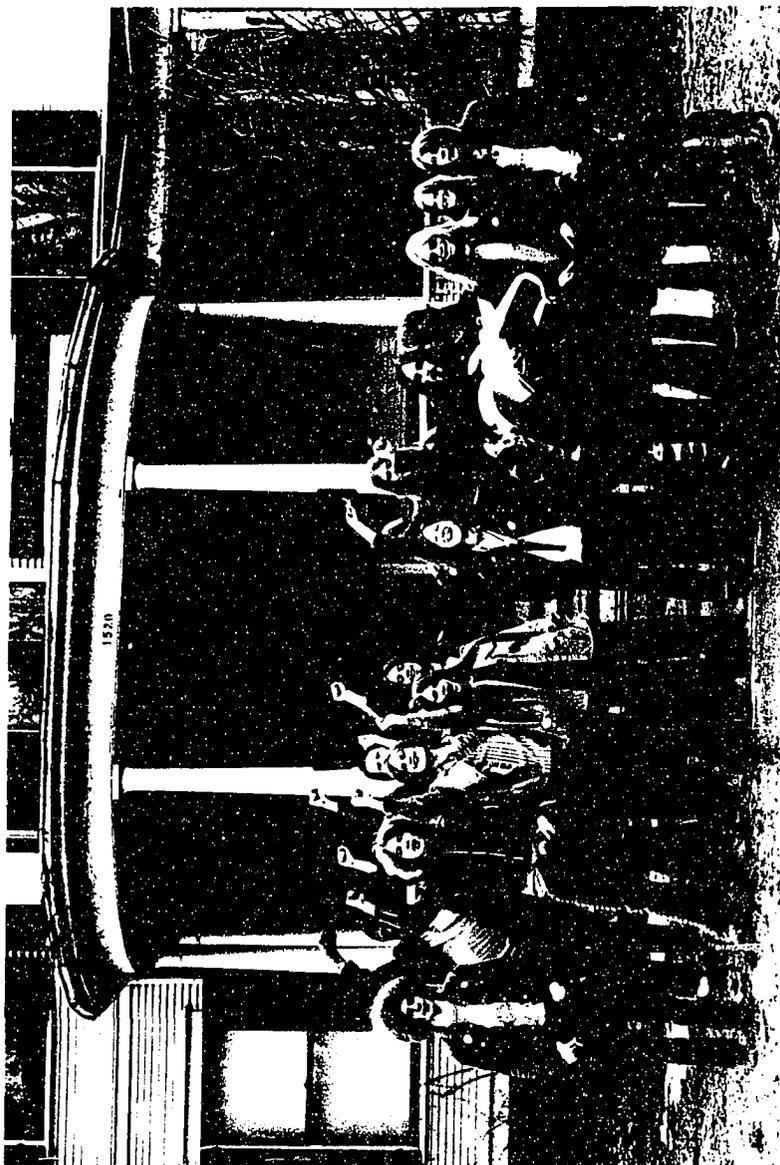
Source: Leni Sinclair Personal Photography Archives





(Figure 4-5)  
White Panther Mythmakers:  
"Jack" Forrest, "Pun" Plamondon, and "Skip" Taube  
From the "Underground," Spring, 1970

Source: Leni Sinclair Personal Photography Archives



(Figure 4-6)  
National Security Threat?  
White Panthers in Front of Commune on 1520 Hill Street,  
circa Fall, 1969

Source: Leni Sinclair Personal Photography Archives

## IV.

Title III specified the due process of law required to control the use of wiretap[s]...These include securing a court order from a judge; showing probable cause; particularizing the offenses under investigation; [etc.]...Now these provisions are vital, for they follow the cherished American legal tradition in securing warrants...They give us confidence that in using the wiretap under these limitations we are reaffirming the constitutional safeguards going back to the Bill of Rights. -- John N. Mitchell, October 5, 1970<sup>96</sup>

The defendant Plamondon has participated in conversations which were overheard by Government agents who were monitoring wiretaps which were being employed to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government [e.g. warrantless taps]...This affidavit is submitted in connection with the Government's opposition to the disclosure...of electronic surveillances which the Government contends were legal. -- John N. Mitchell, December 18, 1970<sup>97</sup>

During the fall of 1970, the public's fears about Weathermen bombers, Charles Manson-type radicals, and what

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<sup>96</sup>U.S. Department of Justice, "Address by John N. Mitchell, Attorney General of the United States, Before the 77th Annual Conference of the International Association of Chiefs of Police," Atlantic City, New Jersey, October 5, 1970, located in the Personal Papers of Senator Robert P. Griffin, Clarke Historical Library, Central Michigan University, Mt. Pleasant, Michigan, box 452, "Griffin on the Issues," folder: "Law and Order" [hereafter "Mitchell IACP Address"]. The author is grateful to Senator Griffin [now a Michigan State Supreme Court Justice] for allowing access to these papers.

<sup>97</sup>Affidavit from Attorney General John N. Mitchell, dated December 18, 1970, submitted to U.S. District Court Judge Damon J. Keith, Davis Papers.

many viewed as an overall breakdown in respect for traditional values and institutions were exacerbated by a ratings-hungry national media, as well as opportunistic politicians. The polarized political environment provided an excellent backdrop, and was one of the principal contributing factors, to the Nixon Administration's decision to reinstitute the Mitchell Doctrine.

Recovering from the crisis surrounding his fateful Cambodia decisions of the late spring, Nixon regained his composure during the summer months, aided by higher public opinion poll ratings from the "silent majority." By late July he indicated that he would assume an unprecedented front-line role in the upcoming mid-term elections, in an attempt to overcome Democratic majorities in both houses. His basic strategy for the campaign was very similar to the one he had used in his successful Presidential election bid two years earlier: namely, to link the Democrats to crime, violence, and student protestors. A focal point for the Administration's offensive was Congress, especially the House Judiciary Committee, which had delayed consideration on a number of anti-crime bills since the early spring. The primary warrior in the Administration's offensive was Vice President Spiro Agnew, whose speeches blasting the Democrats formed the model for the bitter Congressional races that

followed. On July 10, Agnew claimed that polarization over political issues was positive and healthy.<sup>98</sup>

A few highly publicized events during the summer and fall of 1970 kept the crime and lawlessness issue in the public eye. On July 23 the Justice Department issued high-profile indictments against thirteen suspected Weathermen in Detroit. On August 28 a bomb exploded on the campus of the University of Wisconsin at Madison, killing a graduate student; the act was engineered by a small New Left sect known as the "New Year's Gang." On October 8, two separate bombings took place on the West Coast, damaging a courtroom in San Rafael and an Army Reserve training building in Seattle. And finally, the trial of radical murderer Charles Manson got underway. As Gitlin states, "For the media, the acidhead Charles Manson was readymade as the monster lurking in the heart of every longhair."<sup>99</sup>

By early fall, Nixon and the G.O.P. dominated the political environment with their single-issue focus on crime, even though a majority of Americans believed inflation and a worsening economy were of greater concern. The degree to which the Administration fixated upon student protestors and New Left radicals is chronicled in amazing detail in H.R. Haldeman's recently-published Diaries. The July 25 entry

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<sup>98</sup>New York Times, July 11, 1970, 14. Thereafter, media commentators and many Democrats referred to Agnew's position as promoting "positive polarization."

<sup>99</sup>Gitlin, The Sixties, 404.

states: "Some talk of politics again. [President] Wants to be sure our candidates tie their opponents into hippies, kids, Demos."<sup>100</sup> By early-September the Administration's campaign strategy was firmly in focus, supported by speeches from right-wing ideologues Patrick Buchanan and William Safire. Haldeman's entry for September 9 states:

Long morning meeting with political operations and VP's crew for the campaign. P really in his element as he held forth, for Safire and Buchanan, on speech content, campaign strategy, etc. Came up with some darn good lines and ideas, all the stuff he'd like to say but can't. P was delighted with Pat's kickoff speech for VP, which really hits hard. Really wants to play the conservative trend and hang the opponents as left-wing radical liberals. Said to say, 'Our opponents are not bad men, they are sincere, dedicated, radicals'...And force them on the defensive.<sup>101</sup>

At a campaign stop in San Jose, California, on October 29, Nixon stood on the roof of his limousine, prodding a small group of protestors by wildly waving peace signs -- an incident clearly staged for media effect.<sup>102</sup> Two days later, in a speech in Phoenix, Arizona, Nixon called for an

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<sup>100</sup>Haldeman, The Haldeman Diaries, 184.

<sup>101</sup>Ibid., 192.

<sup>102</sup>As Haldeman notes in his diary on October 29: "We wanted some confrontation and there were no hecklers in the hall, so we stalled departure a little so they could zero in outside, and they sure did...rather scary as rocks were flying, etc...Made a huge incident and we worked hard to crank it up, should make a really major story." See Ibid., 205.

end to the "appeasement" of "thugs and hoodlums" in American society.<sup>103</sup>

Finding themselves as vulnerable on the crime issue as they had been in 1968, the Democrats acted predictably. Former Vice President Hubert Humphrey admonished his fellow Democrats to either align themselves firmly on the side of "law and order" or face the same fate that befell his campaign at the hands of Nixon's "law and order" assault two years earlier.<sup>104</sup> Congressional Democrats responded in September and October, supporting nearly all of the Administration's anti-crime bills.<sup>105</sup>

On October 15, Nixon signed into law the "Organized Crime Control Act," an omnibus package containing such measures as pre-trial "preventative" detention of suspects, a so-called "no-knock" law, a significant revision of Federal Grand Jury witness immunity law (so-called "use immunity"), the death penalty for bombers who kill, and a provision allowing judges to tack on additional sentences of up to thirty years for defendants found to be "special offenders." Civil libertarian groups such as the ACLU immediately vowed to challenge several of the bill's components. Mitchell's comment at a Women's National Press Club reception on

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<sup>103</sup>New York Times, November 1, 1970, 1.

<sup>104</sup>New York Times, August 12, 1970, 25.

<sup>105</sup>One notable exception was Title VII, the Administration's unsuccessful attempt to overturn the Alderman decision.

September 18 was prophetic: "this country is going so far right you are not even going to recognize it."<sup>106</sup>

The passage of the new Omnibus Crime Act represented the high point of the Nixon Administration's attempts to address the problems of crime and social disorder with "legislative solutions." Having entered office at a time when Congress and the Attorney General (Ramsey Clark) had been at odds with one another concerning crime policy, the Mitchell Justice Department acted forcefully to regain Executive influence over the Legislative Branch. Unable to dislodge the many unpopular rights-focused Warren court rulings, Mitchell sought legislative routes around the Judiciary. Yet, as John Eliff points out, legislative solutions are usually influenced by partisanship and the "politics of the moment," rather than by thoughtful consideration of long-term consequences. For all of the Administration's efforts securing the passage of the 1970 crime bill, Supreme Court decisions such as Miranda remained the law of the land. In reality, the legislation merely provided Nixon, Mitchell, and the bandwagon in Congress with some temporary political benefits.<sup>107</sup> The net long-term effect of the legislation was to further lessen the Judiciary's credibility and stature of the Judiciary. This situation provided Nixon with the

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<sup>106</sup>Quoted in New York Times, September 19, 1970, 10.

<sup>107</sup>The outcome of the Congressional election was a draw, with the Democrats retaining control of both houses.

opportunity to reassert the power of his office, through a "cult of Executive expertise" in law enforcement matters, such as electronic surveillance.<sup>108</sup>

The Administration displayed a new boldness in its surveillance policies. One important example of this was support for long-term "investigative" wiretaps, in addition to short-term "prosecutive" surveillance. In a rare news conference on July 14, Mitchell asserted that "investigative" wiretapping against "organized crime" was up 100 percent over 1969 figures.<sup>109</sup> By late July, the Administration's public relations campaign to convince the American public of the effectiveness of wiretapping as a law enforcement tool was in full swing, assisted by a powerful Congressional ally, Senator John L. McClellan. As one of the principal drafters of Title III, McClellan might have felt a strong need to extol its effectiveness during an election year. Whatever the motivation, he applauded the Justice Department's success in utilizing Title III court-approved wiretapping.<sup>110</sup>

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<sup>108</sup>Eliff, Crime, Dissent, and the Attorney General, 81, 226, 251.

<sup>109</sup>New York Times, July 15, 1970, 16. Significantly, Mitchell did not directly address the issue of warrantless "national security" wiretaps, which the Administration had claimed the legal right to conduct against domestic organizations [the Mitchell Doctrine]. When pressed on the issue, Mitchell merely added that the number of these taps "had not changed significantly."

<sup>110</sup>(Washington, D.C.) Evening Star, August 3, 1970, A-3.

One of the more significant actions in the Administration's pro-wiretapping offensive occurred on October 5, when Mitchell expounded the statistical effectiveness of court-approved wiretapping before a meeting of the International Association of Chiefs of Police. He asserted that "in reviewing our use of wiretapping in the last year-and-a-half, I think you'll agree that the only repression that has resulted is the repression of crime." Adding that the Justice Department was rapidly expanding its wiretapping operations, he stated that in his view, its use by federal authorities was "not only a right, but a duty."<sup>11</sup> An additional example of the Justice Department's bolder public stand on wiretapping was its virtual admission in the "Chicago Seven" case that the FBI had wiretapped defendant Bobby Seale during the trial.<sup>12</sup>

The Administration's most significant wiretapping initiative was its attempt to overturn the Alderman decision, via Title VII of the Organized Crime Control Act. Unhappily for Mitchell and the Justice Department, the House Judiciary Committee, under the leadership of Representative Emanuel Celler, deleted the principal component of the initiative,

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<sup>11</sup>Mitchell IACP Address, 8. See also New York Times, October 6, 1970, 1; Washington Post, October 6, 1970, A-1. Mitchell's address also made a strong appeal for law enforcement officials to work for the passage of wiretapping statutes in those states that did not have them.

<sup>12</sup>New York Times, August 8, 1970, 47; Washington Post, July 31, 1970, A-17.

which would have required that Federal Judges conduct in camera inspections of illegally-obtained (warrantless) surveillance logs, to determine if information in them was relevant to the case and "in the interest of justice" -- rather than automatically ordering their disclosure to the defense, as was proscribed in Alderman.<sup>113</sup> Chairman Celler referred to the questionable section of Title VII as one of the "unconstitutional potholes" which had to be removed from the crime package before he and other liberal Democrats would support it.<sup>114</sup> Consequently, the most the Administration was able to get was a futile and non-binding "declaration" that "trial judges and not defendants will inspect logs of illegal eavesdropping," as well as a binding provision that illegal wiretaps conducted five years or more before a defendant committed the offense in question were not subject to the disclosure provisions of Alderman.<sup>115</sup> Thus, for all of the Administration's success in the area of anti-crime legislation, it failed in its primary attempt to acquire a "legislative solution" to the Alderman decision. The ruling virtually guaranteed that the gulf separating the Administration's public and private wiretapping policies would continue to widen.

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<sup>113</sup>Eliff, Crime, Dissent, and the Attorney General, 77.

<sup>114</sup>Quoted in New York Times, September 24, 1970, 56.

<sup>115</sup>Ibid., October 18, 1970, 9.

Throughout the late summer and fall the Administration's secret wiretapping policies also became increasingly bold and forceful, bolstered by the same twin forces of social disorder and anti-crime hysteria which had influenced the passage of the Organized Crime Control Act. Stymied by the failure of both the Huston Plan and of Title VII, Nixon had become more convinced than ever of the need to expand vastly the clandestine intelligence gathering capabilities of the government, both to prevent bombings and other crimes, and to expose the violent and subversive intentions of the New Left and other radical groups. Haldeman's journal entry for August 25 vividly demonstrates the Administration's mind-set in the wake of the failed Huston Plan:

San Clemente. Discussed domestic security problem (E and I had discussed with Mitchell yesterday). P said I should take it over because I'm the only one J. Edgar Hoover trusts and will take orders from. Others, especially Mitchell, want it under Domestic Council, with a staff of intelligence types to evaluate input and order necessary projects, etc. Will do it one way or the other, in any event will drop the interagency task force approach which we've started and run into a snag with FBI and Hoover.<sup>116</sup>

Throughout September and October, Nixon and his closest advisors courted Hoover. They invited him to social affairs and brought him into the inner circle of policy-making, a position he had enjoyed under several previous Presidents.

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<sup>116</sup>Haldeman, The Haldeman Diaries, 191.

Haldeman was ordered by Nixon to have lunch with Hoover twice a month, "to keep up close contact."<sup>117</sup>

Very soon the renewed relationship provided rewards for both sides. Over a two month period beginning in early September, Hoover gradually removed several of the restrictions on FBI intelligence gathering techniques and tactics that he had previously refused to support. Perhaps the most important change in FBI practices was a vast expansion of warrantless "national security" wiretaps. These were directed against the full spectrum of New Left and other radical groups -- including the Michigan White Panthers.<sup>118</sup> In return, Hoover was granted one thousand new agents, as well as a blanket authorization to infiltrate college campuses, whenever serious disturbances occurred.<sup>119</sup> By the end of the year, Hoover's "Ten Most Wanted" list had been expanded from ten to sixteen, with nine slots reserved for New Left radicals.<sup>120</sup>

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<sup>117</sup>Ibid., 192.

<sup>118</sup>Theoharis, Spying on Americans, 36.

<sup>119</sup>New York Times, September 23, 1970, 1. The Administration's request for 1000 additional FBI agents was delivered to Congress during the period of anti-bombing hysteria which followed the New Year's Gang bombing at the University of Wisconsin's Math Science Research Center, in which one student was killed. Considered in Congress during a period of frenzied bi-partisan activity on anti-crime measures, the bill was immediately accepted by House Democrats, anxious to refute Republican claims that they were "soft on crime."

<sup>120</sup>Ibid., November 28, 1970, 13.

During the fall and early winter, the Administration continued to consider initiatives designed to centralize domestic intelligence gathering under White House control. The two new men in charge of the project, John Dean and Robert Mardian, pursued different approaches to the problem of inadequate intelligence. Dean, a White House counsel, outlined his desire for a limited, piecemeal approach on September 18, in a memorandum to Mitchell. Dean recommended that "the most appropriate procedure would be to decide on the type of intelligence we need, based on an assessment of the recommendations of this unit, and then proceed to remove the restraints as necessary to obtain such intelligence."<sup>121</sup> The Administration's pressure on Hoover to relax his restrictions on warrantless wiretapping can be viewed as an example of Dean's strategy.

Mardian, the newly-appointed Assistant Attorney General in charge of the Justice Department's Internal Security Division, continued to pursue the sweeping intelligence gathering authority represented by the Huston Plan. He was placed in charge of two White House-directed intelligence gathering units, the Inter-divisional Intelligence Unit (IDIU), which had been created by former Attorney General Ramsey Clark, and a revamped Intelligence Evaluation Committee (IEC), originally created by the Nixon Administration in May of 1969 to provide "threat assessment"

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<sup>121</sup>Quoted in Theoharis, Spying on Americans, 36.

in instances of civil disorder. Both units underscored the need for cooperation across the full spectrum of domestic and international intelligence gathering agencies. Although Mardian's centralized units enjoyed strong support from Nixon and Mitchell, Hoover's response was lukewarm.<sup>122</sup> Thus, for all of the boldness demonstrated by the Administration's public and secret surveillance policies during 1970, a number of "barriers" remained in place, effectively blocking Nixon's desire for Executive control over all domestic intelligence gathering.

The politicized anti-crime atmosphere which pervaded Washington during the fall of 1970 influenced the manner in which law enforcement was carried out in communities across the country. Professor Jerome Skolnik, of the National Commission on the Causes and Prevention of Violence, studied police behavior and attitudes closely during this period. He concluded that police increasingly viewed themselves as an embattled minority, whose hands were tied by liberal Supreme Court rulings and leftist civil libertarians.<sup>123</sup> According to Skolnik, these feelings manifested themselves through increased membership in police fraternal organizations and the emergence of law enforcement as an influential political force in many local communities. Highly politicized police

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<sup>122</sup>Donner, The Age of Surveillance, 282-284. Donner describe's the IEC's "ultimate purpose" as the revival of the Huston Plan.

<sup>123</sup>Eliff, Crime, Dissent, and the Attorney General, 73.

authority predictably reacted very favorably to the anti-crime focus of Nixon and Mitchell.

Neil J. Welch, the new FBI Special Agent-in-Charge (SAC) in Detroit, regarded himself as answering to a "higher calling" by regularly "bending" Hoover's rules and regulations, to say nothing of ignoring the law.<sup>124</sup> Welch employed a number of techniques which Hoover strongly opposed: the use of very young long-haired informers as agents provocateurs; the acquisition, often through "irregular" channels, of the latest high-tech video, wiretapping, and microphone surveillance equipment; and the creation of a super-secret investigative unit, known as the "Nine Squad," which focused solely on projects of Welch's choosing, and was not assigned to regular Bureau business.<sup>125</sup>

Welch's proclivity for selective adherence to Bureau regulations carried over to his wiretapping operations. During the spring and summer of 1969, Attorney General Mitchell had issued guidelines for the FBI to follow in its

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<sup>124</sup>In his memoir, Welch discusses Senator Sam Ervin's investigation of FBI practices during the early seventies. After quoting Ervin as saying that "the United States Constitution does not require the FBI to be efficient," Welch adds "he might have even said that the Constitution does not appear to permit efficient law enforcement." See Welch and Marston, Inside Hoover's FBI, 278-79.

<sup>125</sup>The Welch/Marston book accurately portrays the widening rift between FBI agents, especially the SAC's, and Hoover. See Ibid., 147-61. For additional information concerning the deteriorating Director/SAC relationship, see Sanford J. Ungar, FBI, 196-99.

Title III and "national security" wiretapping. These guidelines were promptly distributed by Hoover to the SAC's with specific instructions that they should ensure that all agents receive them in writing. One of the more important guidelines concerned the sanctity of attorney-client conversations; agents were instructed to discontinue immediately surveillance whenever defendants in pending criminal trials and/or their attorneys were on the line. A series of detailed procedures were to be followed in the event that such conversations inadvertently were overheard by agents.<sup>126</sup> Evidence that Welch paid little attention to these guidelines is contained in his request for a thirty-day continuance of the White Panther wiretap, dated September 14, 1970. In the section of the memorandum pertaining to "information of value" that had been overheard during the previous month, Welch stated that "On 9/12/70 it was learned that WILLIAM KUNTSLER [sic], ABBIE HOFFMAN, JERRY RUBIN and [Leonard] WEINGLASS would be in town for a hearing involving PUN PLAMONDON on 9/21/70."<sup>127</sup> Welch not only informed his boss about this patently illegal eavesdropping: he also sent

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<sup>126</sup>Mitchell to Hoover, July 14, 1969 [unnumbered document in the legal papers of Hugh M. Davis]. This document is known as a "minimization memo," because it is intended to reduce the possibility that the Government might overhear certain constitutionally-protected attorney-client conversations, which, if revealed, could severely damage prosecutions.

<sup>127</sup>SAC, Detroit to Hoover, September 14, 1970, 62-112678-103.

the information via the FBI's electronic communications system ("DEtel") to the SACs in Chicago, New York, and San Francisco on September 24, apparently believing that the information would be of some use to them in their ongoing surveillance of the "Chicago Seven" defendants and attorneys.

Hoover's reaction was immediate. He advised Welch to re-read "SAC Letter 69-43," in which Mitchell's guidelines had been distributed to the field offices by the Director one year earlier. He directed Welch to seal all written materials pertaining to the conversation in question and send them to the Bureau's Headquarters. Furthermore, he instructed that all agents who had been exposed to the information sign sworn statements that they would never reveal the contents of the conversation, unless specifically directed by the Attorney General. Within a few days, all agents in the four FBI offices who had been privy to the information did sign such statements. Hoover concluded his memo with the following warning:

Detroit, in its monitoring of the White Panther Party in Ann Arbor, must follow the instructions set forth in SAC Letter 69-43 and insure [sic] that when any conversations between individuals who are defendants in Federal criminal cases and other individuals are overheard, monitoring should immediately cease.<sup>128</sup>

Welch's response on October 5 stated that "The conversation involved in this matter was not recorded on tape and all

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<sup>128</sup>Hoover to SACs Detroit, Chicago, New York, and San Francisco, September 25, 1970, 62-112678-112.

notes made by the monitoring Agents have been destroyed."<sup>129</sup> Evidence suggests that even after this turn of events, Welch did not revise his practices. Portions of FBI surveillance logs of the White Panthers, released as a result of a counter-suit against the government, reveal that on at least two occasions in October and December of 1970, the FBI agents monitoring the line listened to and duly logged calls from John Sinclair to the White Panther house, in which he discussed a variety of legal details pertaining to his pending cases.<sup>130</sup>

Welch's tactics against the White Panthers were not limited to the round-the-clock warrantless wiretaps that commenced on September 9. In fact, the FBI's elevation of the White Panthers to the status of "a leading revolutionary white organization in the United States" during the fall of 1970 had as much to do with the aggressiveness of Welch as with Plamondon's potential for revolutionary violence.<sup>131</sup> Welch's September third report on Plamondon's capture was widely disseminated, both locally, to the Detroit and

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<sup>129</sup>SAC, Detroit to Hoover, October 5, 1970, 62-112678-134. On October 28 Hoover admitted Welch's mistake in a memorandum to Attorney General Mitchell, and attached the signed statements from all of the agents within the four field offices who had been exposed to the Rubin conversation. See Hoover to Mitchell, October 28, 1970, 62-112678-139.

<sup>130</sup>A sample wiretapping log of Sinclair's conversations is located in Figure 4-7, on page 431.

<sup>131</sup>Quoted in SAC, Detroit to Hoover, August 10, 1970, 62-112678-84, page 2.

Michigan State Police Red Squads, as well as to Headquarters.<sup>132</sup> The result of this information sharing was that the White Panthers soon became well known to many in police and government circles.

An important, albeit bizarre, example of this involved an anonymous letter allegedly found among the personal effects of "Jack" Forrest at the time of his arrest with Plamondon and Taube on July 23. Addressed to the Detroit chapter of the White Panthers, and bearing a Los Angeles, California postmark dated May 27, 1970, the letter states:

To whomever:

A suggestion for you - and it's the ONLY WAY YOU WILL EVER FREE JOHN SINCLAIR - it may have occurred to you, but perhaps not.

Take a leaf from the brothers down in South America who keep snatching American Ambassadors to trade off for prisoners.

It then advises the reader that "If you got a really big pig, such as Ford or Griffin, you could probably get Bobby Seale

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<sup>132</sup>The copy of Welch's September 3, 1970, report on Plamondon's capture that was later found in the files of the Detroit Red Squad contains numerous hand-written comments. On page 18, alongside of a detailed breakdown of Plamondon's address book, the following comment appears: "THIS LIST COULD WELL BE THE NEW LEFT 'UNDERGROUND', EITHER PARTIAL OR TOTAL." A similar comment appears on page 82, alongside of information gleaned from Taube's address book: "These are people who are the 'underground'???? An additional variety of handwritten comment appears on page thirty-four: in the margin above a list of telephone numbers found in Plamondon's possession, the following appears: "WPP TALKS IN NUMBERS OVER PHONE...CODE???? The comment suggests that a various local law enforcement agencies were aware of the WPP surveillance, and also might have had access to the FBI's transcripts. See Figure A-20 in the Appendix.

& Huey freed as well. Rip off Spiro, and you could name your own price...." The letter continues:

OK, how do you know this is not a letter, though, from some provocateur trying to lure you into some action the pigs will be watching for? Nothing's 100% certain. But: a pig agent would be more likely to approach you in person, or thru an infiltrator in your Party itself, rather than via an anonymous letter...please destroy this letter after you read it - because of [sic] there are infiltrators in or around you, I don't care to have it fall into their hands.<sup>133</sup>

Anonymous letters of this variety were in fact among the most common COINTELPRO actions taken by the FBI against the New Left and counterculture during the era.<sup>134</sup>

Information from this COINTELPRO letter ultimately found its way to a surprising number of officials, thanks to

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<sup>133</sup>FBI Report on Plamondon, 75-77. A portion of this letter appears as Figure 4-8 on page 432.

<sup>134</sup>Churchill and Vander Wall, The Cointelpro Papers, 184. The classic FBI modus operandi with COINTELPRO tactics such as anonymous letters involved first studying the rhetoric and style of the New left and counterculture, particularly those individuals and groups espousing radical tactics. Agents would then pick up ideas circulating in the Movement, involving the latest tactics and methods. For example, the highly-publicized May 24, 1970, Weathermen "Declaration of War" announced that the organization was going underground to pursue the tactics of the Vietcong and Tupamaros. A third step in the process involved drafting anonymous letters to targeted individuals and/or groups, advocating -- in language as close to "street jargon" as possible -- that they commit certain actions for the benefit of the entire "Movement." COINTELPRO actions such as these were often submitted to Headquarters for Hoover's approval, but not always. See Welch and Marston, Inside Hoover's FBI, 156-57. Interestingly, the anonymous letter sent to the Detroit White Panthers was postmarked May 27, 1970, only three days after the Weathermen's "Declaration of War" had mentioned the Tupamaros.

Welch's report. On September 22, J. Edgar Hoover discussed the White Panthers, as well as the documents found on Plamondon, Forrest, and Taube, at a White House meeting that was attended by Nixon, Haldeman, and several leading Republican Congressmen. Three days later he sent a letter to Gerald Ford, in response to the ranking Congressman's inquiry concerning the White Panthers during the White House meeting. In his letter, Hoover outlined the group's history and described the materials found in the possession of WPP leaders at the time of their July 23 arrests. He added:

These papers....suggested that the White Panther Party consider kidnapping United States ambassadors and other high Government officials so that White Panther members now in prison may be set free in return for the release of these officials.<sup>135</sup>

On the same day that Hoover's letter was drafted, Detective Sergeant Clifford Murray of the Michigan State Police's Red Squad gave testimony concerning the White Panthers before the U.S. Senate Judiciary Committee's Internal Security Subcommittee in Washington.<sup>136</sup>

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<sup>135</sup>Hoover to Ford, September 25, 1970, 62-112678-102, located in the Gerald R. Ford Congressional Papers, Ford Presidential Library, University of Michigan, Ann Arbor, Michigan, box D-102, folder "Radicals/White Panthers/Protest." See Figure 4-9 on pages 433-34.

<sup>136</sup>Assigned to the Detroit branch of the State Police's Special Investigative Unit during the late sixties, Murray had a long history of investigating the White Panthers, in close cooperation with both the local Red Squad and FBI. Red Squad documents from September of 1968 demonstrate that he was an investigator of the so-called "Valler Bombings." And in 1970, Murray handled the task of reading John Sinclair's  
(continued...)

In his testimony, Murray stated:

A confidential source, who has furnished reliable information in the past, advised that among a variety of courses of action considered by White Panther personnel, or recommended to White Panther Party officers, was a recommendation concerning an action which would result in the release of the White Panther Party chairman from custody. The recommendation included adopting the style of the Tupamaros of South America, involving the kidnapping of of [sic] Government officials to be traded against the release of "political prisoners"...This recommendation included the suggestion that Michigan Congressmen could be traded for John Sinclair. Prominent national figures, such as Senator Robert Griffin and Congressman Gerald Ford, might be good for trading for Black Panther Party leaders such as Huey Newton and Bobby Seale. The recommendation included the suggestion that with someone of the prominence of the Vice President, Spiro Agnew, one 'could write his own ticket.'

Murray concluded that "in connection with this idea," Plamondon suggested that radicals "snatch Governor Milliken" or "rip-off banks."<sup>137</sup> Finally, the White Panthers were also tied to political kidnapping, via information acquired from the anonymous letter, by Assistant FBI Director William Sullivan on October 12, in an address delivered to the editors of United Press International (UPI). Entitled "If

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<sup>136</sup>(...continued)

incoming and outgoing mail, often preparing "restricted" reports concerning its contents for inter- and intra-departmental distribution.

<sup>137</sup>Quoted in U.S. Senate, Committee on the Judiciary, Subcommittee to Investigate the Administration of the Internal Security Act and other Internal Security Laws, Extent of Subversion in the "New Left," Testimony of Clifford A. Murray and Richard M. Schave, Part 8, September 25, 1970, 91st Congress, 2nd Session, (Washington, D.C.: U.S. Government Printing Office, 1971), 1221-2 [hereafter "SISS Murray Testimony"].

Men Were Angels," Sullivan's address outlined the dangers posed by the Weatherman and other associated New Left "terrorist" groups, and included the following statement regarding the White Panthers:

Another...militant group, the White Panther Party, which supports the Black Panther Party, has called for revolutionary violence, including bombings and sabotage. The White Panthers have also suggested the possibility of kidnapping high Government officials and United States ambassadors, demanding freedom for White Panthers now in prison in exchange for release of the officials.<sup>138</sup>

The FBI's elevation of the White Panthers' to the top ranks of U.S. radical organizations owes a great deal to Neil J. Welch, as well as to the author of the COINTELPRO letter which was found in Jack Forrest's possession at the time of his arrest.<sup>139</sup> What role, if any, this anonymous letter had in influencing Plamondon, Taube, and Forrest to move towards

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<sup>138</sup>William C. Sullivan, "If Men Were Angels," printed text of speech delivered at UPI Conference, Williamsburg, Virginia on October 12, 1970, located in the Griffin Papers, box 522, folder "Disorders: Radical Terrorism" [hereafter "Sullivan UPI Address"]. See New York Times, October 16, 1970, 20. Although Sullivan's linkage of the White Panthers to political kidnapping appeared in the printed text of the speech that was distributed to one of the nation's largest media associations, the author has been unable to locate a single newspaper story which picked up on this bogus "lead."

<sup>139</sup>An additional likely example of how information from this anonymous letter was utilized to the detriment of the WPP is found in Hoover's first request to Mitchell for the installation of a warrantless wiretap on the White Panthers' headquarters on August 18, 1970. Hoover's comment that Plamondon advocated "ripping off banks" and kidnapping American ambassadors probably came directly from materials furnished by Welch in advance of the September 3 release date of the "official" FBI report. See Hoover to Mitchell, August 18, 1970, 62-112678-82.

committing acts of "revolutionary violence" is uncertain. By the summer of 1970, the nation's underground press carried many laudatory stories about the Tupamaros. In fact, references to the South American group's tactics appeared in Plamondon's writings on the eve of his capture in mid-July.

An additional COINTELPRO tactic that Welch utilized against the White Panthers during the fall and early winter of 1970 was the infiltration of the group's Ann Arbor chapter by an agent provocateur, who went by the name of "Dennis Marnell."<sup>140</sup> By Welch's own account, "undercover criminal surveillance" was his "primary weapon." The fourteen long-haired, "hippie" agents, Welch's secret "Nine Squad" -- agents whose assignments were apparently not revealed to Hoover -- were "experts" at adopting the street styles and language of the groups they infiltrated.<sup>141</sup>

Marnell arrived at the White Panther commune during the late summer, shortly after Pun Plamondon's arrest. Soon, he

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<sup>140</sup>Marnell was clearly not the first FBI informant to target the group. The first detailed FBI report on the group in September of 1969 stated that several "live [!] informants" were covering the group. See Report from SAC, Detroit to Hoover, September 17, 1969, 62-112678-29 ["Reports Only" binder].

<sup>141</sup>Welch and Marston, Inside Hoover's FBI, 136-140. Welch's memoir does not concede any infiltration of New Left or radical extremist groups; it focuses solely on "organized crime" cases, such as the Anchor Bar ("ABSCAM") gambling sting operation of 1970-1971, which resulted in hundreds of arrests. In fact, the authors would have the reader believe that Welch was a champion against the COINTELPRO cause, fighting off Hoover and Sullivan's repeated orders to investigate fruitless "internal security" cases.

became a confidant of Genie Plamondon, Pun's wife. The two became lovers; before long, Marnell revealed several characteristics that closely match the model of a classic late-sixties COINTELPRO agent provocateur.<sup>142</sup> He carried a weapon, and spent a great deal of time attempting to convince others of the necessity for "armed self-defense." As Genie later recalled:

Dennis was a very serious guy...into getting people to being more militant, to using weapons... what he was trying to teach me [was] how to be comfortable with a weapon, and not to be intimidated by it, to know how to use it...that was his main intent.<sup>143</sup>

Claiming to have had combat experience in Vietnam, Marnell appointed himself "Deputy Minister of Defense," and conducted regular "armed self defense" classes with White Panther members in nearby gravel pits and on rural farms. Not surprisingly, he refused to be photographed, and would not allow his name to appear in any WPP publications. Nonetheless, his name and title appear in a handwritten comment on page three of the FBI's September 3 report on Plamondon, alongside of a list of White Panther Central Committee members. This suggests that the Detroit Red Squad

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<sup>142</sup>For additional information concerning FBI agents provocateurs who operated during the late COINTELPRO era, see Paul Cowan, et. al., State Secrets: Police Surveillance in America, (New York: Holt, Rineholt, and Winston, 1974), 59-76; see also Churchill and Vander Wall, Agents of Repression, 47-48, 65-77.

<sup>143</sup>Interview with author, March 31, 1993, Detroit, Michigan.

officer who entered the information (on October 26) was aware of Welch's infiltration methods.<sup>144</sup> Marnell's infiltration lasted only through the end of the year, because the rest of the Central Committee became increasingly suspicious of his actions and rhetoric. Genie recalls that when other members of the Committee convinced her to accuse him openly, he acted shocked and hurt, but quickly disappeared.<sup>145</sup>

The most revealing incident concerning Marnell's involvement with the White Panthers occurred late in the year, at the New Jersey residence of Leonard Weinglass, one of the leading attorneys in the White Panther's CIA bombing trial. According to Weinglass, Marnell paid a surprise visit to his rural farmhouse one winter afternoon. After being invited inside, Marnell began questioning Weinglass intensely concerning defense strategies, dates of recesses and motions, and the like. He then got emotional, and complained vehemently about the continued imprisonment of John Sinclair.

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<sup>144</sup>See Figure A-21 in the Appendix.

<sup>145</sup>Interview with author, March 31, 1993, Detroit Michigan. Welch's FBI agents who monitored the White Panther wiretap became aware that Marnell was in trouble by early January. In his request for a continuance of the surveillance on January 8, 1971, Welch stated "Source indicated that DENNIS MARNELL was under suspicion as a police informer and is presently in a semi-purged state." Interestingly, Hoover's subsequent memorandum to Mitchell in support of Welch's request also mentioned that "a current White Panther Party leader has been placed in a semi-purged state because of suspicion he is a police informant. It should be noted that this individual is not an informant." See SAC, Detroit to Hoover, January 8, 1971, 62-112678-205; Hoover to Mitchell, January 18, 1971, 62-112678-199.

Pulling out a large revolver, he slammed it on a table in front of Weinglass and asked him how "they" might secure John's release. The stunned attorney politely but firmly requested that Marnell immediately leave.<sup>146</sup>

The FBI's elevation of the White Panthers to the status of a "leading white revolutionary group" coincided with a Nixon Administration all-out offensive against the New Left and counterculture.<sup>147</sup> On September 22, 1970, a deal was struck between the Administration and Hoover. Under its terms, the Director would get one thousand new agents as well as the authority to infiltrate college campuses, in return for his agreement to vastly expand warrantless electronic surveillance of New Left and other radical groups. Three days later, the White Panthers' alleged threat to the nation's security was outlined in detail to the Senate Internal Security Subcommittee. Sergeant Clifford Murray concluded that the WPP was "an organization bent on total destruction of the present government of the United States and detrimental to the welfare of this country."<sup>148</sup> Two weeks later, FBI electronic surveillance officer R.L. Shackelford referred to the White Panthers as "potentially the largest and one of the most dangerous of revolutionary

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<sup>146</sup>Telephone interview with author, November 29, 1992. After the incident, Weinglass never saw Marnell again.

<sup>147</sup>Haldeman, The Haldeman Diaries, 196.

<sup>148</sup>SISS Murray Testimony, 1223.

organizations in the United States."<sup>149</sup> By the end of 1970, the White Panthers were targeted for surveillance by nearly the full spectrum of U.S. intelligence agencies, including the Central Intelligence Agency (CIA), National Security Agency (NSA), U.S. Army Intelligence, and Defense Intelligence Agency (DIA).<sup>150</sup>

Several other events kept the White Panthers in the headlines during the late fall and early winter. Attorneys Justin Ravitz and Sheldon Otis, hoping to "Free John," prepared a careful appeal to the Michigan Supreme Court

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<sup>149</sup>Shackelford to C.D. Brennan, October 8, 1970, 62-112678-125.

<sup>150</sup>The Detroit office of the DIA, known as the "113th Military Intelligence Group," (or "MIG") took an early interest in the White Panthers, as is indicated on the first lengthy FBI report on the group, dated September 17, 1969; the report states that MIG "has requested all available information regarding captioned organization." See Report from SAC, Detroit to Hoover, September 17, 1969, 62-112678-29. Evidence of the CIA's interest in the White Panthers was provided in a January 31, 1995, letter from John H. Wright, the agency's Information and Privacy Coordinator. In response to the author's Freedom of Information Act request to the FBI, the CIA released a document, dated June 2, 1970, demonstrating that the agency closely followed the activities of Genie Plamondon during her April, 1970 trip to Denmark. See "CIA Memorandum for the FBI Re: White Panther Party," June 2, 1970, 62-112678-59. Finally, a June 11, 1970 U.S. Department of State document, released to the author on August 4, 1993, demonstrates that the Yippie/White Panther trip to Hanoi and Moscow by Genie Plamondon, Judy Gumbo, and Nancy Kurshan-Rubin, brought the organizations to the attention of the following intelligence-gathering entities: Airforce, Army, Navy, "OSD," U.S. Information Agency (USIA), NSA, CIA, FBI, and the National Security Council. See Department of State "Airgram," from American Consul in Montreal, Canada to the U.S. Department of State, June 11, 1970, 62-112678-[unnumbered]. A copy of this document appears as Figure A-22 in the Appendix.

concerning the state's draconian marijuana laws. In addition, famed "Chicago Seven" attorneys William Kunstler and Leonard Weinglass agreed to join Hugh Davis on the White Panther's defense team for the upcoming "CIA Conspiracy Trial" against the so-called "Ann Arbor Three." The initial preliminary hearings began in September, in the Detroit courtroom of U.S. District Judge Damon J. Keith. A high degree of tension and excitement surrounded the trial, thanks in part to the reputations that Kunstler and Weinglass brought with them from the contentious Chicago Seven trial, which had ended only a few months earlier.<sup>151</sup> The defense's initial strategy focused on the character of the government's star witness, David Valler, who had been known as Detroit's "mad bomber" during the fall of 1968, during the period immediately preceding the CIA bombing. As the facts concerning Valler's involvement in the Justice Department's case became known, it appeared that he was cooperating with the government in return for a reduced sentence. The most damaging FBI-sponsored COINTELPRO initiative utilized against the White Panthers, however, was the inclusion of John Sinclair in the government's October 7, 1969, conspiracy

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<sup>151</sup>Interview with author, October 21, 1992, Detroit, Michigan. See also William M. Kunstler, My Life as a Radical Lawyer, (New York: Birch Lane Press, 1994), 205.

indictment, intended to keep him in jail by labeling him a "violent radical."<sup>152</sup>

The key to understanding David Valler's complicity in the government's case against Sinclair lies in comparing the statements he made to the FBI, in December, 1968, and June, 1969. His statements of December 26 and 27 focused on his involvement with the various anti-establishment bombings that had occurred in and around Detroit during the fall of 1968. The FBI questioned him concerning each bombing, including the clandestine CIA office in Ann Arbor, which was bombed on September 29, some ten days prior to his arrest for marijuana possession.<sup>153</sup> Valler stated that while Jack Forrest and Pun Plamondon exchanged dynamite in preparation for "the Ann Arbor jobs," John Sinclair's involvement consisted only of telling Valler "that he was more interested in seeing such bombings occur than in committing such bombings personally,

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<sup>152</sup>Sinclair had been sentenced to prison for a third offense marijuana possession charge on July 23, and was denied bond because he "showed a propensity to re-commit the crime." The CIA conspiracy charge in early October linked Sinclair to a serious act of violence.

<sup>153</sup>Detroit's Red Squad had been greatly embarrassed by a September 20 front-page article on Valler which appeared in the Detroit News. Valler all but admitted to reporter Steve Cain that he had been involved in the recent wave of bombings. See Official Transcript, People of State of Michigan v. David Joseph Valler, Case A-148883, May 27, 1969, Wayne County Courthouse Records Division, 3rd Floor, [microfilm files].

inasmuch as he was deeply involved at that time with current charges against him."<sup>154</sup>

Valler's statement to the FBI on June 6, 1969, portrays Sinclair as a mastermind of the bombings, outlining the following "additional details": (1) Valler states that Sinclair privately contacted him regarding his earlier offer for dynamite, which he had initially refused, but this time informed Valler "I want some of the stuff, but I can't handle it. I'll have Pun make arrangements to pick it up," and (2) Valler alleges that in his rendezvous with Plamondon, the latter claimed that "he had been instructed by John Sinclair to pick up some explosives."

The June, 1969 FBI interview claims that Valler requested the second interview, after reading in the papers about the ROTC bombing on the campus of the University of Michigan campus, and wanting to be of assistance "in bringing to justice persons responsible for this bombing, and for two prior Ann Arbor area bombings."<sup>155</sup> A more likely reason for Valler's decision to ask for a second interview concerns his legal dilemma. Valler had been sentenced to seven-to-ten years in prison for second-offense marijuana possession on May 27; he now faced an additional fifteen-to-thirty in the

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<sup>154</sup>Transcript of FBI interview with David Valler, dated December 26 and 27, 1968, John and Leni Sinclair Red Squad Files. See Figure A-23 in the Appendix.

<sup>155</sup>Transcript of FBI interview with David Valler, dated June 6, 1969, John and Leni Sinclair Red Squad Files. See Figure A-24 in the Appendix.

State bombing case. After cooperating with the FBI, Michigan authorities agreed to drop the more severe "conspiracy to bomb" charge, and he was found guilty only of "possession of explosive devices." On April 17, 1970, he was given a sentence of two-to-five years, to be served concurrently with his existing sentence -- a remarkably lenient sentence since both the Detroit Police and the local FBI had amassed mountains of evidence proving that Valler had purchased dynamite, had personally conducted several of the bombings, and had provided both encouragement and explosives for others to do the same. During the summer of 1970, Valler began writing a regular weekly column in the conservative Detroit News, in which he sought forgiveness for his drug-induced life in the counterculture and advised area youth not to make the same mistakes. His articles were distributed to additional newspapers across the country, probably through the FBI's network of "friendly" press sources.<sup>156</sup>

The October 7, 1969, indictment against the "Ann Arbor Three" describes the first "overt act" as a Sinclair-Valler conversation, followed by Plamondon's follow-up meeting with Valler. In order for the FBI to have tied Sinclair into a

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<sup>156</sup>For a discussion of the network of FBI-friendly newspapers, see Donner, The Age of Surveillance, 238-240. Evidence of the Detroit News' linkages with the Bureau is found in Welch and Marston, Inside Hoover's FBI, 162-64. Former Detroit News reporter Steve Cain believes that News Publisher Peter Clark and Editor Martin Hayden enjoyed a "special relationship" with the FBI. See interview with author, July 22, 1992, Ann Arbor, Michigan.

conspiracy, Valler's December, 1968 statements were insufficient. According to the Spock v. U.S. decision of 1969, which set the standard for the Nixon Administration's use of conspiracy law, the government was required to demonstrate "that each individual defendant personally agreed to employ the illegal means contemplated by the agreement." In order to prove a "defendant's adherence to the illegal aims of the conspiracy," evidence had to be provided of one or more of the following: "the individual defendant's prior or subsequent unambiguous statements; by the individual defendant's subsequent commission of the very illegal act contemplated by the agreement; or by the individual defendant's subsequent legal act if that act is 'clearly undertaken for the specific purpose of rendering effective the later illegal activity which is advocated.'"<sup>157</sup> Valler's June, 1969 statement certainly met the Spock case's standard of "prior or subsequent unambiguous statements," alleging that Sinclair said "I want some of the stuff," and later directed Plamondon to approach Valler for dynamite. Only Valler's second statement allowed the inclusion of Sinclair in the CIA indictment.<sup>158</sup>

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<sup>157</sup>Quoted in Eliff, Crime, Dissent, and the Attorney General, 208-9.

<sup>158</sup>The author has located additional evidence that Sinclair was a principal target of the Federal Grand Jury's 1969 investigation of the CIA bombing. The Grand Jury's foreman, a suburban Detroit housewife [who prefers to remain anonymous], vividly recalls the extent in which the FBI  
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As the Justice Department began its preparations for the CIA Conspiracy trial, the FBI and other law enforcement agencies assumed an active role in providing information to the Detroit prosecutors concerning such things as the whereabouts of the White Panthers' attorneys, the location of the defense's headquarters, and the individuals who attended pre-trial hearings. A Detroit Police Inter-Office Memorandum, dated September 4, discussed the fact that intelligence had been received indicating that William

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<sup>158</sup>(...continued)

focused on Sinclair, even though he was then in prison. "Sinclair was the villain," she adds, "they [the FBI] read excerpts of his writings to us, which included exploded body parts and other violent images" [interview with author, October 23, 1992, Detroit, Michigan]. The primary evidence presented against Sinclair was a used typewriter ribbon, supposedly taken from a machine owned by the White Panthers, shortly after the CIA bombing. FBI agents asserted that their analysis of the ribbon revealed that it contained a letter from Plamondon to a relative or friend in Traverse City, in which he confessed to carrying out the crime, with the assistance of Forrest, and the knowledge and approval of Sinclair. Corroboration regarding the typewriter ribbon was provided by former U.S. Attorney Robert Grace, who ultimately handed down the indictments against the Ann Arbor Three. Grace states that the FBI acquired it by following a White Panther member to an Ann Arbor repair shop, and promptly gained the "cooperation" of the shop's owner. This "evidence" was not presented in court, due to the fact that the case never progressed beyond the pre-trial phase. Former White Panther attorney Hugh "Buck" Davis has stated that the presentation of such evidence by the government would surely have been challenged by the defense. "Anyone -- including an FBI agent -- could have typed it," he recalls. Nonetheless, Grace stands by the ribbon's authenticity, claiming that Plamondon's letter related facts which were "entirely consistent" with affidavits given by Valler, and therefore, "could have been typed only by him." See author's personal interviews as follows: Anonymous Grand Jury foreman, October 23, 1992, Detroit, Michigan; Robert J. Grace, July 20, 1992 and April 1, 1993, Ann Arbor, Michigan; and Hugh Davis, July 25, 1992, Detroit, Michigan.

Kunstler and Leonard Weinglass were due to arrive in Detroit that day, and were "destined for 1520 Hill Street, Ann Arbor, which is the address of the WHITE PANTHER PARTY." The report adds that the FBI had also been alerted concerning the attorneys' movements.<sup>159</sup> On September 22, the date of the first pre-trial hearing in the CIA case, the Detroit Red Squad covered a White Panther "demonstration" in front of the Federal Building. The report listed the names of several of the "60 - 70 persons" in attendance, and commented on several of the details of the case, including the fact that "Kuntzler [sic] and Wineglass" [sic] were the attorneys of record.<sup>160</sup> A Michigan State Police Red Squad report, dated December 11, 1970, states that the White Panthers were renting a house in inner-city Detroit for the leaders to use for the duration of the upcoming trial. The report, by Detective Sergeant W. W. Anderson claims "Information is that the telephone was to [be] installed this date 12-11-70."<sup>161</sup>

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<sup>159</sup>Detroit Police Department, Intelligence Division, Inter-Office Memorandum, September 4, 1970, John and Leni Sinclair Red Squad Files.

<sup>160</sup>Detroit Police Department, Intelligence Division, Inter-Office Memorandum, September 22, 1970, "Demonstration at the Federal Building...", John and Leni Sinclair Red Squad Files.

<sup>161</sup>Michigan State Police, Special Investigation Unit, Confidential Report, White Panthers, December 11, 1970, John and Leni Sinclair Red Squad Files. The reference to a telephone installation begs the following question: why was this State Police officer so interested in the pending telephone installation? Under Michigan law, electronic eavesdropping by all non-federal law enforcement agencies and individuals was illegal. See Figure A-25 in the Appendix.

The government's prosecution team in the White Panther case included U.S. Attorney Ralph B. Guy, Jr., and Assistant U.S. Attorneys Kenneth Lowrie and John H. Hausner. Guy, a native of the Detroit suburb of Dearborn, was a corporate attorney turned prosecutor. Nixon appointed him on August 21, 1970. The prosecution's strategy during the pre-trial phase included fending off defense attacks on the credibility of David Valler, opposing a defense motion to include eighteen to twenty-one year-olds on the jury, and discrediting the defense's "expert witnesses," including poet Allen Ginsberg and civil rights leader Julian Bond, who testified "that the counterculture represented a separate and distinct class," and that the White Panthers were typical representatives of an emerging "youth culture" in America.<sup>162</sup>

The White Panther defense team was made up of three members: Chicago Conspiracy attorneys William Kunstler and Leonard Weinglass and Detroit attorney Hugh "Buck" Davis, the local National Lawyers Guild (NLG) representative.<sup>163</sup>

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<sup>162</sup>Kunstler, My Life as a Radical Lawyer, 206; Michael Schumacher's biography of Ginsberg relates how the White Panther case "had all the earmarks of the Chicago Conspiracy Trial, complete with....constant interruptions by the prosecuting attorney, who questioned Allen's authority to act as a spokesman for those under the age of twenty-one, as the defense claimed he was." See Schumacher, Dharma Lion, 546.

<sup>163</sup>Four additional Detroit attorneys provided assistance to the WPP defense team: Sheldon Otis (who handled Sinclair's representation from the time of the October, 1969 indictment until shortly after Plamondon was caught); Justin "Chuck" (continued...)

Although all three of the attorneys worked pro bono, most of the actual preparation was completed by Weinglass and Davis, with assistance from NLG volunteers and the White Panthers. Weinglass and Davis pursued a strategy designed to publicize and politicize the case by: (1) focusing on the questionable credibility of Valler; (2) pointing out what they viewed as a conspiracy to imprison Sinclair, and to keep him there; (3) noting that the jury rolls in Detroit possessed no persons under twenty-one years of age and were generally weighted in favor of middle-aged white suburbanites; (4) pointing out the CIA's history of "imperialist aggression," as well as the fact that the agency's charter forbids it to operate within the United States; and (5) challenging the Nixon Administration's increasing use of conspiracy trials to chill domestic dissent. At Weinglass's insistence, the defense team did not discuss trial strategy or potential witnesses over the telephone or through the mail; instead, they were instructed to send information by "code or hand delivery only."<sup>164</sup>

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<sup>163</sup>(...continued)

Ravitz (who was concurrently representing Sinclair in his appeals on the marijuana conviction); Marc Stickgold; and Richard S. McMillan.

