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New Deal Mass Surveillance: The "Black Inquisition Committee," 1935–1936

Abstract: At the behest of the Roosevelt administration in 1935, the U.S. Senate established a special committee to investigate lobbying activities by opponents of the "death sentence" of the Public Utility Holding Company Bill. Chaired by Hugo L. Black (D-Ala.), the "Black Committee" expanded its mission into a more general probe of anti–New Deal organizations and individuals. The committee used highly intrusive methods, notably catch-all dragnet subpoenas, to secure evidence. It worked closely with the IRS for access to tax returns and with the FCC to obtain copies of millions of telegrams. When the telegram search became public information, there was a major backlash from the press, Congress, and the courts. Court rulings in 1936, resulting from suits by William Randolph Hearst and others, not only limited the committee's powers but provided important checks for future investigators, including Senator Joseph McCarthy.

Keywords: Mass Surveillance, New Deal, Roosevelt Administration, Anti–New Deal, Senator Hugo Black, "Black Commttee"

Historians have rarely applied the term "mass surveillance" to the United States during the New Deal era. In part, this is a byproduct of their longtime focus on the role of the FBI. J. Edgar Hoover's haphazard and sporadic eavesdropping of "subversives" (usually no more than a few hundred on any given day) was indeed a world apart from the NSA's systematic data mining. The term "mass surveillance" begins to make sense, however, when applied to the actions of a certain committee of Congress: the U.S. Senate Special Committee to Investigate Lobbying Activities (1935–36), also known as the Black Committee for its chair Senator Hugo L. Black (D-Ala.).[1]

The committee monitored private communications on a scale previously unrivaled in U.S. history, at least in peacetime. Working in tandem with the

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Federal Communications Commission and the Roosevelt administration, it examined literally millions of private telegrams with virtually no supervision or constraint. The targets of this surveillance were anti–New Deal critics, including activists, journalists, and lawyers. One of the many ironies in this story is that the man at the center later went on to be a champion of privacy rights and civil liberties as a justice on the U.S. Supreme Court.

Only a few historians have dealt with the Black Committee's use of surveillance. Some of the best discussions in recent years are by Frederick S. Lane (on implications for the right of privacy) and Laura Weinrib (on the relationship to free speech in the 1930s). Michael Stephen Czaplicki has one of the most thorough treatments. He puts the Black Committee in the context of the period's anticorruption investigations and uses it as a means to explore the tension between privacy rights and demands for transparency. For the most part, however, historians, including specialists on such topics as governmental eavesdropping, congressional investigations, free speech, and privacy, have not discussed the Black Committee as an instrument of political surveillance.[2]

THE NEW DEAL IMPETUS BEHIND THE BLACK COMMITTEE

In March 1933, Franklin D. Roosevelt had little need for anything akin to the Black Committee. Few presidents in American history enjoyed greater discretion than he did. Because of a sense of national emergency, implementation of his initial New Deal proposals was never in doubt. Roosevelt's mastery of both the press and Congress was formidable. As journalist Frank Kent puts it, "Every department, board, bureau and commission has its quota of paid press agents, and these keep flowing a steady stream of stimulating stuff, designed to convince the country that everything is lovely and the goose hanging high."[3] By 1934, however, Roosevelt faced stiffer winds as media and congressional critics became increasingly assertive. Elisha Hanson, counsel for the American Newspaper Publishers Association, observed in mid-1935 that "whereas in 1933 practically all the columns read like pro-Administration propaganda, today the reverse is substantially true." Beginning in February 1934, according to an analysis of the Democratic Party's leading internal pollster, Emil Hurja, Roosevelt's popular approval had eroded at a steady one percent each month from a high of 69 percent, bottoming out at 50 percent in September 1935.[4]

As New Dealers became more insecure, however, they showed greater inclination to turn to heavy-handed strategies against opponents. The establishment

of the U.S. Senate Special Committee to Investigate Lobbying Activities in 1935 was a key indicator of this trend. The immediate impetus was a rapid succession of setbacks to the New Deal in the spring and summer of 1935. The most significant of these was the U.S. Supreme Court's ruling on May 27 in *A.L.A. Schechter Poultry Corp. v. United States,* striking down the National Industrial Recovery Act as unconstitutional. A little over a month later, the House rejected the so-called death sentence of the Wheeler-Rayburn Bill. This provision authorized the Securities and Exchange Commission to abolish utilities unable to prove they were part of a "geographically or economically integrated system." In arguing for the death sentence, Roosevelt characterized the utilities as "the most powerful, dangerous lobby . . . that has ever been created by any organization in this country." The unexpected resistance to the death sentence threw New Dealers off balance. By the end of June 1935, more than 800,000 letters and telegrams had poured into congressional offices condemning the bill as an assault on free enterprise and constitutional rights.[5]

Still smarting from defeat, and hoping to revive the bill, Roosevelt sent his personal emissary, Thomas "Tommy the Cork" Corcoran, to Senator Burton Wheeler (D-Mont.), one of the authors of the death sentence. Corcoran asked him to chair a probe into the opposition campaign. Wheeler begged off, fearing that he would be perceived "as a prosecutor and not an investigator," but recommended Senator Black, who proved eager to take the job. It made sense for both Black and Roosevelt. Widely dubbed "Chief Ferret" and "Chief Inquisitor," Black's reputation was one of both ruthlessness and tenacity. He was second to none in loyalty to Roosevelt and had already made a splash for the New Deal as chair of a headline-generating committee probing the Hoover administration's awarding of airmail contracts. A foe of big business, Black regarded the utility companies as particularly dangerous. He did not want to regulate them but rather to "destroy them as holding companies with their network of chicanery, deceit, fraud, graft and racketeering."[6]

With Black lined up, the Senate sped through a resolution creating a committee of five "to make a full and complete investigation of all lobbying activities and all efforts to influence, encourage, promote or retard legislation, directly or indirectly, in connection with the so-called 'holding company bill,' or any other matter or proposal affecting legislation." Black recruited two of the other members, Sherman Minton (D-Ind.) and Lewis B. Schwellenbach (D-Wash.), both in their first terms. He had reason to count on them. Along with the freshman Harry S Truman (D-Mo.), they had secured reputations as

the "Young Turks" of the New Deal. The other committees members, Lynn Frazier (R-N.D.) and Ernest W. Gibson (R-VT), were progressive Republicans who generally sat silently on the sidelines.[7]

While Roosevelt gave Black all the powers he asked for, there is no direct evidence that the two coordinated their efforts. They did not really have to, however. Black and Roosevelt were of common mind in their zeal to protect the New Deal from its enemies. As Czaplicki puts it, "Roosevelt gave critical support to Black, but it was a relationship of affiliation and shared ideology rather than of CEO to subordinate." Roosevelt knew that Black could be trusted to do the right thing, from the president's perspective. Later, he told his son James that if "you want something done in the Senate, give it to Black. He'll do it. . . . Father said that the New Deal would have not been the same without Black."[8]

