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RIGHT OF PRIVACY ACT

MONDAY, MARCH 20, 1967

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND
PROCEDURE OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:10 a.m., in room 1318, New Senate Office Building, Senator Edward V. Long of Missouri (chairman of the subcommittee) presiding.

Present: Senator Long of Missouri.

Also present: Bernard Fensterwald, Jr., chief counsel; Bernard J. Waters, Senator Dirksen's office, minority counsel; H. G. Homme, Jr., assistant counsel; and Benny L. Kass, assistant counsel.

Senator LONG. The subcommittee will be in order.

We are beginning hearings today on a bill which, if enacted, will not only reform section 605 of the Communications Act of 1934 but will also provide a Federal eavesdropping law for the first time.

Without objection, Senate bill 928 will be placed in the record at this point.

(S. 928 follows:)

[S. 928, 90th Cong., 1st sess.]

A BILL To protect the right of privacy by prohibiting wire interception and eavesdropping, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Right of Privacy Act of 1967."

SEC. 2. The Congress hereby finds and declares that—

(a) Wire communications are normally conducted through the use of facilities which form part of an interstate network. The same facilities are used for both interstate and intrastate communications. In order effectively to protect the integrity of interstate wire communications and the privacy of parties to such communications it is necessary for the Congress to prohibit the interception of any wire communication using such facilities.

(b) Electronic, mechanical, and other eavesdropping devices are being used to overhear private conversations.

The manufacture, distribution, and use of these devices are facilitated by interstate commerce. To secure the privacy of conversations, it is necessary for the Congress to exercise its power under the Constitution to prohibit such manufacture, distribution, and use.

SEC. 3. Title 18, United States Code, is amended by inserting immediately following section 2424 a new chapter, to be composed of sections 2510 through 2515 as follows:

"Chapter 120.—WIRE INTERCEPTION AND EAVESDROPPING

"Sec.

"2510. Wire interception.

"2511. Eavesdropping.

"2512. Manufacture and distribution of wire interception and eavesdropping devices:

"2513. Confiscation of wire interception and eavesdropping devices.

"2514. National security.

"2515. Definitions.

"§ 2510. Wire interception

"(a) Any person who, whether acting under color of law or otherwise,

"(1) willfully intercepts or attempts to intercept any wire communication without the consent of at least one sender or receiver of such communication; or

"(2) willfully discloses or attempts to disclose, or uses or attempts to use, any information, knowing or having reason to know that such information was obtained in violation of paragraph (1) of this subsection—
shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

"(b) It shall not be unlawful under this section (1) for an operator of a switchboard, or an officer, employee, or agent of any communications common carrier whose facilities are used in the transmission of wire communications, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident of the rendition of service; or (2) for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of the Federal Communications Act, to intercept a wire communication while it is being transmitted by radio, or to disclose or use the information thereby obtained.

"§ 2511. Eavesdropping

"(a) Any person who, whether acting under color of law or otherwise, willfully uses or attempts to use any electronic, mechanical, or other device for the purpose of eavesdropping without the consent of at least one party to the conversation when—

"(1) such device is affixed to any wire, cable, or other connection used in wire communication; or

"(2) such device transmits communications by radio; or

"(3) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

"(4) such use or attempted use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

"(5) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States; or

"(b) Any person who, whether acting under color of law or otherwise, willfully discloses or attempts to disclose, or uses or attempts to use, any information, knowing or having reason to know that such information was obtained in violation of subsection (a) of this section—

"Shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

"§ 2512. Manufacture and distribution of wire interception and eavesdropping devices

"Any person who—

"(a) Except as a common carrier in the usual course of its business, sends through the mail or sends or carries in interstate or foreign commerce any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of wire interception or eavesdropping; or

"(b) Manufactures or assembles any electronic, mechanical, or other device, the design of which renders it primarily useful for the purpose of wire interception or eavesdropping, knowing or having reason to know that such device or any component thereof has been or will be sent through the mail or transported in interstate or foreign commerce; or

"(c) Places in any newspaper, magazine, handbill, or other publication any advertisement of—

"(1) any electronic, mechanical, or other device, the design of which renders its primarily useful for the purpose of wire interception or eavesdropping; or

"(2) any other electronic, mechanical, or other device, where such advertisement promotes the use of such device for the purpose of wire interception or eavesdropping,

knowing or having reason to know that such advertisement will be sent through the mail or transported in interstate or foreign commerce—

“Shall be fined not more than \$25,000 or imprisoned not more than one year, or both.

“§ 2513. Confiscation of wire interception and eavesdropping devices

“Any electronic, mechanical, or other device used, sent, carried, manufactured, or assembled in violation of section 2510, 2511, or 2512 shall be seized and forfeited to the United States. All provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs law; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof; except that such duties as are imposed upon the collector of customs or any other person with respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of electronic, mechanical, or other devices under this section by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General.

“§ 2514. National security

“Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1103; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power or any other serious threat to the security of the United States, or to protect national security information against foreign intelligence activities. No information obtained directly or indirectly, in the exercise of such power, by wire interception or eavesdropping otherwise prohibited by this chapter shall be received in evidence in any judicial or administrative proceeding. Neither shall such information be otherwise used or divulged except as necessary to implement such power.

“§ 2515. Definitions

“In this chapter—

“(a) The term ‘wire communication’ means any communication made in whole or part by aid of wire, cable, or other connection furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications.

“(b) The term ‘intercept’ means the act of acquiring all or any part of any wire communication from the facility transmitting the communication through use of any electronic, mechanical, or other device.

“(c) The term ‘eavesdropping’ means surreptitiously listening to, monitoring, transmitting, amplifying, or recording a private conversation.

“(d) The term ‘electronic, mechanical, or other device’ does not include—

“(1) an extension telephone instrument furnished to the subscriber or user by a communications common carrier in the ordinary course of its business; or

“(2) a hearing aid or similar device used by a person with impaired hearing, for the purpose of overcoming the impairment and permitting the hearing of sounds ordinarily audible to the human ear.”

SEC. 4. The table of contents to “PART I.—CRIMES” of title 18, United States Code, is amended by inserting after

“117. White slave traffic..... 2421”

a new chapter reference as follows:

“120. Wire interception and eavesdropping..... 2510”.

SEC. 5. Section 605 of the Communications Act of 1934 (48 Stat. 1103; 47 U.S.C. 605) is hereby amended to read as follows:

“No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper

accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided, however,* That this section shall not apply to receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast for the use of the general public, or transmitted by amateurs or others, or relating to ships in distress."

Sec. 6. If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to other persons not similarly situated or to other circumstances shall not be affected thereby.

Senator LONG. The timeliness of the proposed Right of Privacy Act of 1967 is easily demonstrated by the fact that this is the 16th set of congressional hearings since 1934 which is aimed at filling the gaps and plugging the loopholes of existing law.

What chance of success do we have now after 16 consecutive failures by other congressional committees?

Personally, I think our chances are good, though I do not wish to play down the difficulties ahead.

My optimism is based on four major factors.

First, we have, for the first time, a very tight proposal, covering both wiretapping and eavesdropping, and staunchly and unwaveringly backed by the President of the United States.

Second, after a long series of hearings, both the Congress and the public are aware of the present dangers of electronic eavesdropping. They know that their right to privacy has been badly eroded by failure of Congress to act in the past. They also know that the relatively little remaining privacy will completely disappear if Congress doesn't act firmly and act soon.

Third, the proposal is completely nonpartisan. We are honored and pleased to have wide support, both in cosponsorship and general help, on both sides of the aisle.

Fourth—but certainly not least in importance—the bill has as its staunch advocate a brilliant lawyer who recently became our Attorney General.

Before calling on the Attorney General, I would like to make an additional comment.

None of the sponsors of this bill believe that it is perfect and cannot be improved. We all hope to amend and strengthen it as a result of these hearings.

It would be unwise to try to hide the fact that the primary area of disagreement about this field of legislation involves use of electronics by law enforcement for serious crimes outside the area of national security. There are many sincere and dedicated advocates of "legalized wiretapping" for rather general use in law enforcement. We shall invite the leading spokesmen for this school of thought to appear and give us the benefit of their knowledge. For example, we have

already issued invitations to Judge J. Edward Lumbard and District Attorney Frank Hogan of New York. There will be many others.

We hope to be fair. Likewise, we hope proponents of various alternative proposals will carefully study the record as we intend to do when these hearings are concluded.

We have several letters from cosponsors and other interested Members of the Senate which will be placed in the record. I particularly have a letter this morning from Senator Randolph, who is one of the cosponsors, and it will be placed in the record at this point.

(The letters referred to follow:)

U.S. SENATE,
COMMITTEE ON PUBLIC WORKS,
March 17, 1967.

HON. EDWARD V. LONG,
Chairman, Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR ED: Thanks very much for your kind invitation to me to attend the opening hearings on the Right of Privacy Act of 1967 (S. 928). I regret that I will be unable to attend; however, I am compelled to state that I will be absent solely because I must chair the opening hearings on S. 9, the Cold War G.I. Bill, pending before my Subcommittee on Veterans Affairs of the Labor and Public Welfare Committee.

Please be assured that I am a firm supporter of the legislation you are considering, S. 928. I have followed the public debate thus far, and the statements submitted on behalf of a "right to privacy" measure by those intimately involved with the problem, and I am convinced that the pending proposal has much merit and is directed to the solution of a very real problem.

I would be most appreciative if this letter could be made a part of the record of your opening hearings, as a measure of my interest in a bill which I am delighted to co-author with you—the Right of Privacy Act of 1967.

With kindest regards, I am

Truly,

JENNINGS RANDOLPH.

U.S. SENATE,
Washington, D.C., March 14, 1967.

HON. EDWARD V. LONG,
Chairman, Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR ED: May I once again thank you for arranging for my recent visit to your City of St. Louis. I had a grand time and I hope that my presence there was of some assistance to you.

I appreciate your invitation of March 9 to attend your hearings on the Right of Privacy Act of 1967 on March 20.

I am presently planning to leave Washington on Saturday, March 18, to return to Hawaii. I therefore regret that I cannot be with you on the opening day. However, I will make every effort to have a statement submitted for the record.

Aloha,

DANIEL K. INOUE, U.S. Senator.

U.S. SENATE,
COMMITTEE ON BANKING AND CURRENCY,
March 16, 1967.

HON. EDWARD V. LONG,
U.S. Senate, Washington, D.C.

DEAR ED: Thank you for your letter of March 9th inviting me to make a supporting statement at the opening of the hearings on the Right of Privacy Act of 1967 on March 20th.

It doesn't appear that my schedule will permit my attendance on that day, and I think I'll simply let it go for the time being.

Thank you for thinking of me.

With best wishes.

Sincerely,

WALTER F. MONDALE.

CONGRESS OF THE UNITED STATES,
JOINT ECONOMIC COMMITTEE,
March 15, 1967.

Hon. EDWARD V. LONG,
*Chairman, Subcommittee on Administrative Practice and Procedure, U.S. Senate,
Washington, D.C.*

DEAR ED: I deeply regret that I simply will not be able to appear in support of the Right of Privacy Act before your Subcommittee on March 20.

As Chairman of the Joint Economic Committee I find that my time is becoming increasingly scarce. In any event, I am sure that you will do a fine job in chairing these important hearings. If I can be of any assistance whatsoever, I know that you will call on me.

Sincerely,

WILLIAM PROXMIRE, *U.S. Senator.*

Senator LONG. Other letters will be placed in the record during the course of the hearings.

We are delighted and honored to have Senator Cannon, our distinguished colleague from the State of Nevada who is a cosponsor of the bill and who is here to testify this morning.

Senator, we welcome you to the hearings and are delighted to have you with us this morning. We are also grateful to you for your statement.

**STATEMENT OF SENATOR HOWARD W. CANNON, U.S. SENATOR
FROM THE STATE OF NEVADA**

Senator CANNON. Thank you very much.

Mr. Chairman, and distinguished members of the subcommittee, I appreciate the opportunity to be the leadoff witness to offer testimony in support of what, in my opinion, is one of the top priority measures for legislation now before the 90th Congress.

I refer, of course, to S. 928, the Right of Privacy Act of 1967. No discussion of the issues presented by this measure would be complete without a sincere commendation for the diligence, insight, and untiring efforts which the chairman has demonstrated in bringing this matter before not only his colleagues in the Senate but to the American people as a whole.

My own State of Nevada has had a unique experience with the perplexing problem of wiretapping surreptitious listening. While a good many of the more sensational aspects of this activity have attracted page one attention in recent years, my State's experience with this law goes back to 1954 when the use of wiretapping became as prevalent in political campaigning as the television tube was in last year's national election.

As a result, the Nevada Legislature enacted a law without a single dissenting vote which would ban this activity except under an order of the district court upon presentation of reasonable cause.

A similar law, I have observed, exists in five other States which require a court order.

Actually, our State law appeared to work quite effectively for approximately 7 or 8 years before Nevada was struck by an invasion of Federal agents who disregarded completely State and Federal law and undertook a program of massive wiretapping that involved dozens of agents.

The outcome of this experience has produced more heat than light. While these unlawful activities, I am assured by the Justice Depart-

ment and the President, have long ceased, the benefits from the strict viewpoint of law enforcement have been negligible. Not a single conviction has been obtained and, as far as I am aware, no great social good has been accomplished.

I do know that these activities did encourage a fear and an atmosphere of psychological intimidation which reached frightening proportions.

In many hearings held by this subcommittee, it has been clearly established that this intimidation and fear which are entirely alien to all that this country represents was a condition experienced in many other communities across the Nation.

If left unchecked, it could lead only to the development of an Orwellian society in which neighbor spies upon neighbor, children inform on their parents, and the Government is encouraged to develop a stranglehold on the freedom of the populace. This would certainly be a final tragic irony for a country which professes to enshrine the ideal of liberty and prides itself on the export of freedom as our most precious commodity.

Mr. Chairman, this legislation can take an historic step in clarifying existing laws and bringing them up to date with the realities of our electronic age.

I have urged President Johnson and President Kennedy before him to lend the full weight of the executive department to this growing national problem. Both of these men, I am happy to say, have supported the general provisions of S. 928, and I am pleased to see Attorney General Ramsey Clark is here today to underscore the support of the executive department.

Much of the difficulty springs from erroneous interpretation which has allowed the Government to intercept communications so long as it did not divulge information. This is contrary to the letter and spirit of existing statutes and hands the Government a dangerous electronic club.

I further submit, Mr. Chairman, that the police do not require this electronic tool to accomplish their responsibility. The legal process is not a one-way street. While we must move vigorously to meet the problems of increasing crime and the challenge of making our streets safe, the way to accomplish these aims is not through breaking the law and trampling upon the rights of the accused. If I may paraphrase the chairman in a statement he made in the Congressional Record last February 8, an electronic anarchy has existed and the victim has not been the criminal element, it has been the American people.

It seems to me that if America ever loses its freedoms, it will not be through war but through our failure to act in time to stop such obnoxious practices as wiretapping and other forms of snooping which are foreign to the spirit of the laws and the way of life of this Nation.

The need for this legislation is further demonstrated by the character and number of devices being marketed today which have as their only purpose, intrusion into the private lives of the citizens of our Nation. To illustrate the need for enactment of the "right to privacy act", I would like to present to the committee descriptions of just a few of these items and some succinct quotations from a catalog which offers these devices for sale. One of the most interesting of the devices offered is a gadget which enables a would-be snooper in

New York to eavesdrop in Los Angeles merely by dialing a telephone number. This is done by attaching to the telephone in Los Angeles a beeper which converts the telephone into a transmitter without its ever leaving its cradle. The advertisement for the Infinity Transmitter, as it is called, states:

Would you believe you can hear whole happenings in a room in Los Angeles when you are in New York and without anyone being any the wiser? You can. It's true, incredible as it sounds.

Here's how.

Dial, activate the beeper and you're listening to all conversations being held on the premises where the transmitter was installed. The phone in that room will never ring. Occupants have no way of knowing their every word is being transmitted to you wherever you are. Just think about that for a minute. It probably outstrips your wildest dreams. Dreams no longer . . . it's a reality.

Mr. Chairman, a device of this sort is not something dreamed up in a comic strip—it is a realistic nightmare.

Senator LONG. If I could interrupt and tell you that we had the man who invented that gadget in our first hearings about 2 years ago, and he demonstrated how the gadget operated, and did make it work in the committee room.

Senator CANNON. I am certain, sir, that the committee is well aware of the type of things that are going on in this country today.

One other example of the tremendous advances in the field of wiretapping and eavesdropping devices, offered by the same company that offers for sale the ingenious Infinity Transmitter, is the Drop-In Telephone Transmitter. The advertising for this little gem states that:

It goes right under the mouthpiece of a standard telephone, and looks like it belongs there.

But it does things a little differently than the part it's replacing. Because it lets you in on somebody else's secrets.

Our telephone transmitter broadcasts both ends of any conversation to an FM receiver and there's no maintenance needed because it is energized by the phone.

As a matter of fact, it makes your radio into an extension phone.

Now, frankly, I object most strenuously to anyone being able to use his radio for an extension phone, and I am encouraged that most Americans feel the same way.

The very existence of devices such as the Infinity Transmitter and the Drop-In Telephone Transmitter available to the general public imperils not just one but all of our basic freedoms and, indeed, the very fabric of our society.

The U.S. Supreme Court has on numerous occasions spoken of our right to privacy in many contexts but all of the pronouncements in this field become merely shams and completely devoid of all substance as long as devices such as these remain on the market available to all comers.

I believe that Congress has been entrusted by the people with the power to protect them in areas such as this, and that we have an absolute duty to act so as to eliminate to the fullest extent possible the means by which wiretapping and eavesdropping are accomplished and to punish those who wiretap and eavesdrop.

The legal history of wiretapping and eavesdropping is revealing in that it shows that the courts have chosen the duty of protecting the privacy of the American people on the Congress.

Olmstead v. United States (227 U.S. 438 (1928)), was the case that gave rise to our present prohibition against wiretapping (47 U.S.C.

605). In *Olmstead*, the Supreme Court held in a 5-to-4 decision that the gathering of evidence by Federal law-enforcement officers through the use of wiretapping devices on a telephone line was not prohibited by the fourth amendment's prohibition against unreasonable searches and seizures because the wiretapping did not trespass or actually enter onto the premises.

Justice Brandeis and Justice Holmes were among the dissenters in the *Olmstead* case and in Justice Brandeis' dissent appears a statement that I believe we must all adhere to if we are to protect our people and their privacy. Although Judge Brandeis was directing his opinion to the facts of the case which involved, as stated before, wiretapping by Federal law-enforcement officers, the principle he expounded can be applied to all who would invade the privacy of others by any means.

In his dissent, Justice Brandeis said:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew only a part of the pain, pleasure and satisfaction of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

We have made much progress since the *Olmstead* decision in 1928 and as a result of that progress, the right to be let alone so cherished by Justice Brandeis must be extended not only to the Government but to all who would intrude surreptitiously into the private lives of their fellow citizens.

The *Olmstead* decision is important too because in the majority opinion written by Chief Justice Taft, he concluded that:

Congress may of course protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials, by direct legislation.

Congress did act in this field 6 years after the *Olmstead* case when section 605 of title 47 was enacted in 1934. The section did not prohibit wiretapping per se, but it did prohibit the divulging of information obtained by wiretap.

Presently, the Court decision, section 605 operates to render inadmissible in Federal courts evidence obtained by the interception of both intrastate and interstate telephone messages. However, the Court in 1961 in *Pugach v. Dollinger* (365 U.S. 458 (1961)) did uphold the earlier decision in *Schwartz v. Texas* (344 U.S. 199 (1952)) which prohibited Federal courts from enjoining the use in a State criminal court of evidence obtained as a result of a violation of section 605 of title 47.

In wiretapping cases the courts have continued to rely on section 605 as the basis for their opinions. I believe that now we must go beyond section 605 and affirmatively prohibit wiretapping. Let us give the courts and Federal law-enforcement agencies the power to protect the privacy of Americans by further prohibiting the shipment and use of eavesdropping devices which do not use wiretapping methods.

S. 928 does precisely this. By enactment of this measure, we can act to insure that no telephone will have its own infinity transmitter or drop-in device, and we can assure our citizens that they will be secure in their homes and offices from secret intruders. We have in S. 928 an opportunity to act in the spirit of the fourth amendment and we must not allow this opportunity to pass.

Thank you.

Senator LONG. Thank you, Senator Cannon, for a very fine statement. It is helpful to us, and we are grateful to you for your comments and for your support.

We look forward to discussing problems that come up on the passage of this.

Without objection, we will insert, at this point in the record, statements by Senator Alan Bible, of Nevada, and Senator Ernest Gruening, of Alaska.

STATEMENT BY SENATOR ALAN BIBLE

Mr. Chairman, legislation to establish tight limits and careful controls over eavesdropping is essential in view of recent disclosures and investigative trends, and I appreciate this opportunity to appear in support of Senate Bill 928. It is largely because of the thorough investigative efforts of this committee that this legislation is now before us. Accordingly, I wish to preface my statement with a commendation to you, Mr. Chairman, and to the members of the committee for your continuing efforts in this critical and extremely sensitive area.

It is simple enough to be against eavesdropping and for individual right of privacy. I doubt that anyone could, in good conscience, take any other position on the general issue. It is when we deal with specific details and specific questions that we run into trouble.

As with any issue, the difficulty is in deciding where and how to draw the line. In protecting the right of privacy we cannot ignore the effectiveness of eavesdropping—wiretapping and “bugging”—as an investigative tool. There are certain cases, principally those involving our national security, whose critical nature can well override individual rights. As I see it, the biggest challenge confronting the Congress is to find the proper line between individual rights and public safety. It is not a new challenge, but it is no less vexing because it is familiar.

First, however, I would like to discuss the basic problem. This committee is all too well aware of the technical advances that have extended man's ability to eavesdrop on his fellow man. Miniaturization has made it possible to conceal a microphone in almost any object—even down to that well-publicized martini olive, if you will. Because man is more proficient at eavesdropping he is more active at it, too. It is reaching the point now where man is so proficient and so active at eavesdropping that no one is really certain whether his telephone has been tapped or his home or office “bugged.” Unfortunately, judging from recent FBI disclosures, the clandestine ear is most likely to be a Federal ear.

I do not need to point out to this committee the extensive Federal bugging that went on in my own state, in Miami, Florida, in Boston, Massachusetts, and right here in Washington, D.C., in connection with alleged tax evasion cases. The Internal Revenue Service as well as the FBI has been all too active, by the direct admissions of the Justice Department.

I was disturbed to learn just last week that the Justice Department has 38 wiretaps operating in the United States—but relieved at the same time to have the assurance by the Attorney General that all these wiretaps are directly involved in threats to our national security and—perhaps just as significant—that no other electronic surveillance by Federal authorities now exists. If the latter part of that statement is accurate, and I presume it is, then there has been a somewhat drastic change in Federal investigative procedures this past year.

The legislation before this committee, which I co-sponsor, is hopefully aimed at the clandestine ear whether it be a Federal, state or private ear. The chairman of this committee has effectively branded this growing practice as “electronic anarchy,” and it must be halted. Such snooping and prying into an individual's personal affairs is repugnant to American social and moral traditions. But it is bad for other reasons, as it now operates.

Eavesdropping is bad because it has cast Federal investigators as violators of state law. In Nevada, for example, Federal agents carried on extensive "bugging" operations for a lengthy period with a network of secret microphones connected by a large system of leased telephone company wires. This is according to the FBI's own accounts before a Federal district court in Denver last June. All this in the face of clear state law expressly forbidding such activity except in certain limited instances under certain specific procedures. With your permission, Mr. Chairman, I would like to offer the pertinent sections of the Nevada Revised Statutes for inclusion in the hearing record at this point (NRS 200.610-200.690).

Eavesdropping is bad because it casts a cloud over all evidence gathered in a criminal case. We have seen recent dramatic examples of how bugging can taint criminal evidence and how it may indeed jeopardize the entire prosecution case.

Eavesdropping is worse than bad as it has been practiced by Federal authorities. By participating in this illicit practice, the Federal Government appears to be giving tacit consent to that same practice by others.

Furthermore, with the procedures and responsibilities undefined, eavesdropping by Federal agencies has created ridiculous situations that cast doubt on the credibility and very integrity of our Federal government as a whole. We have seen high-ranking Federal officials arguing through the public media of press and television over who was responsible for which bug. We have witnessed persons in authority disclaiming authority.

Simply put, the situation cries for firm remedial legislation. I do not think it is necessary to speak more to that point.

But what of this "right of privacy" and where is it expressed in our Constitution and our laws? There are those who argue that this is not a right specifically guaranteed by the Constitution and that it is more an interpreted ideal of our statutes. That argument, I think, is a useless exercise in hair splitting. For the American right to privacy in personal life and in the conduct of personal affairs is to me as basic as the four freedoms. Eventually, I believe, the courts would uphold that view.

Can we say that a man cannot be forced to testify against himself—unless he is unaware that someone is listening?

Can we say that a search warrant is necessary to enter a man's home—unless the purpose is to install a secret microphone?

Can we honor the confidential privilege of professional ethics—except when those confidences are overheard secretly?

This kind of snooping flies in the face of every basic Constitutional and statutory protection, regardless of the motives and regardless of who is doing the snooping.

If electronic eavesdropping is an effective investigative tool, it is also a highly dangerous weapon in the hands of the ruthless or irresponsible. It is a practice that grants the great powers to the unscrupulous. This is so obvious that it needs little discussion.

But, again, where does Congress draw the line? Where is the point between inexcusable eavesdropping and imperative surveillance?

The bill before this committee, recommended by the Administration, draws the line at "national security." However, I question whether this is specific enough to do the job. The phrase "any . . . serious threat to the security of the United States" contained in Section 2514 is general enough to invite broad interpretation.

Conversely, I must ask if a law limiting eavesdropping strictly to cases involving national security might not be too restrictive. Is it wise to deny this effective investigative technique to law enforcement officers involved in controlling major organized crime activities? If effective and rigid safeguards can be written, perhaps it will not be necessary to close off this sector entirely to properly authorized investigative eavesdropping.

I do not have the complete answers. But I do have a very strong recommendation that Congress look very carefully at the line the Administration has proposed that we draw. It should be a line that is much more clearly defined, of that I am convinced. And perhaps it can be a line drawn at a different point. That remains to be developed. The key factor will be the practicality of safeguards.

Certainly, I cannot support any line drawn below the national security level unless a completely adequate system of safeguards, probably including judicial review, can also be drawn. Even with this system, wiretapping and bugging cannot be extended beyond the most critical and major criminal investigation

areas. For electronic eavesdropping remains more dangerous a weapon than an effective tool. The limits for its use must be hard and fast just as the authority for its use must be clearly specified and carefully confined.

I know I have touched on only a few of the sensitive issues raised by this legislation, and I know there are many and varied problems that must be solved before this committee will be in position to report out a good bill. However, Mr. Chairman, I do wish to stress the urgency of this entire subject and to underscore the need for prompt action. We are experiencing—on the surface, at least—a temporary lull in the area of electronic eavesdropping. I do not expect this lull to last long. Without a precise and effective safeguard, we shall see more abuses and more violations of the right of privacy.

