

REPLY BY THE AUTHORS

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IN the course of preparing our article upon the Federal Loyalty Order the authors wrote to Mr. Hoover and requested him to furnish all available materials relating to the methods employed by the FBI in making investigations under the loyalty program. Mr. Hoover supplied us with certain materials, primarily his press statement published in the New York Herald-Tribune on November 16, 1947. On the basis of these materials, together with other available data, we set forth in the article the FBI's position regarding its functions and methods of operation under the program.¹ Mr. Hoover's letter to the Yale Law Journal, except in one notable particular to be considered shortly, adds nothing of substance to his previous statements summarized in the article.

The article also presented certain other facts, in each case carefully documented, which demonstrated that Mr. Hoover's point of view did not reveal the whole story. We also expressed certain conclusions which seemed to us warranted from the evidence. A number of these facts and conclusions Mr. Hoover attacks as "inaccuracies, distortions and misstatements." We have carefully reconsidered these matters in the light of Mr. Hoover's letter and feel compelled to adhere at all points to our original position. Mr. Hoover's accusations, in our judgment, are either based upon a misapprehension of the issues or are unsupported by the facts. A detailed analysis of all significant points in controversy is set forth below. The ultimate judgment must, of course, be made by the reader.

The vituperative tone of Mr. Hoover's letter is not a matter of personal concern to the authors. We are satisfied to leave to the reader, without further argument, the decision as to whether Mr. Hoover's innuendos regarding our motives are justified by the circumstances. But Mr. Hoover's frame of mind has an important bearing upon the merits of the issues under discussion, and for this reason we pause to note it. A single example of his attitude will suffice. Mr. Hoover objects to our conclusion that "a secret police established to investigate the 'loyalty' of American citizens can develop into a grave and ruthless menace to democratic processes," and that "there are signs that the FBI is moving dangerously in this direction." In reply Mr. Hoover impugns "the authors' sincerity" and states: "I find such opinions most frequently expressed on the pages of the Daily Worker, the publi-

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1. See *Loyalty Among Government Employees*, 58 Yale L. J. 45, 71-2, 107-8.

cation of the Communist Party." This readiness by the chief of the FBI to identify (what are to him) unorthodox views with Communist views throws a revealing light upon the atmosphere in which the FBI operates. We cite it as a further sign of the direction in which that agency is moving. It is perhaps unnecessary to remind the reader that the conclusions attacked by Mr. Hoover were based in part upon official documents and in part upon the statements of two former high officials in the Justice Department, a former judge of the New York Court of Appeals, a former FCC Commissioner, an eminent authority upon civil liberties, and six highly respected journalists, each of whom made one or more statements in agreement with our views on FBI practices.²

As previously stated, Mr. Hoover's letter does contain one highly significant piece of information. That relates to wire tapping by the FBI. In his statement to the New York Herald-Tribune on November 16, 1947, Mr. Hoover said:

"Special Agents of the FBI in handling the Federal Employee Loyalty Program do not inquire whether the employee reads liberal or other publications, nor do they tap telephones as has been rumored."³

We had interpreted this statement as an unqualified denial that the FBI under any circumstances tapped telephones. In this we were apparently wrong. In his letter to the Journal Mr. Hoover now states:

"It is no secret that the FBI does tap telephones in a very limited type of cases with the express approval in each instance of the Attorney General of the United States, but only in cases involving espionage, sabotage, grave risks to internal security, or when human lives are in jeopardy. This is never done in the investigation of the loyalty of Federal employees."⁴