THE BLACK COMMITTEE HEARINGS: FIRST ROUND

Emboldened by a sweeping Senate authorization, Black moved with great haste. Much as he had as chair of the Senate Special Committee to Investigate Air-Mail and Ocean Mail Contracts, he leaned heavily on blanket *duces tecum* subpoenas ("under penalty bring it with you"). Also known as dragnet subpoenas, they required the witness to bring to the hearing room all relevant (sometimes defined in sweeping terms) papers, including correspondence and financial information. To make these subpoenas stick, Black made liberal use of the contempt power. This allowed the affected chamber of Congress to cite recalcitrant witnesses and turn them over to prosecution in a federal court for potential jail time (a maximum of one year). Black set new records in applying this sanction, at least for the twentieth century up to that time. The two committees he chaired (Air-Mail) and (Lobbying) generated all six contempt citations by the Senate in the 1930s. His counterparts in the equally high-profile U.S. Senate Committee on Banking and Currency (Pecora Committee) investigation of Wall Street (1932–33) and the Senate Special Committee on Investigation of the Munitions Industry (Nye Committee) (1934–36) also issued subpoenas *duces tecum*, but neither had recommended a contempt citation.[9]

Black's potent combination of these subpoenas and contempt was, as Czaplicki notes, "designed to eliminate his target's capacity for choice and discussion through his presentation of constraining binaries: provide the information/go to Washington; swear under oath/go to Washington." Philip H. Gadsden, the chair of the Committee of Public Utility Executives, was the first

to feel the full force of the dragnet subpoena. Black brought him in to testify only a day after the Senate had authorized creation of the committee. Staffers presented the understandably bewildered Gadsden with a subpoena in his hotel room and whisked him off to the hearing room. As he testified, others gathered up evidence, which they ferried over in boxes.[10]

While under questioning, Gadsden pushed back by stressing the political nature of theinvestigation. He identified two kinds of lobbies: "One is a group that comes down here trying to get some selfish advantage out of the Government in preference to other taxpayers. I think the other group is a group like myself that come down here to do what they can to resist the effort of their Government to destroy their property." Black [interposing]: "They all claim that." Speaking later to reporters, Gadsden declared that "this isn't Russia" and complained that the committee had rifled through all his papers, including his personal checkbook. Although the members had the advantage of surprise, they had no luck extracting damaging testimony.[11]

But four days later, on July 16, they struck pay dirt, which transformed the investigation in Black's favor. After Representative Denis J. Driscoll (D-Pa.) reported that a suspiciously high number of telegrams against the death sentence had poured in from the small town of Warren, Pennsylvania (many of these beginning with last names starting with "B"), another witness identified a utility lobbyist, who had copied names from the city directory, as the source. The revelations uncovering thousands of "fake telegrams" from Warren and other locations gave the investigation tremendous momentum. Although as utility company executive, and future GOP presidential candidate, Wendell Willkie noted, these were "an infinitesimal percentage of the total protests of utility stockholders," the sheer volume was enough to put future witnesses on the defensive for quite some time.[12]

The fake telegrams gave Black his opening wedge for a widened investigation. A few days later, he asked the U.S. Bureau of Internal Revenue to issue a "general blanket order" for access to the tax returns of possible witnesses. The bureau gave Black everything he wanted. While making the arrangements, Secretary of Treasury Henry Morgenthau Jr. privately observed that the senator was "in an awful hurry about it." Black had long dismissed philosophical or constitutional concerns about the privacy of tax returns as a cover for vested interests. Citing powers previously granted in the airmail investigation, the bureau authorized the release of any return that "may properly be made subject of inspection." This permissive wording left the choice of names entirely up to the committee.[13]

Context is important here. Although privacy was the general rule for income tax information after 1870, Congress had passed a law in 1934 requiring all income taxpayers to submit a separate form for public disclosure. Printed on pink paper, it included their names, addresses, gross income, taxable income, and deductions. Black had backed this so-called Pink Slip provision as a beneficial reform to end "the secrecy with reference to the Income Tax return" so as to shame the wealthy to pay more rather than seek loopholes. In April 1935, however, a well-organized campaign forced repeal of the law. Repeal attracted wide support (though only the well-off were liable for income taxes) because many viewed the Pink Slip as a threat to privacy. Although Roosevelt ultimately signed it, this was perhaps the first important setback for the progressive wing of the New Deal, including for Black. In asking the Bureau of Internal Revenue to selectively disclose returns only months after this vote, Black seemed oblivious to the political risks of revisiting this hot-button issue. [14]

EXPANDING THE INVESTIGATION: TAX RETURNS AND TELEGRAMS

The tax return request also illustrated Black's sweeping approach to obtaining evidence even when it seemed to compromise privacy. Most of the individuals on his list had no conceivable role in fake telegrams. Also, Black asked for returns from as early as 1925, predating the death sentence by a decade. The names included David Lawrence, anti–New Deal columnist for The United States News, and those of two leading congressional opponents of the death sentence, U.S. Representatives James Wadsworth Jr. (R-N.Y.) and George Huddleston (D-Ala.).[15]

Although Black's approach as chair was more draconian than most, precedent was still on his side. In the preceding decades, the courts had regularly deferred to Congress's resort to subpoenas *duces tecum* backed up by contempt citations. In *McGrain v. Daughtery* (1927) and *Sinclair v. United States* (1929), the Supreme Court reaffirmed the right of a Senate committee investigating the Teapot Dome and related scandals to issue broad subpoenas and compel witnesses to testify. In *McGrain v. Daughtery*, it held that a "legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect" and that "some means of compulsion are essential to obtain what is needed." The Supreme Court's ruling in *Jurney v. MacCracken* (1935), which involved a contempt case from Black's airmail investigation, further bolstered Congress's powers.[16]

Spurred by these court rulings as well as a perception that the lobbyists were on the ropes, the committee under Black's leadership greatly widened the focus of the investigation. Making use of a federal requirement that telegraph companies keep copies of the originals, it told Western Union that it wanted *carte blanche* to search all incoming and outgoing telegrams sent through Washington from February 1 to September 1, 1935. This went too far for company executives who refused fearing that customers would see compliance as an invasion of privacy. In taking this stand, Western Union was following a decades-long general policy of resisting even more limited subpoenas of this type. Again, Black turned to the Roosevelt administration for help. He asked for, and secured, FCC authorization to require the telegraph companies to comply with this demand. The FCC also provided staffers to aid the committee on the official basis that it too was investigating fake or destroyed telegrams. This wasn't just a dragnet subpoena. It was in a whole new category.[17]

In early October, staffers from both the Black Committee and the FCC began pouring through thousands of copies of incoming and outgoing telegrams. There were virtually no restrictions. As one staffer happily informed Black on October 5, "We have at last worked out arrangements by which we can review *all* the telegrams in the offices of the telegraph companies." Paul C. Yates, the secretary of the lobbying committee and a former speech writer for FDR, made the ultimate decisions on procedure. Investigators scanned all telegrams sent to, and from, people on their lists. While Yates urged them to avert their gazes from content of a personal nature, he gave few other restrictions. He instructed that all telegrams be pulled for further examination and potential duplication if "in any way connected with lobbying activities." The committee's definition of lobbying encompassed just about any political references. In December, the search was extended to the offices of the Radio Corporation of America and the Postal Telegraph Company.[18]

Because the committee had directed the subpoena to these companies and did not give notice to the senders or receivers, most of the targets found out, if they did at all, when a senator confronted them during a hearing. Black viewed this procedure as entirely consistent with the powers of the Senate. "Repeatedly," he proclaimed, "it has been held that the Senate can call for what it pleases."[19]