Again, my commendation to this committee for its excellent work in this vital field. My best wishes for success with the difficult job that lies ahead.

INTERCEPTION AND DISCLOSURE OF WIRE AND RADIO COMMUNICATIONS, PRIVATE CONVERSATIONS

200.610 *Definitions.* As used in NRS 200.610 to 200.690, inclusive:

1. "Person" means every natural person, firm, copartnership, association or corporation and includes public officials and law enforcement officers of the state and of a county or municipality or other political subdivision of the state.

2. "Wire communication" means the transmission of writing, signs, signals, pictures and sounds of any and all kinds by wire, cable, or other similar connection between the points of origin and reception of such transmission, including all facilities and services incidental to such transmission, which facilities and services shall include, among other things, the receipt, forwarding and delivering of communications.

3. "Radio communication" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by radio or other wireless methods, including all facilities and services incidental to such transmission, which facilities and services shall include, among other things, the receipt, forwarding and delivering of communications. "Radio communication" shall not include the transmission of writing, signs, signals, pictures and sounds broadcast by amateurs or public or municipal agencies of the State of Nevada, or by others for the use of the general public.

(Added to NRS by 1957, 334)

200.620 *Interception, attempted interception of wire, radio communication prohibited; exceptions.*

1. Except as otherwise provided in NRS 200.660, no person shall intercept or attempt to intercept any wire or radio communication unless such interception or attempted interception is authorized by both the sender and receiver.

2. This section shall not apply to any person, or to the officers, employees or agents of any person, engaged in the business of providing service and facilities for such communication where the interception or attempted interception is for the purpose of construction, maintenance, conduct or operation of the service or facilities of such person.

(Added to NRS by 1957, 334)

200.630 *Disclosure of contents, substance of wire, radio communication prohibited; exceptions.*

1. Except as otherwise provided in NRS 200.660 to 200.680, inclusive, no person shall disclose the existence, contents, substance, purport, effect or meaning of any wire or radio communication to any person unless authorized to do so by either the sender or receiver.

2. This section shall not apply to any person, or the officers, employees or agents of any person, engaged in furnishing service or facilities for such communication where such disclosure is made:

- (a) For the purpose of construction, maintenance, conduct or operation of the service or facilities of such person; or
- (b) To the intended receiver, his agent or attorney; or
- (c) In response to a subpoena issued by a court of competent jurisdiction; or
- (d) On written demand of other lawful authority.

(Added to NRS by 1957, 334)

200.640 *Unauthorized connection with facilities prohibited.* Except as otherwise provided in NRS 200.660 to 200.680, inclusive, no person shall make any connection, either physically or by induction, with the wire or radio communication facilities of any person engaged in the business of providing service and

facilities for such communication unless such connection is also authorized by the person providing such service and facilities.

(Added to NRS by 1957, 334)

200.650 *Unauthorized, surreptitious intrusion of privacy by listening device prohibited.* Except as otherwise provided in NRS 200.660 to 200.680, inclusive, no person shall intrude upon the privacy of other persons by surreptitiously listening to, monitoring or recording, or attempting to listen to, monitor or record, by means of any mechanical, electronic or other listening device, any private conversation engaged in by such other persons, or disclose the existence, contents, substance, purport, effect or meaning of any such conversation so listened to, monitored, or recorded, unless authorized to do so by one of the persons engaging in the conversation.

(Added to NRS by 1957, 334)

200.660 *Court order for interception: Contents of application; effective period; renewals.*

1. An ex parte order for the interception of wire or radio communications or private conversations may be issued by the judge of a district court or of the supreme court upon application of a district attorney or of the attorney general setting forth fully the facts and circumstances upon which the application is based and stating that:

(a) There are reasonable grounds to believe that the crime of murder, kidnapping, extortion, bribery or crime endangering the national defense or a violation of the Uniform Narcotic Drug Act has been committed or is about to be committed; and

(b) There are reasonable grounds to believe that evidence will be obtained essential to the solution of such crime or which may enable the prevention of such crime; and

(c) No other means are readily available for obtaining such evidence.

2. Where statements in the application are solely upon the information or belief of the applicant, the precise source of the information and the grounds for the belief must be given.

3. The applicant must state whether any prior application has been made to intercept private conversations or wire or radio communications on the same communication facilities or of, from or to the same person, and, if such prior application exists, the applicant shall disclose the current status thereof.

4. The application and any order issued under this section shall identify fully the particular communication facilities on which the applicant proposes to make the interception and the purpose of such interception.

5. The court may examine, upon oath or affirmation, the applicant and any witness the applicant desires to produce or the court requires to be produced.

6. Orders issued under this section shall not be effective for a period longer than 60 days, after which period the court which issued the order may, upon application of the officer who secured the original order, in its discretion, renew or continue the order for an additional period not to exceed 60 days. All further renewals thereafter shall be for a period not to exceed 30 days.

(Added to NRS by 1957, 334)

200.670 *Application for order, documents, testimony confidential; disclosure of information prohibited.*

1. During the effective period of any order issued pursuant to NRS 200.660, or any extension thereof, the application for any order under NRS 200.660 and any supporting documents, testimony or proceedings in connection therewith shall remain confidential and in the custody of the court, and such materials shall not be released nor shall any information concerning them be disclosed in any manner except upon written order of the court.

2. No person shall disclose any information obtained by reason of an order issued under NRS 200.660, except for the purpose of obtaining evidence for the solution or prevention of a crime enumerated in NRS 200.660, or for the prosecution of persons accused thereof, unless such information has become a matter of public record in a criminal action as provided in NRS 200.680.

(Added to NRS by 1957, 334)

200.680 *Admissibility of information in evidence.*

1. Any information obtained, either directly or indirectly, as a result of a violation of NRS 200.620, 200.630, 200.640 or 200.650 shall not be admissible as evidence in any action.

2. Any information obtained, either directly or indirectly, pursuant to an effective order issued under NRS 200.660 shall not be admissible in any action except:

(a) It shall be admissible in criminal actions involving crimes enumerated in NRS 200.660 in accordance with rules of evidence in criminal cases; and

(b) In proceedings before a grand jury involving crimes enumerated in NRS 200.660.

(Added to NRS by 1957, 334)

200.690 *Penalties*. Any person who willfully and knowingly violates NRS 200.620, 200.630, 200.640, 200.650 or 200.670 shall be guilty of a felony.

(Added to NRS by 1957, 334)

STATEMENT BY SENATOR ERNEST GRUENING OF ALASKA

Mr. Chairman, The Judiciary Subcommittee on Administrative Practice and Procedure has shown responsibly the incredible extent of the invasions upon our privacy. In the last two years your hearings have demonstrated the widespread use of wiretapping and electronic eavesdropping by government officials. The subcommittee has pointed up the need for corrective legislation, and I am pleased to be a cosponsor of S. 928, the Right of Privacy Act of 1967.

On February 2nd of this year, I joined in a discussion of the right of privacy as a constitutional guarantee with a number of my Senatorial colleagues. In our colloquy in the Senate chamber, I said that I considered wiretapping disgraceful and suggested that the Congress put an end to all the wiretapping because there is no excuse for it whatsoever in a supposedly free country. Wiretapping methods belong in a police state.

Any benefits that may be derived from any information secured would be offset more than 100 times by the abuse of the rights of the people.

Mr. Chairman, I should like at this time to make that colloquy part of the hearing record on S. 928.

[From the Congressional Record, Feb. 2, 1967, pp. S. 1336-S. 1402]

THE RIGHTS OF PRIVACY AS A CONSTITUTIONAL GUARANTEE

Mr. MORSE. Mr. President, I address myself to the subject "The Rights of Privacy as a Constitutional Guarantee."

I rise today, as I did over 10 years ago, on the floor of the Senate, to address myself to the problem of wiretapping and the threats it poses to the privacy and security of the American home.

In 1954 Attorney General Brownell proposed a bill to legalize wiretapping and to make wiretapped evidence admissible in courts of law. Although the bill had passed the House of Representatives, the Senate rejected the wiretapping proposal, which I characterized as a "police-state method" and as a surreptitious interception of a person's confidential communications to his family, friends, associates, lawyer, doctor or priest—an insidious kind of intrusion upon personal privacy."

I pointed out then, and I repeat again today:

"When we speak about privacy and protecting the privacy of American citizens we are referring to a historic question, an issue which existed at the time the Constitution itself was adopted. In my judgment, unless there had been assurance that the privacy of American citizens would be protected from the arbitrary discretion of the Federal Government, the Constitution never would have come into being."

The adoption of the Bill of Rights amendments in 1789 and their subsequent ratification by the States established in law the principle that in a democracy the rights of the people are always superior to the expediencies of government officials.

We must not forget the Bill of Rights was adopted against the background of so-called Writs of Assistance authorizing revenue officers to enter suspected places and search for smuggled goods. James Otis, speaking in Boston in February 1761, denounced the character of the writs as an infringement of the Englishman's "right of House."

In the years 1966 and 1967 our distinguished and able colleague from Missouri [Mr. Long] has exposed, through the hearings of his subcommittee, the arbitrary intrusion of the revenue officer into the home of the taxpayer, not through Writs of Assistance, but through a more sophisticated type of intrusion, in the form of electronic monitoring.

In the 13 years since I delivered the speech above referred to in which I defended the constitutional rights of privacy and discussed the wiretapping problems in our country, we have seen "bugging" elevated to a fine art in police detection work. Many private agencies are also using bugging techniques to invade the rights of privacy of free Americans. Much of the impetus upon development of today's ingenious listening devices comes from Federal funds spent by agencies concerned with collecting intelligence information or with the design of miniature information recording equipment for the space program.

The invention of the transistor made it possible to make easily concealed transmitters for tape or wire recorders. Also, advances in sound engineering led to microphones the size of an olive to be inserted into a martini at a cocktail party or a fountain pen on a desk, and similar devices.

Since 1954 Congress has repeatedly rejected similar proposals to legalize wiretapping. As recently as 1962 the Congress failed to enact the Attorney General's program for legalized wiretapping.

Even though the Federal Communications Commission Act of 1934 outlaws the interception and divulgence of telephone communications without the consent of either party to the conversation, and even though the official policy of the various Federal agencies of Government has been to restrict the use of electronic monitoring excepting in cases where national security was involved, the Long Subcommittee has revealed that over 60 Government agencies have at their disposal extensive electronic monitoring gear. The committee finds that these agencies do not hesitate to use such devices as a part of their normal investigative procedure.

On February 28, 1964, Senator Long, as chairman of the Subcommittee on Administrative Practice and Procedure, submitted a detailed questionnaire on invasions of privacy to all Government agencies with the exception of those agencies within the so-called security community. The questionnaire covered purchase and use by the civilian agencies of miniature recording devices, miniature transmitters and receivers, concealable microphones, two-way mirrors, infrared cameras, and other commonly used surveillance equipment.

These questionnaires were filled out by Government agencies with varying degrees of candor and with considerable reluctance. In each instance, the Long subcommittee discovered a considerable gap between the official policy and the practice.

On July 13, 1965, Senator Long stated:

"As late as March of this year Secretary Dillon sat in my office and assured me wiretapping was absolutely banned by the Internal Revenue Service. He said that he and his colleagues in the national office knew of no case of wiretaps. I am certain he was telling the truth. Unfortunately, Department and Agency heads do not have the means to know of such activities."

Subsequent hearings revealed the IRS and the Treasury Department had been conducting a 7-week course for all agents in the art of electronic snooping which included picking of locks, installing hidden microphones, monitoring calls; that such electronic snooping took place in commercial establishments, offices, public telephones, private homes, automobiles, without the knowledge and consent of the individuals being tapped; that taxpayers calling into IRS had their calls monitored by the supervisor of the agent responding to the call; the taxpayers being interviewed in a Government conference room had their conversations overheard by permanent concealed bugs in the room; that it was the official policy of the inspection service of the Bureau of Internal Revenue to listen in on the telephone of its employees without their consent or knowledge.

If it were done in a Fascist country, such as Nazi Germany or in a Communist country such as Russia or China, we would call it a police-state technique. It is as much a police-state technique when practiced in the United States, and it is being practiced in the United States today.

I say to 195 million free Americans: "You have the duty, if you are going to protect your rights of your freedom of privacy to call your Government to an accounting." Yes, an accounting, if they continue to exercise what I consider shocking, unconstitutional, indiscretions, that are arbitrary and capricious in nature and against the rights of privacy guaranteed by the Constitution to a free people.

For we keep our freedom only to the extent and degree to which we insist upon procedures within the Government consonant with the enjoyment of freedom.

Mr. GRUENING. Mr. President, will the Senator yield?

Mr. MORSE. I yield.

Mr. GRUENING. I join in and concur with the remarks of my distinguished colleague, the senior Senator from Oregon.

It does not surprise me that the Senator is taking this firm stand, as he always does when our democracy is imperiled—on this issue or any other issue.

I am not a lawyer, but I view the danger of wiretapping strictly from the standpoint of an ordinary citizen.

As a member of the general public, I would like to make sure whether the Senator means that my conversations could be tapped at any time in my office, on a public telephone, in my home, or in the home of a friend, or in an automobile.

Mr. MORSE. What makes the Senator think this is not so?

Mr. GRUENING. As I read the hearings of the Long committee, I became increasingly apprehensive that that might be the case.

Mr. MORSE. If the Senator and I were private citizens, without senatorial immunity, there would be some interesting material made available in regard to the Senator from Alaska and the Senator from Oregon that, in the minds of certain extremists in this country, would seem to give the interpretation that we are a couple of dangerous men.

Mr. GRUENING. I have no doubt that anybody who fights for democracy incurs the perils of opposition from those who would erode our heritage of freedom.

Is it not true that the Long hearings have demonstrated the chain reaction of bugging and wiretapping where the friends, associates, and innocent third parties who may be in the office, home, or automobile of the suspect become subsidiary or satellite subjects of investigation?

Mr. MORSE. That is what the report points out. Read the report.

Mr. GRUENING. I have. I note from the transcript of the Long committee hearings in San Francisco that the Pacific Telephone & Telegraph Co., had leased lines into a hospital and other establishments, under the pretext of "service-observations." The privileged telephone communications of doctor-patient, lawyer-client, and even husband-wife were overheard. I have examined the record of the hearings of the Long subcommittee and am shocked at the invasion of privacy of the ordinary taxpayer whose telephone conversations with agents are tuned in by supervisors on the pretext of observing the efficiency of agents in answering questions phoned in by the ordinary taxpayer.

It is a shocking situation. I am glad that the Senator has taken up the cudgels. I am with him. I think we should pursue the matter until we put an end to this nefarious practice.

Mr. MORSE. I appreciate the remarks of the Senator. It is not the only time that the Senator from Alaska and I have stood together to defend the rights of the people.

Mr. GRUENING. I think these issues are interrelated. If this practice is started in one field, we will soon have similar abuses in every field.

Mr. MORSE. The Senator is correct.

Mr. GRUENING. I am happy to note that the use of permanent bugging will be eliminated. However, we are informed that temporary bugging will be used on a case-to-case basis.

What is the difference between temporary and permanent bugging? If one is being bugged, he is being bugged. I see no great gain here.

Mr. MORSE. There is no difference as far as the violation of constitutional rights is concerned.

Mr. GRUENING. The hearings also disclose that it has been the custom of the Internal Revenue Service to purchase used trucks from the Bell Telephone Co., to repaint those trucks, to equip and disguise their agents as Bell Telephone employees, and then head them out into the highways and byways to climb poles, to tap lines, to listen to the private conversations of citizens, to record these conversations or simply to record which telephone numbers certain citizens call when they use their telephone.

Mr. MORSE. That is what the committee brings out.

Mr. GRUENING. When one sees a Bell Telephone Co. truck parked at a telephone pole near his home and a couple of men working on the telephone pole, does he have the right to feel insecure and to believe that they are trying to tap the wires in his house?

Mr. MORSE. I am a fellow who has great faith. I assume there must be a broken wire somewhere—I hope from natural causes—not from human splitting.

Mr. GRUENING. I think the Senator from Missouri is entitled to the greatest credit for the manner in which he has pursued this subject.

Mr. MORSE. I have already paid him great commendation in my speech, and when I have concluded, I shall do so again.

The Senator from Missouri has performed a great, dedicated service to the American people, and has become an outstanding defender, as we would expect him to be, of the constitutional rights of all of our people in his opposition to the invasion of privacy through wiretapping and bugging practices.

Mr. GRUENING. There was an interesting colloquy that took place between Senator Long and Owen Burke Yung, Sr., a senior coordinator of the Intelligence Division of the Internal Revenue Service.

Mr. Yung believes that his employment in the Internal Revenue Service gives him a license to break into homes without being in any way subject to the law. He graduated from the Treasury school and this is hard to believe; many of the readers of the Record will not believe this—he had a course in lockpicking.

He was graduated as a lock picker. I cite these interesting excerpts from this committee transcript:

“Senator LONG. Is there a special course in that school on teaching the use of burglar tools?

“Mr. YUNG. There is, or was up until this year, a course in lockpicking.

“Senator LONG. Lockpicking?

“Mr. YUNG. Yes, sir.

“Senator LONG. How do you—what do you use this—what would you use the art of lockpicking for?

“Mr. YUNG. For surreptitious entry.

“Senator LONG. Sir?

“Mr. YUNG. For surreptitious entry.

“Senator LONG. That is a good-size word for a country Senator. Is that just ordinary breaking and entering?

“Mr. YUNG. Well, they could be used legitimately. For instance, we say we might want to get into a basement room where the telephone box is located.

“Senator LONG. Well, that would still be breaking and entering, wouldn't it?

“Mr. YUNG. Technically, I guess so, sir.

“Senator LONG. Violation of the law?

“Mr. YUNG. I wouldn't know, sir. I am not a lawyer.”

So our Government officials had gotten to the point where they were condoning and encouraging and teaching breaking and entering, and that is apparently what they are doing.

Mr. MORSE. That is what the committee points out.

Mr. GRUENING. I consider it disgraceful. We should see that this is corrected. We should put an end to all wiretapping. There is no excuse for it whatever in a supposedly free country. Those methods belong in a police state.

The benefits that might be derived from any information secured would be offset more than 100 times by the abuse of the rights of the people.

Mr. MORSE. There is no doubt of that.

I thank the Senator from Alaska for his assistance.

Before I yield to the Senator from New Hampshire [Mr. Cotton], I want to supplement what the Senator from Alaska has said.

We should not blithely forget our history and nor should we forget one of the principal foundations on which our Republic is based—that our forefathers protested—and rightly so—the snoopers of the British Crown.

As I have already pointed out in my speech, one of the great causes of the revolution was the insistence on the part of our colonial forefathers that their rights be protected.

I now yield to the Senator from New Hampshire.

Mr. COTTON. Mr. President, I thank the Senator. I commend him for directing the attention of the Senate so eloquently and forcefully, as he always does, to what I think many of us consider to be the very extremely serious and far-reaching problem of the right of privacy.

I most heartily praise the Senator for the splendid speech he is making.

I am glad the distinguished Senator from Missouri [Mr. Long] has held the hearings. If the Senator from Oregon is going to mention this later, I shall not anticipate him, but I join in commending the distinguished Senator from Missouri for the splendid job he has done as chairman of the committee.

This is not in any sense criticism, but I was a little puzzled and disturbed in reading, I think over a year ago, a release from the Long committee—I do not know whether it was from the chairman, the Senator from Missouri, or not—in which it was indicated that although questionnaires and queries had been directed to many agencies, departments, and bureaus of the Government, no such questionnaires or queries had been directed at least at that time to what I believe was referred to as the security community, consisting of the Department of Defense,

the Department of State, the FBI at least in the Department of Justice, and the CIA.

Some years ago, I served on the Internal Security Subcommittee of the Committee on the Judiciary, during the well-known Otepka case investigations. As I recall, representatives of the Department of Defense and the Department of Justice appeared before us in executive session. To be sure, it was in executive session, but later, by vote of the committee, the evidence was revealed to the public, with one or two small exceptions in which internal security seemed to be involved.

If we are to face up to this matter or bugging and wiretapping, this matter of invasions of the right of privacy, and face up to it in man fashion, it seems to me—even though it might be wise to have certain proceedings in executive session—that no department in this Government and no agency in this Government and no individual in this Government should be exempted. I do not say this in criticism of the committee of the Senator from Missouri [Mr. Long], but simply to suggest that this facet of the problem warrants very careful consideration.

Mr. MORSE. I shall cover that matter and another facet of it later in my speech, if the Senator will permit me to complete my speech, and at that time we can engage in colloquy.

I thank the Senator from New Hampshire for the way he has made it possible for me to stand shoulder to shoulder with him during our years of mutual service in the Senate, as we have approached the problems of protecting these individual rights guaranteed by the Constitution. This is not the first time that the Senator from New Hampshire and the senior Senator from Oregon have been on the same side—and I think the right side—of this great constitutional issue. I appreciated the Senator's cooperation in the past and thank him for his support at present.

Mr. COTTON. I thank the Senator. He certainly will have my support on this issue. I am sorry that I raised this matter prematurely.

Mr. MORSE. I am glad that the Senator has done so.

Mr. COTTON. I look forward to what the Senator will say about the subject.

Mr. BARTLETT. Mr. President, will the Senator yield?

Mr. MORSE. I yield to the Senator from Alaska.

Mr. BARTLETT. A few minutes ago, my colleague from Alaska made a confession or bragged—I am not sure which—that he is not a lawyer. I am similarly situated, so this question—

Mr. MORSE. May I interrupt the Senator, goodnaturedly, to say that the Senator would make an excellent witness. He could not be charged with advocacy.

Mr. BARTLETT. Perhaps this question is altogether stupid, but, being a layman, I shall ask it.

Is there a special law that permits Internal Revenue agents to break into homes in order to connect devices to telephone wires?

Mr. MORSE. In the opinion of the senior Senator from Oregon, it is outlawry, not legality.

Mr. BARTLETT. Is there any law that the Senator knows of which makes such a practice legally permissible?

Mr. MORSE. I do not believe that it can possibly be justified legally.

Mr. BARTLETT. I, too, wish to say that I believe the Senator from Oregon, in discussing this subject, is doing what is not only wise and advisable, but also essential, if the freedoms that the American people have known for so long are to be protected.

I wonder whether the Senator from Oregon, who obviously is very knowledgeable on this subject, can tell me when this strange, un-American business of tapping telephone wires commenced on the part of the Federal Government.

Mr. MORSE. I believe that it has existed surreptitiously for quite a number of years, but not to the degree to which it has now developed. I cannot pinpoint the date.

The Senator's question causes to flash through my mind a somewhat humorous incident, and at the same time a very serious one. Some years ago, while in my office, I received a telephone call from a newspaper reporter, who said that he wished to see me.

I said, "Come over."

He said, "Oh, no, I don't want to see you in your office."

I said, "What do you mean?"

He said, "I'll tell you when I see you."

So I made an appointment to meet him for coffee in the Senate Restaurant, and I took my administrative assistant with me.

When the reporter arrived, I said, "Why didn't you want to come to my office?"

He said, "Because it's bugged."

I said, "That's a lot of nonsense."

He said, "It isn't. I want you to know that I was advised by a member of the Secret Service to get in touch with you and warn you that your office is bugged."

I said, "I don't believe it."

"Well," he said, "did you recently make the following statement in your office?"

Well, I had. It was, of course, a highly personal and privileged matter, and I made the statement to only one person, my administrative assistant, who was sitting on the other side of the desk; and when I talk to him, I talk to myself. I can assure the Senator that my administrative assistant, Mr. William Berg, would never divulge any privileged discussion that he had had with me.

This quotation was so word-perfect—it involved comments that I had made about a high official of the Government—that I could not reach any conclusion but that the Secret Service report was accurate.

Mr. BARTLETT. We can be thankful, then, that there are some tattlers in the Federal Establishment.

Mr. MORSE. But is it not unfortunate that violations of our rights must be disclosed in that manner?

Permit me to finish the story. We had this discussion with the reporter for quite some time.

He said, "This Secret Serviceman also suggested that I ask you if you have had a new chair come into your home recently."

I said, "I don't recall. I'll call Mrs. Morse and see."

So I went to the telephone and called Mrs. Morse; and she said, "You got your hot seat chair from New York, from 'The Hot Seat' program."

In those days, there was a program called The Hot Seat; and if one was a guest on the program, he sat in a new chair, and the chair was sent to him as a sort of remembrance of the experience.

The reporter suggested, "Did you have it thoroughly inspected?"

"Well," I said, "If you're trying to imply that that might have a bug in it, it's down in the children's recreation room. There would probably be some very interesting conversations recorded on any bugs that might be attached to the springs of that chair."

Before we finished the conversation, the newspaper reporter said, "Do you mind if you take me over to your office and we do a little searching for ourselves?"

I should have said "No," because, in my judgment, while searching there we got into almost a silly posture.

But before it was over, I said, "I just wish you could have a photograph of this. This would be the picture of the year, as far as silly performance is concerned."

We found no bug in the office.

Then he said, "What about the fireplace?"

I got down and put my hand up in the opening of the fireplace, and began laughing.

I said, "How silly can we be?"

I immediately rose and said, "I'm all through with this. We couldn't find a bug if it were in here."

I called the FBI and told them of the report that I had received, and they sent over one of their special teams for searching out monitoring devices.

The interesting thing was that it was necessary to turn the office over to them and leave them alone in the office. You cannot stay in the office while they search it. They reported to me the next day that they found no bugs, but they said that that did not mean that one was not there. That incident was some years ago. The practice has been greatly refined since then.

These devices have reached the point where they can be hidden in an office without a wire connection. There are little devices no larger than a wristwatch that can sit in an automobile a mile away from the office and by means of the electronic devices that have been developed can record everything said in the office vocally. Even a whisper can be picked up by that type device. This is the most unbelievable to me.

If Senators will read the Long report, it will be discovered that they have so perfected the practice that, as I said in the early part of my speech today, there can be a device as small as an olive, which looks like an olive, in a cocktail glass, and it can record the conversation taking place.

I have made the preceding comments because I felt that there was a pit of human interest in it. Knowing the current state of the art, who knows what bugging is taking place anywhere? One thing I do know: It cannot be justified under the Constitution, and that is the issue I am raising here this afternoon.

Mr. BARTLETT. Mr. President, will the Senator yield?

Mr. MORSE. I yield to the Senator from Alaska.

Mr. BARTLETT. I did not know whether to be encouraged or dismayed by the comment that a conversation between my wife and me may have been intercepted.

Mr. LONG of Missouri. Mr. President, will the Senator yield?

Mr. MORSE. I yield to the Senator from Missouri [Mr. Long].

Mr. LONG of Missouri. The size of these gadgets has been refined since the last information of the Senator. These devices are now in the size of an aspirin tablet.

Mr. MORSE. There you are.

