FISA COMMENTARY SERIES

PRESIDENTIAL "WARRANTS"

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INTRODUCTION

The "Mitchell Doctrine" as referenced in this Article—a national security wiretapping framework hinging on executive certification—has a well-documented history.

In 1980, W. Mark Felt, Sr., Associate Director of the FBI, and Edward G. Miller, head of the FBI's Domestic Intelligence Division,

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were convicted of violating the civil rights of associates of the Weather Underground Organization or "Weathermen."[1] Felt and Miller's trial defense depended on their "good faith" belief that the Executive Branch had the authority to authorize surreptitious entries and other "extra-legal" techniques in the appropriate case involving a foreign-connected domestic threat.[2] They relied on their understanding of the law as it existed in 1972.[3] This inability to cleanly sort surveillance into "foreign" and "domestic" categories informed Congress's passage of FISA in 1978, and continued to complicate FISA policy through 2002.[4]

For its part going back to the 1930s, the FBI had in place a highly professional corps of counterintelligence specialists for dealing with foreign subversion and espionage within the nation.[5] They were effective because they used techniques that many deemed "extra-legal" in a criminal law context but were a sanctioned practice going back to the Roosevelt Administration.

A directive from President Roosevelt dated September 6, 1939, charged the FBI with the responsibility for investigative work "relating to espionage, counterespionage, sabotage, subversive activities, and violations of the neutrality law."[6] This directive charged

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[1] United States v. Felt, No. 78-00179 (D.D.C. 1980). Ironically, in 2005, after 30 years of silence Mr. Felt revealed for the first time that he was Woodward and Bernstein's Watergate source, "Deep Throat."

[2] MARK FELT, THE FBI PYRAMID 324-327 (Putnam) (1979).

[3] *See id.*

[4] In pretrial proceedings the Felt/Miller defense sought the full introduction of a highly classified ongoing domestic intelligence program run through the FBI at the behest of another agency. The government claimed it was irrelevant and that the disclosure would be detrimental to U.S. security and compromise valuable intelligence. The Court ultimately ruled that although the program was relevant the details would remain a secret. It would be cited, euphemistically, as "Program C." The specifics of Program C would not be disclosed except for informing the jury that it involved warrantless entries against domestic targets; *see* Transcript of Oral Argument at 3762-63, United States v. Felt, No. 78-00179, (D.D.C. 1980) (testimony of Herbert Brownell); Transcript of Oral Argument at 3729-30, United States v. Felt, No. 78-00179, (D.D.C. 1980) (testimony of Gerard Burke).

[5] *Timeline*, FBI History (last visited May 23, 2020), https://www.fbi.gov/history/timeline.

[6] Franklin D. Roosevelt, The Federal Bureau of Investigation is Placed in Charge of Espionage Investigation (Sept. 6, 1939), 1939 THE PUB. PAPERS & ADDRESSES OF FRANKLIN D. ROOSEVELT 478, 478-79 (1941).

J. Edgar Hoover, the Director of the FBI, with the authority to approve surreptitious entries at his discretion without a court-issued warrant.[7] He did not need to return to the President for permission for whatever technique the immediate task called for.[8] These techniques included wiretaps, microphones, and covert entry.[9] On January 8, 1943, President Roosevelt redefined the delegation of authority in another directive to Director Hoover.[10]

With the advent of the Cold War, the Director's authority was carried forward by the Truman administration. The KGB was ascendant and expanding a network of spies, assassins, sabotage, and subversion.[11] In 1947, the founding of the Central Intelligence Agency ("CIA") became the primary weapon at the President's disposal for countering the KGB abroad and for intelligence-gathering as well.[12] The CIA's directive placed the agency at the forefront of global intelligence.[13] On July 24, 1950, in an executive directive to the FBI Director, President Truman reaffirmed a "blanket" authority for the Bureau to utilize clandestine methods, including warrantless covert entry.[14]

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[7] *See id.*

[8] *See id.*

[9] President Roosevelt had good reason to be concerned about penetration of our nation by Nazi spies and saboteurs. The German-American Bund was loyal to the Nazi cause in the years leading up to Pearl Harbor; see Douglas M. Charles, *Informing FDR: FBI Political Surveillance and the Isolationist-Interventionist Foreign Policy Debate, 1939-1945*, 24 Diplomatic History 211, 215-16 (2000).