While the extent of the Black Committee's surveillance did not quite rival the modern national security state, it was remarkable by 1935 standards. Over nearly a three-month period, staffers dug through great stacks of telegrams sent through Washington between February 1 and September 1, 1935, of sundry

company employees, lobbyists, newspaper publishers, and political activists as well as every member of Congress. Finally finishing on January 3, they had worked on an almost daily basis. Writing to Black, one investigator stated that they had gone through "from 35,000 to 50,000 per day" during this period. Later estimates that they had examined some five million telegrams during the investigation seem entirely plausible. In 2018, this would be somewhat akin to staffers from a congressional committee and the FCC teaming up at the headquarters of Gmail and Yahoo and then spending months secretly searching all emails for specific names or organizations selected on the basis of any political references.[20] Either because of a desire to keep potential targets in the dark or out of fear of questionable legality, Black stressed to subordinates the need to maintain secrecy. Writing to H. A. Blomquist, the committee's chief investigator, Yates, stated that it was "Black's wish that we do everything possible to uncover all the facts. . . . *It would, of course not be wise to mention the source of our information*" (emphasis Czaplicki's).[21]

Even as his staffers culled through these telegrams, the Black Committee was using what it had found as a basis for more specific subpoenas. An early target was a leading anti–New Deal voice in the Northwest, the W. H. Cowles Publishing Company of Spokane, Washington, publisher of the *Spokesman Review* of Spokane, the *Spokane Chronicle*, the *Oregon Farmer*, and the *Washington Farmer.* On November 12, 1935, the committee subpoenaed Western Union and other telegraph companies for all incoming and outcoming telegrams in the United States.[22]

Troubling electoral signs for Democrats continued to give urgency to Black's pursuit of the probe. While the slide in Roosevelt's approval in the polls had abated, his party lost two open House seats in 1935, including one in a traditionally Democratic district in Rhode Island. In November 1935, the Republicans captured the New York Assembly (FDR's home state), scored legislative gains in New Jersey, and won mayoral contests in Cleveland and Philadelphia. The New Year brought more discouraging news for the Democrats. On January 6, the U.S. Supreme Court demolished a keystone of the First New Deal by striking down the Agricultural Adjustment Act as unconstitutional. Meanwhile, secret White House internal polls concluded that the president was likely to lose New York and Illinois and faced a close race in Iowa, Indiana, and Minnesota. As historian William E. Leuchtenburg frames it, Roosevelt's reelection as of January 1936 seemed "very much in doubt."[23]

With one eye on the presidential campaign, Black mounted a more frontal assault on the New Deal's enemies. On January 25, as former Democratic standard-bearer Al Smith was speaking at a highly publicized American Liberty

League dinner, the committee was mailing out questionnaires to hundreds of individuals. These asked under oath for itemized answers for any contributions over the previous two years to the American Liberty League as well to the following other anti–New Deal groups: the Crusaders, the New York State Economic Council, the American Taxpayers League, and the Sentinels of the Republic. The mailings warned recipients to be prepared to testify. Not without reason, many critics suggested that a key goal of the probe was to help Roosevelt's campaign by scaring away potential donors fearful of being hauled before a congressional committee or subjected to tax audits. In a predictable response, the American Liberty League said it was being singled out for advocating "constitutional principles" and did not intend to comply because it was not a lobby. Similarly, Fred G. Clark, National Commander of the Crusaders, opined that only anti–New Deal groups had received questionnaires, while "Red" and "Pink" ones had not.[24]

None of these attacks phased Black in the least. At the beginning of 1936, he was at the height of his power in the Senate. Few senators past or future were his equal, certainly not the blustering and sloppy Joseph McCarthy, in putting witnesses through the wringer. In February 1936, political reporter Arthur Sears Henning elaborated on his technique: "When he takes a witness in hand before his dreaded tribunal he is all purr. He smiles, he ingratiates, he leads his victim from one commitment to another, and he seeks to tangle the witness in his own testimony. Then when he thinks he has the subject in his toils he pounces. . . . Fortunate is the man able to bear up under the ordeal. The experience is one that most men dread."[25]

Black's first inclination was to publicly dismiss this resistance as predictable subterfuge from conspirators against the public good. Expressing feigned surprise, he wondered why the American Liberty League was "so suspicious lest somebody answer questions." In an article for *Harper's Magazine*, he characterized these complaints as typical of the "perennial objections to this congressional right to summon and to inspect papers" dating to the founding of the Republic. Black repeatedly denied that he was doing anything out of the ordinary. "Whenever a congressional committee inspects the so-called private papers of a corporation official," he declared matter-of-factly, "the cry goes up that this is an outrageous invasion of the rights of private citizens."[26]

Meanwhile, Black, acting without the knowledge of the public or potential witnesses, was pulling the noose tighter via more dragnet subpoenas on Western Union, although this time without the FCC's direct help. The committee was also expanding the probe of anti–New Deal organizations to include allied newspapers and law firms. On February 8, for example, it subpoenaed

all messages of the Times Publishing Company of Wichita Falls, Texas, which published *The Times* and *The Record-News*. By the beginning of March, the committee had served more than one thousand separate subpoenas. Missing from this list were some of the most powerful anti–New Deal voices, including the *Chicago Daily Tribune* and the Associated Press. It is not clear why. The committee might not have subpoenaed them because it already had information from the earlier catch-all search at Western Union. Just as likely, it feared the political repercussions of targeting too many powerful critics, though it had included the *Tribune*'s publisher, Robert R. McCormick, in the January questionnaire.[27]

THE CHALLENGE IN THE COURTS: STRAWN AND HEARST

The broad reach of the subpoenas alarmed Western Union's executives, who feared driving away privacy-conscious customers. In early February, the company implemented a policy of automatically informing all targeted individuals receiving new subpoenas that the Black Committee had searched their telegrams. Before this time, the committee was able to do its work in secret and most targets had no clue about what was happening. The change virtually guaranteed a lawsuit.[28]

The first legal action, brought on March 2 by Silas Hardy Strawn on behalf his law firm Winston, Strawn and Shaw, dramatically shifted the course of the investigation. He sued to prohibit Western Union from handing over copies of the telegrams generated by the firm after finding out that the committee had subpoenaed all telegrams including those of its "known officers, employees, and agents." Strawn's prominence made big headlines almost inevitable. He was not only a partner in a prestigious Chicago law firm but a past president of the American Bar Association and the U.S. Chamber of Commerce, as well as the former national finance chair of the Republican Party. Strawn's lawyer, Frank J. Hogan, alleged that the committee had launched an inquisition that was exposing client information "of a private nature and which should not be subjected to public scrutiny."[29]

Strawn's suit shifted the balance of power against Black, at least for the time being. No longer was it possible to depict the investigation as a limited probe of fake telegrams or even an exposé of utility legislation lobbying. It was relatively easy to brush off the complaints of particular individuals about dragnet subpoenas or rifled files. It was more difficult to ignore evidence that investigators had scanned millions of private telegrams, copied thousands of them, and took notes at their own discretion.