Mr. LONG of Missouri. The Senator spoke about Senators' offices being bugged. Over a year ago we had specialists working with my staff, and we checked the offices and corridors in the office building. We found that the offices of two Senators were apparently bugged, but we were not able to locate the devices. The next day we looked for them, and they had been removed. We were advised that the offices of these two Senators were bugged in the Senate Office Building over a year ago.

Mr. MORSE. When many conversations are recorded in many places, they must make very interesting listening to the eavesdroppers.

Mr. BARTLETT. Mr. President, I wish to say, in all seriousness, that I believe that the work that the Senator from Missouri [Mr. Long] has done and is doing in this area, and the work which the Senator from Oregon [Mr. Morse] is now doing in calling the attention of the American public to what is going on, is in the best interest of the American people.

We all know that, increasingly, files are labeled confidential or secret, or both, within departments that have nothing whatsoever to do with national security. If such a department can violate the law and engage in wiretapping, there is no reason why, eventually, every minor agency cannot do it. If the practice is illegal for one, it should be illegal for all.

Mr. MORSE. I agree.

Mr. BARTLETT. The sooner we cause these police-state methods to be discarded—methods which we deplore in other nations—the sooner we will return to the kind of America that this country was when we were younger, and the kind of America that our forefathers knew.

Mr. MORSE. The Senator is correct. That is my thesis.

Mr. GRUENING. Mr. President, will the Senator yield?

Mr. MORSE. I yield to the Senator from Alaska.

Mr. GRUENING. In view of the fact that bugging devices are getting smaller and smaller—they were the size of an olive a few moments ago, and now the Senator from Missouri [Mr. Long] has informed us that their size has been reduced to that of an aspirin tablet—I wonder if it would not be somewhat like the verse:

"Big bugs have little bugs upon their backs to bite 'em,
"And little bugs have lesser bugs, and so ad infinitum."

Mr. MORSE. I think that the application of the flea story is apropos.

Mr. HATFIELD. Mr. President, will the Senator yield?

Mr. MORSE. I yield to my colleague from Oregon.

Mr. HATFIELD. Mr. President, I am pleased that the senior Senator from Oregon [Mr. Morse] has introduced this important subject today on the floor of the Senate.

While I am not a constitutional lawyer, I do appreciate the reference that the Senator made to the Constitution and the Bill of Rights. I wish to ask the Senator if he does not believe this issue really comes down to a conflict between what we might call two goals, the goal of efficiency in law enforcement and the goal we would call the personal liberty of our people; and so, when these two goals are in conflict, does not the Senator believe that the goal of personal liberty should prevail over the goal of law enforcement efficiency?

Mr. MORSE. My answer is yes. As one who was professionally involved in many investigations in connection with the administration of criminal justice in this country before coming to the Senate, I never found that the protection of the public in the field of law enforcement ever justified the violation of constitutional guarantees.

Mr. HATFIELD. Mr. President, will the Senator further yield?

Mr. MORSE. I yield.

Mr. HATFIELD. Many times we hear laymen speak with regard to this subject, and often their view has been expressed that if we hold the goal of personal liberty paramount, criminals would once again be turned loose to prey on people. What

is the view of the Senator with respect to self-denial on the part of our Government in making personal liberty paramount over law enforcement efficiency, even to the extent of the release of guilty men?

Mr. MORSE. I have two responses. If we give support to the police departments, we can have adequate law enforcement. I have always voted to give that kind of support by providing the manpower they need, by way of training courses they should have, by way of equipment to which they are entitled, and also by giving them the most important weapon in law enforcement; namely, our trust and confidence in them, so long as they, themselves, remain within the framework of our legal guarantees. We do not need to resort to illegal techniques to protect the public interest.

The second point that I shall make concerns the matter of the presumption of innocence and the requirement on the part of the government to establish probable guilt. This is pretty vital to each of us.

It is easy to rationalize ourselves into supporting a violation of constitutional rights if we look at the situation from the standpoint that X is guilty of something.

But one of the great strengths of our Republic is the preservation of the presumption of innocence.

Senators know of my work in the Senate as chairman of the subcommittee of the Committee on the District of Columbia having to do with law enforcement in the District of Columbia vis-a-vis the police. I have never found much consideration of the presumption of innocence on the part of those who would have us take away from the people of the District of Columbia the constitutional guarantees to which I have addressed myself so many times.

Mr. HATFIELD. I am grateful to the Senator for his responses.

Mr. MORSE. I appreciate the intervention by the Senator.

Mr. MORSE. I yield to the Senator from Georgia [Mr. Talmadge].

Mr. TALMADGE. Mr. President, I desire to commend the distinguished Senator from Oregon on the stand he has taken on wiretapping and bugging. I personally think that wiretapping and bugging should be authorized only when the national security is involved.

Will the Senator yield for a question?

Mr. MORSE. I am happy to yield to the Senator from Georgia.

Mr. TALMADGE. Is it correct that in February 1961 the Justice Department authorized investigations to be made by the use of electronic equipment by agents in the drive on organized crime?

Mr. MORSE. That is my understanding. That was brought out in the Long report.

Mr. TALMADGE. Would that not presuppose a double standard of law enforcement; one applied to ordinary citizens, who would be protected in their constitutional right to privacy, and the other to a group of citizens who may or may not be criminals or otherwise, and who would be denied the same constitutional right?

Mr. MORSE. I think it is based upon that premise. It is a fallacious premise. In my judgment, we cannot safely draw those lines of distinction. Constitutional rights have to be recognized as uniform in character for all our citizens. We cannot give only a degree of it to certain alleged criminals whom we may presume to be guilty of wrongdoing.

Mr. TALMADGE. In other words, even criminals have constitutional rights.

Mr. MORSE. It is basic Anglo-Saxon justice that those accused of crime are entitled to the same procedural protections as anyone else. How do we know in advance that X is really guilty? He may be covering up for someone. He may, in fact, be innocent. He may be mentally unfit. He may be emotionally upset. He may be the victim of a hysterical disorder at the time.

The Senator from Georgia is a great lawyer. I am delighted he has intervened in this discussion, because the Record shows that over the years I have referred—and now refer again—to the fact that I do not know of a more able lawyer in the Senate than the Senator from Georgia.

Mr. TALMADGE. I desire to express my appreciation to the Senator for that compliment.

Mr. MORSE. The Senator and I do not always agree on every legal point; but then, lawyers never do. I have always had great respect for the Senator's judgment. I am so glad he is raising these questions today. I do not raise them in my manuscript, and, therefore, the Senator is contributing to it. I want to make the point again that I do not believe we can have a system of justice where we boast about, "Equality before the law," if, in fact, we have inequality in the administration of legal procedures.

Mr. TALMADGE. I share that view. Would not the Senator agree that lawless law enforcement, applied to any segment of society, injures all segments of society?

Mr. MORSE. I agree entirely; it would be promoting lawlessness. More and more we are seeing evidences of a person on trial who seeks to justify the course of action he followed because he knows a law enforcement official did something similar to what he has been indicted for. That does not justify such a course of action, of course, but the examples of lawlessness we see within the Government, I think, serve to be, in effect, teachers for the lawlessness.

Mr. TALMADGE. I agree. Will the Senator yield for a brief observation?

Mr. MORSE. I am happy to do so.

Mr. TALMADGE. I have noted a recent case involving three men convicted of a narcotics violation. Wiretapping was involved, and the court of appeals remanded the case for a new trial. In doing so, Judge Desmond wrote:

"The constitutional philosophy rests on the assumption that if public authority wrongfully invades the rights of a guilty man, the protection of the innocent man against wrongful interference is also imperiled; and we have never been willing to permit ultimate judgments of this kind to be made by prosecutors or by the police."

I further note that Judge Desmond agrees with our distinguished colleague that wiretapping is tantamount to a general warrant or writs of assistance complained about by James Otis in 1761.

Judge Desmond stated:

"Another unanswerable constitutional objection to wiretapping is the long-standing doctrine that no search is valid except for the seizure of specific property, not evidence. Wiretapping, by its very nature can never be anything but a search for evidence."

I wish to commend the distinguished Senator from Oregon for what he has said, and to express my deep appreciation for his personal references.

I also desire to extend to the distinguished Senator from Missouri [Mr. Long] my compliments for his great contribution to bringing to public light the extent of electronic snooping by Federal agents into the lives of ordinary American citizens. It is only through public exposures of this kind of operation that we will begin to close the gap between policy against wiretapping and the practice which condones it.

I thank my colleagues.

Mr. MORSE. Mr. President, I thank the Senator from Georgia for his intervention. He has noted some of these points, more succinctly than I could. I am glad that, on this subject, we stand shoulder to shoulder in defense of the constitutional right of privacy for all American citizens.

Mr. TALMADGE. I always feel better when I stand on the same side with the distinguished senior Senator from Oregon.

Mr. MORSE. That is a mutual feeling, let me say.

Mr. LONG of Missouri. Mr. President, will the Senator from Oregon yield?

Mr. MORSE. I have promised to yield to the Senator from Wisconsin; then I shall be happy to yield to the Senator from Missouri.

Mr. PROXMIER. Mr. President, I commend the distinguished Senator from Oregon, who is unsurpassed in this body as a constitutional lawyer. He has demonstrated that ability repeatedly. He is also unsurpassed as a champion of civil liberties.

I want to ask the Senator from Oregon one or two questions. First, I wish to read one sentence from the Constitution, from the Bill of Rights, amendment IV:

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

I ask the Senator from Oregon: In this electronic age, when it is clear that by bugging, by placing within a person's home an electronic device which will report this conversations, or within a person's office—as the Senator from Oregon has described—is it not clear that this is an obvious, patent, prima facie violation of the Bill of Rights, particularly amendment IV, according to any kind of reasonable construction?

Mr. MORSE. That is my contention.

Before I discuss the subject further, let me make this personal remark to the Senator from Wisconsin. He is very kind to give me credit for the qualifications he attributes to me, but I think he overlooks the fact that many times, in serving together in the Senate, he has been my leader, and I have been one of the privates in his front ranks as he has led a fight on the floor of the Senate for civil liberties.

I want him to know, again, that I appreciate his support of me in what I consider to be another aspect of the same overall problem.

In regard to amendment IV of the Constitution, which the Senator has just read to the Senate, there are lawyers who seek to draw distinctions when it comes to the application of that section of the Constitution to specific fact situations arising in some cases.

They would seek to depreciate or dwarf what I consider to be the constitutional meaning of illegal searches and seizures. But as one who did his best to teach the constitutional law doctrine for many years on the basis of the lessons that were taught to me by a great constitutional law teacher, I always taught the Constitution as being a dynamic instrument; not a dead letter or a dead hand, but as a living, legal instrument capable of adjusting itself to the changing conditions of the country. That is the doctrine I would apply in this case.

Of course, when the illegal search-and-seizure protection was written into the Constitution, our Founding Fathers knew nothing about electronic devices that would be developed in the 20th century and which could constitute an invasion through the portals of that castle—a man's home—just as much as an invasion by a human body after it knocks down the door and walks in, or gains any other kind of illegal entry.

Thus, the thesis of my argument on this point is that the use of electronic devices in such instances does constitute an unconstitutional invasion of privacy, the concept of which the Constitutional Fathers sought to protect us from.

We must take this approach to constitutionalism in the country. That has been, by and large, the approach which the courts have taken, so this is not my doctrine; it has been the doctrine of the great constitutional law decisions for a long time in the constitutional law history of the Republic.

MR. PROXMIRE. I thank the Senator. I think his answer is irrefutable. It is thoroughly logical.

I want to ask the Senator from Oregon a further question. In addition to the fear referred to by the Senator from Alaska [Mr. Bartlett], that every agency will follow the policies that a few agencies have followed, is it not even more dangerous that local police throughout the country, because they work with Federal agencies often, are adopting this policy of violating the constitutional liberties of our people because the Federal Government, with its prestige, is leading them into it? Unless we stop this, unless we take the President's words as delivered in his state of the Union message, is it not true that there will be a police state in the very worst sense of the term throughout the Nation, in every town, village, and city, and not just on the part of local police authorities?

MR. MORSE. May I say, in answer to the question of the Senator from Wisconsin, that these invasions of individuals' privacy are rampant in the country in many, many police forces. It is so serious that many bar associations have appointed special committees to look into the extent and degree to which they may exist in their localities. The place to set the example, in my judgment, is at the Federal level. That is why I am directing my attention to what I consider to be an invasion of privacy by the Federal Government.

MR. PROXMIRE. To follow up the question which the junior Senator from Oregon asked the senior Senator from Oregon, about the extent to which this prohibition might interfere with law enforcement, I believe the worst thing that can happen to a local police force or, for that matter, any police force is to have it lose public confidence and public support. If the people of this country begin to develop a suspicion and fear and hatred of the police because of this kind of electronic policy to any significant extent, is not that loss going to be far greater to effective law enforcement than any kind of loss—which has never been documented—as a result of prohibiting the use of electronic devices, snooping, telephone tapping, and violations of that kind?

MR. MORSE. The Senator is completely right in that observation. That has been the approach I have made in my work on the District of Columbia Committee. I want to strengthen the police department here in Washington so that there will be more confidence in it. They are entitled to the confidence of the people of this city because, by and large, we have a good police department. Every police department has to be under constant surveillance though. That is the history of law enforcement. We have the officers to keep it under surveillance. I want to see that we deny the extension of electronic monitoring systems not only to the Federal agencies but to police agencies.

MR. PROXMIRE. One other observation. I commend the Senator from Oregon [Mr. Morse] and the Senator from Missouri [Mr. Long] for their work to date for future protection of civil liberties. One thing we know is that science

has made tremendous progress in development of devices. If they are ingenious now, think what they will be in a few years. Unless we step in now, based on the excellent revelations brought out by the Senator from Missouri, we are going to be in trouble in a few years.

Mr. MORSE. That is what I think. That is why I am making my statement at this time.

Mr. LONG of Missouri. Mr. President, will the Senator yield?

Mr. MORSE. I yield.

Mr. LONG of Missouri. The Senator from Wisconsin mentioned local police. Right here, almost in the shadow of the Capitol, we have sworn testimony that the police of Fairfax County not only purchased but used bugging devices.

Mr. MORSE. I did not know of that specific case, but I knew of so many other cases that I was sure I was right when I said the situation is rampant within police departments.

Mr. LONG of Missouri. There has also been testimony on the so-called organized crime drive and how people lumped in the OCD category were treated. Does the Senator know of the information brought out in my hearings of how they treat an OCD member? A Federal agent out in the field asks for an OCD number from the Justice Department and, almost without exception, they give him the OCD number.

Mr. MORSE. I know that was brought out in the committee.

Mr. LONG of Missouri. Does the Senator know that testimony was given in my committee, under oath, that after the individual was given a number, he received entirely different treatment from that which he had received until he was given that number? He was given a massive investigation, with no holds barred—anything to gain evidence on him. This is known as a saturation investigation.

Mr. MORSE. That is exactly what happens. Another evil developing in connection with wiretapping and bugging philosophy of our law enforcement police officers in this country is the development of secret files and records that American citizens cannot get their hands on. But the files exist nonetheless, and the interesting thing is that so often the contents are made known to others who seek to have some relationship with the citizen in the future. He discovers that he loses jobs; he finds that he is subject to various types of pressures and wrongs, and he does not know where it is coming from, because he is not given the protection of another precious right that every man is entitled to—the right to be advised as to who is testifying against him and submitting charges against him.

I shall not get off on it today, but the Senator has heard me say in the past that that is why I am a critic of the investigative procedures of some of the committees of Congress. That is why I am urging a common procedure binding on all committees; namely, that when any committee ever conducts an investigation raising the issue of guilt or innocence in regard to anyone who is taken within the jurisdiction of that committee, the individual should be entitled to the same procedural protections and rights that the Senator and I are entitled to if we are hailed before a court of record and charged with something involving our guilt or innocence of an alleged wrongdoing.

That is why Senators have heard me on the floor of the Senate, for over 20 years now, protesting what I consider to be investigations by men rather than by laws. We ought to reform the procedures of our committee investigations, so that those basic rights guaranteed by Anglo-Saxon justice are given to any person coming before a congressional committee.

So that is why—and it is apropos to the general subject matter—I have discussed in the past all those rights. They are very simple. They are rights of all individuals.

Some years ago many of my liberal colleagues were astounded because I rose in the Senate to oppose a resolution introduced against the then Senator from Wisconsin, Mr. McCarthy; and I yielded to no one in the Senate in my attitude toward the policies and tactics of the Senator from Wisconsin; but in my speech I made clear that he was entitled to a bill of particulars. The resolution that was introduced, as I described it, out-McCarthyed McCarthy.

The resolution did not set forth a bill of particulars. I said, "Recess tonight, and if I have to sit up all night with my administrative assistant, the two of us will submit a resolution tomorrow containing a bill of particulars, giving notice to the Senator as to the charges against him." And we did, as the record will show.

So I say that a person charged with a matter that raises the question of guilt in connection with alleged wrongdoing is entitled to a bill of particulars. He is entitled to be confronted by those who supply the information. He is entitled to cross-examine them. He is entitled to put on his defense in an orderly fashion—not to be stopped from putting on his defense, as so often happens in congressional hearings. The Senator from Missouri knows whereof I speak, because it is not uncommon, when someone is under investigation, to have a Member of Congress ask him a question, and when he starts to answer it and it is obvious that his answer will not be to the liking of the questioner, he is told, "That's enough of that, what do you have to say about this?"

If he says, "I want to complete my answer," unless some other member of the committee comes to his aid, as sometimes does not happen, he is not even permitted to put on his case in an orderly fashion.

As to the obtaining of information, the Senator knows as well as I do, that when he seeks the source of information, he is often told, "We cannot disclose that source, because if we do, then our source dries up, and we cannot obtain any further information."

I say that if it is the kind of source that will dry up under such circumstances, the sooner it is dried up the better. This is my position, because we have no right to take so-called evidence involving allegations that affect the rights of free men and women, and not give those men and women the opportunity to answer them, to cross-examine their accusers, and present their defense in regard to the source of the information. Being the brilliant lawyer that he is, the Senator from Missouri knows that the source of information, the source of evidence, is itself of vital importance for examination in any case involving an allegation of wrongdoing on the part of an individual.

So we have cut that short in this speech, because it involves subject matter that we shall have to discuss before this session is over, I am sure, in another format. I only wish to re-emphasize what I have been saying—and I think it is what the Senator is bringing out by clear implication, and sometimes by direct statement, in the work he is doing in his committee—we need to see to it that the Bill of Rights, which includes these procedural guarantees upon which our substantive rights are completely dependent, is followed in the administration of justice, whether it is by a congressional committee, before a justice of the peace, by a police court, or by the Supreme Court of the United States.

Mr. LONG of Missouri. Certainly we agree with the Senator's statement, which is a brilliant statement on the rights of the individual. It points out how easy it is to destroy those rights. That is what is being done today, as the work of my committee has been demonstrating.

I have one further question about the OCD program. Does the Senator know it is the general practice, in some of the agencies, after a suspect has been given an OCD number, to decide he is guilty then and there? The agents are sent out to secure evidence to convict him of any crime he may be guilty of? Normally, law enforcement personnel are charged with finding the persons committing crimes. First comes the crime, then search is made for the person who committed it. In the OCD program certain suspected criminals were given OCD numbers without any specific crimes in mind. Thereafter, Federal agents were sent out to find crimes to fit these "criminals."

Mr. MORSE. I did not know that was true. I suspected it was true. But again, as I said earlier this afternoon, I am a man of great faith. I would like to believe that men given the responsibility of administering our system of government would not substitute that kind of government by men for government by law.

Mr. LONG of Missouri. I wish some of the overzealous agents of the departments that we have heard about, and who have testified before my committee, could have heard the Senator's statement.

He mentioned the difficulty encountered in obtaining the records from these various agencies. We have tried very hard, and have had great difficulty. Most of the reports and records from the Internal Revenue Service have not been made available to the subcommittee, despite repeated requests. Some of them we have been able to get were incomplete and incorrect, and IRS has later come in and amended them.

It has been only recently, since the state of the Union message by the President of the United States, that representatives of the Bureau of Narcotics and the Bureau of Customs have cooperated at all. As late as yesterday, they came to my office. The Bureau of Customs finally agreed to answer our questionnaire—which they have had for over 2 years—and to furnish us some of the evidence. The Bureau of Narcotics still refuses to answer our questionnaire on eavesdropping.

But since the state of the Union message from the President, apparently word has seeped down to these various agencies that they must come clean, and we are getting more cooperation, the last week or two, than we had received at any time during the past year.

Mr. MORSE. I am glad that the Senator has interjected again. I say now what I intended to say at the end of my speech, that I cannot begin to tell the Senator from Missouri what a source of inspiration he is in carrying out his responsibilities of chairman of the Long subcommittee, to those of us who have stood for so long in this body in opposition to what we have considered to be a policy that is cancer-like in its growth, taking over our body politic in this country, eating away the rights of privacy of free men and women.

I merely wish to add that the reason that I have expressed my disagreement with this policy over the years is that I have seen it coming for a long time, and I fear for my grandchildren if we, in our time, do not put a stop to the spread of this cancer of outlawry within the administration of government under the pretense that it is necessary in order to protect the innocent. I wish to say that the Senator has made a great contribution. No doubt he will make many other contributions, and will go down in history known for other great services to the people of Missouri and to the Nation, but I do not think any of them could possibly exceed this one in importance, because I think it goes to the very substance of freedom itself.

Mr. LONG of Missouri. Mr. President, if I may comment on the Senator's statement, I cannot tell him how grateful I am for his statement, and not only for the statement he has made and is making, but for comments made by other Senators who have participated in this discussion on the floor, and I am grateful to him for the other times when he has stood face to face, looking eyeball to eyeball at the Internal Revenue Service, the Justice Department, and many other Federal agencies. We are looking eyeball to eyeball with them now, and it gives us a great deal of assurance, and makes us feel much better, to know that we have men of the ability of the Senator from Oregon and other Senators, standing shoulder to shoulder with us to protect the rights of freedom in this country.

Mr. FONG. Mr. President, will the distinguished Senator from Oregon yield?

Mr. MORSE. I yield.

Mr. FONG. Mr. President, I commend the distinguished senior Senator from Oregon for initiating, at this early date in the proceedings of the 90th Congress, this discussion of a question so fundamental to the liberty and freedom of our people.

The Senator from Oregon, like the distinguished junior Senator from Missouri, has been in the forefront of protecting the constitutional liberties of all Americans. His firm and strong stand will help in reversing what I fear is a trend toward wholesale violations of the fourth amendment to our Constitution by electronic surveillance of American citizens. I, too, wish to voice my strong disapproval of the use of such devices by agencies of our Federal Government. I, like Senators Morse and Long, am fearful that if these illegal eavesdropping practices continue, we will soon become a nation under fear—a police state. ~~Now~~

I commend the Senator for his very strong stand against these illegal activities. I wish, also, to discuss this subject. I have prepared a brief statement of the matter. If the Senator will permit me to present it at this time, I shall appreciate it.

Mr. MORSE. I certainly do not wish to deny the Senator from Hawaii the right to discuss the matter. I shall be perfectly willing to yield, with the understanding, Mr. President, that the speech of the senior Senator from Hawaii [Mr. Fong] be printed at this point in the record, and that in so yielding I shall not lose my right to the floor.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. MORSE. Mr. President, before the Senator from Hawaii starts, I want to thank him for his interjection and his support.

There is nothing new in it, because the last time I took the floor of the Senate in regard to a matter of protecting the constitutional guarantees and individual rights of the citizens of our country, the Senator from Hawaii took the same position he is taking today.

After all, the Senator from Hawaii comes from a State—and I am sure he understands the implications of my statement, and that they are complimentary and laudatory in import—in which a large part of the population knows the importance of the protection of minority rights and individual rights.

The Senator from Hawaii and his colleague are men whom we have always been able to count on to see to it that these individual liberties are safeguarded in any course of action that we have an opportunity to take in the Senate.

Mr. FONG. I thank the distinguished Senator for his very kind remarks.

In my State we believe in all of the civil liberties and civil rights secured to us by the Constitution. We believe in freedom. We believe that every man should be safe in his home and that his constitutional rights should be guaranteed to him.

I thank the distinguished Senator from Oregon for yielding to me.

Mr. President, during the 89th Congress, the Judiciary Subcommittee on Administrative Practice and Procedure, whose chairman is the distinguished junior Senator from Missouri [Mr. Long], investigated and held hearings on the wiretapping practices of all Federal agencies, except those considered a part of the "national security community."

On the ground that the Department of Justice was a part of this security community, that agency was exempted from the subcommittee's investigation.

The results of these hearings and investigation were quite startling.

They showed that even though, one, the Federal Communications Act of 1934 outlaws the interception and divulgence of telephone communications without the express consent of either party to the conversation, and, two, even though the official policy of the Federal agencies has been to restrict the use of electronic monitoring devices to cases in which the national security was involved—more than 60 agencies of Government have at their disposal extensive electronic monitoring equipment which are unhesitatingly used as a normal part of any investigations they may conduct.

In short, the hearings revealed widespread use of wiretapping by our Federal agencies.

Although the Department of Justice was not included in the subcommittee's investigation, the hearings showed that Justice was in fact very much involved in electronic surveillance in many cases not related to national security interests.

For example, a memorandum—IRD—94—issued some years ago, authorized and extended the use of electronic surveillance to criminal cases. That memorandum also set up the Organized Crime Division of the Department.

At that time, the investigative agents of some 26 other agencies were swung behind this Division's efforts, and wiretapping and bugging became an everyday duty for thousands of employees of the Federal Government.

These facts were divulged in the course of the hearings by Senator Long's subcommittee.

It is thus evident that in many instances in which the national security is not involved, many Federal agencies were engaged in wiretapping activities for the Justice Department, particularly as regards the Organized Crime Division.

It is also obvious that the latest electronic techniques have been widely used for years in cases where they should never have been used.

Mr. President, it has been suggested during this colloquy that the time has come for a full-scale investigation of the operations of the Department of Justice.

In view of the findings of the subcommittee, I believe that the Justice Department should be called to account by the subcommittee in all aspects of its work which do not relate to national security operations.

I should point out that all 10 cases where the Justice Department has gone into court and asked that convictions be set aside because evidence obtained by illegal wiretapping and bugging had been submitted in court, every one of these cases involved convictions in the area of tax evasion or wagering. None of them involved questions of national security.

Unless the Long subcommittee—or another committee—calls the Justice Department to account for its electronic surveillance activities, we shall never know whether President Johnson's directive to restrict these operations to only certain national security cases is being followed.

As we pursue this matter, we are once again reminded that we can never relax our vigilance to protect our right to privacy—the right to be left alone, the right against unreasonable search and seizure guaranteed us by the fourth amendment to our Constitution.

As a U.S. Senator, and as an attorney with long experience in defense of people accused of crime in the State courts of Hawaii, I have been firmly opposed to the determined efforts in past sessions of Congress made by the U.S. Attorney General to enact legislation allowing the Federal Government to invade the privacy of our lives by making wiretapping legal.