Mr. Hoover's admission that the FBI taps telephones, never publicly

2. Thurman Arnold (former Assistant Attorney General of the U.S.), *How Not to Get Investigated*, 197 Harper's 61 (1948); John Lord O'Brian (former Assistant to the Attorney General), *Loyalty Tests and Guilt by Association*, 61 Harv. L. Rev. 592 (1948); Charles B. Sears (former judge of the New York Court of Appeals), *In the Matter of Harry Renton Bridges*, Memorandum of Decision 183-4 (1941); Statement of FCC Commissioner Clifford J. Durr, from minutes of Commission action on letter to J. Edgar Hoover, Dec. 1, 1947, pp. 1-2 (mimeographed); Robert Cushman (Goldwin Smith Professor of Government at Cornell), *The President's Loyalty Purge*, 36 *Survey Graphic* 283 (1947); Carroll Kilpatrick, *Washington Worry-Go Round*, 48 *Magazine*, March 1948, pp. 126-32; Henry F. Pringle, *Snooping on the Potomac*, *Saturday Evening Post*, Jan. 15, 1944; Guy Richards, *Is Your Phone Tapped?*, *N. Y. Star*, Sept. 27, 28, 29, 30, and Oct. 1, 1948; Hanson Baldwin, *N.Y. Times*, Mar. 2, 1948, p. 18, col. 3-4; Alexander Uhl, *PM*, Aug. 17, 1947, p. 2, col. 4; *I. F. Stone*, *PM*, July 2, 1947, p. 2, col. 2.

3. Statement of J. Edgar Hoover, *N.Y. Herald-Tribune*, Nov. 16, 1947, p. 42, col. 4.

4. See p. 405 *supra*.

conceded in recent years so far as we are aware, is an astounding statement from a public official charged with enforcement of our laws. Section 605 of the Federal Communications Act provides that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person. . . ."⁵ The Supreme Court in *Nardone v. United States* held that this provision applies to the tapping of telephones by Federal officials. Hence in that case the Court ruled inadmissible in evidence in the Federal Courts any information obtained as a result of wire-tapping.⁶

The statutory prohibition is directed against interception *and* divulging the results of the interception. Hence mere interception is not unlawful. But obviously an FBI agent tapping a telephone does not keep the information to himself; he normally communicates it to other persons. And the *Nardone* case is clear that the statute is to be literally construed as preventing intercepted information from being divulged to "any person":

" . . . the plain words of § 605 forbid anyone, unless authorized by the sender, to intercept a telephone message, and direct in equally clear language that '*no person*' shall divulge or publish the message or its substance to '*any person*.' " (Italics in original.)

"For years controversy has raged with respect to the morality of the practice of wire-tapping by officers to obtain evidence. It has been the view of many that the practice involves a grave wrong. In the light of these circumstances we think another well recognized principle leads to the application of the statute as it is written so as to include within its sweep federal officers as well as others."⁷

In 1940 Attorney General Jackson plainly stated that the practice of wire-tapping by the FBI was illegal under Section 605:

"Notwithstanding it will handicap the FBI in solving some extremely serious cases, it is believed by the Attorney General and the Director of the Bureau that the discredit and suspicion of the law enforcing branch which arises from the occasional use of wire tapping more than offsets the good which is likely to come of it.

5. 48 Stat. 1103, 47 U.S.C. § 605 (1948). The penalty for violation is a maximum fine of \$10,000, or imprisonment for not more than two years, or both. 48 Stat. 1100, 47 U.S.C. § 501 (1948).

6. *Nardone v. U.S.*, 302 U.S. 379, 382 (1937). In *Weiss v. U.S.*, 308 U.S. 321 (1939) the Court ruled that the prohibition extended to intrastate communications. For subsequent cases, see *U.S. v. Goldstein*, 316 U.S. 114 (1942); *Reitmeister v. Reitmeister*, 162 F.2d 691 (C.C.A. 2d 1947); *U.S. v. Polakoff*, 112 F.2d 888 (C.C.A. 2d 1940). See also Notes, 2 Bill of Rights Rev. 48 (1941); 53 Harv. L. Rev. 863 (1940).

7. 302 U.S. 382, 384 (1937).