<sup>164</sup>Memorandum from Leonard I. Weinglass to Legal Staff, November 3-4, 1970; Memorandum from Hugh "Buck" Davis to Legal Staff, "Preliminary Outline No. 2 for the Defense," December 4, 1970, [internal memoranda], JLSC/BHL, box 19, folder 20, "CIA Conspiracy Case, 1970-1971" (quote p. 10). [Hereafter "Davis-Weinglass Legal Strategy Memoranda"]

The defense's political focus dictated that they make their case both inside and outside of Judge Keith's courtroom. Davis' December 4, 1970, memorandum to the "Legal Staff" states:

We dig the idea of having a release every day of the trial passed out around the Federal Building every day at say noon by about 4, steady persons, who will seek over the course of the trial to befriend persons on their route...Can deal with imperialistic crimes--CIA--FBI, etc....(Each release should be short--1 page--well-documented, and bent on honestly opening the minds and educating the every day folk on the street).<sup>165</sup>

In addition, the defense, in cooperation with the White Panthers, held a number of rallies and fund-raisers, both to raise public awareness of the case and to solicit much needed funds for the "CIA Conspiracy Defense." One celebrity who gave considerable support to the White Panthers was Hollywood actress turned political-activist Jane Fonda, who stayed at the White Panther's commune for extended periods of time. Her appearances on behalf of the "Ann Arbor Three" on November 21 at the White Panther house (and later on the U-M campus) in Ann Arbor and on December 3 on the campus of Wayne State University in Detroit attracted the attention of the local and national media, as well as that of the Michigan State Police Red Squad.<sup>166</sup>

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<sup>165</sup>Davis-Weinglass Legal Strategy Memoranda, 9-10.

<sup>166</sup>Red Squad coverage of the events was extensive, and included two or three informants, each of whom prepared detailed written reports. See Michigan State Police, Special Investigation Unit, Confidential Report: "White Panther (continued...)"

A celebrity in his own right, WPP attorney William Kunstler possessed an international reputation for ably defending a number of leading anti-war, New Left, Black Power, and counterculture figures. During the fall of 1970 he was extremely busy, defending the Chicago Seven, Phillip and Daniel Berrigan, and others, all at the same time. Although he made several public appearances in Detroit and Ann Arbor on behalf of his clients, his principal contribution to the defense team during the pre-trial phase was limited to his preparation of a "Motion for the disclosure of electronic surveillance, for a pretrial hearing, to suppress evidence and to dismiss the indictment,"

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<sup>166</sup>(...continued)

Party," December 1, 1970 and December 4, 1970; Complaint Report Re: Hertz Rent-a-Car, December 4, 1970; Intelligence Report Re: Hertz Rent-a-Car, December 5, 1970; See also informant reports, November 30, 1970 and December 3, 1970 [executing agency not listed, probably State Police Red Squad and/or FBI]. One incident concerning the Red Squad's surveillance of Fonda is worthy of note: the day after her December 3 appearance in Detroit she was arrested in Ann Arbor, along with four "French Nationalists" she had been travelling with, on the charge of stealing a Hertz Rent-a-Car. The State Police's "Intelligence Report" on the incident states that "an investigator for the Hertz Corp." approached the police with the information. Immediately thereafter, the police located Fonda and the car at a local Holiday Inn and arrested her, confiscating all of her possessions, including an Avis Rental agreement for the vehicle. After initially charging Fonda with forging rental agreement papers, the police acknowledged that "an apparent misunderstanding" had occurred, whereby one of the French Nationals who rented a car from Avis, accidentally drove off with a Hertz vehicle. The fact that the key issued by the Avis agent to the French National worked in the ignition of a car alleged to be of Hertz's ownership casts doubt on the police's "official" explanation of the incident. Several documents concerning the incident are included as Figures A-26 and A-27 in the Appendix.

which was entered on October 5. As lead attorney on the Chicago Conspiracy defense team, Kunstler had received the government's June 13, 1969, memorandum describing the Mitchell Doctrine. He had witnessed the Justice Department's increasingly bold electronic surveillance initiatives, such as the submission of wiretap logs regarding defendant Bobby Seale after the trial had ended. Kunstler's motion specifically requested that the government admit any and all electronic surveillance that might have intercepted the conversations of any of the three WPP defendants, in three broad areas: (1) that which had been conducted with court approval, as per Title III; (2) that which was "regarded by the government as lawful under its so-called 'National Security' and 'internal subversion' exceptions to the Fourth Amendment"; and (3) that which contained the conversations of any defense lawyer or persons employed by them. The motion also requested an evidentiary hearing prior to trial, in accordance with the Alderman decision, to determine whether any of the government's evidence had been tainted by illegal surveillance. Finally, Kunstler requested that, should the proposed taint hearing reveal that the government's case was "in reliance upon illegally-obtained evidence," the indictment be dismissed.<sup>167</sup> As it turned out, Judge Keith's

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<sup>167</sup>"MOTION FOR DISCLOSURE OF ELECTRONIC SURVEILLANCE...", U.S. v. Sinclair, et. al., Indictment No. 44375, October 5, 1970, JLSC/BHL, box 19, folder 18, "CIA Conspiracy Trial, 1970-1971."

approval of Kunstler's electronic surveillance motion was the only defense motion he granted.<sup>168</sup>

Although Kunstler and Guy had many disagreements concerning the White Panther case, in later years they were in complete agreement on one point: once the issue of wiretaps was raised, "everything changed."<sup>169</sup> On December 18, Attorney General Mitchell issued a memorandum to Judge Keith in response to Kunstler's motion, restating the Mitchell Doctrine.<sup>170</sup> According to Guy, from the time that

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<sup>168</sup>Weinglass and Davis submitted lengthy motions on a wide variety of issues. Keith denied them all. Years later, Keith recalls that he acceded to Kunstler's motion because he felt so strongly about the issue of the government's electronic surveillance powers, versus the citizen's right to privacy. See Davis interviews with author, November 10, 1991 and July 25, 1992, Detroit, Michigan; see also Keith interviews with author, October 21 and 27, 1992, Detroit, Michigan.

<sup>169</sup>Kunstler, My Life as a Radical Lawyer, 206.

<sup>170</sup>The White Panther case was not the first case in which the Mitchell Doctrine was re-instituted by the Nixon Administration in 1970. Similar Mitchell affidavits had been filed earlier in the year in two cases: U.S. v. Melvin Carl Smith (Criminal No. 4277-CD; Appeals No. 71-1378; U.S. District Court, Central District of California) and U.S. v. Felix Lindsey O'Neal (Criminal No. 1204; Appeals No. 71-1101; U.S. District Court, District of Kansas). In the Smith case, Mitchell raised the issue following the conviction of a Black Panther, as the case was under consideration by the U.S. Court of Appeals for the Ninth Circuit. Remanded back to the District Court for the Central District of California, the issue was heard before Judge Warren J. Ferguson. Ferguson's January 11, 1971 decision, which predated Keith's by two weeks, refuted the Government's claim of "inherent right." In the O'Neal case, also involving a Black Panther, Mitchell raised the issue during the trial, submitting surveillance logs to Judge Arthur J. Stanley, Jr., solely for his in camera inspection. Judge Stanley ruled that because the surveillance had occurred prior to the incidents in which the

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Judge Keith granted Kunstler's motion for disclosure, "the Justice Department in Washington took over the argument....they handled the case." The U.S. Attorney and his staff stood idly by -- as a team of Justice Department attorneys, flown in from Washington, showed up prepared to sell the Mitchell Doctrine. For Guy, the "abstract principle" pursued by the Justice Department -- the Executive's "inherent right" to keep U.S. dissidents under surveillance without court order -- became "the only issue" in the case.<sup>171</sup>

Mitchell insisted that the government was entitled to ignore Keith's order to disclose to the defense several conversations involving Plamondon, which had been picked up in warrantless "national security" wiretaps of two California Black Panther Party chapters. As Donner notes, the Mitchell Doctrine:

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<sup>170</sup>(...continued)  
 defendant was charged, it was irrelevant to the prosecution's case. But he went further: in a letter to U.S. Attorney Robert J. Roth, Stanley expressed his agreement with the Mitchell Doctrine. Therefore, going into the U.S. v. Sinclair, et. al. case in December of 1970, the Justice Department had thus far acquired two positive (albeit weak) rulings on the Mitchell Doctrine (Judge Hoffman's in U.S. v. Dellinger, as well as Judge Stanley's), while scoring a reverse from Judge Ferguson in the Smith case. Because the White Panther case involved a disputed issue occurring during the pre-trial phase, it provided the Government with a more timely Supreme Court ruling concerning the Mitchell Doctrine.

<sup>171</sup>Interview with author, July 17, 1992, Ann Arbor, Michigan. Guy adds that "The response to Keith's order for disclosure was prepared in Washington...We had nothing to do with its preparation."

insisted that the President, acting through the Attorney General, has the inherent constitutional power to authorize electronic surveillance without judicial warrant in national security cases and to determine unilaterally whether a given activity threatens the national security. Moreover, Mitchell insisted, this power was exclusive. Application to a court for a warrant would be inappropriate: a court lacked the competence to assess national security dangers and, besides, the risk was too great of leaks of the sensitive matters that would be the subject of warrant applications.<sup>172</sup>

Along with the Mitchell affidavit, the government submitted various printed transcripts of Plamondon's conversations to Judge Keith for his in camera inspection only. This sealed exhibit contained conversations which had taken place during the spring and summer of 1969, when Plamondon had made several offers of assistance to the Black Panthers.<sup>173</sup>

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<sup>172</sup>Donner, The Age of Surveillance, 247.

<sup>173</sup>Mitchell's in camera exhibit may have contained the logs of Plamondon's February 26 conversation with individuals at the Black Panthers' Headquarters in Oakland. Information concerning this conversation was promptly relayed by the FBI's SAC in San Francisco both to Bureau Headquarters and to the Detroit Field Office. The "paper trail" left by these communications would surely have entered the FBI's ELSUR Index, allowing for rapid access, once the Justice Department initiated a search for all conversations concerning the three Ann Arbor White Panthers (which was initiated on October 15, 1970). See SAC, San Francisco to Hoover, February 27, 1969, 62-112678-9; see also March 1, 1969, 62-112678-10. A copy of the February 27 document is included in the Appendix as Figure A-28. FBI documents released as a result of Sinclair's countersuit against the Government, Sinclair, et. al. v. Kleindienst, et. al., (Civil Action No. 610-73) reveal that a total of five of Plamondon conversations were overheard by FBI agents monitoring "national security" wiretaps on the Oakland and San Francisco offices of the Black Panthers, between February 26 and July 6, 1969. See Figures A-29 and A-30 in the Appendix.

Mitchell's memorandum made the same argument that had been presented in Judge Julius Hoffman's Chicago courtroom eighteen months earlier -- with one important difference. While the government in June, 1969 claimed that the wiretaps of several Chicago Conspiracy defendants were conducted for prosecutorial, as well as investigative purposes, Mitchell's revised affidavit was more limited, stating that the Black Panther wiretaps had been instituted not for the purpose of prosecution, but instead as part of an ongoing domestic intelligence investigation.<sup>174</sup> In other words, the revised Mitchell Doctrine now represented a full-blown argument for an intelligence exemption to the Fourth Amendment; this was now combined with an assertion of the Executive Branch's "inherent powers" in "national security" areas.

In the meantime, the Justice Department made two important decisions: (1) to admit only the Plamondon conversations, containing relatively innocuous information, that had been picked up inadvertently on the California Black Panther wiretaps, and (2) not to disclose the existence of the warrantless wiretap on the White Panthers' Ann Arbor Headquarters, even though Mitchell himself had authorized the surveillance, and also had approved of its continuation at regular thirty-day intervals.<sup>175</sup> In response to Keith's

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<sup>174</sup>Donner, The Age of Surveillance, 247.

<sup>175</sup>William Kunstler's memoirs state that the government's in camera submission to Keith contained conversations between  
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order granting Kunstler's motion, Assistant Attorney General Will Wilson contacted Hoover on October 15, to request that the FBI conduct a search of the ELSUR Index to determine if any of the three defendants in the CIA Conspiracy case "had been monitored by electronic surveillance devices." In the event that the FBI did discover the existence of such conversations, Wilson instructed Hoover to submit information concerning the dates, locations, and letters of authority pertaining to the wiretaps. Wilson reminded Hoover to follow the instructions contained in his minimization memorandum of July 14, 1969: discontinuing surveillance during attorney-client conversations, "with respect to this case."<sup>176</sup> Four days later, Hoover relayed Wilson's request to all FBI field offices, giving only one week to respond.<sup>177</sup> Hoover's November 16 memorandum to Wilson states that "[name deleted] and John Sinclair were not the subject of a direct electronic surveillance nor were any of their conversations monitored by

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<sup>175</sup>(...continued)

Plamondon and "employees of the Cuban embassy." The author has been unable to find any corroborating evidence for this statement, although attorney Hugh Davis has intimated that the government's sealed exhibit contained surveillance carried out by the National Security Agency. See Kunstler, My Life as a Radical Attorney, 206.

<sup>176</sup>Wilson to Hoover, October 15, 1970, [unnumbered document], Davis Papers.

<sup>177</sup>Hoover to SAC, Detroit, October 19, 1970, [unnumbered document], Davis Papers.

an electronic device of the FBI."<sup>178</sup> Wilson responded again three days later, this time to remind Hoover of Mitchell's minimization guidelines concerning attorney-client conversations, and to request that "documents reflecting the Attorney General's authorizations and pertinent reauthorizations for [information deleted] and [information deleted]" be immediately forwarded to the Justice Department.<sup>179</sup> These documents indicate that the Justice Department selected the White Panther case in late October or early November.<sup>180</sup>

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<sup>178</sup>Hoover to Wilson, November 16, 1970, [unnumbered document], Davis Papers. It is the author's assumption that the deleted name is "John Waterhouse Forrest." A comparison of the two deleted names listed in the upper left-hand corner of the memo -- Plamondon and Forrest -- suggest that they are of similar length. The deleted information immediately preceding Sinclair's name in paragraph two is almost precisely the same length as either of the two deleted names. Since the Government admitted that Plamondon had been overheard, the deleted name next to Sinclair's was probably Forrest's. See Figure 4-10 on page 435.

<sup>179</sup>Wilson to Hoover, November 19, 1970, [unnumbered document], Davis Papers. All four of the FBI and Justice Department documents referred to in this paragraph were withheld in their entirety by the FBI, despite the author's Freedom of Information Act requests.

<sup>180</sup>This conclusion is based on three facts: (1) Wilson's November 19 memorandum to Hoover requests all authorizations and reauthorizations for Detroit's ongoing surveillance of the White Panthers, indicating that the Justice Department was planning something big for the WPP; (2) unlike all of the other related memorandums, the November 19 memorandum carries the heading "SECRET"; and (3) Mitchell requested additional time to respond to Keith's order on December 14, four days before he issued his affidavit, indicating that the Justice Department was scrambling to assemble its response.

Hoover's November 16 response to Wilson raises important questions concerning the integrity of the Bureau. By asserting that Sinclair had neither been "the subject of a direct electronic surveillance" nor overheard on any "electronic device of the FBI," the FBI seemed to be intentionally lying, in collusion with the Justice Department, in order to prevent the discovery of the warrantless wiretap currently in operation on the White Panthers' Ann Arbor headquarters. Welch knew better. Several of Sinclair's conversations had already been intercepted by FBI monitors on the WPP house prior to Hoover's November 16 response to Wilson. In addition, numerous White Panther discussions concerning legal strategy continued to be overheard -- and duly logged -- by Welch's agents, even after the September incident involving the intercepts of Chicago Conspiracy defendants Rubin and Hoffman, which led Hoover to issue Welch a severe reprimand.<sup>181</sup> Welch seems to have regarded his intelligence-gathering activities as above both the law and the control of his boss, J. Edgar Hoover.

The Mitchell Justice Department's response to Keith's order for disclosure was no better. Kunstler had requested that the government reveal not only intercepted conversations from any of the three defendants, but also conversations by defense lawyers and/or persons employed by them. Mitchell

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<sup>181</sup>See Figure A-31 in the Appendix.

may not have known of the existence of Sinclair's conversations in Welch's surveillance net, but he certainly was aware that on September 12 Welch's agents monitoring the White Panther surveillance had overheard a conversation involving William Kunstler and a pending CIA Conspiracy case hearing.<sup>182</sup> Welch unwisely bragged about this in his September 14 memorandum to Hoover. Mitchell knowingly lied to Keith by failing to disclose the existence of the White Panther wiretaps in his December 18 affidavit.

What was the Administration's motivation? Nixon continued his quest for better intelligence concerning student radicals, after the failures of both the Huston Plan and Title VII of the Organized Crime Control Act. Yet the various legislative and judicial barriers to heightened domestic surveillance power for the Executive Branch remained in force at the end of 1970. Having introduced the Mitchell Doctrine in June of 1969, the Administration immediately backed away from the initiative, in the face of vehement public protest.<sup>183</sup> Moreover, the Alderman and Giordano decisions stood in the way of the Administration's plans to expand "national security" wiretapping against the New Left and counterculture. If enacted, the Huston Plan would have

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<sup>182</sup>See SAC, Detroit to Hoover, September 14, 1970, 62-112678-103.

<sup>183</sup>Having asserted its power to wiretap without warrant in "national security" cases, the Administration was free to initiate such tactics, taking advantage of a "grey area" in the law.

provided the Administration with much of what it desired, namely, the expansion and centralization of all domestic intelligence gathering under White House control, as well as an outlet for official deniability at the top levels of government: Huston's signature on the plan. Yet the Administration was prevented from implementing its secret surveillance strategy by the unexpected opposition of an aging FBI Director, no longer keen to institute so many illegal tactics. Congress' unwillingness to overturn Alderman via Title VII meant the failure of the Administration's "legislative strategy" concerning the easing of barriers to heightened surveillance. By the fall of 1970 both strategies had failed, and therefore, the option of pursuing a judicial strategy -- even one as reckless as the Mitchell Doctrine -- began to look attractive for an Administration facing the worst year of social disorder in more than a century.

The Nixon Administration's desire to create a "chilling effect" on dissent also contributed to the reinstatement of the Mitchell Doctrine. Nixon recognized that one of the prerequisites to a successful reelection bid would be the silencing of the anti-war movement. An incident that occurred in the wake of the July 23 Detroit Weathermen indictments revealed an underlying motive in the anti-crime offensive. Mitchell predicted that the indictments would push militants further to the left, which would have the

desired effect of increasing the alienation of the moderates and liberals.<sup>184</sup> The Weathermen indictments were intended to intimidate would-be radicals, a process referred to by Gitlin as "Weatherguilt."<sup>185</sup> The FBI's stepped-up COINTELPRO-NEW LEFT program also had a clear goal. A September 16, 1970, Hoover memorandum recommended intensified FBI harassment of New Left members, to "'enhance the paranoia endemic in these circles,'" and "'to get the point across there is an FBI agent behind every mailbox.'"<sup>186</sup>

An additional reason why the Administration sought the judicial solution of the Mitchell Doctrine was its newly-revised intelligence and surveillance strategy. For the first time since the onset of the Cold War, the Justice Department and FBI came to the conclusion that "the need for sanctions and publicity takes precedence over the secret collection of information."<sup>187</sup> The Huston Plan might have offered the Administration a significantly enhanced intelligence gathering capability, but when compared with the Mitchell Doctrine, it possessed two major weaknesses. First, continued secrecy in domestic intelligence gathering provided no ancillary benefits, such as public awareness that the government could be listening in on any private

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<sup>184</sup>New York Times, July 30, 1970, 15.

<sup>185</sup>Gitlin, The Sixties, 398.

<sup>186</sup>Quoted in Theoharis, Spying on Americans, 149.

<sup>187</sup>Quoted in Donner, The Age of Surveillance, 245.

communications. Second, the Huston Plan, like the secret "national security" wiretapping policy pursued by Hoover from the thirties through the sixties, would not allow the Justice Department to utilize the fruits of warrantless electronic surveillance in litigation against selected targets. In fact, continued secret intelligence left open the possibility that the illegal operations might be exposed to an angry public, as had occurred during the Coplon and Black crises. The Mitchell Doctrine would provide the Executive with the power to institute whatever "national security" wiretapping it desired, as well as the power to selectively utilize the fruits of this surveillance in court, without being forced to disclose wiretaps it desired to keep secret.

Having come to the decision to re-institute the "inherent right" argument, the Administration selected the White Panther case in Judge Keith's Detroit court as the primary vehicle. Several things made the White Panther case attractive to the Justice Department. First, the government possessed the ideal type of electronic surveillance logs for a high-stakes legal gamble. Plamondon's conversations with the Black Panthers were relatively innocuous, to the extent that their ultimate release to the defense would not seriously damage the government's national security apparatus.<sup>188</sup> The fact that the government concealed the

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<sup>188</sup>If White Panther attorney Hugh Davis is correct, and the Plamondon intercepts included domestic surveillance by  
(continued...)

existence of the warrantless White Panther wiretap altogether, knowingly defying Keith's disclosure order, and opted instead to submit only the Plamondon intercepts from Black Panther surveillance, demonstrates the degree of calculation. The White Panther case offered the quickest route to the Supreme Court: a mandamus action during a trial's pre-trial stage. By raising the mandamus issue prior to the start of the trial, the Justice Department was able to acquire an immediate hearing in the Court of Appeals, rather than having to wait for the outcome of the case. However, a mandamus appeal would not have been possible if the presiding judge ruled in favor of the Mitchell affidavit. One of only a handful of black U.S. District Judges, Keith's liberal voting record was well known to the Justice Department. This, combined with the blunt language of Mitchell's affidavit, indicate that the Justice Department meant for Keith to rule against it. He proved happy to oblige.

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<sup>188</sup>(...continued)

the National Security Agency, never part of its charter, more may have been involved in the government's refusal to disclose the Plamondon surveillance logs than just a desire to test the Mitchell Doctrine.

Date	Time	Activity Reported
		<p>CONTINUED</p> <p>PCM: Yeah, those bomb threats are stupid, stupid. Just puts people up tight. Bomb threats on planes are stupid. Must be a bunch of right wingers.</p> <p>PAF: Yeah. We are going to Marquette, Peggy, Terry and Skipt folks are going. He will get a light sentence, his lawyer says</p> <p>PCM: I'm in Wayne Co. Jail, I want something done so Pun and I can get together and talk.</p> <p>PAF: Lennie Weinglass is supposed to come in Sunday. but Buck is making different arrangements. The number for the Nat'l. Lawyers Guild is 871-1251. We are having Killer meetings but organization is not good. We are changing the 10 point program. Pun isn't getting his mail the warden is violating the court order, he should be jailed for contempt. I have people who could sign affidavits. Your message to the Woodstock Nation was hard to read.</p> <p>PCM: What! I wrote it simply, Dick &amp; Jane style.</p> <p>PAF: This is Lennie, Hi John.</p> <p>PCM: They just brought me here, I asked to be with Pun. They won't put me there. I went to see Buck Davis he has some good motions. I read them. We have to print some in the paper so people can make use of them. For people who need help, and can't call on Kunstler with there B. bogus raps.</p>
Page 2 FBI, Date 10/16/70	Employee's Name Kenneth Lee Schriber Tape # 57	Date Given

## EXHIBIT # 4 TO INTERROGATORIES

(Figure 4-7)  
 FBI Surveillance Log of the White Panthers  
 October 16, 1970  
 Featuring a Conversation with John Sinclair  
 Regarding Legal Strategy

Source: Legal Papers of Hugh M. Davis

## C O N F I D E N T I A L

Re: Lawrence Robert Plamondon;  
White Panther Party

There must be ½ dozen rightwing Michigan congressmen, say, that you could rip off without too much of a security hassel - They are mostly listed right in the DC phonebook. Nab him at home at 3 a.m., then out with him to someplace safe, followed by messages to the press threatening he will be offed unless John Sinclair is freed.

If you got a really big pig, such as Ford or Griffin, you could probably get Bobby Seale & Huey freed as well. Rip off Spiro, and you could name your own price....

OK, how do you know this is not a letter, though, from some provocateur trying to lure you into some action the pigs will be watching for? Nothing's 100% certain. But: a pig agent would be more likely to approach you in person, or thru an infiltrator in your Party itself, rather than via anonymous letter.

Also: the idea about congressmen, etc. is really just a suggestion. I'm sure you are creative enough to come up with a variation as to persons, time and place that would do the job just as well.

Anyway - I don't recommend you discuss the idea outside of small "affinity groups" - and please destroy this letter after you read it - because of there are infiltrators in or around you, I don't care to have it fall into their hands.

Good Luck.

FREE JOHN SINCLAIR

Yours in Revolution,

Tupac Amaru

C O N F I D E N T I A L

76

(Figure 4-8)  
FBI Report on Plamondon's Capture  
September 3, 1970  
Anonymous FBI COINTELPRO Letter to the White Panthers,  
Suggesting that they Kidnap Politicians to Free Sinclair

Source: John and Leni Sinclair Red Squad Files

JOHN EDGAR HOOVER  
DIRECTOR



~~Book of New papers?~~  
Federal Bureau of Investigation  
United States Department of Justice  
Washington, D. C.

September 25, 1970

New Left >

Honorable Gerald R. Ford, Jr.  
Minority Leader  
House of Representatives  
Washington, D. C. 20515

My dear Congressman:

In response to your inquiry concerning the White Panther Party which you raised during our conference with the President on September 22, 1970, I thought you would be interested in the following.

The White Panther Party is a relatively small New Left group formed in late 1968 by a "Hippie" rock and roll musical group named the "Motor City Five." The headquarters for this group is located at 1520 Hill Street, Ann Arbor, Michigan. This organization has distributed a leaflet setting forth a "ten-point program" which, among other things, calls for full support of the Black Panther Party, a self-described revolutionary organization advocating the use of guns to end the oppression of black people.

The program of the White Panther Party calls for total assault on the culture by any means necessary, including rock and roll, the use of dope, the utilization of obscene acts in public and free exchange of energy and materials. This group demands the end of the use of money, calling for the turning over of everything to the people. The White Panther Party states in their program that "they breathe revolution" and are "LSD driven."

ORIGINAL RETIRED FOR PRESERVATION

(Figure 4-9)

Hoover Letter to Congressman Gerald R. Ford  
September 25, 1970

Referring to a White House Meeting on Sept. 22, in which Nixon, Ford, and Hoover Discussed the White Panthers

Source: Congressional Papers, Ford Presidential Library

(fig. con'd.)

Honorable Gerald R. Ford, Jr.

The leaders of this organization are John Sinclair, Milton Taube and Lawrence Robert Plamondon. These individuals have all been convicted of drug violations in the past and Plamondon has been indicted for the bombing of a Central Intelligence Agency office in Ann Arbor, Michigan, in 1968.

Plamondon was arrested on July 23, 1970, and he had in his possession papers belonging to him and other members of the White Panther Party indicating that conditions in the United States must escalate to "revolutionary violence." Plamondon referred to the level of violence as "bombings and sabotage." He also stated "We will see more guerrilla violence" as such activity is an excellent tool because it is highly organized and highly developed. These papers also suggested that the White Panther Party consider kidnaping United States ambassadors and other high Government officials so that White Panther Party members now in prison may be set free in return for the release of these officials.

The Department of Justice has been forwarded all pertinent information concerning the White Panther Party and its leaders. The FBI has this organization and its membership under active investigation. Any information coming to our attention concerning violations of laws will either be referred to local authorities or to the Department of Justice depending on the nature of the violation.

Sincerely yours,



- 2 -

ORIGINAL RETIRED FOR PRESERVATION

Assistant Attorney General  
Criminal Division

November 16, 1970

Director, FBI

~~\_\_\_\_\_~~  
JOHN SINCLAIR

~~\_\_\_\_\_~~  
ELECTRONIC SURVEILLANCE

Reference is made to your memorandum dated October 15, 1970, captioned "Electronic Surveillance Information Request: ~~\_\_\_\_\_~~ John Sinclair; ~~\_\_\_\_\_~~ wherein you request electronic surveillance information.

~~\_\_\_\_\_~~ and John Sinclair were not the subject of a direct electronic surveillance nor were any of their conversations monitored by an electronic device of the FBI.

EXHIBIT # 20 TO INTERROGATORIES

(Figure 4-10)

FBI Memorandum, Hoover to Asst. A. G. Will R. Wilson  
November 16, 1970

Denies Sinclair has been Overheard in FBI Wiretaps

Source: Legal Papers of Hugh M. Davis

## Chapter Five

### The Keith Decision: U.S. v. U.S. District Court

#### I.

There may have been a time when a valid distinction existed between external and internal threats. But such a distinction is now largely meaningless. The radical left...is plotting violence and revolution. Its leaders visit and collaborate with foreign Communist enemies. Court-authorized wiretapping requires a prior showing of probable cause and the ultimate disclosure of sources...[which] would seriously handicap our counterespionage and counter-subversive operations...Freedom can be lost as irrevocably from revolution as from foreign attack. -- Lewis F. Powell, August, 1971<sup>1</sup>

On January 25, 1971, U.S. District Judge Damon J. Keith issued his now-famous "Keith Decision," in response to the Nixon Administration's Mitchell Doctrine affidavit. Borrowing heavily from Judge Warren Ferguson's decision in

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<sup>1</sup>Quoted in New York Times, November 3, 1971, 47. Powell's article was originally written in July of 1971. His views concerning the subject of warrantless wiretapping underwent significant revision during the subsequent year, as the following passage from the Keith decision demonstrates: "Though the investigative duty of the executive may be stronger in such [national security] cases, so also is there greater jeopardy to constitutionally protected speech. History abundantly documents the tendency of Government....to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. U.S. v. U.S. District Court, June 19, 1972, 407 U.S. 297, 15-16.

U.S. v Smith, delivered just two weeks earlier, Keith refuted Mitchell's claim of "inherent right," and ordered the government to disclose to the defense all electronic surveillance transcripts pertaining to defendant Lawrence R. Plamondon. Within days, the Justice Department sought an immediate review of Keith's order from the Sixth Circuit Court of Appeals in Cincinnati, via a "mandamus" appeal. Overnight, the White Panther "CIA Conspiracy Case" became a cause celebre for the Justice Department's Internal Security Division. During the next eighteen months, the Mitchell Doctrine underwent the scrutiny of the upper levels of the U.S. Judiciary. The Sixth Circuit Court of Appeals upheld Keith in a two-to-one decision on April 8, 1971; the Supreme Court ruled on June 19, 1972, in a unanimous 8-0 decision.<sup>2</sup>

During the interim, the Justice Department's position on the Mitchell Doctrine underwent significant revision. At both the district court and appellate levels, the government's principal attorneys on the case, Solicitor General Erwin N. Griswold and Assistant Attorney General Robert C. Mardian, argued the following: (1) the President (and his representative, the Attorney General), possess the "inherent constitutional power" to initiate "national security" wiretapping against suspected "domestic subversives," without seeking prior judicial approval; (2)

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<sup>2</sup>Newly-appointed Justice William H. Rehnquist took no part in the deliberations or decision.

Congress specifically recognized this power in section 2511(3) of the Omnibus Crime Control and Safe Streets Act of 1968; (3) the Supreme Court indicated support for "national security" wiretapping in selected passages of the Katz and Giordano decisions, recognizing the "inherent power" of the Executive in numerous cases involving foreign relations and internal security matters; (4) in view of the high levels of social disorder present in America, threats posed by domestic groups seeking to "subvert the existing political order" parallel those of any strictly "foreign" entity; and (5) the Court should therefore recognize the Executive's powers to wiretap without warrant.<sup>3</sup>

After Chief Judge George C. Edwards ruled against the government, Mardian and Griswold revised their brief, arguing instead: (1) the Fourth Amendment does not prohibit all searches and seizures, only those that are "unreasonable"; (2) "national security" surveillance conducted by the Executive without prior judicial approval is not an unreasonable search; and (3) the various requirements associated with judicial review in "national security" wiretapping cases -- obtaining probable cause, disclosing "sensitive" and secret information, and relying on judges to make decisions "outside the traditional judicial responsibilities" -- would "frustrate the governmental

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<sup>3</sup>United States Court of Appeals for the Sixth Circuit, Case No. 71-1105, U.S. v. U.S. District Court, 444 F.2d, 651-77.

purpose behind surveillance" and "significantly reduce the chances of the surveillance being effective."<sup>4</sup>

Opposing the government's position were two separate teams of defense attorneys. William Kunstler, Leonard Weinglass, and Hugh M. Davis, who had represented the "Ann Arbor Three" (Sinclair, Plamondon, and Forrest) in the White Panther "CIA Conspiracy" case in Detroit, argued at the appeals level, while corporate attorney William J. Gossett and "people's lawyer" Arthur Kinoy represented the respondents (Judge Keith and the three White Panthers) before the Supreme Court. The defense's argument remained virtually unchanged and focused primarily on the Constitution; it argued that the Executive is not immune from the warrant requirement of the Fourth Amendment, and that the "checks and balances" inherent in the U.S. system of government require that an independent Judiciary insert its "impartial judgement," in this case a court order, between the Executive Branch and the citizen. An important secondary focus for the defense was the assertion that the government was reading far too much into section 2511(3) of the Omnibus Act. It found

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<sup>4</sup>"Brief for the United States," [dated September, 1971], filed October 1, 1971, U.S. v. U.S. District Court, No. 70-153, 5-7; bound case files located in the U.S. Supreme Court Building, Washington, D.C., 3rd Floor, "Technical Services," "Records and Briefs" [hereafter "SCR/B"].

the passage "neutral on the issue of whether the President does have power to eavesdrop on domestic activities."<sup>5</sup>

The Supreme Court's majority decision, written by newly-appointed Justice Lewis F. Powell, Jr., squarely rejected the Mitchell Doctrine. Acknowledging that the period was one of "civil disorders" and "worldwide ferment," Powell nonetheless ruled:

The circumstances described do not justify complete exemption of domestic security from prior judicial scrutiny. Official surveillance, whether its purpose be criminal investigation or on-going intelligence gathering, risks infringement of constitutionally-protected privacy of speech. Security surveillances are especially sensitive because of the inherent vagueness of the domestic security concept, the necessarily broad and continuing nature of intelligence gathering, and the temptation to utilize such surveillances to oversee political dissent.<sup>6</sup>

Powell's decision upheld Keith's order for the government to disclose its wiretap logs of Plamondon's intercepted conversations. As a result, the Justice Department soon abandoned its case against all three defendants, claiming that disclosure would "damage national security." The decision had a tremendous impact upon a number of the government's other high-profile cases against the anti-war movement and the Black Panthers; many of them were abandoned as a result of the Keith ruling.

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<sup>5</sup>"Brief for the District Court and the Honorable Damon J. Keith," filed December 15, 1971, 4-7, SCR/B.

<sup>6</sup>U.S. v. U.S. District Court, 407 U.S. 297, 21-22.

The Nixon Administration's inability to secure the support of even a single Justice in the Keith case was rooted in the social and political changes which took place in American society during 1971 and the first half of 1972. The Administration's offensive against the anti-war, New Left, counterculture, and Black Power movements reached new heights, characterized by such highly-publicized measures as a legal action against major newspapers during the "Pentagon Papers" crisis, mass arrests and internment of thousands of anti-war demonstrators during the demonstrations of May, 1971, the expansion of highly-political conspiracy trials, and an attempt to re-activate political inquisitions, through a rejuvenated Subversive Activities Control Board (SACB).

A similar boldness also characterized the Justice Department's revised wiretapping policies. Having been largely silent on the subject of "national security" surveillance during the latter half of 1969 and throughout 1970, the Nixon Administration, within weeks of Keith's January, 1971, decision, conducted a forceful public relations campaign designed to bolster public support for the Mitchell Doctrine. For the first time in almost two years, the divergence between the Administration's publicly-stated wiretapping policies and its actual practices narrowed, as the Justice Department admitted the FBI was tapping more and more telephones. As the Keith case moved through the appellate level and on to the Supreme Court, Nixon, Mitchell,

Richard Kleindienst, Robert Mardian, and William Rehnquist (while still Assistant Attorney General) delivered a number of public addresses extolling the benefits of expanded surveillance power to investigate suspected domestic, as well as "foreign" threats to the nation. The Mitchell Doctrine became an important part of a renewed "law and order" campaign being waged by the Nixon Administration.

The Administration's public relations campaign backfired on a grand scale. The reasons for the Mitchell Doctrine's demise were closely related to the audacity which characterized the initiative, as well as to bad timing. A combination of reduced social disorder, increasing media revelations of Army, FBI, and governmental surveillance abuses, a revitalized Democratic opposition, and the Justice Department's callous "law and order" actions against dissenters, created an atmosphere inimical to Nixon's hope for expanded wiretapping. Throughout 1971, the national media reported numerous revelations of Army spying, FBI covert operations, and the increasing practice among government agencies of collecting and computerizing personal information concerning millions of Americans. Revelations of suspected Army surveillance, made public in hearings conducted by Senator Sam Ervin's Subcommittee on Constitutional Rights, became an ongoing "story" throughout the spring and summer. One major revelation of Ervin's Subcommittee was the Army's "CONUS" program, in which tens of

thousands of dossiers had been opened on civilian politicians and members of anti-war/peace movement groups since the onset of the Cold War. Ervin's Army hearings led to media inquiries into other, heretofore secret, government intelligence/surveillance practices. Also damaging to the Administration was the public release of documents which exposed the FBI's COINTELPRO program, as well as the so-called "Pentagon Papers."

Media reaction to the Justice Department's bold campaign to secure judicial sanction for the Mitchell Doctrine only increased public apprehension. Newspaper articles and editorials from such journalists as Fred Graham and Tom Wicker of the New York Times and Sanford Ungar and Alan Barth of the Washington Post, strongly opposed the Mitchell Doctrine. The media also followed closely the Keith case, as it moved through the courts. Within a week of Powell's decision, Fred Graham commented that the Administration's position in the case contributed to "a very real sense of near-paranoia" existing in America, concerning the government's wiretapping policies.<sup>7</sup>

Ervin's hearings, the Mitchell Doctrine, and other public disclosures concerning governmental surveillance, provided the Democratic opposition with a potent political issue. Throughout 1971, Democrats charged Nixon with conducting a widespread campaign of political spying. In

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<sup>7</sup>New York Times, June 25, 1972, section IV, 4.

April, Presidential aspirant Edmund Muskie made public an FBI report documenting that the Bureau had conducted sweeping physical and electronic surveillance of 1970's "Earth Day" celebrations; the rallies had included speeches from prominent politicians, including Muskie himself. Democrats also charged that the FBI was bugging and wiretapping their Congressional offices and private residences. Several called for Hoover's resignation. Nothing signalled the end of an era of unquestioned Congressional acquiescence in executive policy-making on surveillance and "national security" issues more than the aging Director's inability to "deflect" the Democrats' unrelenting criticism, as he had successfully done over the previous four decades.

There is no small irony in the fact that "law and order" -- the issue which had contributed greatly to Nixon's election in 1968, and which had allowed the Administration to push a huge anti-crime package through Congress the previous fall -- backfired on Nixon, with the failure of the Mitchell Doctrine. One of the keys to its failure was the reduction in social disorder during 1971 and 1972. Like many of the Administration's other anti-crime initiatives, the Mitchell Doctrine depended upon fear.<sup>8</sup> A central premise of the government's argument in Keith was that the threat posed by "domestic" individuals and groups paralleled that of "foreign nations and their agents." To support their claim, the

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<sup>8</sup>New York Times, January 14, 1971, 37.

government quoted statistics of recent anti-establishment bombings, asserting "the President must protect the government." It implied that without unchecked wiretapping powers he would be unable to do so effectively.<sup>9</sup> Mitchell's June 11, 1971, address to the Virginia Bar Association also addressed this theme:

Never in our history has this country been confronted with so many revolutionary elements determined to destroy by force the government and the society it stands for...the threat to our society from so-called 'domestic subversion' is as serious as any threat from abroad...The Constitution...is the charter for a viable government system, not a suicide pact.<sup>10</sup>

The Nixon Administration's Keith initiative depended upon high levels of social disorder, yet, the turbulence and polarization that had largely defined America during the late sixties was winding down. "Terrorist" bombings continued at or near 1970 levels, but the number and ferocity of large confrontations in the struggle between the Movement and the conservative establishment underwent a steady decline. The anti-war demonstration in Washington, D.C. in early May was one of the last major flashpoints of the sixties.<sup>11</sup> A

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<sup>9</sup>"Brief for the United States," filed October 1, 1971, SCR/B.

<sup>10</sup>Quoted in New York Times, June 12, 1971, 12. See also Washington Post, June 12, 1971, A-1, and June 27, 1971, B-6.

<sup>11</sup>The historical era known as the "sixties" does not neatly fit within a standard decade-by-decade categorization (commonly debated in U.S. historiography). The social and political dynamics of the "sixties" actually lasted well into the early seventies. A better demarcation might be 1963  
(continued...)

Gallop Poll conducted in August of 1971 indicated that only 12 percent of Americans viewed "crime and lawlessness" as the nation's top problem; by mid-December the figure had fallen to 6 percent, as the Vietnam War and a worsening economy eclipsed all other concerns.<sup>12</sup>

During the same period, the White Panther Party evolved along a path similar to the rest of the Movement. No longer satisfied with the radical connotations of the title "White Panthers," the Ann Arbor chapter adopted the name "Rainbow People's Party," (RPP) and re-focused their energies on local organizing. The government portrayed the White Panthers in its Keith briefs as a dangerous terrorist organization and a threat to the internal security of the nation at precisely the time when the group was adopting a moderate position and increasingly working within the local political "system." By 1972, the Rainbow People joined forces with the local "Human Rights Party," successfully elected several local officials, and even supported Democratic Presidential candidate George McGovern.

The moderation of the group's politics and name change, however, made little difference to the authorities. Although the FBI's warrantless wiretaps on the Ann Arbor chapter were

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<sup>11</sup>(...continued)  
(Birmingham riots and John F. Kennedy's assassination) through 1973/4 (Watergate, the Arab oil embargo, and Nixon's resignation).

<sup>12</sup>New York Times, December 19, 1971, 54.

turned off the day after Keith's ruling, other forms of FBI and local law enforcement surveillance continued. In addition, counterintelligence actions targeting the Rainbow People reached new heights. A highly-coordinated COINTELPRO initiative aimed at the group occurred in March of 1971, when the Nixon Administration issued a press release charging that the White Panther leadership had considered kidnapping Vice President Agnew and other high-ranking politicians, to gain the release of John Sinclair. The timing -- just as the Appeals Court was deliberating over the Keith case -- suggested top-level government coordination. Several White Panthers were also implicated in the Weathermen bombing of the U.S. Capital in early March. All told, between 1966 and 1972, the number and variety of COINTELPRO-like initiatives utilized against Sinclair and his associates by local, county, state, and federal officials rivalled that of the Black Panthers.

With most of its leadership in prison, the Rainbow People nevertheless displayed a remarkable resourcefulness. The "Free John" and "CIA Conspiracy" campaigns continued to attract local and national support. Benefit concerts, featuring the likes of Bob Seger, Dr. John, Commander Cody, Ted Nugent and the Amboy Dukes, and Mitch Ryder, generated the money required to continue the legal defense funds for Sinclair, Plamondon, Taube, and Forrest. Celebrity support also increased, with Donald Sutherland, Jane Fonda, Allen

Ginsberg, and others appearing at Rainbow People rallies. On December 10, 1971, the "John Sinclair Freedom Rally" was held in Ann Arbor's Crisler arena, featuring performances by Stevie Wonder, Phil Ochs, Bob Seger, and Commander Cody; also appearing were four of the "Chicago Eight": Bobby Seale, David Dellinger, Jerry Rubin, and Rennie Davis. The highlight of the evening, however, was a performance by John Lennon and Yoko Ono, which featured a Lennon composition entitled "John Sinclair."

The high visibility of the "Free John" movement, as well as the tenacious legal battle fought by White Panther attorney Justin Ravitz, had a cumulative effect on Michigan's population, as many began to reassess the harshness of the state's marijuana laws. By the fall of 1971 the same Michigan Supreme Court that had repeatedly denied appeals for Sinclair's release on bond was giving serious consideration to Ravitz's position that a felony charge for possession of small amounts of marijuana was "cruel and unusual punishment." On December 13, 1971, just three days after John Lennon's appearance at the Freedom Rally, the Court ruled as Ravitz had requested, freeing John Sinclair on bond. The Sinclair case soon became a model in a nation-wide initiative to decriminalize marijuana.

Overkill also damaged the Nixon Administration's attempt to reverse the decisions of the Warren Court. The retirement of Justices Harlan and Black in September of 1971 provided an

excellent opportunity for Nixon to remake the Court in his image. Although his selection of Lewis Powell and William Rehnquist was probably due to a number of factors, including their overall pro-law and order "judicial philosophies," he could scarcely have found two individuals more adamant in their public support for expanded FBI wiretapping of domestic radicals. Rehnquist, during his tenure with the Justice Department, had been one of the principal framers of the Mitchell Doctrine; by mid-1971 he had also acquired a reputation as the Department's most enthusiastic supporter of harsh measures against anti-war protestors, such as mass arrests and internment. Lewis Powell, a well-known former American Bar Association President, had been a member of the President's Task Force on Crime and Violence in 1968 -- the same task force that parted ways with President Johnson and Attorney General Clark by supporting Title III wiretapping. He had also headed up the controversial ABA Committee on Police Standards, which drafted guidelines for states to use in establishing wiretapping statutes.

For Rehnquist, the "backfire effect" occurred during his confirmation hearings, as Senator Kennedy and other liberals on the Judiciary Committee grilled him concerning his involvement in several of the Justice Department's more questionable initiatives, including the Mitchell Doctrine. Under intense questioning, Rehnquist made two unwise admissions: (1) he had assisted in the drafting of the

government's Keith briefs, and (2) he avowed that if confirmed, he would not take part in the pending Keith case. Thus, the bluntness of the Nixon Administration's public relations campaign in favor of expanded wiretapping power (and other initiatives) ultimately cost Nixon a key vote on the Keith case, even before it came up for consideration in the Supreme Court.

The backlash affected Powell in a very different manner. During the confirmation hearings, he was questioned at length concerning a newspaper article he had recently written, in which he referred to the current furor over wiretapping as "a tempest in a teapot." In the same article he asserted that the distinction between "domestic" and "foreign" threats to the nation's security had become "meaningless."<sup>13</sup> Powell stood his ground in the hearings, stating that he had not yet made up his mind on the issue of "national security" surveillance. By the following spring, when, as a member of the Supreme Court, he heard oral arguments in the Keith case and (ironically) assumed the duty of writing the decision, he had undergone a dramatic shift in his thinking concerning surveillance issues. The text of his decision left no doubt concerning the enormous impact which the public's increasing concern about surveillance had on his thinking:

The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power. Nor must the fear of unauthorized official

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<sup>13</sup>Quoted in New York Times, November 3, 1971, 47.

eavesdropping deter vigorous citizen dissent...By no means the least importance [of this decision] will be the reassurance of the public generally that indiscriminate wiretapping and bugging of law-abiding citizens cannot occur.<sup>14</sup>

The Court's unanimous decision in Keith, as well as its focus on the Fourth Amendment, indicated that the Justices were cognizant that more was involved in the case than merely a request for heightened wiretap power. In constitutional terms, the Executive sought to acquire additional search and seizure powers from the Judiciary, by capitalizing on social disorder and public fears of crime and lawlessness. However, the Mitchell Doctrine was also a challenge to the Constitution's checks and balances. The Executive was essentially asking the Judiciary to cede a portion of its powers, in the interest of "national security." Such requests are not unique in the history of the Republic; as recently as the Korean War, President Truman had used the "inherent power" argument in an unsuccessful attempt to seize and operate the nation's steel mills.

What made Nixon's constitutional challenge in the Mitchell Doctrine unique was the fact that it was just one of a series of Administration attacks on the Judiciary, which had started even before Nixon took office, and which would continue through the Watergate crisis. In many ways, Nixon's election had been a repudiation of not only the Liberals, but also the Warren Court. Its decisions protecting the rights

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<sup>14</sup>U.S. v. U.S. District Court, 407 U.S. 297, 16, 23.

of the accused, such as Miranda and Escobedo, remained a focus for the Administration's invective throughout its first years in office. John Eliff's study of the Mitchell Justice Department during the years 1969-1971 finds that it followed a policy of selective enforcement of Miranda and other Warren Court rulings, while simultaneously exploiting "grey areas" in the law to "crack down" on criminals. The Administration's policies regarding "national security" wiretapping evolved along similar lines, but with one important difference: the Mitchell Doctrine attacked not only the rulings of the Judiciary (e.g. Katz and Alderman), but also the independence of U.S. District Court judges. By arguing that federal judges lacked the expertise and knowledge required to make "informed judgements" concerning national security issues, the Administration displayed a deep distrust of the Judiciary, which paralleled Hoover's position dating back to the Coplon case.<sup>15</sup> While Hoover's statements were made in private, Nixon and Mitchell did not hesitate to attack the courts in public.

The Court's decision in U.S. v. U.S. District Court did not forestall the coming of the "Nixon Court." In fact, during the very term in which Keith was decided (1971-72),

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<sup>15</sup>In a 1954 letter to Congressman Kenneth Keating, Hoover outlined the reasons for his opposition to judicial review of "national security" wiretapping. He focused primarily on the character of federal judges, stating: "no one Federal judge possesses sufficient information on the nation's security upon which he can base a decision." Quoted in Charns, Cloak and Gavel, 33.

the Court handed down several five-to-four rulings which signaled a shift to Nixon's "law and order" philosophy. One of these cases, Laird v. Tatum, erected nearly insurmountable legal obstacles preventing aggrieved parties from acquiring justice in cases involving government surveillance. As a result of this decision, the burden of proof was shifted to the plaintiffs in such cases: individuals and/or organizations seeking damages against the government now had to demonstrate that "actual damage" had been inflicted upon them as a result of the surveillance and/or dossier collection -- which proved almost impossible to accomplish. In addition, Keith may not have ended the FBI's time-honored practice of instituting warrantless wiretaps against suspected "domestic subversives"; it may have merely driven the practice back "underground."

These facts, however, do not detract from the historical and constitutional significance of the Keith decision. The ruling established the absolute necessity of prior court orders in law enforcement situations involving the use of electronic surveillance of U.S. citizens. It halted a potentially dangerous Executive Branch encroachment into a realm properly reserved for the Judiciary -- reaffirming both Marbury v. Madison and the Constitution's system of "checks and balances." Keith also sent a strong message to Congress, urging it to enact the ruling's provisions into statute.



(Figure 5-1)  
Contemporary Photograph of the Honorable  
Judge Damon J. Keith

Source: Mayhew and Peper, Cincinnati, Ohio

## II.

The government states that the decision to initiate surveillance in this type of case must be 'based on a wide variety of considerations and on many pieces of information which cannot readily be presented to a magistrate'...In cases involving foreign affairs this argument might very well prevail. In that situation, numerous non-judicial factors are relevant and the decision would probably be far removed from the consideration of probable cause. However, this argument is totally inapplicable in a criminal proceeding in a federal court involving a domestic situation. -- Judge Warren J. Ferguson<sup>16</sup>

An idea which seems to permeate much of the Government's argument is that a dissident domestic organization is akin to an unfriendly power and must be dealt with in the same fashion. There is great danger in an argument of this nature for it strikes at the very constitutional privileges and immunities that are inherent in United States citizenship. -- Judge Damon J. Keith<sup>17</sup>

"Life is a game of inches" recalls U.S. Appeals Judge Damon J. Keith, reminiscing about the unusual events which led to his handling the U.S. v. Sinclair, Plamondon, and Forrest case, which became U.S. v. U.S. District Court. Originally, it was not Keith's case. The "blind draw" system utilized by the District Courts for the Eastern District of

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<sup>16</sup>Memorandum Opinion, U.S. v Melvin Carl Smith, January 8, 1971, Crim. No. 4277-CD, located in the Papers of Justice William O. Douglas, Manuscript Division, Library of Congress [hereafter "Douglas Papers"], container 672, Subject File: "Wiretapping, 1954-70," 10.

<sup>17</sup>"Memorandum Opinion...", U.S. v Sinclair, Plamondon, and Forrest, January 25, 1971, Crim. No. 44375, JLSC/BHL, box 19, folder 21, 9 [hereafter "Keith Decision"].

Michigan had originally assigned the Sinclair case to Judge Talbot Smith, who resided in Ann Arbor. Because of the White Panthers' reputation as committed "revolutionaries," Judge Smith was not at all happy with the draw. His first concern was the safety of his wife, but he also worried that attorneys William Kunstler and Leonard Weinglass might attempt to make the case a cause celebre for the Movement, as they had done with the "Chicago Seven" trial in Chicago. Smith related his concerns to Chief Judge Ralph Freeman and the other judges of the Eastern District during a regularly-scheduled "Judge's Meeting" in the summer of 1970. Smith suggested that Freeman contact the Chief Judge for the Sixth Circuit in Cincinnati, to request an out-of-state judge to try the case. Keith, one of the youngest judges on the court, objected, stating that this would set a bad precedent. He acknowledged the validity of Smith's concerns, but believed the case should be kept within the Eastern District. Judge Freeman agreed, which meant the case had to be re-assigned. Under normal circumstances, it would have been sent back to the Clerk of Court's office for a new "blind draw." However, one of the other judges present suggested that all of the judges (except Smith) place their names in a hat and draw for the case in the Judge's Meeting. Freeman

accepted: in this unlikely manner, Judge Keith was assigned the case.<sup>18</sup>

Damon Jerome Keith was born in Detroit in 1922, the seventh and last child of lower-middle class factory worker. Growing up on the streets of Detroit's west side, he recalls being exposed to "pimps, hustlers, and foundry workers at the automobile factories." "Most kids," Keith adds, "did not go to college -- most went to Jackson Prison." Against considerable odds, he distinguished himself at Northwestern High School, where he received three varsity letters in track and field. Perry Keith, Damon's father, was determined that one of his children would receive a college education, and somehow the family raised the necessary funds to send Damon to the all-black West Virginia State College in Morgantown, where he earned a Bachelor of Arts degree in 1943. Upon graduation, he was immediately drafted, and spent the next three years driving trucks for the Quartermaster Corps, a member of an all-black unit. After the war, he enrolled at Howard University Law School in Washington, D.C., where he came to know Thurgood Marshall, Spottswood Robinson, and James Nabrit. At the time, they were plotting various legal strategies to attack school segregation nationwide, and Jim Crow laws in the South -- a strategy which culminated in the landmark Brown v. Board of Education of Topeka case in 1954.