For example, in 1961 and again in 1963, the Attorney General asked Congress for authority to tap telephones and to use what is overheard as legal evidence in

criminal trials. In effect, he wanted the power to eavesdrop, not only when a crime was already committed, but also when in his judgment a crime was about to be committed.

An American citizen's home is not likely to be much of a castle if law enforcement authorities can barge into it without so much as a warrant whenever they happen merely to suspect that he was about to commit a crime.

I consider this to be a gross encroachment on one of the most valued rights of a citizen—the right of privacy and to be personally secure. It was against precisely these kinds of police state tactics that our Founding Fathers rebelled from England and established our Republic.

Justice Brandeis recognized this right when he said:

"The makers of our Constitution . . . sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. They conferred as against the Government the right to be let alone—the most comprehensive of the rights of man and the right most valued by civilized men."

With modern electronic devices and tiny transisterized instruments, conversations within the home and office could be recorded without tapping any wire. The intimacies of private life could be made public without a key being turned or a window raised.

A wiretap cannot be limited to a particular person, place, or purpose. It is by its very nature unlimited and unlimitable. Whenever a tap is placed on a phone, it monitors all conversations on that phone, and every phone in the world which may be connected with it.

Of course, all Americans are concerned that those who violate the law are apprehended and convicted. But if wiretapping is made legal, is not the price we must pay—the loss of our personal liberty—far too high a price?

When we open this door to the Government, as Alan Barth rightly points out, it is only a very short step to allowing the Government to rifle our mails and search our homes.

Mr. Barth said further:

"A great deal could be learned about crime by putting recording devices in confessionals and in physicians' consulting rooms, by compelling wives to testify against their husbands, by encouraging children to report the dangerous thoughts uttered by their parents; the trouble with these techniques, whatever their utility in safeguarding national security, is that a nation which countenances them ceases to be free."

Any of these actions would clearly violate the guarantees of the fourth amendment to the Constitution:

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated."

These guarantees have been a part of Anglo-Saxon law since the 15th century. Nothing has been deemed more fundamental to freedom than the concept that a man's home is his castle. William Pitt put it in these eloquent words:

"The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter, the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement."

What is at stake in any proposal to legalize wiretapping is our very freedom embodied in those liberties inalienably guaranteed us by the Constitution. These are high stakes. A free society guards its liberties jealously. The most important lesson of history America has learned is that when freedom is denied to one man, it is denied to all.

The elimination of all forms of electronic surveillance from our national life is in my opinion a matter of utmost urgency. In our efforts no agency of Government should be regarded as sacrosanct.

I urge that the Congress investigate the Department of Justice, to determine whether or not justice has been done, and whether or not equal justice has been dealt all Americans.

Mr. MORSE. I thank the Senator from Hawaii for the points he has raised in his able and eloquent speech. I shall cover these points later in my remarks.

Before I return to the next point of my prepared speech, because the Senator from Missouri and I had been talking about some procedures that are being followed in some of our Federal departments—and without commenting upon the substantive nature of the charges, but limiting myself to the procedural matters involved—I should like to illustrate some of the matters that the Senator from Missouri and I have been talking about, and which I have been talking about with other Members of the Senate who have intervened in this discussion. It

involves the Otepka case, which has become somewhat of a cause celebre in the State Department.

I shall not comment upon the substance of the charges. It is my understanding that no crime or no national security problem was involved. Yet, an official of the State Department, in the spring of 1963, tapped Otepka's telephone. This was admitted. I have never read anything in the case that indicates that this official of the State Department was even reprimanded, although it is true—it might be sort of an unknown reprimand or an indirect reprimand—that some time later he resigned from the State Department. But that resignation, interestingly enough, followed a considerable amount of comment about the case on the Hill. In fact, there has been a running comment for a long time. Every once in awhile we get a new chapter of discussion in regard to it. But I am informed that the State Department official who did the tapping, and who resigned, is now working for the Federal Communications Commission.

This set of facts raises questions of puzzlement. I think the Senator from Missouri is familiar with the case I am talking about and the reason why I am puzzled.

Mr. LONG of Missouri. The man has a very good job.

Mr. MORSE. I believe that the matter should be gone into by fair procedure for a determination out in the open, so that no one can retain any suspicion as to whether or not these rights and guarantees about which I have been talking this afternoon were fully protected.

Mr. LONG of Missouri. Mr. President, will the Senator yield?

Mr. MORSE. I yield.

Mr. LONG of Missouri. The John Reilly to whom the Senator has referred has a very fine position with the FCC. Would the Senator not think that it is apropos that the man is in a position where he can check other people, in violation of section 605?

Mr. MORSE. I have expressed my puzzlement.

Mr. LONG of Missouri. It does make one wonder.

Mr. MORSE. In United States against Haggarty, in the northern district of Illinois, on May 16, 1966, the official position of the Government in that case, which involved the electronic monitoring of one of its employees over a period of 8 months, was stated:

"It is the Government's position that the Government is entitled to intercept by wiretap conversations on Government phones. If by some chance it is illegal to listen in on Government telephones without the consent of either party, if that is illegal, then we will produce anything that we have received from doing this."

It is not surprising that this elite corps of 200 inspectors checking on agents of IRS over a period of years failed to report one single case of illegal wiretapping. They did not regard wiretapping as either a violation of law or departmental regulations.

The record reveals that illegal wiretapping by the Internal Revenue Service is not an occasional action of an overzealous agent, but is the logical and reasonable consequence of a well-defined program which begins in the special school on wiretapping and bugging, which graduates approximately 30 agents each year, and upon graduation the agent receives a wiretap kit, including burglar tools for illegal breaking and entry, as well as other electronic equipment necessary for the performance of these duties.

When one of the agents was questioned by Senator Long regarding his illegal wiretapping activities, his defense was that he was simply carrying out what appeared to be the policy of the Department. He said:

"If I am trained to wiretap, if I am given the tools of wiretapping, why shouldn't I assume I am expected to do this as a part of my official duty?"

The depth and extensiveness of wiretap activity among the 3,000 agents of the Internal Revenue Service has never been disclosed. It ought to be. We are entitled to it. I am sure that the Senator from Missouri and his committee will continue to press to ascertain whether we can have this information made publicly available to the American people.

On repeated occasions Senator Long has requested Commissioner Sheldon Cohen to produce the affidavits of their agents regarding their wiretap and bugging activities, their diaries and the report of the Commissioner's Special Committee appointed to conduct, in depth, an investigation on electronic snooping by agents of the Service. On three separate occasions, Senator Long has requested this information, and in each case, I understand, Commissioner Cohen refused

to comply with any of these specific requests—or, at least, has not fulfilled them to date.

However, on December 7, and in supplemental teletype communications of December 29 and 30, 1966, and in January 1967, Commissioner Cohen directed all regional Directors to have all employees of the Department engaged in investigation, and wherever possible former employees of the Department report in detail cases, including time and place, where electronic snooping was used, and whatever evidence, if any, was obtained through these methods.

I shall submit for the Record the teletype communications referred to which are indeed revealing of the type and depth of the problem.

I ask unanimous consent to insert at this point in the Record teletype communications of December 29 and 30, 1966, and supplemental communications.

There being no objection, the documents were ordered to be printed in the Record, as follows:

**"SUPPLEMENTAL COMMUNICATIONS ON REPORTING OF ELECTRONIC SURVEILLANCE
BY IRS EMPLOYEES AND OTHERS**

"From: Sheldon S. Cohen, Commissioner, IRS, Washington, D.C.

"To: All Regional Commissioners, IRS.

"My memorandum dated December 6, 1966, explained why it is essential for the service to obtain complete information on instances of electronic surveillance, including: The overhearing or recording of any telephone or nontelephone conversation unless with the consent of every party to the conversation; the use of a pen register; the use of a tailing device on a vehicle without the consent of the owner, related to investigations conducted by the Service. Information requested by the memorandum pertained to specific cases listed in the attachments or to be subsequently transmitted. Since complete information is required to assure that no injustices under the law may result or have resulted from the use or potential use of information obtained by electronic surveillance, it is absolutely necessary that all known or reasonably suspected instances of electronic surveillance be immediately reported, regardless of whether the case involved is or is not named on a list previously transmitted to you. The full impact of investigative acts cannot be evaluated without knowing all specific instances of electronic surveillance.

"I consider the needs of justice to be so compelling that I authorize you to assure all employees that no administrative action, repeat, no administrative action, neither disciplinary nor discriminatory as to career advancement, will be taken against an employee based, on instances of electronic surveillance in organized crime or in similar investigations prior to July 1, 1965, to be reported now, or on failure to have previously reported such instances, provided the failure to report was not both willful and while under oath. In order that the national office can have immediate knowledge of all instances of electronic surveillance, each A. & T.T. criminal investigators, special agent, intelligence and A. & T.T. supervisor, division or branch chief, and OCD coordinator, including any employee who has held one of these positions at any time since January 1, 1957, will submit an immediate report. Wherever a former employee is known to be available and believed to be amenable to submitting such a report, he should be contacted and asked to submit a report. The report must identify each specific instance of electronic surveillance in which the employee participated or about which he has knowledge or reasonable suspicion, regardless of whether the surveillance was conducted by employees of the service or by persons outside the service. Attempts at surveillance should be reported even though no information was obtained or used. The report must try to identify (1) each case where electronic surveillance was utilized or attempted by name or case number, if known, (2) the type and location of such surveillance, (3) the date or dates of such surveillance, (4) the names of any other cases (other than those identified in (1) above) in which information obtained from surveillance was or might have been utilized, and (5) the names of other service employees believed to have knowledge of the surveillance. Negative reports to this office are required.

"Reports required by this teletype should be submitted to the District Director by district personnel, or to the regional Commissioner by regional personnel, as soon as possible and no later than January 13.

"Regional Commissioners and District Directors will forward the reports to the Assistant Commissioner (compliance) daily as received and conduct a followup to assure that a report has been submitted no later than January 18, by all employees required to report. Immediately after submitting the report required herein, each employee will expeditiously complete and submit in triplicate a

questionnaire form of the type required by my December 6 memorandum of each case or incident raised in the report required by this teletype, except for those cases identified on a list previously transmitted to you (for which questionnaires are required under earlier instructions). Distribution will be in accordance with instructions in the December 6 memorandum.

"Regional Commissioners and District Directors should reproduce this teletype and my December 6 memorandum as necessary to assure that all appropriate present and former employees receive a copy of each."

"From: Sheldon S. Cohen, Commissioner, IRS, Washington, D.C.

"To: All Regional Commissioners, IRS.

"To: All District Directors, IRS.

"To: District Director IRS, Jackson, Miss.

"The following additional information covering the use of electronic surveillance equipment referred to in my teletype of December 29 1966, should be furnished to all AT&T criminal investigators, special agents, intelligence and AT&T supervisors, division or branch chiefs and OCD coordinators.

"1. All instances of electronic surveillance that occurred after July 1, 1958, should be reported, except that:

"A. Instances of the use of regularly installed telephones for the purpose of overhearing telephone conversations with the permission of one of the parties to the conversation should not be reported.

"(E.g., listening in on informants or undercover agents placing bets or purchasing evidence). The consenting party may be a Service employee.

"B. Instances of electronic surveillance conducted by persons outside the Service should be reported only if the information gained by the surveillance is in some way related to an Internal Revenue Service case.

"C. Instances of electronic surveillance in investigations under the direction of the inspection service need not be reported by compliance personnel. Since the inspection service is highly centralized, this information is readily available in the national office.

"2. All regional office technical employees in intelligence and alcohol and tobacco tax should submit reports.

"3. The date required for submission of the reports is extended to January 27, 1967.

"4. Authority is granted to reproduce Form M-0533 through use of regional facilities.

"5. The phrase in questions 11, 12, and 13 in the questionnaire/Form M-0533, 'without the knowledge of one of the parties' is defined as indicated in my teletype of December 29 1966; i.e., "the overhearing or recording of any telephone and non-telephone conversation unless with the consent of every party to the conversation." An exception is provided in item 1A above.

"6. Assurance that no adverse administrative action will be taken relates to the use of electronic surveillance techniques in only those cases involving organized crime subjects, other racketeers and subjects of wagering, liquor or firearms investigations. However, no adverse administrative action is contemplated with regard to the use of legal and appropriate investigative techniques in any type of case.

"I want to make clear that many instances you are being asked to report were not only legal but were expected in connection with your investigative responsibilities. The purpose of these requests are to place the Service in a position to give full and detailed information to Justice and Congress in connection with requests received and to the courts when deemed necessary."

"COPY OF A TELETYPE FROM THE COMMISSIONER OF INTERNAL REVENUE TO ALL DISTRICT DIRECTORS, INTERNAL REVENUE SERVICE, DATED AND RECEIVED DECEMBER 30, 1966

"My memorandum dated December 6, 1966 explained why it is essential for the Service to obtain complete information on instances of electronic surveillance, including: The overhearing or recording of any telephone or non-telephone conversation unless with the consent of every party to the conversation; the use of a pen register; the use of a tailing device on a vehicle without the consent of

the owner, related to investigations conducted by the Service. Information requested by the memorandum pertained to specific cases listed in the attachments or to be subsequently transmitted. Since complete information is required to assure that no injustices under the law may result or have resulted from the use or potential use of information obtained by electronic surveillance, it is absolutely necessary that all known or reasonably suspected instances of electronic surveillance be immediately reported, regardless of whether the case involved is or is not named on a list previously transmitted to you. The full impact of investigative acts cannot be evaluated without knowing all specific instances of electronic surveillance. I consider the needs of justice to be so compelling that I authorize you to assure all employees that no administrative action, repeat, no administrative action, neither disciplinary nor discriminatory as to career advancement, will be taken against an employee based on instances of electronic surveillance in organized crime or in similar investigations prior to July 1, 1955, to be reported now, or on failure to have previously reported such instances, provided the failure to report was not both willful and while under oath. In order that the national office can have immediate knowledge of all instances of electronic surveillance, each AT&T criminal investigator, special agent, intelligence and AT&T supervisor, division or branch chief, and OCD coordinator, including any employee who has held one of these positions at any time since January 1, 1957, will submit an immediate report. Wherever a former employee is known to be available and believed to be amenable to submitting such a report, he should be contacted and asked to submit a report. The report must identify each specific instance of electronic surveillance in which the employee participated or about which he has knowledge or reasonable suspicion, regardless of whether the surveillance was conducted by employees of the Service or by persons outside the Service. Attempts at surveillance should be reported even though no information was obtained or used. The report must try to identify (1) each case where electronic surveillance was utilized or attempted by name or case number, if known, (2) the type and location of such surveillance, (3) the date or dates of such surveillance, (4) the names of any other cases, other than those identified in (1) above, in which information obtained from surveillance was or might have been utilized, and (5) the names of other Service employees believed to have knowledge of the surveillance. Negative reports to this office are required. Reports required by this teletype should be submitted to the district director by district personnel, or to the regional commissioner by regional personnel, as soon as possible and no later than January 13. Regional commissioners and district directors will forward the reports to the assistant commissioner, compliance, daily as received and conduct a followup to assure that a report has been submitted no later than January 18, by all employees required to report. Immediately after submitting the report required herein, each employee will expeditiously complete and submit in triplicate a questionnaire form of the type required by my December 6 memorandum on each case or incident raised in the report required by this teletype, except for those cases identified on a list previously transmitted to you, for which questionnaires are required under earlier instructions. Distribution will be in accordance with instructions in the December 6 memorandum. Regional commissioners and district directors should reproduce this teletype and my December 6 memorandum as necessary to assure that all appropriate present and former employees receive a copy of each."

Mr. MORSE. It should be noted that while the communication of December 30 calls for unqualified disclosure by the agents and security officers of A.T. & T., the supplemental communications impose serious limitations and exceptions of the type of information to be disclosed.

At the close of the supplemental communications the following exceptions are noted, and need not be reported:

"a. Instances of the use of regularly installed telephones for the purpose of overhearing telephone conversations with the permission of one of the parties to the conversation should not be reported. (e.g., listening in or informants or undercover agents placing bets or purchasing evidence.) The consenting party may be a service employee."

What about the other poor fellow? That exception does not even conform to any element of justice. That exception does not even meet the test of half justice, simply because half of the two has given consent to have his conversation taken down. We must not forget as the Supreme Court has pointed out in some of its decisions on this subject matter, that when a telephone is tapped, everything is heard. One cannot select the things that he thinks he should be given the right to hear.

My objection is that the tap is a violation of the constitutional right of privacy. Mr. LONG of Missouri. Mr. President, will the Senator yield for a question? Mr. MORSE. I yield.

Mr. LONG of Missouri. Does the Senator know that agencies that engage in this practice can rent equipment from A.T. & T. which permits them to tap and listen in on any telephone line that goes through any switchboard and that the people in these agencies can sit back in their air-conditioned office and listen in on the communications?

Mr. MORSE. That, I did not know. I missed that in the report, if it is in the report.

Mr. LONG of Missouri. The IRS office in Washington has that equipment.

Mr. MORSE. I did not know it.

I do not think the Senator can ascribe any abuse to preservation by agencies of our Government that would surprise me in the slightest. I think this has become such a honeycomb situation—what I have previously given the descriptive phrase “so cancerous in the body politic”—it is running through much of our governmental system.

Returning to the exceptions:

“b. Instances of electronic surveillance conducted by persons outside the service should be reported only if the information gained by the surveillance is in some way related to an Internal Revenue Service case.

“c. Instances of electronic surveillance in investigations under the direction of the inspection service need not be reported by compliance personnel. Since the inspection service is highly centralized, this information is readily available in the national office.”

From this teletype list of exceptions one may infer that Commissioner Cohen is either not aware of President Johnson's Executive order of June 30, 1965, prohibiting all agencies of the Federal Establishment the use of all electronic listening devices, as well as the interception of all telephone and other wire communications, in all instances other than those involving the collection of intelligence affecting the national security, or he does not intend to follow the Executive order at all. In either case, Commissioner Cohen owes the President of the United States and the Congress an explanation.

In my judgment, Commissioner Cohen's exceptions to the President's Executive order banning electronic snooping in Federal agencies is typical of the attitude of the Federal bureaucracy. Because of this attitude, bugging and other forms of electronic snooping have grown by leaps and bounds despite the law, Executive orders, and official policy to the contrary.

Is it possible that Commissioner Cohen is still pursuing the policies of his predecessor on February 24, 1961, in a memorandum to the Assistant Commissioner—Operations—regional commissioners and district directors, stated:

“As a part of the Government's drive against organized crime, the Attorney General has requested the Service to give top priority to the investigation of the tax affairs of major racketeers . . . *in conducting such investigations full use will be made of available electronic equipment and other technical aids.*”

Equally disturbing to me, Mr. President, are the series of confessions or admissions of illegal wiretapping by the Department of Justice in a series of what is now an ever-increasing number of cases, referred to by the Senator from Hawaii [Mr. Fong].

The Acting Attorney General Ramsay Clark and Solicitor General Thurgood Marshall are to be commended for the position taken by the Department in its supplemental memorandum in the *Black* case—*Black v. U.S.*, 385 U.S. 26 (1966). This memorandum reveals a serious intention to conform Department practices to the policies declared by the President on June 30, 1965, in his Executive order banning electronic snooping in all cases excepting those affecting the national security. I ask unanimous consent that the supplemental memorandum be set forth at this point in my remarks.

There being no objection, the supplemental memorandum was ordered to be printed in the Record, as follows:

“[In the Supreme Court of the United States, October term, 1966]

“FRED B. BLACK, JR., PETITIONER V. UNITED STATES OF AMERICA—SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

“This supplemental memorandum is submitted in response to this Court's order of June 13, 1966, requesting ‘a response from the Government in this case, not limited to, but directed in particular toward the kind of apparatus used by the

Government; the person or persons who authorized its installation; the statute or Executive Order relied upon; the date or dates of installation; whether there is in existence a recording of conversations heard; when the information concerning petitioner came into the hands of any attorney for the government and to which ones, as well as what was made of the information in the case against petitioner.'

"1. The listening device referred to in our memorandum of May 24, 1966, was a tubular microphone which was installed through the common wall of a room adjoining the suite occupied by petitioner at the Sheraton-Carlton Hotel in Washington, D.C. The microphone extended through the six-inch common wall and one-fourth of an inch into the one-half molding of petitioner's suite. It was installed on the afternoon of February 7, 1963, and agents of the Federal Bureau of Investigation began to monitor conversations in petitioner's suite on the afternoon of the following day. The installation was removed and the monitoring was terminated on April 25, 1963.

"No recording of any portion of the monitored conversations exists today. The assignment of the monitoring agents was to keep a contemporaneous log in which were summarized the conversations in petitioner's suite. A tape recorder was available and was used to record particular conversations whenever a monitoring agent felt that such a recording would be helpful in preparing his summaries. After the summaries were prepared, the used tape was erased.

"While none of the recordings are, consequently, available today, the handwritten notes of the monitoring agents do exist. These notes summarize the conversations, and, in some instances, contain excerpts from conversations.

"2. No specific statute or executive order was relied upon in the installation of the listening device in question. Under 5 U.S.C. 300, the Attorney General has the authority to appoint officials for the detection and prosecution of crimes against the United States. In carrying out this responsibility, Attorneys General have delegated to the Director of the Federal Bureau of Investigation the duty to gather intelligence, to investigate violations of federal laws, and to collect evidence in cases in which the United States is or may be a party. See 28 C.F.R. § 0.85 (1966 rev.).

"An exception to the general delegation of authority has been prescribed, since 1940, for the interception of wire communications, which (in addition to being limited to matters involving national security or danger to human life) has required the specific authorization of the Attorney General in each instance. No similar procedure existed until 1965 with respect to the use of devices such as those involved in the instant case, although records of oral and written communications within the Department of Justice reflect concern by Attorneys General and the Director of the Federal Bureau of Investigation that the use of listening devices by agents of the government should be confined to a strictly limited category of situations. Under Departmental practice in effect for a period of years prior to 1963, and continuing into 1965, the Director of the Federal Bureau of Investigation was given authority to approve the installation of devices such as that in question for intelligence (and not evidentiary) purposes when required in the interest of internal security or national safety, including organized crime, kidnapping and matters wherein human life might be at stake. Acting on the basis of the aforementioned Departmental authorization, the Director approved installation of the device involved in the instant case.

"Present Departmental practice, adopted in July 1965 in conformity with the policies declared by the President on June 30, 1965, for the entire federal establishment, prohibits the use of such listening devices (as well as the interception of telephone and other wire communications) in all instances other than those involving the collection of intelligence affecting the national security. The specific authorization of the Attorney General must be obtained in each instance when this exception is invoked.

"3. The information concerning petitioner obtained by the monitoring agents was submitted to their superiors in the Federal Bureau of Investigation in the form of the logs previously mentioned. Some of this information was then incorporated into two reports and two memoranda captioned 'antiracketeering' since these dealt with petitioner's possible affiliation with organized criminal activity in the United States.* The reports, dated April 17, 1963, and July 12, 1963, were transmitted by the Federal Bureau of Investigation to the Criminal Division of the Department of Justice, and the memoranda, dated April 5, 1963, and April 9, 1963, were sent to the Attorney General with copies to the Criminal Division. The date on which the April 1963 report was received by attorneys in the Organized Crime and Racketeering Section is not known, but it was transmitted to the Office of the Assistant Attorney General in charge of the Criminal Division, where

*Recital of these facts is not intended to suggest that any wrongdoing on the part of petitioner was uncovered by the monitoring.

it was received on November 6, 1963. The July 1963 report was received in the Organized Crime & Racketeering Section on August 2, 1963, and in the Office of the Assistant Attorney General in charge of the Criminal Division on October 28, 1963. The memoranda were received in the Office of the Attorney General on April 5 and April 9, 1963, respectively.

"Neither the reports nor the memoranda were seen by attorneys of the Tax Division responsible for the prosecution of the tax evasion charges against petitioner until January 1964 when, in preparing for trial, they requested from the Criminal Division such material as the latter possessed concerning petitioner. The F.B.I. reports and memoranda were included in the material transmitted pursuant to this request. They were received and examined by the Tax Division attorneys some time between January 31, 1964, and April 15, 1964, when petitioner's trial began.

"The bulk of the information contained in the reports had been obtained from sources other than the monitoring. Neither the reports nor the memoranda indicated that any portion of the information was derived from a listening device.

"The Tax Division attorneys found nothing in the F.B.I. reports or memoranda which they considered relevant to the tax evasion case. No information from these reports or memoranda (whether obtained from the listening device or from any other source) was used by government counsel in petitioner's tax-evasion trial. The charges against petitioner in this case were based upon his failure to include in his income tax returns for 1956 through 1959 certain specific items of income. The proof that petitioner had received these items in those tax years was obtained not by the Federal Bureau of Investigation but by agents of the Internal Revenue Service in an investigation begun in the spring of 1960 and concluded late in 1962. On December 12, 1962, the Internal Revenue Service referred the case to the Tax Division of the Department of Justice for criminal prosecution. All evidence produced by the government at petitioner's trial was detailed in any accompanying report of the Internal Revenue Service. Neither additional evidence nor any lead to additional evidence was obtained from the F.B.I. reports and memoranda.

"In connection with an inquiry on an unrelated matter, the F.B.I. informed the Attorney General and the Criminal Division in late August 1965 that a listening device had been installed in petitioner's hotel suite. The logs were then obtained and reviewed within the Criminal Division in connection with the unrelated matter. However, the fact that conversations between petitioner and counsel whom he had then retained had been overheard was not noted by any attorney in the Department of Justice until after April 21, 1966, when the logs were again examined, this time by attorneys in the Tax Division who were familiar with the history of petitioner's case. They completed their review in early May and brought this fact to the attention of the Attorney General. At his direction, the Solicitor General was advised on May 10, 1966, that a listening device had been in operation in petitioner's hotel suite and that such conversations had been overheard, and our memorandum of May 24, 1966, was accordingly filed in this Court.

"Respectfully submitted.

"THURGOOD MARSHALL,
"Solicitor General.

"JULY 1966."

Mr. MORSE. In nine additional nonsecurity cases, the Department has admitted to electronic snooping, most of which emanated from the policies authorizing the use of electronic devices at the time of the creation of the Organized Crime Division in the Department of Justice in 1961.

Mr. President, the frank admission of the Solicitor General in these cases gives rise to the need for an in-depth investigation of the Department of Justice regarding past practices. As I stated on the floor of the Senate in 1954:

"What is needed is public disclosure. What is needed is to bring the light to bear on such practices. As we brought the light to bear on the third-degree tactics of police departments, the tyrannical browbeating conduct of prosecutors, and corruption in the administration of criminal justice, remedies were forthcoming to bring to an end those tyrannical practices."

As Senator Long has so eloquently demonstrated, a good public policy in the field of wiretapping is not enough, because the age-old question asked by Juvenal still remains: "Who will guard the guards?"