[10] *See* Transcript of Oral Argument at 3759-387, United States v. Felt, No. 78-00179, (D.D.C. 1980) (testimony of Herbert Brownell); Athan G. Theoharis, *The FBI's Stretching of Presidential Directives, 1936-1953*, 91 Political Sci. Quarterly 649, 660 (Winter 1976-1977).

[11] *KGB*, HISTORY.COM (Apr. 25, 2019), https://www.history.com/topics/russia/kgb.

[12] *See A Look Back…The National Security Act of 1947, Central Intelligence Agency*, CIA.GOV (last visited May 23, 2020), https://www.cia.gov/news-information/featured-story-archive/2008-featured-story-archive/national-security-act-of-1947.html.

[13] *See id.*

[14] Surreptitious entries became known as "black bag jobs" or "bag jobs" in the language of counterintelligence. So named for lock picking, eavesdropping devices and other tools of the trade carried in a black leather bag by agents engaged in these techniques; *see* Theoharis, *supra* note 10, at 665-66.

The Eisenhower Administration renewed the 1950 directive providing for authorization of covert searches of private premises to thwart communist subversion.[15] At the 1980 Felt/Miller trial, former Attorney General Herbert Brownell testified that the directive's framework for justifying a covert entry in a purely domestic matter turned on whether the "primary purpose"[16] of the entry was gathering intelligence rather than assembling evidence for a criminal trial. If the covert entry sustained such scrutiny, it was exempt from the Fourth Amendment prohibition against unreasonable searches and seizures.

Brownell's testimony that the 1950 directive stipulated a "primary purpose" standard for authorizing *domestic* executive power-based national security wiretapping is especially notable given that "primary purpose" played a central role in national security surveillance jurisprudence (including FISA jurisprudence) in later years.[17] Whether such internal memoranda influenced Judge Albert Bryan's application of a "primary purpose" standard in the landmark *Humphries-Truong* case is unclear.

Another Presidential directive, dated December 15, 1953, reaffirmed the FBI Director's authority.[18] However, troubling to the Director was the "twilight zone" with regard to the boundaries of the Fourth Amendment vis-à-vis citizens' rights under the Fourth Amendment as opposed to Presidential responsibility to defend the Nation from foreign threats.[19]

At the 1980 Felt/Miller trial, former Attorney General Herbert Brownell testified and addressed the dichotomy between intelligence gathering and use of fruits of such entries in a criminal case.[20] Brownell addressed the issue in light of the U.S. Supreme Court decision in *Irvine v. California*.[21] *Irvine* was a gambling conspiracy where evidence was obtained by a microphone placed in a bedroom by a warrantless

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[15] *See id.* at 668.
[16] *See* Transcript, *supra* note 10.
[17] *See* United States v. Humphrey, 456 F. Supp. 51, 57-58 (E.D. VA, 1978); United States v. Truong Dinh Hung, 629 F.2d 908, 913-14, 914 n.4 (4th Cir. 1980).
[18] Theoharis, *supra* note 10, at 668-69.
[19] Transcript, *supra* note 10, at 3777-787.
[20] *See* Transcript, *supra* note 10.
[21] *See* Irvine v. California, 347 U.S. 128 (1954), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

entry.[22] Although the Court expressed its displeasure, it ruled that the Fourteenth Amendment did not apply to illegally obtained evidence in state court prosecutions.[23]

Importantly with respect to legal history, Brownell revealed in his 1980 Felt/Miller testimony that the gambling conspiracy underlying *Irvine* had presented the Justice Department with what was then a unique, unprecedented problem: according to Brownell, this was the first instance where national security surveillance had problematically overlapped with a criminal prosecution.[24] The FBI had been engaged in an intelligence gathering activity at the request of another unnamed intelligence agency.[25] The operation depended on warrantless surreptitious entries conducted by FBI.[26] The disclosure of its very existence would cause irreparable harm to U.S. counterintelligence activities and it was referred to simply as "Program C."[27] Other than the fact that it involved warrantless entries for counterintelligence purposes it was left officially unexplained; the program was still in place at the time of the Felt/Miller entries in 1972-73. Understandably, the *Irvine* opinion made no reference to national security surveillance, leaving Brownell's account, 26 years later, to confirm the national security-criminal overlap surveillance problem.