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<sup>18</sup>Personal interview with Judge Damon J. Keith, October 21, 1992, Detroit, Michigan.

The "moot" Supreme Court sessions at Howard, featuring the best African-American legal minds in the country, had a profound impact on Keith.<sup>19</sup> After receiving his LLB degree in 1949, he returned to Detroit, and was admitted to the Michigan Bar the following year. He soon joined a local law firm and became a trial attorney. In 1953, he married Rachael Boone, a Liberia-born medical resident. By the mid-sixties, Keith had become a civic leader in Detroit, led the most successful black law firm in the city, and chaired the Michigan Civil Rights Commission. His growing reputation, as well as his personal friendship with Michigan Senator Philip Hart, earned him a nomination for a U.S. District Judgeship in 1967. Congress promptly confirmed Keith, and President Johnson appointed him on October 18, 1967.

Within three years of his appointment to the Federal Bench, Keith handled one of the nation's most contentious desegregation cases: Davis v. School Board of Pontiac, Inc.. Despite death threats and frequent incidents of violence, Keith presided over the forced desegregation of the city's public schools. Davis was the first case in U.S. history to extend federal court-ordered school integration to the North.

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<sup>19</sup>For an analysis of the impact which these Howard University attorneys had upon the "modern" civil rights movement, see Juan Williams, Eyes on the Prize: America's Civil Rights Years, 1954-1965, (New York: Penguin Books, 1988), 2-35.

It would not be the last time that Keith went with his "gut instincts" and ruled in a controversial manner.<sup>20</sup>

From the moment that he presented Mitchell's "inherent right" affidavit in Judge Keith's Detroit courtroom on December 18, 1970, U.S. Attorney Ralph B. Guy was no longer in charge of the government's case against the "Ann Arbor Three." As Guy recalls: "the Justice Department in Washington took over the argument, and from this point on they handled the case."<sup>21</sup> By this time, Mitchell had already acquired legal decisions on the doctrine from three separate U.S. District Courts. He first presented the issue in June of 1969, before Judge Julius J. Hoffman in Chicago, who affirmed it the following February.<sup>22</sup> An additional affirmation was acquired in Kansas during the fall of 1970, from Judge Arthur J. Stanley.<sup>23</sup> And on January 8, 1971, Judge Warren J. Ferguson ruled against Mitchell in California.<sup>24</sup> Therefore, going into the U.S. v. Sinclair

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<sup>20</sup>Detroit Free Press, (Detroit Magazine), June 10, 1984, 1.; "Resolution Honoring the Honorable Damon J. Keith," State Bar of Michigan, February 17, 1978, [unpublished resolution]; Personal Vita of Damon J. Keith. The author is grateful to Judge Keith for furnishing copies of these materials.

<sup>21</sup>Personal interview with author, July 17, 1992, Ann Arbor, Michigan.

<sup>22</sup>U.S. v. Dellinger, et. al., (N.D. Ill), Crim. No. 69-180, February 20, 1970.

<sup>23</sup>U.S. v Felix Lindsey O'Neal, Crim. No. KC-CR-1204, (Dist. of KS), September 3, 1970.

<sup>24</sup>U.S. v. Melvin Carl Smith, Crim. No. 4277-CD, (C.D. CA), January 8, 1971.

case, the government was "two for three" on the Mitchell Doctrine in the district courts, but had not yet received an appellate court ruling, or -- the real prize -- a Supreme Court decision.

The affidavit Mitchell brought before Judge Keith contained essentially the same argument he had presented in the previous three cases: (1) one of the defendants [Plamondon] had been overheard in "national security" investigative wiretaps, conducted for the purpose of protecting the nation's internal security from "domestic" revolutionary organizations; (2) a sealed exhibit, containing the surveillance transcripts, was presented to the judge, strictly for his in camera inspection; and (3) Mitchell asserted that it would "prejudice the national interest" to disclose the contents of the exhibit to the defense.

Mitchell's affidavit presented Keith with several options. Ostensibly, it appeared that the government was asking him to review the contents of the logs and rule that the information contained in them was inconsequential to the prosecution's case, which would effectively end the electronic surveillance issue, and allow the trial to go forward as planned, with the defense never having access to the transcripts. In fact, Judge Stanley had ruled precisely in this manner the previous September, in a Kansas case involving a Black Panther. Another option Keith could have pursued would have involved holding a "taint hearing"

concerning the wiretaps prior to the trial, in accordance with the Alderman decision, which would have required disclosing the transcripts to the defense, in direct opposition to Mitchell's wishes. Instead, Keith chose a middle road: he ordered immediate disclosure, but, in a highly unusual move, directed that the taint hearing would occur at the conclusion of the trial.<sup>25</sup>

Keith's decision, handed down January 25, 1971, was a strong rebuke to Mitchell's doctrine. Keith began with a discussion of the Alderman decision, which empowers federal judges to force disclosure of illegal surveillance. He then shifted to an analysis of the government's position, as outlined in the Mitchell affidavit and supporting brief, and summarized the three court cases which had already dealt with the matter. Of particular interest to Keith was Judge Warren Ferguson's recent decision in the Central District of California, which he termed "exceptionally well-reasoned and thorough."<sup>26</sup> Conceding that he was "compelled to adopt the

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<sup>25</sup>Although Keith declared the government's position inimical to the Constitution, he was nonetheless prepared to delay ruling on the issue of the surveillance's relevance to the government's case until after the trial. In this manner (and only this manner), his ruling was similar to that of Judge Hoffman, who was asked for a decision on the doctrine in June of 1969, but put off ruling on it until the conclusion of the trial, in February of 1970.

<sup>26</sup>Keith had learned of Ferguson's decision during the pre-trial arguments in his court in mid-January. During the proceedings, he stated that he would not rule on the electronic surveillance issue until he had a chance to examine Ferguson's ruling. See Detroit News, January 17, 1971, 1-A.

rule and rationale" of Ferguson's decision, Keith then outlined the heart of his argument: the history and significance of the Fourth Amendment. He reviewed the key cases which had established the modern legal interpretation of the Amendment, beginning with Weeks v. U.S. (1914), which set the precedent that evidence secured in violation of the Fourth Amendment is inadmissible in a court of law. He then addressed Silverthorn Lumber Co. v. U.S. (1920), the well known "fruit of the poisonous tree" ruling, and Mapp v. Ohio (1961), the Warren Court ruling which expanded the exclusionary rule to prohibit the introduction in court of any information derived from illegally obtained evidence. Keith also cited the landmark electronic surveillance cases Silverman v. U.S. (1961) and Katz v. U.S. (1967), which he referred to as "the final buttress to this canopy of Fourth Amendment protection." Charging that the government, in its Mitchell Doctrine brief, "apparently ignores the overwhelming precedent of these cases," Keith asserted: "the Court is unable to accept this proposition. We are a country of laws and not men."<sup>27</sup>

Keith next addressed the government's assertion that section 2511(3) of the Omnibus Act of 1968 demonstrated Congressional sanction for the President's "national security" wiretapping authority. Again, he deferred to Ferguson's decision, quoting him as follows: "'Regardless of

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<sup>27</sup>Keith Decision, 2-5.

these exceptions in the criminal statute, the President is, of course, still subject to....Constitutional limitations.'" Keith then returned to the Fourth Amendment, delivering a detailed defense of the exclusionary rule:

It is to be remembered that the protective sword which is sheathed in the scabbard of Fourth Amendment rights, and which insures that these fundamental rights will remain inviolate, is the well-defined rule of exclusion...[and] the cutting edge of the exclusionary rule is the requirement that the Government obtain a search warrant before it can conduct a lawful search and seizure. It is this procedure of obtaining a warrant that inserts the impartial judgement of the Court between the citizen and the Government.

Stressing the importance of probable cause to the warrant requirement, Keith asserted that "Absent such a requirement," law enforcement would be able to make "their own evaluation as to the reasonableness, the scope and the evidence of probable cause of such a condition" -- a situation which he was "loath to tolerate."<sup>28</sup>

Addressing the government's position equating domestic threats with foreign ones, Keith termed the argument "untenable," and opined that the Executive Branch must not be granted wholly new powers simply because "certain accused persons espouse views which are inconsistent with our present form of government." He cautioned that in a "turbulent time of unrest," in which "contented and established members of....society" increasingly display their unwillingness to understand the purposes and rhetoric of radical groups such

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<sup>28</sup>Ibid., 5-8.

as the White Panthers, it is doubly important for the Judiciary to stand vigilant against the tide of public hostility, to ensure that these individuals and groups are not persecuted merely for their beliefs. He continued:

If democracy as we know it, and as our forefathers established it, is to stand, then 'attempts of domestic organizations to attack and subvert the existing structure of the Government'....cannot be, in and of themselves, a crime. Such attempts become criminal only where it can be shown that the activity was/is carried on through unlawful means.

Keith expressed doubt concerning whether the government had probable cause to wiretap Plamondon in the first place, adding "if such probable cause did exist, a warrant to search may have properly been issued." He concluded his ruling with an order that the government make full disclosure of the wiretap logs to the defense within forty-eight hours.<sup>29</sup>

Like Ferguson, Keith ruled against the Mitchell Doctrine and ordered disclosure. Although his ruling borrowed heavily from Ferguson, there are important differences. Ferguson granted the government a full month to "perfect an appeal," while Keith granted only forty-eight hours. He later acknowledged that his curtness with the government was rooted in his anger and suspicions concerning the Mitchell Doctrine itself, as well as the manner in which Mitchell had presented it. In a 1992 interview with the author, he recalled his

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<sup>29</sup>Ibid., 8-14. The Keith Decision was covered extensively by the national media; see New York Times, January 26, 1971, 15; and Washington Post, January 27, 1971, A-3.

reaction to the Mitchell affidavit: "It was a complete shock to me. I had not heard of it before. I thought it was absolutely absurd...it was such an obnoxious claim that the chief law enforcement officer of the country could be making. It was so provocative." The contents of the sealed exhibit, wiretap logs of five Plamondon conversations with the California Black Panthers in 1969, raised Keith's suspicions, and contributed to his anger. He recalls:

The Government was playing games...there was nothing in the sealed exhibit to indicate it was a domestic organization seeking to subvert the structure of the U.S.A., and the Government knew that the conversations had nothing to do with this.

Keith inferred that Mitchell's unwillingness to disclose a sealed exhibit containing a handful of inoffensive conversations -- which took place subsequent to the CIA bombing, which the White Panthers had been charged with in the case -- masked his hidden agenda, which was to acquire exemption from the Fourth Amendment's warrant requirement concerning electronic surveillance of any domestic target which the Executive unilaterally deemed a "national security" threat.

Keith's statement regarding the "provocative" nature of Mitchell's affidavit, as well as his angry response to it, raises the possibility that Mitchell may have actually wanted an adverse ruling, in the interest of acquiring an appellate court ruling on the Mitchell Doctrine. When questioned about this possibility, Keith responded:

I have never given thought to this issue before, but...this could have been concocted and orchestrated...It was clear to anybody's eyes that nothing in the exhibits....would suggest that the national security of the Government was in jeopardy...They, I'm sure, had checked my entire background, and knew what type of judge I was. I'm sure they had a reading on me...So this may have been a test case to accelerate and put in concrete this new theory that Mitchell had concocted.<sup>30</sup>

The sequence of events following Keith's decision quickly brought the issue of the Mitchell Doctrine's constitutionality to the attention of the Sixth Circuit Court of Appeals in Cincinnati.<sup>31</sup> For Keith and the other

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<sup>30</sup>Personal interview with the author, October 21, 1992, Detroit, Michigan. White Panther attorney Hugh M. Davis is in overall agreement with this thesis. He also believes that the government's primary motive in selecting the White Panther trial was speed: a mandamus appeal issued during the pre-trial phase of a criminal case offered the fastest possible route to an appellate court ruling. Personal interview with author, July 25, 1992, Detroit, Michigan.

<sup>31</sup>Judge Warren Ferguson had ruled against Mitchell more than two weeks prior to Keith in U.S. v. Smith, a case that was very similar to U.S. v. Sinclair, et. al. in two important respects: (1) it also involved an in camera exhibit containing a small amount of innocuous Black Panther wiretaps, which the government conceded had nothing to do with "foreign powers or their agents," and (2) Ferguson, like Keith, had a very liberal voting record, and responded vigorously to the provocative nature of Mitchell's affidavit. The government also sought mandamus in Smith, which begs the (as yet unanswered) question: why did Keith reach the appellate level first? One possible explanation is that Keith offered only forty-eight hours for the government to initiate an appeal (later extended an additional ten days), while Ferguson offered a full thirty days. However, accounting for the earlier date of Ferguson's ruling (January 8), as well as Keith's ten day extension (12 total days from his January 25 decision), the deadline in both cases was approximately February 8. Perhaps the Sixth Circuit Court of Appeals was able to hear the case first. The government did go forward with mandamus in California, but by late spring,  
(continued...)

principals involved, events affecting the case unfolded at an amazing pace. Using the English common law device of "mandamus," the government, within a week of Keith's decision, appealed his ruling to the court responsible for supervising his decisions and rulings: the Sixth Circuit Court of Appeals.<sup>32</sup> The court agreed to hear the case on February 8, and oral arguments were set for February 15. In effect, mandamus meant that the Nixon Administration was taking Judge Keith to court for his adverse ruling on a pre-trial motion. The U.S. v. Sinclair, et. al. case now became known as U.S. v. U.S. District Court for the Eastern District of Michigan, Southern Division, and Hon. Damon J. Keith, Presiding; and John Sinclair, Lawrence "Pun" Plamondon, and John Waterhouse Forrest. The three circuit court judges empaneled to hear the appeal were George C. Edwards (Chief Judge), Harry Phillips, and Paul C. Weick.

The speed with which the case went before the Sixth Circuit did not allow either side much time to revise positions. From Detroit, Hugh M. Davis prepared the defense's brief in opposition to the writ of mandamus, while

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<sup>31</sup>(...continued)  
the Keith case was headed to the Supreme Court, so the Ninth Circuit awaited its ruling.

<sup>32</sup>New York Times, January 28, 1971, 18; Washington Post, January 28, 1971, A-3; (Washington, D.C.) Evening Star, January 28, 1971, A-1 and January 29, 1971, A-6. Mandamus is a highly irregular tactic, usually granted only when the appellate court is convinced of the urgency of a contentious issue. Under normal circumstances, the government must wait until the conclusion of a trial to initiate an appeal.

William Kunstler, working in New York, prepared the brief on behalf of Keith, reiterating and refining his opposition to the Mitchell Doctrine. The Justice Department also submitted a somewhat expanded brief, very similar to the one presented in Keith's courtroom. By this time, the case was being handled at the upper echelons of the Justice Department's Internal Security Division, under the personal direction of Robert Mardian.<sup>33</sup> The only unusual aspect of the oral arguments on February 15 was Hugh Davis' automobile crash en route to Cincinnati from Detroit.<sup>34</sup>

On April 8, 1971, the Sixth Circuit Court of Appeals upheld Keith in a two-to-one decision, Judges Edwards and Phillips in the majority, Judge Weick dissenting.<sup>35</sup> The decision, written by Edwards, began provocatively: "This case has importance far beyond its facts or the litigants

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<sup>33</sup>Washington Post, January 28, 1971, A-3. Ken W. Clawson's article states: "Before the government decided to appeal to the circuit court, and possibly to the Supreme Court, Attorney General Mitchell held extensive meetings with Robert C. Mardian, newly-appointed chief of Justice's Internal Security Division, which is handling the White Panther case."

<sup>34</sup>Davis lost control of his car on icy roads, and ended up in a terrible accident (part of his ear had to be removed). Requiring Davis' brief, Kunstler rented a car in Cincinnati, drove to the crash site, and retrieved it from the snow near the wreckage. Upon returning to Cincinnati, Kunstler had the pages of the brief dried and pressed at a local dry cleaners, and delivered it on time. Hugh M. Davis personal interview with author, July 25, 1992, Detroit, Michigan. For Kunstler's angle on the incident see My Life as a Radical Lawyer, 207-208.

<sup>35</sup>Crim. No. 71-1105, 444 F.2d, 651, April 8, 1971 [hereafter "Edwards Decision"].

involved."<sup>36</sup> The decision attacked the government's assertion of "inherent right" to monitor domestic groups, in much the same manner that both Keith and Ferguson had ruled. The court also deemed "totally inapplicable" the Justice Department's use of "war powers or foreign relations" cases as precedents for granting the Executive Branch additional powers in the domestic field. Further, it agreed with Keith that the surveillance in question involved strictly domestic matters.

The boldness of some of Mardian's assertions shocked Edwards and Phillips, just as they had Ferguson and Keith. The appellate judges thought it ironic that the government would cite Marbury v. Madison -- which they referred to as "Chief Justice Marshall's ringing affirmation of the supremacy of the Constitution over all three branches of government" -- in support of its position. In addition, the ruling asserted that it was "strange, indeed" that the government would invoke "the traditional power of sovereigns like King George III....on behalf of an American President to defeat one of the fundamental freedoms for which the founders of this country overthrew King George's reign."<sup>37</sup>

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<sup>36</sup>The national media also acknowledged the enormous importance of the decision. Front-page stories appeared in both the New York Times and Washington Post on April 9, 1971. A flurry of editorials also appeared during the following weeks.

<sup>37</sup>Edwards Decision, 1-25. In fact, Mitchell and his "Arizona Mafia" associates at the Justice Department --  
(continued...)

One of Justice Department's principal arguments in support of its "inherent right" thesis focused upon precedent-setting cases in which the Supreme Court had recognized exceptions to the warrant requirement for law enforcement, such as the well-known "stop and frisk" and "no-knock" decisions. Edwards' decision disputed this as well, asserting that all of cases cited by the government "involved emergency situations which were held to prevent obtaining or absence of a prior warrant," and none of them involved wiretapping.<sup>38</sup>

The case most frequently cited by Edwards was Youngstown Sheet and Tube Co. v. Sawyer, the well-known steel seizure case involving President Truman. He quoted Justice Black's decision at length, concluding that it was the most potent rejection of the "inherent power" thesis ever handed down in a case involving strictly domestic issues.<sup>39</sup>

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<sup>37</sup>(...continued)

Mardian, Rehnquist, and Kleindienst -- were all admirers of British legal history, who frequently cited English common law precedents in their legal briefs (often to get around the Bill of Rights). An additional instance of this occurred during the battle over the "Pentagon Papers." The government's brief for the Supreme Court, prepared by Mitchell and Mardian, relied upon English common law rights of property, as well as "crown copyrights" over the publication of government documents; Sanford Ungar describes these precedents as "utterly inapplicable in the United States." See Sanford J. Ungar, The Papers & The Papers: An Account of the Legal and Political Battle Over The Pentagon Papers, (New York: Columbia University Press, 1989) 229.

<sup>38</sup>Ibid., 13-14.

<sup>39</sup>Ibid., 14-16.

The appellate court's decision reviewed the history of wiretapping law and practice in the United States, and outlined four major positions concerning "the legality of wiretapping or the admissibility of evidence derived therefrom" which had been offered since the invention of the telephone: (1) the Olmstead ruling, which held that wiretapping was not a search subject to the protections of the Fourth Amendment; (2) Justice Brandeis' dissent in Olmstead, which held that wiretapping was an unfair invasion of privacy, and ought to be banned; (3) the Katz ruling, which held that wiretapping was indeed "governed by the restrictions of the Fourth Amendment"; and (4) the Mitchell Doctrine position, which the government traced to Presidential directives dating back to 1940, as well as to articles written by Attorneys General Herbert Brownell and William P. Rogers during the early fifties. Edwards suggested that the fourth position "could (and perhaps should)" be subdivided into "foreign" and "domestic" applications, a position which the ABA had recently adopted in its guidelines for state wiretapping statutes. The court also reviewed the history of Congressional consideration of wiretapping, paying particular attention to Title III of the 1968 Omnibus Act. Rather than looking only at section 2511(3), as the government's brief had, the court reviewed the entirety of the statute, quoting lengthy passages, in an effort to demonstrate that, on the whole, the legislation

represents "a general recognition by Congress that the Fourth Amendment does mandate judicial review of proposed searches and seizures of oral communications by wire." Further, the court declared the language of section 2511(3) "completely neutral" with respect to the constitutional powers of the President.<sup>40</sup>

The government's brief argued that Keith had ruled improperly by refusing to conduct an in camera review of the surveillance transcripts. It contended that even if Keith believed the wiretaps illegal, "he should have determined in camera that they were not relevant to this case, and hence, not subject to disclosure." Aware of Keith's reliance upon the Alderman decision -- and committed to overturning it -- the government asserted that Justice Stewart's opinion in Giordano indicated there is no "absolute constitutional rule of disclosure" binding judges to automatically disclose all such surveillance.

The circuit court disputed the government's interpretation of Stewart's opinion, asserting that the "full text" of it actually supported Alderman. It also claimed that, having examined the sealed exhibit, "we cannot (and we do not believe the District Judge could) ascertain with any certainty whether or not the government had derived prosecutorial benefits from this illegal search." Edwards therefore concluded that a defendant is entitled to any and

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<sup>40</sup>Ibid., 16-22.

all personal conversations illegally seized by the government, "without regard to whether a judge on inspection in camera might or might not be able to find relevancy."<sup>41</sup>

In its "Holding," the court returned to the Fourth Amendment:

The government has not pointed to, and we do not find, one written phrase in the Constitution which exempts the President, the Attorney General, or federal law enforcement from the restrictions of the Fourth Amendment in the case at hand...That which has distinguished the United States of America in the history of the world has been its constitutional protection of individual liberty. Beyond doubt the First Amendment is the cornerstone of American freedom. The Fourth Amendment stands as guardian of the First.

The circuit court's decision concluded that the Executive Branch "is subject to the limitations of the Fourth Amendment to the Constitution when undertaking searches and seizures for oral communications by wire." It refused to rule on several related issues, such as what measures the President, as Commander-in-Chief, can and cannot take to protect internal security, and whether Mitchell could have acquired a warrant prior to initiating the Black Panther wiretaps which intercepted Plamondon's conversations.<sup>42</sup>

In his dissenting opinion, Judge Weick charged that Keith had made an "erroneous" interpretation of the Alderman decision. Weick agreed with several of the government's positions concerning Giordano and Taglianetti, particularly

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<sup>41</sup>Ibid., 28-31.

<sup>42</sup>Ibid., 27-32.

a passage in the latter case which held that nothing in Alderman "requires full disclosure for resolution of every issue raised by an electronic surveillance." He added that by ordering an evidentiary hearing at the conclusion of the trial, Keith intimated he knew the logs contained "no useful information relative to the conspiracy or bombing." Therefore, Weick argued, Keith should not have ordered disclosure.<sup>43</sup>

Addressing the "inherent right" issue, Weick agreed with the government's contention that section 2511(3) of Title III "constitutes clear congressional recognition of the President's power to order electronic surveillance in national security cases." He also regarded as "inappropriate" the Youngstown case, asserting that "the protection of the government against attacks designed to overthrow it by force and violence involves an entirely different matter."<sup>44</sup>

Weick's dissent most fervently took issue with Keith over the issue of social disorder in American society and the right of the Executive to act in the defense of national security. His statements regarding the threats posed by "domestic subversives" mirrored those of Mitchell's:

At a time when our soldiers are fighting on foreign soil and there is turbulence at home, thereby confronting the President on two fronts,

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<sup>43</sup>Ibid., 37-39.

<sup>44</sup>Ibid., 46-47.

with many serious, perplexing and complex problems, there rests on his shoulders a heavy responsibility to protect, not only the fighting men abroad, but also the people at home, from destruction of their Government by domestic subversives...The risk of injury to the Government is just as great whether the attacks are from within or without...Attacks by domestic subversives and saboteurs may be even more dangerous than those of foreign sources.

Weick also agreed with the government's contention that neither Congress nor the Judiciary "have the facilities to cope with the destruction of public buildings by saboteurs." Most surprising of all, Weick was prepared to cede the Judiciary's constitutionally-established supervisory power over the Executive in domestic, as well as foreign "national security" areas, in the interest of social stability:

When the Chief Executive deems it necessary to gather intelligence for this purpose he ought not to be required first to make detailed explanations of classified information to a magistrate and secure his consent as a condition precedent to the exercise of his constitutional powers.

Responding directly to Keith's statement regarding the "established and contented members of our society," Weick avowed that although citizens may be "required to tolerate peaceful dissent," they are nonetheless "not required to tolerate, much less understand, plots of discontented members to overthrow the Government by force." He also took issue with Keith's position that the government cannot act against suspected revolutionaries until they cross-over from mere

advocacy to the commission of illegal acts, charging: "It is too late to act after there has been a *fait accompli*."<sup>45</sup>

The manner in which the majority decision addressed social disorder and the government's powers to act in response to it displayed a mind-set fundamentally at odds with Weick's conservative philosophy. Echoing Keith, Edwards' decision attested that "It is the historic role of the Judiciary to see that in periods of crisis, when the challenge to constitutional freedoms is the greatest, the Constitution of the United States remains the supreme law of the land." Edwards also suspected that under the guise of "national security," the Nixon Administration was attempting to exploit the public's fears of crime and lawlessness, for its own political benefit:

The argument for unrestricted employment of Presidential power to wiretap is basically an argument in terrorem [emphasis in original]. It suggests that constitutional government is too weak to survive in a difficult world and urges worried judges and worried citizens to return to acceptance of the security of 'sovereign' power.

Edwards added a prophetic quote from Benjamin Franklin: "They that give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety."<sup>46</sup>

The Court of Appeals' decision opposing the Mitchell Doctrine laid the groundwork for a government appeal to the Supreme Court, via a petition for a writ of certiorari. Few

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<sup>45</sup>Ibid., 43-47.

<sup>46</sup>Ibid., 23-25.

doubted that the Nixon Administration would hesitate over so important an issue. On April 27 the Justice Department requested a "stay of mandate" until May 29, so that it could prepare its appeal, and Edwards granted the stay on May 10. The Supreme Court agreed to hear the case on June 21.

### III.

We are earnestly asked to believe that the awesome power sought for the Attorney General will be used with discretion. Obviously, even in very recent days....this has not always been the case.

-- Judge George C. Edwards<sup>47</sup>

One of the principal factors contributing to Edwards' rejection of the Mitchell Doctrine is revealed in his reference to "in very recent days." Throughout 1971, and continuing through the Supreme Court's June, 1972, decision in U.S. v. U.S. District Court, a powerful debate took place in American society, concerning the proper role, purpose, and scope of domestic surveillance by government and law enforcement officials. The Mitchell Doctrine influenced this debate, becoming a focus both for "law and order" advocates, such as the Justice Department and FBI, and an increasing number of Americans who were opposed to such surveillance. In time, this domestic surveillance debate also influenced the Judiciary, as Judge Edwards' statement demonstrates.

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<sup>47</sup>Ibid., 25.

The Nixon Administration stood little chance of acquiring judicial sanction for the Mitchell Doctrine unless public fear of crime and "domestic subversion" was stronger than its fear of government and law enforcement surveillance. Throughout 1971, however, many social observers recognized a dramatic easing of tensions in American society, particularly on college campuses. In February, the New York Times reported that less than ten percent of college students gave favorable ratings to either the Black Panthers or SDS.<sup>48</sup> By fall, the national media was regularly reporting that the "youth rebellion" of the sixties was coming to a close, explained by the passage of the 26th Amendment (eighteen year-old vote), a worsening economy, and an overall moderation in the student movement.<sup>49</sup> Yet the passions of the sixties did not disappear overnight.<sup>50</sup> Although fewer large confrontations took place, smaller incidents of political violence continued unabated, as the tensions which had been centered in urban areas and on college campuses during the sixties were disseminated into the larger society. Newer modes of radical political expression, such as prison uprisings (e.g., Attica State), ambushes of police, and

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<sup>48</sup>New York Times, February 7, 1971, 54.

<sup>49</sup>New York Times, October 24, 1971, 1.

<sup>50</sup>Todd Gitlin, in The Sixties [page 417], states that after 1970, "There was a long sputtering," as "the anti-war initiative passed into new hands."

"terrorist bombings," also continued to make headlines.<sup>51</sup> On July 13th, the New York Times reported a relatively minor incident, which nonetheless symbolized the thousands of similar ideological clashes taking place across America. A New Jersey Appellate Court ruled that State Police did not have the right to stop and search a car, simply because its driver and/or occupants had long hair.<sup>52</sup>

After several months of quietly remaining "underground," the Weathermen surfaced on March 1, claiming responsibility for setting off a small bomb in a Senate bathroom, located in the Capitol building complex. They considered the bombing retaliation for the Nixon Administration's recent decision to expand the war into the formerly neutral country of Laos. There were no injuries in the blast, which went off at 1:32 a.m. The Administration's response was immediate and harsh: Justice Department attorneys from Robert Mardian's Internal Security Division, led by firebrand Guy M. Goodwin, fanned out across the country, establishing federal grand juries to

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<sup>51</sup>New York Times, September 21, 1971, 1. One additional interesting statistic: a survey released in early September revealed that over 50 percent of American men believed that the police should "shoot, but not to kill, in controlling 'hoodlums, student protests and ghetto riots'." New York Times, September 6, 1971, 23.

<sup>52</sup>New York Times, July 13, 1971, 29. The New Jersey State Trooper testified "It was a combination of the appearance of the defendants and the otherwise unobtrusive [aspirin] bottle that led....[me] to believe a violation of the law might be occurring."

investigate the incident, as part of an overall dragnet-style hunt for the elusive Weather underground.

Goodwin's specialty involved utilizing a new "use immunity" law, part of the Omnibus Crime Act of 1970, which limited a grand jury witness's immunity from self-incrimination. Frank Donner asserts that, as an intelligence gathering instrument, the new grand jury system effectively terrorized the entire Movement, through the use of "subpoena power, the power to compel testimony and the production of documents on pain of contempt."<sup>53</sup>

However, grand juries were only one of a wide variety of tactics utilized by the Administration against the Movement during 1971. When tens of thousands of anti-war and counterculture protestors converged on the nation's capital in late April and early May, as part of the planned "May Day" demonstration, the Justice Department responded by arresting 13,500, jamming them together in a makeshift "stockade" at Kennedy stadium. Newly-arrived White House aide John Dean was assigned to assist with the coordination of the White House's response. He recalls that a "war room" was set up in the basement of the White House, where commanders Haldeman and Kleindienst received minute-by-minute "situation reports," gave orders to the police, National Guard, and Army

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<sup>53</sup>Donner estimates that over 100 grand juries were empaneled in eighty-four cities in thirty-six states between 1970 and 1973, and that the "conviction and plea rate" was never higher than 15 percent. See The Age of Surveillance, 354-56.

personnel deployed against the demonstrators, and reported to Nixon every half-hour.<sup>54</sup> According to Haldeman, Nixon became obsessed with the approaching demonstration during late April, coming up with slogans to be sent out to the various "troops" in the field for motivation.<sup>55</sup>

The domestic incident which most upset the Nixon Administration during 1971 was the release and subsequent publication of the "Pentagon Papers," a mammoth Defense Department study of U.S. involvement in Indochina since World War II.<sup>56</sup> The person responsible for this "leak" of classified documents was Daniel Ellsberg, a former employee of the Rand Corporation. Acquiring and duplicating a copy of the 7000-plus page Rand study, which had been entrusted to him as a contributor and courier, Ellsberg gave it to the New York Times for editing and eventual publication. The first installment, on June 13, 1971, shocked the entire U.S. defense and foreign relations establishment. Within a week, Attorney General Mitchell issued a restraining order against the Times, essentially challenging the newspaper's First Amendment right to publish, on the grounds that further revelations would damage "national security." The Washington Post and Los Angeles Times simultaneously published portions

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<sup>54</sup>Dean, Blind Ambition, 28-29; see also Lukas, Nightmare, 9-11.

<sup>55</sup>Haldeman, Diaries, 281-83.

<sup>56</sup>Ungar, The Papers & The Papers, 13.

of the papers as well, prompting other Justice Department orders. By all accounts, the person within the Administration who was the most upset over the incident was Kissinger, who believed publication of the highly sensitive material would undermine his negotiation stances with both North Vietnam and China; some of his anger was undoubtedly due to having known and trusted Ellsberg.<sup>57</sup>

In its response to the Pentagon Papers crisis, the Nixon Administration increased its willingness to utilize questionable legal tactics. Objective number one, stopping further publication, led the Justice Department to coordinate a reckless legal challenge against the New York Times, which it lost by a six-to-three vote in the Supreme Court on June 30.<sup>58</sup> Unable to prevent publication, the Administration shifted its focus to discrediting Ellsberg. A variety of tactics were used, including "leaking" false and derogatory information to the media, ordering a break-in of the office of Ellsberg's psychiatrist, Dr. Lewis Fielding, and plotting to steal documents from the Brookings Institution in Washington, D.C. In addition, the Administration's obsession with damaging Ellsberg led to the creation of the infamous

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<sup>57</sup>During the peak of the crisis, Kissinger said of Ellsberg "[he is] the most dangerous man in America....who must be stopped at all costs." Quoted in Ambrose, Nixon, (vol. 2), 447.

<sup>58</sup>One little-known fact concerning the legal case against the New York Times is that the newspaper's owners were prepared to go forward with publication, regardless of the Supreme Court's decision.

"Plumbers": a clandestine "special projects" team of former CIA and FBI officials, funded through an illegal "slush fund" of unused Nixon campaign monies, which specialized in all types of espionage and political "dirty tricks."<sup>59</sup>

Against the advice of Solicitor General Erwin Griswold, Mitchell initiated criminal charges against Ellsberg during the summer. The Administration also sought information and warrantless wiretaps against Ellsberg and his known associates from a reluctant Hoover, who recognized the political nature of the requests. The ensuing confrontation had long-lasting consequences, as Nixon and his aides increasingly spoke of the need to retire Hoover. The Administration courted Assistant FBI Director William Sullivan, a close associate of Assistant Attorney General Mardian, who was eager to be of assistance to Nixon because he hoped to be named Hoover's successor.

Large conspiracy trials continued to dominate the headlines throughout 1971, as the Justice Department engaged in far-flung prosecutions of Black Power and anti-war movement organizations and groups. On May 13th, a jury in New York City acquitted all of the so-called "[Black] Panther 13," who had been charged with conspiring to bomb a number of urban targets. The trial lasted eight months and cost over \$750,000. Meanwhile, in New Haven, Connecticut, a highly-

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<sup>59</sup>Haldeman, Diaries, 299-303; Lukas, Nightmare, 71-77; Dean, Blind Ambition, 44-47; Kutler, The Wars of Watergate, 110-11; and Ambrose, Nixon, (vol. 2), 446-50.

publicized murder trial involving Black Panther leaders Bobby Seale and John Huggins ended on May 25 in a mistrial, as the "deadlocked" jury proved unable to reach a verdict. By the end of the year, the third trial of Huey Newton, in connection with a 1967 Oakland, California shooting incident (in which a police officer was killed), also ended in a mistrial. Other Black Panther trials took place in cities across the country.<sup>60</sup> Facing the largest and most coordinated COINTELPRO attacks from the FBI and a variety of other intelligence agencies, the Party's internal structure was approaching collapse.<sup>61</sup>

The best-known conspiracy trial of 1971 involved the so-called "East Coast Conspiracy to Save Lives" (ECCSL), a small group of activist Catholic priests and supporters, led by brothers Philip and Daniel Berrigan. On January 12th the Berrigans and four other ECCSL members were charged with plotting to kidnap Henry Kissinger, as well as with conspiring to blow up the heating system of the Federal buildings in Washington, D.C. Hoover himself had instituted

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<sup>60</sup>New York Times, May 14, 1971, 1; May 25, 1971, 1; December 14, 1971, 44.

<sup>61</sup>O'Reilly, Racial Matters, 293-324. The breakdown in Party structure is also described in David Hilliard and Lewis Cole, This Side of Glory: An Autobiography of David Hilliard and the Story of the Black Panther Party, (Boston: Little, Brown, and Company, 1993), 295-332.

the charges the previous November, accusing the Berrigans of being Communist sympathizers.<sup>62</sup>

The trial came to symbolize the ongoing struggle between the anti-war movement and the conservative establishment in America. The Justice Department dedicated dozens of agents and officials to aid Guy Goodwin and the Internal Security Division in their grand jury investigation, centered in Harrisburg, Pennsylvania. In late April, a second round of indictments were handed down, creating the so-called "Harrisburg Eight." Media attention increased when former Attorney General Ramsey Clark offered his services to the defense. In the end, the government was unable to prove conspiracy, beyond the mere exchange of letters between Rev. Philip Berrigan and Sister E. McAlister, in which she allegedly raised the idea to "kidnap someone like Kissinger."<sup>63</sup>

The Nixon Administration's audacity in its "law and order" offensive also extended into the area of electronic surveillance. After reinstating the Mitchell Doctrine in Ferguson and Keith's courtrooms in January, the Justice

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<sup>62</sup>Some of the tactics utilized by the ECCSL included raiding draft board offices and destroying conscription records (pouring red paint on them to simulate the blood on the government's hands in Vietnam). At the time of the federal indictment, both Berrigans were already in prison, serving sentences for destroying draft records.

<sup>63</sup>Donner, Age of Surveillance, 381-82; New York Times, January 13, 1971, 1; February 21, 1971, 1; March 9, 1971, 1; May 1, 1971, 1.

Department initiated a public relations campaign designed to generate support for its "inherent right" thesis concerning "national security" wiretapping of domestic radicals. Within a week of the government's oral argument before the Sixth Circuit Court of Appeals in the Keith case (February 15), Assistant Attorney General Kleindienst delivered the first public statement in support of the Mitchell Doctrine since the Justice Department had backed away from the initiative in July, 1969. Responding to reporters' questions, Kleindienst reiterated one of the government's principal arguments in its Keith brief:

It would be silly to say that an American citizen, because he is an American, could subvert the Government by actions of violence and revolution and be immune from, first, identification, and second, prosecution...the whole question of internal security is not a divisible subject matter...You can't divide subversion into two parts -- domestic and foreign.

Kleindienst added "I don't think we're going to lose...We're dealing with a direct constitutional power vested in the President of the United States." The overall importance of the issue was not overlooked by the UPI reporter, who stated that because the government was now faced with conflicting positions on the issue from federal judges, "the case will ultimately reach the Supreme Court."<sup>64</sup>

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<sup>64</sup>New York Times, February 22, 1971, 34; Washington Post, February 22, 1971, A-3; New York Daily News, February 22, 1971, 4; (Washington, D.C.) Evening Star, February 22, 1971, A-12.

Kleindienst followed with a letter to the Washington Post, providing an overview of Presidential directives relating to "national security" wiretapping, dating back to Roosevelt's 1940 memorandum. The letter also stated that the concept of a national security exception to the warrant requirement in wiretapping cases "did not spring like Minerva from the head of John Mitchell." Kleindienst then quoted Justice Charles Evans Hughes's statement that civil liberties require the existence of "an organized society maintaining public order without which liberty itself would be lost." In response, the Post recited the Youngstown decision and stated:

The Fourth Amendment does not impose impossible restraints upon the President. It requires no more than that he obtain, in advance...a court order or warrant...[from] an impartial judicial officer...Neither Mr. Mitchell nor Mr. Kleindienst has explained why the obtaining of such a court order seems to them an unbearable burden.<sup>65</sup>

The debate intensified in March, as a result of comments made by Assistant Attorney General William Rehnquist before Senator Sam Ervin's Subcommittee on Constitutional Rights. In two days of testimony, Rehnquist asserted that the Justice Department had the "inherent constitutional power" to initiate surveillance of any American, including U.S. Senators, and warned that the government "will vigorously oppose any legislation" that would limit its surveillance powers by imposing "unnecessary and unmanageable judicial

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<sup>65</sup>Quoted in Washington Post, February 24, 1971, A-19.

supervision" over the its intelligence operations. Rehnquist further stated that recent revelations of "isolated imperfections" regarding the Army's surveillance programs should not be permitted "to obscure the fundamental necessity of Federal information gathering." Ervin, one of several Senators taking issue with Rehnquist, asserted "there is not a syllable in there [the Constitution] that gives the Federal Government the right to spy on civilians." Republican Senator Charles Mathias responded angrily to Rehnquist's assertion that "self-discipline on the part of the executive branch" would provide adequate protection against further abuses; Mathias replied "it is not only proper but essential" for Congress to act in this area.<sup>66</sup>

Following the Court of Appeals' decision in Keith, Mitchell entered the debate. In an address to the Kentucky Bar Association on April 23, he unveiled several of the Justice Department's newly-revised arguments in the case. Abandoning "inherent right," Mitchell instead focused on the "reasonableness" issue -- the government's contention that the Fourth Amendment prohibits only unreasonable searches and seizures. He also stressed that the Fourth Amendment's protections "must be balanced against 'the right of the public to protect itself,' which he said was implicit in the Constitution." Criticizing the notion of probable cause in

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<sup>66</sup>Quoted in New York Times, March 10, 1971, 1; March 18, 1971, 19.

long-term investigative "national security" surveillance, Mitchell asserted "if the Government waited until it had enough evidence to get a wiretap warrant in such cases [under Title III guidelines], it might be too late." He also reiterated that domestic radicals pose as great a threat to the nation's security as any "foreign" threats. Turning his attention to the recent uproar concerning governmental surveillance, he announced his diagnosis of "a new type of paranoia -- called Tappanoia."<sup>67</sup>

In mid-June, just ten days prior to the Supreme Court's granting of a writ of certiorari in the Keith case, Mitchell presented an even more detailed outline of the government's position, in a speech to the Virginia Bar Association. Revising his "reasonableness" argument, he stated "the distinction to be drawn is not whether the subjects are foreign or domestic, but instead whether the wiretaps are used for 'intelligence' or prosecution purposes." When the purpose behind a wiretap is strictly investigative, the President and "his officials," Mitchell insisted, are in a much better position than a federal judge to decide whether the installation of a listening device is reasonable. Commenting on the foreign/domestic dichotomy, Mitchell added

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<sup>67</sup>Quoted in New York Times, April 24, 1971, 1.

that "history has shown greater danger from the domestic variety."<sup>68</sup>

Nixon added his support for the Mitchell Doctrine in comments made during a press conference on May 1. He asserted that the number of "national security" wiretaps had been greater during the early sixties than at any time during his administration. Responding to the suggestion that America was becoming a repressive police state, he stated "I've been to police states. I know what they are...this isn't a police state and it isn't going to become one." Nixon added that "all of this hysteria" concerning political and Army surveillance "simply doesn't serve the public purpose."<sup>69</sup>

By admitting openly that it was engaging in warrantless wiretaps of suspected "domestic terrorists," without providing any information as to the guidelines it used for determining which individuals and/or groups qualified as targets, the Nixon Administration was presenting its boldest surveillance strategy to date. However, the Administration displayed its audaciousness regarding electronic surveillance

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<sup>68</sup>Quoted in New York Times, June 12, 1971, 12. Fred Graham's article also pointed out that Mitchell was breaking with tradition by commenting on a case pending before the Supreme Court. "In the past," Graham stated, "when matters have been pending before the Supreme Court, Justice Department officials have avoided making statements that might be regarded as exerting pressure upon the justices." Obviously, Mitchell believed the Keith case worthy of breaking with tradition.

<sup>69</sup>Quoted in New York Times, May 2, 1971, 66.

in other ways as well. On February 27, the Justice Department announced it was discontinuing its policy of automatically disclosing the existence of illegal wiretap information concerning defendants in criminal cases.<sup>70</sup> The Attorney General also revised the rhetoric of his new Mitchell Doctrine affidavits, at two separate Weathermen trials. The new affidavits stated:

The wiretapping has been installed on the basis of a request from J. Edgar Hoover, director of the Federal Bureau of Investigation, 'which was considered in conjunction with the entire range of foreign and domestic intelligence available to the executive branch of the Government.'<sup>71</sup>

Press releases throughout 1971 and 1972 announced that court-approved Title III wiretaps were also increasing rapidly.<sup>72</sup>

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<sup>70</sup>New York Times, February 27, 1971, 3; Washington Daily News, February 27, 1971, 2; and Washington Post, February 27, 1971, A-2. Solicitor General Erwin Griswold issued the new policy statement, claiming it was necessary because of the "considerable administrative burden" involved in conducting electronic surveillance reviews. He added that the government would now search its records only in response to specific motions for disclosure of electronic surveillance, which, he asserted, were becoming "routine" in criminal cases. What made the new policy particularly puzzling is the well-known fact that the FBI, from the thirties forward, had rarely admitted the existence of warrantless wiretaps in criminal proceedings, even after motions for disclosure were filed. An excellent case in point was the FBI's "national security" surveillance of White Panthers' Ann Arbor chapter, which Mitchell knowingly hid from Judge Keith in late 1970.

<sup>71</sup>Quoted in New York Times, March 27, 1971, 43; September 28, 1971, 42. The affidavit's reference to "foreign and domestic intelligence," indicates that it may have been part of a larger Justice Department strategy to encourage judicial acceptance of the Mitchell Doctrine.

<sup>72</sup>New York Times, February 9, 1971, 7; May 3, 1971, 1; May 6, 1972, 1.

The national media's coverage of the Administration's renewed Mitchell Doctrine campaign was extensive. In marked contrast with the previous two years' coverage, articles and editorials appearing in the New York Times and Washington Post displayed a comprehensive understanding of the key issues. When the Mitchell Doctrine was introduced in June of 1969, and for months thereafter, journalists commonly equated "national security" wiretapping with court-approved, Title III surveillance. This led to the frequent mistake of taking the Justice Department at its word when it asserted that to deprive the FBI of the power to conduct "national security" wiretapping would prevent it from conducting any and all electronic surveillance (e.g. ignoring that Title III allowed the extensive use of court-approved wiretaps, in nearly every major category of crime). However, when Kleindienst attempted a similarly deceptive maneuver in his February, 1971 statements -- intimating that depriving the government of "national security" surveillance would make domestic revolutionaries "immune" from both identification and prosecution -- veteran journalists Fred Graham and Tom Wicker of the New York Times and Sanford Ungar and Alan Barth of the Washington Post effectively refuted his statement. Their articles pointed out that under existing law, all the government had to do to secure a court-order for surveillance was go before a magistrate with probable cause.

Wicker, in particular, exhibited an unusually keen interest in (and knowledge of) the subject. His response to Nixon's "police state" comment was a case in point:

It may well be true, as he claimed, that there are only half as many telephone taps today 'as there were in 1961, '62 and '63,' although this is an assertion by the FBI...Nevertheless, it is the Nixon Administration -- unlike any before it -- that has claimed the unchecked right to tap the phones of persons it suspects as subversives, without any form of court authority and with no necessity ever to admit, or to inform the target of the eavesdropping, even if a trial should result.

As for Nixon's assertion that warrantless taps would be limited to those instances where the "national security" was in peril, Wicker retorted:

Mr. Nixon missed the point entirely...the point is that if Mr. Mitchell has sufficient reason to consider, say, Rennie Davis or the Black Panthers a threat to the Government, he would have sufficient evidence to get a wiretap order from a court; if he does not have sufficient reason -- only his own suspicions -- he has and should have no right to act on his own, without accountability to anyone.<sup>73</sup>

In his Memoirs, Nixon states that when John Dean revealed the existence of the Huston Plan and the Administration's so-called "17 wiretaps" in 1973, causing widespread shock and anger, the public's response was overblown, largely because "there was no cushion of preparation, no context of public awareness and acceptance" for such politically-motivated surveillance. He adds that if the public had been aware of the precedents in these areas

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<sup>73</sup>New York Times, May 4, 1971, 47.

set by previous Chief Executives, its reaction would have been decidedly less negative.<sup>74</sup> The historical record does not support Nixon's claim. Long before Dean's admissions, the American public had been exposed to numerous revelations of Army, FBI, CIA, and law enforcement surveillance abuses within the United States; it was also becoming aware that much of this surveillance was politically motivated. One of the reasons why Tom Wicker and other journalists so thoroughly analyzed the Mitchell Doctrine was due to the fact that it was only part of an ongoing, and much larger "story" concerning improper government surveillance practices. As the "cult of secrecy" that had shielded U.S. intelligence operations since the onset of the Cold War began to crumble, it made for good copy.

Without question, the incidents most responsible for the media's initial focus on domestic surveillance abuses were the hearings conducted by Senator Sam Ervin's Subcommittee on Constitutional Rights, which revealed, among other things, that the U.S. Army had conducted widespread surveillance and intelligence gathering on the political activities of

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<sup>74</sup>Quoted in Nixon, Memoirs, 871. In Nixon (vol. 2), historian Stephen Ambrose agrees on this point, adding [on page 273] that the President was hesitant to institute the original so-called "17 taps" (against reporters and National Security Council aides), because he realized that, should the surveillance ever be revealed in public, "it would matter little" that previous Presidents had conducted similar illegal wiretaps. This is one of several instances where Ambrose repeats essentially word-for-word passages from Nixon's Memoirs.

thousands of Americans, over the course of three decades. Put on hold during the politically charged 1970 fall congressional term, Ervin's hearings resumed late in the year.

The first major "bombshell" fell on December 16 and 17, when Ervin disclosed that the Army's 113th Military Intelligence Group, based in Illinois, had spied on high-ranking politicians, as well as hundreds of civilians. The incident set off a firestorm of debate in Congress, and a panic in the Nixon White House.<sup>75</sup> According to Haldeman, for the next two days Nixon fumed about the affair, charging that "the whole episode poses a major problem for us in the area of repression; which our enemies are trying to build up in that this implies we're using the Army to spy on political people." Characteristically, Nixon opted to strike back, as Haldeman relates: "He [Nixon] wants to launch an all-out assault to make a bigger story out of our denial than the original story. We've got to attack the attackers on this one."<sup>76</sup>

Over the next several months, Ervin's subcommittee heard testimony from a number of former Army intelligence officers, who exposed "CONUS," a widespread surveillance and intelligence gathering operation, which focused entirely on

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<sup>75</sup>New York Times, December 17, 1970, 1; December 18, 1970, 1.

<sup>76</sup>Quoted in Haldeman, Diaries, 221-22.

Americans. One former officer who testified on several occasions was Christopher H. Pyle, a former Army Captain. In February, Pyle revealed that in the wake of Secretary of Defense Melvin R. Laird's recent directives to discontinue domestic surveillance, the Justice Department's Inter-Divisional Intelligence Unit (IDIU) "supplanted" CONUS as the government's "principal watchdog on political protest." Front-page headlines revealing the extent of Army surveillance continued through early March, when the Department of Defense formally announced a ban on most forms of political surveillance and intelligence gathering within the U.S.<sup>77</sup> Therefore, when Rehnquist and Mardian appeared before Ervin's subcommittee in March, they were forced to defend much more than just the Mitchell Doctrine.

As the media's interest in the Ervin hearings peaked, the so-called "Media Papers" incident occurred, which also received public attention. On March 8, a group calling itself "The Citizen's Committee to Investigate the FBI" broke into the Bureau's Media, Pennsylvania, field office, removing a large cache of documents, which revealed for the first time the scope and variety of the Hoover's COINTELPRO programs. Within two weeks, the Washington Post published excerpts, in

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<sup>77</sup>New York Times, January 3, 1971, 26; January 18, 1971, 1; February 25, 1971, 15; March 4, 1971, 22. Pyle's Military Surveillance of Civilian Politics, an extensive study of the history and expansion of CONUS during the late sixties, remains unparalleled as an historical source. Particularly useful is Pyle's analysis of the conservative, "Cold Warrior" mind-set which characterized nearly all of his commanders.

bold defiance of appeals from Mitchell and Hoover. In addition to exposing the various COINTELPRO tactics, such as anonymous letters, infiltration, and electronic surveillance, the Media Papers provided irrefutable evidence of the Bureau's intense political surveillance of Movement groups.<sup>78</sup>

Sensing the public's growing concerns about governmental surveillance issues, the Democratic leadership in both houses of Congress initiated a sustained attack on the Nixon Administration and J. Edgar Hoover. On March 17 Rehnquist informed Ervin's Subcommittee on Constitutional Rights that, in his opinion, the Justice Department possesses the constitutional power to initiate surveillance of high-ranking politicians. Senator Montoya, three days later, charged that "more than a few" members of Congress believed that their communications were being monitored by the Justice Department and/or FBI.<sup>79</sup> On April 5, House Majority Leader Hale Boggs delivered a speech on the floor of Congress, demanding the

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<sup>78</sup>New York Times, March 10, 1971, 7; March 24, 1971, 24; March 25, 1971, 1. See also Donner, Age of Surveillance, 157-59. Throughout the spring and summer, Senator Ervin made several unsuccessful appeals to Mitchell, requesting FBI and Justice Department documents pertaining to their domestic surveillance practices. Surprisingly, the Media Papers incident disappeared from the headlines of the "straight" media by the end of March. However, the "underground" press carried the story for months. The complete collection of Media Papers appeared in the March, 1972 issue of WIN magazine, a publication of the War Resister's League (Rifton, NY, vol. VIII, nos. 4 and 5, March 1 and 15, 1972).

<sup>79</sup>New York Times, March 21, 1971, 60.

resignation of Hoover, and charging that the FBI had his public and private telephones wiretapped.<sup>80</sup> In response, the G.O.P. leadership demanded he produce proof of his allegations.<sup>81</sup>

Even more damaging were the allegations made by Senator Edmund Muskie on April 15, when he released FBI documents demonstrating that the Bureau had conducted widespread surveillance of "Earth Day" activities across the nation in 1970. Himself a target of the surveillance report, Muskie stated:

If there was widespread surveillance over Earth Day last year, is there any political activity in the country which the FBI does not consider a legitimate subject for watching? If antipollution rallies are a subject of intelligence concern, is anything immune? Is there any citizen involved in politics who is not a potential subject for an FBI dossier?

When questioned about the incident by reporters, White House Press Secretary Ronald L. Ziegler stated that the President considered surveillance of this variety "totally repugnant," and added "there is an impression that is creating a feeling of fear among the people that they are being spied upon." The New York Times intimated that Ziegler "seemed to be

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<sup>80</sup>New York Times, April 6, 1971, 1.

<sup>81</sup>New York Times, April 6, 1971, 27; see also Haldeman, Diaries, 267, 270.

drawing a distinction between Administration policy on surveillance and F.B.I. activities."<sup>82</sup>

Over the following months, the Democrats continued to emphasize the issue. On April 25, Representative Emanuel Celler, Chairman of the House Judiciary Committee, warned that the Nixon Administration's wiretapping policies might be heading the nation toward a "police state." The next day, the New York Times printed excerpts of Celler and Hale Boggs's recent appearance on CBS's "Face the Nation." Addressing the issue of the Mitchell Doctrine, Celler stated "Who is to be the judge of national security?...He [Mitchell] is to be the judge? That's not government by law, that's government by personality." Boggs added "Mitchell is obsessed with tapping wires."<sup>83</sup> Senator Ervin soon joined in the Democratic chorus, charging that the Army's widespread surveillance of Americans was having a "chilling effect" on their exercise of First Amendment freedoms. He also warned of the dangers inherent in the government's increasing practice of collecting and storing masses of financial and political data concerning the private lives of Americans.<sup>84</sup>

Not to be outdone, Senator Edward Kennedy attacked the Nixon Administration's overall record on privacy and

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<sup>82</sup>Quoted in New York Times, April 15, 1971, 1; April 19, 1971, 29.