Of the many Americans who found out that the Black Committee had looked through their messages, few responses matched the red-hot anger of Newton D. Baker. Baker had served as Woodrow Wilson's Secretary of War and was a cautious critic of the New Deal. After Western Union informed him that the committee had examined his telegrams for an entire year, he wrote: "Man of peace as I am, I am quite sure I could not keep my hand off the rope if I accidentally happened to stumble upon a party bent on hanging him." The new Western Union policy considerably weakened Black's once formidable element of surprise. It did not destroy it, however, since the committee still had no obligation to share the actual contents of telegrams with witnesses.[30]

More than ever, top newspapers vigorously condemned the committee's methods. As expected, the anti–New Deal *Chicago Daily Tribune* labeled the inquiry as "terroristic," but more establishment voices also joined in. The *Washington Post* detected a threat to representative government "when private messages are indiscriminately exposed to official scrutiny without the consent of the sender," while the *Baltimore Sun* observed that "resistance to new Deal policies" appeared to be the only criterion for investigation. Mark Sullivan, a popular syndicated columnist, charged that any misdeeds by utilities did not justify targeting anti–New Deal organizations as a whole. Washington, D.C., United Press bureau chief Raymond Clapper, who was generally sympathetic to Roosevelt's policies, asked a question on many minds: "Why doesn't the Black Committee seize the telegrams of prominent Democrats who have been selling their influence with the Administration people for fat legal fees?" while Arthur Krock of the *New York Times* blasted the "snooping of Congressional bodies more interested in getting political ammunition against the enemies of the party in power than in contributing to the orderly consideration of legislation."[31]

Signs of discontent were also more apparent in Congress. Representatives James W. Wadsworth (R-N.Y.), John J. Cochran (D-Mo.), and Andrew J. May (D-Ky.) put the FCC's enabling role on center stage. Wadsworth was upset that the committee had seized "tens of thousands of telegrams," including many "confidential or private in character, and to my knowledge, some of them passing between husband and wife." In the U.S. House, a rare voice who spoke up for Black was Representative John E. Rankin (D-Miss.), who brushed aside the objections as just so much "power propaganda." Rankin, already regarded as one of the most notorious racists in Congress, was, like Black, very much a New Dealer and shared his disdain for the holding companies. Throughout, he was a fast friend of the committee.[32]

Black continued to pooh-pooh the critics. His actions were not extraordinary, he proclaimed, and he did not ask for or care whether witnesses backed "one administration or another administration." Somewhat in contradiction to this assurance, he stated that his mission was to expose the "lobbyists, propagandists, and so-called patriotic societies supported by tax dodgers and racketeers." Instead of undermining the First Amendment, he was upholding it because the true threat to free speech came from that small minority "who have grown rich out of the Public Treasury" by failing to pay taxes. To top it off, Black denied that the courts had jurisdiction over the committee's actions, pointedly warning that "if any judge ever issued an injunction to prevent the delivery of papers that were sought by this body through subpoena, the Congress should immediately enact legislation taking away that jurisdiction from the courts."[33]

RESISTANCE MOUNTS FROM THE PRESS AND CONGRESS

Despite this outward self-confidence, Black had cause for concern. Most worrisome, he was getting flak from unexpected quarters, including a leading spokesman of liberal reform: syndicated columnist Walter Lippmann. Lippmann had joined the fight only five days after Strawn filed his suit. His prose was as strident as any from conservatives. The committee was "becoming an engine of tyranny in which men are denied the elementary legal protection that a confirmed criminal caught red-handed in the act can still count upon." Lippmann, who had a strong civil liberties credentials (including defense of Sacco and Vanzetti and John T. Scopes), saw similarities between Black's investigation and those of right-wing red-hunters who "cared nothing whom they slandered." Lippmann unsparingly challenged Black's motivations and abilities: the "Senator is an enthusiast for investigations but in the realm of justice he is an obvious illiterate" and closed by calling for an investigation of the investigators.[34]

Just the next day, it looked like Lippmann might get his wish. William E. Borah (R-Ida.), the Dean of the Senate, proposed a bill requiring the FCC to explain its role in any inspection of telegrams. Leading off the spirited debate on the bill, Senator Frederick Steiner (R-Ore.) compared the committee to the OGPU (Soviet Secret Police). Black retorted that it was "absurd" to allege that he had any interest in private telegrams, adding that this "loud clamor" was just obfuscation by the "mouthpieces of greed and grab." Black's colleagues seemed less inclined than ever to listen to him. By a voice vote, the Senate approved Borah's resolution.[35] On March 11, Chief Justice Alfred A. Wheat of

the Supreme Court of the District of Columbia dealt another setback to Black by granting an injunction prohibiting the committee from examining and seizing more telegrams from Winston, Strawn, and Shaw. Contra Black, Wheat asserted that he had jurisdiction to protect Strawn's Fourth Amendment rights against unreasonable search and seizure from Congress: "This subpoena goes way beyond any legitimate exercise of the right of subpoena *duces tecum*." Wheat did not object to a more limited subpoena directed to specific telegrams or individuals but rather to a catch-all approach. Though Strawn had sued Western Union, not the Black Committee, the company preferred that the plaintiff prevail. The ruling, as Roger K. Newman observes, "was one of the few times in American history that a court had restrained a congressional investigating committee." Black responded that he was pondering a bill stripping the courts of the power to issue injunctions in such cases.[36]

While the energized congressional opposition quickly dashed any hope of that happening, Black showed no signs of relenting as he headed into a new controversy. At the center was the most famous newspaper publisher in American history: William Randolph Hearst. An exuberant nationalist and law-and-order advocate, Hearst was instrumental in securing Roosevelt's nomination in 1932 but had since turned against his old ally. Roosevelt reciprocated this animus by instructing the Department of Treasury to closely monitor Hearst's taxes. On February 8, the Black Committee served a direct subpoena on Hearst for a specific telegram he had sent on April 5, 1935, to James T. Williams Jr., editorial writer for the Hearst papers. In that communication (marked "Confidential"), Hearst had told Williams to write editorials calling for the impeachment of Representative John J. McSwain (D-S.C.), the chair of the House Committee on Military Affairs: "He is the enemy within the gates of Congress. . . . He is a Communist in spirit and a traitor in effect. He would leave United States naked to its foreign and domestic enemies." It is rather odd that Black publicly subpoenaed the original from Hearst given that he already had a complete copy of it from the earlier search of the Western Union office. Perhaps he was skittish about raising potentially embarrassing questions about the secretive nature and methods used in that search.[37]

On March 13, Hearst petitioned the Supreme Court of the District of Columbia to enjoin Western Union from handing over the telegram. Hearst's lawyer, Elisha Hanson, who was also general counsel of the American Newspaper Publishers Association, charged that the committee had violated the First, Fourth, and Fifth Amendments. He stressed the illegality of the act, adding that the telegram had no reference to lobbying.[38]

Black's first instinct was to counterattack, but this time he did so in an uncharacteristically clumsy way. On March 18, he sent on the committee's behalf a copy of the Hearst telegram to both the press and McSwain. Black apparently hoped that his colleagues would be so offended by Hearst's inflammatory prose that they would rally to the committee. In a coup de grace, Black minimized any potential legal damage by also withdrawing the subpoena. He claimed that since the committee already had a copy, no "good purpose can be served by a one-sided court battle in the nature of a mock trial of an injunction proceeding affecting the basic constitutional powers of the Congress of the United States."[39]

At the same time, Black vented his anger to Western Union for its uncooperative attitude toward the committee. In a public letter to the head of the company's Washington office, he implied that the owners were putting the needs of one particularly high-volume customer, William Randolph Hearst, ahead of the public good: "The Western Union Telegraph Co. would naturally not desire to bring out the fact than an effort had been made by its patron to intimidate and coerce in the performance of its legislative duty a Member of Congress [McSwain], whose reputation for loyalty and patriotic service is above criticism."[40]