In the wake of *Irvine*, J. Edgar Hoover was concerned that disclosure of Program C (and other covert activities) would be damaging to the FBI's reputation.[28] Consequently, Brownell authored a memo on May 20, 1954 which was later introduced by the defense in the Felt/Miller trial.[29] Brownell's memorandum addressed *Irvine* and stated emphatically that the ruling "would not interfere with the [covert] operations […] where it involves tracking down spy activities, sabotage and subversive activities that threatened the security of the government."[30] Brownell explained that entries such as those under

[22] *See Irvine*, 347 U.S. at 129-32.
[23] *See* Transcript, *supra* note 10*; see also Irvine*, 347 U.S. at 137-38.
[24] *See* Transcript, *supra* note 10.
[25] *See id*.
[26] *See id*.
[27] *See* Transcript, s*upra* note 4.
[28] Transcript, *supra* note 10, at 3762-66.
[29] *See id*. at 3763-66
[30] *See id*.

Program C did not require Court fiat, and that the authority was vested in the Director of the FBI via the President's inherent constitutional powers.[31]

In his testimony, Brownell assured the court and the jury that under the President's direction, the FBI had the "duty" to use these techniques so the information gathered "would be available to the President, the National Security Council, the Secretary of State, and the Defense Department."[32] Under cross-examination, Brownell was emphatic that the Bureau had the authority to perform warrantless entries under a "blanket" authority from the President where foreign threats were involved.[33]

Brownell noted that on March 8, 1956, Director Hoover met with Eisenhower's full Cabinet, including the Director of the CIA, where Hoover participated in a briefing on Soviet espionage activities.[34] Eisenhower required that every wiretap be approved in advance by the Attorney General.[35] There was no restriction placed on surreptitious physical searches by Bureau agents.[36] In his testimony, Brownell said it was "common sense" in conducting "effective" counterintelligence that the Director need not seek authority in advance for every surreptitious entry.[37]

Judge Richard Yeagley also testified in the Felt/Miller trial.[38] Judge Yeagley started his career as an FBI agent, ascended the Department of Justice hierarchy, serving as chief of the Internal Security Division as Assistant Attorney General.[39] He supervised national security investigations until 1970 when he was appointed a

[31] *See id*. at 3780-87.
[32] *See* Transcript, *supra* note 10, 3763-66.
[33] *See id.*
[34] *See id*.
[35] *See id*.
[36] *See id*.
[37] *See id*.
[38] *See* Transcript of Oral Argument, United States v. Felt, No. 78-00179 (D.D.C. 1980) (testimony of Judge Yeagley).
[39] *See J. W. Yeagley Dies*, THE WASH. POST, May 1, 1990.

Judge of the District of Columbia Court of Appeals.[40] Thus his experience extended through four administrations.

Forecasting FISA policy, Judge Yeagley's testimony established that Hoover kept his office informed of warrantless entries especially where there could be a criminal prosecution.[41] More to the point, while Hoover never asked in advance for authority to approve a surreptitious entry, he always obtained pre-approval for a wiretap.[42] The Bureau was forthcoming in identifying questionable evidence derived from warrantless surreptitious entries.[43] Hoover and his agents freely consulted with DOJ attorneys in disclosing evidence developed from such entries.[44] By virtue of the Presidential authorizations, Judge Yeagley did not believe that it was his responsibility to oversee the FBI's intelligence-gathering except where the evidence might compromise its admissibility in a criminal prosecution.[45]

Judge Yeagley served under Robert Kennedy and Nicholas Katzenbach, who were both apprised of the Bureau's handling of national security surveillance information.[46] For example, a covert FBI search revealed that John William Butenko, an American citizen of Russian origin, was passing classified material to a Soviet trading company operated by the KGB.[47] At Butenko's trial, prosecutors avoided using evidence derived from surreptitious entries. However, two of Butenko's confederates were deported on the strength of evidence obtained by a surreptitious entry.[48]

Both John N. Mitchell (Attorney General 1969-72) and Richard Kleindienst (Attorney General 1972-73), testified at the Felt/Miller trial.[49] They corroborated Brownell's testimony regarding the Bureau's authority to use the technique in appropriate