<sup>83</sup>Quoted in New York Times, April 26, 1971, 27.

<sup>84</sup>New York Times, June 27, 1971, 14.

constitutional issues, in an October address entitled "The 'Burden' of the Constitution." Kennedy asserted that Nixon, Mitchell, Hoover, and their lieutenants "see the Constitution as a burden, an obstruction to be overcome[;] as a technical barrier to be avoided when inconvenient, evaded where possible, and ignored if necessary." He then outlined a list of examples of the Administration's heavy-handedness in its "law and order" offensive, including the legal injunctions against the press during the "Pentagon Papers" crisis, the mass arrests during the May Day demonstrations, and Nixon's attempt, through Executive Order, to re-institute the Subversive Activities Control Board. Kennedy issued a warning that "only strong, independent courts can call the executive to task...An appeals court said flatly that domestic wiretapping without court order violated the Constitution, and the high court has the case."<sup>85</sup>

Some found humor in the degree to which the Washington, D.C. political environment had become overwhelmed by the whole surveillance debate. Russell Baker's satiric New York Times article, entitled "Third Ear Envy" was a case in point:

Since Congressman Hale Boggs accused the F.B.I. of tapping his telephone, it has become a mark of distinction in Washington to have your telephone tapped...If the F.B.I. is tapping big men, everybody who wants to be thought a big man desperately needs to have his phone tapped. In short, the only thing worse than having the F.B.I. tap your phone is not having the F.B.I. tap your phone...No one in his right mind, of course, would

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<sup>85</sup>Quoted in New York Times, October 22, 1971, 39.

openly admit any longer that his telephone is not being tapped.<sup>86</sup>

It is safe to assume that Nixon was not amused. Heightened criticism of governmental surveillance and other allegedly "repressive" tactics left his administration eager to strike back. In doing so, Nixon and Mitchell increasingly justified their actions with statements referring to "inherent executive power" and "national security." When Mitchell asked the Supreme Court to uphold his injunction preventing the New York Times from further publishing the "Pentagon Papers," -- and also when he requested that the Court grant him vastly expanded wiretapping powers -- he claimed that he was acting solely in the interest of "national security."

However, revelations of illegality exposed during the Watergate era, Mitchell's so-called "White House Horrors," demonstrated conclusively that while the Administration's actions might have been based in part on genuine national security considerations, their actions demonstrated more than a concern for the nation's security. Discussing the frame of mind which characterized the Administration during the Ellsberg crisis, J. Anthony Lukas states "many men in the White House apparently felt events closing in, as if somehow all the people on their 'enemies list' had joined hands to destroy them." Nixon's own Memoirs paint a similar portrait

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<sup>86</sup>Quoted in New York Times, May 2, 1971, section IV, 15.

of the Ellsberg crisis. Referring to the "plumbers'" break-in of Dr. Fielding's office that September, he asserts:

It is clear that it was at least in part an outgrowth of my sense of urgency...Given the temper of those tense and bitter times and the peril I perceived...Kissinger said that we were in a 'revolutionary' situation...I did not care about any reasons or excuses...I wanted the full resources of the Government brought to bear. If the FBI was not going to pursue the case, then we would have to do it ourselves...Ellsberg['s] views had to be discredited...We were going into an election year, and I wanted ammunition against the antiwar critics.<sup>87</sup>

This admission supports Lukas' contention that although Nixon and Mitchell claimed to be acting out of a concern for national security, "they felt another kind of security was at stake too -- Nixon's political security."<sup>88</sup>

By the spring of 1971, the Administration had embarked upon a path of lawbreaking for political purposes that continued through Nixon's resignation in August of 1974. The pattern was forged shortly after Nixon's inauguration, when a series of seventeen secret (warrantless) wiretaps was instituted against journalists and members of the National Security Council, State Department, and White House staffs. The surveillance was intended to root out the source of "leaks" concerning the Administration's foreign policy strategies. However, some of the wiretaps were clearly utilized for political purposes. One notable example

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<sup>87</sup>Quoted in Nixon, Memoirs, 513-14.

<sup>88</sup>Lukas, Nightmare, 11.

involved the surveillance of NSC staff members Morton Halperin and Anthony Lake. The FBI installed wiretaps on them during 1969, when they were with the NSC. However, the taps were left on for nearly a year after they left the NSC, to become foreign policy advisors for Edmund Muskie.<sup>89</sup> The wiretapping program ended on February 10, 1971, when the transcripts and summaries were placed in Assistant FBI Director William Sullivan's safe.<sup>90</sup> By this time, however, wiretapping had become institutionalized in the Nixon White House. During the spring of 1971 the infamous White House taping system was installed.<sup>91</sup>

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<sup>89</sup>Ibid., 58-60. FBI documents uncovered by Athan Theoharis demonstrate that on several occasions, Hoover utilized the Halperin/Lake wiretaps as a source of political intelligence on the Muskie campaign; Hoover then provided the information to Nixon. See Theoharis and Cox, The Boss, 415.

<sup>90</sup>At the height of the Ellsberg crisis in early July, Sullivan removed the transcripts from his FBI office and delivered them to Nixon aide John Ehrlichman (an act which probably lost him his job). He did so because of the growing feud between the Administration and Hoover, over who had authorized the original seventeen wiretaps. The Nixon Administration was also angered by Hoover's refusal to pursue with vigor its proposed wiretaps and break-ins targeting Daniel Ellsberg. Hoover saw the writing on the wall as early as mid-April; Haldeman's Diaries entry for April 13 (page 272) state that Mitchell telephoned the White House to report that Hoover was circulating memoranda among the top FBI officials, intimating that the Bureau had conducted some secret wiretaps at the specific request of the President. Nixon's inability to force Hoover's retirement may have been due to the Director's intimate knowledge of the 17 wiretaps. See Kutler, The Wars of Watergate, 116-121.

<sup>91</sup>Nixon states that he made the decision to install the taping system after speaking with Lyndon Johnson, who claimed his tapes were proving invaluable in the writing of his memoirs. Unlike Johnson's system, which was switched on  
(continued...)

Another type of political lawbreaking committed by the Administration involved the so-called "dirty tricks" campaign against selected targets, usually leading Democrats. The White House official most often utilized for this service was Charles Colson, a special counsel who had risen rapidly in the staff ranks, to become one of Nixon's most favored strategists. Colson's specialty involved compiling lists of the Administration's political enemies, and devising creative ways to inflict damage upon them. His prime targets were Senators Kennedy, Muskie, and McGovern, as well as journalists Daniel Schorr and Jack Anderson. However, Colson's "enemies list" eventually grew to include liberal politicians, radical groups, and even Hollywood celebrities. The tactic most often utilized by Colson and his staff was "controlled" leaks of derogatory information concerning targeted individuals and/or groups. An extensive list of "friendly" contacts in the national media were called upon to disseminate the information. Haldeman referred to Colson and his staff as "the nutcutters...[who specialized in] forcing our news....in a brutal vicious attack on the opposition."<sup>92</sup>

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<sup>91</sup>(...continued)  
manually, Nixon's worked automatically, recording all incoming and outgoing communications. Many White House offices were also bugged. See Nixon, Memoirs, 501-2.

<sup>92</sup>Haldeman, Diaries, 443; Lukas, Nightmare, 11-18, 43-55; Kutler, The Wars of Watergate, 116-25. Jack Anderson claims to have evidence that Colson actually concocted a plan to have him murdered, but that Mitchell vetoed the plan.



(Figure 5-2)  
Rainbow People's Party, Summer 1971

Source: Leni Sinclair Personal Photography Archives

## IV.

A source has advised that, in terms of radical and violent activity to meet its goal, the White Panther Party should be rated 2nd only to the Weathermen and to the Black Panther Party.

-- Michigan State Police Report, February, 1971<sup>93</sup>

The Government....should have been paying us for what we were doing. -- John Sinclair, July, 1971<sup>94</sup>

The convoluted history of the origins and evolution of the Mitchell Doctrine contains many ironies. One, however, is particularly ironic: a principal argument utilized in the Nixon Justice Department's Keith brief was that "domestic subversive" organizations posed as great a threat to the nation's security as do "foreign" groups. Yet by mid-1971, as the Keith case moved to the Supreme Court, the organization the Administration selected as exemplifying this domestic threat -- the Michigan White Panthers -- had changed its name to the "Rainbow People's Party," significantly moderated its position, and committed itself to working for political change "within the system."

"Things aren't very Woodstocky out here" David Sinclair told his brother during a prison visit in February of 1971.

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<sup>93</sup>Michigan State Police, Special Investigation Unit, "Confidential Report" on the White Panthers, [date illegible, probably early February, 1971], John and Leni Sinclair Red Squad Files.

<sup>94</sup>Quoted in Sinclair, Guitar Army, 349 [emphasis in original].

The White Panther Chief of Staff was referring to the darkening mood which prevailed in the Movement as a whole, since the "aura" surrounding the huge Woodstock youth festival of August, 1969 had long since faded. As recently as the fall of 1970, Sinclair and other White Panthers had debated changing the organization's name to the "Woodstock People's Party," which Sinclair hoped would place the group in the vanguard of an emerging youth culture revolution. By the spring of the following year, the White Panthers were still debating changing names, but Woodstock no longer sounded appealing. Infighting during the Winter of 1970-1971 had been the worst in the WPP's history. The organization's top leadership remained in jail awaiting a trial that was being held up indefinitely.<sup>95</sup> Lacking leadership, the remaining members often quarrelled over the rent and telephone bills, which remained perennially in arrears. The

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<sup>95</sup>The White Panther leadership was scattered in prisons across the country. Sinclair rotated between Jackson State Penitentiary and Wayne County Jail. Plamondon spent fifteen months in various county jails in Michigan prior to pleading guilty to possession of a bogus Selective Service card. He was then sentenced to twenty-eight months in the Federal Correctional Institution in Terre Haute, Indiana. Forrest received a one-to-three year sentence for harboring a fugitive, which he served at the Federal Correctional Institution in El Reno, Oklahoma. For the same offense, Taube received one-to-five years, and served time at Terre Haute, Indiana, Sandstone, Minnesota, and Milan, Michigan.

Ann Arbor chapter, the so-called National Headquarters, all but lost contact with other chapters across the country.<sup>96</sup>

Writing from his prison cell in Wayne County Jail in late February, Chairman John summarized the organization's plight and offered his insight into the "wrong turns" he had taken since the creation of the White Panther Party.<sup>97</sup> He began with a candid admission about the Black Panthers, the organization that had once had a tremendous influence on him and the other White Panthers:

In the past, because of our name, we were identified (and identified ourselves of course) primarily with the Black Panther Party, even though we received little or no positive recognition from the BPP. In fact, I would have to say that that particular aspect of our approach has been an almost total failure: the BPP never really gave us any recognition, and the other black organizations who were antagonistic toward the BPP gave us no consideration at all due to our name...I think we all recognize this fact in our eagerness to get rid of the name 'White Panther Party.'

Sinclair then offered his support for Pun and Genie Plamondons' suggestion that the group adopt the name "Rainbow People's Party." "Rainbow" suggested a multi-cultural focus,

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<sup>96</sup>A discussion of the inter-group rivalries and personality clashes within the Rainbow People's ranks during 1971 is contained in an unpublished paper by former Wayne State University history graduate student Robert Buchta. Entitled "The Rise and Fall of the White Panthers, 1968-1971," Buchta's study utilizes numerous correspondence and other primary sources from the voluminous "John and Leni Sinclair Collection" (Bentley Historical Library, University of Michigan).

<sup>97</sup>Sinclair had been transferred from Marquette to Wayne County Jail at the start of the new year, because of his attempts to organize prisoners.

which, he hoped, would appeal not only to young, white counterculture types, but also to the widest possible variety of Movement groups. He added "Woodstock is terribly limited as an effective image around which to carry out work and organize our people into a revolutionary force."<sup>98</sup>

The name change was "officially" announced in the May 1, 1971 issue of the new Ann Arbor Sun, which stated:

The White Panther Party has been dissolved...We changed our name to the Rainbow People's Party because we feel that it's a lot more expressive of what we really are and what we want to be than 'White Panther Party' could ever be...we realized we weren't really 'white panthers'....we're freaks, Rainbow People, rock and roll maniacs who want to create a whole new way of life...and the way we'll do it isn't by spouting a lot of slogans and trying to be 'more revolutionary' than anybody else, but by getting down with our own people and working with you to build up an alternative social order.

The communique attested that the new organization's focus would be local organizing in Ann Arbor, as opposed to "setting up 'chapters' all over the country without carrying out any actual community programs."<sup>99</sup>

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<sup>98</sup>Sinclair, "To the Central Committee," unpublished series of typed letters, February 26-28, 1971, JLSC/BHL, box 17, folder 21, "WPP Ideology" [hereafter: "Sinclair 1971 Central Committee Report"]. The "Rainbow" symbol had become increasingly popular in the Movement during 1970 and 1971, even appearing on communiques from the Weather Underground. The Rev. Jesse Jackson's "Rainbow Coalition" was just one of several organizations that adopted this symbolism during the early seventies.

<sup>99</sup>Quoted in Guitar Army, 325-26 [emphasis in original]. The message was signed by the entire "Central Committee," instead of just Sinclair and/or Plamondon. The Committee included: John and Leni Sinclair, Pun and Genie Plamondon,  
(continued...)

Despite the appearance of unity in the Rainbow statement, a fundamental debate remained unresolved. While the majority of the Central Committee wished to give up on national organizing altogether, so that they could focus all of the organization's energies on local programs, Sinclair was unwilling to abandon the national focus. Sinclair argued that the group was "already recognized [nationally], even if we don't want to be," and advocated that the "principal secondary task" be "the laying of the groundwork for the national Movement." He complained of the organization's lack of a person capable of "pushing our images and symbols" to the national Movement, as he had done so effectively in 1968.<sup>100</sup>

Sinclair's desire for the Rainbow People to retain the national focus which had characterized the White Panthers stemmed from a number of factors, undoubtedly including pride and ego. Throughout 1971, he worked on the manuscript for Guitar Army, a detailed chronicle of the organization's history, in which Random House had expressed strong interest. He also continued to believe that the Rainbow People were uniquely qualified to provide leadership to the nation's fragmented and quarrelling anti-war, New Left, and counterculture movements. However, Sinclair was correct in

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<sup>99</sup>(...continued)  
Gary Grimshaw, Frank Bach, Peggy Taube, David Fenton, and David Sinclair.

<sup>100</sup>Sinclair 1971 Central Committee Report.

his assessment that the White Panthers were already well known, thanks to the "Free John" and "CIA Conspiracy" initiatives. National attention over Sinclair's imprisonment, as well as the CIA conspiracy indictment, required a more concerted national effort. His appeal of the ten-year marijuana sentence had been rejected 3-0 by the Michigan State Court of Appeals in mid-February, but Sinclair's attorney, Justin Ravitz, appealed to the State Supreme Court, and was granted a writ of certiorari.<sup>101</sup> In addition, the Michigan State Legislature began debating legislation that would reclassify marijuana from a "narcotic" to a "controlled substance," which would lower the penalty for possession of small amounts from a felony to a misdemeanor.<sup>102</sup>

The "Free John" movement continued to grow, both as a national symbol for the movement to decriminalize marijuana laws and as a local fund-raising effort for the Rainbow People. With its more moderate name and focus, the Rainbow People attracted a number of friends and supporters in the emerging rock business, so-called "hip capitalists." Responding to pressure from the Movement, many rock

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<sup>101</sup>(Washington, D.C.) Evening Star, February 18, 1971, A-2.

<sup>102</sup>Sinclair, "Musical Memoirs," 1-2, unpublished 1991 article, solicited for inclusion in the program guide for "Beatle-Con 1991," a conference focusing on the music and historical/cultural significance of the Beatles, held in Plymouth, Michigan, Summer 1991.

performers and promoters began playing benefit concerts for political "causes." "Free John" benefits attracted several of the better known Michigan acts, such as Mitch Ryder and Bob Seger, as well as a few nationally-known performers, including Commander Cody and his Lost Planet Airmen, Dr. John, and Ted Nugent and the Amboy Dukes. Celebrities and pseudo-celebrities such as Jane Fonda, Donald Sutherland, Allen Ginsberg, and William Kunstler commonly spoke at rallies in support of the imprisoned Rainbow People leaders.

Through the experience of organizing larger and larger rallies and benefits, the Rainbow People refined their organizational skills. Security was provided by the "Psychedelic Rangers," consisting of the group's membership, who patrolled the events and took care of problems such as stage security, drug overdoses, and fist fights. Event coordination and logistics were increasingly handled "in house" as well, with assistance from local "hip capitalists," such as Peter Andrews.<sup>103</sup>

The greatest challenge to the Rainbow Peoples' organizational skills came during November and December of 1971, when they planned their largest event to date: the John Sinclair Freedom Rally. Scheduled for December 10 at the

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<sup>103</sup>Andrews had known Sinclair since the mid-sixties, through his management of the local rock act "SRC." The MC-5 and SRC had played many events together prior to Sinclair's imprisonment in July of 1969. By 1971, Andrews had become the "official" in-house promoter for the University of Michigan. See Ibid., 3-4.

University of Michigan's 14,000-seat Crisler arena, the event was intended to raise public awareness of the "Free John" movement, as well as to raise badly needed legal defense funds. The Rainbow People hoped also to "put irrepressible pressure on the legislature to pass the new drug bill before its 1971 session....recessed for the holidays."<sup>104</sup>

Before the first week of December, the Rainbow People had been only marginally successful in lining up talent. With the inclusion of Jerry Rubin and Ed Sanders (Yippie founders), Bobby Seale (Black Panthers founder), Rennie Davis and David Dellinger (MOBE founders) and radical priest Father James Groppi, the bill looked more like a replay of Chicago '68 than a rock event. The only musical acts signed up in early December were Commander Cody, Archie Shepp & Roswell Rudd, Detroit's Contemporary Jazz Quintet, Phil Ochs, The UP (RPP band), and David Peel & the Lower East Side. Promoter Peter Andrews worried that the event would be a flop.

At the last moment, Jerry Rubin convinced his new friend John Lennon to appear (with wife Yoko Ono). Everything changed overnight. In a matter of hours following the announcement, all 14,000 tickets sold out, at \$3.00 apiece. It would be Lennon's first public appearance in the United States since the Beatles final "live" performance at San

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<sup>104</sup>Ibid., 2.

Francisco's Candlestick Park in 1966. Soon thereafter, Stevie Wonder and Bob Seger signed on.<sup>105</sup>

The Rally made international headlines, as a unique combination of music and activist politics -- the same combination that Sinclair had dedicated his adult life to, and which, he believed, had simply not occurred at Woodstock. The evening's highlights included two songs from Stevie Wonder and Lennon's three-song set, which featured his most explicitly political writing to date. He opened with a song entitled "John Sinclair," which had been inspired by Ed Sander's poem "The Entrapment of John Sinclair." The song's lyrics focused on Sinclair's marijuana conviction:

It ain't fair, John Sinclair.  
 In the stir for breathing air.  
 Won't you care for John Sinclair?  
 In the stir for breathing air.  
 Let him be, set him free.  
 Let him be like you and me.

They gave him ten for two.  
 What else can Judge Columbo do?  
 Gotta, gotta, gotta, gotta, gotta, gotta,  
 gotta, gotta, gotta, gotta, gotta, gotta,  
 gotta, gotta, set him free.

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<sup>105</sup>Ibid., 3-4, 10-11. The John Sinclair Freedom Rally was recorded for posterity by Lennon's film crew, which included award-winning Director Steve Gebhardt, who had directed the break-through "live" performance "Ladies and Gentlemen, the Rolling Stones" during the mid-sixties. The film created as a result of the Sinclair Rally has an unusual history. Ten for Two was pulled from theaters only days after its national release in 1972. No reason was ever given by the Lennons. Gebhardt believes the Justice Department's deportation hearings against Lennon, ostensibly due to a prior marijuana conviction, led Yoko to pressure John into discontinuing overt "political" activities. It remains one of the few Lennon performances never released by Ms. Ono.

Jerry Rubin told the crowd that the event was only the first of many, to unite music and revolutionary politics in a cross-country tour ending up at the Republican National Convention in San Diego.<sup>106</sup>

Sinclair was released from prison on a \$2500 bond two days after the Rally. The Michigan Legislature, on December 9, passed the "drug reclassification bill," significantly lowering the penalties for possession and sale of marijuana. Soon thereafter, the Michigan Supreme Court ruled in Sinclair's appeal; they found the ten year sentence for two marijuana "joints" to be "cruel and unusual punishment." Although Lennon's appearance at the Rally may have had little effect on the Legislature's decision to pass the drug reclassification bill, the timing of the bill's passage gave the Rally an almost mystical reputation.

Sinclair made a triumphant return to 1520 Hill Street. He quickly became involved in the local projects of the "Ann

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<sup>106</sup>Ibid., 11-12; Jon Wiener, Come Together: John Lennon In His Time, (New York: Random House, 1984), 187-196. The success of the Sinclair Rally led many of the performers to believe that an anti-Nixon tour, featuring rock music and radical politics, was just what the ailing Movement needed to regain its focus. The so-called "1972 Anti-Nixon Tour," planned by musicians and "Movement heavies," was to be spearheaded by Lennon, who would headline the tour, picking up local bands in cities across the country, and leaving a large percentage of the profits for local community projects. The tour never got past the planning stage, thanks to the Nixon Administration's deportation hearings against Lennon. The anti-Nixon tour, as well as the meeting between Lennon and Sinclair in early 1972, is described in Jonathan Cott and Christina Doudna, eds., The Ballad of John and Yoko, (Garden City, N.Y.: Rolling Stone Press, 1982), 126-34.

Arbor Tribal Council," which included the Rainbow People's Party and a number of other Ann Arbor-based community groups. Sinclair's book, Guitar Army was released in 1972.<sup>107</sup> The Rainbow People also became involved with the Ann Arbor "Human Rights Party" (HRP), a coalition of Movement groups dedicated to working within the local democratic "system" to influence policy making by electing its own officials. A number of HRP candidates were elected to positions on the City Council and elsewhere.<sup>108</sup>

"It is impossible to characterize a Rainbow Nation or Rainbow People as in any way threatening to the security of Euro-Americans," Sinclair stated in February of 1971, in his "Message to the Central Committee."<sup>109</sup> Once again, he underestimated the resolve of his foes. Neither the White Panther Party's name change, nor its new tone of moderation, made any difference to the FBI or the local and state police, whose surveillance continued unabated. A Michigan State

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<sup>107</sup>Bound by hand, Guitar Army's multi-colored pages, slick art design, and numerous photographs make it a good example of "Movement literature." However, the publishing company, Douglas Books, went bankrupt shortly after the book's publication, so promotion and sales lagged.

<sup>108</sup>Clashes between the Rainbow People and the Human Rights Party led to the final dissolution of Sinclair's group in 1973, when he moved back to Detroit with Leni to work in publishing the Detroit Sun, as well as the music business. The history of Sinclair's life after the Rainbow People is contained in a yet-to-be-released documentary film by Steve Gebhardt, tentatively titled Twenty To Life. See unpublished film script, "Twenty To Life -- A Film By Steve Gebhardt," 1992-1993, in possession of the author.

<sup>109</sup>Sinclair 1971 Central Committee Report, 11.

Police Red Squad report on the White Panthers, written at approximately the same time as Sinclair's "Message," described the group as second only to the Weathermen and Black Panthers, "in terms of radical and violent activity to meet its goal." It further stated: "This office has an informant attempting to infiltrate the WPP."<sup>110</sup> The FBI's "national security" wiretap of the White Panther commune in Ann Arbor was discontinued on January 26, 1971, one day after Keith's landmark ruling. The memorandum from SAC Neil Welch to Hoover made no mention of Keith's decision:

Detroit Division is discontinuing source....on the basis that there has been no recent information of value furnished by the source. The leaders of the White Panther party...suspect that the telephone at WP Headquarters, Ann Arbor, Michigan, is tapped. Consequently, occupants of WP Headquarters have been cautioned to use pay phones for sensitive business. In view of the above [word obliterated] is being discontinued as of 11:00 AM, 1/26/71.<sup>111</sup>

Even without a steady stream of intelligence from warrantless taps, Hoover remained interested in the Rainbow

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<sup>110</sup>Michigan State Police, Special Investigation Unit, "Confidential Report" on the White Panthers, [date illegible, probably early February, 1971], John and Leni Sinclair Red Squad Files. The practice of state police red squads infiltrating radical groups via informers, unheard of before the sixties, is discussed in Donner, Protectors of Privilege, 69-70. Donner finds no evidence of the use of infiltrators and/or informants in either the Detroit or the Michigan State Police Red Squads.

<sup>111</sup>Airtel, SAC, Detroit to Hoover, January 26, 1971, 62-112678-210. Hoover informed Mitchell of the discontinued wiretap in a February 3, 1971 "Memorandum for the Attorney General," [also 62-112678-210]. Despite Welch's statement "for the record," the only valid explanation for the date of discontinuance is the Keith Decision.

People during 1971 and 1972. In his testimony before the House Subcommittee on Appropriations on March 17, 1971, the Director discussed the White Panthers immediately after mentioning the Weathermen. He referred to the WPP as "typical supporters of the Weathermen-type of terrorism." Hoover added that although the WPP has "no clearly defined ideology of their own," they nonetheless "constitute local communes of New Left terrorists who are capable of committing revolutionary violence."<sup>112</sup>

The FBI continued its close surveillance, sharing its intelligence with the Internal Security Division of the Justice Department, as it pursued the Keith appeal. A report, dated March 25, 1971, indicates that Guy Goodwin had requested that all FBI documents pertaining to the White Panthers be forwarded to his office for analysis. The cover page of the report contains the following subheadings under the heading of "Character of Case": "Internal Security - White Panther Party; New Left - Violence; New Left - Foreign Influence." The report further indicates that the Bureau was investigating seven WPP chapters in Michigan: Ann Arbor,

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<sup>112</sup>U.S. House of Representatives, Committee of the Judiciary, Subcommittee on Appropriations, 92nd Congress, 1st Session, Part 1, Testimony of J. Edgar Hoover, March 17, 1971, 46-47.

Grand Rapids, Mt. Clemens, St. Clair Shores, Jackson, East Lansing, and Ypsilanti.<sup>113</sup>

By 1971, the FBI's interest in the White Panthers was national. Documents released through the Freedom of Information Act reveal that virtually any group which referred publicly to itself as a chapter of the White Panthers merited FBI surveillance. A report, dated January 28, 1971, states: "Receiving offices should regard all WPP suspected communes investigated as a result of information set forth herein as possible sources of violence." The Seattle field office put under active surveillance "anyone who was identified....as being an associate of [name obliterated] in his aborted attempt to establish a WPP chapter." A Seattle field office report stated: "White Panther Party members are known to possess firearms and explosives material and should be considered armed and

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<sup>113</sup>Report, "White Panther Party," Detroit Michigan, March 26, 1971, 62-112678-231. The reference to "foreign influence" [emphasis added] indicates the Bureau was attempting to locate "evidence" that the WPP was receiving monetary or other support from "foreign powers and/or their agents." An earlier report, dated January 28, 1971, asserts the group received "a cash amount of \$1,000.00" from "an unidentified source in England," and that a different source in Denmark had furnished funds to a WPP member [name obliterated, probably either Pun or Genie Plamondon, both of whom visited Denmark during the spring of 1970]. See Report, Detroit to Hoover, January 28, 1971, page 44, 62-112678-218.

dangerous." Chapters across America were placed under surveillance.<sup>114</sup>

Much of the FBI attention was aimed at individuals and groups lacking a clear connection with the National Headquarters of the White Panthers in Ann Arbor. This was especially true from the Winter of 1970-1971 forward, when the Ann Arbor leadership lost contact, for the most part, with the national chapters. By this time, the White Panther "myth" was well-known, and sufficiently malleable to be utilized for numerous purposes. Any radical desiring recognition as a certified member of the "revolutionary vanguard" need only put out a flyer or write an article for the underground press, announcing his or her affiliation as a "White Panther," to receive instant attention from the local authorities and the FBI. Yet even the FBI recognized that some individuals adopted the White Panther name to sound more important. An October, 1970 report from the Newark field office to Hoover states that an unnamed individual who had been targeted for FBI surveillance, was "believed to have

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<sup>114</sup>FBI Report, SAC Detroit to Hoover, January 28, 1971, 62-112678-218. See Figure A-32 in the Appendix. The report identifies a total of thirty-five separate cities where "chapters, possible chapters or identified personnel of the White Panther party (WPP) [are] located." See also Report, San Francisco to Hoover, April 8, 1971, 62-112678-274 [cover page]; and Report, Seattle to Hoover, May 28, 1971, 62-112678-274 [cover page].

used the WPP name as a publicity gimmick to gain attention."<sup>115</sup>

The very nature of "politicized" counterculture groups such as the WPP and YIP, who believed in the loosest possible group structure, contradicted "establishment" ideals, such as strict chapter admission procedures or supervision from a central office. The Black Panther Party did make a valiant effort to enforce strict chapter discipline and adherence to national organizing principles; leaders such as Bobby Seale and Fred Hampton frequently inspected BPP chapters across the country, prior to being taken "off the streets" by Hoover's COINTELPRO.

Not so with the White Panthers. By 1971, Sinclair, Plamondon, and the other creators of the White Panther Party had largely lost control of the Party's name and image outside of Michigan. The Ann Arbor White Panther Party's reputation -- already damaged by Plamondon's "off the pig" rhetoric -- was further damaged by "renegade" White Panthers. In July of 1970, a New York radical group calling itself the White Panthers successfully extorted a percentage of profits from the promoters of the three-day "Randall's Island Rock Festival," by threatening "trouble" if their demands were not

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<sup>115</sup>Report, Newark to Hoover, October, 29, 1971, 157-18283-7.

met.<sup>116</sup> A similarly damaging incident occurred in September of 1971, when a Detroit woman -- whom police referred to as a "White Panther" -- attempted to hijack a plane at Detroit's Metropolitan Airport, allegedly to force the release of two Black Panthers being held in Wayne County Jail.<sup>117</sup> In addition, a Newsweek article of October 12, 1970, featured an interview by Karl Fleming with a "terrorist bomber" named "Larry," who, while stationed in Vietnam some years earlier, had allegedly become associated with a White Panther "recruiter." The White Panther reportedly asked "Larry" if he would like to "fight against the U.S." upon returning home, and gave him telephone numbers of "contacts" living in Arizona, California, Montana, Ohio, Kentucky, and Tennessee. It was through the Los Angeles contacts that "Larry" joined the revolutionary underground, where "five-man squads train in demolition, street fighting, booby trapping, bomb setting, sniping, night marching, and foraging." Although "Larry" stated that his "own group has no name -- for security reasons," Senator Peter H. Dominick of Colorado concluded that "Larry"'s conversation with a White Panther in Vietnam, proved he must have become one upon returning to the U.S.,

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<sup>116</sup>New York Times, July 7, 1970, 37. The coalition which "convinced" the promoters to "donate" a portion of the profits included the WPP, Young Lords, and the Revolutionary Youth Party Collective. The incident is described in Free, a 1976 documentary film of the Randall's Island Festival. The incident exemplified the height of the Movement's anger at "hip capitalists," who profited from "the people's music."

<sup>117</sup>New York Times, September 25, 1971, 38.

despite an absence of evidence. The Senator entered the Newsweek article in the Congressional Record, with the following introductory comment:

I believe that we should become more aware of this danger and better understand the motives of those who would seek to destroy our institutions and threaten the safety of our high officials...one such group....[is] the White Panthers.<sup>118</sup>

The Congressional Record also contained an article, reprinted from an Associated Press story of March 16, 1971, outlining among the most unusual of all COINTELPROS employed against the White Panthers. Containing a Washington, D.C. dateline, the story alleged that the White Panther Party

considered kidnapping political leaders of the prominence of Vice President Agnew to gain release of jailed radicals, according to a policeman's testimony released today by a Senate Subcommittee...kidnapping plans had been among several courses of action suggested to or considered by White Panther officers.

The press release was reportedly from the Senate Judiciary Committee's Subcommittee on Internal Security, which, of course, had heard testimony regarding the White Panthers from Sergeant Clifford Murray of the Michigan State Police the previous September. Murray claimed his information came from "a confidential source who has furnished reliable information in the past." In fact, the "confidential source" was one of the FBI's own COINTELPRO letters, sent anonymously to the Detroit chapter of the White Panthers in late May, 1970. The

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<sup>118</sup>U.S. Senate, Congressional Record, May 11, 1971, S 6633-34.

letter, which suggested that the White Panthers "snatch" Senator Robert Griffin, Congressman Gerald Ford, and/or Agnew in order to secure Sinclair's release, was among the personal papers of Jack Forrest which were confiscated by the FBI when they apprehended Forrest, Plamondon, and Taube in July of 1970.<sup>119</sup>

Hoover's FBI got lots of mileage out of this one COINTELPRO letter, used repeatedly to damage the White Panthers during the fall of 1970. Detroit SAC Neil Welch had included the entire text of the letter in his September, 1970 report concerning Plamondon's capture, which he circulated to Bureau headquarters, as well as to Detroit's Red Squad. Several weeks earlier, Hoover had quoted directly from the anonymous letter in his initial memorandum to Mitchell requesting the installation of "national security" wiretaps on the White Panthers' Ann Arbor headquarters. The alleged "kidnap plot" born out of the COINTELPRO letter had also been a topic of discussion at the September 22, 1970, White House meeting between Nixon, Hoover, and Ford, only two weeks before William Kunstler presented his motion for disclosure of electronic surveillance in Judge Keith's courtroom. Assistant FBI Director William Sullivan's October 12, 1970

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<sup>119</sup>New York Times, March 17, 1971, 51; Washington Daily News, March 16, 1971, 2; New York Daily News, March 17, 1971, 17. The first news association to carry the story was UPI, on March 16, followed by AP the following day. The headlines were damning: "White Panthers' red plot," said the Washington Daily News; the New York Times stated "Political Kidnapping Plot Tied to the White Panthers."

address to the editors of United Press International stated that the White Panthers "suggested the possibility of kidnapping high Government officials....demanding freedom for White Panthers now in prison in exchange for release of the officials." Although the text of Sullivan's speech, containing the White Panther allegations, had been distributed to the UPI editors, they failed to make even a passing reference to it in their stories concerning the speech. Why then, did a press release containing essentially the same information make headlines the following March?

Several aspects of the March, 1971, news release indicate high-level coordination. First, the Associated Press and UPI stories disseminated via the national press were not the same as the "official" press release drafted by the Senate Internal Security Subcommittee, for release on March 16. The Subcommittee's original release, dated March 16 (now stored in the National Archives), contains no references to the kidnapping plot, and focuses instead on other aspects of Murray's testimony, such as the fact that Plamondon was captured with "65 pounds" of dynamite in his possession.<sup>120</sup>

The national media's interest in political kidnapping peaked at the moment the White Panther story appeared. Also,

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<sup>120</sup>Press release, "From the Senate Internal Security Subcommittee," March 16, 1971, Records of the U.S. Senate, Internal Security Subcommittee Subject Files, box 222, folder for "Rainbow People's Party," Record Group 46, National Archives, Washington, D.C.

in mid-March 1971, the Sixth Circuit Court of Appeals was deliberating the Keith case, having heard oral arguments on February 15. Two aspects of the release were particularly helpful to the government's case: (1) the WPP's consideration of high-level political kidnapping demonstrated the seriousness of the threat they posed to the national security, and (2) the fact that the WPP had allegedly received its inspiration to kidnap from the "Tupamaros of South America," provided direct support for the Justice Department's contention that domestic radical groups posed as great a danger to society as "foreign" groups.

The importance of the Keith case to the Nixon Administration suggests that by March of 1971, the White Panthers had made Chuck Colson's "enemies list" -- and Colson's specialty was bogus press "leaks." Senate hearings had traditionally been released approximately nine months after the hearing dates. In this case, however, the hearing was released less than six months following Murray's testimony. The timing suggests that high-ranking government officials possibly engineered the "kidnap plot"'s release, in order to influence the outcome of the Keith case at the appellate level. The fact that the sole basis for the kidnapping charge was an anonymous FBI COINTELPRO letter, adds irony to the bizarre incident.<sup>121</sup>

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<sup>121</sup>The dissemination of "bogus" press releases, referred to in intelligence circles as "disinformation" or "grey  
(continued...)

An additional example of negative White Panther Party press occurred in late May, 1971, when the Justice Department's top radical hunter, Guy Goodwin, went after two WPP members. A Seattle-based federal grand jury investigating the bombing of the U.S. Capital on March 1 had subpoenaed Leslie Bacon, an organizer of the May Day demonstrations and, Goodwin suspected, a Weatherwoman. On the advice of her attorneys, Bacon refused to testify, citing the unconstitutionality of the new "use immunity" laws governing grand jury testimony. Federal Judge William Goodwin then held her in contempt of court and ordered her to jail until such time as she agreed to give testimony. In an attempt to acquire evidence regarding Bacon's radical activities, Guy Goodwin shifted the investigation's focus, to two meetings, in which Bacon had supposedly taken part: (1) the gathering of about two thousand radicals from across the U.S. in Ann Arbor in February of 1971, during which the planning for the May Day demonstrations was allegedly carried out, and (2) a series of meetings in Washington, D.C. between radical groups and organizers of the May Day demonstrations, which occurred during the time that the Capital was bombed. Implicated in both meetings were former White Panthers (now

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<sup>121</sup>(...continued)  
propaganda," was utilized by the Nixon Administration, in its "dirty tricks" campaigns, as well as the FBI, in its COINTELPRO programs. See Churchill and Vander Wall, Agents of Repression, 43-44 and The Cointelpro Papers, 182; see also Donner, Age of Surveillance, 238-40; and Lukas, Nightmare, 43.

Rainbow People) Ken Kelley and Terry Taube, Skip's younger brother. By early June, Goodwin made Detroit the focus for his Capital bombing probe, and an additional grand jury was impaneled. Like Bacon, both Kelley and Taube refused to testify, which put Judge Talbot Smith in the position of putting them in prison for contempt or freeing them. He chose the latter, but only after weeks of legal wrangling between attorneys of both sides.<sup>122</sup>

It is thus surprising that the White Panther/Rainbow People's Party somehow survived through a turbulent period in U.S. history, when a considerable number of law enforcement officials from all levels of the government were attempting to "expose, disrupt, and otherwise neutralize" it. In reviewing all of the COINTELPRO and COINTELPRO-like initiatives utilized against Sinclair and his tribe over the course of five years, 1967-1971, the author has found documentation for nine:<sup>123</sup>

1. "Bogus Mail"/Anonymous Letters. Two incidents: August, 1969 FBI COINTELPRO aimed at WPP and MOBE, and May, 1970 FBI COINTELPRO suggesting kidnapping.
2. Infiltration/Agents Provocateurs. Dennis Marnell, 1970; State Police attempt in 1971.

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<sup>122</sup>Washington, D.C. Evening Star, May 28, 1971, B-1 and June 3, 1971, A-2; New York Times, June 2, 1971, 21. Kelley had assisted in the publication of May Flowers, an underground newspaper distributed during the Mayday demonstrations. He and Bacon had also "booked" a number of rock acts for the event.

<sup>123</sup>The categories utilized herein come from Churchill and Vander Wall, The Cointelpro Papers and Agents of Repression.

3. Resource-Draining Litigation. Sinclair's arrest on drug charges and repeated denials of bond; CIA Conspiracy indictments.
4. Tainting Radical Leaders with Violence. Inclusion of Sinclair in the CIA Conspiracy indictment, thanks to Valler's coerced testimony.
5. Eavesdropping/Warrantless Electronic Surveillance. Continuous from September 9, 1970 through January 26, 1971. Hidden by the government until 1978.
6. I.R.S. Investigations. See Figure A-33 in the Appendix.<sup>124</sup>
7. Police Support for Right-Wing "Pseudo-Gangs". Fire bombings of Trans Love houses in 1967; other incidents of unexplained break-ins and beatings.<sup>125</sup>
8. "Kangaroo Grand Juries". 1969 Detroit grand jury aimed at getting Sinclair off the streets; Guy Goodwin's subpoenas of Kelley and Taube in 1971.
9. Physical Surveillance. Practically non-stop from local, state, and federal agencies throughout the history of the WPP and RPP.

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<sup>124</sup>1971 I.R.S. 1040 Form, John and Leni Sinclair, located in the John and Leni Sinclair Red Squad Files; also see FBI Report, Detroit to Hoover, September 17, 1969, 62-112678-29, "IRS Income Tax By Liaison" agency designation for "Dissemination Record."

<sup>125</sup>Beginning in 1966, and continuing through the early seventies, the Detroit field office of the FBI utilized the activities of the far-right vigilante group "Breakthrough," led by Donald Lopsinger. An October, 1966 memorandum from Detroit's SAC to Hoover states: "Detroit is proposing a Counterintelligence technique that efforts be made to take over their activities and use them in such a manner as would be best calculated by this office to completely disrupt and neutralize the MDCP [Michigan District Communist party]." SAC, Detroit to Hoover, October 18, 1966, 100-3-104-15; Located in Detroit COINTELPRO Files, National Security Archive, Washington, D.C. See Figure A-34 in the Appendix. For a discussion of FBI-sponsored right-wing vigilantism, see Churchill and Vander Wall, The COINTELPRO Papers, 225-27; and Agents of Repression, 48.

## v.

The thinking of the Supreme Court of the United States with its several recent changes may be along the lines of suppressing the activities of those who openly espouse the overthrow of democratic authority in the United States.

-- J. Edgar Hoover<sup>126</sup>

During the fall of 1971, as the Keith case awaited consideration from the Supreme Court, Justices Black and Harlan announced their retirements. An opportunity suddenly presented itself for Nixon to select his third and fourth appointees to the Court, leading to the creation of the conservative "Nixon Court." The announcements were very welcome news to both Nixon and Hoover. From Nixon's first days in office, they had discussed the damage inflicted on America by the Warren Court.<sup>127</sup> Immediately following his inauguration, the two discussed the High Court, as Alexander Charns notes:

Hoover complained that at times he was almost 'despondent' about whether anything could be done about the Supreme Court rulings. The president said it was 'going to take at least four years or more to get the Court changed.' Hoover disagreed -- he felt that 'some progress' could be made because there would be four vacancies. Surprised, Nixon asked Hoover how he came up with four. 'The

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<sup>126</sup>Quoted in Theoharis, Spying on Americans, 188.

<sup>127</sup>Alexander Charns's Cloak and Gavel, contends that Hoover engaged in a separate COINTELPRO specifically aimed at creating a conservative Supreme Court.

fellow from New York,' Hoover said. 'Harlan?' Nixon asked. 'Yes,' Hoover said. 'He's deaf and can't hear anything and is planning to retire, and of course, Warren will be going off and Black's health is getting worse....Douglas, of course, is crazy, and is not in too good health. That makes Harlan, Douglas, Black and Warren.'<sup>128</sup>

Nixon had appointed two Justices almost immediately after taking office, when Justice Warren retired and Justice Fortas was forced to resign. Warren Burger, Nixon's selection to replace Warren as Chief Justice, was easily confirmed. But Nixon ran into enormous difficulty over Fortas' replacement. Two bitter fights were waged over the nominations of Clement Haynsworth and G. Harold Carswell.<sup>129</sup> Forced to select a moderate, Nixon chose Minnesotan Federal Appeals Judge Harry Blackmun. Yet the campaign to overturn the Warren Court continued. In April of 1970, Congressman Gerald Ford called for a special Congressional investigation of Justice William O. Douglas, initiating an Administration-inspired "impeach Douglas" campaign. Lacking evidence, Ford was forced to back down.<sup>130</sup>

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<sup>128</sup>Ibid., 102.

<sup>129</sup>Ibid., 108. Charns criticizes the FBI's background checks on the two nominees. Although they both had segregationist pasts, the FBI found "no derogatory information."

<sup>130</sup>Athan Theoharis has documentation demonstrating Nixon and Hoovers' complicity in Ford's impeachment drive. Also, Charns has obtained evidence that Douglas' mail had been opened by the CIA, and that he had been overheard, although not specifically targeted, in FBI "national security" wiretaps. See Theoharis and Cox, The Boss, 406; and Charns, Cloak and Gavel, 112-13.

On September 17, Nixon received word of Black and Harlan's pending retirement from Mitchell, who had telephoned Haldeman with the news. The President did not announce the nominations of Lewis F. Powell and William H. Rehnquist until October 21. During the intervening four weeks, Nixon was influenced by a variety of forces. Foremost in his thought was the bitter battle over Carswell and Haynsworth, which strained the President's relationship with Mitchell and Hoover. The strain is suggested in Mitchell's conversation with Haldeman on September 17:

The Attorney General wants guidance from the P on what he wants to do on a replacement appointment. Feels that we've got to really think it through carefully and establish our position on it.<sup>131</sup>

Nixon also had to consider growing support across America for a female Justice. By September 25, Haldeman was reporting that the President "[is] feeling that he really should go for a woman judge, if we can get a good, tough conservative."<sup>132</sup>

The force exerting the greatest pressure on Nixon was his determination not to repeat the mistakes he had made with the Carswell and Haynsworth debacles; but he certainly sought to name advocates of "law and order," who would work to reverse the Warren Court's rulings. One of the first names he had circulated around Washington was Congressman Richard H. Poff, the Vice Chairman of the National Commission on the

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<sup>131</sup>Haldeman, Diaries, 355.

<sup>132</sup>Ibid., 358.

Reform of Federal Criminal Law. Poff was considered for only a few days before media scrutiny forced him to withdraw his name. Nixon reacted with anger, as Haldeman stated: "he's going to go for a real right-winger now...and really stick it to the opposition." Nixon then suggested Senator Robert Byrd, who Haldeman referred to as "a former KKK'er....he's more reactionary than [George] Wallace."<sup>133</sup> Two other names also surfaced: Senators Howard Baker and Robert Griffin. As each name appeared, the media provided thorough biographical sketches, and Senators were urged to comment as to how they might vote.<sup>134</sup>

What Nixon did next was baffling, even to his closest aides. Relying on neither Hoover nor Mitchell, Nixon, on October 13th, submitted a list of six persons, including two women, to the ABA's "Judicial Fitness Committee." All but Byrd and U.S. Appeals Court Judge H. H. Friday were relative unknowns. The selections angered Chief Justice Burger, who told Mitchell he would resign if Nixon did not select "distinguished judges." Nixon retorted: "let him resign."<sup>135</sup> From this point until October 21, Nixon did not discuss his selections with anyone, not even Haldeman or Ehrlichman. The selection of well-known former ABA President Lewis Powell surprised few. Nixon's other choice, Assistant

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<sup>133</sup>Ibid., 361.

<sup>134</sup>New York Times, October 12, 1971, 1.

<sup>135</sup>Haldeman, Diaries, 365.

Attorney General William Rehnquist, shocked not only the media, but also the White House staff.<sup>136</sup>

Powell and Rehnquist both had impressive credentials, graduating first in their law school classes; Powell from Washington and Lee, and Rehnquist from Stanford. Powell had gone on to become President of the ABA, where he had chaired several of the Association's committees. Rehnquist had clerked for Supreme Court Justice Robert Jackson, and had become a successful lawyer in Phoenix, where he became associated with Senator Barry Goldwater's unsuccessful presidential bid in 1964. After Nixon's election, he was one of the so-called "Arizona Mafia" who went to work for the Mitchell Justice Department.<sup>137</sup>

Although neither nominee possessed experience as a judge, both met Nixon's standards on "law and order." Powell had been a member of the Presidential Commission on Violence in 1968, which had opted to support Title III wiretapping, against the wishes of both President Johnson and Attorney General Clark. In addition, he had played a key role in the ABA's Commission on Standards for Law Enforcement, which had

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<sup>136</sup>Ibid., 366-367. Haldeman believes Nixon did not settle upon Rehnquist until the night prior to the speech. Two days prior to the announcement Haldeman wrote: "He's now thinking of some different approaches and is not telling anybody what he's really up to, but he's forcing Mitchell to re-evaluate."

<sup>137</sup>James F. Simon, In His Own Image: The Supreme Court in Richard Nixon's America, (New York: David McKay Company, 1973), 228. The other members of the "Arizona Mafia" were Richard Kleindienst and Robert Mardian.

delivered a ringing endorsement of court-approved wiretapping. Powell had written an article in late July, 1971, in which he expressed opinions consistent with the Nixon Administration's Keith brief. One passage stated that the difference between domestic and foreign threats had all but disappeared in recent times. In the article, which first appeared in the Richmond, Virginia Times Dispatch, and was later reprinted by the New York Times, Powell dismissed the furor in Washington over wiretapping as "a tempest in a teapot."<sup>138</sup>

Rehnquist's "law and order" credentials far exceeded those of Powell. As Assistant Attorney General under Mitchell, he had been a chief architect of several of the Administration's harshest and most constitutionally-questionable policies regarding activist dissenters, such as mass arrests, so-called "no-knock" laws, and pre-trial internment of radicals. Along with Kleindienst, he was Mitchell's most outspoken supporter of surveillance practices. Rehnquist was also a chief theoretician of the Mitchell Doctrine. His strong support for eavesdropping had been demonstrated in March of 1971, during two appearances before the Ervin's Committee on Constitutional Rights.

With Powell and Rehnquist on the Court, Nixon would have two staunch supporters of wiretapping in his corner for the pending Keith case; perhaps the two strongest such supporters

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<sup>138</sup>New York Times, November 3, 1971, 47.

possessing the qualifications to be confirmed. Although this consideration may have been only one of several weighing on Nixon's mind during the selection process, it is difficult to imagine that it was not in his thoughts. Less than three weeks prior to Nixon's nomination announcement the Justice Department had submitted its final Keith brief.<sup>139</sup>

During the confirmation hearings in the Senate, both nominees were questioned by liberals and moderates concerning their views on governmental surveillance, and particularly on the issue of "national security" wiretapping. Forced to defend his "tempest" address, Powell asserted that he had not yet made up his mind about the issue of wiretapping domestic subversives without court order.<sup>140</sup> Rehnquist was grilled about this issue, and was forced to admit that he had "helped write" the government's Keith brief.<sup>141</sup> By admitting his

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<sup>139</sup>New York Times, October 1, 1971, 10.

<sup>140</sup>In a letter to Senator Birch Bayh on October 27, Powell reiterated his indecision concerning the Mitchell Doctrine, but added that it was his "general judgement," that "it is now extremely difficult to distinguish between foreign and domestic threats to our democratic institutions." Quoted in Washington Post, October 28, 1971, A-5. On November 8, he backed away from this position. Under intense questioning from Liberals Bayh, Kennedy, and Philip Hart, Powell suggested that "court approval and other safeguards could be applied to the Government's wiretapping of domestic groups in many cases." Quoted in New York Times, November 9, 1971, 19.

<sup>141</sup>The "backfire" which took place against the Nixon Administration's bold "law and order" initiatives during 1971 may have been a decisive factor in the Senate's criticism of Rehnquist, which ultimately cost Nixon a key vote in the Keith case. A series of detailed articles, editorials, and "Letters to the Editor" concerning Rehnquist's background  
(continued...)

direct involvement in a pending case before the High Court, Rehnquist had no choice but to assert that if confirmed, he would not participate in the Keith case. With these words, Nixon lost one "sure" vote on the pending case, as well as a forceful "law and order" proponent, who might have swayed undecided Justices.<sup>142</sup>

Both of Nixon's nominees were confirmed in the Senate: Powell by a nearly unanimous vote (89-1) on December 6, and Rehnquist by 68 to 26 on December 10. A New York Times editorial claimed that a number of Senators who voted for Rehnquist's confirmation had nevertheless worried greatly

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<sup>141</sup>(...continued)

appeared in leading newspapers prior to and throughout the confirmation hearings. On October 26 Tom Wicker of the New York Times stated "it will be remarkable if he does not bring something of the Mitchell-Nixon attitude to the task" when considering cases involving wiretapping [page 41]. Four days later, a letter from three Harvard law students appeared in the New York Times, advising the Senate Judiciary Committee to "ask Mr. Rehnquist whether he intends to absent himself from the Court's resolution of impending wiretap cases. A response which indicates a failure by Mr. Rehnquist to appreciate his ethical responsibility should weigh heavily on his confirmation by the Senate" [page 30]. Four days later, Rehnquist disqualified himself from consideration of the Keith case.

<sup>142</sup>New York Times, November 4, 1971, 66. James F. Simon's In His Own Image states: "Rehnquist was what many libertarians had long feared: a smart conservative who, unlike a mediocrity, could possibly win other justices to his point of view" [page 238]. Although losing Rehnquist's vote on the Keith case must have been a blow to Nixon, neither he nor Haldeman made any mention of it in their later writings. White Panther attorney Hugh M. Davis thinks that from this time forward, Nixon realized his chances of securing a majority in favor of the Mitchell Doctrine were minimal. See personal interview with author, July 25, 1992, Detroit, Michigan.

about his ideology and "activist conservatism." Most were in agreement, however, that he possessed high intellectual abilities:

The question is whether the nominee should be evaluated by the Senate in terms of his specific political, social and economic view -- quite apart from the obvious requirements of integrity, ability, temperament and training.<sup>143</sup>

An additional reason for Rehnquist's confirmation may have been the abrupt softening of his "law and order" positions late in the confirmation process. He testified that "he had worked behind the scenes to persuade the Justice Department to ease rigid positions supporting wiretapping and opposing 'speedy trial' legislation." According to his testimony, Rehnquist recognized that the government's use of the "inherent power" argument in the Keith case was "a mistake," because the Justice Department "would be on stronger legal grounds to concede that it was subject to the Fourth Amendment." Fred Graham concluded that Rehnquist's revised views represented a "softened....image."<sup>144</sup>

Rehnquist's confirmation may have also been made possible, at least in part, by Nixon's maneuvering. Leon Friedman's interviews with a number of Senators following Rehnquist's confirmation revealed a common theme:

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<sup>143</sup>New York Times, November 15, 1971, 40.

<sup>144</sup>Quoted in New York Times, November 5, 1971, 22. Fred Graham's article fails to point out how this "softening" of the government's position in Keith would in any way change the outcome of the case, if the government was victorious.