While Senator Long's original desire to avoid an investigation of the agencies in the "security community" is understandable, a thorough-going investigation of the Justice Department should no longer be delayed, as pointed out also by the Senator from Hawaii [Mr. Fong], particularly in view of the fact that the Department's admission of wiretapping and bugging took place in 10 nonsecurity cases. Any investigation would, of course, treat national security matters as classified information. Of all agencies of the Federal Government, the Department of Justice has the greatest opportunity to abuse its great power for political purposes.

As I stated in my speech in 1954:

"There is no question about the Attorney General's being a political officer. . . .

"I was once offered the Attorney Generalship of the United States, and in the discussion that took place prior to my declination, I made very clear that if I accepted the Attorney Generalship of the United States, political considerations and pressures would have no place in the administration of the Department of Justice."

Without going into the merits or demerits of recent cases, such as the Baker case and the Hoffa case, where serious allegations of wiretapping and bugging have been made, there certainly is need for congressional investigation in the use of alleged wiretapping and bugging activities to determine whether or not there has been an abuse of official discretion. At this point I submit for the Record a recent news story appearing in the Wall Street Journal dated Wednesday, January 25, 1967, which contains the following heading: "Alleged FBI Informant Is Said To Have Used Wiretaps and Bugs During 1964 Trial."

There being no objection, the article was ordered to be printed in the Record, as follows:

"[From the Wall Street Journal, Jan. 25, 1967]

"REPRIEVE FOR HOFFA?—TEAMSTER BOSS TO CLAIM EAVESDROPPING BY UNITED STATES IN BID TO AVOID PRISON—ALLEGED FBI INFORMANT IS SAID TO HAVE USED WIRETAPS AND BUGS DURING 1964 TRIAL—FORMER JUSTICE AID'S DENIAL

"(By Jerry Landauer and John A. Grimes)

"WASHINGTON.—Jimmy Hoffa, apparently doomed to a long stretch behind bars, thinks—or hopes—he may have found the way to continued freedom.

"By a stroke of fortune, or perhaps attracted by a proffered reward, a man said to be an FBI 'special employe' wise in the ways of wiretapping has dropped into Teamster Union laps. His arrival apparently accounts for union chief Hoffa's recently gained confidence—a confidence actually born of desperation, Government men say—that he'll yet escape the eight-year jail term to which he has been sentenced.

"The purported 'special employe,' meaning a paid FBI informant, goes by the name Bud Nichols. With his wife and two children he's holed up here in a closely guarded hotel suite near Teamster headquarters. He claims that the Justice Department paid him \$1,684 to eavesdrop not only on Mr. Hoffa and his lawyers but also on the Chattanooga Federal jury that found Mr. Hoffa guilty in 1964 of tampering with jurors in an earlier case.

"Any day now, Treasury attorneys intend to file papers petitioning the Supreme Court to hear what they will contend is new evidence bearing on Mr. Hoffa's conviction. The papers will include an affidavit in which Bud Nichols swears that Walter Sheridan, former head of the Justice Department's special 'Hoffa squad,' instructed him to slip tiny transmitters under the mattresses of the Chattanooga jurors when they were sequestered in the Read House hostelry there.

"Moreover, Mr. Nichols is prepared to swear that he placed four microphone 'bugs' and tapped six telephone lines leading to rooms in the Patten Hotel which were occupied during the trial by Mr. Hoffa and his legal counselors.

"MR. SHERIDAN DISMISSES STORY

"Mr. Sheridan, now an executive of the National Broadcasting Co., dismisses the story of the alleged FBI informant. 'I've been expecting something like this,' he remarks. 'It's unbelievable. It's fantastic. He sure as hell didn't do any bugging or tapping for me.'

"Despite Mr. Sheridan's disavowal, some Justice Department officials seem concerned that Mr. Nichols' story may sound sufficiently impressive to win Mr. Hoffa a reprieve. At minimum, Teamster attorneys hope the High Court

will remand the conviction to the lower courts for the purpose of determining whether tapping or bugging indeed did occur.

"And some Teamsters seem to believe, despite the apparent odds against it, that the Supreme Court will actually reverse itself and knock down the jury-tampering conviction. 'The lawyers insist that there is good reason to believe this is what will happen,' says one union official.

"At any rate, Mr. Hoffa is reported to have persuaded himself that he is going to get off. 'You can think what you want to,' says one Teamster official, 'but I'm telling you he's convinced that he's not going to jail.'

"The Teamster high command is quite aware, of course, that Mr. Nichols' willingness to turn against the Government may be motivated by visions of a \$200,000 reward being offered to anybody who can help spring Jimmy Hoffa free. No doubt, too, the Teamster chiefs might suspect Mr. Nichols of being a Government plant designed to learn what other surprises the Hoff defense might yet be planning to spring.

"CHATTANOOGA CONVICTION

"But the real shortcoming of the Teamsters' find might be that it would fail to upset the case against Mr. Hoffa. Conceivably, the Supreme Court might hold that his conviction was based on legally admissible evidence not obtained by wiretapping or bugging. He was convicted by the Chattanooga jury largely on the testimony of Edward Partin, a Louisiana Teamsters official who turned out to be a Government agent. At the trial, Mr. Partin detailed how Mr. Hoffa, both in direct conversations with him and in other conversations he overheard, told of planning and trying to 'fix' the jury in an earlier trial in which Mr. Hoffa was charged with accepting money from an employer in violation of the Taft-Hartley Act.

"Teamster attorneys contended to the Supreme Court that Mr. Partin was a paid informer who wormed his way into Jimmy's confidence under false colors, and that the defendant's Constitutional rights were violated. But a majority of justices rejected this claim, saying the Constitution was not intended to protect Mr. Hoffa's 'misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.' Later the justices set Feb. 4 as the deadline for the defense to file a petition for the court to reconsider."

"In effect, then, the Teamster leader has little recourse except to rely on Bud Nichols' story of the bugging and wire tapping in Chattanooga. 'Jimmy's staking his life on that boy,' an associate says, speaking of the 34-year-old informant.

"DOCUMENTS ARE CITED

"Mr. Nichols is telling the Teamsters that he's been on 'retainer' to the FBI for nearly a decade, receiving \$200 a month just to stand by for special jobs. Much of the time, he says, Special Agent John Parker of the FBI's Knoxville office gave him the money on the 15th day of each month from confidential 'blue slip' funds. Mr. Nichols claims the bureau also set up a 'cover company,' enabling him to purchase electronic equipment and operate in the guise of a private technician. He says he can produce copies of documents initialed by FBI Director J. Edgar Hoover authorizing purchases of electronic gear to track down a matter involving national security.

"Moreover, Mr. Nichols apparently has secreted away other documents for use to establish his credentials if the FBI or the Justice Department disavows him. But agent Parker, who has been transferred from Knoxville to the Pittsburgh office, may have no intention of such a disavowal.

"Do you know a man named Bud Nichols?" Mr. Parker was asked yesterday. 'Oh, good Lord,' the agent replied in seeming recognition of the name, but had declined further comment.

"It is Mr. Nichols' recollection that he and agent Parker got on well together. Relations were less satisfactory, he says, with Richard C. Quinn, resident agent for the Secret Service in Knoxville who 'serviced' him after Mr. Parker's departure to Pittsburgh. But, he claims, it was the Government's refusal to help him untangle personal financial problems that prompted his cooperation with the Teamsters.

"EXPLAINING THE INEXPLICABLE

"The Teamsters' secret discovery of Mr. Nichols helps explain what otherwise has seemed inexplicable: Mr. Hoffa's recent ability to maintain a crisp, cocky exterior while confronted by his eight-year jail sentence.

"It's true there's a bit of puffiness to his face and his middle that wasn't there before, but Mr. Hoffa offhandedly blames this on lack of exercise resulting from having to handle his court moves as well as the union's business. He is, on occasion, tense and terrible-tempered, but he always has been known to have a short fuse.

"By and large, Mr. Hoffa is running himself and his union as though his prospect of a lengthy stretch behind bars just didn't exist. To long-time Hoffa-watchers unaware of Mr. Nichols' existence, his behavior has been nothing short of astounding.

"Sample: Just last week, the Teamster leader threw himself into the opening round of 1967 negotiations with the trucking industry without so much as a hint that he might not be around to follow through if the talks go down to the March 31 deadline. If anything, his performance indicated that he felt he owned the industry.

"Mr. Hoffa told employer and union officials where they would sit and how the session would proceed. He read an 86-page document of master contract proposals, identifying the specific problem each was designed to overcome. He chastised the operators for supposed shortcomings in treatment of employees, calling each of the employers by their first names as they stood up to respond to his questions (they called him 'Mr. Hoffa' and 'Mr. Chairman,' usually with a 'sir'). He further told them how future bargaining sessions would be conducted. Power was clearly talking, and the employers knew it.

"Another sample: Earlier this month, Mr. Hoffa ran his union's 18-man general executive board through a two-day session with his usual tight control of the agenda and the decisions. There was no whisper of suggestion in the meetings as to what detailed arrangements Mr. Hoffa might be making for the running of the union in his absence. If the board members had any doubt whether the union boss would be present for the next meeting, they did not bring it up. It is true there was some extra-curricular grumbling about the fact that Mr. Hoffa did not choose to discuss who would take over some of the various titles he holds and functions he fills in addition to union president, or to prepare for the possible transition of his powers to newly elected General Vice President Frank Fitzsimmons—but no one was about to raise the subject openly. Power was talking in the meetings, and the union officials knew it.

"PRISON, THEN PRESIDENCY AGAIN?

"Should the 'unthinkable' yet happen to Jimmy Hoffa, he does have an additional comfort: With time off for good behavior, he might be out of jail in advance of the union's next convention in 1971, ready to be reelected and to reclaim the president's seat kept warm for him by loyal aide Fitzsimmons; meantime, the union might operate quietly on a live-and-let-live basis, with no power struggles to rupture the chief's plans for returning to office.

"The insistence by Mr. Hoffa and his lawyers that he still has a good chance of getting his conviction reversed has kept other top Teamsters uncertain about what's coming next. No one, these officials privately agree, is going to make a move to fill any power vacuum left by Mr. Hoffa's departure unless they're absolutely sure a vacuum exists.

"CARETAKER ARRANGEMENT

"Even if Mr. Hoffa does go to jail, many Teamster officials believe he has things set up so that the union will run much as he wants it to.

"At last July's convention, Mr. Hoffa set up a potential caretaker arrangement by creating the post of general vice president and filling it with Mr. Fitzsimmons, an old Detroit ally of unquestionable loyalty to the Teamster chief. Mr. Fitzsimmons, aged 58, is amiable and mild-mannered. No one expects he would run the union in Hoffa style, as a tightly centralized organization with vast powers centered in the presidency. The guessing is that under 'Fitz' the union would revert more to the days of former president Dan Tobin, when regional and local leaders held sway without much interference from national headquarters.

"While Mr. Fitzsimmons would be largely on his own, a Teamster aide predicts, 'Fitz will have a set of written instructions from Jimmy on how to cope with almost any situation that comes up. And he'll be told to try to get along with everyone, no matter what the provocation.'

"As for a possible challenger, 'There isn't anyone I see who can, or will, try to take over if Jimmy is behind bars,' says one Teamster official. Adds another: 'If Jimmy gets out of jail before the next convention in 1971, he'll be reelected;

there's no doubt about that. If he's beyond the next convention, that's a different story. But I can't yet see who the next guy would be, and I don't think anyone else can.'

"There is, however, one imponderable: If Mr. Hoffa were out of the way for a few years, what if any ambitious young strong-man began to put together the power blocs necessary to become a real influence in the union, such as Mr. Hoffa did years ago? 'That is what we have to worry about,' says a top Teamster official."

MR. MORSE. In the light of these allegations of wiretapping and bugging, certainly the Congress has a right to know whether the Hoffa case—*Hoffa v. U.S. Sup. Ct.*, 17 L. Ed. 2d, (1966)—has been included among the cases presently being investigated for electronic surveillance by the Department of Justice.

MR. PRESIDENT, I ask unanimous consent to insert in the CONGRESSIONAL RECORD at this point in my remarks, an editorial from the January 30, 1957, issue of the Nation magazine, which raises the question as to whether or not the Department of Justice, in the Hoffa case, is pursuing the policy laid down in Black and Schipani—*Schipani v. U.S.*, 362, F. 2d, 825, cert. denied, 385 U.S. 26 (1966) cases.

There being no objection, the editorial was ordered to be printed in the Record as follows:

"WHY NOT HOFFA?"

"The Teamsters' union has offered a \$100,000 reward for information leading to the disclosure that the Department of Justice relied on illegal wire taps or 'bugs' in securing the conviction of James Hoffa. William Loeb, the New Hampshire publisher whose newspaper once secured a substantial loan from the Teamsters and who apparently wants to demonstrate his gratitude, has put up another \$100,000 on the same terms. But are either of these rewards really necessary?"

"In the recent case involving Joseph Schipani, the Department of Justice consented to a reversal of the conviction because illegal wire taps had been used. In this case the Solicitor General Thurgood Marshall, stressed the point that since the Supreme Court exercises a supervisory role over methods used in federal prosecutions, he felt it his duty to inform the court of the taps. Mr. Marshall also said that the government had initiated an intensive survey of pending cases to determine if convictions had been obtained by 'tainted' or illegally obtained evidence. Reports from Washington indicate that as many as 200 cases are being scrutinized as part of this general survey. This month, in a case involving seven Florida residents, Mr. Marshall informed the court that although none of the seven had been under 'direct electronic surveillance,' two of them were participants in conversations which were electronically monitored. This is the ninth instance in which the Department of Justice has volunteered a disclosure of this kind. Is the Hoffa case included in the survey? If not, why not? Have the records of the case been investigated to determine if any illegal wire taps or bugs were used? If Schipani was entitled to a frank statement of the facts, why isn't Hoffa entitled to the same treatment? After Fred Black's conviction (see 'A Dirty Business,' *The Nation*, December 26), the Department volunteered the information that illegal wire taps had been used. If Black and Schipani, why not Hoffa?"

MR. MORSE. Mr. President, I commend my colleague, the junior Senator from Missouri, for his courage and dedication during the past 3 years in pursuing relentlessly the abuse of official policy by the Federal bureaucracy. I hope the investigation by the Long subcommittee will be extended to the Department of Justice and to the agencies in the so-called security community on matters where no security problem is involved.

Summing up, I would like to remind the Senate that official declarations against wiretapping either in the form of Executive order or legislation are not simply enough. Official policy must be implemented by an informed public opinion to demand enforcement of this policy. Despite the revelations of the Long subcommittee, I am informed that not one civil servant has been disciplined for violations of State or Federal law either in terms of departmental discipline or prosecution for violation of such law.

Only through an aroused public opinion which is aware that wiretapping affects the privacies of innocent persons, affects privileged and confidential relationships of husband and wife, parent and child, lawyer and client, doctor and patient; yes, the sanctity of the confessional, there must be a continuous exposure of these violations of individual rights. Wiretapping is indiscriminate. Wiretapping is in the character of a general tool. It is a form of Writs of Assistance,

the very thing that James Otis protested against in 1761. Writs of Assistance are cited by historians as one of the causes of the American Revolution.

Mr. President, I urge the Long subcommittee to continue its unrelenting fight for public exposure—and I pledge to that committee my shoulder-to-shoulder support in its endeavors to bring to an end what I consider to be a violation of the precious constitutional rights in this country—and that it immediately will proceed to investigate violations of citizens' rights through wiretapping and bugging by the Department of Justice. A great constitutional guarantee pertaining to rights of privacy is involved.

Mr. President, I conclude by saying that one of the basic rights which determines the continuous freedom of the American people is the presumption of innocence. In my judgment, we cannot square this invasion of the constitutional guarantee of the right to privacy with that precious guarantee that all of us are protected by the presumption of innocence before we are brought to trial.

But that presumption of innocence cannot be separated from our constitutional right of privacy. That presumption of innocence cannot be separated from the right of the American people to be free and to have torn out of the body politic this cancerous growth of unconstitutionality which is involved in wiretapping devices used by the Government in so many of its agencies, and the same practice which is being adopted in States and local police departments across the Nation.

Mr. President, to make certain that I have permission to include all the material I want in the RECORD, I ask unanimous consent to have printed in the RECORD certain other material in regard to the wiretapping issue which I have raised this afternoon.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

[In the Supreme Court of the United States—October Term, 1966—No. 504]

"JOSEPH F. SCHIPANI, PETITIONER V. UNITED STATES OF AMERICA—SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

"After a non-jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on five counts charging him with willfully attempting to defeat and evade income taxation for the years 1956 through 1960. He was sentenced to three years' imprisonment and fined \$12,500. The conviction was affirmed by the court of appeals. 362 F. 2d 825. A petition for a writ of certiorari was filed on August 29, 1966. The government filed a memorandum in opposition to the granting of the petition on September 30, 1966, and certiorari was denied by this Court on November 7, 1966. As yet no petition for rehearing has been filed, and under Rule 58(1) of this Court the time within which to file a petition for rehearing, if not extended, will expire on December 2, 1966.

"In light of this Court's continued jurisdiction over the cause, we submit this supplemental memorandum to advise the Court of the information set forth below and to suggest the appropriate disposition.

"1. Petitioner kept no books, furnished no explanation of his failure to file returns and adduced no proof at trial. The government's proof was based on the net-worth method; the sufficiency of that proof to support the district court's findings was the primary issue presented by the petition. The facts developed at trial and the applicable law are set forth in the government's memorandum in opposition.

"2. Since November 21, 1966, the following additional facts have come to the Solicitor General's attention:

"(a) In response to a memorandum of October 24, 1966, from the Tax Division of the Department of Justice,¹ the Federal Bureau of Investigation informed the Acting Attorney General, by memorandum of October 28, 1966, that, although petitioner was not the subject of direct electronic surveillance by agents of the F.B.I., he was a participant in various conversations electronically monitored on a number of occasions in 1961. The microphone was installed, by means of a trespass, at a place of business where petitioner and others frequently met. It was believed by the F.B.I. that this establishment was being utilized for purposes connected with organized crime. The Federal Bureau of Investigation, acting on the basis of the Departmental authorization as previously described at pages 2-3 of the Supplemental Memorandum for the United States filed in *Black v. United States*, Oct. Term, 1965, No. 1029, approved the installation here in question.

¹ The memorandum of October 24 was written in connection with the review program described in paragraph 4, *infra*.

"(b) The substance of the monitored conversations involving petitioner and others was recorded in logs kept by the F.B.I. agents who conducted the electronic surveillance, and was reflected in various F.B.I. reports which came to the attention of those in charge of investigating and prosecuting petitioner for possible tax violations. The reports did not disclose the manner in which the information contained therein had been obtained. Following receipt of the F.B.I.'s memorandum of October 28, 1966, noted above, attorneys of the Department of Justice obtained the relevant F.B.I. logs and examined them in detail in order to make an informed judgment about the matter.

"3. Unlike the situation in *Black v. United States*, we cannot say in the instant case that none of the evidence used by the government at petitioner's trial was obtained, either directly or indirectly, from an improper source. Some of the material in the F.B.I. reports (which were based in part on the electronic surveillance) provided investigatory leads and other information used in proceeding against petitioner. Since there was material evidence against petitioner which was tainted, his conviction cannot stand, and no purpose would be served here in having the district court conduct a collateral hearing, such as was suggested by the government in its memorandum in *Black*.² We concede, moreover, that petitioner would have standing to object to the introduction of the evidence obtained as a result of the electronic surveillance. Although he was not the owner of the establishment under surveillance, he was at least an 'invitee' on the premises within the meaning of *Jones v. United States*, 362 U.S. 257.

"4. In view of this Court's supervisory role in the federal judiciary system, the Department of Justice believes it appropriate to apprise the Court of its policy in regard to electronic surveillance of the kind here involved. Present governmental practice, adopted in July 1965 in conformity with the policies declared by the President on June 30, 1965, for the entire federal establishment, prohibits such electronic surveillance in all instances except those involving the collection of intelligence with respect to matters affecting national security. Such intelligence data will not be made available for prosecutorial purposes, and the specific authorization of the Attorney General must be obtained in each instance when the national security exception is sought to be invoked.³

"Recognizing its obligation not to use evidence obtained in violation of a defendant's protected rights in any criminal prosecution, the Department has initiated a program to discover prior instances in which this may have occurred. An extensive review is presently being conducted in order to determine the instances in which there might have been monitoring affecting a case which has been brought to trial.⁴ Reports of the results of this continuing review are being sent to the Acting Attorney General. Similarly, a careful review of pending and prospective prosecutions is being conducted by the Department for the purpose of determining what other cases might fall within this category. This will necessarily be a time-consuming process but will be diligently pursued to completion. The government will promptly notify the appropriate court when any material discovery is made.⁵

"5. In light of the foregoing, and in view of this Court's decision and *per curiam* opinion in the *Black* case, we suggest that the Court vacate its order denying certiorari, grant certiorari, vacate the judgment of the court of appeals,

² Following the issuance of the Court's order denying certiorari in this case, the United States Attorney for the Eastern District of New York was advised not to have petitioner apprehended to commence serving his sentence, and petitioner has not in fact been incarcerated.

³ A memorandum of the Acting Attorney General of November 3, 1966, addressed to all United States Attorneys, summarizes the Department's policy in this regard as follows:

"This Department must never proceed with any investigation or case which includes evidence illegally obtained or the fruits of that evidence. No investigation or case of that character shall go forward until such evidence and all of its fruits have been purged and we are in a position to assure ourselves and the court that there is no taint or unfairness. We must, also, scrupulously avoid any situation in which an intrusion into a confidential relationship would deny a fair hearing to a defendant or person under investigation."

⁴ As the instant case illustrates, problems in this regard may still arise in cases in which some investigation was conducted prior to July 1965.

⁵ Action similar to that taken in the *Black* case and in this case has been taken by the government in *DeNiro, et al. v. United States*, pending on appeal, Nos. 17,053-17,055, C.A. 6, where the government suggested that the Sixth Circuit remand the cases to the district court.

and remand the cause to the district court for a new trial, should the government seen to prosecute petitioner anew.⁶

"Respectfully submitted.

"THURGOOD MARSHALL,
Solicitor General.

"NOVEMBER 1966."

"[SUPREME COURT OF THE UNITED STATES—OCTOBER TERM, 1966]

"BLACK v. UNITED STATES—ON PETITION FOR REHEARING—No. 1029, OCTOBER TERM, 1965—DECIDED NOVEMBER 7, 1966

"PER CURIAM.

"In *Davis v. United States*, No. 245, October Term, 1966, we today denied the petition for certiorari. The sole question raised there (but not passed upon by the Court of Appeals because not necessary to its disposition) involved petitioners' claim that conferences between petitioners and their counsel were surreptitiously overheard and intercepted by law enforcement officials through concealed monitoring devices built into the jail where petitioners were being held for federal authorities. The Solicitor General did not deny the existence of the devices but said that there were no recordings of the conversations in question. He pointed out that since the case has been remanded by the Court of Appeals for a new trial on other grounds, a full exploration of this question could be made on retrial. In the light of these representations we denied the petition for certiorari so that the question might be fully explored at the new trial, as suggested by the Solicitor General.

"In *Black v. United States*, No. 1029, October Term, 1965, the petitioner raises a similar question and while *Davis v. United States*, *supra*, is not controlling, its relation is obvious. In *Black* the Solicitor General advised the Court voluntarily on May 24, 1966, after the petition for certiorari had been denied but before an application for rehearing had been filed, that agents of the Federal Bureau of Investigation, in a matter unrelated to this case, on February 7, 1963, installed a listening device in petitioner's hotel suite in Washington, D.C. The device monitored conversations held in the hotel suite during the period the offense was being investigated and beginning some two months before and continuing until about one month after the evidence in this case was presented to the Grand Jury. During that period, 'the monitoring agents,' the Solicitor General advised, 'overheard, among other conversations, exchanges between petitioner and the attorney who was then representing him' [Black] in this case. In a supplemental memorandum filed July 13, 1966, the Solicitor General, in response to an inquiry of the Court, stated that the recordings of such interceptions had been erased from the tapes but that notes summarizing and sometimes quoting the conversations intercepted were available, and that reports and memoranda concerning the same had been made. 'Neither the reports nor the memoranda,' he reported, 'were seen by attorneys in the Tax Division responsible for the prosecution of' this case until January, 1964, when in preparing for trial they were included in material transmitted to them; that the reports and memoranda of the intercepted conversations were examined by the Tax Division attorneys and retained by them until April 15, 1964, when petitioner's trial began; and that the attorneys never realized until April 21, 1966, that any conversations between Black and his attorneys had been overheard and included in the transcriptions.

"The Solicitor General advised further that the 'Tax Division attorneys found nothing in the FBI reports or memoranda which they considered relevant to the tax evasion case.' He suggests that the judgment be vacated and remanded to the District Court in which the 'relevant materials would be produced and the court would determine, upon an adversary hearing, whether petitioner's conviction should stand.' We have sometimes used this technique in federal criminal cases, *United States v. Shotwell Mfg. Co.*, 355 U.S. 233. However, its use has never been automatic. Indeed, in *Remmer v. United States*, 347 U.S. 227, we found it necessary despite the hearing in the District Court, to

⁶ On November 29, 1966, while preparing to file this memorandum, we learned that agents of the Alcohol and Tobacco Tax Division of the Treasury Department had engaged in electronic surveillance of another establishment frequented by petitioner. Logs were not maintained and we are unable at this juncture to provide a full statement of the relevant facts. Although our information is incomplete, it appears that the surveillance lasted for a brief period and that no relevant information relating to petitioner was obtained. Investigation of this matter will be continued and no further prosecution of petitioner will be instituted in advance of its completion. Since, however, the facts stated in the text of this memorandum call, without more, for the disposition which we are suggesting, we are filing the memorandum without further delay. In the event that the government should seek to proceed further against petitioner, all additional information which we obtain will be made known to the district court.

subsequently order a new trial on the merits, 350 U.S. 377. There are other complicating factors here that were not present in *Remmer*. There the judge had been informed of the alleged jury tampering, but here neither the judge, the petitioner or his counsel knew of the action of the federal agents. Moreover, the Solicitor General advises that the Tax Division attorneys did not know at the time of the trial that conversations between Black and his attorneys were included in the transcriptions. In view of these facts it appears that justice requires that a new trial be held so as to afford the petitioner an opportunity to protect himself from the use of evidence that might be otherwise inadmissible.

"This Court has never been disposed to vacate convictions without adequate justification, but, under the circumstances presented by the Solicitor General in this case we believe that a new trial must be held. This will give the parties an opportunity to present the relevant evidence and permit the trial judge to decide the questions involved. It will also permit the removal of any doubt as to Black receiving a fair trial with full consideration being given to the new evidence reported to us by the Solicitor General.

"The petition for rehearing is therefore granted, the order denying certiorari vacated, certiorari granted, the judgment of the Court of Appeals vacated and the cause remanded to the District Court for a new trial.

"Mr. JUSTICE HARLAN, whom Mr. JUSTICE STEWART joins, dissenting.