[40] *See id*.
[41] *See* Transcript, *supra* note 38.
[42] *See id*.
[43] *See id*.
[44] *See id*.
[45] *See id*.
[46] *See J. W. Yeagley Dies*, THE WASH. POST, May 1, 1990.
[47] *See* United States v. Butenko, 384 F.2d 554, 558 (3d Cir. 1967).
[48] *See id*. at 560 (3d Cir. 1967).
[49] Transcript, *supra* note 10, at 5742-5826.

circumstances.[50] Neither was ever asked to approve a covert entry but both agreed it was a legal tool when national security was at stake and fell under the umbrella of executive power to protect the country from foreign threats.[51]

A. *Hoover's cut-off*

Following a November 3, 1966 directive from Attorney General Ramsey Clark concerning the "national security limitations" of warrantless wiretapping, J. Edgar Hoover circulated a letter memorandum to his subordinates, halting the use of surreptitious entries.[52] Mitchell testified in the Felt/Miller trial that Hoover's desistance was less motivated by legal concerns than by regard for the Bureau's image.[53] Mitchell and others opined that rising public concern for civil rights, stemming from anti-war protests, had alerted Hoover, who was always keen to safeguard the FBI's public reputation.[54] However, Program C -- foreign intelligence against domestic targets -- continued unabated. This may be in part because the Program's fruits were not to be used in criminal proceedings and the warrantless entries conducted by Bureau agents were at the behest of another agency.

B. *The Huston Plan*

In 1970, Tom Huston, a White House aide, was tasked with preparing a comprehensive plan to coordinate domestic intelligence gathering and to make recommendations for combating "left wing radicals" and anti-war extremists.[55] Huston reported to the Interagency Committee on Intelligence (ICI), a group of representatives from the various intelligence agencies chaired by

[50] *See id.*
[51] *See id.*
[52] FELT, *supra* note 2, at 323.
[53] BURTON HERSH, BOBBY AND J. EDGAR: THE HISTORIC FACEOFF BETWEEN THE KENNEDYS AND J. EDGAR HOOVER THAT TRANSFORMED AMERICA (2007); WILLIAM C. SULLIVAN, THE BUREAU: MY THIRTY YEARS IN HOOVER'S FBI (Ishi Press 2011) (1979).
[54] Transcript, *supra* note 10, at 5765-71, 5905.
[55] *See The Huston Plan*, GLOBAL SECURITY.ORG (last visited May 23, 2020), https://www.globalsecurity.org/intell/ops/huston-plan.htm.

Hoover. The group included representatives from the CIA, DIA and NSA.

The Plan outlined proposals to rein in radical groups including the Weathermen, SDS, Black Panthers and other "New Left" organizations that had turned to violence in their anti-war activities.[56] It called for infiltration of anti-war groups by underage informants, mail covers, surreptitious entries, and warrantless electronic surveillance, and also suggested a detention center to house and hold imprisoned radicals.[57]

The Huston Plan was roundly accepted by the representatives from the other intelligence agencies.[58] Hoover, who would be responsible for overseeing most of the recommended activities, was the sole dissent.[59] He secured support from Attorney General Mitchell, who convinced the President to abandon the Plan.[60] It died on the vine.[61]

During his testimony in the Felt/Miller trial, President Nixon testified that although Hoover vetoed the Plan, it did not mean the Executive branch did not have the power to authorize some of the techniques that were recommended.[62] He testified that Hoover's lack of enthusiasm for the plan was distinct from the issue of Presidential power to delegate authority to the FBI Director for warrantless searches.[63]

C. *The Weathermen*

The Students for Democratic Society (SDS) was a national student activist group launched in 1960.[64] It grew rapidly as a response

[56] *See id.*
[57] *See id.*
[58] *See id.*
[59] *See id.*
[60] *See id.*
[61] *See id.*
[62] *See* Transcript of Oral Argument at 5909-36, United States v. Felt, No. 78-00179 (D.D.C. 1980) (testimony of Richard Nixon).
[63] *See id.*
[64] *See* Laura Lambert, *Students for a Democratic Society,* BRITANNICA (last visited May 23, 2020), https://www.britannica.com/topic/Students-for-a-Democratic-Society.

to the Vietnam War.[65] At its height it spread over 300 campuses and boasted over 30,000 supporters.[66] By 1969 a faction led by Bernadine Dohrn, Bill Ayers, Cathy Wilkerson, Kathy Boudin, Howard Machtinger and Mark Rudd, resolved "to bring the War home" and promote the violent overthrow of the government.[67] They took their new name from a Bob Dylan lyric, "…you don't need a weather man to know which way the wind blows…"[68]