The forces which had worked so effectively on the prior campaigns against Judges Haynsworth and Carswell found it was extremely difficult to crank up for a third major fight at the end of the legislative session...[One Senator stated] 'This man is far worse on most important issues than either Haynsworth or Carswell, but we didn't have enough time to prove this to the people whose help we needed.'<sup>145</sup>

By submitting the list of six names to the ABA, and allowing it to be circulated publicly, Nixon diverted his opponents' attention. By the time he revealed his true intentions, the liberal forces had already expended a great deal of time and effort. It was a shrewd political move, reflecting the lessons Nixon had learned during the Haynsworth and Carswell crises. Powell and Rehnquist were sworn-in as the 99th and 100th U.S. Supreme Court Justices on January 7, 1972.

On June 21, 1971 the Supreme Court granted a writ of certiorari in the Keith case, setting the stage for a full year of legal maneuvering and heightened anticipation concerning the decision.<sup>146</sup> Beginning in October, and continuing through mid-February, the two sides submitted briefs to the High Court, outlining their final positions. Because of the unique nature of the case, separate briefs were filed on behalf of Judge Keith and the three White

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<sup>145</sup>New York Times, December 12, 1971, section iv, 12.

<sup>146</sup>Only four Justices voted to grant the Keith writ: Black, Burger, Harlan, and Blackmun. See U.S. Supreme Court Docket Sheet, 1971-1972 Term, Case No. 70-153, U.S. v. U.S. District Court, et al, located in the Papers of Justice William A. Brennan, Manuscript Division, Library of Congress [hereafter "Brennan Papers"], container 420, folder 5.

Panther (now Rainbow People) defendants. Representing Keith was Detroit corporate attorney William Gossett, who had been recommended to Keith by the Michigan Bar Association.<sup>147</sup>

Gossett, a Republican, had an impressive background in corporate law. He had been general counsel for Ford Motor Company for over fifteen years, and was a former ABA President. His decision to represent Keith (pro bono), led to friction with his law partners and some of his clients, who did not believe that he should be risking his professional reputation by taking on the Nixon Administration in behalf of a black judge. Assisting Gossett in the preparation of the legal brief was Professor Abraham Sofaer of Columbia Law School, a well-known constitutional historian and author.<sup>148</sup>

The "Ann Arbor Three" were represented by Arthur Kinoy, a "people's lawyer," who had represented controversial civil rights workers, union organizers, and those targeted by the House Committee on UnAmerican Activities [HUAC].<sup>149</sup>

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<sup>147</sup>Keith had submitted a request to the Michigan Bar Association for a counsel qualified to argue before the Supreme Court. William Gossett reports that Chief Judge George Edwards of the Sixth Circuit Court of Appeals also asked him to represent Judge Keith. Personal interview with author, July 23, 1992, Detroit, Michigan.

<sup>148</sup>Ibid. In a 1992 interview, Gossett referred to Sofaer as "very intellectually competent." "He wrote most of the brief," Gossett adds, "but I polished it, and added a few key points."

<sup>149</sup>Kunstler, My Life as a Radical Lawyer, 208-209; Kinoy, Rights on Trial: The Odyssey of a People's Lawyer,  
(continued...)

Immediately prior to his involvement in the case, Kinoy had assisted in the preparation of a 547-page appellate brief in the "Chicago Seven" case, which included a detailed refutation of the Mitchell Doctrine.<sup>150</sup>

Robert Mardian and Erwin Griswold continued to direct the government's side, assisted by Department of Justice Attorneys Daniel J. McAuliffe, Robert L. Keuch, and George W. Calhoun. As is customary in Supreme Court cases, the government filed its brief first, on October 1, 1971, and reserved the right to submit a "Reply Brief" near the end of the filing period. The government's case made several major points: (1) the Fourth Amendment does not prohibit all searches and seizures without a warrant, but only those that are unreasonable; (2) "national security" surveillance authorized by the Attorney General to protect the nation from "domestic" danger does not constitute an unreasonable search and seizure under the Fourth Amendment; (3) the process of judicial review by federal magistrates in "national security" wiretapping cases is inappropriate, and "outside the

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<sup>149</sup>(...continued)

(Cambridge: Harvard University Press, 1983), 2-16. The decision to have Kinoy argue the case, rather than Kunstler, was based on discussions between Rainbow People members, Kinoy, Kunstler, and William Bender, formerly with the Center for Constitutional Rights in New York, and then the Director of the newly-formed Rutgers Law School Constitutional Litigation Clinic. Kunstler says the decision to use Kinoy "wounded my ego substantially...[but] eventually I came to realize that we would do best with Arthur."

<sup>150</sup>Kinoy, Rights on Trial, 3.

traditional judicial responsibilities"; (4) in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, "Congress recognized the President's authority to conduct such surveillances without prior judicial approval"; and (5) in the event that the Court rules warrantless wiretapping of U.S. citizens illegal ("contrary to our contention"), the Alderman decision's automatic disclosure requirement regarding illegal government surveillance should be rescinded, in favor of a system permitting judges to make in camera determinations of "whether the information obtained by the surveillance is arguably relevant to a prosecution before turning the material over to a defendant."<sup>151</sup>

The government's brief displayed a significant shift in emphasis from the "inherent power" argument, to a position focusing on the "reasonableness" doctrine of the Fourth Amendment. The central premise of the argument was that the Fourth Amendment should be read as two clauses: first, the people have a right to be secure in their "persons, homes, papers, and effects, against unreasonable searches and seizures." Second, no warrants shall be issued without "probable cause." Thus "national security" surveillance without prior court order represented "reasonable searches under the first clause which need not comply with the second clause." This position had been accepted by the Supreme

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<sup>151</sup>Keith case, "Brief for the United States," October 1, 1971, SCR/B.

Court until the early fifties, for example in U.S. v. Rabinowitz (1950), which stated that the test "is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." However, by the sixties, the Warren Court emphasized the necessity (or "primacy") of warrants in most cases involving law enforcement searches and seizures.<sup>152</sup> In Keith, the government correctly stated that the Supreme Court had yet to rule on this issue as it pertained to "national security" surveillance. Finally, the government's brief again cited numerous cases in which searches without a warrant had been held constitutional.

A second theme in the government's brief was related to the issue of social disorder and fear. It asserted that the purpose of the Black Panther wiretaps (which picked up Plamondon's conversations) was "not merely law enforcement....but protection of the fabric of society itself." The brief is full of references to radicals seeking to "attack and subvert" or commit "acts of sabotage" against the government. Statistics on the number of campus and other bombings were supplied from the "National Bomb Data Center." This heavy-handed attempt to frighten the Justices -- which Judge Edwards had referred to as "an argument in terrorem" -- provided the backdrop for the government's assertion that:

The President must protect the government... and proper performance of this function still requires, as it has in the past, the occasional

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<sup>152</sup>339 U.S. 56, 66; Quoted in CRS, 1041-45.

use of electronic surveillance to gather information concerning the plans of those who have committed themselves, in many instances publicly, to engage in covert, terrorist tactics to destroy and subvert the government.<sup>153</sup>

The brief reiterated, without significant revision, two of the central components of the government's argument, dating back to the earliest days of the Mitchell Doctrine. Citing section 2511(3) of the Omnibus Act, the government asserted "the standard of national security that the Attorney General applies is the same standard Congress provided" in the statute: namely, that there are certain categories of "exceptions" to the standard warrant requirement that the President and the Attorney General are entitled to make, in this case "investigative" wiretaps of domestic radicals seeking "to attack and subvert the existing structure of the Government." Also present was the familiar foreign/domestic distinction: "To attempt to compartmentalize national security into rigid separate segments of 'foreign' and 'domestic' ignores the realities of the way in which many organizations and individuals....operate."<sup>154</sup>

There were two additional substantially revised arguments in the government's brief. When the Attorney

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<sup>153</sup>"Brief for the United States," October 1, 1971, 6-19, SCR/B.

<sup>154</sup>Ibid., 19-21; 32-34. In response to the Appeals Court's assertion that section 2511(3) is "completely neutral," the government reviewed the legislative history of the passage, particularly Senator McClellan's Committee Report. See Ibid., 28-29.

General authorizes wiretaps without prior court order, "the surveillance is subject to limited judicial review." As if to deflect charges that the government was seeking immunity from judicial review, the brief asserted: "Once the surveillance has been made, the courts may review it to determine its conformity with the standard of the Fourth Amendment." The government did concede, however, that "such judicial review would not take place until a criminal prosecution has been initiated -- and, of course, most national security electronic surveillances do not result in prosecutions...[and therefore] the scope of judicial review should be extremely limited." Skirting the probable cause section of the Fourth Amendment, the brief suggested that this standard would be "wholly inappropriate" to "national security" cases, which depend on "a wide variety of facts and considerations, many of which involve information that necessarily must be kept confidential." As for the issue of prior warrants from federal judges, the government once again made the familiar argument that only the Executive Branch possesses the "entire spectrum of information available" to make informed decisions concerning probable cause to initiate such surveillance:

A warrant for national security surveillance would compel the judiciary to embark upon a far different kind of inquiry than courts now make in considering the application of a warrant...In national security surveillance cases...the justification for surveillance cannot be simply stated or easily demonstrated; generally it involves a large number of detailed and

complicated facts whose interrelation may not be obvious to one who does not have extensive background information.<sup>155</sup>

A second argument, occupying eleven of the brief's forty-seven pages, was the claim that were the Court to find the Mitchell Doctrine unconstitutional, it should overturn a portion of the Alderman decision which dictates that federal judges must automatically disclose all illegal surveillance to criminal defendants, regardless of its relevancy to the government's case, and without consideration to the damage that such disclosure might inflict upon the national security. Disputing a position taken by Judge Weick in his dissent to the Sixth Circuit's Keith decision, the government conceded that "Alderman appears to require automatic disclosure." The brief then reviewed the legislative history of Title VII, part of the Administration-inspired Omnibus Crime Control Act of 1970, warning "if disclosure is required in this area, the government must face the dilemma of either dropping the prosecution of an often serious criminal offense...provid[ing] the defendant with immunity from prosecution for all crimes, past, present, or future...or revealing sensitive national security information." It recommended that the Court adopt the standard of in camera review contained in the Title VII statute.<sup>156</sup>

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<sup>155</sup>Ibid., 21-27.

<sup>156</sup>Ibid., 35-41.

The next brief to be filed (December 15, 1971) was Gossett and Sofaer's, on behalf of Judge Keith.<sup>157</sup> Although the arguments presented were considerably more detailed than Kunstler's, the central premises of his earlier arguments were the same. The brief reflected the positions of Keith, Ferguson, and the Court of Appeals regarding to the history and significance of the Fourth Amendment. It began with the case controlling the relationship between electronic surveillance and the Fourth Amendment, the Katz decision; Gossett argued that the decision was unequivocal, and recognized no exceptions to the warrant requirement. The brief then addressed the government's position concerning certain exceptions to the warrant requirement, asserting that where the Supreme Court had made such exceptions, "its governing principle" was that warrantless searches "are unreasonable except in carefully defined classes of cases."

Next, the brief charged that the government was attempting to carve out "a new exception to the warrant requirement," which it asserted would be "likely to chill

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<sup>157</sup>Although the attorneys for the "Ann Arbor Three" filed a motion in opposition to the government's petition for a writ of certiorari (obviously hoping that the High Court would not grant the writ, which would let stand the Appeals Court ruling, allowing the trial to go forward), neither Keith nor his attorneys opposed the writ. This was not the only issue in which Gossett and the attorneys for the three former White Panthers did not see eye-to-eye on. See letter, William T. Gossett to Robert E. Seaver, Clerk, U.S. Supreme Court, December 6, 1971, Records of the U.S. Supreme Court, 1971-1972 Term, Case No. 70-153, Record Group 267, National Archives, Washington, D.C.

free expression" and therefore undermine constitutional checks and balances. The government's after-the-fact judicial review was termed "patently deficient," and the claim that judicial review would frustrate law enforcement was dismissed with the assertion that "Courts are well suited to consider complicated fact situations...and Congress contemplated that they would do so."; it added "leaks can be prevented through special precautions." Section 2511(3) was again termed "neutral," and the government's foreign/domestic distinction was quickly dismissed: "Whatever authority the President may have to utilize warrantless electronic surveillance with respect to foreign powers cannot be invoked to support this domestic search." Finally, Gossett's brief argued that the disclosure provisions of the Alderman case should be left unchanged.<sup>158</sup>

The brief for the three original defendants was filed on January 21, 1972, and carries the names of the following attorneys: Kunstler, Kinoy, Weinglass, Davis, and William J. Bender. In language considerably more agitated than Gossett's, the 157-page argument made the following main points: (1) the Mitchell Doctrine represented a "sweeping" and "extraordinary" claim of executive power, "without foundation in the Constitution"; (2) the judicial review proposed was "wholly non-existent"; (3) the government's

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<sup>158</sup>"Brief for the District Court and the Honorable Damon J. Keith," December 15, 1971, 4-8, SCR/B.

"last minute" attempt to "interject considerations of 'foreign security' into the case...reflects a desperate attempt to camouflage the illegality"; (4) the Executive had already proven its inability to restrain itself in conducting widespread warrantless surveillance of citizens; (5) section 2511(3) of the Omnibus Act was, as Edwards stated, "not the language used for a grant of power"; and (6) Alderman should not be revised.<sup>159</sup>

Several parts of the Kinoy/Bender/Kunstler brief were new. Its repeated references to the government's attempts to resurrect King George III-style surveillance powers displayed a penchant for rhetorical overkill.<sup>160</sup> In addition, the brief disputed the "inherent power" thesis, although the government dropped this aspect of its argument prior to preparing its final brief. The brief effectively reminded the Judiciary of its "historic role...as 'the ultimate interpreter of the Constitution.'" Further, it placed Keith among "certain cases in the history of this Court which touch the 'bedrock of our political system,'" and required that the Court "stand resolutely as an 'impenetrable bulwark against

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<sup>159</sup>"Brief for the Defendant-Respondents," January 21, 1972, 9-17, SCR/B.

<sup>160</sup>Of course, the WPP attorneys were merely developing a point in Judge Edwards' decision in the Sixth Circuit Court of Appeals.

every assumption of power' which threatens fundamental liberties of the people."<sup>161</sup>

The final brief was the government's "Reply Brief for the United States," submitted on February 18, 1972, less than two weeks prior to oral arguments.<sup>162</sup> Its principal argument was that the respondents had erred in viewing the case as one in which electronic surveillance were directed at the defendants "in connection with a routine criminal investigation." Instead, the government asserted that the surveillance was of a unique character: investigative in nature, and aimed at preventing domestic radicals from engaging in terrorist acts against the State. Therefore, the traditional standards of probable cause, usually associated with criminal investigations aimed at prosecuting suspects, did not apply. The government still reserved the right to utilize any and all information acquired as a result of its "national security" surveillance in court. The brief also reiterated the narrowing of "foreign/domestic" distinctions, as well as the President's constitutional power to quell domestic disorder.

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<sup>161</sup>"Brief for the Defendant-Respondents," January 21, 1972, 9-10, SCR/B.

<sup>162</sup>Five additional briefs (or "amicus curiae") were submitted in support of Judge Keith and the "Ann Arbor Three," by the American Federation of Teachers, American Friends Service Committee, United Auto Workers, Black Panther Party, National Lawyers Guild, and both the national and Michigan offices of the ACLU. The briefs contain many of the same arguments that are found in the respondents' main briefs.

The government admitted that the data originally provided regarding bombings in America were inaccurate. They had reported 3285 bombings; 2022 had actually taken place. The brief responded as well to the ACLU's contention, supported by correspondence between Senator Kennedy and Assistant Attorney General Mardian, that the President, Attorney General, and FBI Director had all provided misleading statistics to the public and Congress concerning the total number of warrantless wiretaps that were in operation; the brief explained this by asserting that the government provided figures pertaining to the actual number of wiretaps in operation at a given time, while the information given to Senator Kennedy "refer[s] to the total number of such surveillances in the years involved."<sup>163</sup>

Oral arguments before the Supreme Court took place on Thursday, February 24, 1972.<sup>164</sup> Outside of the Supreme Court, a large crowd, unable enter the courtroom, attested to

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<sup>163</sup>"Reply Brief for the United States," February 18, 1972, 1-14, SCR/B.

<sup>164</sup>The Court allowed a half-hour of argument from Gossett on behalf of Keith, and an additional half-hour from Kinoy on behalf of the three original defendants. The Supreme Court also granted the government sixty minutes. In his December 6, 1971, letter to Clerk of the Court Robert Seaver, Gossett asserted: "if only one-half hour is to be allowed for oral argument, the full time should be allotted to me as counsel for the judges of the District Court, the named parties and the only parties before the Court." Correspondence, William T. Gossett to Robert E. Seaver, Clerk, U.S. Supreme Court, December 6, 1971, Records of the U.S. Supreme Court, 1971-1972 Term, Case No. 70-153, Record Group 267, National Archives, Washington, D.C.

public interest in the case. Kinoy recalls being shocked that armed guards with metal detectors scanned every person who entered the Court, including the attorneys.<sup>165</sup> The other major shock for Gossett and Kinoy was that the government's argument would be delivered not by Solicitor General Erwin Griswold, but instead by Robert Mardian. Sometime during the Winter of 1971-1972, Griswold, as well as the entire Solicitor General's staff, had refused direct involvement in the case; it had thus become the exclusive domain of Mitchell and Mardian, as well as the President they represented. At the opening of the proceedings, Griswold entered the Judges Chambers, greeted Gossett, and whispered in his ear: "By the way, I'll argue your position if you like."<sup>166</sup> A comment in jest? Perhaps. But it was nonetheless an amazing statement, coming from the top attorney in the Nixon Administration. Griswold then took a seat in the front row, to observe the proceedings.<sup>167</sup>

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<sup>165</sup>Kinoy, Rights on Trial, 19.

<sup>166</sup>New York Times, June 20, 1972, 1; Personal interview with William T. Gossett, July 23, 1992. Gossett and Griswold graduated from Columbia University Law School together in 1928, and had been friends ever since. Gossett relates that in conversations with the Solicitor General after the case, he was told that Griswold refused to argue the case on the grounds that he disagreed with "the issues the government had wished him to make."

<sup>167</sup>Apparently, the tension between Griswold and the Justice Department over the Keith case was minor. In a letter to Griswold, dated February 28, 1972, Mardian thanked him for submitting a memorandum to Mitchell regarding Mardian's argument. Referring to Griswold's memorandum,  
(continued...)

Mardian spoke first, stating emphatically that the government had dropped its "inherent power" claim and recognized the President must abide by the provisions of the Fourth Amendment. He placed great emphasis on the in camera exhibit, and what he claimed it would prove concerning the intentions of the organization under investigation [the Black Panther Party] to "engage....in activities of a type which would ultimately lead to the destruction of the United States Government by force and violence."<sup>168</sup> Mardian then summarized points he had made in the government's earlier briefs: (1) the surveillance was not initiated for prosecutorial purposes; (2) the President is "imbued with" the constitutional power to protect the nation from all dangers, foreign and domestic; and (3) the nature of intelligence gathering is such that it is impossible to distinguish between foreign and domestic purposes. He was

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<sup>167</sup>(...continued)

Mardian states: "As usual, you were quite generous as well as thoughtful. Whatever success I enjoyed was contributed to by your wise counsel and the moral support you demonstrated in sitting with me." Correspondence, Mardian to Griswold, February 28, 1972, Personal and Professional Papers of Solicitor General Erwin N. Griswold, [soon to be housed in the Harvard University Law School], used with the permission of Griswold's former law firm: Jones, Day, Reavis, and Pogue. The author is grateful to Secretary Jeanette E. Moe for conducting a search for these papers and forwarding copies for use in this study.

<sup>168</sup>It is interesting to note that neither the names of the Black Panther Party nor the White Panther Party were spoken at any time throughout the proceedings. Official Transcript of Proceedings, U.S. v U.S. District Court, et. al., February 24, 1972, SCR/B [hereafter: "Transcript, Oral Argument"], 4-5.

then interrupted repeatedly by Justices Stewart and White, who focused on the issue of Congress' powers in internal security matters. After getting Mardian to recognize these powers, Stewart then reached the main point of his inquiry: the Mitchell affidavit presented to Judge Keith, and its incompatibility with Title III. He asked Mardian: "do you think this affidavit squares with the Safe Streets Act?" Mardian responded that the affidavit was only a partial justification, and that the in camera submission provided the balance. White continued pressing Mardian on the issue:

Does it contain a certification of the Attorney General that the standards set down by the Safe Streets Act are complied with?

Mardian responded that the mere signature of the Attorney General represented automatic adherence to Title III. Justice Marshall had heard enough. He interrupted Mardian, asking if the Attorney General's decision to institute Surveillance "is....subject to review by anybody?" Mardian began a lengthy discussion concerning how only the Attorney General is qualified to interpret the "entire spectrum" of intelligence information available, when Marshall again interrupted, asking: "Well, let me ask you, does the Federal judge take the same oath the Attorney General takes?" Thrown off balance, Mardian continued his discussion of how judges are "not in a position to determine" whether intelligence is needed. He then quoted Professor Telford Taylor's analysis concerning how the "Committee of Privy Counselors" in England

had determined that vesting exclusive power over national security surveillance in the hands of a single Minister was wise, and protected the privacy of citizens. Mardian concluded that the American public's privacy would be better protected by leaving the authority over such surveillance "to one man, the Attorney General, acting for the President, rather than to proliferate it amongst all of the Federal sitting justices." Now visibly angry, Marshall interjected: "Of course, the Privy Council isn't bound by the Fourth Amendment."<sup>169</sup>

Justice White returned to the issue of the Congressional statute, the Omnibus Act: "do you rely on the Safe Streets Act at all as an authorization?" Answering yes, Mardian asserted that the government gained its authority from both the Constitution and the Omnibus Act. He then presented a lengthy summary of numerous passages from the Constitution which, he stressed, conferred power upon the Executive in national security areas. He conceded that this enormous discretionary Executive power carried with it the possibility for abuse, but added: "this is the very essence of our government." Mardian then reviewed the history of judicial review in the U.S., suggesting that the Founding Fathers were undecided as to whether the Supreme Court possessed the power of judicial review; he added: "I doubt if we can find one phrase or word [in the Constitution] which reposes in the

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<sup>169</sup>Ibid., 2-22.

Court the power of judicial review." Marshall exploded: "What about -- you keep ducking the Fourth Amendment! Are you going to get to it?" Mardian repeated his opening statement that the Executive was not seeking an exception to the Fourth Amendment:

We simply suggest that in the area in which he has limited and exclusive authority, the President of the United States may authorize an electronic surveillance, and in those cases it is reasonable.

Marshall responded: "And I understand your position that if the President decides its [sic] necessary to bug John Doe's phone, that's it. There's nothing under the sun John Doe can do about it?" Mardian answered "if he [the President] chooses to violate that statute, he might well choose to violate his oath." Obviously backed into a corner, Mardian then requested that the remainder of his time be reserved for rebuttal.<sup>170</sup>

William Gossett then addressed the Court. "I'm very clear on one thing," he began, "the government's case has many infirmities, fundamental infirmities." He argued that this was the first case in U.S. history where the Executive was seeking to legalize what it had known to be illegal for more than four decades. Gossett's argument touched upon the following points, all of which had been made in the brief he and Professor Sofaer had prepared on behalf of Judge Keith: (1) section 2511(3) of the Omnibus Act does not confer any

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<sup>170</sup>Ibid., 22-33.

additional powers on the President, and the only "national security" provision in the statute is for an emergency situation, which requires application for a court order within 48 hours; (2) though the government attempts to narrow the foreign/domestic distinction, no assertion had been made that the group in question "has foreign ties nor is influenced by foreigners"; and (3) the President, Attorney General, and "those who work for him; they're politicians, and they should not be given the power to determine how much and how long and how great will be the intrusion of private citizens." Gossett added "I may trust this Administration....[but] I'm talking about long, over a period."<sup>171</sup>

Kinoy addressed the Court next. He warned that the case involved "a claim of executive power so ominous in its implications and sweeping in its dimensions that it has transformed this appeal into a case which....touches the bedrock of our political system." He further stated: "this case had become one of those rare cases of peculiar delicacy, which call for the historic role of the Court as the ultimate interpreter of the Constitution." Then, for thirty uninterrupted minutes -- itself unprecedented in Court history -- Kinoy outlined the dangers inherent in the Mitchell Doctrine:

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<sup>171</sup>Ibid., 33-50.

I suggest that we have arrived now in 1972, we've already arrived in 1984...[The doctrine is a] frank attempt by the Executive to use this case to obtain the imprimatur of this Court for a program of domestic...espionage and surveillance of political opponents unprecedented in our history...there's been a great deal of discussion today about the security of the Republic and the security of the government...Already the subjects of the Attorney General's suspicion -- and I use that word advisedly -- fall on leaders of the AntiWar Movement, black militants, Catholic activist pacifists, advocates of the youth culture...Now I suggest to the Court would these critics [Democratic politicians] be included within the scope of this domestic surveillance? Unless this program, now loudly proclaimed by the Executive, of uncontrolled executive, warrantless, open-ended wiretapping of domestic political opponents...is decisively repudiated, not sidestepped...the inevitable effect will be...to choke and stifle the exercise of First Amendment rights by millions of American citizens...this Court...must stand resolute now to reject this effort to introduce this spectre, this fear which erodes the fundamental rights of all Americans.<sup>172</sup>

The final eighteen minutes of the two-hour proceeding were granted to Mardian for his rebuttal. Much of the time was used attempting to get the Court, and Keith's attorney, Gossett, to view the in camera exhibit, which had been "augmented" with Black Panther wiretap logs, ostensibly demonstrating "foreign" connections. One Justice argued with Mardian concerning why he would be willing to show Gossett the logs, while steadfastly refusing to allow Kinoy the same courtesy. Mardian then issued a veiled warning that the Executive, on its good graces, had openly acknowledged the existence of Plamondon's intercepts, but certainly possessed

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<sup>172</sup>Ibid., 54-68.

the ability to hide the existence of such surveillance in the future. He disagreed with Kinoy's suggestion that the government could use the power it was requesting to monitor opposing political parties:

Neither this President nor any prior President, to my knowledge, has authorized electronic surveillance to monitor the activities of an opposite political group.

Mardian concluded with Mitchell's earlier assertion that the Constitution "isn't a suicide pact."<sup>173</sup>

As the Keith case went before the Supreme Court for consideration, the issue of governmental surveillance remained prominent in the news. Following Mitchell's remarks before the Virginia Bar Association in mid-June, the Nixon Administration refrained from discussing the Mitchell Doctrine in public. However, the Justice Department and FBI continued to speak out concerning the beneficial aspects of wiretapping as a law enforcement tool.<sup>174</sup> A front-page story in the New York Times on May 6, 1972, reported that court-approved wiretapping by police and the FBI had risen 37 percent during 1971, and that twenty states now had wiretapping statutes.<sup>175</sup> In addition, a highly-publicized "FBI Conference," sponsored by Princeton University, featured fifty-five prominent journalists, legal scholars, and former

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<sup>173</sup>Ibid., 71-83.

<sup>174</sup>Washington Post, October 21, 1971, A-6; New York Times, January 7, 1972, 8.

<sup>175</sup>New York Times, May 6, 1972, 1.

Justice Department officials -- all of whom denounced past and current FBI surveillance practices. The FBI Director declined an invitation to participate.<sup>176</sup>

Senator Kennedy made headlines in mid-December, when he released several months of correspondence between his office and Mardian, concerning the extent and duration of warrantless wiretaps since the Nixon Administration took office. Kennedy's inquiry revealed that "there were from 3.4 to 9.6 times as many days of listening on warrantless devices as there were on devices installed under judicial authorization." In addition, Kennedy exposed the inaccurate information which Mitchell, Hoover, and Nixon had released concerning "national security" wiretaps. In all instances where the Administration had discussed publicly the total number of such surveillances, it had consistently understated the actual figures. Also disturbing to Kennedy was the Justice Department's "'absence of well-defined procedures' to promote compliance with the statutes under which executive-ordered surveillance was conducted."<sup>177</sup>

The factor most responsible for keeping the domestic surveillance debate in the news during the latter half of 1971 and the first half of 1972, was the prevalence of legal cases involving wiretapping. As the issue of warrantless

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<sup>176</sup>Washington Post, October 30, 1971, A-2. See also Theoharis and Cox, The Boss, 426.

<sup>177</sup>Quoted in New York Times, December 19, 1971, 20.

domestic wiretaps remained tied up in the courts, pending the much-anticipated Keith decision, the Nixon Justice Department continued to acknowledge the existence of "national security" surveillance in increasing numbers of cases. At the same time, defense lawyers, attuned to the atmosphere of public concern about warrantless government spying, began utilizing this backlash against the Administration's surveillance policies, particularly in cases involving anti-war and other radical dissenters. Before long, a number of federal judges began granting defense attorneys -- rather than the government -- the benefit of the doubt, whenever the suspicion of surveillance was introduced.

Aside from Keith, the most visible case involving wiretapping was the Berrigan trial in Pennsylvania, where Sister Joques Egan of the "East Coast Conspiracy" refused to testify before a grand jury, claiming that the government had used warrantless surveillance in its preparation of questions. When Guy Goodwin and his Justice Department attorneys failed to emphatically deny the allegation, the U.S. Court of Appeals for the Third Circuit ruled (5-2) that the government could not force her to testify. The case was pivotal for defense attorneys across the country.

From this point forward, in cases involving domestic dissent, defense attorneys endlessly challenged the

government over warrantless wiretaps.<sup>178</sup> Within a month of the Third Circuit's ruling, U.S. District Judge Barrington D. Parker handed down an identical decision in a case involving a member of the "May Day Collective." He held that a full court hearing on the subject of electronic surveillance would have to be held prior to defendant Marlene Fishlowitz's testimony before a grand jury.<sup>179</sup> The government promptly appealed, and lost; on July 23, 1971, the Court of Appeals for the District of Columbia, in a 2-1 decision, also ruled that "the government must reveal in advance whether electronic surveillance has been carried out against persons subpoenaed to testify before federal grand juries if the witness so much as charges that wiretapping has occurred." The decision affected Fishlowitz and fellow May Day Tribe member Carol Evans.<sup>180</sup>

Another highly-visible warrantless wiretapping case involved the Jewish Defense League [JDL] of New York, in which members were charged with the transportation of firearms and possession of explosives. In mid-June, 1971,

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<sup>178</sup>New York Times, May 29, 1971, 1. The Justice Department appealed the ruling to the Supreme Court, and promptly received a writ of certiorari. In the same case, the Justice Department admitted it had "probably" overheard conversations of a different "East Coast Conspiracy" defendant, Sister Elizabeth McAlister, in a warrantless wiretap. See Washington Post, May 25, 1971, A-8.

<sup>179</sup>Washington Post, June 16, 1971, A-3.

<sup>180</sup>Quoted in Washington, D.C. Evening Star, July 24, 1971, A-35.

Mitchell acknowledged during a pretrial hearing that the government had "overheard" conversations involving Rabbi Meir Kahane, the organization's director. The U.S. District Judge hearing the case, Jack B. Weinstein, immediately ruled that there was "substantial probability" that the wiretap logs would "show illegality," and therefore ordered the government to make full disclosure to the defense, after consulting with "the White House."<sup>181</sup> Four months later, Kahane and fifteen other members of the JDL filed suit in Federal court, charging that Attorney General Mitchell had directed several FBI agents to illegally wiretap their telephones.<sup>182</sup>

Attorneys representing Daniel Ellsberg claimed that the government had utilized illegal surveillance in its case against him.<sup>183</sup> And in yet another government case against Abbie Hoffman, alleging that he had crossed state lines to incite a riot during the May Day demonstrations, U.S. District Judge John Lewis Smith ruled that four of the five wiretapped conversations the government submitted in camera were illegal. Smith's decision echoed the Keith case: "The government has apparently chosen to deal with dissident domestic organizations in the same manner as it does with hostile foreign powers."<sup>184</sup>

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<sup>181</sup>Quoted in New York Times, June 25, 1971, 23.

<sup>182</sup>Washington, D.C. Evening Star, October 8, 1971, A-2.

<sup>183</sup>New York Daily News, July 16, 1971, 19.

<sup>184</sup>Quoted in Washington Post, November 25, 1971, B-4.

The Supreme Court, minus Justice Rehnquist, held its "Conference Discussion" concerning the Keith case on March 6, 1972, ten days following the oral arguments. Written notes from four of the Justices have survived, though in abbreviated form. Summary comments concerning their initial impressions of the case indicate unanimity on the issue of affirming the Court of Appeals and Keith. They differed, however, over what direction the decision should take. Three Justices -- Burger, Blackmun, and White -- wished to focus the decision squarely on the statute pertaining to wiretapping: Title III of the Omnibus Act. The following comments demonstrate the opinions of four Justices at the onset of deliberations:

Justice White: Could do it under statute as not being satisfied. Even on constitutional approval the Attorney General's theory of domestic subversion is too broad.

Justice Powell: Statute doesn't fit the case, except portion that says 'nothing in statute shall deprive [President] of power he now has.'

Justice Blackmun: Do it on statutory ground if can be.

Chief Justice Burger: Agree there is some inherent power in the Executive, but whatever it is Congress [failed in] 1968 [to] establish guidelines for how that should be exercised. So if you can do this on statutory ground, should do so [and not touch] constitutional. I'd lean that way.<sup>185</sup>

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<sup>185</sup>U.S. Supreme Court Docket Sheet, 1971-1972 Term, Case No. 70-153, U.S. v. U.S. District Court, et al, Brennan Papers, container 420, folder 5.

On March 6, Chief Justice Burger assigned Justice White to write the decision.<sup>186</sup> However, as a result of Justice William O. Douglas's efforts, the writing of the majority decision was soon assigned to newly-appointed Justice Lewis F. Powell. On the day of the Conference vote, Douglas wrote to Burger, suggesting that since White was in the minority on the vote concerning the direction the decision should take, perhaps the case should be written by Powell, who "represents the consensus." Douglas added that "with all respect....I am sure that Byron, who goes on the statute, will not get a [unanimous] court." Douglas felt strongly that in a case of such importance, in which all eight of the voting Justices were in fundamental agreement opposing the Mitchell Doctrine, the majority position -- focusing on the Constitution -- would be more likely to attain a unanimous decision.<sup>187</sup> Burger responded as follows: "I adhere to my request that Byron proceed to write...[but] see no reason why Lewis should not undertake to write and see what support his position achieves."<sup>188</sup>

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<sup>186</sup>U.S. Supreme Court, Assignment Sheet, October Term, 1971, March 6, 1972, located in the Papers of Justice Thurgood Marshall, Manuscript Division, Library of Congress [hereafter "Marshall Papers"], container 75, folder 1, "Assignments and Special Lists."

<sup>187</sup>Letter, Justice William O. Douglas to Chief Justice Warren Burger, March 6, 1972, Marshall Papers, container 86, folder 6. See Figure 5-3 on page 566.

<sup>188</sup>Letter, Chief Justice Warren Burger to Justice William O. Douglas, March 6, 1972, Marshall Papers, container 86, folder 6.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM O. DOUGLAS

March 6, 1972

Dear Chief:

In No. 70-153, U. S. v. U. S. D. C., I would like to make a suggestion.

I think the assignment to Byron (much as I love my friend) is not an appropriate one for the reason that he and two others including yourself voted to affirm on the statute, while there were five who voted to affirm on the Constitution. Those five were Brennan, Stewart, Marshall, myself, and Powell.

You will recall that Lewis Powell said that to handle the government's problem of searching the country over for an appropriate magistrate to issue a warrant, an opinion should be written suggesting that the court here in the District of Columbia should handle all of the cases, which I thought was a splendid idea.

With all respect, I think Powell represents the consensus. I have not canvassed everybody, but I am sure that Byron, who goes on the statute, will not get a court.

To save time, may I suggest you have a huddle and see to it that Powell gets the opinion to write?

Or if you want me to suggest an assignment, that would be mine.

W. O. D.  
*W. O. D.*

The Chief Justice

(Figure 5-3)  
Letter, Justice Douglas to Chief Justice Burger  
March 6, 1972  
Recommends Justice Powell Write the Keith Decision

Source: Marshall Papers, Library of Congress

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Douglas then wrote to Powell:

As you know, the Chief and I have had an exchange of correspondence on the...case. The vote at Conference was to affirm but there were five of us who could not do it on the statute but went on the Constitution. And according to my notes, you were one of the five. Byron, however, was explicit. He could not go on the Constitution but would have to go on the statute. Traditionally an opinion would therefore be in the province of the senior Justice [Douglas] to assign. That was not done in this case and the matter is of no consequence to me as a matter of pride -- but I think it makes a tremendous difference in the result. I am writing this note hoping you will put on paper the ideas you expressed in Conference and I am sure you will get a majority. I gather from the Chief's memo that he is not at all averse to that being done.<sup>189</sup>

The first draft of the decision, circulated to the Court on March 15, was prepared by Justice White; his second draft was circulated on May 5. However, by May 4, Powell's first draft had appeared, and apparently had the backing of the majority.<sup>190</sup> On this day, Douglas wrote to Powell: "I am happy to join your fine decision in No. 70-153 - United States v. U.S. District Court."<sup>191</sup> The same day, Justice

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<sup>189</sup>Letter, Justice William O. Douglas to Justice Lewis F. Powell, March 8, 1972, Brennan Papers, container 264, folder on case 70-153.

<sup>190</sup>Drafts of Memorandum Decisions, Case No. 70-153, U.S. v. U.S. District Court, et. al., First Draft of White, March 3, 1972; Second Draft of White, May 5, 1972; First Draft of Powell, May 3, 1972; Third Draft of Powell, May 22, 1972, Brennan Papers, container 264, folder for Case No. 70-153.

<sup>191</sup>Letter, Justice William O. Douglas to Justice Lewis F. Powell, May 4, 1972, Marshall Papers, container 86, folder 6. Several other documents of this date indicate that another Conference meeting probably took place between the eight voting Justices, on or immediately prior to May 4. It may  
(continued...)

Stewart wrote to Powell: "I think you have done a fine job in this case, and I am glad to join your opinion for the Court."<sup>192</sup>

The Keith decision was handed down near the close of the Court's term, on June 19, 1972. Justice Powell's unanimous decision began with the statement that the case "is an important one for the people of our country and their Government." He continued:

Its resolution is a matter of national concern, requiring sensitivity both to the Government's right to protect itself from unlawful subversion and attack and to the citizen's right to be secure in his privacy against unreasonable Government intrusion.

After reviewing the history of the case, Powell addressed Title III of the Omnibus Act, concluding that Congress, in drafting the statute, had been guided by the Katz and Berger decisions. Quoting from several sections of Title III -- not just section 2511(3), which the government had relied upon -- Powell concluded that the statute overwhelmingly supported prior judicial warrants. Echoing the opinions of Judges Ferguson, Keith, and Edwards, he concluded that section

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<sup>191</sup>(...continued)  
have been in this meeting that Powell's draft became the majority decision.

<sup>192</sup>Letter, Justice Potter Stewart to Justice Lewis F. Powell, May 4, 1972, Marshall Papers, container 86, folder 6.

2511(3) was "essentially neutral" concerning the President's surveillance power.<sup>193</sup>

Powell acknowledged that the issue being addressed by the Court was "limited" and "narrow," and that it was not deciding the constitutionality of Title III itself. Nor was it passing judgment regarding "the scope of the President's surveillance power with respect to the activities of foreign powers."<sup>194</sup> Therefore, the central issue to be addressed, he added, was the one left open in Katz: "'Whether safeguards other than prior authorization by a magistrate would satisfy

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<sup>193</sup>U.S. v. U.S. District Court, 407 U.S. 297, 4-8. Powell addressed section 2511(3) in considerable detail, quoting the exchange between Senators McClellan, Holland, and Hart on the Senate Floor on May 23, 1968. He concluded that in view of Congress' careful attention to the 48-hour emergency provision of Title III, which outlines "carefully specified conditions" under which warrantless wiretaps can be instituted, "it would have been incongruous for Congress to have legislated with respect to the important and complex area of national security in a single brief and nebulous paragraph. This would not comport with the sensitivity of the problem involved or with the extraordinary care Congress exercised in drafting other sections of the Act. We therefore think the conclusion inescapable that Congress only intended to make clear that the Act simply did not legislate with respect to national security surveillances." Neither Powell nor any of the other Justices knew that section 2511(3) had been largely the idea of J. Edgar Hoover; neither could they have known that the passage was specifically constructed to be vague, so that a "grey area" in the law could be relied upon by the FBI in its continuing use of warrantless "national security" wiretaps.

<sup>194</sup>Ibid., 10-11. Powell agreed with the lower courts that there was no evidence presented in the case showing any involvement, "directly or indirectly," with a foreign power. However, in footnote 8 he reiterated his earlier statement, dating back to the "tempest in a teapot" article of July, 1971, that "there are cases where it will be difficult to distinguish between 'domestic' and 'foreign' unlawful activities...But this is not such a case."

the Fourth Amendment in a situation involving national security.'"<sup>195</sup>

Powell focused on the history of the "reasonableness" doctrine concerning the Fourth Amendment, beginning with an acknowledgment that the President has a "fundamental duty" to protect the United States from "overthrow...by unlawful means," and that in carrying out these duties, he "may find it necessary to employ electronic surveillance."<sup>196</sup> He then spoke to the temper of the times:

A recognition of these elementary truths does not make the employment by Government of electronic surveillance a welcome development -- even when employed with restraint and under judicial supervision. There is, understandably, a deep-seated uneasiness and apprehension that this capability will be used to intrude upon cherished privacy of law-abiding citizens. We look to the Bill of Rights to safeguard this privacy.

Reviewing the history of the Fourth Amendment, Powell admitted that in national security cases, "the investigative duty of the executive may be stronger" than in ordinary cases, but "so also is there greater jeopardy to constitutionally protected speech." He acknowledged that because the Fourth Amendment is "not absolute in its terms," an examination of the balance between the government's duty

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<sup>195</sup>Ibid., 11.

<sup>196</sup>Ibid., 12-13. Powell's decision supported court-approved wiretapping as a law enforcement tool. He quoted Brownell on wiretapping's usefulness, discussed his background with the President's Crime Commission in 1968, and concluded that "threats and acts of sabotage against the Government exist in sufficient number to justify investigative powers with respect to them."

to protect "domestic security" and the privacy rights of citizens must be made.

"The question," he continued, "is whether the needs of citizens for privacy and free expression may not be better protected by requiring a warrant before such surveillance is conducted." Powell refused to consider the Fourth Amendment's two clauses as separate and distinct, as the Court had intimated in the 1950 Rabinowitz decision; instead, he cited Chimel v. California (1969), which referred to the warrant requirement as not merely "an inconvenience to be somehow 'weighed' against the claims of police efficiency." He held that the consideration of applications for warrants by "neutral and detached" magistrates, based on "probable cause," supports "our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government."<sup>197</sup>

Powell next attacked the government's claim that in times of heightened social disorder, the Executive Branch requires intelligence gathering to prevent acts of violence and "subversion"; closely related to this was the argument that only the Executive Branch possesses the know-how to

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<sup>197</sup>Ibid., 14-20. Powell dismissed the government's claim that the Mitchell Doctrine would allow for "limited" judicial review, stating that "post-surveillance review would never reach the surveillances which failed to result in prosecutions."

determine whether surveillance is "reasonable." He responded:

These contentions....merit the most careful consideration. We certainly do not reject them lightly, especially at a time when worldwide ferment and civil disorders in this country are more prevalent than in the less turbulent periods of our history...But we do not think a case has been made for the requested departure from Fourth Amendment standards. The circumstances described do not justify complete exemption of domestic security surveillance from prior judicial scrutiny.

Powell also disputed the government's assertion that "internal security matters are too subtle and complex for judicial evaluation," and, echoing Judge Ferguson, added "If the threat is too subtle or complex for our senior law enforcement officers to convey its significance to a court, one may question whether there is probable cause for surveillance." He concluded that the government was therefore not exempt from securing warrants in domestic surveillance cases, and that whatever burden this process places upon law enforcement "is justified in a free society to protect constitutional values."<sup>198</sup>

Powell's ruling was a very limited one. The last few pages of the decision were dedicated to the issue of "investigative" domestic surveillance, which he clearly supported, within the restrictions of the Fourth Amendment's warrant requirement:

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<sup>198</sup>Ibid., 21-23. The Court also refused to alter the Alderman decision, as the government had requested.

The gathering of security intelligence is often long range and involves the interrelation of various sources and types of information. The exact targets of such surveillance may be more difficult to identify than in surveillance operations against many types of crime...Often, too, the emphasis of domestic intelligence is on the prevention of unlawful activity or the enhancement of the Government's preparedness for some possible future crisis or emergency.

Assuming the role of policy-maker, Powell suggested steps which Congress might take to allow law enforcement officials greater leeway to conduct long-term "investigative" surveillance, while simultaneously abiding by the tenets of the Keith decision:

Congress may wish to consider protective standards [in domestic security cases]...if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens. For the warrant application may vary according to the governmental interest to be enforced...It may be that Congress, for example, would judge that the application and affidavit showing probable cause need not follow the exact requirements of...[Title III] but should allege other circumstances more appropriate to domestic security cases.

He concluded with a suggestion that "a specially designated court" -- such as the D.C. District Court or Court of Appeals -- might be placed in charge of authorizing all such domestic security wiretap applications, and that the stringent "time and reporting requirements" of Title III might be relaxed in these cases.<sup>199</sup>

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<sup>199</sup>Ibid., 24-25. Congress debated Powell's recommendation for a separate wiretapping court for six years, eventually adopting many of his ideas into the "Foreign Intelligence Surveillance Act" of 1978.

Two concurring opinions were filed. Justice White's opinion stated: "I would affirm the Court of Appeals on the statutory ground urged by respondent Keith....without reaching or intimating any views with respect to both the District Court and the Court of Appeals." Alluding to his questioning of Mardian during the oral argument, White argued that regardless of the wording or intent of section 2511(3) of Title III, the type of surveillance proposed in Mitchell's affidavit was illegal under section 2511(3). He criticized both Keith and Edwards for failing to inquire whether the challenged wiretaps were illegal under Title III, instead of proceeding "directly to the constitutional issue."<sup>200</sup>

Justice Douglas's concurring opinion went the other way, focusing squarely on the constitutional dangers presented in the Mitchell Doctrine. He reviewed the historical tendency of "police and intelligence agencies," with their "recurring desire....to employ dragnet techniques to intimidate their critics," by seeking exceptions from the prohibitions of the Fourth Amendment. Referring to the large number of cases before the Court during the term which dealt with governmental surveillance issues, he asserted:

We are currently in the throes of another national seizure of paranoia, resembling the hysteria which surrounded the Palmer Raids, and the McCarthy era. Those who register dissent or who petition their governments for redress are subjected to scrutiny

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<sup>200</sup>Ibid., White's Concurring Opinion, 3-6. White's opinion in this respect was very similar to that of Judge Weick's dissent in the Sixth Circuit.

by grand juries, by the FBI, or even by the military. Their associates are interrogated. Their homes are bugged and their telephones are wiretapped. They are befriended by secret government informers. Their patriotism and loyalty are questioned.

Douglas added that "We have as much to fear from the erosion of our sense of privacy and independence by the omnipresent electronic ear of the Government as we do from the likelihood that fomenters of domestic upheaval will modify our form of governing," and concluded that had the case been decided in the negative, "then the federal intelligence machine would literally enjoy unchecked discretion."<sup>201</sup>

In their analyses of the 1974 U.S. v. Nixon case, constitutional law professor Alan F. Westin and journalist J. Anthony Lukas state that the Supreme Court's unanimous 8-0 decision, with Rehnquist abstaining, was the product of tough negotiation between the liberal and conservative wings of the Court. It was also a product of the leadership of Chief Justice Burger. Westin asserts that the principal challenge Burger faced in the case "was to find a way to unite behind one unanimous opinion....thus putting the greatest weight of judicial authority behind the Court's ruling, earning the greatest support from the public, and applying the greatest pressure on the President to comply with such a 'definitive

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<sup>201</sup>Ibid., Douglas' Concurring Opinion, 2-9.

ruling.'"<sup>202</sup> Lukas agrees, adding that Burger's decision "had the ring of a heavily 'negotiated' settlement."<sup>203</sup>

The Keith decision was also a "negotiated settlement."<sup>204</sup> The 5-3 vote which had divided the Court during its March 6 Conference was ultimately smoothed over, thanks to the following factors: (1) the close personal involvement of Justice Douglas, who obviously took a great interest in the case; (2) the willingness of Chief Justice Burger to cooperate, by allowing Powell to write a decision, after he had assigned the case to White; and (3) the willingness of Justices Powell and Brennan to work out a potentially serious disagreement. Following the circulation of Powell's "First Draft," Justice Brennan stated that he was "considerably disturbed" by footnote 20, in which Powell outlined the position of the ABA Standards Committee regarding the possibility that warrantless surveillance might be constitutional in the area of "foreign intelligence."

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<sup>202</sup>Leon Friedman, Compiler, United States v. Nixon: The Complete Case, (New York: Chelsea House, 1974), xv-xvi. Westin's introduction further states that Burger's decision sounded like "the cool lecture on constitutional fundamentals that a rather pedantic school master might deliver to a pupil who has handed in a very poor paper on the constitutional fundamentals of the American system." Many aspects of Powell's decision were similarly "cool," and focused on the fundamental constitutional issues involved, while avoiding, for the most part, references to both a society gone mad [the Government's position] and a Government dedicated to chilling dissent [the respondents' position].

<sup>203</sup>Lukas, Nightmare, 517.

<sup>204</sup>Chief Justice Burger stated that he concurred "only in the result."

Justice Douglas intervened, writing a letter to Powell, in which he related his impression's of Brennan's concerns, and expressed his hope "that you could find some way to satisfy Bill Brennan so as to bring him into the opinion. It would be fine if this could be wholly unanimous."<sup>205</sup> In response, Powell modified the contents of the footnote to state: "For the view that warrantless surveillance, though impermissible in domestic security cases, may be constitutional where foreign powers are involved see...[etc]."<sup>206</sup> The changes satisfied Brennan, who told Powell that they met "completely" his concerns. Brennan then made "one more suggestion" -- that Powell modify his lengthy passages supporting wiretapping as an effective law enforcement tool.<sup>207</sup> Powell's statements were so similar to the government's brief that Brennan inquired "Am I correct in believing that those

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<sup>205</sup>Letter, Justice William O. Douglas to Justice Lewis Powell, May 4, 1972, Douglas Papers, container 1553, Opinion No. 70-153. Douglas' letter indicates that Brennan saw the potential for great abuse. He may have been concerned that Powell's footnote might subsequently be utilized as a justification for the government to initiate warrantless wiretapping against citizens with the most casual affiliations with "foreign" nationals. Brennan may have been guided by what had occurred in the Katz case: Justice Stewart's footnote and Justice White's concurring opinion regarding "national security" surveillance had become major tenets of the Administration's defense of the Mitchell Doctrine.

<sup>206</sup>U.S. v. U.S. District Court, 407 U.S. 297, 23-24.

<sup>207</sup>Draft of Memorandum Decisions, Case No. 70-153, U.S. v. U.S. District Court, et. al., First Draft of White, March 3, 1972, Brennan Papers, container 264, folder for Case No. 70-153. It was pages 13 and 14 of the First Draft that Brennan objected to.

paragraphs are a summary of the Government's justification for the asserted authority?"<sup>208</sup> Powell stood his ground, arguing that his experiences with the President's Commission had convinced him that "controlled surveillance is in the public interest." He also cited the Annual Title III Reports to Congress as evidence of the effectiveness of wiretapping. Yet, he did agree to modify the wording of several passages, to "make them relatively neutral."<sup>209</sup> These changes satisfied Brennan, who informed Powell: "Your proposed accommodation is entirely satisfactory."<sup>210</sup>

The media reported the decision as a "great surprise." The New York Times called it a "stunning legal setback" for the Administration, while the New York Daily News termed it "a major rebuff."<sup>211</sup> Many of the persons most directly involved were shocked. "It was almost impossible to believe" recalls Kinoy; for Kunstler, it was "a monumental

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<sup>208</sup>Letter, Justice William A. Brennan to Justice Lewis F. Powell, May 18, 1972, Brennan Papers, container 264, Case No. 70-153.

<sup>209</sup>Letter, Justice Lewis F. Powell to Justice William A. Brennan, May 19, 1972, Brennan Papers, container 264, Case No. 70-153.

<sup>210</sup>Letter, Justice William A. Brennan to Justice Lewis F. Powell, May 19, 1972, Brennan Papers, container 264, Case No. 70-153.

<sup>211</sup>New York Times, June 20, 1972, 1; New York Daily News, June 20, 1972, 2.

victory."<sup>212</sup> The first Nixon Administration spokesperson to respond was newly-appointed Attorney General Richard Kleindienst, who "directed the termination of all electronic surveillance in cases involving security that conflict with the Court's opinion."<sup>213</sup> In a press conference three days after the decision, Nixon refused to refer to the Mitchell Doctrine as "this Administration's policy"; he called attention to past Presidents' surveillance practices, and avowed that since the Kennedy era "the number of taps has gone down." Attempting "spin control," he noted that the decision "simply prohibits wiretapping unless there is a court order" -- as if the destruction of the Mitchell Doctrine did not bother him at all.<sup>214</sup>

One indication that the Administration was indeed very bothered by the decision was the number of cases it dismissed, rather than disclose the contents of surveillance logs of warrantless wiretaps -- which it had freely admitted initiating against anti-war, Black Power, and counterculture

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<sup>212</sup>Arthur Kinoy, Rights On Trial, 33; Kunstler, My Life as a Radical Lawyer, 208. Edith Lapidus, in Eavesdropping on Trial (page 102), states that the press "treated the decision....almost as a personal triumph" for Judge Keith.

<sup>213</sup>New York Times, June 20, 1972, 1. Mitchell had just stepped down as Attorney General, so that he could run Nixon's reelection campaign. On June 29 the Justice Department reported that it had discontinued all "national security" surveillances in cases involving U.S. citizens, except for three cases, which, the government contended, involved "groups....somehow linked with foreign organizations." Quoted in New York Times, June 30, 1972, 17.

<sup>214</sup>New York Times, June 23, 1972, 14.

groups. One of the first to be abandoned was the White Panther CIA Conspiracy Trial in Detroit, which Judge Keith dismissed "with prejudice" on July 28. Soon thereafter, cases against Yippies, Black Panthers, Weathermen, and a variety of other Movement groups were also dropped.