"The denial of certiorari in No. 245, *Davis v. United States*—where the Court of Appeals for the Fifth Circuit has already ordered a new trial on grounds wholly unrelated to alleged eavesdropping and at which trial petitioners will have a full opportunity to explore their contentions that the Government interfered with their constitutionally protected right to counsel—bears no solid relation to, still less furnishes justification for, what the Court has done in the present case. A brief statement of the circumstances of the *Black* disposition will reveal that in summarily vacating this final conviction and ordering a completely new trial the Court has acted prematurely.

"In 1964, petitioner Black was convicted in the District Court of federal income tax violations. His conviction was affirmed by the Court of Appeals for the District of Columbia on November 10, 1965. 353 F.2d 885. Certiorari was denied by this Court on May 2, 1966. 384 U.S. 927. Before Black's petition for rehearing was filed here, the Solicitor General filed a memorandum bringing to the Court's attention that fact that in the course of an unrelated criminal investigation Black's hotel suite had been "bugged" by the Federal Bureau of Investigation and conversations between Black and his attorney electronically recorded. The Solicitor General further stated that in consequence of an investigation, instituted by him following his discovery of this occurrence, he was able to represent to the Court that none of the information so procured had been utilized in Black's aforesaid prosecution. In a further memorandum, filed in compliance with a request from this Court, the Solicitor General has represented that it was not until late August 1965 that the Criminal Division of the Department of Justice learned that a listening device had been installed in Black's hotel suite and not until April 21, 1966, that attorneys in the Tax Division, responsible for the prosecution, learned that any conversations between Black and his counsel had been overheard.

"The Solicitor General recognizes that Black is entitled to a full exploration of the matter, and to that end suggests that the case be remanded to the District Court for a hearing and findings on the episode in question as it may bear on the validity of Black's conviction. Black responds that this course is inadequate and contends that this Court should, without more, forthwith order dismissal of the indictment in this income tax prosecution.

"Without anything more before it than the representations made by both sides, the Court today orders a totally new trial in spite of the fact that the disclosures commendably made by the Solicitor General reveal no use of "bugged" material in Black's prosecution, and no knowledge by prosecuting attorneys that material may have been improperly obtained. I agree, of course, that petitioner is entitled to a full-scale development of the facts, but I can see no valid reason why this unimpeached conviction should be vacated at this stage. In *Davis, supra*, exploration of the alleged eavesdropping episode is appropriate upon the retrial of the case since the original conviction has already fallen on other grounds. In the *Black* case, however, a new trial is not an appropriate vehicle for sorting out the eavesdropping issue because until it is determined that such occurrence vitiated the original conviction no basis for a retrial exists. The Court's action puts the cart before the horse. The orderly procedure is to remand the case to the District Court for a hearing and findings on the issues in question. See *United States v.*

Shotwell Mfg. Co., 355 U.S. 233. See also *Remmer v. United States*, 347 U.S. 227, 350 U.S. 377. Unless and until the facts on this issue have been resolved and their legal effect assessed favorably to petitioner, this conviction should remain undisturbed.

"The only basis I can think of for justifying this decision is that any governmental activity of the kind herein question *automatically* vitiates so as at least to require a new trial any conviction occurring during the span of such activity. But I cannot believe that the Court, without even briefing or argument, intends to make any such sweeping innovation in the Federal criminal law by today's preemptory disposition of this case.

"Mr. JUSTICE WHITE and Mr. JUSTICE FORTAS took no part in the consideration or decision of this case."

Mr. COOPER. Mr. President, I shall not speak in detail on this subject, I am fortunate to have been in the Chamber today and to have heard the able speech of the Senator from Oregon. I respect him as a great constitutional lawyer. He is always fighting for the constitutional rights of the individual. His action today—bringing to the attention of the Senate the problem of wiretapping and bugging as an invasion of privacy, and as a violation of other sections of the Bill of Rights is timely.

Mr. President, the Senator from Missouri [Mr. Long] is also to be highly commended for the courageous position he has taken. He needs the support of the Senate, as well as of the people of this Nation.

I believe, with the Senator from Oregon and others, that it is very important that the Congress, in this year, look into this question thoroughly and take action to assure that the constitutional rights of all our citizens will be protected.

As the Senator from Oregon and others have pointed out today, these rights have been achieved at the cost of great effort, hardship, martyrdom—even blood and sacrifice, over the period of hundreds of years.

These rights should not be eroded. They will not be eroded if Congress and the people understand the issue and take action to protect the rights of every individual.

Mr. MORSE. Mr. President, I want to thank the Senator from Kentucky. Let me say for the Record that the source of this intervention, I think, is a very important source, for the Senator from Kentucky served on the bench in his State and he therefore knows whereof I speak when I talk about the importance of protecting the procedural rights of the people who may be brought to trial charged with wrongdoing.

The support the Senator has given me to this cause, not only today but also in the past, is particularly important. He has supported me before as I have raised my voice in the Senate in protest against the invasion of the right of privacy by wiretapping devices, and the fact that he is giving us this support, I think, carries great weight. I want to thank him very much, because he is an ex-judge. He is a good witness. As well as being a good witness, he is also one of our most able Senators.

Mr. McCARTHY. Mr. President, will the Senator from Oregon yield?

Mr. MORSE. I am happy to yield to the Senator from Minnesota.

Mr. McCARTHY. Mr. President, I join the Senator from Oregon [Mr. Morse] and other Senators who have expressed concern about the practice of wiretapping, a concern which I certainly share. I also want to commend the Senator from Missouri [Mr. Long] and the Subcommittee on Administrative Practice and Procedure for holding hearings on the invasion of privacy by Government agencies and to give my support for continuing its work.

The testimony which the subcommittee has already taken and previous testimony take by the Subcommittee on Constitutional Rights, which held hearings in 1958 and several years following, show that the problem is far from solved, and I believe we must give close attention to this matter—not only to wiretapping but also to the whole run of procedures and the use of various electronic devices which constitute an invasion of privacy.

The problem is more serious when these practices are carried on by Federal officials, despite the Federal law and, in some cases, despite the law of the State.

It is surprising to read the testimony and to find examples such as the statement of Mr. Jack Schwartz, an Internal Revenue special agent from Pittsburgh. The Senator from Missouri inquired about his part in bugging an office. Mr. Schwartz said it was the only time he had done so. The Senator from Missouri asked him whether he was embarrassed being a party to illegal entry.

Mr. President, I ask unanimous consent that this exchange, which took place at the subcommittee hearing on July 14, 1965, and which is printed in part 3 of the committee hearings, pages 1252-1253, be printed in the RECORD.

There being no objection, the excerpt was ordered to be printed in the RECORD, as follows:

"SENATOR LONG INTERROGATING MR. JACK SCHWARTZ, INTERNAL REVENUE SPECIAL AGENT, FROM PITTSBURGH—HEARINGS ON JULY 14, 1965

"Senator LONG. Did you not feel just a little embarrassed about being a party to a group illegally entering an office, breaking into an office?

"Mr. SCHWARTZ. I never gave it a thought, sir, to be honest with you. Those of us who are in the organized crime drive, and I think I was the first one in Pittsburgh in that drive, all felt very proud to be a part of it.

"Senator LONG. Yes, but—

"Mr. SCHWARTZ. And I think anything that would have been asked we would not have thought about the consequences.

"Senator LONG. I think—I cannot understand you, Mr. Schwartz.

Mr. SCHWARTZ. I say anything that would have been asked, I think I would have taken part in.

Senator LONG. You mean you would have committed any crime?

"Mr. SCHWARTZ. No.

"Senator LONG. You have violated any constitutional right of any citizen if you had been directed to?

"Mr. SCHWARTZ. No. No. I meant by that surveillance.

"Senator LONG. Breaking and entering.

"Mr. SCHWARTZ. I didn't regard it as such, sir.

"Senator LONG. Well, what do you regard as breaking and entering then?

"Mr. SCHWARTZ. Well, we were trying to obtain—trying to obtain the evidence of this racket association.

"Senator LONG. I know, but even an overzealous desire on the part of an officer doesn't authorize him to violate the laws of the State or the constitutional rights and privileges of a citizen, does it?

"Mr. SCHWARTZ. I was overzealous.

"Senator LONG. Beg pardon?

"Mr. SCHWARTZ. I was overzealous, sir.

"Senator LONG. I agree. You do know that breaking and entering is a crime in the State of Pennsylvania, is it not?

"Mr. SCHWARTZ. If you have willful intent; yes.

"Senator LONG. You did not mean to enter? That is what that means.

"Mr. SCHWARTZ. I had no profit motive.

"Senator LONG. I am sure the law is that it does not have to have a profit motive.

"Mr. SCHWARTZ. I am not acquainted with the law.

"Senator LONG. I would respectfully suggest to you that you should acquaint yourself with the State law in a situation of that kind. * * *"

Mr. McCARTHY. Mr. President, I do not want to single out Mr. Schwartz, whom I do not know personally, because there are other statements at the hearing besides his which give one pause. The point is that there seems to be a view that certain agents of government are above the law so long as their intentions are good.

Wiretapping, illegal entry to bug, and the use of other eavesdropping devices, raise questions not only about respect for statutes but also beyond this to constitutional rights and basic human rights.

The brevity of the language in the Bill of Rights is part of the greatness of these amendments. They are concise and simple enough so that the broad meaning can be understood by all. They are not so detailed and rigid as to exclude further interpretation and applications to new conditions. In this sense, the Bill of Rights places a responsibility on the courts of each generation, on each Congress, and upon the people to restudy the terms in the light of changing modes of living, producing and exchanging, of changing technology and changing levels of knowledge and education, and of vastly different opportunities for choice.

We can never take the Bill of Rights for granted, not so much because old interpretations become invalid but rather because new conditions require new applications and permit new insight.

Questions of freedom of speech, the right to assemble, or the right to privacy today are far more complex than they were in the early years of our Nation.

They require study by Congress and frequently require new statutes. Certainly, the recent advances in electronics have presented us with new problems to solve and the need to further protect the right to privacy.

In considering these questions, it is important to remember that we are not merely dealing with procedural questions but with procedures which touch directly upon basic human and constitutional rights.

The Bill of Rights of the U.S. Constitution, both in its creation and in the history of the lives of citizens who have lived under it for more than 175 years, is a testament to the dignity of the individual. The first, the fourth, the fifth, and other amendments, represent a balance between the power of government—even good government—and the loneliness and isolation of the individual. They set forth areas of sanctuary for him, providing an opportunity for him to develop as a free person; to seek truth openly, to choose freely, and to retain personal integrity and privacy.

The first amendment with its guarantees of several freedoms and the fourth and fifth amendments with their protection against unreasonable searches and seizures, for warrants only upon probable cause, their insistence upon due process of law, and their privilege against self-incrimination—all these are constitutional provisions to give civil support to fundamental rights based upon human nature. They require government to respect these areas in building its case against a suspect; they exist, of course, not in the interest of weakening action against the criminal, but rather because there is no more appropriate way to protect the innocent from the unequal power of government and society.

We must be concerned about all activities in this area, including those of government agents, to make certain that we do not diminish these rights. Just as certainly, we must be ready to investigate and move positively when it is necessary to safeguard them.

Mr. MORSE. I thank the Senator from Minnesota for his fine comments on this great issue which faces the American people.

Mr. HART. Mr. President, will the Senator from Oregon yield?

Mr. MORSE. I am happy to yield to the Senator from Michigan.

Mr. HART. Mr. President, it was not my good fortune to be in the Chamber during the time the Senator from Oregon addressed the Senate. I arrived within a few minutes after he had concluded his remarks.

However, having heard him before on this subject, and having read articles which he has authored, I realize that tomorrow morning I should reach for the CONGRESSIONAL RECORD early and read it very carefully.

I have a strong suspicion that I know exactly what he tells us in this speech. I know that it is what every American should be reading these days.

The Senator from Oregon always goes to the most difficult of all the areas of competing principles of societies such as ours, in the business of balancing our obligation to insure our survival and our security against our responsibility to insure that individual freedom is respected and protected and assured.

This is never an easy chore when a specific problem is presented. It oversimplifies it terribly to say, as some attempt to say, that our freedom is our security, but it comes close to saying what is the truth.

It is my good fortune to serve, under the chairmanship of the Senator from Missouri [Mr. Long], on the subcommittee which has given, and will continue to give, much thought to the subject. His leadership is emerging and is increasingly acknowledged in this country. When it is joined by the Senator from Oregon [Mr. Morse], I think that no matter how difficult the problem, we can have confidence that it can be solved prudently by Congress and by other public agencies.

That it will continue to be an increasingly difficult problem, one does not have to be a Ph. D. in science to understand. Today, photographs which can identify tiny objects on earth can be taken from many miles in the sky. The scientific advances which produced that ability have produced equally fantastic devices which can intrude next door or intrude across the street, and which may reach, although not yet, our unspoken thoughts, and record our every spoken word.

Surely, this kind of scientific advance should be matched by equally dramatic applications of political policies that will insure against the intrusion by such devices, given an opportunity to have that occur.

I am grateful that we are advised today that the Senator from Oregon [Mr. Morse] has given support to the efforts being made by the Senator from Missouri [Mr. Long] to enable Congress to stay at least abreast of the problem and be assured against the destruction of a value which we claim to be unique in our society, which, if lost, would produce a different kind of America.

Mr. MORSE. I thank the Senator from Michigan, a member of the Judiciary Committee. He has stood shoulder to shoulder with the Senator from Missouri [Mr. Long] in the investigation of this problem, and I know he will continue to do so. We all feel safer in the Senate when we know that the committee is trying to protect our constitutional rights. I also wish to thank the Senator from Michigan for his support, not only on this subject but also on similar subjects that govern all the civil liberties of this country.

Mr. President, I yield the floor.

Mr. YOUNG of Ohio. Mr. President, very definitely I am convinced that wiretapping and the use of any electronic devices or the practice of bugging, so-called, is a procedure that is repulsive to all liberty loving people. I desire to associate myself with the statements made by the distinguished senior Senator from Oregon. I commend him on the outstanding statement he has made today on a subject of vital importance to all Americans. He has performed a real public service. It is my intention to speak out on this subject some time during the present session of the Senate, and I shall do so.

I do wish it to be known that I consider any practices pursued by officials of the Internal Revenue Service in invading the privacy of individuals or intruding by the use of electronic devices in conversations between a lawyer and his client who is accused of income tax violations to be nefarious. It is contemptible and intolerable conduct on the part of Government officials which should find no tolerance whatever in the United States. If the Internal Revenue Service and any of its officials have adhered to such practices, they should be stopped immediately, and advantages gained by use of wiretapping should not be permitted to prevail.

Also, in this connection, if it is true that FBI Director Hoover has authorized or tolerated the tapping of telephone calls or the installation of electronic devices and engaged in "bugging" of citizens' conversations, to me that seems a practice and procedure which very definitely should not be tolerated. As a former prosecuting attorney who fervently believed that punishment, like a shadow, should follow the commission of a crime, I likewise certainly support the Bill of Rights of our Constitution adopted on the demand of men who won the Revolutionary War. I would favor enactment of any legislation considered necessary to prevent law enforcement or other officials of our Government from engaging in "bugging" conversations of suspected criminals or engaging in wiretapping of any conversations between any persons whatever. We should outlaw all wiretapping, public and private, wherever and whenever it occurs. I would be opposed to any legislation permitting wiretapping even if such wiretapping were authorized by a U.S. district judge, except when proof is offered that the security of the Nation itself is at stake, and only then with the strictest safeguards.

Mr. BYRD of West Virginia. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. CLARK. Mr. President, I ask unanimous consent that the order for the quorum call be recinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Senator LONG. I see the distinguished Attorney General in the room.

General Clark, will you come forward, sir?

General, I am delighted to have you here at one of our committee hearings. I see that you have with you a distinguished member of your staff, Fred Vinson, Jr.

We are delighted to have both of you here.

I was out of town and was unable to attend the full meeting of the Judiciary Committee when you were confirmed. I recommended the confirmation.

General, we will be very happy to hear your statement at this time. I believe we all have copies.

General CLARK. Thank you very much, Chairman Long. It is a pleasure to be with you this morning.

I have with me Assistant Attorney General Fred Vinson, Jr., of the Criminal Division, as you have noted, plus some staff members who have worked many hours on this important legislative proposal.

STATEMENT OF HON. RAMSEY CLARK, ATTORNEY GENERAL OF
THE UNITED STATES, ACCOMPANIED BY FRED M. VINSON, JR.,
ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPART-
MENT OF JUSTICE

General CLARK. We have cared enough for our privacy to prohibit unreasonable searches and seizures and unrestricted warrants in the Bill of Rights. For privacy is after all the foundation of freedom and the source of individualism and personality. But as Justice Brandeis observed nearly four decades ago, " * * * general warrants are but puny instruments of tyranny and oppression when compared to wiretapping." Still we permit the most insidious invasion of privacy—the electronic surveillance.

Privacy has always been a rare commodity, but never so rare as in our times. Never, therefore, has it been more important that we cherish privacy. The sheer numbers in our lives, our urban living, and our immense and growing technological capacities burden and further threaten privacy. They compel us to seek ways of being alone and being let alone—of solitude—and the chance to be ourselves.

John Stuart Mill said: "The worth of a State, in the long run, is the worth of the individuals composing it." When the State demeans its citizens, or permits them to demean each other, however beneficent the particular purpose, it will only find that it has limited opportunities for individual fulfillment and for national accomplishment.

Public safety will not be found in wiretapping. Security is to be found in excellence in law enforcement, in courts and in corrections. That excellence has not been demonstrated to include wiretapping.

Nothing so mocks privacy as the wiretap and electronic surveillance. They are incompatible with a free society and justified only when that society must protect itself from those who seek to destroy it.

Recent proposals have been advanced to authorize limited wiretapping and eavesdropping under judicial supervision. Constitutional challenges to such State legislation are now presented to the Supreme Court in the case of *Berger v. New York*. Before this session of the Congress expires, the Supreme Court may well decide some of the constitutional issues. But even if the practice withstands this constitutional test, it should be stopped by statute.

Only the most urgent need can justify wiretapping and other electronic surveillance. Proponents of authorization have failed to make a case—much less meet the heavy burden of proof our values require. Where is the evidence that this is an efficient police technique? Might not more crime be prevented and detected by other uses of the same manpower without the large scale, unfocussed intrusions on personal privacy that electronic surveillance involves?

The proposed right of privacy act would establish a blanket prohibition against the interception of wire communications. Wire communications involve the interstate communications network, and it has long been clear that Congress has plenary power in this area. The statutory ban would close a major gap in existing law, by making clear that interception alone or divulgence alone would be a crime. Section 605 of the Communications Act of 1934 (47 U.S.C. 605) prohibits "interception and divulgence" and has long been subject to the interpretation that interception alone is not an offense.

The bill also deals with eavesdropping. Like wiretapping, eavesdropping involves a pervasive invasion of the privacy of conversations. Its incidents, as this subcommittee has dramatically demonstrated in previous hearings, range far beyond the overhearing of telephone conversations. The sophisticated electronic devices presently available and aggressively promoted on the market are capable of intruding into almost any conversation anywhere. Such devices, highly portable and easily concealed, can be secreted in the innermost reaches of a person's home. They indiscriminately record his most private conversations. They can be used to overhear conversations even where there has been no physical trespass on private premises.

It is therefore essential that any enactment contain, as does the bill before the subcommittee, a comprehensive ban on the use of electronic, mechanical, or other devices for the purpose of eavesdropping. The disclosure or use of information obtained by eavesdropping is and must also be proscribed.

The prohibitions against wiretapping and eavesdropping apply only when none of the parties to the conversations has consented to the activity. Quite different practical and legal considerations come into play when one of the parties to the conversations has authorized the surveillance. The use of electronic devices in such circumstances has consistently been upheld by the Supreme Court against constitutional attack.

In addition to the broad prohibitions against the use of wiretapping and eavesdropping devices, the statute will reach the sources of supply of these devices. It contains specific prohibitions against the manufacture, shipment, or advertisement of devices whose design renders them primarily useful for the purpose of wire interception or eavesdropping. This section will eliminate many objectionable devices now readily obtained on the market, such as the spike microphone, the cufflink microphone, the martini olive transmitter, and other devices whose design indicates that their primary purpose is to facilitate the surreptitious overhearing of private conversations. This section will not affect the manufacture or shipment of simple induction coils, tape recorders, or other innocent electronic equipment even though they may be adaptable to wiretapping or bugging uses. It should be noted, however, that the bill prohibits the advertisement even of legitimate devices, whenever the advertisement promotes the use of the devices for wiretapping or eavesdropping.

Only wiretapping and eavesdropping directly related to and necessary for the protection of the security of the Nation is excepted from the prohibitions contained in the bill. Even in this area, however, no information obtained as a result of such measures will be admissible in evidence in judicial or administrative proceedings. Other use or disclosure of such information is prohibited except as essential to national security. The national security exception is a necessary provision in the statute; the evidentiary restriction, however, will serve an important function in confirming such activity to the extremely narrow bounds that are appropriate.

This bill is far-reaching and comprehensive. When enacted, it will afford major protection to a fundamental right of all Americans. Legislation to safeguard the right of privacy is long overdue.

Senator Long. Thank you General, for a fine and very helpful statement.

I am interested in the first page of your statement, where you state the public safety will not be in wiretapping. Are you familiar with the testimony that we had in some of our hearings from various Federal agents who tell us that they do not think the use of wire-tapping and snooping devices have been helpful to them?

General CLARK. Yes, Mr. Chairman, I am generally familiar with that testimony.

Senator LONG. In much of the testimony we have had from Federal agents, they tell us that in practically all cases they failed, and, as a result, there have been very few successful convictions.

I am concerned about another matter, too, General, that I would like to ask you about.

Section 2511(a)(1) of the bill states:

Such device is affixed to any wire, cable, or other connection used in wire communication.

I call your attention to the word "affixed." How about gadgets that gather in the electronic signal by induction rather than by a fixed wire? They have a certain type coil, as I understand, that they place just beside the wire—not directly connected with it—that will pick up the electronic impulse the same way. Will the bill cover that type of coil?

General CLARK. Certainly, the bill would cover the use of induction coils where they intercept transmissions over wires. That would be more directly covered by section 2510, the provision dealing with wire interception, as distinguished from section 2511, the provision dealing with eavesdropping. Section 2511(a)(1) is directed primarily against the so-called leased line use of wires for eavesdropping.

Senator LONG. You feel there would be no question then but what the use of an induction coil, which the Japanese sell for less than \$3, would be prohibited under the bill?

General CLARK. No doubt whatsoever that that would be prohibited under section 2510(a)(1).

Senator LONG. Section 2511(a)(2) prohibits eavesdropping by a device which transmits communications by radio. Is this statement broad enough in your judgment to cover sophisticated devices that are in the experimental stage such as the laser beam?

General CLARK. We think that it might. We would have to look at each device in its particular circumstances. The five numbered subparagraphs in section 2511 are specifically recognized techniques of Federal legislation based on powers delegated under the constitution; and that is the reason we have taken these approaches rather than a more general approach.

Senator LONG. General, you mentioned in your statement that the Federal Government had the plenary authority in eavesdropping and wiretapping legislation. What about the use of bugs and electronic gadgets where they are not used in interstate commerce?

Is it your view, and the view of the men who worked on it, that the fact that the various gadgets, or some parts of them, are transmitted in interstate commerce gives us the necessary Federal authority to regulate them?

General CLARK. Yes. When I used the word "plenary," it was in connection with wiretapping, where you have a clear and direct involvement of interstate commerce.

Senator LONG. I would like to have your statement in regard to that.

General CLARK. In addition, in section 2511(a)(2), we have reached radio transmission, which also clearly involves the commerce power of the Federal Government. In section 2511(a)(3), we have prohibited eavesdropping through the use of equipment manufactured in a different State. This provision will place a very severe limitation on those who seek to engage in what you might call "local eavesdropping." In section 2511(a)(4), we have specifically reached places where the commerce clause historically has been used—on premises of businesses or commercial establishments which, themselves, affect commerce. In section 2511(a)(5), we have provided a total prohibition in areas of Federal legislative jurisdiction such as the District of Columbia, Puerto Rico, territories and possessions. Finally, in section 2512, we have used the commerce clause to ban the manufacture, distribution, or advertising of wiretapping and eavesdropping devices.

Senator LONG. In your judgment, that provides sufficient base to legislate in that field?

General CLARK. That is correct.

Senator LONG. Federal legislation?

General CLARK. That is correct.

Senator LONG. General, section 2514 provides an exception for the national security, and I quote:

Any other serious threat to the security of the United States.

So the legislative history will be clear—as clear as possible on this point—I would like for you, as the Attorney General, to tell us whether this section is meant to exempt law enforcement officials in such fields as organized crime, criminal intelligence, gambling, prostitution, bribery, extortion, and so on?

General CLARK. The language to which you refer, "any other serious threat to the security of the United States," follows the language "actual or potential attack or other hostile acts of a foreign power."

So, we are speaking only of matters that directly affect the national security and are a threat to the Nation.

This bill would, therefore, prohibit the use of wiretapping for investigation of gambling, numbers, prostitution, and such things as that.

Senator LONG. I have observed over the years that some agencies may have become so enthused and so zealous—overzealous—that they feel even a minor crime that they are interested in affects the national security, and I want to be clear that this bill does not make the exception for the use of wiretapping and electronic gadgets for such cases.

General CLARK. The exception, first, is only for the Federal investigative agencies. It is not an exception for State and local law enforcement. It would be supplemented by additions to the regulations that are now in effect controlling the use of this equipment in Federal establishments, and certainly the language seems perfectly clear that it is directed only at direct threats to the national security.

Senator LONG. As you know, of course, as well as I do, part of the opposition to the bill which we are considering now comes from some of the people who are interested, I think, more in law enforcement than

they are in protecting the rights of the citizens—their constitutional right to privacy. There must be a proper balance.

I want to be clear that our record here is such that they will not be in a position to say, "Well, we think this affects our national security, and we are entitled to use this type of eavesdropping or electronic gadgets." There is no question in your mind but that the use of devices would not be permitted under the statement that they affect the national security?

General CLARK. That is correct, except in the national security area.

Senator LONG. I noticed an editorial in the *Washington Star* of Friday, March 17, pointing out, and rightly so, that the conflict of interest in this particular bill—the difference between this and other bills which may be considered in the Congress—is that some people are primarily interested in law enforcement in preference to the protection of the constitutional rights of the citizens. This is the reason that I am anxious to be sure that there is no misunderstanding in this particular field.

While we are talking about law enforcement—this may not be in this bill and you may not want to talk about it—but there have been some news articles and a great deal of interest indicated by this committee in the invasion of rights of the privacy of our citizens by any public official who employs his own private law enforcement agency, in no way obligated or that has any responsibility related directly to the citizens and is only obligated to the officials who employ them.

Would you care to comment on that, how it might affect the privacy of citizens or whether it is an invasion of the right of privacy at this time? You may not have had time to go into this.

General CLARK. I am not sure that the threat to the invasion of the privacy of citizens would be essentially different where the investigators are private rather than public officials. It depends on what they do. We might believe that the public officials would tend to be more even-handed and fair-minded in their application of investigative resources. That would be my personal judgment. Still, it would depend on the conduct of the individual investigators.