Black's colleagues on the committee, Minton and Schwellenbach, used the occasion to mount a well-coordinated attack on Hearst and all he represented. They revisited Hearst's misdeeds dating back to the Spanish-American War to expose the publisher's hypocrisy and double standards on issues such as free speech. Hearst, Minton proclaimed, "would not know the Goddess of Liberty if she came down off her pedestal in New York Harbor and bowed to him. He would probably try to get her telephone number." Like Black, Minton depicted Hearst and other anti–New Dealers as the real enemies of free speech for spreading fascist propaganda and stealthily promoting a financial dictatorship.[41]

Buried in the rhetoric of Black Committee members, however, were statements about the nature of the investigation that were false or misleading. Most stunningly, Schwellenbach flatly declared that "no telegram sent into or out of Washington by any person, association, or corporation not engaged in lobbying activity was at any time examined by the committee or any member of the committee or any of its agents or employees." He also denied, without qualification, that the committee had used "the Federal Communications Commission in an effort to secure information."[42]

This was clearly untrue. Earlier that month, Black had received a confidential and detailed update on how committee and FCC staffers had examined

the telegrams in Western Union's Washington office in the fall and winter. Minton and Black were somewhat more circumspect in their wording. They skirted over accusations that staffers had examined millions of telegrams by focusing on the relatively small number (about 13,000) actually copied. When Minton and Black used the term "seized," they meant it only in that narrow sense. An example was Minton's carefully parsed challenge to detractors "to name some of the private citizens whose unrelated telegrams have been seized."[43]

The release of the Hearst telegram backfired for Black in a major way. As critics pointed out, it directly contradicted the committee's pledge on March 8 to reveal only telegrams found to be relevant. The release of the telegram showed, the *Washington Post* editorialized, that the Black Committee had become "rather too smart for success." Instead of discrediting Hearst, the action had instead "sharply underlined the indefensible nature of its own dragnet tactics," which had revealed "a private wire from a citizen who has filed a charge of conspiracy against the committee." *Editor and Publisher* wondered "if anything is safe" when a congressional committee and the FCC were able to fish a "private message out of the Western Union office for political reasons solely." Arthur Krock dubbed the release a misguided ploy to "gain public approval of Snoopnocracy" that had no justification even if Hearst was as terrible as his detractors charged.[44]

Caught flatfooted, Black's defenders repeated that they were following precedent set by congressional investigations, most notably *McGrain v. Daughtery* and *Sinclair v. United States*. But those earlier, more limited subpoenas, which had named specific individuals, had not even approached the open-ended demands for telegrams by the Black Committee. The search at Western Union, more than any of the others, was a true mass "fishing expedition" under which investigators scanned millions of telegrams exchanged between thousands of unspecified individuals. Black did not help his cause by a continuing tone-deafness toward privacy concerns. An example was his claim after the Strawn decision that the "law doesn't recognize that a telegram is a man's," but "is the telegram company's and is retained for subpoena purposes."[45]

Resumed testimony by witnesses from mid-March to April increasingly vied for media attention with the Hearst telegram imbroglio. In those new hearings, Black left nothing to chance, or so he thought. Instead of calling well-known figures in the American Liberty League, such as Al Smith, Raskob, or the du Ponts, he focused on the officers of smaller, and more vulnerable, allied organizations, such as the American

Taxpayers League, the Crusaders, and the Farmers' Independence Council. Black still had a crucial advantage. Because he had their private telegrams, and they usually did not, he could throw them off balance by asking about actions or statements that had occurred months earlier from documents.[46]

Committee members drew blood in the questioning of the most combative Vance Muse of the Southern Committee to Uphold the Constitution. Muse made several embarrassing admissions about his role in a "Grass Roots Convention" in Macon, Georgia, in January 1936 to launch Democratic governor Eugene Talmadge's campaign against Roosevelt for the presidential nomination. Muse related that three leading donors to the American Liberty League, Pierre S. du Pont, Alfred P. Sloan of General Motors, and John K. Raskob (also of the DuPont company), had helped defray the costs of the event. Muse admitted that he had distributed copies of a picture at the rally of Eleanor Roosevelt being escorted by two black men during an appearance at Howard University in a ploy to inflame racial passions.[47]

Muse said that these donors did not have prior knowledge of this action, though Talmadge's racism in a general sense, of course, was no secret. Also troublesome to Black's critics, though somewhat less so, was information that Alexander Lincoln, president of the Sentinels, had made anti-Semitic comments. Roosevelt had also expressed anti-Semitic and racist views and forged his own unsavory alliances with segregationists such as Senator Theodore G. Bilbo (D-Miss.), Senate Majority Leader Joseph Robinson (D-Ark.), and Representative Rankin. Even so, the revelations unearthed by Black proved extremely damaging.[48]

The testimony of Kurt Grunwald of the Farmers' Independence Council, which received considerable publicity, was not as helpful to the committee. Black's goal was to spread the perception that outsiders funded the council and that it was not a genuine farmer's group. The main story of the day, however, was Grunwald's vigorous resistance. When Black asked him to name people who had aided his fight against the Agricultural Adjustment Act, Grunwald refused, saying he did not want to "get anybody into trouble." Black pressed further: Did he really believe that? Grunwald retorted, "You bet your boots. I'd get them in trouble under this New Deal." Minton had no better luck with the witness. When he asked Grunwald about his citizenship status, Grunwald countered that he "expected that because we men of foreign birth have to go through hell sometimes with 100 percent Americans."[49]

Black made more progress with other witnesses representing the council. He was able to highlight that some key donors to the group also had ties to the American Liberty League and many nonfarmers were in the leadership. While an officer of the council later boasted to members that it had successfully shielded membership lists from the scrutiny of the "Black Inquisitorial Committee," he also lamented worsening "hand to mouth" finances. Echoing the concerns of the council's president, rancher Dan D. Casement, he feared that Black was making headway in branding the group as a "smoke screen" for big business.[50]

THE FCC AND CONGRESS HOBBLE THE COMMITTEE

If Black scored some propaganda points, however, he also lost a crucial ally. To fend off a possible injunction against it, the FCC announced that any telegrams it had seized were now "in the possession of the Special Committee of the United States Senate." Moreover, it did not intend any "further investigation or examination" of telegrams at Western Union. An editorial in the *Washington Post* attributed the FCC's decision to "public outcry against the OGPU methods followed by Senator Black's investigators." Short of funds, and under fire, Black had no other choice but to announce that the committee had completed its "field investigations."[51]

The FCC's decision forced the Black Committee to retreat on future searches but also shielded it from direct legal sanctions. Chief Justice Wheat made this clear, conceding his helplessness to intervene because the seizures had stopped and Black had withdrawn the Hearst telegram subpoena, which had led to the suit in the first place. At the same time, the committee had already acquired a vast store of material from a year of investigation. This led columnist and Republican pundit Alice Roosevelt Longworth (the daughter of Theodore Roosevelt) to quip that Black's "snoopers up to their eyebrows in their booty" had to be satisfied with "the millions of trophies of their acquisitiveness; engaged in the congenial occupation of ferreting out other people's business."[52]