"In a limited class of cases, such as kidnapping, extortion and racketeering . . . it is the opinion of the present Attorney General as it was of Attorney General Mitchell that wire tapping should be authorized under some appropriate safeguard. Under the existing state of the law and decisions, this cannot be done unless Congress sees fit to modify the existing statutes."⁸

Following this complete repudiation of wire-tapping as illegal, Attorney General Jackson, Attorney General Biddle and Mr. Hoover repeatedly requested Congress to legalize wire tapping in a restricted area: cases involving espionage, sabotage and major crimes.⁹ This Congress refused to do. And very recently Attorney General Clark asked Congress for legislation to legalize wire-tapping in investigations affecting the national security.¹⁰

It seems clear, therefore, that the tapping of telephones by a Federal investigating agency constitutes a violation of Federal law. Even were Section 605 less definite in its terms Federal enforcement officials would be under an obligation to comply with the spirit of the statute which, as the Supreme Court has pointed out, expresses the judgment of Congress that wire-tapping is "inconsistent with ethical standards and destructive of personal liberty."¹¹ Mr. Hoover's broad claims to a

8. N.Y. Times, Mar. 18, 1940, p. 1, col. 3, p. 10, col. 6. The earlier history of Justice Department shifts in policy on wire tapping is outlined in the Times news story. It is interesting to note, in view of the fact that Mr. Hoover has invoked the memory of Chief Justice Stone, that the former Chief Justice, when Attorney General, established a departmental regulation completely forbidding wire tapping: "Wire tapping, entrapment, or the use of any other improper, illegal or unethical tactics in procuring information in connection with investigative activity will not be tolerated by the bureau." *Ibid.*

Shortly after Attorney General Jackson's statement Mr. Hoover characterized the practice of wire-tapping as "archaic and inefficient" which "has proved a definite handicap or barrier in the development of ethical, scientific, and sound investigative technique." Letter quoted in 53 Harv. L. Rev. 870 (1940). Just a few months later the FBI tapped the telephone wires of the labor leader Harry Bridges. See Sears, In the Matter of Harry Renton Bridges, Memorandum of Decision 183-4 (1941). This is not denied by Mr. Hoover in his letter to the Journal.

9. See, e.g., N.Y. Times for the following dates: Jan. 4, 1941, p. 7, col. 1; Feb. 18, 1941, p. 12, col. 2; Mar. 18, 1941, p. 12, col. 2; Oct. 9, 1941, p. 4, col. 2; Feb. 19, 1942, p. 11, col. 7. On the last date Mr. Biddle urged legislation to permit wire-tapping as such, and also to make evidence so obtained admissible in court.

10. N.Y. Times, Jan. 15, 1949, p. 1, col. 8. The bill introduced by Senator McCarran as a result of Attorney General Clark's letter would expressly authorize the Director of the FBI and the heads of certain other Federal intelligence agencies, with respect to investigations involving national security and defense, under regulations prescribed by the Attorney General, to require "that any information obtained by means of intercepting, listening in on, or recording telephone, telegraph, cable, radio, or any other similar messages or communications, be disclosed and delivered to any authorized agent of any one of said investigatorial agencies, without regard to the limitations contained in section 605 of the Communications Act of 1934." A separate provision provides that "the information thus obtained shall be admissible in evidence . . ." S. 595, 81st Cong., 1st Sess., Sec. 5 (a).

11. *Nardone v. U.S.*, 302 U.S. 379, 383 (1937).

scrupulous regard for civil rights seem strangely at variance with his open disregard of established law and Congressional policy.

We turn now to a brief analysis of Mr. Hoover's various charges of "inaccuracies, distortions and misstatements."