I think there are many other questions that are quite serious, regarding the desirability of using private resources for public law enforcement. I think law enforcement is the first business of government and perhaps the last that we would ever seek to have performed by private individuals without public responsibility. There is also the very difficult problem of the confidentiality of criminal intelligence that is developed where a private organization might be engaged by private clients with an interest adverse to the public, perhaps, at some later date.

Senator LONG. One of the great differences and great dangers in that type of law enforcement is that that particular agency is just responsible only to the individual, whether he is a public official or not, that employs him. They are not answerable to the people. They have no obligation to them as law enforcement officials. Do you see any danger to law enforcement officials in this country, to permit that type of operation?

General CLARK. Are you talking about the dangers of invasion of privacy again?

Senator LONG. The law enforcement in general because law enforcement in general is the concern of this committee and of this type of legislation.

General CLARK. I would start with the belief that if public law enforcement is not adequate to protect the public, then there is very little hope that we can secure that protection through private means, and I would be very concerned about anything that would take the focus off the great need for excellence in every level of law enforcement in every jurisdiction. This is where we need to build and improve the quality of our public service.

Senator LONG. I agree with you entirely. I am very apprehensive about that type of legislation.

I notice a paragraph in the paper quoting Governor Kirk of Florida. He said: "Your Governor has just left the President of the United States", and then he added, "I told him and Attorney General Ramsey Clark that if they want to learn about law enforcement, they should come to Florida."

Of course, we know that Florida is the area where this type of operation is in effect. I am concerned as to the effect it would have on law enforcement and the violation of privacy that is covered by this type of bill.

General, there are two or three more sections that I want to ask you about for the record, so we are sure there is no misunderstanding.

In section 2510(b)(1), employees of telephone companies can intercept wire communications in the normal course of employment while engaged in any activity which is a necessary incident of the rendition of service.

Now, would this allow telephone companies to return to the practice of service-observing or monitoring customer-to-customer calls up to 10 minutes in length which we found that they had been doing in a practice which they admitted they have abandoned as of June 1, 1966? Is there a possibility that we would revert to that and is there some tightening up of this section that is desired?

General CLARK. We feel that section 2510(b)(1) is adequate to the need. The telephone companies are rendering an important service, and the quality of their service has to be high. To the extent that it is necessary to them, in guaranteeing good service, to know the quality of particular service, such monitoring should not be prohibited. At the same time, I think it is perfectly clear under the bill that this does not in any way authorize them to listen to conversations of people for the purpose of hearing the content of the conversations.

Senator LONG. General, we found that they were listening, not only to see whether the connection was made, but listening to the conversations up to 10 minutes in length. They told me that the employees were not aware of what was being said, but their own regulations say if they were talking to the FBI or Government agencies, then they should not listen any further. So, it is a little difficult to see how they were not paying attention to the conversations, not being able to tell what they were. We also heard they were listening to Government phones here in Washington, between agencies, up to 10 minutes in time. When our committee started an investigation of this, one of the major companies denied that they had made the change for that reason but in June they abandoned that type of operation. I can understand that they might need to do it to see if there

was a proper connection made. But it is difficult for me to condone a company that will permit their employees to listen in to calls up to 10 minutes in time. In a northeast city, they even listened to the Government calls and other Federal agencies' calls on whatever was going on. So, I want to be sure that this is tight enough, that after the light goes out, that they do not go back to that practice.

General CLARK. Well, I think this type of listening will be permitted only where it is necessary for the rendition of the service. Perhaps the Federal Communications Commission can give some assistance in this area, because of the need to watch the practices and see what they are. The telephone companies have no interest or business in listening to the contents of conversations themselves, and that should not be permitted.

Senator LONG. I am sure the companies themselves will do it, but I am sure the girls have heard some very interesting conversations when they listened in in 1965. They admitted they listened in on, I believe, 39 million telephone calls. So, I think that we will have the A.T. & T. make some further statements on how they regard this section.

General, referring to section 2515(d)(1). This would exempt extension telephones furnished to the subscriber or user by a communications common carrier in the ordinary course of its business.

Would this permit the telephone company to continue the leasing of service-observing equipment to be used by employers to monitor calls of employees?

General CLARK. This is the definition of electronic, mechanical or other device that you are referring to?

Senator LONG. This is in situations where large banks have listened to their clerks' conversations, and I understand newspapers and other companies have used the same practice. Hospitals have also used this practice to listen to conversations between the doctors, nurses, and the patients in the hospital. Would this permit a continuation of that practice?

General CLARK. Only to the extent that the practice involves the use of extension telephones.

Senator LONG. It certainly would not be the intent of the bill to promote this practice?

General CLARK. That is correct.

Senator LONG. What about the beep tone that is now, under the present regulations, to be used wherever a recording is made?

General CLARK. This legislation would not affect that regulation.

Senator LONG. General, it has been the conclusion of some of us that some of the past Attorneys General have been reluctant to prosecute violations of section 605. We know some of the agencies have gone so far on the fine-spun legal theories that if one agent makes the tap, and he tells his brother agent, that is not a divulgence. We know this. In view of that reluctance of the past, would it be wise to include civil remedies similar to those in antitrust matters, injunctive relief, and so on?

General CLARK. We considered that, and it was our judgment that it probably was not necessary. I think the reluctance of the Attorneys General to move with any firmness in view of the history of section 605 is more understandable. It is equal justice, because when the situation gets as entangled as the laws relating to wiretapping are

today, there is only one way to cut the Gordian knot and that is legislation. That is why we are so anxious for this committee to consider and take favorable action on the bill as proposed.

Senator LONG. General, there is nothing in S. 928 that deals with the suppression of evidence or leads from wiretaps or eavesdrops in either Federal or State courts, or both.

In other words, they can do the wiretapping and the evidence is not admissible, but the leads they get may be used. Should there be such a provision included in this legislation to prohibit this?

In some cases, as you know, certain Federal agents have had State and municipal agents do the wiretapping for them to get their leads. There have been other cases where even Federal agents wiretapped. They do not use that evidence themselves, but they use the leads in getting other evidence.

Our committee has testimony, incidentally, from a certain agency that they bring the agents in who do the wiretapping before he goes before a grand jury or petit jury, and if he would admit that he got this, they would never send him in, but they would use the lead of the evidence they had to go around and get this evidence from another source (using that lead). In view of that situation and the history of that type of operation, would there be any need to add provisions or a provision dealing with the suppression of evidence from such leads?

General CLARK. We have felt not for two reasons.

Senator LONG. You say you have felt not?

General CLARK. We have not felt so for two reasons: First, we think that the new legislation will place a heavy, heavy inhibition on the use of these devices and that the matter will not be nearly so significant.

Second, the courts have been dealing for a long time with the evidentiary rules, and the present state of judicial interpretation seems adequate for the protection that we need here.

Senator LONG. A couple more questions I want to ask you that I think are vital to all of us:

If S. 928 is enacted, will this really be aiding the criminals as the opponents of this bill claim?

General CLARK. Not at all, in my judgment; not at all.

Senator LONG. Will passage of S. 928 limit in any way your department's war on organized crime?

General CLARK. I think not. There is a good bit of evidence that I can offer. In calendar 1966 the number of indictments under our organized crime statutes and the number of people indicted were more than 25 percent higher than any year in history. The evidence used in securing these indictments was not developed in any way through the use of electronic surveillance.

Senator LONG. General, are you familiar with the fact that in some of the States which permit wiretapping, and use wiretapping and eavesdropping very extensively, their rate of crime has increased higher, percentage-wise, than many States who do not permit that practice?

General CLARK. I think that is true. Whether it is happenstance is another question, but it would indicate that wiretapping is not the cure-all for crime.

Senator LONG. And permitting wiretapping or bugging of that type, we run the chance of convicting one individual, but at the same time losing our right of privacy and other constitutional guarantees that may be worth more than one or two convictions.

General CLARK. That is true. But I really do not subscribe to the balance theory.

In my judgment, we have the potential to enlarge simultaneously the public safety and the right of privacy. I do not think it is a matter of balance. I think it is a matter of the devotion of adequate resources to secure the public safety, and I think that if we do this, we can enlarge both our liberty and our public safety. And this is the thing that we need to do.

Senator LONG. The manpower that you would use in placing wiretaps and bugs could be used much more effectively and much better in other means of law enforcement?

General CLARK. Yes, I rather think so. I can understand how law enforcement agencies that have been using wiretapping feel that it has been helpful to them. When you work with something for a long time and you get so close to it, it becomes a standard technique with you. Until you have studied the thing through and have seen the other more effective ways, you might think this bill would limit you.

In our judgment, the manpower that is devoted to wiretapping and electronic eavesdropping in some police departments might be more beneficially used for purposes of public safety in other ways.

Senator LONG. In your judgment, the enactment of this bill will not be aiding organized crime and will, in no way, affect your department's war on organized crime?

General Clark. That is correct.

Senator LONG. Until the new bill is enacted, General, would it not help if the Department of Justice enforced section 605 as it reads now, in regard to divulgence to any person, so that it will include the divulgence to another agent?

General CLARK. As I indicated earlier, I think the resolution for the unhappy state of the law today is legislation. It is late in the day, and I think that it would be unwise and unfortunate to try to change the present policy under section 605. Certainly, we would have to give a long lead to law enforcement before we did so, if we were going to be equal in our application.

Senator LONG. I agree with you. Legislation would certainly be the answer to it.

You are satisfied, are you, General, that the Department of Justice is not now engaged in any wiretapping except in national security cases?

General CLARK. That is exactly right. There is no wiretapping or other electronic surveillance engaged in by the Department of Justice, except in cases directly affecting the national security. When I say cases, I do not mean lawsuits. They are investigations directly related to the national security.

Senator LONG. They are a very limited number and under very strict control from your office?

General CLARK. Approximately 38, very strict controls.

Senator LONG. In your office?

General CLARK. Yes, in my office.

Senator LONG. Mr. Fensterwald?

Mr. FENSTERWALD. Mr. Chairman, I am afraid you asked all the questions that I had in mind.

Senator LONG. Mr. Waters?

Mr. WATERS. Thank you, Mr. Chairman.

General, in view of the fact that States like New York, for example, permit wiretapping based on an amendment to their State constitution of 1939 on ex parte order, States like Maryland permit wiretapping, and States like Illinois prohibit it, is it your contemplation that this statute will preempt the existing State statutes dealing with wiretapping?

General CLARK. Yes, to the extent that they are inconsistent, the States would have to yield to the Federal legislation.

Mr. WATERS. So, there will be a consistency between all of the 50 States, and you would not have a situation where a man, thinking a telephone conversation is private, may find it is not private according to the State to which the conversation is directed?

General CLARK. That is correct.

Mr. WATERS. With respect to your comment on the telephone company's practices, the service-observing, as it is called, would not be subject to any interference, as this is designed solely to make certain that the subscriber's telephone service is adequate and is kept up to standard, and it does not contemplate any interception or listening beyond what is absolutely necessary for the rendition of that service?

General CLARK. That is right.

Mr. WATERS. I am glad to hear your comment on section 2514. You are satisfied in your own mind, as the Attorney General of the United States who has the responsibility, that our national security would not be in any danger as a consequence of the passage of this law?

General CLARK. That is true.

Mr. WATERS. Mr. Clark, I would like to cover just one other point. A good deal of equipment which is used in wiretapping and in electronic eavesdropping is the kind of thing which has a utility other than that of eavesdropping. So that we can clarify the best we can for the record, do you have any comment as to how the use of such devices for legitimate purposes would be enforced? An object which can be used for electronic interception may also have a legitimate purpose. How are you going to distinguish it?

General CLARK. In the drafting of the bill, this was the most difficult problem for us to resolve. We have directed the manufacturing and distribution prohibition to those pieces of equipment which are primarily useful for the purpose of wiretapping or eavesdropping. It is obviously quite important that we not in any way impair the development of all the good things that electronic technology can bring to us. So, it is only where they are primarily useful for the purpose of wiretapping or eavesdropping that their manufacture or distribution is prohibited. This is fairly narrow. In addition, in the advertising prohibitions, you cannot advertise even the most general type of electronic equipment, dictating machines and things like that, for purpose in such a way as to promote their use for wiretapping or eavesdropping. However, the specific prohibitions on manufacturing and shipment are more narrow and limited.

Mr. WATERS. Thank you, General.

Senator LONG. Thank you, General. Your statement and comments have been very helpful. We are grateful to you and Mr. Vinson for coming.

General CLARK. Thank you, Mr. Chairman.

Senator LONG. I am sure the members of our staff will call on you from time to time to work out some of the problems with you.

Thank you very much.

Mr. FENSTERWALD. Mr. Chairman, without objection, I would like to place in the record at this point three articles:

One is "Wiretapping and Eavesdropping: A Review of the Current Law", by Francis C. Sullivan, which is an up-to-date review of the law.

Secondly, an article which is coming out in April, 1967, entitled, "Electronic Eavesdropping" by Robert M. Brown, which is a very good description of the present available electronic devices.

Last, an article compiled by Mr. Norman J. Small of the Legislative Reference Service of the Library of Congress, entitled "Wiretapping and Eavesdropping: An appraisal of the Legal Issues Arising from Their Use."

I think these will be helpful to have in the record.

Senator LONG. Without objection, so ordered.

The three articles referred to are as follows:)

WIRETAPPING AND EAVESDROPPING: A REVIEW OF THE CURRENT LAW

(By FRANCIS C. SULLIVAN*)

Over the years since its invention, the telephone has passed through the stages of being a luxury and convenience until today it is generally considered a necessity for both business and home. At the present time, there are more than eighty-eight million telephones in use in the United States.¹ Recent estimates place the number of telephone conversations in the United States at one-hundred fourteen billion per year² and the number per person at 591 per year.³

This wide usage of the telephone provides the background for the problem of wiretapping, which, as used here, refers to the surreptitious overhearing of telephone conversations by mechanical or electronic means.⁴ The problem of the legality of eavesdropping and the use of evidence procured through wiretapping has been before the courts for almost forty years, and barring some dramatic change of circumstances seems certain to be a matter for judicial concern for at least the next forty years.

It is well to remember that we are dealing here with a basic tool of criminal investigation.⁵ This simple fact is sometimes overlooked in the heat and passion surrounding partisan discussion of this subject, resulting in strong preconceptions and even stronger blanket condemnations. Reduced to its most basic form, wiretapping is nothing more than a specialized type of surveillance, a method of investigation as old as the organized detection of crime.

Wiretapping came into widespread use as an investigative tool in order to combat the use of the telephone by the criminal element in society as an efficient scientific aid to the planning, preparation, and commission of crime. Since the

*Professor of Law, Loyola University of Chicago; Visiting Professor of Law, Louisiana State University (1966-67).

¹ AMERICAN TELEPHONE & TELEGRAPH CO., THE WORLD'S TELEPHONES 2 (1966).

² *Id.* at 11.

³ *Ibid.* For a discussion of the relation of these statistics to the problem of wiretapping and eavesdropping see *Hearing Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary of the United States Senate Pursuant to S. Res. 234, 85th Cong., 2d Sess., on Wiretapping, Eavesdropping, and the Bill of Rights*, Pt. 1 (1958).

⁴ See generally DASH, SCHWARTZ & KNOWLTON, THE EAVESDROPPERS (1959); New York State Legislature, REPORT OF THE JOINT LEGISLATIVE COMMITTEE ON PRIVACY OF COMMUNICATIONS AND LICENSURE OF PRIVATE INVESTIGATORS (1962); CAL. SENATE COMMITTEE ON JUDICIARY, REPORT ON THE INTERCEPTION OF MESSAGE BY THE USE OF ELECTRONIC AND OTHER DEVICES (1957).

⁵ This article is limited to a consideration of wiretapping and eavesdropping by law enforcement officers. For one consideration of the use of wiretapping and eavesdropping by private investigators see Lipset, *The Wiretapping-Eavesdropping Problem: A Private Investigator's View*, 44 MINN. L. REV. 873 (1960). For examples of other uses of wiretapping and eavesdropping see Ruebhausen & Brim, *Privacy and Behavioral Research*, 65 COLUM. L. REV. 1184, 1190-91 (1965).

telephone provides an immediate, direct, and private means of communication, freely available to criminals, some specialized method of surveillance was sought by law enforcement agencies to counteract the effects of the perversion of the telephone to criminal use.

It must be conceded by all that wiretapping is a most useful device for the detection of crime and the production of evidence of crime.⁶ It has the great benefit of almost complete secrecy, while providing the ability to monitor and record verbatim telephone conversations at substantial distances. The cost of wiretapping operations is small in terms of both manpower and equipment, and, when compared to the information potentially obtainable, this cost becomes minute. It must likewise be conceded that wiretapping by its very nature constitutes an invasion of the privacy of telephonic communications, and provides a ready potential for abuse.⁷ The basic difficulty with wiretapping is that it is indiscriminate—it subjects to official scrutiny all conversations, innocent as well as criminal, conducted by all persons using the tapped line. The balancing and weighing of these competing interests has proved to be a difficult task for the courts.

Background: Development of the Law

Wiretapping was first brought before the Supreme Court of the United States in 1928. The decision in *Olmstead v. United States*⁸ has remained the basic law in this area for almost forty years, despite the vigorous and classic dissents by Justice Holmes,⁹ Brandeis, Stone and Butler.¹⁰ The majority in this five to four decision laid down the rule that evidence obtained by federal officers through tapping telephone wires, even though in violation of a state statute, may be used in a criminal prosecution in the federal courts. Clearly the most significant holding by the Court was that wiretapping does not constitute an unreasonable search and seizure in violation of the fourth amendment, because it does not involve a "physical invasion of the premises."¹¹ Most of the law subsequently developed in this area is based upon this refusal to apply constitutional restrictions to the wiretapping method of producing evidence.

THE FEDERAL COMMUNICATIONS ACT: SECTION 605

In the course of the decision, the majority invited Congress to enact legislation to exclude wiretap evidence, a result which the Court thought could not be achieved merely by judicial interpretation of the fourth amendment. It was indicated that legislation could be enacted to protect the secrecy of telephone messages by providing for the exclusion of intercepted messages from evidence in criminal trials. Subsequently in 1934, Congress enacted the Federal Communica-

⁶ See ROGERS, *The Case for Wire Tapping*, 63 YALE L.J. 792 (1954); Silver, *The Wiretapping-Eavesdropping Problem: A Prosecutor's View*, 44 MINN. L. REV. 835, 844 (1960).

⁷ See AMERICAN CIVIL LIBERTIES UNION, *THE WIRETAPPING PROBLEM TODAY* (March 1962. Revised April 1965).

⁸ 277 U.S. 438 (1928).

⁹ Mr. Justice Holmes dissented on nonconstitutional grounds, saying: "I think it a less evil that some criminals should escape than that the Government should play an ignoble part." *Id.* at 470. The much quoted phrase "dirty business" was used by Holmes to refer to wiretapping in violation of the Washington state statute, not to wiretapping in general. *Ibid.*

The late W. H. Parker, former Chief of Police in Los Angeles, in describing police work in general, observed: "It is often a dirty business—a very dirty business—because of the warped nature of the criminals with whom the police must often deal. But history has shown and is continuing to show that it is a necessary business, and that the responsibility must be placed on someone." Parker, *Surveillance by Wiretap or Dictograph: Threat or Protection?* 42 CALIF. L. REV. 727, 728 (1954).

¹⁰ Justices Brandeis, Stone and Butler dissented on constitutional grounds. Mr. Justice Brandeis introduced the concept of a right to privacy which should be protected not by the fourth amendment, but by the due process clause contained in the fifth and fourteenth amendments. He described the right to privacy as "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." 277 U.S. at 478. It is interesting to note that these dissents have been cited and quoted much more than the majority opinion, almost to the point of submerging the legal rationale of the decision in the sea of eloquence produced by the dissenters.

¹¹ The majority reasoned that the prohibition of the fourth amendment extends only to searches of a man's person, his house, his property and his effects, and that tapping a telephone wire does not involve any of these. The fourth amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

The Court also found no violation of the fifth amendment, there being "no evidence of compulsion to induce the defendants to talk over their many telephones," and since the defendants were "voluntarily transacting business without knowledge of the interception." 277 U.S. at 462. One is led to wonder whether this interpretation of the fifth amendment retains any validity in the light of recent decisions of the Supreme Court. In this connection, consider the following statement of the Court in *Miranda v. Arizona*, 384 U.S. 436, 467 (1966): "Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed from being compelled to incriminate themselves." Note, however, that *Miranda* still speaks of some degree of compulsion before the fifth amendment privilege is violated.

tions Act and in the now famous section 605¹² provided that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person"

Many commentators have attacked the notion that section 605 was in fact the response of Congress to the invitation of the Supreme Court in *Olmstead*.¹³ It appears that the Act was passed with little debate or consideration of this section, and the clear purpose of the Act seems to be simply to create the Federal Communications Commission as a new governmental agency with powers to regulate the communications industry. The origin of section 605 is apparently to be found in section 27 of the Radio Act of 1927,¹⁴ which may well have found its way into the 1934 Act merely by way of re-enactment. There seems to be no support for the view that Congress intended section 605 to operate as a ban on the use of wiretapping as a means of producing evidence for use in criminal trials.

The thirty-one words quoted above have, however, been lifted from their context in a statute containing some 20,000 words¹⁵ and used to control the use of evidence obtained through wiretapping.¹⁶ This approach was first used by the Supreme Court in 1937 in the first *Nardone* case.¹⁷ Here it was held that section 605 applies to federal law enforcement officers as well as to any other person, and that the prohibition of "divulgence" forbids divulgence by use of the intercepted communication in evidence in a federal criminal trial. The Court, giving the statute a most literal interpretation, stated:

"the plain words of § 605 forbid anyone, unless authorized by the sender, to intercept a telephone message, and direct in equally clear language that 'no person' shall divulge or publish the message or its substance to 'any person.' To recite the contents of the message in testimony before a court is to divulge the message."¹⁸

As a result, the exclusionary rule, sought to be established by the *Olmstead* minority, was created by statutory interpretation of section 605 and applied to the federal courts, despite the fact that the Act itself contained no such exclusionary provision.¹⁹ This decision dealt a double blow to the hopes of prosecutors and law enforcement officers. It had been contended that the Act did not by its terms apply to law enforcement officers and that they should, therefore, be excluded from its provisions entirely.²⁰ In addition, it had been argued that testimony in open court consisting of evidence of criminal conduct could not have been contemplated by Congress or such intent would have been spelled out clearly in the statute. It seems apparent that the philosophy of the *Olmstead* minority found a receptive audience in the *Nardone* court to the extent that the new statutory interpretation reached the result desired.²¹

Two years later, the second *Nardone* case²² provided the Supreme Court with a vehicle to extend the newly created exclusionary rule to the "fruit of the poisonous tree."²³ Consequently, not only the communication intercepted by a wiretap, but also any evidence obtained as a result of information produced through the wiretap, must also be excluded from evidence in the federal courts.²⁴ This decision strikes directly at the great value of wiretaps as a means of producing

¹² 48 Stat. 1064 (1934).

¹³ See Rosenzweig, *The Law of Wire Tapping*, 32 CORNELL L.Q. 514, 534 (1947); Westin, *The Wire-Tapping Problem: An Analysis and a Legislative Proposal*, 52 COLUM. L. REV. 165, 174 (1952).

¹⁴ 44 Stat. 1162 (1927).

¹⁵ Anthony P. Savarese, Jr., Chairman of the New York State Legislative Joint Committee on Privacy of Communications, has described section 605 as "a brief, obscure, and undebated clause in that Act—truly a needle in a legislative haystack." Savarese, *Eavesdropping and the Law*, 46 A.B.A.J. 263, 336 (1960).

¹⁶ At least one federal court summarily rejected the application of section 605 to wiretapping in the period shortly after the passage of the Federal Communications Act. *Smith v. United States*, 91 F. 2d 556 (D.C. Cir. 1937).

¹⁷ *Nardone v. United States*, 302 U.S. 379 (1937).

¹⁸ *Id.* at 382.

¹⁹ The Act provides a penalty of imprisonment for not more than one year (two years for subsequent convictions), and a fine not exceeding \$10,000, or both, for "Any person who wilfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful" 47 U.S.C. 501. The frequent use of the exclusionary rule as a means of enforcement of constitutional provisions and statutes seems to indicate a feeling on the part of the Supreme Court that criminal penalties are ineffective to accomplish the purpose for which they were created. This is a serious denigration of the criminal law.

²⁰ 302 U.S. at 383-84.

²¹ Mr. Justice Roberts described wiretapping as "inconsistent with ethical standards and destructive of personal liberty." *Id.* at 383.

²² *Nardone v. United States*, 308 U.S. 338 (1939).

²³ This famous phrase was first used by Mr. Justice Frankfurter in this case.

²⁴ The Court thus made the wiretapping exclusionary rule co-extensive with the rule as applied in the search and seizure cases. See *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

leads for further investigative development.²⁵ If the source of the evidence is tainted by the method of its production—wiretapping—then the evidence is inadmissible in a federal criminal trial.²⁶

The next step was taken by the Supreme Court in the *Weiss* case,²⁷ where the application of section 605 was extended to intrastate communications making evidence of such communications obtained through wiretapping inadmissible in the federal courts.²⁸ This result closed an apparent gap in the law which would have allowed wiretapping and use of both a communication and its fruits where only a local conversation was involved.

The question of the defendant's standing to object to the introduction of evidence produced by wiretapping reached the Court in 1942. In the *Goldstein* case²⁹ the Supreme Court held that the protection provided by section 605 is personal to the participants in a telephone conversation, and only the participants in the intercepted conversation may object to its use in evidence. This principle has never been overruled and is presumably controlling today in the wiretapping area,³⁰ despite the fact that a different rule has been adopted in the search and seizure cases.³¹ If the goal is to prohibit the use of all wiretap evidence through strict application of section 605, then there appears to be little justification for this arbitrary limitation. Any use of an intercepted communication would seem to constitute a "divulgence" under the interpretation of *Nardone I*³² calling for the application of the exclusionary rule therein created.

On the same day, the Supreme Court held in the *Goldman* case³³ that the use of an electronic eavesdropping device,³⁴ without a trespass, whereby one side of a telephone conversation is overheard, does not violate either the fourth amendment or section 605.³⁵ This result represents an attempt to confine the application of section 605 to the typical wiretap situation where the interception is of both sides of the communication and is obtained by overhearing the conversation as it is transmitted through the telephone system. In the *Goldman* situation, all conversation taking place within the room could be heard through the electronic device. The fact that a portion of the conversation overheard happened to consist of one side of the telephone conversation was merely incidental. This is more properly an example of electronic eavesdropping which is considered hereafter.