Like the Nixon case two years later, the Keith decision was a "definitive" repudiation of a Nixon Administration attempt to bypass or ignore judicial review of its actions. Historically, Executive claims of authority have rarely been turned back by the Judiciary.<sup>215</sup> As Marc Stickgold argues, a vast majority of American judges had traditionally ruled on the security end of the "rights-security spectrum."<sup>216</sup> The

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<sup>215</sup>Westin, in United States v. Nixon (pages xviii-xix) states that research conducted by Professor Glendon Schubert demonstrates that between 1790 and 1956, of the 800-odd cases in the federal and state courts which "dealt with questions of presidential power," only thirty-eight rulings "held presidential orders to be invalid, with only fourteen of these rulings coming from the United States Supreme Court." In addition, only two of the thirty-eight rulings invalidated "a major program or policy of the Executive."

<sup>216</sup>Stickgold, "Yesterday's Paranoia is Today's Reality," 883-85. Stickgold adds: "In confronting constitutional attacks on police surveillance of political activity, courts (or judges) initially make a significant value choice, between first amendment rights and public or state security, and then employ almost automatically a complex of presumptions about police and citizen behavior." It is Stickgold's contention that increasing revelations of unwarranted police surveillance of First Amendment activity, in this case the Detroit Red Squad, contributes to "enlightened judicial attitudes" concerning law enforcement surveillance; in other words, judges are less anxious to "take the police at their word," and increasingly hand down decisions closer to the rights end of the "rights-security spectrum."

Keith case was among the first instances where the Supreme Court had acted to curtail presidential claims of authority since the 1952 steel seizure case (Youngstown). The Court's rejection of the Mitchell Doctrine was rooted in the public's strong opposition to the increasing prevalence of government, law enforcement, and military surveillance in the domestic sphere, as well as in the Constitution's "checks and balances." Heightened public concern over domestic wiretapping and other surveillance was exacerbated by the Nixon Administration's audacious "law and order" campaign. At the same time, a steady reduction in social disorder made the Administration's actions against dissenters appear all the more "repressive." Mitchell's Justice Department did little to allay the public's fears, preferring to look "tough on crime." The strategy backfired in the Keith case. A Court, in which the majority of Justices were not at all sympathetic with the counterculture or the values it represented, voted unanimously to uphold the "primacy of warrants" in Fourth Amendment cases involving domestic surveillance. Why they did so is suggested in the following passage from Justice White's decision in U.S. v. White (1971):

Monitoring, if prevalent, certainly kills free discourse and spontaneous utterances. Free discourse -- a First Amendment value -- may be frivolous or serious, humble or defiant, reactionary or revolutionary, profane or in good taste; but it is not free if there is

surveillance...Free discourse liberates the spirit, though it may produce only froth.<sup>217</sup>

An additional point is found in a statement made by William Gossett in early 1972, as he was preparing for his oral argument in Keith. When queried as to why a corporate attorney of his stature, with a strong involvement in the Republican Party of Michigan, had gotten into this kind of a case, he replied:

I am a conservative, and I believe in conserving the fundamental values of the Constitution.<sup>218</sup>

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<sup>217</sup>Quoted in Lapidus, Eavesdropping on Trial, 32.

<sup>218</sup>Quoted in Kinoy, Rights On Trial, 17.

## Chapter Six

### Cycles of Wiretapping "Reform"

The crescendo of improper intelligence activity in the latter part of the 1960s and the early 1970s shows what we must watch out for: In time of crisis, the Government will exercise its power to conduct domestic intelligence activities to the fullest extent. The distinction between legal dissent and criminal activity is easily forgotten.  
-- Church Committee Final Report, 1976<sup>1</sup>

The tragic bombing of the Murrah Federal Building in Oklahoma City on April 19th stands as a challenge to all Americans to preserve a safe society...we must ensure that law enforcement authorities have the legal tools and resources they need to fight terrorism...My legislation will provide an effective and comprehensive response to the threat of terrorism. -- President Clinton, 1995<sup>2</sup>

Supreme Court Justice Oliver Wendell Holmes, Jr.'s well-known dictum "Great cases may only make bad law" certainly applies, in several respects, to the Keith decision.<sup>3</sup> The decision did not end the debate concerning the citizen's right to privacy versus the government's right to protect internal security. The proper role that electronic surveillance should play in "domestic security"

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<sup>1</sup>Church Committee Final Report, Book II, 289.

<sup>2</sup>U.S. Newswire, May 4, 1995, "Letter from the President to Congress on Antiterrorism Amendments Act of 1995," [White House Press Release].

<sup>3</sup>Quoted in Ungar, The Papers & the Papers, 224.

investigations continued to be debated during the decades following Keith, as cycles of intelligence agency abuse and reform repeated each other.

Since the notorious "Red Scare" Palmer Raids following World War I, tension has existed between the constitutional rights of citizens and the nation's intelligence and law enforcement community. A cyclical pattern of abuse and reform has characterized this relationship. Typically, each cycle has contained three phases: lethargy, abuse, and reform. Long periods of public apathy are followed by revelations of domestic surveillance. The degree of public concern is critical in determining where the cycle reaches a "reform" phase. Because Congress typically reacts to events, rather than anticipating them, a public outcry is generally required before extensive Congressional and/or Executive Branch investigations are conducted. Regardless of the party in power, the natural tendency within the Justice Department is to attempt damage control by pledging to do better.

When simple assurances from the President and the Attorney General are insufficient, Congressional investigations commence, the national press begins its own probe of abuses, and a reform phase begins. The duration of reform varies according to the level of public disgust, the willingness of the press to keep surveillance abuse in the headlines, and the speed with which Congress and the Executive Branch act to "correct" the situation. Periods of

reform are usually brief, as the public and press quickly lose interest. Often, the Executive Branch places great pressure on Congress to wrap up its investigations as quickly as possible, "for the good of the nation." Congress forgives and forgets, and the public returns to a state of lethargy. Rarely, if ever, have the statutes and guidelines enacted during periods of reform prevented the intelligence bureaucracy from renewing illegal surveillance practices during a later era.

The pattern of lethargy-abuse-reform has occurred at least three times during this century: as a result of the "Red Scare" of 1919, the post-World War II era of "McCarthyism," and the COINTELPRO/Watergate period. The most recent cycle was unique, in several respects. The special circumstances of the early to mid seventies, including the discovery of FBI, CIA, Army and other abuses, coming at the onset of the Watergate crisis, extended the reform era for nearly a decade (1971-1980) -- an unprecedented occurrence.<sup>4</sup> An additional reason for the longevity of the seventies reform era was the long period of lethargy which preceded it. During the fifties and sixties, when America's Cold War fears peaked, intelligence agencies enjoyed substantial public

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<sup>4</sup>Others have argued that the "reform" process did not start until the revelations of Watergate in 1973 and 1974. However, the beginnings of reform can be traced to 1971, after Hoover "officially" ended COINTELPRO, and Senator Sam Ervin's Subcommittee on Constitutional Rights revealed the Army's domestic intelligence abuses. The Keith decision the following year is another example of pre-Watergate reform.

support, protected by a total secrecy that the media dared not penetrate.

Some of the defining characteristics of the most recent "reform" cycle were: (1) a steady build-up of revelations of illegal intelligence agency surveillance of citizens, beginning with the Black case in 1965, and continuing through the Nixon years; (2) the Watergate crisis, which brought to light many of the Nixon Administration's improper wiretapping and surveillance practices; (3) the first truly extensive Congressional investigations of intelligence agency practices in U.S. history; (4) the implementation of intelligence reforms via Executive Orders from Presidents Ford and Carter, as well as new domestic intelligence guidelines from Attorney General Edward H. Levi; and (5) Congress' passage of the Foreign Intelligence Surveillance Act of 1978, which, after more than four years of debate, made statutory the principal components of the Keith decision.

When President Ronald Reagan took office in 1981, the nation entered a time of quietude, accompanied by the reversal of many Watergate-era intelligence reforms. With President George Bush's election in 1988, new revelations of abuses surfaced, the two most significant being the "Iran-Contra Affair" and the COINTELPRO-like surveillance and harassment of domestic groups opposed to U.S. foreign policy in Central America, especially the "Committee in Solidarity with the People of El Salvador" (CISPES). Abuses suggested

that intelligence operatives had already forgotten the excesses of the 1960s.

Yet more recent events, such as the World Trade Center and Oklahoma City bombings, have created an anti-terrorism atmosphere in the country, which may lead to a lessening of restrictions on the FBI and other intelligence agencies. The eagerness of both the Clinton Administration and the 104th Congress to respond to the "terrorist threat" provides ample indication that politicians have forgotten the lessons of the 1970s.

The reform phase of the seventies was in some ways unique. The combination of Watergate and a steady stream of revelations concerning Cold War intelligence agency abuses resulted in the first thorough examination of the surveillance practices of the FBI, CIA, NSA, Military Intelligence, and other government agencies possessing intelligence capabilities. Yet, Nixon and Ford Administrations' opposition to Congressional "barriers" to Executive Branch surveillance practices delayed the legislative enactment of Keith for over four years.

Justice Lewis Powell's June, 1972, decision encouraged Congress to enact immediately legislation codifying the ruling. Powell hoped the unanimous decision refuting the Mitchell Doctrine would convince America's public that the government was not eavesdropping at will on private communications. He also hoped that Congress would relax the

Title III restrictions on "foreign intelligence" surveillance, to allow the FBI easier access to warrants for "investigative" wiretaps. Congress in fact took six years to respond.

Nixon dragged his feet too. After declaring that his Administration would fully comply with Keith, he noted his opposition to "corrective legislation" on the topic.<sup>5</sup> His reasoning may have been related to Powell's other suggestion in Keith: the Executive Branch possesses as-yet-undefined, "inherent national security" surveillance powers in situations involving "foreign powers and/or their agents." Within a month of the Keith decision, Attorney General Kleindienst acknowledged that several warrantless wiretaps were being instituted against Americans "somehow linked" with foreign powers.<sup>6</sup> This action demonstrated that the Administration was again prepared to take full advantage of a "gray area" in the law to preserve its "national security" surveillance powers. As long as Congress refused to enact the Keith decision via statute, or to define the parameters of "foreign intelligence," the Executive Branch and its expansive intelligence bureaucracy remained free to continue wiretapping without warrant any American who was "somehow linked" with foreign nations.

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<sup>5</sup>New York Times, June 23, 1972, 14. Nixon made the announcement during a news conference on June 22.

<sup>6</sup>New York Times, June 30, 1972, 17.

Following Keith, the Judiciary also moved slowly to enact "barriers" to the Executive's intelligence gathering powers. A week after Keith, the Court handed down its decision in Laird v. Tatum, which involved the Army's domestic surveillance abuses. The 5-4 ruling, written by Chief Justice Burger, held that a citizen's constitutional rights are not abridged merely by the existence of governmental surveillance; standing to sue depended upon proving that some specific injury had occurred as a result of the surveillance.<sup>7</sup> The following year, the Supreme Court let stand a decision from the Third Circuit Court of Appeals, which held that warrants are not required in cases involving U.S. citizens acting as "agents of foreign powers."<sup>8</sup> The resulting state of affairs was not conducive to rebuilding public confidence in government.

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<sup>7</sup>408 U.S. 1, 92 S. Ct. 2318, 33 L. Ed. 2d. 154, June 26, 1972. See New York Times, June 27, 1972, 1. Considerable controversy surrounded the decision, focusing on the refusal of Justice Rehnquist to abstain in a case in which he might have had direct dealings, while in the position of Assistant Attorney General. Rehnquist also participated in two other cases involving a possible conflict of interest. All three were decided by a single vote. These facts indicate that he would have made every effort to participate in Keith, had the Senate Judiciary Committee failed to question him vigorously regarding his involvement with the Mitchell Doctrine during the confirmation process. For additional details on the Rehnquist controversy in Laird v. Tatum, see New York Times, October 11, 1972, 1; and October 12, 1972, 46. The original attorneys in the case were still attempting to attain a rehearing in the mid-eighties.

<sup>8</sup>U.S. v. Butenco, 494 F. 2d 593 (3rd Cir. 1973). See Monrad G. Paulson, The Problems of Electronic Surveillance, (Philadelphia: American Law Institute, 1977), 111-18.

Of course Watergate helps place things in a different context. The crisis monopolized the Legislative Branch's attention from the spring of 1973 through Nixon's resignation in August of 1974. Nixon's unwillingness to respect Congressional and Judicial "barriers" to Executive power ultimately brought about his forced resignation. Had Congressional impeachment proceedings occurred, illegal wiretapping and other surveillance practices would have been a prominent part of alleged "high crimes and misdemeanors." In 1974, during the peak of the crisis, the Administration even resurrected the Mitchell Doctrine's "inherent right" defense to justify both past wiretapping practices, as well as the FBI's domestic surveillance authority.

Executive claims of "inherent power" continued into the Ford Administration. In 1975, during the trial of John Ehrlichman for his involvement with the "Plumbers'" 1971 break-in at the office of Daniel Ellsberg's psychiatrist, the Justice Department "publicly asserted the power of the Executive Branch to conduct warrantless surreptitious entries unconnected with the use of electronic surveillance." The District of Columbia Circuit Court rejected this argument<sup>9</sup>

Throughout the Watergate period, the FBI continued to monitor suspected domestic radicals and to implement COINTELPRO-style actions against them, despite Hoover's "official" abolition of COINTELPRO in April of 1971.

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<sup>9</sup>Church Committee Final Report, Book II, 131-35.

Organizations such as the American Indian Movement (AIM), Socialist Workers Party (SWP), and the Symbionese Liberation Army (SLA) were wiretapped and infiltrated by agents provocateurs; several had their offices broken into by FBI "black bag" squads.<sup>10</sup> The disarray which characterized the Bureau in the aftermath of Hoover's death was soon corrected by the new Director, Clarence Kelley, who paid lip service to reform by promising a new emphasis on "quality over quantity" in domestic intelligence gathering. Despite Kelley's assurances, the Bureau refused Senator Ervin access to its files, and submitted only innocuous records in response to a GAO review. The recently published memoirs of career agent M. Wesley Swearingen demonstrate that between 1973 and 1975, the Los Angeles Field Office continued to open tens of thousands of investigative files on individuals guilty of nothing more than being on the receiving end of telephone calls from organizations under investigation. "Those innocent individuals," Swearingen attests, "will never be able to obtain a job with the U.S. or any state government, and they will never know why they were rejected for employment, unless they request their file under the Freedom

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<sup>10</sup>Churchill and Vander Wall, The Cointelpro Papers, 52-4; Blackstock, Cointelpro, xi; Halperin, et. al., The Lawless State, 240. Churchill and Vander Wall's Agents of Repression is particularly useful concerning the FBI's operations against AIM during the mid-seventies, long after COINTELPRO was supposed to have been discontinued.

of Information Act."<sup>11</sup> In fact, it was through the Freedom of Information Act, revised and updated in 1974, that journalist Carl Stern acquired the first substantive proof of the full scope of the FBI's COINTELPRO programs.<sup>12</sup>

Following the resignation of Nixon in August of 1974, President Ford and Attorneys General William B. Saxbe and Edward H. Levi (who replaced Saxbe on February 7, 1975) faced a movement in Congress to reform the nation's intelligence agencies. The following year, Ford created the so-called "Rockefeller Commission," which included Nelson Rockefeller, Erwin Griswold, and Ronald Reagan, among others, to investigate the improper practices of the CIA within the United States. The Commission's "Report to the President" disclosed the agency's "CHAOS" program, which monitored domestic dissent during the late sixties and early seventies.<sup>13</sup>

Ford found himself in a very awkward position. He favored keeping the intelligence agencies' abuses secret, but nonetheless recognized the public's concern with surveillance issues. His Administration opposed the sweeping reform

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<sup>11</sup>M. Wesley Swearingen, FBI Secrets: An Agent's Expose, (Boston: South End Press, 1995), 97-99.

<sup>12</sup>James K. Davis, Spying on America: The FBI's Domestic Counterintelligence Program, (New York: Praeger, 1992), 162-64.

<sup>13</sup>"Report to the President by the Commission on CIA Activities Within the United States," (Washington, D.C.: Government Printing Office, June, 1975).

legislation introduced by Senator Ervin ("Watergate Reorganization and Reform Act"), while allowing the Rockefeller Commission's report to become public, against the wishes of several Commission members.<sup>14</sup> By early 1976, Ford recognized that he stood little chance of being elected that year without initiating additional reforms of the surveillance practices of the FBI and other intelligence agencies. The result was new domestic surveillance guidelines issued by Attorney General Levi, as well as Ford's Executive Order 11905.

Levi's guidelines, issued March 10, 1976, represented the first serious attempt by the U.S. Government to settle the so-called "intelligence versus evidence debate" concerning domestic security investigations by law enforcement entities, which had been part of the American criminal justice system since the advent of electronic surveillance. Did the opening of domestic security investigations require "probable cause," and if so, what "threshold activity" was required to meet this standard? Was mere advocacy of intent to break the law sufficient? Or, did law enforcement have to wait for the commission of specific unlawful acts to initiate investigations? The Smith Act of 1950 had declared that mere advocacy of criminal intent was justiciable in a court of law. The Supreme Court struck down this position in 1957, in the Yates and Jencks decisions.

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<sup>14</sup>Kurland, Watergate and the Constitution, 190-95.

Thereafter, Hoover continued to base his investigations on "mere advocacy," but hid the practice. He dared not reveal much of what he knew in a court of law, for fear that the Court would exclude all evidence based on the improper investigation (as had happened in the Black and Coplon cases).

Many of the Warren Court's decisions, including Katz and Berger, found that domestic security investigations require probable cause. The Nixon Administration opposed this dictum in its Keith briefs, arguing that the standards for probable cause cannot apply to domestic "national security" investigations, because the dangers posed by "domestic subversives" are too great; if the government were held to the probable cause requirement, Nixon argued, by the time it had gathered sufficient information concerning a group's intentions, bombs could go off or the nation could be attacked.<sup>15</sup> Although Keith established the primacy of warrants in domestic intelligence cases involving electronic surveillance, it did not settle the intelligence/evidence debate.

The Levi guidelines affected FBI operations in a number of ways. Three levels of domestic security investigations were created: preliminary, limited, and full. The guiding principle was that a "criminal predicate" was required for domestic intelligence investigations. FBI field offices were

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<sup>15</sup>Keith Case, Brief for the United States, SCR/B.

empowered to open preliminary investigations on their own initiative, based on "allegations and other information" that an individual or group may engage in activities that will involve the use of force or violence. Because this was perilously close to the old "mere advocacy" standard, the agents were limited to "less intrusive" investigative methods, such as examining publicly-available information, searching Bureau records and indexes, conducting physical surveillance, and interviewing persons believed to be associated with the individual or group. In order to advance to the next level of "limited investigation," written authorization was required from a SAC or from Headquarters. The most important technique at this level was the recruitment and placement of informers. Wiretapping was still prohibited. No preliminary or limited investigation could exceed ninety days, although extensions could be applied for in writing.

The third and most intrusive level, "full investigation," required the approval of Headquarters, and was only to be authorized "on the basis of specific and articulable facts giving reason to believe that an individual or a group is or may be engaged in activities which involve the use of force or violence and which involve or will involve the violation of federal law." Agents could use "mail covers," whereby the exterior covers of a targeted individual or group's incoming mail were photo-duplicated by

agents. Agents could also request court approval for electronic surveillance. In accordance with Keith, warrantless wiretapping was prohibited in all cases involving U.S. citizens. Strict "minimization" standards were outlined concerning the monitoring of attorney-client conversations; agents were required to turn off the monitoring equipment, so as to not "taint" the government's possible case against the target(s). Levi's guidelines also authorized the Justice Department to review all full investigations at least once a year, via a newly-created "Investigative Review Unit."<sup>16</sup>

The other important reform of 1976 was Ford's Executive Order 11905, issued on February 18. New guidelines were issued, affecting the entire intelligence community. These required that all intelligence operations be authorized by agency heads, and be "subject to approval and review of personnel directly responsible to the President."<sup>17</sup> Ford says that Levi was primarily responsible for drafting these guidelines as well.<sup>18</sup>

Although Levi's guidelines represented a significant shift toward the "evidence" side of the intelligence-evidence debate, the Ford Administration received a great deal of

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<sup>16</sup>Levi Guidelines, Justice Department Press Release, March 10, 1976; see A. Stephen Boyan, Jr., comp., Constitutional Aspects of Watergate, vol. 5, (Dobbs Ferry, NY: Oceana Publications, 1979), 287-94; see also Morgan, Domestic Intelligence, 57-8.

<sup>17</sup>Quoted in Theoharis, Spying on Americans, 235.

<sup>18</sup>Telephone interview with author, July 13, 1992.

criticism for enacting its "reforms" solely within the Executive Branch, rather than via legislation.<sup>19</sup> Ford states that while his Administration did seek "reformist legislation," the "atmosphere in Congress" was not right.<sup>20</sup> Since the Pike Committee in the House, and the Church Committee in the Senate, were both investigating these same issues at the time, it is fair to assume that Ford opted for unilateral Executive action out of concern that the only legislation likely to receive Congressional approval in the post-Watergate "reform" atmosphere of 1975-1976 would have restricted too much the practices of the FBI and the intelligence community.

The Church Committee's investigation of intelligence agency abuses ran from January 27, 1975 through April 26, 1976. After examining thousands of heretofore top secret documents, the Committee issued a "Final Report" -- a harsh indictment of American Cold War intelligence abuses.<sup>21</sup> The inquiry was facilitated by the powerful new Freedom of Information Act, which allowed the committee unprecedented

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<sup>19</sup>See Halperin, et. al., The Lawless State, 244-54; and Theoharis, Spying on Americans, 235-36. Two of the more common criticisms include the vague wording of Levi's guidelines, as well as Ford's unwillingness to ban all intelligence agencies except the FBI from operating within the United States.

<sup>20</sup>Telephone interview with author, July 13, 1992.

<sup>21</sup>Every credible historical account of U.S. surveillance policy since 1976 has relied, to a significant degree, on the Church Committee's Final Report. The original committee files will be opened to researchers in 1995 and 1996.

access to the inner workings of America's secret intelligence community. As Athan Theoharis asserts, the internal security bureaucracy's traditional "posture of defiance" concerning Congressional inquiries became "politically untenable."<sup>22</sup> Senator Frank Church was critical of the Administration's continued reliance upon "inherent power" justifications for domestic security investigations.<sup>23</sup> The committee's Final Report included ninety-six specific recommendations; number 44 states that the FBI should be prohibited from opening domestic intelligence investigations based solely on "mere advocacy" of illegal acts.<sup>24</sup> The report continued:

The Committee's approach to FBI domestic security investigations is...that the FBI should only conduct criminal investigations...the Committee would only permit intelligence investigations with respect to foreign intelligence activity and terrorism.

Church also criticized the Levi guidelines for authorizing investigations aimed at "subversives," a term which he deemed "so vague as to constitute a license to investigate almost

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<sup>22</sup>Theoharis, Spying on Americans, 118.

<sup>23</sup>Such an inquiry might never happen again. The CIA's practice of leaving no "paper trail" during the Iran-Contra affair of the mid-1980s is a case in point. With increasing amounts of the government's communications now going out over computers and electronic on-line networks, the process of hiding secret files and information has been greatly facilitated.

<sup>24</sup>This recommendation mirrored Judge Keith's position that domestic groups such as the White Panthers have the constitutional right to advocate revolution and overthrow of government, and that the FBI cannot legally investigate them until they cross the threshold from words to illegal acts.

any activity of practically any group that actively opposes the administration in power." The report concluded that "now is the time for Congress to turn its attention to legislating restraints upon intelligence activities which may endanger the constitutional rights of Americans."<sup>25</sup>

While Congress debated a variety of intelligence-related bills, the Judiciary delivered several important decisions. In 1975, the Supreme Court let stand the D.C. Circuit's ruling in Zweibon v. Mitchell, the Jewish Defense League's suit against the former Attorney General. The decision, which relied heavily upon Keith, declared that court orders shall be required in all instances where wiretaps are utilized against U.S. citizens, regardless of their association with "foreign powers," unless the FBI has concrete proof that the subjects are agents or "collaborators" of foreign nations.<sup>26</sup> That same year, in White v. Davis, the California Supreme Court ruled that under certain circumstances a citizen may bring suit successfully against the government for law enforcement surveillance of First Amendment activity. Although the ruling did not directly challenge Laird v. Tatum, it did represent an "expansive judicial view" of citizens' rights concerning governmental surveillance practices. According to Marc

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<sup>25</sup>Church Committee Final Report, Book II, 318-21, 289.

<sup>26</sup>516 F 2d 594 (D.C. Cir. 1975); see Paulson, The Problems of Electronic Eavesdropping, 98-111.

Stickgold, these two decisions represented the Judiciary's shift toward the "rights" end of the "rights-security" spectrum.<sup>27</sup>

Evidence of reform was visible in other quarters as well. In 1975, under orders from Attorney General Levi, the FBI instituted its "Victim Notification Plan," contacting tens of thousands of Americans who had been targeted in COINTELPRO investigations. The resulting flood of Freedom of Information Act requests for personal and group files kept FBI agents busy for years.<sup>28</sup> By 1977, both houses of Congress abolished their "Internal Security" Committees, and established permanent "Intelligence Oversight Committees."<sup>29</sup> Numerous lawsuits were filed against local and national government officials, alleging that the FBI and urban "red squad" surveillance programs of the sixties and early seventies had abridged constitutional rights. As Frank Donner states, a "retreat from political intelligence operations" was underway.<sup>30</sup>

One of the many damage suits against the government during the period was Sinclair, et al. v. Kleindienst, et

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<sup>27</sup>Morgan, Domestic Intelligence, 119-20; see also Stickgold, "Yesterday's Paranoia...", 890-91.

<sup>28</sup>One of the agents who processed these requests was M. Wesley Swearingen. See FBI Secrets, 105, 158-60.

<sup>29</sup>The Church Committee had specifically recommended these oversight committees in its "Final Report."

<sup>30</sup>Donner, Protectors of Privilege, 346-7.

al., filed by former WPP leaders Sinclair, Plamondon, and Forrest on March 29, 1973.<sup>31</sup> The countersuit, which was argued by attorneys with the Center for Constitutional Rights in New York and the Constitutional Litigation Center in New Jersey, alleged that several high-ranking government officials (including Nixon, Hoover, and Mitchell) instituted "illegal surveillance" of the WPP and conducted a "bad faith criminal prosecution" in the CIA Conspiracy case. The case moved at a glacial pace through the courts for the next seventeen years.<sup>32</sup>

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<sup>31</sup>645 F. 2d 1080 (D.C. Cir. 1981); 711 F. 2d 291 (D.C. Cir. 1983); 834 F. 2d 103 (6th Cir. 1987-1988); 916 F. 2d 1109 (6th Cir. 1990).

<sup>32</sup>The first of several rounds of legal battles occurred in Washington, D.C., and involved two judges of diametrically opposed political viewpoints: U.S. District Judge Oliver Gasch and D.C. Circuit Court Chief Judge David Bazelon. On April 30, 1975, Judge Gasch dismissed the case, stating that there were reasonable grounds to conclude that the government had acted in the "good faith belief in the lawfulness of their [sic] surveillance" of the California Black Panthers. The warrantless White Panther wiretaps of 1970-1971 remained secret. On January 27, 1976, the D.C. Court of Appeals, headed by Bazelon, issued a summary reversal of Gasch's decision, and remanded the case back to his court. On November 17, 1977, the FBI produced the logs of the five Plamondon conversations with the BPP during the spring and summer of 1969, which the Nixon Administration had utilized in the Keith case. A year later, on November 18, 1978, the Justice Department admitted for the first time the existence of the White Panther [Ann Arbor chapter] wiretaps, and submitted a heavily-censored set of logs to Judge Gasch. The case dragged on for four more years in Washington, as the WPP attorneys sparred with Justice Department lawyers for additional discovery of information. Gasch again dismissed the case on June 4, 1982. Bazelon reinstated the case for a second time on June 24, 1983, and, at the request of the plaintiffs' attorneys, transferred it to the Eastern District of Michigan, where ultimately it was heard by two judges:  
(continued...)

The election of Jimmy Carter in 1976 led to the apogee of the "era of reform." On January 24, 1978, Carter issued Executive Order 12036, expanding White House and Justice Department oversight of the intelligence bureaucracy, and further limiting domestic intelligence operations. Warrantless electronic surveillance of U.S. citizens was authorized only in instances where "the President has authorized the type of activity involved and the Attorney General has both approved the particular activity and determined that there is probable cause to believe that the United States person is an agent of a foreign power."<sup>33</sup> On July 3, Carter also issued Executive Order 12065, making it more difficult for government agencies to withhold information requested via the FOIA.<sup>34</sup>

On October 25, 1978 President Carter signed into law the Foreign Intelligence Surveillance Act (FISA), the first

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<sup>32</sup>(...continued)

Charles W. Joiner and George LaPlata. Seven additional years of litigation by attorneys Hugh M. Davis and Dennis M. Hayes resulted in the dismissal of the case by the Sixth Circuit Court of Appeals on October 23, 1990 (ironically, Judge Keith was [and remains] a member of this court, although he did not participate in the ruling). Hugh Davis offers the following reflection concerning the seventeen year countersuit: "Ultimately, we won...we got some secrets out, and the people were set free." See interview with author, July 25, 1992; see also Ann Arbor News, November 6, 1983, 1, and April 30, 1989, E-1.

<sup>33</sup>Executive Order 12036, January 24, 1978, Presidential Documents, (Washington, D.C.: Government Printing Office, 1978), 3684-85.

<sup>34</sup>Churchill and Vander Wall, The Cointelpro Papers, 26.

comprehensive wiretapping legislation since the 1968 Omnibus Crime Act, and the operative statute regarding domestic electronic surveillance to this day. After more than six years of deliberation and debate, Congress finally enacted into law the Keith decision's ruling that prior judicial warrants are required for domestic intelligence wiretaps of U.S. citizens, as well as for almost all types of "foreign intelligence" surveillance.<sup>35</sup> The act also required that a criminal activity "threshold" be crossed prior to requesting court orders for electronic surveillance in domestic intelligence investigations. Refusing to acknowledge the "inherent power" of the Executive Branch in domestic surveillance areas, the act specifically repealed section 2511(3) of Title III, which had been one of the primary tenets of the Mitchell Doctrine.

As if specifically responding to Justice Powell's suggestion in Keith, Congress also created a special seven-member "Foreign Intelligence Surveillance Court," to review applications for court-ordered electronic surveillance. The sitting members on this court are Federal Judges, appointed by the Chief Justice of the Supreme Court for seven-year terms. They meet in a secret, specially designed courtroom within the Justice Department's Washington, D.C., complex, behind what James Bamford describes as a "cipher-locked

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<sup>35</sup>FISA defined "U.S. Person," as a citizen, a legally resident alien, or an "unincorporated association" made up of members of either group.

door."<sup>36</sup> After being presented with detailed written requests from the FBI or NSA for court-approved wiretaps, which must show the basis for "probable cause," and which must be personally signed by the Attorney General, the Court can rule in one of two ways: (1) to grant the request for a 90-day surveillance, subject to renewals for up to one year, or (2) to refuse the request. After the government has gone to great pains to comply with all of the paperwork and restrictions involved in the warrant application, the burden of proof shifts to the Court itself. In the event that one or more judges vote to deny a warrant, a three-member panel of Circuit Court judges -- also appointed by the Chief Justice, considers the issue. If a majority of the panel upholds the denial, the issue is brought before the Supreme Court for a final consideration.

Warrants are required even if the target clearly is a "foreign power."<sup>37</sup> However, both the probable cause requirements and the paperwork involved are much less stringent in "foreign" cases. The act also stipulates that "no United States person may be considered a foreign power or an agent of a foreign power solely upon the basis of activities protected by the first amendment to the

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<sup>36</sup>Bamford, Puzzle Palace, 368.

<sup>37</sup>The FISA statute defines "foreign power" as a foreign government, a faction thereof operating within the U.S., "a group engaged in international terrorism or activities in preparation thereof," and/or "entities" directed or controlled by foreign nations.

Constitution of the United States." In emergency situations whereby the FBI and/or NSA are unable to submit their requests to the FISA court for its immediate approval, they are authorized to institute warrantless surveillance for no longer than forty-eight hours (originally twenty-four) before applying for a court order. Information gathered from court-approved wiretaps can be utilized in court, but the government must notify the aggrieved person within a "reasonable time" of the trial. Information concerning non-targeted individuals that has been "unintentionally acquired" is to be destroyed by the surveillance agency in question. Targeted individuals have standing to submit motions to suppress evidence obtained via electronic surveillance, but only on the grounds that the information was either "unlawfully acquired" or was not made "in conformity with" the court order. In the event that the Attorney General files an affidavit attesting that disclosure of portions or all of the surveillance information in a given case will "harm the national security," the trial judge must review the information in camera, and determine whether the surveillance was "lawfully authorized and conducted." If a judge determines that the surveillance was improper, his only option is to suppress the evidence which was derived from the surveillance. He no longer may not force automatic disclosure, as had been the case since the 1969 Alderman decision.

The act also contains several Congressional oversight components, involving periodic reporting to the House and Senate Permanent Intelligence Oversight Committees. Aggrieved "U.S. persons" who have been illegally wiretapped have the right to attempt civil liability suits for actual damages, punitive damages, and attorney's fees.<sup>38</sup>

The FISA bill was originally introduced in 1976 by Senator Edward Kennedy, and was itself the product of four consecutive years of unsuccessful attempts by the Senator to enact into law the Keith decision's prohibition of warrantless wiretapping of U.S. citizens. However, Executive Branch support had been lacking prior to 1976. The final bill was the result of intense discussion between the Justice Department and members of the Congressional oversight committees, including Kennedy. As Bamford states, the resulting legislation was truly indicative of governmental "give and take":

Its establishment was the product of compromise between legislators who wanted the NSA and the FBI...to follow the standard procedure of obtaining a court order required in criminal investigations, and legislators who felt the agencies should have no regulation whatsoever in their foreign intelligence surveillances.<sup>39</sup>

Several additional Carter-era reforms were passed, as Congress sought to implement still more institutional and

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<sup>38</sup>Public Law 95-511, October 25, 1978, reproduced in Boyan, comp., Constitutional Aspects of Watergate, 407-22.

<sup>39</sup>Bamford, Puzzle Palace, 367-68.

statutory "barriers" against the types of Executive Branch abuses which had characterized Watergate. The "Financial Privacy Act of 1978" bars government agencies from obtaining bank records without the knowledge of the person under investigation, except in the rarest of circumstances. And the 1980 "Intelligence Oversight Act," requires that the CIA report its covert operations to the House and Senate Intelligence Oversight Committees.<sup>40</sup>

In 1980, constitutional historian Richard E. Morgan published Domestic Intelligence: Monitoring Dissent in America, an assessment of the state of intelligence agency "reforms." Morgan concluded that "unless they are flagrantly ignored, which is unlikely under the new oversight arrangements, they severely limit the sort of intelligence gathering in which the bureau may engage." Addressing the position of the ACLU concerning the threshold required for probable cause in domestic surveillance investigations -- that an actual illegal act has to be committed, and that criminal conspiracy cases should be categorically excluded from warrant considerations -- Morgan found the position too restrictive. Equating the recent "stiffening of opposition" by FBI Director William Webster with the continuing demands for additional information on the Bureau's past and present practices from Senator Kennedy and other "extremist critics" on the Senate Judiciary Committee, he expressed concern that

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<sup>40</sup>Kutler, The Wars of Watergate, 588-90.

Congress might do more harm than good if it was allowed to institute the sweeping reforms then under consideration. Morgan quoted Webster's 1979 statement that 16 percent of all FOIA requests received by the Bureau were from "prisoners seeking to identify the informers who helped place them in jail."

Concluding that "reform may have gone too far," he also opposed one of the Church Committee's primary recommendations: the expansion of criminal penalties "for law enforcement and intelligence officers who behave improperly." Morgan's study was not one-sided. He supported the enactment of a legislative charter for the FBI and also criticized the "vagueness" characterizing the Levi, Ford, and Carter guidelines. Comparing the Levi guidelines regarding "thresholds" for domestic intelligence investigations with those of the Church Committee, he asserted that they should be "refined," by modifying the wording to be "considerably more precise."<sup>41</sup> Morgan believed that the reform process was "far from complete."<sup>42</sup> The election of Ronald Reagan soon made that conclusion seem remarkably prescient.

Just how extensive was the "reform era"? Without question, the reforms enacted in the seventies were highly

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<sup>41</sup>Morgan, Domestic Intelligence, 144-61. In the Preface, Morgan acknowledges that the study is specifically intended to provide background on the current debates taking place in society concerning the role of domestic intelligence in American society.

<sup>42</sup>Ibid., 3.

significant. The Foreign Intelligence Surveillance Act firmly established the primacy of warrants in domestic surveillance matters, effectively codifying the Keith decision. The government must seek judicial warrants to wiretap U.S. citizens, as well as most others who reside in America. Other reforms, such as the establishment of permanent Intelligence Oversight Committees in both houses of Congress, indicate that the types of wholesale political surveillance of First Amendment political activity which characterized Hoover's half-century as FBI Director are not likely to occur again.<sup>43</sup>

Morton Halperin, one of the Nixon Administration's primary targets in the infamous seventeen warrantless "national security" wiretaps, criticizes the Ford/Carter "reforms," asserting that they proceed from the faulty premise that "to reveal abuses is to reform the situation." He points out that a vast majority of the era's "reforms" were enacted solely within the Executive Branch, "written by the very people that they are supposed to control." The danger inherent in this situation, he adds, is that these reforms "can be repealed in total on whim" by another Chief Executive. Halperin also criticizes FBI guidelines concerning domestic intelligence investigations. He asserts that the vague terminology concerning the necessary threshold

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<sup>43</sup>Assuming of course that the guidelines and statutes affecting the intelligence bureaucracy are not significantly revised.

for opening and expanding investigations invites "expansive interpretation."<sup>44</sup>

Other studies have criticized the elusive Foreign Intelligence Surveillance Court, created in 1978 via the FISA act. Louis Fisher states that, as of 1984, after reviewing more than 1400 warrant applications, the Court "never rejected an intelligence agency's request for a wiretap."<sup>45</sup> James Bamford is critical of the fact that the Court's judges hear only the government's side in all applications for surveillance, and that there are "no provisions" for judges to "'look behind' the application to determine the necessity or propriety of the surveillance." He adds that "as long as he [a FISA judge] finds....that the proper application procedures have been followed, he has no choice but to approve it."<sup>46</sup>

Athan Theoharis focuses much of his criticism on Congress. He states that "Congressional failure" during the period prior to 1978, rooted in a "hesitancy to challenge Cold War norms," allowed the Executive Branch to continue operating with minimal oversight. Ford's Executive Order 11905 is described as more of a "commitment to ensure

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<sup>44</sup>Halperin, et al., The Lawless State, 239-54.

<sup>45</sup>Louis Fisher, Constitutional Conflicts Between Congress and the President, 305.

<sup>46</sup>Bamford, Puzzle Palace, 370. Currently, the person responsible for selecting the judges sitting on the FISA Court is Chief Justice William H. Rehnquist, one of the principal drafters of the Mitchell Doctrine.

presidential control over agencies" than a serious attempt to reform their operations. Like Halperin, Theoharis condemns the "broad language" of Levi's guidelines, adding that "'domestic security' investigations continued thereafter but under different terminology -- to combat 'terrorism' or as 'foreign counterintelligence.'"<sup>47</sup>

Theoharis's reference to "terrorism" brings up an important point regarding the efficacy and legacy of the so-called "era of reform." By 1980, the FBI refrained from claiming the authority to investigate "domestic subversives," in much the same way that the Executive Branch stopped asserting expansive "national security" powers following the flagrant use of the term by President Nixon during Watergate. The Bureau now claimed that a majority of its domestic intelligence investigations were aimed at "terrorists" and "foreign intelligence" targets. The shift in focus may have been mere lip service. As Frank Donner notes:

The prospect is far from remote of a revival of domestic political intelligence activities in response to the same social and political pressures that have in the past dominated American public life...[The] intelligence constituency cannot function without an enemy, a hostile 'they'...The primary contemporary candidate for expanded intelligence operations is terrorism, a phenomenon that has profoundly shocked popular consciousness.<sup>48</sup>

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<sup>47</sup>Theoharis, Spying on Americans, 234-42.

<sup>48</sup>Donner, Age of Surveillance, 452-55.

Churchill and Vander Wall have traced the FBI's rhetorical shift to the spring of 1972, immediately following the death of Hoover. An April 12th Airtel from "Acting Director" L. Patrick Grey to the SAC in Albany, New York concerning the Black Panther Party uses the word "terrorist" to describe a local group which "had only months earlier still been designated as 'agitators' and 'key extremists.'" Soon thereafter, the Bureau's terminology underwent a rapid transformation, as Churchill and Vander Wall attest:

The public, which experience had shown would balk at the idea of the FBI acting to curtail political diversity as such, could be counted on to rally to the notion that the Bureau was now acting only to protect them against 'terror.' Thus, the Bureau secured a terminological license by which to pursue precisely the same goals, objectives and tactics attending COINTELPRO.<sup>49</sup>

The limits of reform during the seventies have also been demonstrated in other ways. An August, 1980 government Accounting Office report states that nearly half of all FBI investigations involved no violation of law. The information indicates that more than three years after Levi had promulgated his guidelines, the FBI was still opening investigations based on "mere advocacy." The Judicial Branch also continued to send mixed signals concerning intelligence agency "reforms." Marc Stickgold's study of judicial attitudes examines several damage suits instituted by aggrieved parties who had been the targets of police, FBI,

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<sup>49</sup>Churchill and Vander Wall, The Cointelpro Papers, 306.

and Army surveillance and dossier collection during the sixties. He finds that even after the revelations of intelligence agency abuses which surfaced during the Watergate era, a majority of judges continued to display deference to law enforcement and other government authorities in their rulings. He also addressed the Benkert, et al. v. Michigan State Police case, involving surveillance conducted by the Detroit and Michigan State Police "Red Squads." After examining the files of several defendants in the suit, Stickgold concluded that more than three-quarters of all police monitoring involved "constitutionally-protected political activity." He argues that if more judges were aware of such statistics, they might reconsider their strict adherence to the "security" end of the "rights-security spectrum."<sup>50</sup>

Two Supreme Court decisions during the late seventies provide additional support for Stickgold's assertions. In U.S. v Donovan (1977), the Court ruled that in instances where the FBI had obtained evidence of illegality concerning persons not specifically named in a wiretap warrant, the evidence obtained was nonetheless admissible in court.<sup>51</sup> Two years later, it ruled in Smith v. Maryland that the FBI's

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<sup>50</sup>Stickgold, "Yesterday's Paranoia...", 877-929.

<sup>51</sup>Jay S. Albanese, Justice, Privacy, and Crime Control, (Lanham, MD: University Press of America, 1984), 10-11. See also Theoharis, Spying on Americans, 241. Theoharis refers to this variety of wiretap as "technically illegal."

warrantless installation of a "pen register," a device which records all of the numbers dialed from a given telephone, was constitutional.<sup>52</sup> Such examples support Stanley Kutler's "judgement" that "the effectiveness of post-Watergate reforms results in a mixed verdict."<sup>53</sup>

The "Reagan Revolution" of 1980 reflected the nation's eagerness to put the sixties' upheavals and the guilt of the Watergate era behind it, and to try to recapture lost feelings of patriotism and national pride. Part of this movement for change was a backlash against what many considered to be "over-restrictive" and "excessive" reforms of the seventies.<sup>54</sup> Within a year of taking office, Reagan overturned the Ford and Carter directives with Executive Order 12333. It authorized the FBI to collect "foreign intelligence" information within the United States. Theoharis concludes that Reagan, like Ford, paid lip service to constitutional rights, while simultaneously permitting the acquisition and dissemination of domestic intelligence information in a wide range of circumstances, including "incidentally obtained information that may indicate

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<sup>52</sup>Albanese, Justice, Privacy, and Crime Control, 12.

<sup>53</sup>Kutler, Wars of Watergate, 610.

<sup>54</sup>Morgan's Domestic Intelligence reflects this attitude. He concludes that despite past abuses, "limited domestic intelligence operations are justifiable," particularly against the growing threat of "terrorism" [pp. 9-12].

involvement in activities that may violate Federal, state, local or foreign law.'"<sup>55</sup>

Although Kutler asserts that E.O. 12333 "unleashed" the intelligence agencies, in reality, the provision was minor -- when compared with the sweeping new FBI guidelines issued by Attorney General William French Smith on March 7, 1983.<sup>56</sup> Exploiting "a current fear of international terrorism," as well as a final round of Cold War hysteria, Smith's guidelines rescinded two of the central tenets of the Levi guidelines: (1) the prohibition against "indefinite monitoring" of dissident political activities, and (2) the requirement that the Attorney General authorize all full FBI investigations in writing. Theoharis and Cox assert that the net effect of the new guidelines was to erase the distinction between preliminary and full investigations. Smith's guidelines lowered the much-debated "threshold" for investigations, doing away with "the requirement that FBI investigations be predicated on a probable violation of statute standard." Thus, the FBI can now resume investigating individuals who "'advocate criminal activity or indicate an apparent intent to engage in crime, particularly crimes of violence.'" Another Levi guideline, close Justice Department oversight, was also rendered pointless, as Smith

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<sup>55</sup>Theoharis and Cox, The Boss, 432-33 [emphasis in original].

<sup>56</sup>Kutler, The Wars of Watergate, 588.

"invited FBI officials to employ their new authority broadly, using their own perception of need"; most reporting requirements, which had been mandatory under the Ford/Levi system, were now made strictly voluntary.

The new "terminological license" of "terrorism" was used throughout the Smith guidelines, providing the appearance that the Reagan Administration was "cracking down" on international terrorists. In fact, "domestic security" and "terrorism" were now linked. The guidelines repeatedly refer to "domestic security/terrorism" investigations. Crime "prevention" -- one of the Nixon Administration's favored justifications for opening sweeping investigations of domestic dissenters based on nothing more than "mere advocacy" -- was also resurrected to justify the new guidelines.<sup>57</sup>

A month after Smith's guidelines went into effect, Reagan issued Executive Order 12356, dramatically revising the Freedom of Information Act. The new FOIA guidelines empower the FBI and other Federal agencies to withhold documents under a wide array of categories, including "national security." The 1974 FOIA's requirement that agencies demonstrate "identifiable" potential damage to the nation's security before they withhold documents was reversed. Under NSC Directive 84, issued March 11, 1983, Reagan promulgated new rules that made "leaks" of documents

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<sup>57</sup>Theoharis and Cox, The Boss, 432-34 [emphasis added].

by agency officials punishable by fines and imprisonment. More than 120,000 government officials with access to "sensitive compartmented intelligence" must submit to lie detector tests if requested, and must also submit their writings to "prepublication censorship" for the rest of their lives. The net effect of these new Executive Branch policies and procedures has, as Arthur M. Schlesinger, Jr., concludes, recreated the "fortress of the Imperial Presidency, the secrecy system." Schlesinger adds:

The harm to national security through leaks is always exaggerated. We have had leaks from the start of the republic...No one has ever demonstrated that these leaks, or the publication of the Pentagon Papers either, harmed national security. No one can doubt that the disclosures benefitted the democratic process.<sup>58</sup>

The Smith/Reagan guidelines encountered surprisingly little opposition. A special committee of the American Bar Association praised Attorney General Smith's guidelines for their "'healthy degree of balance' between First Amendment rights and the demands of domestic security."<sup>59</sup>

With regard to wiretapping statutes, the Reagan Administration proposed few modifications. Reagan lobbied Congress for permission to institute so-called "roving wiretaps": allowing FBI agents to continue wiretapping (with a single court order) all of the telephones used by suspects

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<sup>58</sup>Schlesinger, The Cycles of American History, 298-300; Churchill and Vander Wall, The Cointelpro Papers, 27.

<sup>59</sup>Quoted in Kutler, The Wars of Watergate, 586.

who move around in order to evade detection. In 1981, Justice Department officials, claiming the "inherent power" of the President, petitioned the FISA Court for permission to re-institute "black bag jobs" as a standard investigative technique which could be utilized in "non-residential premises." In the Court's only publicly-assessable written decision, Presiding Judge George L. Hart turned down the Justice Department's specific application order, but agreed with the "inherent power" assertion. The effect of the decision was to place the authority for future surreptitious entries solely at the discretion of the Executive Branch.<sup>60</sup>

Stanley Kutler states: "It would have been naive to expect that Watergate-inspired reform legislation could end official abuses of power."<sup>61</sup> Maybe so. Yet Reagan and Smiths' dismantling of the Ford/Carter guidelines certainly opened the door for many of the same types of domestic intelligence abuses that Congress had spent the decade of the seventies debating and "correcting." The most flagrant Reagan-era abuses -- Iran-Contra and the FBI's COINTELPRO-style investigation and surveillance of "The Committee in Solidarity with the People of El Salvador" (CISPES) -- rivalled any of those perpetuated by Hoover, Mitchell, and Nixon. Several aspects of Iran-Contra were reminiscent of

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<sup>60</sup>Bamford, Puzzle Palace, 370-72. Bamford adds that "it would be difficult to conclude that it [the FISA Court] has become anything other than a rubber stamp."

<sup>61</sup>Kutler, The Wars of Watergate, 590.

Watergate. CIA Director William Casey's plan to use the profits from Iranian arms sales to create an "'off-the-shelf, self-sustaining, stand-alone' entity to conduct intelligence operations" -- completely outside of Congressional view -- was reminiscent of Nixon's "plumbers" operation. In addition, the National Security Council's covert operations in support of the Nicaraguan Contra Rebels, conducted under a "no log" procedure of paperless (primarily electronic) communications, involved "government within a government," which answered neither to Congress nor to the Judiciary.<sup>62</sup>

The FBI's CISPES investigation involved the widespread surveillance of constitutionally-protected political activity within the United States, and closely resembled several Hoover-era COINTELPRO programs. In 1983, as Americans began protesting the Reagan Administration's foreign policy in Central America, the FBI instituted a program aimed at the largest and most active protest group: CISPES. A March 30 memorandum from Headquarters to SACs in eleven field offices authorized physical surveillance and COINTELPRO-style intimidation techniques, ostensibly to uncover "'the involvement of individuals and the CISPES organization in international terrorism.'" By the time the Justice Department revealed the program in 1985, it involved fifty-two of the FBI's fifty-nine field offices, and resulted in the investigation of tens of thousands of Americans. The

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<sup>62</sup>Theoharis and Cox, The Boss, 434-35.

program featured some of the more effective COINTELPRO techniques of the past, including the use of informants as agents provocateurs, openly photographing demonstrations to intimidate participants, and recording the license plate numbers of everyone attending CISPES meetings and demonstrations, for the purpose of opening investigative dossiers on everyone involved. One confidential memorandum, acquired via the Freedom of Information Act in 1988, states that agents "'deemed it imperative....to formulate some plan of attack against CISPES and specifically against individuals....who defiantly display their contempt for the U.S. Government.'" Old fashioned patriotism was apparently a mandatory feature of the "Reagan Revolution."<sup>63</sup>

Other revelations of domestic intelligence abuse surfaced during the eighties and early nineties. New York City's "Joint Terrorism Task Force" (JTTF), cooperated closely with the FBI to re-name formerly "domestic subversive" individuals and groups as "terrorists." It also resurrected grand jury investigations of domestic dissent, and published a "terrorist network" listing. Churchill and Vander Wall assert that one 1985 occurrence which the JTTF categorized as a "terrorist incident" was the arrest of nine members of the progressive "May 19th" organization, for "trespassing" during a sit-in at the ticket office of South

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<sup>63</sup>Davis, Spying on America, 178-79; Churchill and Vander Wall, Agents of Repression, 373-76.

African Airways. In 1984, following the disbanding of a grand jury that had been investigating JTTF cases, several of the jurors asserted that "the JTTF tactics revealed at trial had constituted a 'clear violation of the civil rights and liberties of the accused,' and that the conduct of the 'counter-terrorists' themselves represented 'a far greater threat to freedom," than those of the groups under investigation.<sup>64</sup>

Other organizations targeted by local, state, and/or federal surveillance agencies during the eighties included the anti-nuclear movement and the Puerto Rican Independence Movement.<sup>65</sup> One of the most unusual examples of FBI tactics occurred as the result of country music singer Willie Nelson's appearance at a southern California benefit concert for imprisoned AIM leader Leonard Peltier in 1987. Following the appearance, FBI agent Richard T. Bretzing denounced Nelson publicly and sent several lower-ranking agents to local radio stations, asking the owners to stop playing Nelson's music. Shortly thereafter, a "random" IRS audit found that Nelson owed the government millions of dollars in back-taxes.<sup>66</sup>

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<sup>64</sup>Quoted in Churchill and Vander Wall, The Cointelpro Papers, 306-11.

<sup>65</sup>Ibid.; Donner, Protectors of Privilege, 358-60.

<sup>66</sup>Churchill and Vander Wall, Agents of Repression, 379.

The Presidency of George Bush coincided with the revelations of Iran-Contra, and the FBI's CISPES program. Neither his Administration nor Congress, however, supported substantive reforms. In fact, during 1991's "Gulf War," the FBI conducted intensive investigations of 200 Arab American leaders. Athan Theoharis states that these investigations were "ostensibly [intended] to obtain information of (1) violations of the civil rights of Arab citizens, and (2) planned "terrorist" activities."<sup>67</sup> Throughout the war, media images of angry, fist-waving Arabs in the streets of Baghdad reinforced American fears concerning "terrorism."

The movement to reform the intelligence community did enjoy some partial victories during the eighties. The decade opened with guilty verdicts for high-ranking FBI officials Mark Felt and Edward Miller, in a counter-suit filed by members of the Weathermen, which alleged that the FBI had conspired to "'injure and oppress citizens of the United States.'" For the first time in U.S. history FBI officials had been convicted of abridging the constitutional rights of domestic dissenters. However, in one of his first official acts as President, Reagan granted full pardons to the officials.<sup>68</sup> In 1984, the House Subcommittee on Constitutional Rights released a report, four years in the

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<sup>67</sup>Theoharis, From the Secret Files of J. Edgar Hoover, 360.