Undeterred, Hearst not only appealed the FCC's decision but demanded the return of all other seized telegrams. His newspapers continued to be as strident as ever. Not even the *Chicago Daily Tribune* (which represented the gold standard in anti–New Deal journalism) rivaled them in intensity and volume. A representative editorial charged that Black had become the "symbol of the modern American Inquisition." One of several cartoons showed a giant black keyhole captioned "Will the People allow the Light of

Liberty to be swallowed up by Black?" Hearst's papers did not limit their salvos to editorials or cartoons. Resident poet Berton Braley also took part. On April 11, he wrote:

> "You may have thoughts
> But you must not speak
> Or you'll be summoned
> By a New
> Deal
> Sneak!"[53]

On May 2, he returned to this theme:

> "This is a country where speech is free
> And thoughts have absolute liberty
> Subject, of course, to the third degree
> By Senator Black's committee."[54]

Also writing in the Hearst press, Arthur "Bugs" Baer, one of the nation's best-known humorists, quipped: "If you see members of the Black Committee on the roof with bird dogs and scatter guns you will know Western Union and Postal Telegraphy are training carrier pigeons to take the place of messenger boys."[55]

A most unfamiliar bedfellow for Hearst in the fight against the Black Committee was the American Civil Liberties Union (ACLU). As early as March, it had released an open letter calling for the committee to return "improperly seized" telegrams. As with Lippmann, Black found it perplexing that he had to worry about his left flank. Replying to the head of the Kansas state chapter, he wondered why a group claiming "to protect the masses of the people from loss of their economic and political liberty" had aligned itself with those who valued "property" over "human" rights. The ACLU renewed its campaign against the committee after news reports that the National Woman's Party, led by equal rights crusader Alice Paul, and was on the target list. ACLU executive director Roger D. Baldwin queried Black as to why he was probing an organization that had nothing to do with utility legislation. Black evaded an answer, pleading that it was improper to give details in a case where subpoenas were pending. After emphasizing that the committee's procedure did not depart from time-worn American traditions, Black added, somewhat ominously, that he was "sure that upon mature consideration, you will wish to withdraw your request for information."[56]

The conflict culminated in a fiery exchange between Senator Minton and New York ACLU attorney Dudley Field Malone. Minton demanded: "Who are

you to lecture me on my duties? When we reach the point in this country where there is nobody left but you and William Randolph Hearst to defend our liberties, we had better give the country back to the Indians." Uncowed, Malone promised that millions of Americans would fight against "you and the Black committee's effort to invade the private affairs of citizens."[57]

The combined impact of the Strawn decision, the Hearst telegram, and the FCC's withdrawal of support even prompted some longtime New Dealers, notably U.S. Representatives Emanuel Celler (D-N.Y.) and John McCormack (D-Mass.), to break ranks with Black. A lightening rod was a vote to pay for counsel to defend the committee against Heart's appeal. No less controversial was the fact that the counsel in question was Black's former law partner, Crampton Harris of Birmingham. Celler was relentless: "Commandeering private papers by the ton cannot be excused by the assertion that private wires are no longer private if they refer to public matters." To Celler, Black's release of the telegram to McSwain showed that wholesale subpoenas "can be made an instrument of oppression." The names or reputations of those targeted were beside the point, Celler argued. He did not care whether it was a Strawn or Hearst; the committee had no right to examine five million telegrams. Celler went so far as to compare Black to Benito Mussolini and King George III in his use of espionage. If the Senate was not going to sanction Black, he asserted, it was up to the House to give him "a rap across the knuckles."[58]

In more restrained rhetoric, McCormack faulted the committee's disrespect for rights and smearing of "the character and reputation of others, whether Members of this House or humblest citizens of the United States." Nevertheless, McCormack supported paying Crampton, but only to get clarification from the courts on Congress's power to examine "papers and effects" in investigations. Yet again, one of the few members to rise in Black's defense was Representative Rankin, who lauded the committee for doing "more for the American people than any other investigating committee I have ever known."[59]

In the Senate, it was pretty much left to members of the Black Committee to carry the water for the proposal. As usual, Minton went on the attack saying that denial of the funds was tantamount to giving aid and comfort to the American Liberty League, "whose pockets are lined with the blood money of the munitions manufacturers." He elaborated that the framers of the First Amendment never intended to protect communications between a newspaper owner and subordinates. The investigation was a legitimate means, according to Minton, to find out if Strawn had tried to influence the Reconstruction Finance Corporation during the Hoover administration to get a loan for the Dawes Bank of Chicago. No such evidence of any influence was uncovered.

The final U.S. House vote on the bill to deny the funds for paying Crampton (153 to 137) was a stunning rebuke to the Black Committee. The *Chicago Daily News* celebrated that the House had stymied Black's attempt to "secure a fat fee for his former law partner" and added that the senator's record of defending individual rights was "as dark as his surname."[60]

Following on the heels of the vote, the American Newspaper Publishers Association's committee on free speech excoriated the Black Committee for waging "a campaign of persecution and harassment against individuals, organizations and newspapers which have in any manner criticized or opposed the policies of the present national administration." Despite the committee's claims of objective truth-seeking, the real purpose was to "punish any who presume to exercise their rights of citizenship." Continuing his line of attack from the Strawn case, Lippmann castigated the initial seizure of the Hearst telegram as a "plain outrage" not just against the "freedom of the press but against the freedom of all individuals."[61]

A few voices linked their critique of Black's methods to his alleged ties to the Ku Klux Klan. After he was on the Supreme Court, Black admitted past membership, but at this point his involvement was just the stuff of rumors. The *Chicago Daily Tribune* was the most prominent in bringing it up. In February 1936, Arthur Sears Henning reported that "Some said" that Black had belonged to "that secret organization of persecution," which was as dreaded as "the Black committee today." Regarding the questionnaires sent out in January, an editorial surmised that Black had not quizzed about the KKK "because it elected him in Alabama and he knows too much about it." Even more pointedly, the front page that day featured a cartoon showing a group of hooded night riders. In the lead was "Senator Black of Alabama," carrying a banner titled "Black Inquisition."[62]

By this time, Black's main defenders came from the most reliably progressive wing of the New Deal coalition. Referring to the Strawn injunction, Paul W. Ward of the *Nation* predicted that if "this thing keeps up, it will not be necessary for Congress to have these privateers-men thrown out of the court; they'll be laughed out." These arguments were most persuasive, albeit in a purely negative way, when they underlined the hypocrisy on the other side. Hence, the *Progressive* editorialized that those "forever defending 'constitutional liberties' for the fat boys" did not care about the violations of free speech under criminal syndicalism laws and other restrictions on the poor and vulnerable. Typically, these voices characterized the American Newspaper Publishers Association's crusade for free speech as a ploy by big metropolitan dailies to mask "greed and selfish aims."[63]

The committee's most powerful champion was Roosevelt himself, although he carefully avoided tipping this hand in public. On April 14, Black figured prominently in a private discussion with Secretary of the Interior Harold Ickes about possible picks to chair a new Senate Special Committee to Investigate Campaign Contributions. According to Ickes, Roosevelt laid out two options. The first was to "name a perfectly respectable Senator as chairman, one who stood pretty well in public opinion" and the second was to choose Black backed by "a vigorous, aggressive chief investigator." Senate leaders apparently did not agree and Augustine Lonergan (D-Conn.), a conservative freshman who had voted against the death sentence, got the nod.[64]