The Weathermen planted and exploded their first bomb in October 1969 at the Haymarket Square Police Memorial in Chicago.[69] In the last week of December, 1969 the leadership met in Flint Michigan for a "War Council."[70] In Flint they voted to abolish the SDS, to change their name to the Weather Underground Organization (WUO), and to go into hiding and wage guerilla warfare against the United States.[71]

In the early morning hours of February 21, 1970 the WUO committed their first act of terror when they firebombed the home of Judge John M. Murtagh as his family slept.[72] If not for a courageous neighbor the whole family would likely have perished.[73] At the time, Judge Murtagh was presiding in pretrial hearings involving bombing conspiracy charges against several members of the Black Panthers.[74] On March 6, 1970, Wilkerson and Boudin escaped from the rubble of a townhouse in New York City's Greenwich Village, which had exploded.[75] It was later discovered that the building was a WUO bomb

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[65] *See id.*
[66] *See* Laura Lambert, *Weather Underground*, BRITANNICA (last visited May 23, 2020), https://www.britannica.com/topic/Weathermen.
[67] *See id.*
[68] *Weather Underground Bombings*, FBI.GOV, https://www.fbi.gov/history/famous-cases/weather-underground-bombings.
[69] *See* Laura Lambert, *supra* note 66.
[70] *See id.*
[71] *See id.*
[72] Emmanuel Perlmutter, *Justice Murtagh's Home Target of 3 Firebombs*, N.Y. TIMES, Feb. 22, 1970.
[73] *See id.*
[74] *See id.*
[75] *See* Jim Dwyer, *An Infamous Explosion, and the Smoldering Memory of Radicalism*, N.Y. TIMES, Nov. 14, 2007.

factory.[76] Three members of the group, Ted Gold, Terry Robbins and Diana Oughton, died in the blast.[77] The group had planned to explode anti-personnel bombs at nearby Fort Dix, which would be timed to explode during an NCO (non-commissioned officers') banquet and dance.[78]

Many more bombings followed as the WUO proceeded to engage in guerilla warfare against the United States. Their targets (for bombing attacks) included the U.S. Capitol Building, the Pentagon, the Ferry Building in San Francisco and the Golden Gate Park Police Station. In 1971, Ayers' fingerprints, along with those of many other members of the WUO, were found at 10 Pine Street in San Francisco. Also located at the apartment were explosive and bomb-making equipment. The WUO remained active even after the Vietnam War. In 1977 a WUO bomb plot to target California State Senator John V. Briggs was thwarted by FBI agents. Judith Bissell and four others were arrested. On October 20, 1981, WUO members Kathy Boudin, Judith Clark, David Gilbert and Sam Brown were all involved in the armed robbery of a Brink's armored truck in Nanuet, New York. Two police officers and a Brink's guard were slain.[79]

Of greater significance than WUO's violent activities were their foreign associations, which served to complement their operations with training and indoctrination in Communist-revolutionary ideology and guerilla tactics.[80] Competent evidence shows that between 1968 to 1974, members of the WUO made numerous visits to Russia, the People's Republic of China, Cuba, Cambodia, North Vietnam, Algeria, Libya and Lebanon for meetings

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[76] *See id*.
[77] *See id*.
[78] *See id*.
[79] *See generally* LARRY GRATHWOHL, BRINGING DOWN AMERICA, AN FBI INFORMER WITH THE WEATHERMEN (1976); *see also* Transcript of Oral Argument at 5909-36, 3537-3692, United States v. Felt, No. 78-00179 (D.D.C. 1980) (testimonies of William Reagan and Larry Grathwohl); *see also,* FBI 302 Interview with Karen Latimer (concerning the Golden Gate Park Police Headquarters bombing); *see also* BILL AYERS, BERNARDINE DOHRN, JEFF JONES, & CELIA SOJOURN, PRAIRIE FIRE: THE POLITICS OF REVOLUTIONARY ANTI-IMPERIALISM (1974).
[80] *See* Nicholas M. Horrock, *F.B.I. Asserts Cuba Aided Weathermen*, N.Y. TIMES, Oct. 9, 1977.