<sup>68</sup>Ibid., 315.

making, that documented the FBI's improper use of informants during the sixties and early seventies. The report acknowledged that many informants, considerably more than the FBI had admitted, assumed agent provocateur roles within targeted organizations. "Because agents create crime, rather than merely detect it" the report stated, "they hold the power to create the appearance of guilt." Yet the Subcommittee stopped short of recommending significant Bureau reforms, once again demonstrating Congress' traditional "to reveal is to reform" attitude toward intelligence agency abuse.<sup>69</sup>

Several landmark cases challenged the power of the FBI and local "red squads" to monitor domestic dissent. On December 30, 1985, Judge Susan Getzendanner ruled in favor of the plaintiffs in Alliance to End Repression v. City of Chicago, a high-profile "Red Squad" case that had been in the courts for eleven years. She found that the mere collection of "subversive files" on citizens violates First Amendment rights and creates "standing" for legal complaints, whether or not the aggrieved party can prove linkage between the surveillance and actual harm committed by law enforcement officials. The Court also found that "organizational plaintiffs" have justiciability, on the grounds that police

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<sup>69</sup>Ibid., 376-78.

agencies publicly disseminated derogatory information concerning them.<sup>70</sup>

Also in 1985, the lengthy Socialist Workers Party v. Attorney General case was finally decided by U.S. District Judge Thomas P. Greisa, who ruled that the FBI had violated the constitutional rights of SWP members over an extended period by physical and warrantless electronic surveillance, as well as "black bag jobs" and COINTELPRO "disruptions" of the Party's political operations. A total of \$246,000 in damages was awarded. Two years later, Judge Greisa barred the FBI from utilizing the estimated one million pages of SWP files for any reason whatsoever in the future, without his personal consent.<sup>71</sup>

Another long-running "red squad" suit, Benkert et al. v. Michigan State Police, et al., was decided in 1990 in favor of the plaintiffs. Judge Lucile Watts awarded \$750,000, earmarked for the exclusive use of notifying aggrieved persons that the Detroit and/or Michigan State Red Squads had targeted them for surveillance during the previous five decades. Her decision also allowed aggrieved parties access

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<sup>70</sup>561 F. Supp. 537 (N.D. Ill. 1982, 1985); see Donner, Protectors of Privilege, 353-55. In light of the "White Panther Party kidnapping plot" story leaked to the national media by the Nixon Administration during the spring of 1971 [see chapter Five] -- which utilized an anonymous FBI COINTELPRO letter as its source -- the AER v. Chicago case could be used as a precedent in another White Panther damage suit against the Government.

<sup>71</sup>458 F. Supp. 895 (S.D.N.Y. 1978+); see Churchill and Vander Wall, The Cointelpro Papers, 62.

to information contained in their files. These three cases made it clear that the Judiciary still could play an important role in preventing future domestic intelligence abuses.

Nearly fifteen years have passed since the previous reform era came to a close. Throughout the long period of public lethargy characterizing the Reagan/Bush years, there have been signs that domestic intelligence abuses are again on the rise. Just as the situation in the mid-sixties (Black crisis) was but a prelude to the dramatic expansion of domestic surveillance beginning in 1967, there are indications that the nation is currently poised for a new phase of abuse. Responding to two recent "terrorist bombings" -- the New York World Trade Center on February 26, 1993, and the Federal Building in Oklahoma City on April 19, 1995 -- the Clinton Administration has proposed legislation which would greatly expand the domestic surveillance capabilities of the FBI and other surveillance agencies; ostensibly this is so that they may better respond to the "terrorist threat." Clinton also proposed an "Omnibus Counterterrorism" bill in early 1995. It remained bogged down in Congress until the Oklahoma City bombing. Recent amendments to the bill would institute sweeping revisions of the guidelines governing the intelligence bureaucracy's ability to monitor and infiltrate domestic groups. As a whole, the proposed Clinton "anti-terrorism" package

challenges many of the constitutional principles enumerated in the Keith case and invites the same types of abuses which occurred during the late sixties and early seventies.

The Clinton Administration's first successful anti-terrorism legislation was the highly-controversial "Digital Telephony" bill, which became law during the fall of 1994.<sup>72</sup> The initiative was originally proposed by President Bush during the spring of 1992, but did not receive substantial Congressional support until after the World Trade Center bombing.<sup>73</sup> Officially known as "Public Law 103-414, The Communications Assistance for Law Enforcement Act," this legislation would allow the FBI and NSA instant access to the nation's digital communications technologies for wiretaps. Since proposing the bill in early 1992, the FBI has maintained that the newer, fiber optics-based digital signals are impossible to tap with conventional methods. Therefore, the initiative requires that telephone companies install highly-sophisticated digital electronic equipment and software, at the taxpayer's expense, so that the Bureau's

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<sup>72</sup>The initiative remains unfunded. As of this writing, however, Clinton's recently-introduced "Omnibus Counterterrorism Act" does contain full funding for it. See Austin American Statesman, June 8, 1995, A-11.

<sup>73</sup>A coalition of telecommunications industry officials and civil libertarian groups waged an effective campaign against the bill: while civil libertarians objected to the dangers of privacy invasion, the telecommunications industry opposed the FBI's demand that the companies pass on to subscribers the costs of installing this new equipment.

computers can interface with their telecommunication networks.<sup>74</sup>

The precise threat, if any, which Digital Telephony poses to American citizens' privacy rights is much debated. FBI and NSA officials assert that without this new equipment, their agents will soon lose access to the private communications of "drug dealers and terrorists." Logistically, the system would also offer much easier access to wiretaps, because physically locating a target's telephone line would no longer be necessary; the technology should allow the FBI to access any of the nation's 140 million telephone lines from a single super-computer, in a matter of seconds. One example of how this process could potentially save thousands of man-hours is during "roving wiretaps." With the new technology, the Bureau could immediately access a target's conversations wherever he or she went, making evasion much more difficult.

Those opposing the plan have presented a variety of complaints, as well as some frightening scenarios. Some claim the FBI and NSA already possess the technological know-how to access easily digital communications, but now want instantaneous access to every telephone line in the U.S.<sup>75</sup> Others warn that once this initiative has been implemented,

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<sup>74</sup>New York Times, April 19, 1992, E-2 and April 30, 1992, D-1; Wall Street Journal, May 12, 1992, B-11; Washington Post, March 12, 1994, C-1.

<sup>75</sup>New York Times, April 19, 1992, E-2.

the intelligence bureaucracy will have access to much more than personal conversations:

'Transactional data will reveal far more about individuals than it has in the past...In fact, in some cases it may be equivalent to content information. This transactional data certainly could make it possible to build a detailed model of an individual's behavior and movements.' The result....could be Orwellian in its implications.<sup>76</sup>

As increasing numbers of Americans utilize telephone lines for access to the Internet, as well as a myriad of other purposes (shopping, bill-paying, and research, for example), the potential dangers posed by government access will dramatically increase. Still others complain that technological innovation in the telecommunications industry, the key to lowering communications costs, may be thwarted by the initiative.<sup>77</sup>

It is too early to predict the outcome of "Digital Telephony." The rapid advancement of telecommunications technology may make such a centralized and sophisticated system inevitable. In addition, the opponents of Digital Telephony have not yet offered a workable alternative which would allow law enforcement legitimate access to the conversations of organized crime members and terror bombers (among others), at least some of whom are now utilizing the latest communications technology, such as encryption, to

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<sup>76</sup>Quoted in Washington Post, March 12, 1994, C-1.

<sup>77</sup>New York Times, April 30, 1992, D-1.

avoid detection. The potential for abuse with Digital Telephony appears great. Richard Morgan discusses a strong "bureaucratic impulse" within the FBI and other intelligence agencies, stemming from "the temptation of technology itself." He adds:

If ways exist for doing things, the nature of bureaucratized praetorianism is to make use of them...As new capabilities are added to what Christopher Pyle calls the 'intelligence repertoire,' the temptation to use the new technology may be very difficult to control.<sup>78</sup>

Although President Clinton, Attorney General Janet Reno, and FBI Director Louis Freeh have all given assurances that court orders will be sought prior to the institution of wiretaps under Digital Telephony, the opportunity and temptation for evading both Judicial and Legislative oversight might be too much for some over-zealous agents to resist. If the FBI and NSA, with or without White House approval, revert to wiretapping at will Americans without court orders, and hide the practice by not revealing the surveillance in court, what "barriers" are in place to prevent them from succeeding?

During the decade and a half separating the passage of the FISA act and the advent of Digital Telephony, the wiretapping process itself was something of a barrier to abuse; the necessity of going on-site, installing a court-

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<sup>78</sup>Morgan, Domestic Intelligence, 132. Frank Donner's Protectors of Privilege [page 369] asserts that "newer, less traceable surveillance technology...has made the maintenance and dissemination of files easier to conceal."

approved wiretap, and completing all of the required paperwork may have acted as a deterrent.<sup>79</sup> Under Digital Telephony, the FBI would only have to flip a switch to tap virtually any telephone. There is no small irony in the fact that the Clinton Administration is essentially asking the American people to believe that the Executive Branch's integrity alone will prevent domestic surveillance abuses: this was precisely the argument the Nixon Administration made in the Mitchell Doctrine.

Since the turn of the century, major periods of law enforcement and domestic surveillance abuse have been preceded by cataclysmic events, which have shocked the American public. The "Red Scare" of 1919 was precipitated by several mail bombs, allegedly sent by Communist and "anarchist" groups, during the post-war atmosphere of fear regarding Bolshevism.<sup>80</sup> The McCarthy era featured the infamous trial of Judith and Ethel Rosenberg, which also took place during a post-war atmosphere of anti-Communist

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<sup>79</sup>New York Times, April 19, 1992, E-2; Anthony Ramirez's article addresses the concerns of several editors of privacy-related journals, who claim that the "relatively small" number of wiretaps under the current system "reflects the difficulty of obtaining judicial permission and installing the devices." Ramirez adds that "wiretaps are physically onerous to install."

<sup>80</sup>David M. Kennedy, Over Here: The First World War and American Society, (New York: Oxford University Press, 1980), 288-92.

hysteria.<sup>81</sup> During the sixties, the urban riots, especially Detroit in 1967, and violent confrontations such as the 1968 Democratic National Convention, provided the justification for the abuses of the late sixties and early seventies. Each of these incidents had the effect of galvanizing the forces of authority in the nation for a prompt "response," characterized by overreaction and massive suppression of civil rights.

The Oklahoma City bombing of April 19, 1995, coming just two years after the World Trade Center bombing, may be the catalyst for a new cycle of domestic surveillance abuses. One indication of the incredible impact this tragedy has had on the government can be demonstrated by comparing the fate of President Clinton's anti-terrorism legislation in February and March of 1995, just weeks before the explosion, with the situation following it. On February 9 the Administration introduced Senate Bill No. 390, "The Omnibus Counterterrorism Act of 1995," a comprehensive package of anti-crime measures, which included expanded wiretapping powers for the FBI. It arrived on Capitol Hill at the onset of the first "Hundred Days" of the new Republican-dominated 104th Congress, as the G.O.P. focused on implementing its conservative social agenda, dubbed the "Contract With America." The new Republican majorities in both houses of Congress, the first

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<sup>81</sup>See Ronald Radosh and Joyce Milton, The Rosenberg File: A Search for the Truth, (New York: Vintage Books, 1984), 5-6.

since the Eisenhower Presidency, displayed a fierce determination to pursue deficit reduction and tax cuts simultaneously, which did not portend well for the Administration's anti-terrorism bill. The outlook was also grim for the Digital Telephony Act, which had become law the previous fall but remained unfunded. In early March, Attorney General Reno requested partial funding for both measures during her testimony before the Senate Appropriations Committee. The atmosphere was not encouraging: the Justice Department's request for a 20 percent budget increase received a very cool reception from G.O.P. Committee members, who stressed their Party's commitment to across-the-board cuts. In sum, the Clinton antiterrorism legislation was going nowhere fast.<sup>82</sup>

The Oklahoma City bombing changed everything. Appearing before the same committee on May 11th, three weeks after the explosion, Reno proposed expensive FBI and Justice Department initiatives. She made frequent references to the threat of domestic and international "terrorism":

These resources are needed by law enforcement to combat the threat of terrorism, both now and in the future...The tragic events of April 19 should remind us that we must never forget that terrorism can strike any where [sic] and at any time. At the same time, we must do all in our power to prevent such an event from happening again...there are steps that can be taken, and must be taken, to provide the Department with the personnel and

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<sup>82</sup>Washington Telecom News, March 20, 1995, No. 11, vol. 3.

equipment needed to detect future terrorist events when they are in the planning stage.

Reno now requested \$100 million dollars for Digital Telephony's first year alone, adding: "We plan to ask for more funding in 1996." Some of the additional items on her "wish list" included a totally-new "Counterterrorism Center," five million dollars for "rewards for information related to terrorism," and \$71 million dollars for 570 new agents.<sup>83</sup>

The Oklahoma City bombing also gave the Administration's anti-terrorism bill a new life. In his May 4 letter to Congress, Clinton outlined a number of amendments to his earlier bill, and urged Congress to give the package its "prompt and favorable consideration."<sup>84</sup> The principal components of the amended legislation are as follows: (1) full funding for Digital Telephony; (2) a revision of the

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<sup>83</sup>Federal Document Clearing House, "Testimony, May 11, 1995, of Attorney General Janet Reno, Before the U.S. Senate Appropriations Committee."

<sup>84</sup>The amendments introduced on May 4, known as "The Antiterrorism Amendments Act of 1995," were immediately merged with the earlier package (S. 390), forming the comprehensive "Omnibus Counterterrorism Act of 1995," (S. 761). Clinton's primary Democratic supporters were Joseph Lieberman, Tom Dashle, and Joseph Biden. Soon after the Oklahoma City bombing, Senate Republicans (led by Bob Dole and Orin Hatch) introduced S. 735, "The Counterterrorism Prevention Act of 1995." In late May, a third bill was introduced in the House by Rep. Henry Hyde: the "Comprehensive Antiterrorism Act of 1995." How this legislation will ultimately fare is unclear at this writing. However, there are powerful indications that Clinton's bill will soon receive Congressional approval. The "Omnibus Counterterrorism Act of 1995" passed in the Senate by a vote of 91-8 on June 7, 1995. At this writing, the measure is pending in the House.

current guidelines governing "roving wiretaps," which would allow the FBI increased access to them in "national security" cases, as well as the expanded use of "pen registers" and "tap and trace" devices; (3) an amendment to the current wiretapping statute [Title III], adding "potential terrorist actions" as one of the categories under which the FBI can institute "emergency" surveillance without court order for forty-eight hours; (4) an additional revision to Title III, allowing the FBI to use in court any evidence obtained in violation of the privacy protections of the law, unless it can be proven that the government has acted in "bad faith"; (5) authorization for the use of warrantless "national security letters," by FBI agents to "obtain records critical to terrorism investigations from hotels, motels, common carriers, storage facilities, and vehicle rental facilities"; (6) a requirement that makers of "explosive raw materials" include "taggants" in their products, which would permit tracing by Federal agencies; (7) an additional revision of current domestic surveillance guidelines, which would allow the U.S. Army to assist the FBI in investigating "cases involving chemical and biological weapons" within the U.S.; (8) stiffened sentences for convicted "terrorists," as well as minimum ten-year sentences for anyone convicted of assisting them; and (9) expanded authority for "law enforcement agencies to gain access to financial and credit reports in antiterrorism cases." The only component of the

package which did not receive Senate approval was the proposal to allow warrantless emergency wiretaps in domestic terrorism cases. The Senate approved the bill by a 91-8 margin on June 7, reminding some of the frenzied anti-crime atmosphere which had characterized Congress prior to the passage of the Omnibus Crime Acts in 1968 and 1970.<sup>85</sup>

"The history of American liberty," asserted Senator Sam Ervin, "has been a continuing struggle between the desire for security and the human striving for personal freedom."<sup>86</sup> Recent events vividly demonstrate that America is still struggling to define the proper "balance" between constitutional rights and "national security" priorities. This process, known as "balance theory," has been debated with greater urgency since the passage of the Omnibus Act in 1968. Title III was itself an attempt to "balance" the desire of law enforcement for access to the "tool" of wiretapping, with the Warren Court's 1967 Katz and Berger decisions, which made electronic surveillance subject to the strictest requirements of the Fourth Amendment. Edith Lapidus suggests that at any given point in time, public opinion can be pinpointed on a rights-security scale, and that "The balance between competing values of privacy and law

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<sup>85</sup>U.S. Newswire, May 4, 1995, "Letter from the President to Congress on the Antiterrorism Amendments Act of 1995," White House Press Release; Washington Post, May 27, 1995, A-11; Austin American Statesman, June 8, 1995, A-11.

<sup>86</sup>Lapidus, Eavesdropping on Trial, i.

enforcement is constantly shifting and requires periodic reexamination."<sup>87</sup>

An assessment of the current state of American public opinion on the "rights-security scale" is appropriate. The level of public concern with domestic security and its related issues of crime, drugs, and "terrorism" is still high. Clinton's 1994 anti-crime package, the largest in U.S. history, reflected the public's fears concerning violence and crime on the streets of America, as well as his "New Democrat" image as a tough crime-fighter. Measures such as the "three strikes and you're out" bill, whereby criminals convicted of three violent felonies will receive life sentences without the possibility of parole, have become a rallying point for a frightened public and reelection-minded politicians. The majority's priorities were clearly spelled out in the crime bill: a dramatic expansion in funding for additional police officers and prisons, in an era of budget cuts for nearly all other social programs. The legislation demonstrates that both Congress and the President are dedicated to capitalizing on what remains a potent political issue.<sup>88</sup> The 1996 presidential race, already in its initial stages, displays signs that it will focus on such emotionally-charged social issues as the "war on drugs," in

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<sup>87</sup>Ibid., 205.

<sup>88</sup>Democrats work to dispel the impression that their Party is "soft on crime."

addition to a new "war on Hollywood," as conservatives and liberals alike accuse the entertainment industry of glorifying sex and violence.<sup>89</sup> Violent crime coverage, from an increasingly-competitive local and national media, has made Americans more fearful than ever about the safety of their neighborhoods. Private security services and "victim's rights" groups have proliferated. The Oklahoma City tragedy has also expanded Congress' interest in the potential hazards of the Internet. Some have suggested that because information on topics like "how to construct bombs" is so readily available to anyone, child or adult, who merely cruises "cyberspace," some form of censorship may be needed.

America's heightened security concerns are also related to the unsettled status of the post-Cold War world. Economic retrenchment at home also has induced many to desire U.S. disengagement abroad. Even so, the supposed "geographical isolation" of the United States is definitely a thing of the past. The media portrayed the 1993 World Trade Center bombing as irrefutable "proof" that "terrorism has arrived in America." Time covers the so-called "terrorist threat" with great gusto.<sup>90</sup> Poison gas attacks in Japanese subways and

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<sup>89</sup>"The Cronkite Report," a documentary airing on the Discovery Channel on June 20, 1995, addressed the failed "war on drugs" that by now is already ten years old.

<sup>90</sup>The August 29, 1994, cover of Time shows a masked nuclear terrorist: "Nuclear Terror For Sale: Once we feared thugs like Carlos the Jackal. Now no one knows who might buy smuggled plutonium -- and hold the world hostage."

ebola virus "outbreaks" in Africa receive top billing on CNN for days running.

The so-called "militia movement" has become an additional factor contributing to America's security concerns. The Oklahoma City bombing has been linked to a growing ultra-right movement -- a "homegrown" variety of terrorism, which has shocked many. The Clinton Administration's first significant clash with these elements occurred during the spring of 1993, when a stand-off between the FBI and the so-called "Branch Davidians" in Waco, Texas, resulted in the deaths of eighty-five cult members on April 19. Since then, there has been a proliferation of news reports regarding groups such as the "Michigan Militia," who have allegedly armed themselves in defiance of the authority of the U.S. Government. Recent hearings by the Senate Judiciary Committee, chaired by Senator Arlen Specter, have exposed the paranoid psychology characterizing at least some of the militia leaders.<sup>91</sup> In addition, Clinton's proposed anti-terrorism legislation is clearly aimed at allowing the FBI and other government agencies to penetrate and expose the militia movement's violent intentions.

Although the nation's concerns with domestic security are certainly strong, the issue of the citizen's right to privacy is certainly not dead. In fact, one of the militia movement's primary arguments is that government intrusion

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<sup>91</sup>New York Times, April 24, 1995, A-12.

into their lives has reached an unacceptable level. Many Americans are uncomfortable about the proliferation of surveillance cameras and microphones into such "everyday" places as automatic teller machines, fast-food restaurants, public elevators, convenience stores, and even the workplace. The so-called "privacy lobby," a loose confederation of groups including the ACLU, Libertarian Party, and the Center For Democracy and Technology (among many others), has proven to be an effective force in national policy debate. A recent alliance between this lobby and the telecommunications industry effectively delayed the passage of the Digital Telephony bill for more than two years. The media has also played a major role in keeping the issue of privacy alive. Television documentaries and print stories dealing with the subject have appeared with regularity.

There is no escaping the conclusion, however, that the American public's interest in security far outweighs its desire for privacy; in Lapidus's terms, the "competing values of privacy and law enforcement" are leaning strongly toward the latter. The average American appears willing to give up a significant amount of his or her constitutional rights in the interest of heightened security.

On a psychological level, it is quite easy to understand this "trade-off." Fears about crime and security affect people in the most primal of ways -- appealing to their most basic survival instincts. In contrast, a citizen's interest

in privacy involves "higher-ordered" thinking, and might be directly related to that person's awareness of Constitutional issues. People respond much more powerfully to fears about security than they do to perceived privacy invasions. The fact that the local and national media devote much more attention to violent crime than they do to surveillance and privacy issues reflects these trends and contributes to a further expansion of them. In the end, it is simply no contest: the debate between rights and security is, for now anyway, decided in favor of security.

This trend toward security over privacy rights in general is also reflected by the degree to which opinions have changed concerning wiretapping and "national security" issues since the Keith decision of June, 1972. A comparison of President Clinton's proposed "Omnibus Counterterrorism Act of 1995" with the positions taken by the Nixon Administration in its Keith briefs is revealing. Clinton's bill contains the greatest number of revisions in the Title III wiretapping statute since the Foreign Intelligence Surveillance Act of 1978. Some are shocking in their implications. For example, the proposal to prevent the exclusion of evidence improperly obtained by law enforcement officials, unless the aggrieved party can prove the officers acted in "bad faith," represents a significant shift away from the original intent of the statute -- and challenges much of the case-law concerning the exclusionary rule.

The recent debate surrounding Clinton's counterterrorism bill resembles the Keith case in several respects. For Judge Keith, as well as for Judge Ferguson, the central issue involved in the Mitchell Doctrine was the government's attempt to bypass the Fourth Amendment in the interest of "national security." Keith cited the precedent-setting cases of Weeks, Mapp, Silverthorn, and Katz, which firmly established that the Judiciary's primary method of ensuring that law enforcement operates within the Fourth Amendment's boundaries is the power to exclude improperly obtained evidence. Nixon attempted to bypass the warrant procedure altogether -- to take the Judiciary completely out of the "national security" wiretapping equation. While Clinton's bill does not challenge the warrant provision, it would nonetheless leave the Fourth Amendment on shaky ground, by limiting the involvement of federal judges in wiretapping cases simply to approving or disapproving warrant applications. Under the Clinton plan, once the government obtains a warrant, improper conduct and procedures utilized by its officials, no matter how heinous, could in no way damage the admissibility of wiretap evidence, unless the aggrieved party could somehow prove "bad faith" -- an undertaking which has been described as "usually impossible" to accomplish.<sup>92</sup> Suppression of evidence due to improper

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<sup>92</sup>Federal Document Clearing House, "Testimony, May 24, 1995, of James X. Dempsey, Deputy Director, Center for  
(continued...)

law enforcement procedures (e.g., illegal "search and seizure") remains one of the Judiciary's only tools to "police the police" in their wiretapping operations.<sup>93</sup> The Clinton provision demonstrates the Executive Branch's continuing assault on the civil and constitutional rights-focused Warren Court rulings.

An additional aspect of the Clinton proposal which resembles the Nixon Administration's Keith position is its focus on the need for "investigative" surveillance concerning domestic as well as foreign groups, so that the government can both prevent crimes before they are committed and investigate them more effectively after they occur.<sup>94</sup> The "threshold" for initiating investigations currently being proposed by the Clinton Administration -- "conspiratorial activities characteristic of domestic terrorism" -- is

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<sup>92</sup>(...continued)

National Security Studies, Before the Senate Judiciary Committee's Counterterrorism Subcommittee." The process of proving the Government's "bad faith" in wiretapping cases is akin to the standard established in Laird v. Tatum, whereby persons who have been monitored by the Government cannot sue for damages unless they can prove that the surveillance has in some way done them demonstrable injury, above and beyond mere "chilling effect." Such standards make it difficult, if not impossible, for aggrieved parties to obtain justice. They also eliminate any deterrent which might otherwise prevent law enforcement officials from acting improperly.

<sup>93</sup>This fact is often ignored in the current atmosphere of "law and order" and "victim's rights."

<sup>94</sup>Frank Donner's Age of Surveillance [pp. 17-23 and 462] asserts that this crime "prevention" ruse has been advanced by supporters of domestic surveillance since the Haymarket Riots of 1886.

dangerously vague, as was the "national security" passage of Title III [section 2511(3)]. In fact, one of the principal arguments presented by the Nixon Administration in Keith was that the "probable cause" standard in criminal cases should not be applied to "national security" investigations. The brief added:

National security surveillances are not designed to obtain facts needed in criminal investigations, but to obtain intelligence information...In [these] cases, the justification for surveillance ordinarily cannot be simply stated or easily demonstrated; generally, it involves a large number of detailed and complicated facts whose interrelation may not be obvious to one who does not have extensive background information, and the drawing of subtle inferences.<sup>95</sup>

Just as the Mitchell Doctrine posed a significant threat to American constitutional liberties, the Clinton guidelines, in the hands of an over-zealous Attorney General and/or FBI Director, would allow the government to cast the widest possible net in its domestic security investigations, by advancing an expansive definition of "domestic terrorism." So far, no one in the Executive Branch has offered anything approaching a precise definition of "terrorist."<sup>96</sup>

Congress is currently giving serious consideration to revising the 1983 Reagan/Smith guidelines pertaining to the opening of domestic intelligence investigations. Senate Judiciary Committee Chairman Arlen Specter has expressed

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<sup>95</sup>Keith Case, Brief for the Government, September, 1971, 25, SCR/B.

<sup>96</sup>Quoted in Washington Post, May 27, 1995, A-11.

support for a revision which would allow the FBI to infiltrate domestic groups such as the "Michigan Militia," based on nothing more than their publicly stated support for incidents like the Oklahoma City bombing. Numerous FBI officials and intelligence "experts" provided testimony before Specter's committee to the effect that current guidelines are "too stringent" and have effectively "tied the hands of law enforcement." One agent complained about the large amount of written documentation that is required to obtain a FISA wiretap. The overall impression given by the law enforcement side of the debate is that the current guidelines must be "liberalized" if the FBI is going to effectively combat "terrorism."<sup>97</sup>

Speaking for the other side of the debate was James X. Dempsey of the Center for National Security Studies. In testimony given on May 24, he stated:

The Smith guidelines make it absolutely clear that the FBI does not have to wait for a crime to be committed before it can investigate a terrorist group. The guidelines expressly state: 'In its efforts to anticipate or prevent crimes, the FBI must at times initiate investigations in advance of criminal conduct.' The threshold for opening a full investigation is low...[and] the FBI is authorized to open a preliminary inquiry on an even lower threshold.

Dempsey reminded the Committee that one of the "main purposes" of Smith's revision of the Levi guidelines in 1983

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<sup>97</sup>U.S. Senate Judiciary Committee, Subcommittee on Intelligence, May 5, 1995, and May 24, 1995 [obtained from CSPAN].

was to allow for the opening of preliminary investigations based on "advocacy of violence." Dempsey added that "many of the same criticisms of the current [Smith] guidelines are really the same criticisms lodged against the Levi guidelines, which the Smith guidelines were intended to rectify." He supported his position with statistical data: "over the years since the Smith guidelines were adopted, nearly two-thirds of....[the FBI's] full investigations were opened before a crime had been committed." A majority of the Senators on the Committee were clearly not in sympathy with Dempsey's position.<sup>98</sup>

There are several other similarities between Clinton's proposed anti-terrorism legislation and Nixon's own position in Keith. Like Nixon, Clinton equates the threat posed by domestic "terrorists" with that of "foreign powers" and is requesting authority to transfer several of the Executive Branch's expansive powers in "foreign" and "national security" areas to strictly domestic situations, something the Supreme Court may be loathe to support. Clinton also employs the tactic, frequently used by the Nixon Administration, of seizing upon public outrage and fears concerning cataclysmic events (e.g., bombings), in order to acquire additional investigative powers. What is more, the Clinton Administration's attempt to bypass the exclusionary rule in wiretapping cases is tantamount to a "raid" by the

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<sup>98</sup>Ibid.

Executive Branch into a domain that traditionally (and correctly) has been reserved to the Judiciary; the Keith case represented a similar "raid."<sup>99</sup>

Considered as a whole, the current positions of both the Legislative and Executive Branches indicate that the "intelligence-evidence debate" concerning domestic surveillance has now been decided in favor of allowing the government to wiretap and monitor domestic groups, based on little more than suspicion. Where the Judiciary presently stands on this issue is uncertain.<sup>100</sup> These were precisely the circumstances sought by Hoover, Nixon, and Mitchell prior to and during the Keith case. An informed populace that takes an active interest in the issues of privacy and domestic intelligence may be the only thing that can prevent a repeat of Philip Kurland's dictum regarding the Watergate era: "It seems true once again that we learn nothing from history except that we learn nothing from history."<sup>101</sup>

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<sup>99</sup>Dempsey states that the "roving wiretap," provision in Clinton's bill offends the "particularity" standards of the Katz and Berger decisions, upon which Title III was based. He adds that the current narrow standards covering roving wiretaps have been "carefully scrutinized by the courts" (citing U.S. v. Bianco, 998 F. 2d 1112, 1st Cir. 1993). Finally, he warns that "Any loosening of those standards could open the door to the type of abuse Congress sought to avoid in 1986 [when roving wiretaps were first enacted] and could render the roving tap authority unconstitutional." See Dempsey Testimony.

<sup>100</sup>The Rehnquist Court is currently split into ultra-conservative and a moderate wings, each of roughly equal size.

<sup>101</sup>Kurland, Watergate and the Constitution, 171.

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## Appendix

<del>TRANS LOVE ENERGIES UNLIMITED COOP.</del>	(1389)
4863 John Lodge	831-6840
4642 Second Ave.	833-3166
499 West Forest -1967	
1510 Hill, Ann Arbor	1-313-769-2017
4-1-15, 1967, Fifth Estate art.	in file "DETROIT ARTISTS
FBRM "TRANS LOVE ENERGIES COOP."	

The above phone number is reg. to: ARTISTS WORKSHOP,  
4863 John Lodge.

The above will sponsor TRANS LOVE WEEKEND including a  
huge celebration on Belle Isle on Sunday - April 28-30  
1967, On April 30, 1967. See file #1389 for DB write up.

(Figure A-1)

Detroit Police Department, Special Investigation Bureau (SIB)  
Master Index Card for Trans-Love Energies

Source: John and Leni Sinclair Red Squad Files.

SINCLAIR, JOHN ALEXANDER

(2166)

4825 John C. Lodge

831-2594

Card #2

9-16-65, Det. News art in file "BOND INCREASED FOR STUDENT IN DOPE RAID." Re; subject, who was ordered bound over for trial on charges of both sale and possession of narcotics in the latest case. No trial date was set. The bail bond was jumped fivefold, from \$1,000 to \$5,000.

2-8-66, Det. News art. in file "WAYNE STUDENT PLEADS GUILTY TO DRUG CHARGE." Re; Subject, who currently resides at 1116 W. Hancock will be sentenced 2-24-66. The maximum penalty is 10 years in prison. Subj. one of 8 persons arr. 8-16-65, in a raid on an apartment on John Lodge which police described as a rendezvous for musicians artists and writers as well as Wayne students. He was then on probation for possession of marijuana.

8-16-65, Subj. arrested at 11:00 P.M. at 4825 John C. Lodge, charged with VSNL (SALE AND Possession of Marijuana. Subject previously for similar charge and is currently on probation.

Claims he is a graduate from the Univ. of Mich. and is currently attending Wayne State Univ. working on his masters degree.

This location is but a few door away from the headquarter of the Detroit Comm. to End the War in Vietnam, where a meeting was in progress. The arresting officers had to summon aid in making this arrest at the group from the Peace Center attempted to obstruct police in the performance of their duty. See file for list of persons investigated and released.

3-18-65, Free Press art in file "WOULD BE SCHOOL TEACHER DEFENDS MARIJUANA HABIT." Re; subject.  
See file for interrogation sheet on subject.

(Figure A-2)

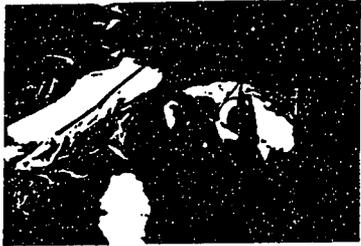
Detroit Police Department, Special Investigation Bureau (SIB)  
Master Index Cards for John Sinclair

Source: John and Leni Sinclair Red Squad Files.

<p>White Panther Party Minister of Education-MPP Rainbow Peoples Party Artist Work Shop</p>		<p>Subject is the WIFE of JOHN SINCLAIR (MPP)</p>	
<p>150 Hill St., Ann Arbor, Mich. 48106 S. 524 574 081177</p>		<p>Code 75-76 119-8101/72 Code 75-76</p>	
<p>9-29-69</p>	<p>75</p>	<p>1-14</p>	<p>Wife of John Sinclair - name mentioned on large petition to free John Sinclair. Detroit FREE PRESS, Pg. 1-3, daughter born to the Sinclairs and named Celia Sanchez Mao. Above attended a dance at Eastern Michigan University. Detroit FREE PRESS, Pg. 13-4, "Dr. Leary Comes to Town."</p>
<p>1-25-70</p>	<p>75</p>	<p>28</p>	
<p>3-25-70</p>	<p>75</p>	<p>76</p>	
<p>1-11-73</p>	<p>75</p>	<p>12</p>	
<p>DO 316-8-111</p>			

(Figure A-3)  
Michigan State Police, Security Investigation Squad (SIS)  
Master Index Card for Leni Sinclair

Source: John and Leni Sinclair Red Squad Files.

LAST NAME		FIRST	MIDDLE	DETROIT POLICE DEPARTMENT						
SINCLAIR Jr.,		John	Alexander	Criminal Information Bureau 9.2						
ALIAS										
"Coltrane"										
ADDRESS										
4863 John C. Lodge - Det. 1310 N.										
TELEPHONE				1510 Hill STREET ANN ARBOR						
AUTOMOBILE				761-1709 LICENSE NO.						
FAMILY				Wife- Magadelene AKA Leni						
Born: Flint, Michigan				BIRTH DATE	COLOR	HEIGHT	WEIGHT	HAIR	EYES	
				10-2-41	W/M	6'4"	210	Blk	Brn	
				INFORMATION SUBMITTED BY					DATE	
				[REDACTED]					2-5-69	
ASSOCIATES				[REDACTED]			CIB NO.			
				[REDACTED]			OTHER NO. (OFFICE AGENCY)			
				[REDACTED]			MSB [REDACTED]			
				JFC Mich O/L S-524-429-044-760						
				LOCALITIES FREQUENTED						
MO SPECIALTY				BUSINESS OR OCCUPATION						
				Artists Chairman WPP						
CRIMINAL HISTORY										
REMARKS:										
				8-16-65 Above was arrested for possession of Marijuana						
				1-30-69 Info. rec'd that prior to 1-21-69, TRANS-LOVE ENERGIES distributed a flyer to various news agencies announcing SINCLAIR's trial before Judge Farrell Roberts, Oakland County Circuit Court, Pontiac, Mich. Subject had been arrested by Oakland County Sheriff Department last summer for "Assaulting a Police Officer". SEE WHITE PANTHERS FILE						
				5-1-69 Took part in "Free Huey Newton Rally at Detroit Federal Bldg.						

(Figure A-4)

Detroit Police Department, Special Investigation Bureau (SIB)  
Intelligence Exchange Card for John Sinclair

Source: John and Leni Sinclair Red Squad Files.

#2166

JOHN ALEXANDER SINCLAIR  
4863 John Lodge  
Detroit Michigan

Male white 25 years

1-24-67 Arrested for Violation State  
Narcotics Law and possession of same  
in the LSD raids vicinity of Wayne  
State University



#2166

MAGDLEN SINCLAIR  
white female 26 years  
4867 John Lodge  
Detroit Michigan

1-24-67 Arrested for Violation State  
Narcotics Law and possession of same  
in the vicinity of Wayne State University



(Figure A-5)  
Detroit Police Department, Special Investigation Bureau (SIB)  
Mug Shots for John and Leni Sinclair  
(January 25, 1967 arrests)

Source: John and Leni Sinclair Red Squad Files.

CRIMINAL RECORD	DEPARTMENT	#244886
NAME	F.B.I. No. 10479 F	ALIAS
JOHN ALEXANDER SINCLAIR JR. (W)	M.S.B. No. 538350	"Coltrane"
THIS RECORD FORWARDED TO OR RECEIVED BY _____		SIGNATURE AND/OR AGENCY OF PERSON RECEIVING _____
ON _____	BY _____	IDENTIFICATION RECORD BUREAU
8-5-69 LJ Re-type		

CONTRIBUTOR	NAME AND NUMBER	DATE	CHARGE AND DOCKET NUMBER	DISPOSITION
D, Lansing, Mich.	John Sinclair #37026	4-30-61	Drunk	5-1-61, 5 days or \$1 pd
D, Det., Mich.	John Sinclair #244886	10-7-64	Viol St Narc Law (Poss & Sale) #A122357	12-30-64, Conv: Poss Bulk Marij 2 years probation \$250 Cost 3-4-66, Viol Prob \$300 Cost & 3 years probation
"	"	8-16-65	Viol St Narc Law #A126310 (Poss & Sale)	2-24-66, Conv: VSMIL (Poss) 3 years probation 1st 6 mont DHC
RC Plymouth, Mich.	John Sinclair #155911	2-24-66 (sent)	Viol Narc Law (RC Detroit)	6 months 3 years pr
D, Det., Mich.	John Sinclair #244886	1-24-67	Viol St Narc Law (Sale & Poss Marij) #A154588	7-28-69, 9½ to 10 years SPSM
"	"	6-1-67	Traffic Warrant	10-17-67, Susp Sent
30 Pontiac, Mich.	John Sinclair #15402	7-24-68	A&B Pol Off	/
50 Port Huron, Mich.	John Sinclair #21787	4-20-69	Viol Narc Law	4-21-69, TOT US Customs

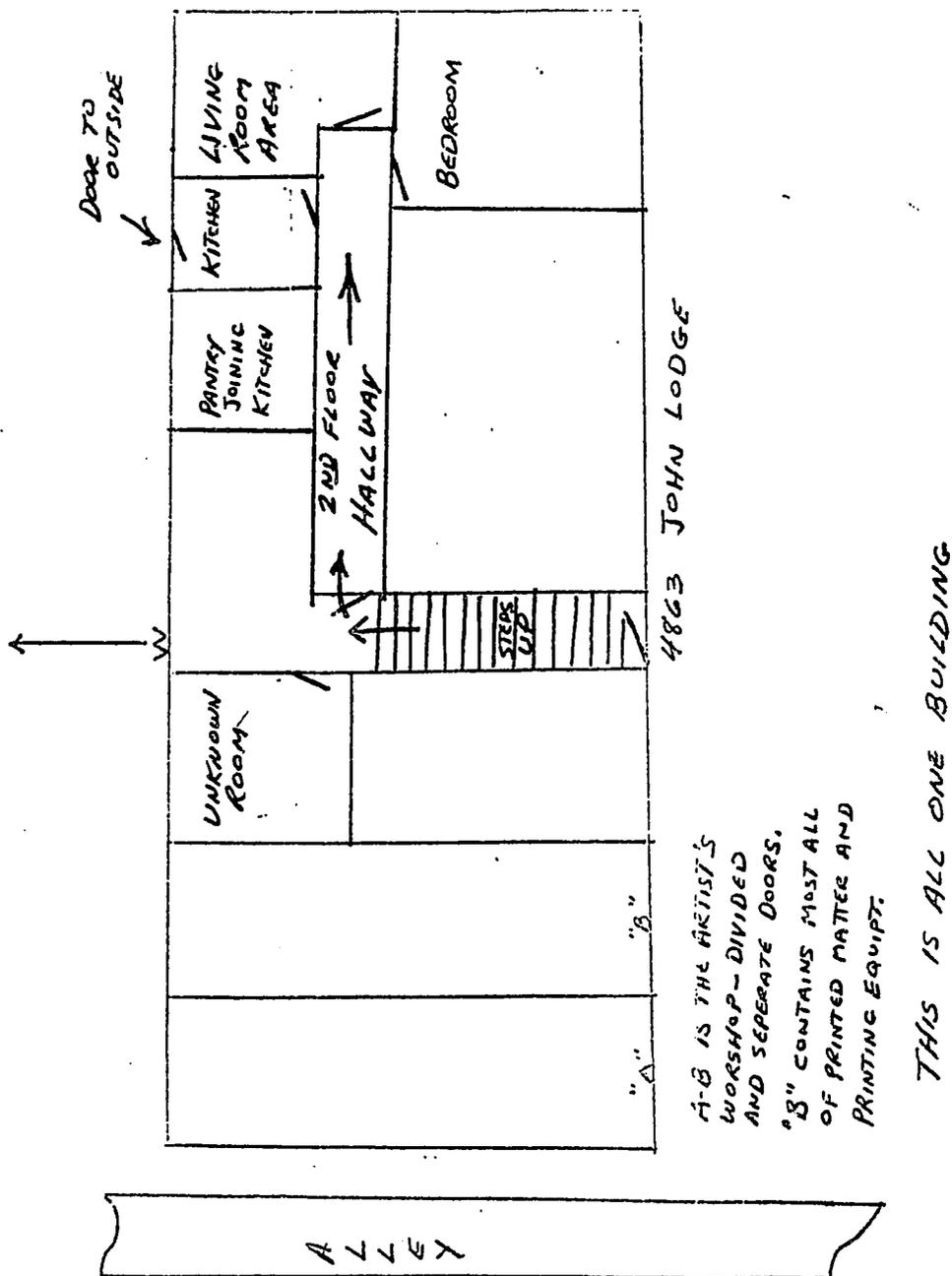
(See Page 2)

**MASTER RECORD MUST BE LEFT IN FILE**

(Figure A-6)

Detroit Police Department, Special Investigation Bureau (SIB)  
Criminal Record Index for John Sinclair

Source: John and Leni Sinclair Red Squad Files.



(Figure A-7)  
 Detroit Police Department, Special Investigation Bureau (SIB)  
 Undercover Police Officer's Diagram of Artists Workshop

Source: John and Leni Sinclair Red Squad Files.

DETROIT POLICE DEPARTMENT  
DETECTIVE DIVISION  
SPECIAL INVESTIGATION BUREAU

April 26, 1967

TO: [REDACTED], Special Investigation Bureau

SUBJECT: Conference on LOVE-IN to be held on Belle Isle, April 30, 1967.

At 10:30 A.M., April 26, 1967, a meeting was conducted by District Inspector Anthony Bertoni at Police Headquarters Conference Room with the Organizing Committee of TRANS-LOVE ENERGIES.

Representing the Detroit Police Department was District

[REDACTED]  
[REDACTED] of the Tactical Mobile Unit,  
[REDACTED] of the Motor Traffic Bureau,  
[REDACTED] of the Harbormaster Bureau,  
[REDACTED] of the Special Investigation Bureau.

Representing TRANS-LOVE ENERGIES was JOHN SINCLAIR, 25/m/w, NOEL COOPER, 20/m/w, DAVE KAPLAN, 19/m/w, all residing at 4867 John C. Lodge, and BRYAN COLLINS, 24/m/w, 3035 East Grand Boulevard.

Ground rules governing the "love-in" were formulated. The Organizing Committee was appraised of the State Laws and City Ordinances regarding indecent and obscene conduct, consumption of alcoholic beverages in parks, etc. If the gathering becomes disorderly or a disturbance is anticipated, the participants will disband on orders from the police department. TRANS-LOVE ENERGIES will appoint approximately 100 psychedelic rangers to control the conduct of the participants. They will be wearing arm bands and large buttons with "TRANS-LOVE ENERGY" on them.

MR. SINCLAIR stated that the "love-in" is scheduled to start at 12:00 noon and will disband shortly after dark. It will be held in the picnic area adjacent to the band shell. There will be two flat bed trucks containing generators and bands. There will be several musical groups and folk singers throughout the area. The members were requested to park on the mainland and walk to the area to avoid a parking problem. Two thousand participants are anticipated.

(Figure A-8)

Detroit Police Department, Special Investigation Bureau (SIB)

April 26, 1967 Report

Trans-Love's Planned "Love-in" on Belle Isle

Source: John and Leni Sinclair Red Squad Files.

(fig. con'd.)

-2-

April 26, 1967

**The police detail will be:**

- 1 Sergeant and 11 Patrolmen, Mounted Bureau
- 1 Inspector, 1 Sergeant, and 3 Patrolmen,  
Motor Traffic Bureau
- 1 Lieutenant, 1 Sergeant, and 10 Patrolmen,  
Belle Isle Station
- 2 Patrolmen, Stationary Traffic Bureau
- 1 team of Policewomen

**Special Investigation Bureau.**

These officers will be equipped with prep radios. They will not be assigned to the picnic area proper, but will work the perimeter. The officers of the Motor Traffic Bureau will be in radio equipped cars and on 1/2 hour pulls. The officers of the Stationary Traffic Bureau will be assigned to the bridge entrance at Jefferson Avenue, and if it becomes necessary will close the bridge to traffic.

The prisoner bus will be on standby at the Municipal Garage, 2650 East Jefferson. There will be one wagon assigned to the Belle Isle station.

The Tactical Mobile Unit will have one unit working in the Fifth Precinct and one unit working in the Seventh Precinct. These two units will consist of one Inspector, one Lieutenant, three Sergeants, and 40 Patrolmen.

**Special Investigation Bureau**

**READ AND APPROVED**

**Special Investigation Bureau**

DETROIT POLICE DEPARTMENT

INTER-OFFICE MEMORANDUM  
CRIMINAL INTELLIGENCE BUREAU

Date May 22, 1967

*Security*  
*C*

To:  Criminal Intelligence Bureau

Subject: THREATS OF SUMMER CIVIL DISTURBANCES

On May 21, 1967 at 4863 John C. Lodge, the headquarters of the ARTIST'S WORKSHOP, also known as TRANSLOVE ENERGIES, a Second Precinct Scout Car (Sct 2-13) drove by and observed inside this location but visible through an open door a large kite, described as red white and blue bearing the inscription "FUCK THE UNITED STATES -GO FLY A KITE". The scout car officers confiscated the kite and conveyed the lone occupant of this location to the Second Precinct where he was issued Ordinance Complaint Violation #053 636 with a court date of June 7, 1967. The name of this defendant was GARY MICHAEL GRIMSHAW a W/M/27 who gave his address as 4863 John C. Lodge.

A short time after this subject arrived at the police station a large group of people entered the station lead by a JOHN SINCLAIR, DPD #244886 also of 4863 John C. Lodge. SINCLAIR was a leader in the recent so called LOVE IN at Belle Isle. These people demanded to know why GRIMSHAW had been taken in and in the course of there complaints one of the group made the remark that because of this incident the police would have more trouble this summer with this group than they could handle.



READ AND APPROVED:

  
Criminal Intelligence Bureau

*P. 10*  
*217*

*1389*

Form C of D-77-ME D.P.D. 344 (12-65)

(Figure A-9)

Detroit Police Department, Criminal Intelligence Bureau (CIB)  
May 22, 1967 Inter-Office Memorandum  
Gary Grimshaw "Go Fly a Kite" Incident

Source: John and Leni Sinclair Red Squad Files.

1345

**DETROIT POLICE DEPARTMENT**

INTER-OFFICE MEMORANDUM

Date December 19, 1967

To: [REDACTED]

Subject: **INFORMATION RE: HARBORING RUNAWAY JUVENILES.**

On 12-19-67 at 7:00 P.M. [REDACTED] & [REDACTED] of the Gang Detail, Youth Bureau were in the Plum Street area attempting to locate a **MICHAEL O'LEARY** 16/M/W of Royal Oak and **JEFFERY WALTERS** 16/M/W of Peoria Illinois. The writers talked a [REDACTED] 18/M/W of 2136 Fourth St. (a former runaway himself) at the "Rock Shop" at Fourth & Plum streets.

The informer stated to the writers that while he was a runaway, he was harbored by a **JOHN SINCLAIR** 30/M/W, owner of Artist Workshop on W. Warren & Lodge Service Drive. Informer stated further that Sinclair has harbored many teen-age runaways, mostly girls while he had been staying at the workshop. Informer also stated that Sinclair sells drugs to the teenagers and permits them to engage in sexual activities on his premises. Informer was in the premises this date and observed about twelve teenagers, mostly young girls, five of which he knew to be runaways.

The Artist Workshop is a known hangout for drug users and several arrests have been made by the Narcotic Bureau in the past. **JOHN SINCLAIR** is a convicted narcotic pusher and is now awaiting trial in Recorder's Court for sale and possession of marijuana.

The informer stated that most of "the action" occurs after midnight, and that he has seen runaway, **MICHAEL O'LEARY** at the workshop.

[REDACTED]  
Gang Detail - Youth Bureau.

(Figure A-10)

Detroit Police Department, Gang Detail, Youth Bureau  
December 19, 1967 Inter-Office Memorandum  
Alleges Trans-Love is Harboring Teen-age Runaways

Source: John and Leni Sinclair Red Squad Files.

DETROIT POLICE DEPARTMENT  
 Detective Division

Feb. 7, 1968

To: [REDACTED]

Subject: ARSON AT 499 W. FOREST; Complainant: JOHN SINCLAIR,  
 26/W, 499 W. Forest, 833-3166 (Store & Residences)

1. At 11:35 PM, received a call from [REDACTED] stating that at 10:40 PM, last, he and his partner, [REDACTED] had a radio run to the above address, on report of an arson.
2. Complainant told the officers that at about 10:30 PM, last, unknown persons had thrown four fire-bombs at his store-residence--three had landed on the roof, causing minor damage, and one had landed short, falling behind the building. The bombs were small brown throw-away type bottles.
3. Responding to the scene were: Chief 4, Ladder 20, Engine 5 and Squad 2.
4. [REDACTED] Arson Bureau, responded and took a whole bottle and the necks of 2 bottles to the Arson Bureau where they are held on Evidence Tag #659184.
5. Assigned to DFD Arson Bureau and 13th Pct.; copies to Special Investigation, Scientific and Central Photo Bureaus.

[REDACTED]

[REDACTED]  
 Det. Lieutenant

(Figure A-11)

Detroit Police Department, Detective Division  
 February 7, 1968 Complaint Report  
 Concerning Fire-Bombing of Trans-Love Energies House

Source: John and Leni Sinclair Red Squad Files.

**Conspiracy to Place Explosives With Intent to Damage Property**

<p>WITNESSES:</p> <p>JANE SAUVE PENNY BELLERIA WILLIAM CROFT JOHN BOSTON ANDREW PACHARE GERALD KISS MYRON QUARUCCIO LAURENCE GIACUZZO BOBBY TAYLOR CHARLES JACOB RICHARD LLOYD</p>	<p>CHARLES S. MC EWE DONALD DAY JAMES NASH BARBARA JACKSON RONALD DUANE TUNSTALL MIKE SAUBE JOHN BOSTON ANNA LEE SIMPSON EARL BUGLO EDWARD RADTKE</p>	<p>RONALD STEPHENS WILLIAM GAYK CRAWFORD BENNETT MAX SWARTZ JOANN INGROA JAMES KEELAN PHILIP TORSON (see attached list) GARY CARLESS JAMES HOUSEY GEORGE FLEISHER WILLIAM R. MCCOY (Special Agent) IN CHARGE</p>
--	---	--

STATE OF MICHIGAN CLAIR THE RECORDER'S COURT FOR THE CITY OF DETROIT

THE PEOPLE OF THE STATE OF MICHIGAN

<ol style="list-style-type: none"> <li>1. DAVID JOSEPH VALLER 411</li> <li>2. JOHN WATERHOUSE FORREST</li> <li>3. RONALD PIERCE 503</li> <li>4. JEFFREY RANDALL FARR</li> <li>5. JAMES ROBERT MOSCARA 405</li> <li>6. GARY ROBERT MILTIMORE</li> <li>7. JOHN SCHMITTROTH 205</li> <li>8. WILLIAM DAVIDSON LADD - 308</li> <li>9. BENJAMIN HARRISON PARKS 204</li> <li>10. ANTOINE DAGHUE 511</li> <li>11. JOSEPH CLEVER 611</li> <li>12. DILTPA FLOWERS</li> <li>13. SANDRA ROUSSEAU 1111</li> </ol>	<p style="text-align: center;"><b>WARRANT</b></p> <p style="text-align: center;">August 27, 1968 up to and including</p> <p>DATE OF OFFENSE <u>November 6, 1968</u></p> <p>LOCATION <u>Various locations in Wayne, Macomb, Oakland and Washtenaw Counties and other places in State of Michigan</u></p> <p>COMPLAINANT <u>William R. McCoy</u></p> <p>COMPLAINING WITNESS <u>William R. McCoy</u></p>
--	---

Defendant(s)

STATE OF MICHIGAN } ss. 14. JANE DOE #1; 15. JOHN DOE #1; 16. JOHN DOE #2;  
COUNTY OF WAYNE } 17. JOHN DOE #3; 18. JANE DOE #2 and 19. JOHN DOE #4  
CITY OF DETROIT }

TO: The Superintendent or any Inspector, Lieutenant, Sergeant, Detective or Patrolman of the Metropolitan Police of the City of Detroit, County of Wayne, State of Michigan, GREETING:

WHEREAS the above-named COMPLAINING WITNESS hath this day made complaint to the undersigned Judge (or Acting Judge) of the Recorder's Court of the City of Detroit that heretofore on the DATE OF OFFENSE listed above, at the LOCATION listed above in the City of Detroit, County of Wayne, State of Michigan, the above-named Defendant(s), late of the City of Detroit.

did wickedly, maliciously and feloniously conspire, combine, confederate and agree together and with divers other persons and Ronald Duane Tunstall for the purpose and with the intent then and there to place in, upon, under, against and near buildings, cars, vessels and structures, gun powder, dynamite and other explosive substances with intent to destroy, throw down or injure the whole or any part thereof, which explosive substances did cause injury to and destruction of the property of others, to wit: a 1962 Ford Fairlane Couch, 1968 Michigan License No. HB 07 61 owned by William Croft; a building commonly known as 25935 Gratiot, Roseville, Michigan; a building commonly known as 23700 Greater Mack, St. Clair Shores, Michigan; a 1965 Plymouth Coach, 1968 Michigan License BB 71 55 owned by Richard Lloyd; a building commonly known as 4829 Woodward, Detroit, Michigan; a 1964 Valiant Coach Vehicle # 32593458 owned by U.S. Government; a building commonly known as 450 S. Main, Ann Arbor, Michigan; a building commonly known as Institute of Science & Technology at 2200 North Campus Boulevard, Ann Arbor, Michigan, contrary to Act 290, P.A. 1966 and 750.206, C.L. 1948.