Roosevelt referred more specifically to the Black Committee at a meeting on May 3 as recorded by former "Brain Truster" Raymond D. Moley. In the midst of a "nightmarish conversation [that] went on and on in circles for some two hours," Moley bluntly asked Roosevelt about the lack of "moral indignation" when Black's Committee had "ruthlessly invaded the privacy of citizens?" Moley opined that he preferred letting the guilty "go free than to establish the principle of dragnet investigations." The president responded with "a long discourse of how Black's invasion of privacy had ample precedent." The inference drawn by Moley was that for Roosevelt "the end justified the means."[65]

Although Minton and others talked about resuming the deliberations in the winter, the committee never met again under Black's chairmanship. In June, the Senate bypassed the House by voting to pay Harris's fee from its own funds but showed no appetite for more investigations. Black's methods, while sometimes digging up dirt on anti–New Dealers, had proved too toxic. Moreover, even if the committee had tried to continue, and had the funds, Justice Wheat's ruling in the Strawn case (made permanent on June 25) had removed its main leverage over witnesses. The Black Committee was not completely forgotten in the final months before the election, however. In an obvious reference, the Republican Party National Platform charged that New Dealers had bullied "witnesses and interfered with the right of petition" through "investigations to harass and intimidate American citizens." But, in the end, Republicans rarely returned to the issue in the campaign. Black himself had moved on to other concerns as one of the leaders of an effort to rally progressive voters for Roosevelt.[66]

Although as late as July, two Gallup polls showed Landon winning, electoral trends were very much in Roosevelt's favor. Signs of economic improvement, Landon's lackluster campaign, and Jim Farley's adept funneling of patronage and funds to doubtful states bolstered the confidence of Roosevelt's advisers.

Few of them took seriously the *Liberty Digest*'s now infamous poll showing a Landon victory and all three major preelection commercial polls predicted otherwise. On November 4, Roosevelt's historic landslide victory, carrying every state but Maine and Vermont, brought with it an even more lopsided Democratic congressional majority.[67]

AFTERMATH

The absence of public opinion polling on the Black Committee makes it hard to gauge its impact, if any, on the campaign. To be sure, the committee's methods produced some headaches for the administration in Congress and trouble with civil libertarians. On the positive side of the ledger for Roosevelt, it had successfully spread the view that the main anti–New Deal organizations represented a small cabal of big business interests. An illustrative case was the Farmers' Independence Council, which never overcame the stigma that it was only a front group for big business. As the election approached, the same Kurt Grunwald, who had a few months earlier dramatically refused to name names, reported that the Republican Party wanted to distance itself because of the council's growing reputation as a catspaw of the American Liberty League. Meanwhile, the league's own executive committee was so fearful of harming the GOP that it suspended formal operations for the last five weeks of the campaign.[68]

The decision of the United States Court of Appeals of the District of Columbia in the Hearst case on November 9 gave only mixed solace, at least in the short term, to Black Committee foes. The Court blasted the FCC for sanctioning a "wholesale" examination of telegrams and then turning these over to the Black Committee as "without authority of law and contrary to the very terms of the act under which the Commission was constituted." It declared that "telegraph messages do not lose their privacy and become public property when the sender communicates them confidentially to the telegraph company," elaborating that in many states it was a "penal offense" to violate this privacy. The Court also affirmed that it had jurisdiction over the FCC's actions. The final decision, however, was essentially the same as the one by the lower court—for example, there was no constitutional basis to assert jurisdiction over a congressional committee despite the "unlawful nature of the search." But Minton's proclamation that there was "nothing in the decree to keep us from subpoenaing all the telegrams we want" also missed the mark. Both the Strawn and Hearst rulings stood as important precedents against any future mass seizure of private telegrams by a congressional committee.[69]

Press reaction to the ruling was sparse, no doubt because it did not impose sanctions for past actions and because Roosevelt's landslide dominated the news. Nevertheless, a few prominent media voices spoke up. An editorial in the *Washington Post*, for example, praised the repudiation of the Black Committee's "wholesale seizure of private telegrams . . . one of the blackest chapters in the history of legislative fishing expeditions." The release of Hearst's telegram to Williams, it charged, had represented "the tactics of fascism" and was "utterly at variance with the American principle of freedom from promiscuous governmental snooping." It accurately predicted that the Court had effectively killed off any resumption of the hearings, at least in their current form.[70]

The Court of Appeal's prohibition of wholesale examination of telegrams put new roadblocks in the way of any future investigations. It meant that hostile witnesses were much better able to shield private information from congressional committees, though, in some cases, the price might be a few months of jail time. The practice of "ambushing" witnesses with their own private comments also became more difficult. The record of later high-profile investigations illustrates the contrast. The La Follette Committee probe into employer antiunion practices, which began hearings in April 1936 just as the Black Committee was winding down, issued several subpoenas *duces tecum* and had to threaten obstructive witnesses with sanctions, but none were cited for contempt.[71]

While the La Follette Committee had some limited success in achieving its goals, the post–Hugo Black U.S. Senate Special Committee to Investigate Lobbying Activities (with Minton as chair) did not. The committee had resumed work in 1938 to investigate opposition to FDR's Court Packing and Government Reorganization proposals. The partisan nature of the proceedings under the ham-fisted chair, however, was all too obvious, leading to bad press from the outset. The committee encountered open defiance after serving a dragnet subpoena to Edward H. Rumely, an officer of the Committee to Uphold Constitutional Government, a group funded and controlled by publisher Frank Gannett. Rumely refused to turn over membership and contributor lists on the grounds the subpoena violated the First Amendment and the privacy rights of donors. Rather than press the issue, the committee backed down on advice from the Department of Justice that prosecuting Rumely for contempt would backfire by turning him into become a free-speech martyr.[72]

From 1938 to 1944, the Martin Dies Committee (House Special Committee for the Investigation of Un-American Activities) served several broad

subpoenas *duces tecum* for membership lists and other records and generated five contempt citations. This was only a prelude, however, to its successor, the House Committee on Un-American Activities (HCUA), often misidentified as "HUAC," created in 1945. The House gave the committee permanent status in great part because of the legislative acumen of Black's old ally, John E. Rankin. Similar to the Black Committee's broad mandate, HCUA's stated mission to simultaneously investigate "Un-American" and "subversive" behavior defied precise definition and clear restraining limits. Between 1945 and 1957, its investigations led to a remarkable 135 contempt citations, more than the total number for either house of Congress up to that time in American history. During the first two years, the lion's share of these involved subpoenas *duces tecum* for the records of various Communist and Communist Front organizations. After that, they centered on refusal of witnesses to testify and/or relating to their appeal for immunity under the self-incrimination provision of the Fifth Amendment.[73]

The Senate Special Committee to Investigate Organized Crime in Interstate Commerce (Kefauver Committee) was in distant second place, at forty-two contempt citations. The Senate Permanent Committee on Investigation of the Committee on Government Operations (McCarthy Committee) had just thirteen citations. There were seven under McCarthy's two-year chairmanship, most of them dealing with witness refusal to testify (as a whole or to specific questions) rather than failure to produce papers under a subpoena *duces tecum*. Far down the list were three citations from the House Select Committee to Investigate Lobbying Activities (Buchanan Committee), the 1950s counterpart of the Black Committee. The Supreme Court overturned one of these on First Amendment grounds in *United States v. Rumely* (1953). The litigant was the same witness held in contempt more than a decade earlier by the Minton Committee.[74]