(1) Mr. Hoover objects to our statement that "in deciding what facts to report the FBI makes constant judgments of relevancy." (p. 45).^{*} He contends that FBI agents "report all information conveyed to them." (p. 401). A few pages later Mr. Hoover contradicts himself by labelling "untrue" our statement that the FBI investigatory process inevitably results in "the collection of gossip, rumor and data on private affairs." (p. 407). Apart from this inconsistency, it is manifestly impossible for FBI agents to "report all information conveyed to them." Each agent must decide what facts are relevant, what questions to ask, what leads to pursue, what individuals to interrogate, how to write up his findings. The resulting report inevitably is a highly subjective document and the judgments embodied in it substantially influence the ultimate disposition of the case.

(2) Mr. Hoover characterizes as "inaccurate" our statement that the authority of the FBI to undertake an investigation "is, for all practical purposes, unlimited." (p. 68). His answer is that "the FBI investigates only when there is a reason, which must be based upon fact." (p. 402). We did not contend that the FBI instituted investigations without any reason. We merely asserted that there was no effective limitation on the FBI's power to start an investigation whenever it so desired, a proposition that Mr. Hoover does not specifically refute.

(3) Our quotation of the letter from Mr. Hoover to the Chairman of the National Labor Relations Board (p. 68) is attacked as "furnishing only partial facts." (p. 403). The facts said to be omitted are that the information in the letter was furnished the FBI by another highly respected government agency and that the employee involved was later investigated and exonerated. None of these facts are available in the public record or were known to the authors. Nor are they relevant to the point we were making,—that the FBI considered it significant to inform the NLRB that one of its employees had "studied anthropology" and "visited Mexico City." Mr. Hoover also argues that the letter was sent in November 1940 (as the article made clear) whereas "the Loyalty Program was inaugurated" seven years later. It is true that the Loyalty Order was issued in 1947 but loyalty investigations had been in progress since 1939, the date of the Hatch Act. Moreover, Mr. Hoover does not assert that FBI investigation policies in loyalty cases have changed in any way since 1939.

(4) With respect to the quotation from Commissioner Durr (p. 69),

* Page numbers in parentheses refer either to the principal article or to Mr. Hoover's comment.

its purpose was not to attack the FBI practice of furnishing pertinent data to Federal agencies, but simply to show what kind of data the FBI considered relevant. We examined the contention of Commissioner Jones that the data was "completely out of context" and concluded his criticism did not substantially impair the significance of the material. It was impossible for reasons of space to review in detail the whole controversy within the FCC; hence we merely noted the difference of opinion.

(5) Mr. Hoover challenges the validity of our data showing the kind of information sought by the FBI in loyalty investigations, charging that "only excerpts have been selected from reports to fit the convenience of the authors" (p. 403) and denying that certain questions are asked by FBI agents. (p. 404). It is impossible to make a comprehensive analysis of FBI investigative reports since such reports are not available to public scrutiny. Our material is based on reliable sources, which have in all cases been indicated. We are satisfied from our entire study of the subject, including not only the sources cited but numerous conversations with Federal employees under investigation, that the material included in the article represents the kind of information gathered by the FBI. It does not, of course, represent the only data collected and was not presented as such. Our point is that a general loyalty program designed to weed out the "potentially disloyal" inevitably leads to inquiries of the character we have outlined.

(6) Mr. Hoover takes exception to our statement that witnesses "are assured that their identity will not be revealed" and that FBI reports "usually refer to the source of information by symbols only." (p. 71). His point is that witnesses are assured their identity will be withheld only when they insist upon it and that "frequently" signed statements are transmitted to Loyalty Boards. (p. 405). Our statement was based upon the 1942 report of the Attorney General's Interdepartmental Committee on Investigations which stated:

"It frequently happened that other informants . . . would report frankly only on condition that they remain unidentified. Consequently the Bureau's (FBI) reports generally designated informants by symbols only."¹²

Mr. Hoover does not deny that this is still the situation. He simply asserts that "frequently" signed statements are secured.