(signed by Judge Thomas L. Poindexter, Nov. 9, 1968)

(Figure A-12)  
November 9, 1968 (Michigan State) Bombing Indictment  
"David Valler Bombings Case"

Source: State of Michigan Case No. A-149570

CONFIDENTIAL

## DETROIT POLICE DEPARTMENT

INTER-OFFICE MEMORANDUM  
DETECTIVE DIVISION  
SPECIAL INVESTIGATION BUREAU

SUPT TO COMM.	TO	CC
DEPUTY SUPT.		
CHIEFS FILE		
INTELL-2		

SEP 26 1968  
*[Signature]*  
DEPUTY CHIEF OF DETCS.

Date, September 26, 1968

To: Commanding Officer, Special Investigation Bureau

Subject: SURVEILLANCE OF DAVID J. VALLER

12:00 PM WEDNESDAY, SEPTEMBER 25, 1968: ~~██████████~~ MURRAY (MSR), Detective Stanley Doubleday (MSF), Patrolman Charles Henry, and Patrolman Crear Mitchell were on duty at the 12th Precinct.

12:40 PM Crew began a surveillance in the vicinity of Wayne State University, in an attempt to locate subject, DAVID VALLER. The following vehicles were observed in the vicinity of 4867 John Lodge service drive:

2690 CA 1967 V.W., 2 dr., registered to PETER A. & MARILYN WERBE, 8021 Third - Detroit.

3MH 443 Minnesota plate - 1960 Chevy, registered to DONALD T. PERRON, 800 W. 80th Street, Bloomington - Minnesota.

MA 9670 1965 Ford, convertible, registered to JAMES R. MOSCARA, 32055 Lancaster Drive - Warren.

6662 CD\* A Black and Green Ford.

1:35 PM Crew informed by Patrolman Coulter, via radio, that he would be working with the night crew, this date.

2:30 PM Patrolman Mitchell observed VALLER walking eastbound on Hancock Arr. from Third, where with crew following, he walked to 4820 Cass, a White Castle Restaurant and entered from view. (VALLER was wearing dark pants and a Blue jacket).

2:35 PM

2:45 PM Patrolman Henry observed VALLER exit the above location, and Arr. with crew following, walk to 5201 Woodward, the Detroit Main Library, where he entered via rear Cass entrance away from view.

3:00 PM

4:00 PM Detective Doubleday observed VALLER exit the library. Crew Arr. followed him to 39 W. Warren, Johnnie's Dining Room, where he 4:07 PM entered away from view.

4:45 PM Detective Murray observed VALLER exit the restaurant above and with crew following, walk to the vicinity of W. Forest, and the southbound John Lodge service drive. VALLER was lost by crew, LOST 5:05 PM while he was running through heavy pedestrian and vehicle traffic.

6:15 PM Detective Doubleday observed VALLER walking southbound on the northbound John Lodge service drive, from Hancock. Crew followed Arr. him to 4718 Trumbull, the Dairy Treat, where VALLER made a purchase, and then walked to 4755 Commonwealth, home of JOHN W. FORREST, and entered from view. (VALLER now wearing White pants).

6:38 PM

WEDNESDAY, SEPTEMBER 25, 1968  
SEP 26 1968

PAGE ONE OF TWO PAGES

(Figure A-13)

Detroit Police Department, Special Investigative Bureau  
September 26, 1968 Surveillance Report, David J. Valler

Source: John and Leni Sinclair Red Squad Files

UNITED STATES GOVERNMENT

# Memorandum

TO : Director, FBI (62-112678)

FROM : SAC, Detroit (157-3554)

SUBJECT: WHITE PANTHER PARTY (WPP)  
INFORMATION CONCERNING  
OO: Detroit

DATE: 2/25/69

UNCLASSIFIED  
 DATE 3/31/12 BY SP-1  
 157-3554

Re Detroit teletypes to Bureau, 12/26/68 and 12/27/68, Bureau letter to Detroit, dated 1/21/69 and New York airtel to Bureau, dated 1/28/69.

Enclosed for the Bureau are 11 copies of an LHM concerning captioned matter. Two copies of the LHM are furnished New York inasmuch as investigation has been conducted by that Division regarding captioned organization.

Investigation regarding captioned organization continuing and further information regarding the White Panther Party (WPP) and its leaders and members will be furnished the Bureau in a form suitable for dissemination at a later date.

There is some indication the WPP was formed by JOHN SINCLAIR as a method to provide invaluable publicity for the MCS, the rock band that he manages.

Sources utilized in the LHM are as follows:

[REDACTED]

- 2 - Bureau (Enc. 11) (RM)
- 2 - New York (100-164951) (Enc. 2) (RM)
- 2 - Detroit

(6)

18 FEB 28 1969

AGENCY: ACS, GSI, OSI, SEC. SER.

DATE FORWARDED: 3/6/69

MAR 25 1969

MAR 18 1969

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

(Figure A-14)

FBI Memorandum, SAC Detroit to Hoover  
 February 25, 1969 (62-112678-7)  
 First Detailed Report on WPP from the Detroit Office

Source: Freedom of Information Act Files on WPP

(fig. con'd.)



UNITED STATES DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF INVESTIGATION

In Reply, Please Refer to  
File No.

Detroit, Michigan  
February 25, 1969

CONTAINED  
CLASSIFIED  
3/3/69 BY SP-5  
9/1/82 BY SP-5  
1866 [redacted] b7c

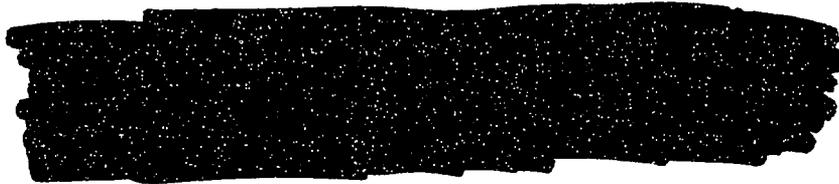
Re: White Panther Party (WPP)

The January 3, 1969, edition of "Time Magazine", a well-known widely circulated weekly American magazine, carried an article entitled, "The Revolutionary Hype", on pages 49-50. The article states that the most violent expression of revolutionary rock so far comes from a Detroit quintet called ~~MCS (for Motor City) 5~~. After months of rumbling about them in the pop underground, they erupted at Manhattan's Fillmore East. Their performance was less revolutionary than revolting. The group performed John Lee Hooker's Motor City is Burning, and there was no mistaking the message.

"All the cities will burn,  
You are the people who will build up the ashes."

John Sinclair, 26 years old, manager and mentor of the MCS, who runs the group's hippie-style communal household in Ann Arbor, Michigan, stated the MCS are a free, high-energy source that will drive us wild into the streets of America, yelling and screaming and tearing down everything that would keep people slaves. The article states that Sinclair and the MCS are self-styled "musical guerrillas", who flaunt their membership in a minuscule left-wing organization called the White Panther Party (WPP). The article states that the MCS now favor outrageous on stage stunts as removing their clothes and burning the United States flag and that the MCS are taking protest one step further to get attention by practicing what they preach, as is shown by their string of arrests on charges of noisemaking, obscenity, and possession of marijuana.

b7c  
b7D



62-112678-7  
ENCLOSURE

Michigan State Police ADDITIONAL COMPLAINT REPORT		Case No. <u>99-76-60</u>
Special Investigation Unit, Detroit	Date <u>12/19/68</u>	File No. <u>1.15</u>
TITLE OF COMPLAINT <u>WHITE PANTHER PARTY</u>		DATE OF THIS REPORT <u>5/29/69</u>
<input checked="" type="checkbox"/> UNFOUNDED <input type="checkbox"/> CLOSED BY ARREST <input type="checkbox"/> ARREST UNDER IS <input type="checkbox"/> OTHER <input checked="" type="checkbox"/> SERVICE RENDERED		

SENTENCE DATE:

On 5/21/69, JOHN SINCLAIR appeared before the HON. FREDERICK ROBERTS, Oakland County Circuit Judge in Pontiac for sentencing after being found guilty previously of assaulting a police officer.

On motion of the defense attorney for a new trial, JUDGE ROBERTS set the sentencing aside until 6/10/69, 9:00 am, while he reviews the new evidence submitted by the defense.

IDENTIFIED:

JOHN SINCLAIR

PETER WERNE

MAGDALENE SINCLAIR

FREDERICK JOHN SMITH

VEHICLES OBSERVED:

Blk/whr 65 Chev 2 dr., AA 3657. Registered to ALAN J. COOKIN, 1172 W. Hancock, Detroit.

65 Dodge 2 dr., WF 3801., to CAROL SANDUSKY, 50 E. George, Hazel Park.

64 Chev 2 dr., GU 8257., to DONALD E. COOCH, 1351 N. Clawson, Clawson.

69 Ford Sta Wgn, Gold, WF 9685, to Budget Rent A Car of Ann Arbor Inc., 2714 Washington, Spillanti.

Green 64 Buick Convrt, 69 Ohio, MI 372. Check with Ohio SOS revealed not in files as yet.

FURTHER:

[REDACTED], of the Ann Arbor Police Department, checked the Budget Rental Co. and found that the vehicle was rented on 5-1-69, to the University of Michigan. Further checks to be made.

COMPLAINT STATUS:

Complaint remains open.

[REDACTED]  
Intelligence Section  
Special Investigation Unit  
Detroit

REPORTING OFFICER'S SIGNATURE

P.396

(Figure A-15)

Michigan State Police, Special Investigative Unit  
May 29, 1969 Report: Surveillance of White Panthers

Source: John and Leni Sinclair Red Squad Files

UNITED STATES GOVERNMENT

## Memorandum

E/P  
Box 1

TO : DIRECTOR, FBI (100-449698)

DATE: 9/9/69

FROM : SAC, WFO (100-47757) (P)

SUBJECT: COINTELPRO - NEW LEFT

POTENTIAL COUNTERINTELLIGENCE ACTION

Utilizing sources WFO contemplates the publication and distribution of anti-New Left literature attacking the New Left from the left as well as from the liberal and conservative positions.

Sources within the administrations of local universities, through public source information, will be kept up-to-date on the policies of prominent New Left organizations so they can make informed judgments to forestall and quell potential disruptive activities. Sources within the movement will attempt to capitalize on the political differences prevalent within the movement today.

Efforts also will be made to further the drive in the black-white movements.

PENDING COUNTERINTELLIGENCE ACTION

During a recent meeting of the National Mobilization Committee to End the War in Vietnam (NMC), the Black United Front (BUF) demanded a sum of money from the NMC for allowing the NMC to hold a demonstration in WDC on 11/14/69 - 11/15/69. BUF warned that if the money was not forthcoming, they would prevent the NMC from demonstrating.

REC-1

(2) - Bureau  
1 - WFO

GIG:rms

(3)

SEP 18 1969



Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

(Figure A-16)

FBI Memorandum, SAC WFO to Hoover

September 9, 1969

Reports Successful COINTELPRO Action Against "The Mob"

Source: Eynon Collection/BHL

# POLITICAL EDUCATION MEETING

sponsored by the Free University  
conducted by the White Panther Party

IN DEFENSE OF A LIFESTYLE

The citizens of the  
Woodstock Nation

shall meet this Thursday  
MARCH 5 at 8 PM

and every Thursday  
thereafter at

4867 JOHN C. LODGE: corner of karren :

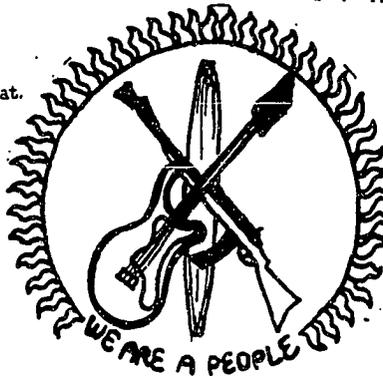
\*all persons\*  
Hippies, Yippies, Commies  
Dope Fiends, and Other  
Assorted Scum

are cordially invited

to attend- contribute-

and PARTICIPATE

We can learn what.  
We are not only good  
world, we are also  
the  
Chairman



we did not know.  
at destroying the old  
good at building  
new.  
Mao Tse-Tung

(Figure A-17)

Flyer, WPP Detroit Chapter, circa Spring, 1970  
Announcing a WPP/YIP "Political Education Meeting"

Source: John and Leni Sinclair Red Squad Files

DETROIT POLICE DEPARTMENT

INTER-OFFICE MEMORANDUM  
INTELLIGENCE

Date March 13, 1970

To: [REDACTED] Intelligence Bureau

Subject: SURVEILLANCE, "PROJECT EAGLE"

3:00 PM THURSDAY, MARCH 12, 1970. On duty.

4:00 PM The undersigned officers to the Intelligence Bureau office for information pertaining to PROJECT EAGLE.

7:30 PM Officers began a surveillance in the vicinity of 4867 Lodge, the last known residence of the target subject, JOHN WATERHOUSE FORREST, DPD 275307, no I.B.

9:00 PM [REDACTED] observed subject FORREST, wearing a black jacket and white shirt, accompanied by an unknown white male and female, exit a 1965 Dodge Van, blue in color with white stripe, 1970 Michigan license JVN 904. All persons entered 4867 Lodge. JVN 904 is registered to DAVID SINCLAIR, no DPD or I.B., of 1520 Hillst., Ann Arbor, Michigan, this vehicle is designated as C-1.

9:15 PM [REDACTED] observed subject FORREST, in company with an unknown white male and female, exit 4867 Lodge and enter C-1. With all officers following they drove to the DETROIT METROPOLITAN AIRPORT where they parked C-1 and entered the airport complex. Note: subject FORREST was carrying an army-type duffle bag when he exited the Lodge address.

9:40 PM [REDACTED] and [REDACTED] of the [REDACTED] entered the airport complex for a close-in surveillance in an effort to determine if subject FORREST was leaving on a flight. Patrolmen Heberly and Stover observed subject FORREST greet and unknown white male and female in the AMERICAN AIRLINE TERMINAL.

10:00 PM [REDACTED] observed subject FORREST in company with four white males and four white females exit the building and enter C-1. Persons described as:

Subject FORREST, full beard, medium long hair, left foot in cast, using crutches. Wearing a blue beret, black leather jacket with hippy decals, black pants.

One white female, 18/5-2, medium build, long black hair. Wearing a black leather jacket and blue pants.

PROJECT EAGLE

PAGE ONE

AFTERNOONS MARCH 12, 1970

— C of D-77-ME D.P.D. 348 (12-43)

(Figure A-18)

Detroit Police Department, Criminal Intelligence Bureau (CIB)  
March 13, 1970

"Project Eagle" Surveillance of Detroit WPP House

Source: John and Leni Sinclair Red Squad Files

# Memorandum

JUNE

TO : DIRECTOR, FBI (Bufile 62-112678 ) DATE: 6/22/70

FROM : SAC, DETROIT (100-36217- Sub 2)

SUBJECT: RECOMMENDATION FOR INSTALLATION OF TECHNICAL OR MICROPHONE SURVEILLANCE

RE: Title YOUTH INTERNATIONAL PARTY-  
WHITE PANTHER  
Character of Case IS - YIP-WP  
Field Office DETROIT  
Symbol Number  
Type of Surveillance (Technical or Technical  
Microphone)

1. Name and address of person or organization on whom surveillance is to be placed: Youth International Party - White Panther  
1520 Hill Street, Ann Arbor, Michigan  
708 Arch Street, Ann Arbor, Michigan
2. A. Address where installation is to be made (set forth exact room number or area to be covered): Same as above.  
Telephone 761-1709, 769-1333, 769-1336  
B. [REDACTED] b7E
3. Previous and other current installations on the same subject:

None

ALL INFORMATION CONTAINED  
HEREIN IS UNCLASSIFIED  
DATE 6-4-82 BY SP-2 [REDACTED] b7C

ENCLOSURE  
REC-31 62-112678-6  
ST-112 7/7  
JUN 23 1970

b2  
b7D/E 4. Cost and manpower involved: [REDACTED]

5. Adequacy of security:

Maximum security assured.

1 Bureau  
Registered Mail  
1 - Detroit [REDACTED] (2)

b7C



(Figure A-19)  
FBI Memorandum, SAC Detroit to Hoover  
June 22, 1970  
Neil Welch's First Request for a Warrantless Wiretap  
on the White Panthers

Source: Freedom of Information Act Files on WPP

CONFIDENTIAL

Re: Lawrence Robert Plamondon;  
White Panther Party

*WPP Talks IN NUMBERS  
OVER PHONE  
CODE ???*

(right side)

LUX SCHNEIDER  
01 234 56789,10,11,12,13

313-961-1709 - 919-281-1204

*WPP phone #*

10. Note torn from Calendar

This item is a scrap of paper torn from a calendar bearing the notations "769-1535 Marty and Patty".

11. Note regarding Travel to Moscow

This item concerns a one-page note regarding air travel to Moscow which appears to concern arrival at Stockholm, Sweden, via Aroflot for a change at 2:15 PM with arrival at Moscow 3:05 PM. Following this data is a note concerning the North Vietnamese Embassy in Moscow, followed by numbers 45-09-79. Numbers also follow this entry as follows; 009468, 854545, followed by words "Embassy of N.V.". This note contains a listing of what appear to be immunization requirements, including yellow fever, typhoid plague, and cholera. The last entry on the notes appears as "N. Viet Embassy in Moscow 2 45 1095".

12. Report to the Central Committee, WPP,  
dated April 12, 1970

This item concerns a four-page report prepared on the letterhead of the "Youth International Party", 1520 Hill Street, Ann Arbor, Michigan, and is dated April 12, 1970. It is noted as submitted by "Vic Coleman, Field Marshal". This report is set forth in part on letterhead bearing the inscription, "Folketinget Christiansborg".

This report is set forth below verbatim; however, the material was typed on a foreign typewriter and foreign letters are transposed:

CONFIDENTIAL

34

(Figure A-20)  
FBI Report on Plamondon's Capture  
September 3, 1970  
Hand-Written Comment Concerning the White Panthers'  
Telephone Conversations

Source: John and Leni Sinclair Red Squad Files

## C O N F I D E N T I A L

Re: Lawrence Robert Plamondon;  
White Panther Party

freedom of the individual. Source advised that the WPP maintains its National headquarters at 1520 Hill Street, Ann Arbor, Michigan, which he described as a "commune" known as the "Trans-Love Energies, Incorporated".

August 20, 1970

B. Official Personnel of WPP

A source advised in August, 1970, that the WPP is operated by a "Central Committee" (CC), all of whom have used 1520 Hill Street, Ann Arbor, as their address, including the following with their official positions:

- ~ John Sinclair, Chairman - WPP
- Lawrence Robert Plamondon, commonly known as "Fun", Minister of Defense - WPP  
*Dennis Marnell M-22 - Dep. Min of Def. (629) 10-26-70*
- Genie Plamondon (Mrs. Lawrence Robert Plamondon), Minister of Foreign Affairs - WPP, formerly Minister of Communication
- ~ Milton Edward Taube, commonly known as "Skip" or "Tube", Minister of Interior - WPP, formerly Minister of Education
- Magdaline Sinclair (Mrs. John Sinclair), commonly known as "Leni", Minister of Education - WPP
- David Sinclair, brother of John Sinclair, commonly known as "Dave", Chief of Staff - WPP
- ~ Kenneth Michael Kelley, commonly known as "Ken", Minister of Information - WPP

C O N F I D E N T I A L

3

(Figure A-21)  
FBI Report on Plamondon's Capture  
September 3, 1970  
Hand-Written Inclusion of Dennis Marnell  
as the WPP's "Deputy Minister of Defense"

Source: John and Leni Sinclair Red Squad Files

DEPARTMENT OF STATE  
**AIRGRAM**

62-112678-42

Original to be Filed in \_\_\_\_\_ Decentralized Files \_\_\_\_\_

FILE DESIGNATION: \_\_\_\_\_

UNCLASSIFIED RECEIVED A-25

TO: Department of State  
Ottawa  
JUN 18 8 23 AM 1970  
RS/AN  
ANALYSIS BRANCH

FROM: Amconsul MONTREAL  
DATE: June 11, 1970

SUBJECT: ~~Yippies Protest Canadian Customs "Seizure"~~

REF: [Redacted]

SUGGESTED DISTRIBUTION

ADM	ARMY	NAVY	OSD
5	3	5	3
10	3	16	1

POST ROUTING

TO:	Action	Info.	Initials
AMB PD			
OCM			
POL			
ECOM			
CONS			
4Dm			
AIG			
*SIS			
*ILC			

Enclosure: Clipping from The Montreal Star June 11, 1970

62-112678-  
NOT RECORDED  
182 JUL 8 1970

53 JUL 9 1970

ORIGINAL FILED IN 100-4118910-42

(Figure A-22)  
U.S. State Department "Airgram"  
June 18, 1970  
Concerning the WPP/YIP International Travels  
(Note the Various Intelligence Agencies  
Also Receiving the Information)  
Source: Freedom of Information Act Files on WPP

## FEDERAL BUREAU OF INVESTIGATION

Date 12/26/68

DAVID JOSEPH VALLER, then an inmate at Wayne County Jail, Detroit, Michigan, on interview, was presented with a rights waiver form, which he read, acknowledged his understanding of and signed.

Regarding the bombing of the Ann Arbor, Michigan, office of the Central Intelligence Agency (CIA), September, 1968, he furnished the following information:

Sometime in August, 1968, VALLER said he attended a three day concert, called "Dialogue 1968," which was held at the Unitarian Church, Cass and Forest Streets, Detroit, on a consecutive Friday, Saturday and Sunday, dates unrecalled. On two of those three days, an Ann Arbor band, known as the MC/5, performed at this affair. On those two days VALLER said he met with JOHN SINCLAIR, who is associated with the Ann Arbor band referred to.

VALLER advised that he and others had earlier purchased a quantity of dynamite from a location in northern Michigan. A portion of the dynamite so acquired he said was, at the time of the concert referred to, stored in the basement of the church referred to. He said that on these two occasions he discussed with JOHN SINCLAIR, a friend of his, the fact that he had possession of a quantity of a quantity of dynamite and asked JOHN SINCLAIR whether SINCLAIR had anything he wished to blow up. VALLER said SINCLAIR said he would be interested in securing some dynamite, but that he did not know just what he would want to use it for at that time, as there were many things he would like to blow up. VALLER recalled that SINCLAIR, on this occasion, said something to the effect that he was more interested in seeing such bombings occur than in committing such bombings personally, inasmuch as he was deeply involved at that time with current charges against him.

VALLER recalled that within one week after his meeting with JOHN SINCLAIR, he, VALLER, encountered PETER WERBE, editor of the "Fifth Estate" at Detroit, Michigan.

(Figure A-23)

FBI Synopsis of Interview with David Valler  
December 26, 1968

(Note the Minimal Role Ascribed to John Sinclair)

Source: John and Leni Sinclair Red Squad Files

Date 6/6/69

DAVID JOSEPH VALLER, as an inmate, Wayne County Jail, Detroit, Michigan, acknowledged his knowing that the interviewing Agents. [REDACTED] and [REDACTED] were Special Agents of the Federal Bureau of Investigation, United States Department of Justice. He acknowledged that he had requested this interview with the identified Agents, who were previously known to him. He read and executed an "Advice of Rights" form, prior to interview. On interview, he furnished the following information:

He had read in the newspapers of a bombing of the ROTC unit on the University of Michigan (UM) campus, Ann Arbor, Michigan, June 1, 1969. He said that while he had no specific information concerning that bombing, whatever, he felt some responsibility for same, inasmuch as he believed dynamite he had previously furnished to persons in Ann Arbor, Michigan was likely used in the ROTC bombing. He said he wished to make the following additional information available as of possible assistance in bringing to justice persons responsible for this bombing, and for two prior Ann Arbor area bombings.

He noted that he had previously furnished considerable information to interviewing Agents concerning his part in making dynamite available to an individual known to him as "FUN" PLAMONDON. He added that all previous information furnished by him was true and accurate; however, that he had recalled the following additional details:

Regarding JOHN SINCLAIR of Ann Arbor, Michigan, he recalled having furnished information to the effect that he had met with SINCLAIR at Detroit, Michigan, in August or early September, 1968, and prior to the bombing of the CIA office at Ann Arbor, Michigan, September, 1968. They met at the Unitarian Church, Cass at Forrest Streets, Detroit, during the time that SINCLAIR's band, the "10/5" was doing a concert at that church. He recalled that he met with SINCLAIR in the basement of that church, along with several other persons, including JACK FOREST, and possibly BEN FARRAS.

(Figure A-24)

FBI Synopsis of Interview with David Valler  
June 6, 1969

(Valler has Changed his Story since his 12/26/68 Interview:  
He Now Ascribes a Primary Conspiratorial Role to Sinclair)

Source: John and Leni Sinclair Red Squad Files

(fig. con'd.)

He recalled offering SINCLAIR dynamite and asking SINCLAIR if he had anything he would like to blow up. SINCLAIR responded something to the effect there were many things he would like to blow up, but that he was more interested in seeing things blown up than doing the thing himself. He said he was under observation of the police because of several charges then held against him.

At the time of the above-described encounter with SINCLAIR, there was located in the same basement of this church a cache of dynamite. It was stored in a crate, and represented something more than a case of dynamite. Some may have been stored in a brown paper bag. This dynamite, and some additional loose dynamite was at the time stored in the basement of the building in which JOHN FOREST resided. All of it represented the results of several purchasing expeditions made by DAVID VALLER to acquire dynamite and related equipment, intended for "anti-establishment" bombings in the Detroit, Michigan area. In acquiring this cache of dynamite, VALLER was accompanied by several different individuals on several different occasions, none of these individuals identical with persons referred to herein.

SINCLAIR's concert at the Unitarian Church was scheduled over a three day weekend. VALLER, a day or two following the contact referred to above, was contacted privately by SINCLAIR who at that time referred to VALLER's earlier offer of dynamite and said something to the effect, "I want some of that stuff, but I can't handle it. I'll have "PUN" make arrangements to pick it up." He then referred to the "Figs" having him under observation.

VALLER said he knew "PUN" to be "PUN" FLEMINGTON, whom he knew to be a close associate of SINCLAIR's in the operation of both the "Trans-Love Energies" organization, as well as of the operation of the "MC/5" band. He added that he knew "PUN" FLEMINGTON, with JOHN SINCLAIR, to be an officer in an organization known as the "White Panther Party" (WPP), which organization was developed by them. VALLER said he knew "PUN" to be one of SINCLAIR's closest and most trusted associates.

Regarding "PUN" PLIMMOND, VALLER said he recalled that shortly after his above-referred to discussions with JOHN SINCLAIR, and in any case probably within a week of those discussions, he was contacted personally by one PETER WERBE in Detroit, Michigan, who advised him that "PUN" was then at WERBE's offices at the "Fifth Estate" in Detroit, looking for DAVID VALLER.

VALLER went to the "Fifth Estate" offices where he met with "PUN", who told him he had been requested by JOHN SINCLAIR to follow up on SINCLAIR's earlier contact with VALLER, and to make arrangements to pick up some explosives from VALLER. "PUN" did not identify any specific intended target for use of this material, but in conversation made it clear that the dynamite would be used in an "anti-establishment" manner.

VALLER said that on this occasion, he instructed "PUN" in the safe use of dynamite, and the manner of fusing same. He gave him instructions on the location of the Detroit, Michigan residence of JACK FORREST on Commonwealth Street. He told him that the dynamite would be placed in a package for pick up by "PUN" in, or on, a garbage can, and located in the alley behind the residence of FORREST. They agreed on the time and date of pickup, which VALLER believed was the same evening as the meeting referred to. No funds changed hands in this arrangement, VALLER explaining that he was not "selling" explosives, but simply making it available to persons with intended "anti-establishment" uses.

VALLER recalled that he contacted JACK FORREST and gave him instructions that dynamite and fuse and caps were to be placed in a package and placed as explained above for pickup by "PUN". He also recalled that he wrote out detailed instructions for the use of this equipment and gave same to FORREST for placement with the package for "PUN". VALLER believes that he instructed FORREST to place some 15 sticks of dynamite in the package along with an unspecified, or unrecalled quantity of safety fuse and blasting caps.

VALLER later in the evening of the day designated for the above-described pickup by "PUN" verified that FORREST

DC-312 (25) <b>CONFIDENTIAL</b> <b>REPORT</b> Special Investigation Unit	OFFICER Det. S/Sgt. V.V. Anderson OCCASION White Panthers. PUBLICATION	FILE CODE 75 DATE 12-11-70 PAGE NO.
<p>Information regarding the <b>WHITE PANTHER PARTY LEADERS</b> renting a house in the City of Detroit.</p> <p>Information received from [redacted] advising that 800<sup>th</sup> Dexter has been rented by the <b>WHITE PANTHER PARTY</b> at this address for the purpose of housing during the up coming trials involving <b>WHITE PANTHER MEMBERS, JOHN SINCLAIR, FUN PLANCHON, JOHN W. FOREST</b> which are to start in the later part of January believed January 26, 1971.</p> <p>The following people are to reside at this location, <b>JOHN SINCLAIR, FUN PLANCHON, JOHN W. FOREST, and [redacted]</b>.</p> <p>Information is that the telephone was to installed this date 12-11-70.</p> <p>The above listed people have not moved in as of this date.</p>		
44-30715 	APPROVED	SPECIAL AGENT 

(Figure A-25)

Michigan State Police, Security Investigation Squad (SIS)  
 December 11, 1970

Information Regarding WPP's "CIA Conspiracy" Defense  
 (Note the Reference to a Scheduled Telephone Installation)

Source: John and Leni Sinclair Red Squad Files

(U) 312-701 <b>CONFIDENTIAL</b> <b>REPORT</b> Special Investigation Unit	TITLE SUBJECT <b>White Panther Party (Ann Arbor)</b>	FILE CODE DATE <b>12-1-70</b> PAGE NO. <b>1</b>	
<p>JANE FONDA to speak at the Union Ball Room, U. of M. campus, sponsored White Panther Party of Ann Arbor and New Move, headed by DAVE GORDON, 12-1-70 at 8:00p.m.</p> <p>JANE FONDA spoke at the Union Ballroom in the Michigan Union at 8:00p.m. on 12-1-70. She spoke in behalf of the White Panther Defense Fund, for JOHN SINCLAIR and JACK FOREST and FUN PLAMONDON.</p> <p>JANE FONDA has been staying at 1520 Hill St., Ann Arbor White Panthers headquarters, for the past week she has been there and holds news and TV conferences. According to inside information she is very discouraged as no one paid any attention to her and she is just one of the group.</p> <p>JANE FONDA spoke for about one hour and the "UP BAND" started to play JANE FONDA told everyone that wanted to talk and ask questions to go over to South Quad as soon as she was done.</p> <p><b>ATTENDANCE:</b> Between 250-300 the most attended the talk and many of them were girls looked as if all the girls were interested in just listening and seeing a ex- movie actress, as they all crowded around her after the talk. Many of the girls that were there were well dressed and seem to be by themselves.</p> <p>There was many smoking pot inside, this come from a very reliable source.</p> <p><b>LICENSE PLATES:</b></p> <p>The following plates were obtained from 1520 Hill St., area. 2 at Union Bl.</p> <ul style="list-style-type: none"> <li>GHB-806, 67 Vol. SW, KAREN A. SWENSON, 403 S. 7th, Apt. #2, Ann Arbor.</li> <li>JVN-904, 65 Dodge SW, DAVE SINCLAIR, 1520 Hill, AA.</li> <li>MCL-771, 63 Vol, sdr. ARTHUR M. ARMSTRONG, 21230 Mascenic, St. Clair Shores.</li> <li>JKJ-661 63 Merc. SW, HILTON SKIP TAUBE, 1520 Hill, AA. is driven by his sister PEGGY TAUBE most of the time, is getting real radical no</li> <li>MTL-309, 64 VW, SW, ROINA S. JACOBS, 21750 Gates Birmingham, Mich.</li> <li>GFS-683, 69- VOL. 2 dr. JAMES CHRISTOPHER HASSETT, 19315 Parke Lane, Grosse I</li> <li>LLF-285, 67 Ram 4dr. ALBERT JOSEPH ALLEN JR. 223 N. Military, Dearborn.</li> <li>HHQ-235, 61 Chev. 2dr. WILLIAM &amp; MARK CARTER, 39321 Eliot, Mt. Clemens.</li> <li>DDM-311, 66 Ford 2 dr, PAUL R. WERT 19611 Osmae, Livonia.</li> </ul> <p><b>SPEECH:</b> JANE FONDA talked about changing to the Socialist form or Communist form of government. Also 2 movies were shown on Red China, the reaction of the group did not response too well to this.</p>			
APPROVED	APPROVED	CARDED	SERIAL NO.

(Figure A-26)  
 Michigan State Police, Security Investigation Squad (SIS)  
 December 1, 1970  
 Surveillance of Jane Fonda's Appearance in Ann Arbor  
 on Behalf of Sinclair, Plamondon, and Forrest  
 Source: John and Leni Sinclair Red Squad Files

Michigan State Police <b>INTELLIGENCE REPORT</b>		(11) Request Number
(12) Received by	(13) Time 9:45 AM	(14) Date 12-5-70
(15) Reviewed by	(16) Time 9:45 AM	(17) Date 12-5-70
SOURCE: (8) Name or Source Number		(9) <input type="checkbox"/> Confidential
Classification of Source		
(10) <input checked="" type="checkbox"/> Highly Reliable	(11) <input type="checkbox"/> Unreliable	(12) <input type="checkbox"/> Usually Reliable
(13) <input type="checkbox"/> Unreliably Questionable		
<b>INTELLIGENCE INFORMATION (14)</b>		
<p>Reports that seven subjects have just been arrested by Ann Arbor City Police who are occupants of a vehicle reported stolen on complaint</p> <p>This vehicle reported stolen by the Hertz Rent a Car on 12-4-70 from Metro Airport.</p> <p>Subjects reportedly produced papers indicating that the vehicle was rented from Avis Rent a Car when stopped. These papers can not be correct according to the manager of Hertz and must be a forgery.</p> <p>One of the occupants in the vehicle was JANE FONDA.</p> <p>All subjects being held at Ann Arbor Pd. at this time.</p> <p>We have an officer from this unit at the scene at this time.</p> <p><b>ADDITIONAL INFORMATION JUST RECEIVED .....</b></p> <p>from the scene reports that it appears at this time as if the subjects got into the wrong car by mistake at the airport. They apparently did rent a Avis Car and this has been checked out. Subjects will be released as soon as papers from the Avis Company and another car arrive in Ann Arbor.</p>		
<b>ANALYSIS-EVALUATION</b>		
(15) <input checked="" type="checkbox"/> Highly Reliable	(16) <input type="checkbox"/> Not Reliable	(17) <input type="checkbox"/> Reliable-Surveillance
(18) <input type="checkbox"/> Remarks	(19) <input type="checkbox"/> Unevaluated	
(20) <input type="checkbox"/> Evaluating Officer	(21) <input type="checkbox"/> Time 9:55 AM	(22) <input type="checkbox"/> Date 12-5-70
<b>DISSEMINATION</b>		
(23) <input type="checkbox"/> Director	(26) <input type="checkbox"/> District Commanders Bulletin	(29) <input checked="" type="checkbox"/> Other
(24) <input type="checkbox"/> Deputy Director, Field Services	(27) <input type="checkbox"/> Operations	(30) <input type="checkbox"/> No Dissemination Outside Intelligence Section
(25) <input type="checkbox"/> Detective Division Commander	(28) <input type="checkbox"/> Uniform Division Commander	
(31) <input type="checkbox"/> Disseminated by	(32) <input type="checkbox"/> Time 10:00 AM	(33) <input type="checkbox"/> Date 12-5-70

(Figure A-27)  
Michigan State Police, Security Investigation Squad (SIS)  
December 5, 1970  
Intelligence Report Regarding the Detainment of Jane Fonda  
(Hertz/Avis Rental "Incident")

Source: John and Leni Sinclair Red Squad Files

FD-36 (Rev. 5-22-64)

FBI

Date: 2/27/69

Transmit the following in \_\_\_\_\_  
(Type in plaintext or code)  
via AIRTEL AIR MAIL - REGISTERED  
(Priority)

TO: DIRECTOR, FBI

FROM: SAC, SAN FRANCISCO (157-1485)

RE: WHITE PANTHER PARTY  
INFORMATION CONCERNING

ALL INFORMATION CONTAINED  
HEREIN IS UNCLASSIFIED  
DATE 3/3/92 BY SP-6

On 2/27/69, [redacted] reported that on the afternoon of 2/26/69, an individual who identified himself only as a representative of the White Panther Headquarters, Ann Arbor, Michigan, contacted Black Panther Party (BPP) National Headquarters, Berkeley, California, attempting to get in touch with [redacted] who was not available. This individual advised that the White Panther Party has a rock and roll band called "NC-5" which is coming to San Francisco, California, on 3/10-13/69. He said they would like to volunteer to use this band to hold a fund-raising benefit for the BPP while in San Francisco.

This individual stated he had been told to contact [redacted] in this regard and he indicated he would recontact National BPP Headquarters in the near future and talk to [redacted]

Since none of the BPP officers were available at the time this individual made his contact, National BPP Headquarters made no commitment whatsoever.

San Francisco will furnish the Bureau and Detroit with any additional information received in this regard.

Detroit is requested to identify the White Panther Party and determine if they have any kind of alliance with the BPP, and advise Bureau and San Francisco.

- 3 - Bureau (AM-RM)
- 2 - Detroit (AM-RM)
- 3 - San Francisco (1 - 157-1485) (RM) (b7C)

Approved: [Signature]  
Special Agent in Charge

Sent \_\_\_\_\_ M Per \_\_\_\_\_

(Figure A-28)  
FBI Airtel, SAC San Francisco to Hoover  
February 27, 1969 (62-112678-9)  
Informs Hoover of Plamondon's Telephone Call to BPP  
(Conversation Picked-Up in FBI's Warrantless Wiretaps)

Source: Freedom of Information Act Files on WPP

the number of overhearings occurring on each date.

B. The duration of each overhearing.

C. The address, apartment number and room where such overhearing took place.

Answer to Interrogatory No. 2:

A) Plaintiff Plamondon's conversations were incidentally overheard on five occasions (February 26, 1969; April 15, 1969; May 6, 1969; May 29, 1969; and July 6, 1969) on an electronic surveillance at 3106 Shattuck Avenue, Berkley, California, and on one occasion (June 2, 1969) on an electronic surveillance at 1336 1/2 Fillmore, San Francisco, California.

B) Please see the copies of the logs of the above-referenced overhearings which are attached hereto as Attachments 1 through 6.

C) Please see the answer to subpart A) above.

Interrogatory No. 3:

For each specific overhearing, indicate if a tape or other recording and/or transcript or other report of the contents of the overheard conversations exists, and if the answer is yes, specify verbatim the contents of each item, or in lieu thereof, attach copies of each of the said items.

Answer to Interrogatory No. 3:

No tapes, other recordings, or transcripts exist. Summary logs of the above-referenced overhearings do exist, however, and copies are attached hereto as Attachments 1 through 6.

Defendant objects to producing those portions of the summary logs which reflect conversations of persons other than the plaintiff on the grounds that such conversations are not relevant to the issues in this case and that disclosure might be injurious to the privacy of third persons.

Interrogatory No. 4:

For each overhearing, indicate:

A. The names of all persons who requested permission to conduct the overhearing; all persons who were the recipients of such requests; and the decision such recipients made upon said requests.

-2- A-342

(Figure A-29)  
**FBI's Admission that Five Plamondon Conversations were  
 "Incidentally Overheard" in Warrantless Wiretaps  
 on two California Black Panther Party Chapters**

Source: Legal Papers of Hugh M. Davis

ATTACHMENT 3: Kelley Ans. to Int.; Sinclair v. Kleindienst  
Civil Action No. 610-72 (D.D.C.)

FD-207 (1-15-57)

Time	Initial	IC OG	Activity Recorded
5:27PM	-cleb	ic	PUN _____ from White Panther EQ in Ann Arbor, Michigan, to HUFFALY GROSS for DAVID HILLIARD who is in conference and cannot speak to anyone. PUN talks to TOMMY JOLLY, saying that he heard that DAVID HILLIARD would be in Cleveland, Ohio, on May 9th, 10th or 11th, and if so, the White Panthers want to meet with him in Cleveland for "formal dialogue" between the WPP and the BPP. PUN explains that the WPP has several things going with the BPP: they printed a thousand posters for the May 1st rally and gave them to the Detroit BPP chapter; they sell 400 papers everyweek ("Black Panther") and other projects. If DH or someone from BPP EQ is going to be in Cleveland over the weekend of May 10th-11th, the WPP will come there early for a meeting. The WPP has been invited to a rally in Cleveland on 5/11. TJ says that he will pass this request on and someone will call PUN about it. PUN gives his number as 313-769-2017.
5:32PM	-cleb	og	
5:33PM	-cleb	og	
5:39PM	-cleb	ic	/
5:49PM	-cleb	ic	
5:50PM	-cleb	og	/
5:51PM	-cleb	og	
5:52PM	-cleb	og	

SF 3215-2 Log Page -12-	Employee's Name	Date Stamp
Tuesday Day Date 5/6/69	SE CECIL J.C.M. LE BLANC	

A-356

(Figure A-30)  
FBI Wiretap Transcript  
May 6, 1969  
Text of a Plamondon Conversation with the BPP  
Source: Legal Papers of Hugh M. Davis

9. [REDACTED] has furnished the following information of value:

1. On 9/9/70 it was learned that the White Panther Party (WPP) is planning a conference in the near future when a large farm house for the meeting can be obtained.
2. On 9/9/70 it was learned that a meeting of all political groups in Ann Arbor is being organized to be held 9/16/70 at Alice Lloyd Hall, University of Michigan, Ann Arbor, Michigan.
3. On 9/9/70 an unidentified male called and asked for KEN KELLEY. The unidentified male stated that he was from Lockport, Illinois and wanted to get two friends into Canada who were arrested on drug charges. Caller was told not to discuss this matter on the phone but to come and see KELLEY.
4. On 9/10/70 a caller identified as JUDY (from New York) spoke with KEN KELLEY regarding a rumor of a split in the WPP and of dissension in the Pittsburgh Chapter.
5. On 9/10/70 MIKE JACOBS, WPP, South California Chapter, advised his new address and stated that he and others from California and Portland, Oregon will try to attend a conference in Michigan.
6. On 9/10/70 a MARY LOU from Milwaukee, Wisconsin, called for a mail-out regarding Liberation 3.
7. On 9/11/70 STEVE PARKINSON, 7 Golden Rod Avenue, North Port, New York, requested that 50 copies of the "Ann Arbor Argus" be sent to him so he could attempt to sell them.
8. On 9/11/70 CARL BROOKS called to tell KEN KELLEY that students at Huron High School are starting an underground newspaper and need typewriters and other supplies.
9. On 9/12/70 it was learned that WILLIAM KUNTSLER, ABBIE HOFFMAN, JERRY RUBIN and WEINGLASS would be in town for a hearing involving PUN PLANONDCN on 9/21/70.
10. On 9/11/70 ROBIN FARUQHASON, London, England, called and advised that he is the Minister of Information in the United Kingdom. He gave his address and requested WPP literature.

- 5 -

EXHIBIT # 12 TO INTERROGATORIES

(Figure A-31)

FBI Memorandum, SAC Detroit to Hoover  
September 14, 1970 (62-112678-103)

"Examples of Valuable Information" Provided by Welch  
In Support of his Request for a 30-Day Continuation  
of the Warrantless White Panther Wiretap  
(Note Reference to Hoffman, Rubin, and Kunstler in No. 9)

Source: Legal Papers of Hugh M. Davis

FEDERAL BUREAU OF INVESTIGATION

Reporting Office <b>DETROIT</b>	Office of Origin <b>DETROIT</b>	Date <b>1/28/71</b>	Investigation Period <b>6/10/70 - 1/27/71</b>
TITLE OF CASE <b>CHANGED WHITE PANTHER PARTY CLASSIFIED AND EXTENDED BY 2,2,3 REASON FOR EXTENSION FCIM, II, 1-2.4.2 (2),(3) DATE OF REVIEW FOR DECLASSIFICATION 1/28/91 1-30-99 bag:q</b>		Report made by <b>SA [REDACTED] b7c</b>	Typed by <b>cm</b>
CHARACTER OF CASE <b>IS - WPP NEW LEFT - VIOLENCE NEW LEFT - FOREIGN INFLUENCE</b>			
<p>The title is marked changed to reflect the proper title of subject organization. It was previously carried at Youth International Party (White Panther), IS - YIP - WP.</p> <p>REFERENCE: Detroit report of SA [REDACTED] dated 6/12/70.</p> <p>Class. &amp; Ext. By <b>42816/ab 2/5/92</b> Reason: FCIM II, 1-2.4.2 Date of Review <b>LEADS 1/28/91 3/13</b></p> <p><b>ALL RECEIVING OFFICES ARE REQUESTED TO CONDUCT THE FOLLOWING INVESTIGATION:</b></p> <p>Two copies each of this report are being furnished to all receiving offices in which information set forth herein indicates chapter, possible chapters or identified persons of the White Panther Party (WPP) located.</p> <p>Receiving offices are requested to identify those chapters and/or individuals identified with your division and conduct appropriate investigation to consider individuals</p>			
Approved <b>[Signature]</b>	Special Agent In Charge	Do not write in spaces below	
Copies made: <b>43 - Bureau (62-112678) (RM) 10 - Detroit (100-36217)</b>		<b>62-112678-218</b>	
(See Cover Page Aa for copies) <b>1cc retained 7082 1cc " 910D 1cc " 914b</b>		<b>FEB 18 1971</b>	
Copy to <b>IES, ATED, SS, BNDD, CROOD, W.D. (20)</b>		<b>EX-103</b>	
by routing slip for <input checked="" type="checkbox"/> info <input type="checkbox"/> action		ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED EXCEPT WHERE SHOWN OTHERWISE	
date <b>2-10-71</b>			
Property of FBI - This report is loaned to you by the FBI, and neither it nor its contents are to be distributed outside the agency to which loaned.			
U.S. GOVERNMENT PRINTING OFFICE: 1969 O-344750			
<b>58 MAR - 1 1971</b>		<b>CONFIDENTIAL</b>	

(Figure A-32)  
 FBI Report, SAC Detroit to Hoover  
 January 28, 1971 (62-112678-218)  
 Lists "Possible" WPP Chapters

Source: Freedom of Information Act Files on WPP

(fig. con'd.)

DE 100-36217

Copies:

2 - Albuquerque (RM)  
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 2 - Dallas (RM)  
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 2 - Indianapolis (RM)  
 2 - Kansas City (RM)  
 2 - Knoxville (RM)  
 2 - Las Vegas (RM)  
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 2 - San Antonio (RM)  
 2 - San Francisco (RM)  
 2 - Springfield (RM)  
 2 - Seattle (RM)  
 2 - Washington Field (RM)

~~CONFIDENTIAL~~

1 - MIG, Detroit (RM)  
 1 - NIS, Chicago (RM)  
 1 - OSI, Dayton (RM)  
 1 - Secret Service, Detroit (RM)

- Aa -  
COVER PAGE

~~CONFIDENTIAL~~

FD-203 (Rev. 12-19-67)

FEDERAL BUREAU OF INVESTIGATION

REPORTING OFFICE <b>DETROIT</b>	OFFICE OF ORIGIN <b>DETROIT</b>	DATE <b>9/17/69</b>	INVESTIGATIVE PERIOD <b>12/28/68 - 8/29/69</b>
TITLE OF CASE <b>WHITE PANTHER PARTY</b>		REPORT MADE BY SA [REDACTED] <b>b7c</b>	TYPED BY <b>gmt</b>
		CHARACTER OF CASE <b>IS - WPP</b>	SEARCHED SERIALIZED INDEXED OTHERWISE

REFERENCES: Detroit letter and LHM, dated 2/25/69  
 Detroit letter and LHM, dated 5/21/69  
 Detroit letter, dated 7/17/69

- P -

LEADS

DETROIT

AT ANN ARBOR, MICHIGAN

1. Will continue to follow the activities of [REDACTED] organization.
2. Will continue investigation to develop background information regarding [REDACTED]

ACCOMPLISHMENTS CLAIMED					<input type="checkbox"/> NONE	ACQUIT- TALS	CARE HAS BEEN:
CONVIC.	AUTO.	FUG.	FINES	SAVINGS	RECOVERIES		PENDING OVER ONE YEAR <input type="checkbox"/> YES <input type="checkbox"/> NO
							PENDING PROSECUTION OVER SIX MONTHS <input type="checkbox"/> YES <input type="checkbox"/> NO

APPROVED: [Signature] SPECIAL AGENT IN CHARGE DO NOT WRITE IN SPACES BELOW

COPIES MADE: 6 - Bureau (62-112678) (RM)  
 (See Cover Page B for Copies)

62-112678-29 REC-3  
 10 SEP 22 1969 EX-103

Dissemination Record of Attached Report

Agency	Request Recd.	Date Fwd.	How Fwd.	By
ALCS, ASI, ONI, RAO/CO				

51 OCT 3 1969

COVER PAGE

(Figure A-33)  
 FBI Report, SAC Detroit to Hoover  
 September 17, 1969 (62-112678-29)  
 "Dissemination Record" Lists I.R.S. as Recipient  
 Source: Freedom of Information Act Files on WPP

UNITED STATES GOVERNMENT

Memorandum

TO : Director, FBI (100-3-104-15)

DATE: 10/18/66

FROM : SAC, Detroit (134-706)

SUBJECT: COMMUNIST PARTY, USA  
COUNTERINTELLIGENCE PROGRAM  
IS - C  
(Breakthrough Operation)

Re Bureau letter to Detroit, dated 10/13/66,  
pertaining to [redacted]

Breakthrough is known to the Detroit Office as a militant anti-Communist right wing organization. It is more of a activist group than is the more well-known John Birch Society whose activities are generally limited to study and the political activities of its individual members. Breakthrough on the contrary has engaged in such activities as counter demonstrations at the speech of [redacted] on the Wayne State University (WSU) campus, Detroit; counter demonstrations at various anti-Vietnam demonstrations; and most recently distribution of a leaflet denouncing the pro-Communist record of [redacted]. A copy of this leaflet has been furnished to the Bureau under the Counterintelligence program.

As can be seen from the foregoing general outline regarding activities the organization has been extremely active in Detroit. Information available to this office from our informants indicates that Breakthrough tactics are beginning to cause concern in the Michigan District CP (MDCP).

It has been the observation of this office that most of the members of Breakthrough are young, nearly all are under 35 and many are under 25. They are, therefore, probably "eager to be active", but not experienced in the actual tactics and not knowledgeable concerning the identities of members of the MDCP. It is doubtful if they have been able to build up a reservoir of public source information concerning the MDCP. This lack of experience and knowledge by Breakthrough can be attributed to the decline of attention activities of the MDCP has received from the local press dating from approximately the Hungarian Revolution and the Khrushchev denouncement of Stalin, both in 1956.

- 1 - 910 9+D
- 2 - Bureau (RM)
- 1 - Detroit
- LMC/cc
- (3)

REC-3 4 OCT 21 1966

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

(Figure A-34)  
FBI Memorandum, SAC Detroit to Hoover  
October 18, 1966 (100-3-104-15-301)  
Early FBI Plans to "Take Over"  
Right-Wing Paramilitary Group "Breakthrough"

Source: National Security Archives, Washington, D.C.

(fig. con'd.)

DE 134-706

Therefore, in view of the activist nature of this organization and their lack of experience and knowledge concerning the interior workings of the MDCP, Detroit is proposing as a Counterintelligence technique that efforts be made to take over their activities and use them in such a manner as would be best calculated by this office to completely disrupt and neutralize the MDCP.

This action would, of course, be accomplished without Breakthrough becoming aware of the Bureau's interest in its operation.

Detroit considers the following to be a general outline of this contemplated action. Individual steps would be taken as the opportunity arises and undoubtedly there would need to be a sophistication and change of various actions as experience is gained and as the entire operation is analysed. This outline is being furnished only for the Bureau's consideration, appraisal, suggestions, comments and assistance. No action will be taken in any of the steps being set out pending specific Bureau authority in each instance.

In view of the Bureau's frequent request for unique and aggressive Counterintelligence recommendations and in view of what Detroit considers a strong likelihood of success in this operation, Detroit strongly recommends that the Bureau favorably consider this operation.

The following is the outline for a Counterintelligence operation designed to take over and/or guide the activities of Breakthrough in a manner best calculated to disrupt the MDCP:

1. To effect such take over lines of communication must be established between this office and Breakthrough. Detroit feels a start will have been made if the Bureau approves Detroit recommendation to send the letter to Breakthrough which was furnished for Bureau approval in the Counterintelligence program under the heading of ██████████ in Detroit letter dated 10/4/66. This letter to Breakthrough is to be signed with the pseudonym LESTER JOHNSTON. This office thus will have no problem with communicating with Breakthrough utilizing the letter concerning ██████████ as a stepping stone.

## Vita

Jeff A. Hale is the son of Leon M. Hale and Delores Stacey; he is married to the former Hortensia Maria Martinez. A 1979 graduate of Caribou High School, Caribou, Maine, Mr. Hale received a Bachelor of Arts from the University of Southern Maine in 1984. He received a Master of Arts from Louisiana State University in 1987.

Between 1988 and 1995, Mr. Hale was a Ph.D. candidate at Louisiana State University. In 1992, he received fellowships from both the Gerald R. Ford Presidential Library and the Bentley Historical Library at the University of Michigan, both located in Ann Arbor, Michigan. Mr. Hale has taught at the high school, community college, and university levels.

Mr. Hale has also worked in international education and development. From 1988 to 1992 he was Programming Coordinator for the "Leadership Center of the Americas." In 1992 he was employed by the "Consortium for Service to Latin America"; he was named Chief Operations Officer the following year, his current position.

DOCTORAL EXAMINATION AND DISSERTATION REPORT

**Candidate:** Jeff A. Hale  
**Major Field:** History  
**Title of Dissertation:** Wiretapping and National Security: Nixon, the Mitchell Doctrine, and the White Panthers

**Approved:**

*David Curtis*  
Major Professor and Chairman  
*Sheldon Larkin*  
Dean of the Graduate School

**EXAMINING COMMITTEE:**

*Donald E. DeVore*  
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**Date of Examination:**

July 7, 1995