with the Palestinian Liberation Organization (PLO).[81] However, the most frequent foreign destination was Cuba, where WUO expenses were paid by the Cuban intelligence agency (DGI), completely controlled in turn by the Soviet KGB.[82] They also met in Canada with representatives of North Vietnam's National Liberation Front.[83]

By the time of the Felt/Miller trial, the Department of Justice prosecutors conceded that the WUO was substantially funded and connected vis-a-vis hostile foreign intelligence agencies, including the KGB.[84]

D. *Black September*

Oddly enough it was not Weatherman bombs or the May 2, 1972 death of J. Edgar Hoover that prompted the Bureau to begin the use of domestic warrantless surreptitious entries after the Hoover "cut off." On September 5, 1972, an Arab terrorist group self-named "Black September" broke into the Israeli compound at the Munich Olympics.[85] A hostage situation unfolded and ultimately 11 Israeli athletes were killed (out of a total of 17 persons killed, including a German police officer).[86]

In the wake of the Munich Massacre, the New York FBI office requested permission to conduct a surreptitious entry into the offices of Al Fatah to identify possible terrorists and apprehend terrorist plans.[87] The search was extremely productive, and subsequent steps taken by the Bureau effectively hobbled Palestinian terrorist activities in the U.S.[88] The request for this surreptitious entry came from the

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[81] *See id.*
[82] *See id.*
[83] *See id.*
[84] The defense offered a comprehensive summary of WUO connections with hostile foreign powers. *See* Felt Trial Exhibit at 99A, United States v. Felt, No 78-00179 (D.D.C. 1980).
[85] *Massacre Begins at Munich Olympics*, HISTORY.COM (last visited May 23, 2020), https://www.history.com/this-day-in-history/massacre-begins-at-munich-olympics.
[86] *See id.*
[87] *See* Gregory Gordon, *FBI Conducted Al-Fatah Break In Without Approval*, UPI ARCHIVES (Oct. 17, 1980), https://www.upi.com/Archives/1980/10/17/FBI-conducted-Al-Fatah-break-in-without-approval/6727340603200/
[88] *See id.*

New York field office and was approved by a Unit Chief in the Domestic Intelligence Division.[89] Neither the new acting Director, L. Patrick Gray III, Edward Miller, Head of the Domestic Intelligence Division, nor Mark Felt learned about the entry until after the fact.[90] Miller took responsibility for the entry in a report to Mark Felt and L. Patrick Gray.[91]

Gray was effusive with his praise for the FBI's success in this first encounter with Al Fatah.[92] In August 1972, on his return from a White House conference, he ushered Edward Miller into his office.[93] In that meeting Gray informed Miller that the Bureau was authorized to approve requests for warrantless surreptitious entries from the field in appropriate cases.[94] Miller asked him if this included the Weather Underground Organization.[95] Gray responded, "Yes, but be sure they get approval from you and Felt." [96]

Miller immediately informed Felt of his conversation with Gray.[97] As Felt testified, there was no doubt in his mind that the President or the Attorney General had decided to unfreeze Hoover's "cut off" and implement a portion of the Huston Plan.[98]

Felt attended several meetings shortly after Gray's appointment with FBI staff and representatives of other intelligence agencies with regard to resumption of FBI warrantless surreptitious entries in the foreign intelligence field.[99] This clearly signaled to Felt that Gray was relying on White House approval.

In Fall 1972, specifically September 26, 1972 and October 6, 1972, two separate SAC conferences in Quantico briefed and updated agents in charge of field offices across the country on policies and

[89] *See id.*
[90] *See id.*
[91] *See id.*
[92] FELT, *supra* note 2, at 326.
[93] *See id.* at 325-27.
[94] *See id.*
[95] *See id.*
[96] *See id.*
[97] *See id.*
[98] FELT, *supra* note 2, at 325-27.
[99] *See id.*

procedures.[100] Gray spoke at both of these conferences.[101] He spent considerable time addressing the recent successful investigation and disruption of Arab terrorist activity.[102] Agents in charge asked if "bag jobs" would be approved and he responded in the affirmative -- but to be "damn sure" to get headquarters approval.[103] Gray subsequently denied making these comments but curiously took credit for the Al Fatah entries.[104]