Four rulings by the U.S. Supreme Court on June 17, 1957, represented an important turning point in the history of congressional investigations. Critics dubbed the day "Red Monday" because the litigants on the winning side were Communists or other leftists. The rulings, however, had implications for investigations of all types. Most notably, in *Watkins v. United States*, which involved HCUA, the Court made it much more difficult for congressional committees to force witnesses to answer questions about their political stances or associations. The Court declared: "There is no congressional power to expose for the sake of exposure where the predominant result can be only an invasion of the private rights of individuals." A precedent cited in this case was *United States v. Rumely*.[75]

CONCLUSION AND HISTORICAL ASSESSMENTS

In general, historians have given short shrift to the Black Committee's role as a source of surveillance. Specialists on the New Deal era, when they mention it at all, have resisted, for example, analogies to the red-hunting investigations that came after it. In his multivolume work on the period, for example, Arthur M. Schlesinger Jr. contends that while Black's questioning was often "harsh," he never tried to "slander reputations, drag in innocent persons, or indulge in promiscuous character assassination" or inquire into opinions. Schlesinger agrees with U.S. Supreme Court Chief Justice Earl Warren that after World War II "there appeared a new kind of congressional inquiry unknown in prior periods of American history." Putting the committee in an even more positive light, legal scholars William A. Gregory and Rennard Strickland assert that "only bitter partisans could accuse Black of a witch hunt."[76]

From the beginning, however, some historians have dissented from this view, most prestigiously William E. Leuchtenburg. He favorably quotes political scientist Earl Latham's observation that "Senator Black in 1936 was the kind of legislator that Justice Black had no use for twenty years later." Roger K. Newman, one of Black's biographers, concludes that his hatred of big business "caused him to trample over witness's rights protected by the Fourth Amendment. He used to the fullest the investigatory powers of Congress . . . but directed them only toward hard-core conservatives. If they had been aimed at the other end of the spectrum, he would have been the first to howl at the infringement of constitutional rights." Despite the many differences between Black and Senator Joseph McCarthy, Czaplicki aptly observes that "they were linked by a faith in the unchecked power of congressional investigating committees." Czaplicki emphasizes the clash between Black's goal of transparency in the service of the New Deal agenda and constitutional protections of privacy: Black's "desire to eliminate mediators between state and citizen threatened to allow no concept of a private sphere free from the state . . . [and] could easily infringe on individual rights."[77]

In subsequent years, Supreme Court Justice Black himself came to have second thoughts about his Senate investigative record. His judicial opinions in the 1950s and 1960s, upholding the rights of witnesses to withhold private information, such as donor and membership lists, and for limiting the contempt power, were directly at odds with his record as a senator. He even expressed regret for initially brushing aside Walter Lippmann's critique, which, in retrospect, struck him as "wholly reasonable." Even so, Black continued to defend his lobbying investigation as essentially valid.[78]

A case can be made that the Black Committee posed a greater threat to individual rights than the "witch-hunts" of the 1940s or 1950s because it enjoyed comparatively vast powers of mass surveillance. Ironically, one of the reasons why the Black Committee did not leave a deeper impression in history was that the courts precluded successor committees from using the FCC to examine private telegrams in a similarly wholesale way. This precedent, however, was not the only factor keeping Congress from revisiting anything akin to blanket telecommunications surveillance. As Frederick S. Lane comments, the Black Committee's "excesses [had] made people more sensitive, at least temporarily, to the potential abuses of legislative committees."[79]

Indicative of this new sensitivity, though Congress was not involved, were two key Supreme Court's rulings limiting surveillance over telephone communication. In *Nardone v. U.S.* (1937), followed up by *Nardone v. U.S.* (1939), the Court ruled that wiretaps were inadmissible as evidence in the federal courts. The decisions rested on Section 605 of the Federal Communications Act of 1934, which stated that "no person" could "intercept and divulge" a "communication by wire or radio" without authorization of the "sender." The Court's application of these "plain words" (words, incidentally, that did not explicity mention telephone communication) probably went beyond anything that Congress had actually intended when drafting this provision. While *Hearst v. Black* had also quoted Section 605, which *did*, after all, specify "wire or radio," the rationales for the decision centered on more generic questions of trespass.[80]

Later court rulings, and, more important, presidential directives, loosened the standards for national security cases, but *Nardone v. U.S.* continued to be the guiding precedent. Although telegrams were already on the wane (declining from about 50 percent of long-distance communication in 1931 to only 23 percent to 1940), wiretapping never approximated in extent the surveillance used by the Black Committee. In testimony to Congress in the 1940s and 1950s, J. Edgar Hoover stated that at any particular time the FBI had between 50 and 200 telephone taps (all for national security cases) and a smaller number of microphone bugs. He did not, of course, report that the FBI was also carrying out an undetermined number of illegal eavesdrops in "black bag" operations. Understandably, neither Hoover nor his superiors had any interest in sharing the fruits of their surveillance, authorized or not, with congressional committees.[81]

On a wide range of issues, including privacy, surveillance, and the rights of congressional witnesses, the Black Committee represented an important turning point in the history of congressional investigations. While Black never

suffered anything approaching a "have you no shame" Joseph Welch moment, he had unintentionally established a legal standard that constrained his successors. Never again would a congressional committee possess this kind of surveillance power whether of telegrams or other forms of private communication. The course of history might have been quite different if the anti-Communist committees of later decades had enjoyed similarly broad search-and-seizure authority.

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NOTES

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3. Graham J. White, *FDR and the Press* (Chicago, 1979), 10; and Gary Dean Best, *The Critical Press and the New Deal: The Press Versus Presidential Power, 1933–1938* (Westport, Conn., 1993), 1–7.

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5. Czaplicki, "The Corruption of Hope," 56–58; and Arnold Markoe, "The Black Committee: A Study of the Senate Investigation of the Public Utility Holding Company Lobby" (PhD diss., New York University, 1972), 37–47.

6. Czaplicki, "The Corruption of Hope," 39, 57; Markoe, "The Black Committee," 92; and David D. Lee, "Senator Black's Investigation of the Airmail, 1933–1934," *Historian* 53, no. 3 (Spring 1991), 439–41.

7. *Congressional Record*, Senate, 11 July 1935, 11003; and Czaplicki, "The Corruption of Hope," 58, 253.

8. Czaplicki, "The Corruption of Hope," 58; and Roger K. Newman, *Hugo Black: A Biography* (New York, 1994), 228.

9. Czaplicki, "The Corruption of Hope," 43–47, 79, 83; Michael Perino, *The Hellhound of Wall Street: How Ferdinand Pecora's Investigation of the Great Crash Forever Changed*

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10. Newman, *Hugo Black,* 178–80; Czaplicki, "The Corruption of Hope," 79; and Markoe, "The Black Committee," 95–96.

11. Markoe, "The Black Committee," 100; Jamie C. Euken, "Evil, Greed, Treachery, Deception, and Fraud: The World of Lobbying According to Senator Hugo Black," *Federal History*, no. 6 (January 2014): 73–74.

12. Markoe, "The Black Committee," 105–6; Euken, "Evil, Greed, Treachery, Deception, and Fraud," 74; and "Executive Defends His Utility," *New York Times*, 13 August 1935, Book 8, 10.

13. Diaries of Henry Morgenthau Jr., 24 July 1935, 122C, Franklin D. Roosevelt Presidential Library and Museum; and Czaplicki, "The Corruption of Hope," 96–97.

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