(7) We have already commented upon Mr. Hoover's statement with regard to wire tapping. Two other observations may be added. In the first place the statement is self-contradictory. Mr. Hoover says he does not tap wires in loyalty cases but only in cases "involving espionage, sabotage, grave risks to internal security, or when human

12. Letter from Attorney General, H.R. Doc. No. 833, 77th Cong., 2d Sess. 23 (1942).

lives are in jeopardy." (p. 405). Yet the Loyalty Order expressly lists "sabotage, espionage, or attempts or preparations therefor" among the subjects of investigation in a determination of disloyalty. Secondly, Mr. Hoover challenges us to show a case where the FBI has tapped telephones in a loyalty case. Our statement was that instances of wire-tapping "have been reported." (p. 71). In support of this we cited the Bridges case, which Mr. Hoover does not deny; an article by a reputable reporter who categorically asserts that phones are tapped in loyalty cases; and a series of articles by another reputable reporter, based on interviews with 18 former FBI agents, which lists a number of Americans whose wires were tapped for political reasons. (p. 71). On the basis of this data, together with the facts set forth above, we stand by our original statement.

(8) Mr. Hoover asserts that in footnote 269 we incorrectly quoted him as saying that FBI files "include everybody who had been involved in any activities of a subversive nature" or who "would be potentially dangerous." (p. 71). The full extract of Mr. Hoover's testimony is given in the footnote.¹³ We interpreted Congressman Rooney's reference to a "comprehensive file" as meaning the FBI file. We still consider this interpretation the most logical one. It is true that the first part of the quotation was spoken by Congressman Rooney and acquiesced in by Mr. Hoover. To this extent our use of the quotation marks is perhaps open to question. But the error, if it be considered one, is wholly inconsequential.

(9) Mr. Hoover asserts that the FBI does not investigate "political activities" or "political views." (p. 406). Mr. Hoover chooses to construe the term "political" as not including "subversive." This seems a plain misuse of the word "political"; "subversive" activities, regardless of their illegality, are certainly "political" as that term is customarily used. Apart from Mr. Hoover's play on words, however, it is obviously not accurate to say that the FBI investigates only "subversive" activities or views. The object of the FBI investigation is to collect information showing whether or not an employee is or may be "disloyal to the Government of the United States." This can be done

13. "Mr. Hoover. Out of 84,923, 84,780 had no derogatory information.

"Mr. Rooney. May I ask a question that might clear up this point? In the building up of your name file, you cooperate with the local police, do you not?"

"Mr. Hoover. That information is secured from every possible source.

"Mr. Rooney. For instance, in the City of New York where the police department had a subversive squad during the war, they have a substantial file and gave you the advantage of all the information they had. So that when you are checking these names given by the Civil Service Commission, you are checking them against quite a comprehensive file which we might say would include everybody who had been involved in any activities of a subversive nature.

"Mr. Hoover. Or that would be potentially dangerous." *Hearings on Department Of Justice Appropriation Bill*, 80th Cong., 2d Sess. 248 (1947).

only by ascertaining what the employee's activities and views are, whether they be "conservative," "liberal," "radical," or "subversive." Thus the FBI necessarily investigates all kinds of "political activities and views."

(10) Also challenged is our statement that "the collection of gossip, rumor and data on private affairs becomes an inevitable part of the process." (p. 72). Mr. Hoover says this is "untrue." (p. 407). The rest of his answer admits that FBI agents collect gossip and rumor but asserts that they "try to ascertain the sources" of such statements. Mr. Hoover's attempt to argue that FBI investigations "are not secret" needs no comment.

(11) Mr. Hoover seems to misunderstand our remarks about efficiency ratings and the pressures on an investigating staff to show results. (p. 72). He is unduly sensitive in construing the statement as peculiarly applicable to the FBI. The point was that *all* large investigating staffs tend to develop aggressive methods and a prosecutor's bias. The conclusion is based largely on the personal experience of one of the authors who served for many years in the Federal service and was for some time in charge of a sizeable staff of investigators.