Felt and Miller developed a procedure for authorizing and documenting the surreptitious entries. When the request came from the field it would go to Miller first, who would then consult Felt.[105] Ten entries were approved targeting WUO associates or relatives in five separate residences.[106] The approval memorandums were kept together in a secure compartment in the Director's office.[107] (It was specifically the WUO entries that furnished the basis of the indictment against Felt and Miller. The Civil Rights Division of the Department of Justice declined to include the entries targeting Al Fatah to avoid distracting the jury from what the prosecutors saw as a clear violation of Fourth Amendment protections.[108])

The Felt/Miller trial lasted eight weeks. The defense relied on the contention that WUO members had sufficient "foreign involvement" to fall within the undefined area of Fourth Amendment law relating to the warrant requirement exception for cases involving agents of foreign powers.[109] This was recognized in *United States v. United States District Court,* also known as the "Keith" decision.[110] Whether a person or organization is vested with sufficient indicia of foreign involvement to permit use of investigative techniques which

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[100] *See id.*
[101] *See id.*
[102] *See id.*
[103] *See id.*
[104] FELT, *supra* note 2, at 325-27.
[105] *See id.* at 327.
[106] United States v. Felt, No. 78-000179 (D.D.C. 1980) (indictment of Felt and Miller).
[107] Transcript, *supra* note 10, at 1133-48 (testimony of Tschudy).
[108] *Situation Report*, 3 SEC. & INTELLIGENCE FUND, 11 (1981).
[109] *See* United States v. Felt, No. 78-00179 (D.D.C. 1980).
[110] United States v. U.S. Dist. Court for E. Dist. of Mich., S. Div., 407 U.S. 297, 321-22 (1972).

would otherwise require a warrant is a question no court had answered at the time of the incidents relevant to the Felt/Miller Indictment.[111] Consequently, Felt and Miller could not have known in 1972-1973 what constituted the legal standard for determining what falls within the narrow exception of the Fourth Amendment -- other than the history referenced herein.

E. *The Verdict and Pardon*

In 1965, Judge William D. Bryant was appointed to the U.S. District Court for the District of Columbia during the Johnson administration.[112] Prior to his appointment, Judge Bryant was a criminal defense attorney who often dealt with F.B.I. agents.[113] Throughout the trial, Judge Bryant's disdain for the defense's case was palpable. Despite the evidence, the judge instructed the jury based on *United States v. Ehrlichman*.[114]

In *Ehrlichman*, the Court of Appeals had upheld the District Court's ruling that the national security exception to the Fourth Amendment warrant requirement can only be invoked by explicit authorization of the President or the Attorney General, but not delegated generally. In *Ehrlichman*, Judge Malcolm Richard Wilkey concluded that no court has indicated the President may authorize "warrantless searches of foreign agents or collaborators, much less the warrantless search of the offices of an American citizen not himself suspected of collaboration."[115]

Thus, Judge Bryant instructed the Felt/Miller jury that unless they found that the President or the Attorney General authorized each entry in the WUO investigation, they should find Felt and Miller guilty. Although the guilty verdict was inevitable, Judge Bryant's attitude toward Felt and Miller must have thawed by the time of sentencing because he decided to impose a financial fine on each

[111] *Id.*
[112] *See William B. Bryant*, HISTORICAL SOCIETY OF THE DISTRICT OF COLUMBIA CIRCUIT (last visited May 23, 2020), https://dcchs.org/judges/bryant-william/
[113] *See id.*
[114] United States v. Ehrlichman, 546 F.2d 910 (D.C. Cir. 1976).
[115] *Id.* at 926.

defendant in lieu of a jail sentence. The case was immediately appealed to the U.S. Court of Appeals for the District of Columbia.[116]

However, on March 29, 1981, just days before an assassination attempt, President Reagan granted full and unconditional pardons to Felt and Miller.[117] The President noted that Felt and Miller had acted in the best interests of the country and in the good faith belief their actions were within the law.[118] Despite the testimony presented in the Felt/Miller trial, the Court of Appeals for the District of Columbia would not have another opportunity to consider the history of surreptitious entries; legal questions about foreign intelligence versus criminal investigative authority have been channeled into FISA jurisprudence.

[116] *See* United States v. Felt, No. 78-00179 (D.D.C. 1980).
[117] Lou Cannon & Laura A. Kiernan, *President Pardons 2 Ex-FBI Officials Guilty in Break-Ins*, N.Y. TIMES (Apr. 16, 1981).
[118] *See id.*