(12) Mr. Hoover takes exception to our statement that the Federal employee "is acutely aware that an FBI investigation can be initiated upon the basis of a complaint made by an unfriendly or psychopathic acquaintance." (p. 76). He considers this "to distort and misrepresent the truth." (p. 408). But he does not deny that such is the case; he simply asserts that the FBI investigation will uncover the true facts. Mr. Hoover once again misses the point. The point we were making is that the possibility of such an FBI investigation, whatever its outcome, is in itself coercive and demoralizing.

(13) Objection is made to the following statement: "It is unlikely that there will be an extensive use of the formal procedures in the case of prospective employees. In effect this places a veto power on government employment in the hands of the FBI." (p. 77). Mr. Hoover feels that "this statement alone . . . tests the credibility of the entire article." (p. 408). His reply is that "the FBI never acts as prosecutor or judge." Mr. Hoover fails to distinguish between the *formal requirements* of the Loyalty Order and its *actual operation*. He seems to construe the statement as an accusation that the FBI will disregard the terms of the Order. Nothing of the sort was stated. The point was that in practical operation where an employing officer is faced with an issue of loyalty in the case of an applicant he is more than likely to feel the safest course is to drop the matter at that point rather than await a determination under the formal procedures. The practical effect of this, as we noted, is to place in the hands of the investigating agency the actual power of determining whether or not a particular individual will be employed by the government.

(14) Mr. Hoover's discussion of the failure to disclose the evidence against an accused employee (pp. 409-10) adds nothing to the treatment of this matter in the article. (pp. 101-9). Once again Mr. Hoover seems to misunderstand the issue. The question is not one of depriving the Government of information from confidential informants as a source of "leads." That was never suggested. The question is whether an employee accused of disloyalty should have the right to know the evidence against him, to confront his accusers, to cross examine, and to exercise other rights accorded accused persons in Anglo-American jurisprudence. These ancient safeguards of democracy Mr. Hoover brushes aside as "the whims and convenience of the individual." (p. 409).

Conclusions

The crux of Mr. Hoover's statement is an appeal to faith. He asks the reader to have faith in his fairness and the fairness of FBI agents in conducting loyalty investigations. He asserts that our analysis of FBI investigative practices and the manner in which FBI reports are utilized by loyalty boards is either distorted or untrue. But categorical assertion without evidence remains unconvincing. Here, as at many points throughout the loyalty program, the full facts are not open to public knowledge and debate.

If the President decides to continue the Loyalty Program we strongly urge upon him that the country is entitled to a fully exposed picture of how the program works. We would suggest, therefore, the establishment of a Committee on Loyalty Practices, composed of independent scholars and citizens (similar to those selected for the President's Committee on Civil Rights), to undertake a thorough scientific and objective study of the loyalty program. Such a Committee should include in its investigations a study of the FBI's role in the program. It should discover the answers to the following questions, among others:

- (1) How are FBI agents selected? Who are they? What are their political preferences? How politically sophisticated are they? What sort of training do they receive to equip them to investigate loyalty cases? On what basis are efficiency ratings determined in loyalty investigations?
- (2) What does a study of FBI loyalty reports reveal? In particular cases what were considered facts? What criteria determine the selection of facts? What percentage of the reports were devoted to personal matters, political views, social relations, reading material, etc.?
- (3) How reliable are FBI informants? The Committee might cross-examine a representative sampling.
- (4) What is the extent of wire tapping? How extensive is the FBI file on "subversives"?

- (5) Given this background, in how many cases would the Committee have judged differently from loyalty boards who must depend almost entirely on the FBI report as a basis for decision in a loyalty case?

Until such a Committee is formed, investigates, and reports to the people, the available material will have to suffice as a basis for judgment. Should the findings of such a committee disprove our views on FBI practices we shall be most gratified to admit error. Until then we re-affirm the analysis we made in the earlier article. The principal published material bearing on FBI investigative methods is there fully presented. Let the reader read and decide.