THE CONSENT DOCTRINE

With the increasing use of the telephone and the introduction of the telephone extension, it was only natural that cases would arise in which one party to a telephone conversation, without the knowledge of the other party, authorizes a third person to listen to the conversation by means of a telephone extension. Such a case was presented to the Supreme Court in *Rathbun v. United States*.³⁶ In a rather surprising departure from the philosophy of prior decisions, the Court held that section 605 forbids only those interceptions not authorized by the sender, and, therefore, when one party consents to allow a third person to overhear a telephone conversation, there is no "interception" under section 605,

²⁵ It may be assumed, however, that law enforcement agencies continue to use wiretapping for this purpose. If the existence of a wiretap is never disclosed, the true source of any evidence so obtained will be unknown to the defense.

²⁶ For an excellent discussion of this rule see Bernstein, *The Fruit of the Poisonous Tree*, 37 ILL. L. REV. 99 (1942).

²⁷ *Weiss v. United States*, 308 U.S. 321 (1939).

²⁸ In this case the Government tapped a wire without the consent of either party. The recordings of the conversation were then used for force one of the parties to the conversation to consent to the divulgence of the contents of the intercepted message.

²⁹ The Court held such consent to be invalid under section 605. *Id.* at 329.

³⁰ *Goldstein v. United States*, 316 U.S. 114 (1942).

³¹ See *United States v. Gris*, 247 F.2d 860 (2d Cir. 1957); *Manger v. State*, 214 Md. 71, 133 A. 2d 78 (1957).

³² See *Jones v. United States*, 362 U.S. 257 (1960). The reliance in the *Goldstein* case on the then existing law in the search and seizure cases, which has since been changed, makes it possible to draw a contrary conclusion, but so long as wiretapping cases are determined on a non-constitutional basis, cases based upon the fourth amendment are not necessarily controlling.

³³ 308 U.S. 338 (1939).

³⁴ *Goldman v. United States*, 316 U.S. 129 (1942).

³⁵ The device used was a "detectaphone."

³⁶ The Court also held that the term interception "does not ordinarily connote the obtaining of what is to be sent before, or at the moment, it leaves the possession of the proposed sender, or after, or at the moment it comes into the possession of the intended receiver," but rather refers to "the taking or seizure by the way or before arrival at the designated place," 316 U.S. at 134. For a complete discussion of the various interpretations of the term "interception," as used in section 605, see Bradley & Hogan, *Wiretapping: From Nardone to Benanti and Rathbun*, 46 GEO. L.J. 418 (1958). The problem of the meaning of the term "interception" has become secondary to the question of consent in later cases. Bradley & Hogan, *supra* at 434-41.

³⁷ 355 U.S. 107 (1957).

both caller and intended receiver being considered as "senders" under the Act.³⁷ This decision, of course, opens the door for one very common and important investigative technique whereby an informer makes a telephone call to a suspect and "consents" to police monitoring of the conversation, resulting in the production of incriminating statements.³⁸ Since the *Rathbun* case, the federal courts have expanded the consent doctrine so that it is now immaterial whether the conversation is recorded rather than overheard directly, or that the extension is installed for the specific purpose of overhearing the conversation,³⁹ rather than being a regularly installed extension as in *Rathbun*.

Free and Voluntary

Perhaps the major problem facing the courts in cases involving consent is to determine whether the consent given by the participant in the telephone conversation is actually a free and voluntary consent. This problem is built into the typical investigative use of the doctrine where an informer is the consenting participant in the conversation.⁴⁰ It has been held that an authorization to monitor a conversation is not involuntary if given in hope of leniency.⁴¹ In so holding, the following standard was used:

"The Court would restrain the use of police coercion and of promises of leniency; and we would restrain the arm of the law from extending out into the community in search of the weak and the vulnerable who might be persuaded to authorize official monitoring of their telephone lines. We believe that the same strict standards which are required in order to validate a consent to a search and seizure should apply to a consent to intercept a telephone conversation."⁴² The situation in which an undercover agent or voluntary informant allows the monitoring or recording of his telephone conversations presents few problems. This is routine and merely a method of preserving accurately the terms of the conversation to which the agent or informant could freely testify in court.⁴³ The problem of the voluntary nature of the consent arises primarily from the prevalent police practice of using informers as decoys after their arrest.⁴⁴ The pressures exerted upon such a person are obvious, and this tends to throw doubt upon the voluntary nature of the consent in such cases. It appears certain that this problem will receive additional attention from the courts in the future.

The pen register

In many investigative situations it is not enough to overhear a particular telephone conversation. This is particularly true where the identity and location of the other party to the conversation are unknown. To provide at least a part of this information, law enforcement officers have made use of a device known as the pen register. This device has no capability for overhearing or reproducing a telephone conversation, but does record on paper dashes equal to the telephone number dialed on a telephone line to which the device has been connected.⁴⁵ With the telephone number available for each call made from a particular telephone, the law enforcement agency has a ready made list of the locations called,⁴⁶ which is a long step toward identification of the associates of the caller. At least one federal court⁴⁷ has held that the use of the pen register, without the consent of the subscriber, is a violation of section 605 inasmuch as the existence of a communication is thereby divulged. This holding appears to represent an unduly strict interpretation of section 605 by apparently ignoring the fact the the pen

³⁷ The Court interjected somewhat of an assumption of risk theory: "Each party to a telephone conversation takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation." *Id.* at 111.

³⁸ See *Wilson v. United States*, 316 F. 2d 212 (9th Cir. 1963), cert. denied, 377 U.S. 960 (1964); *United States v. Williams*, 311 F.2d 721 (7th Cir. 1963). The *Wilson* case has achieved quite a degree of independent fame due to its characterization by the author of the opinion, Judge Carter, as "a small horse soon carried." 316 F.2d at 213.

³⁹ *Wilson v. United States*, *supra* note 38; *Ferguson v. United States*, 307 F.2d 787 (10th Cir. 1962).

⁴⁰ This practice has become standard procedure in narcotics investigations.

⁴¹ *United States v. Zarkin*, 250 F. Supp. 728 (D.D.C. 1966).

⁴² *Id.* at 737.

⁴³ Recordings are frequently used to refresh the recollection of a participant in a conversation prior to trial. See *Monroe v. United States*, 234 F.2d 49, 57 (D.C. Cir. 1956), cert. denied, 352 U.S. 873 (1956).

⁴⁴ See *McClure v. United States*, 332 F.2d 19 (9th Cir. 1965); *United States ex rel. Dixon v. Pate*, 330 F.2d 126 (7th Cir. 1964).

⁴⁵ Devices are also available to provide numbers called from the new push button phones.

⁴⁶ This result is accomplished simply by referring to a "reverse listing" directory in which the listings are by number rather than by subscriber. Such directories are readily available in most areas.

⁴⁷ *United States v. Guglielmo*, 245 F. Supp. 534 (N.D. Ill. 1965). In this case the pen register was installed by the telephone company at the request of internal revenue agents. The court summarily disposed of the government's contention that the defendant had consented to such action by the telephone company by requesting the installation of telephone service, saying: "Recording calls by use of the pen register is only an occasional service of Illinois Bell Telephone Company and not a practice generally known to and accepted by its subscribers or published in its tariffs." *Id.* at 536.

register has no relationship to a communication sent over the telephone lines, and, as a matter of fact, does not indicate whether or not a call is ever completed. It is doubtful that a communication exists until a conversation begins between the parties, and on this basis there should be no violation of the provisions of section 605.⁴⁸

As a part of the ordinary accounting practice of telephone companies, a record is maintained of the date, numbers called, and duration of all long distance calls made from each telephone. It has been held that section 605 does not apply to telephone company accounting employees, and therefore such employees may disclose the existence of telephone listings, including private listings, and accounting records giving the above information.⁴⁹ With reference to long distance calls, therefore, all of the information which might be obtained through the use of a pen register, and more, is readily available and admissible in evidence if otherwise qualified.

The "beep" tone signal

Americans today, particularly in the business community, have become familiar with a "beep" tone signal on telephone lines indicating that the conversation is being recorded. This signal is not required either by statute or by regulation of the Federal Communications Commission, but is merely a prerequisite to approval of telephone tariffs governing the use of automatic recording devices maintained by the telephone company.⁵⁰ The one decision⁵¹ considering this matter indicates that the failure to provide this tone signal will not preclude the introduction of evidence obtained by recording a conversation with the consent of one party.

INTERCEPTION WITHOUT DIVULGENCE

There remains one major unanswered question in the wiretapping area. Section 605 prohibits the interception and disclosure of the contents of any communication by wire, but does the Act prohibit interception alone without divulgence? The Supreme Court has specifically left this question open.⁵² The Department of Justice has for many years taken the position that section 605 does not prohibit wiretapping as such, but only the disclosure or use for personal benefit of information so obtained.⁵³ As a result of this interpretation wiretapping has been and is conducted by the Federal Bureau of Investigation, and presumably by other federal law enforcement agencies as well,⁵⁴ but only with the personal authorization of the Attorney General. The Department has also taken the position that internal disclosure within the Department of Justice does not constitute a divulgence within the meaning of section 605.⁵⁵ Although the information obtained by wiretaps without the consent of one party may not be used as evidence, the wiretap is relied upon in certain cases⁵⁶ as an important investigative weapon providing important leads for further development by customary investigative methods.

This, of course, raises once again the prohibition against the use of the fruits of wiretapping established in the second *Nardone*⁵⁷ case. If it can be established that evidence constituting fruits of illegal wiretapping is being offered by the

⁴⁸ *People v. Schneider*, 45 Misc. 2d 680, 257 N.Y.S.2d 876 (Sup. Ct. 1965), held that the use of a pen register did not violate either defendant's right of privacy or section 605 of the Federal Communications Act. Cf. *Schmukler v. Ohio Bell Tel. Co.*, 116 N.E.2d 819 (Ohio Com. Pl. 1953).

⁴⁹ *E.g.*, *United States v. Russo*, 250 F. Supp., 55, 59 (E.D. Pa. 1966); *United States v. Gallo*, 123 F.2d 229, 231 (2d Cir. 1941).

⁵⁰ The final order of the Federal Communications Commission of November 26, 1947 (as amended May 20, 1948), 12 F.C.C. 1005-09, permits the use of recording devices in connection with foreign and interstate telephone service, when maintained by the telephone company, upon the condition that the "use is accompanied by adequate notice to all parties to the telephone conversation that the conversation is being recorded . . . by the use of an automatic warning device, which will automatically produce a distinct signal that is repeated at regular intervals during the course of the telephone conversation when the recording device is in use."

⁵¹ *United States v. Zarkin*, 250 F. Supp. 728, 738 (D.D.C. 1966) (by implication).

⁵² *Benanti v. United States*, 355 U.S. 96, 100 n.5 (1957); *Rathbun v. United States*, 355 U.S. 107, 108 n.3 (1957).

⁵³ Except for a brief preid in 1940, this has been the consistent position of the Department of Justice. See Katzenbach, *An Approach to the Problems of Wiretapping*, 32 F.R.D. 107 (1963). Some case support for this view is found in *United States v. Coplon*, 91 F. Supp. 867, 871 (D.D.C. 1950), *rev'd on other grounds*, 191 F.2d 749 (D.C. Cir. 1951): "The congressional act [section 605] as construed by the Supreme Court does not make wire-tapping an offense, but the interception and disclosure of the contents of the message constitute the crime. Both acts are essential to complete the offense."

⁵⁴ It has been suggested that the Treasury Department may hold a different view, however. See Donnelly, *Comments and Caveats on the Wire Tapping Controversy*, 63 YALE L.J. 799, 802 (1954).

⁵⁵ See Katzenbach, *supra* note 50; Rogers, *The Case for Wire Tapping*, 63 YALE L.J. 792 (1954); Browell, *The Public Security and Wire Tapping*, 39 CORNELL L.Q. 195 (1954).

⁵⁶ According to the Attorney General, the Federal Bureau of Investigation is authorized to tap wires only in cases involving national security or human life. Katzenbach, *supra* note 50, at 108.

⁵⁷ 308 U.S. 338 (1939).

prosecution, *Nardone II* applies and the evidence should be suppressed. The difficulty lies in establishing wiretapping as the origin of the evidence. *Nardone II* recognized this problem and established a procedure which hopefully would allow a defendant to raise this question. The basic requirement is that the defendant establish in the first instance to the satisfaction of the trial judge that wiretapping was in fact used by the investigative authorities in his case.⁵⁸ This fact should be established by filing a motion to suppress the particular evidence complained of prior to trial. Unless the defendant has had no earlier opportunity in the particular situation to make such a motion, no such motion to suppress should be allowed during trial. At the hearing on the motion, if the defendant is successful in establishing that a wiretap was used, and this must be shown by specific facts,⁵⁹ then the burden is upon the prosecution to show that the evidence in question has an origin independent from the wiretap.⁶⁰ In the usual situation, this burden requires the prosecution to disclose the nature of its case, and thus presents the defense with a most valuable discovery device quite apart from the decision on the motion.

It is doubtful whether this procedure is generally effective to disclose the use of wiretap information or its fruits. In the usual case, the defense is working in the dark. There may be a strong suspicion that wiretapping was employed in the preparation of the particular case, but this is not sufficient. If the wiretap was installed and operated with the care generally used in such cases, it should remain undetected. If care is exercised in the use of the information obtained, it may not be at all apparent that a wiretap set in motion the events leading to the prosecution of the defendant. If the law enforcement agency involved is careful to conceal the fact that a wiretap was employed, this information may never come to the attention of the defense. Perhaps this is unavoidable, but so long as the prohibition on the use of nonconsensual wiretap information and its fruits exists, it seems only proper that defendant should be permitted to discover this fact. Since the prosecution should not be using this type of evidence as the law presently stands, should not the defense be allowed to satisfy its burden by requiring the prosecution to respond under oath to an interrogatory requesting whether a wiretap was employed in the investigation of the case?

THE LAW IN FEDERAL COURTS

Despite the qualms expressed by both commentators and courts as to the propriety and wisdom of the use of wiretapping as an investigative tool, the law in the federal courts is quite clear. Wiretapping unaccompanied by a "physical invasion of the premises" does not violate the fourth amendment.⁶¹ Wiretapping without the consent of one of the parties to a telephone conversation does violate section 605 of the Federal Communications Act,⁶² and evidence of the conversation, as well as any evidence constituting fruits of the conversation, may not be admitted in a criminal trial in the federal courts.⁶³ Only a party to a tapped conversation may object to the introduction of evidence obtained through wiretapping.⁶⁴ The consent to monitor or record a telephone conversation which will permit the use of such information in evidence must be given freely and voluntarily.⁶⁵ If the defendant in a federal criminal case is to raise the question of the use of evidence obtained through illegal wiretapping, he must file a motion to suppress such evidence and establish that a wiretap was employed in the investigation of his case. If he succeeds in establishing this point, then the prosecution must proceed to show that the evidence complained of had an origin independent of the wiretap,⁶⁶ or all such evidence must be suppressed.

⁵⁸ "The burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that wire-tapping was unlawfully employed. Once that is established . . . the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin." *Nardone v. United States*, *supra* note 57, at 341.

⁵⁹ See *United States v. Frankfeld*, 100 F. Supp. 934 (D. Md. 1951). Such hearings are generally referred to as "Nardone hearings."

⁶⁰ See *United States v. Costello*, 171 F. Supp. 10 (S.D.N.Y. 1959).

⁶¹ *Olmstead v. United States*, 277 U.S. 438, 466 (1928).

⁶² *Rathbun v. United States*, 355 U.S. 107 (1957); *Nardone v. United States*, 302 U.S. 379 (1937).

⁶³ *Nardone v. United States*, 308 U.S. 338 (1939); *Nardone v. United States*, 302 U.S. 379 (1937).

⁶⁴ *Goldstein v. United States*, 316 U.S. 114 (1942).

⁶⁵ See *Blanchard v. United States*, 360 F.2d 318 (5th Cir. 1966); *United States v. Ballou*, 348 F.2d 467 (2d Cir. 1965); *United States v. Kountis*, 350 F. 2d 869 (7th Cir. 1965), *cert. denied*, 382 U.S. 980 (1966).

⁶⁶ *Nardone v. United States*, 308 U.S. 338 (1939).

THE LAW IN STATE COURTS

The situation becomes much more complicated when the state law concerning wiretapping is under consideration. The reason for this is, of course, the interaction of section 605 of the Federal Communications Act with particular state laws.

As early as 1952, the Supreme Court was faced with the problem of whether or not the exclusionary rule created in the federal courts for violation of section 605 should be extended to the state courts. In *Schwartz v. Texas*⁶⁷ the Court concluded that section 605 does not contain "a clear manifestation" of the intention of Congress to render inadmissible in state courts evidence obtained by wiretapping. This is hardly surprising in light of the fact that no such "clear manifestation" appears in the Act with reference to the federal courts, but nevertheless the Court reaffirmed the application of the exclusionary rule in the federal courts. While some authorities believe that *Mapp v. Ohio*⁶⁸ has destroyed the vitality of the *Schwartz* ruling,⁶⁹ there is no such case authority up to the present time.⁷⁰ In order to justify extending the exclusionary rule to the states under the rationale of *Mapp*, it would be necessary to establish wiretapping as a constitutional violation, a proposition specifically rejected in the *Olmstead* case and subsequent rulings. Consequently, it is unlikely that the Court would indirectly accomplish this result.

Subsequent developments in the law relating to the use of wiretapping evidence in state courts have been primarily concerned with the effect of state statutes permitting wiretapping. In general, state statutes concerning wiretapping may be divided into two categories: those permitting wiretapping with or without official authorization,⁷¹ and those flatly prohibiting wiretapping by all persons, including law enforcement officers.⁷²

The New York practice

New York is the most well known of the states permitting wiretapping, and here the authority is granted not only by statute,⁷³ but also by specific constitutional provision.⁷⁴ Under the New York procedure, law enforcement officers may obtain a wiretap order from a judicial officer by presenting affidavits or sworn testimony which will satisfy the judge that there is reasonable ground to believe that evidence of crime may be obtained through the tapping of described telephone lines. In a recent decision,⁷⁵ the New York Court of Appeals has held that supporting testimony under oath is not required if the affidavits filed are sufficient to satisfy the judge of the existence of probable cause; but if the affidavit is insufficient for this purpose, additional examination must be made of the affiant under oath, and when probable cause is doubtful or indefinite from the affidavits, additional examination should be made. In other words, substantially the same safeguards are attached to the issuance of a wiretap order as are required for the issuance of a search warrant.

Since there is no exception in section 605 permitting wiretapping by state officers, even under the terms of a court order, every time a state officer acting under the terms of a wiretap order makes a tap and testifies in a state criminal trial as to the information thus obtained, he is violating federal law. This is the problem which has bedeviled the courts, both state and federal, and there appears to be no satisfactory solution in view. In its first consideration of this situation, the Supreme Court held⁷⁶ that evidence obtained by state officers acting under a state wiretap order is inadmissible in a federal criminal trial, the evidence being obtained in violation of section 605.

⁶⁷ 344 U.S. 199 (1952).

⁶⁸ 367 U.S. 643 (1961) (excluding evidence in state courts where obtained in violation of fourth amendment).

⁶⁹ See, e.g., Allen, *The Exclusionary Rule in the American Law of Search and Seizure*, 52 J. CRIM. L., C. & P.S. 246, 254 (1961): "the holding in *Schwartz v. Texas*, which permitted the states to admit wiretap evidence in state proceedings, was based in significant part on the analogous authority of *Wolf v. Colorado* (338 U.S. 25 (1949)). That authority has now been overturned."

⁷⁰ In *Williams v. Ball*, 294 F.2d 94 (2d Cir. 1961), Judge Friendly said: "We do not read *Mapp v. Ohio*, 1961, 367 U.S. 643, as overruling *sub silentio* *Schwartz v. State of Texas*—on which six Justices had expressly relied, only four months earlier, in the per curiam affirmance . . . of our decision in *Pugach v. Dollinger*, 2 Cir. 1960, 277 F.2d 739. . . . We find no basis in *Mapp* for extending its application to a state's receiving evidence the divulgence of which would violate a Federal statute." *Id.* at 96.

⁷¹ Approximately twenty-six states are in this category. See Criminal Law Comment, *Wiretapping: The State Law*, 51 J. CRIM. L., C. & P.S. 534, 538 n. 26 (1961), for a listing of these states.

⁷² Approximately nine states are in this category. See Criminal Law Comment, *supra* note 71, at 538 n.23.

⁷³ N.Y. CODE CRIM. PROC. § 813a.

⁷⁴ N.Y. CONST. art. I, § 12.

⁷⁵ *People v. McCall*, 17 N.Y.2d 152, 216 N.E.2d 570, 269 N.Y.S.2d 396 (1966).

⁷⁶ *Benanti v. United States*, 355 U.S. 96 (1957).

Since wiretapping by state law enforcement officers, even under the terms of a valid state court order, was held to be a violation of federal law, defendants desperately sought a method to prevent the use of evidence so obtained in state criminal trials. Faced with the refusal of the Supreme Court in the *Schwartz* case⁷⁷ to create an exclusionary rule applicable to the states, defense attorneys attempted to block the introduction in state criminal trials of evidence which had been obtained by a violation of federal law by use of the injunction device in federal court. Once again the Supreme Court was asked to consider the problem, but the result was merely a per curiam decision,⁷⁸ the effect of which was to hold that a defendant may not obtain a federal injunction against a prosecutor proceeding in a state case in which wiretap evidence might be used.⁷⁹ As a result, a defendant has no remedy against the use in a state court of evidence obtained through the use of state authorized wiretapping, despite the fact that the action of the state officers constitutes a violation of section 605.

Faced with this closed door, the next effort was to attempt to induce the New York courts to create an exclusionary rule which would prevent the use of evidence obtained in violation of the federal law. In a four to three decision,⁸⁰ the New York Court of Appeals refused to do so, despite a strong dissent by Justice Fuld to the effect that "the imperative of judicial integrity," the purposes of the exclusionary rule, and the necessity to avoid commission of a criminal act in the courtroom require a revision of the New York rule. The effect of these Supreme Court rulings has been felt at the trial court level, however. As a result of the *Benanti* case,⁸¹ at least two New York judges⁸² have refused to issue wiretap orders on the ground that to do so would make the court a participant in a federal crime. Other than this, wiretap orders are being issued in New York, and the results are being admitted into evidence in criminal trials⁸³ without any prosecutions being forthcoming from the federal authorities for violation of section 605—a distasteful and unhappy situation which could be corrected by a simple amendment to section 605 excluding acts by state officers under the terms of a valid state court order.⁸⁴ The failure of Congress to act in this matter can only be attributed to an unwillingness to become involved in the controversy surrounding the whole question of authorized wiretapping.⁸⁵

A warning has been sounded by Judge Medina that the federal courts may overturn the New York practice on quite a different basis:

"While I agree that there seems to be little likelihood that the rule of *Schwartz v. Texas* . . . will be changed, at least in the foreseeable future, it may well be that we are here dealing with something more than a state rule of evidence to the effect that evidence illegally obtained is admissible if relevant to the case and otherwise unobjectionable. The very fact that the State of New York not only has formulated through its courts a rule of evidence, but has also established and maintained, in its Constitution and legislation, a system of wiretapping that is persistently and continuously in operation through orders of New York judges authorizing the wiretapping and through New York enforcement officers who do the wiretapping and then divulge the wiretaps in testimony before Grand Juries and petit juries, all despite the ruling of the Supreme Court in *Benanti* . . . to the effect that the entire system is illegal and in violation of . . . [section 605], and despite the Supremacy Clause, Article VI, Clause 2, U.S. Constitution, may well constitute an invasion of appellant's constitutional right to due process under the Fourteenth Amendment."⁸⁶

⁷⁷ *Schwartz v. Texas*, 344 U.S. 199 (1952).

⁷⁸ *Pugach v. Dollinger*, 365 U.S. 458 (1961), *affirming* 277 F.2d 739 (2d Cir. 1960). The same result was reached in *Voci v. Storb*, 235 F.2d 48 (3d Cir. 1956). See *Stefanelli v. Minard*, 342 U.S. 117 (1951), *affirming* 184 F.2d 575 (3d Cir. 1950).

⁷⁹ Attempts to utilize the declaratory judgment procedure have also failed. *Lebowich v. O'Connor*, 309 F.2d 111 (2d Cir. 1962); *Williams v. Ball*, 294 F.2d 94 (2d Cir. 1961).

⁸⁰ *People v. Dinan*, 11 N.Y.2d 350, 183 N.E.2d 689, 229 N.Y.S.2d 406 (1962), *cert. denied*, 371 U.S. 877 (1962).

⁸¹ *Benanti v. United States*, 355 U.S. 96 (1957).

⁸² See *In The Matter of Interception of Telephone Communications*, 9 Misc. 2d 121, 170 N.Y.S.2d 84 (Sup. Ct. 1958); *Application for Order Permitting Interception of Telephone Communications*, 23 Misc. 2d 543, 198 N.Y.S.2d 572 (Ct. Gen. Sess. 1960).

⁸³ This result is clearly indicated by *People v. McCall*, 17 N.Y.2d 152, 269 N.Y.S. 2d 396, 216 N.E.2d 570 (1966).

⁸⁴ For a complete discussion of statutory possibilities for the correction of this problem, see Westin, *The Wire-Tapping Problem: An Analysis and a Legislative Proposal*, 52 COLUM. L. REV. 165 (1952). Compare *Schwartz, On Current Proposal to Legalize Wire Tapping*, 103 U. Pa. L. Rev. 957 (1954).

⁸⁵ Almost every session of Congress sees the filing of one or more bills designed to correct this situation. Extensive hearings have been held, but no concrete action appears to be forthcoming.

⁸⁶ Judge Medina concurring in *United States v. McMann*, 275 F. 2d 284, 286 (2d Cir. (1960)). For a view that wiretapping violates the first amendment, see King, *Wire Tapping and Electronic Surveillance: A Neglected Constitutional Consideration*, 66 DICK. L. REV. 17 (1961).

The practice in other States

While the Supreme Court has apparently left the states free to choose whether or not they will adopt an exclusionary rule to apply to evidence obtained through wiretapping,⁸⁷ most states have not as yet considered the problem.⁸⁸ To avoid the necessity of judicial establishment of an exclusionary rule, some states, such as California,⁸⁹ have adopted the rule by statute. This would seem to be the clearest method of expressing the policy of a particular state.

Michigan⁹⁰ and Pennsylvania⁹¹ have held that the receiver of a telephone message has a right to record the message without notice to the other party, and that evidence so obtained is admissible in a criminal trial.

Following the federal cases interpreting section 605, Pennsylvania has also held that the act of overhearing a telephone conversation with the consent of one party is not a violation of the Pennsylvania statute prohibiting wiretapping.⁹² The same result has been reached under the California statute.⁹³

In gambling cases it is not unusual for police officers engaged in a lawful search to answer a telephone call made to the premises and to use the conversation as evidence of the violation of the gambling laws. This practice is not held to be a violation of either section 605 or state wiretap statutes on the basis that there is no interception of a communication, but only proper police action.⁹⁴

In general, it can be said that in those states with statutes prohibiting wiretapping, evidence which might be obtained in this manner will be excluded from evidence both on the basis of section 605 of the Federal Communications Act and the state statute. In those states not having a statute prohibiting wiretapping, presumably the exclusionary rule would be applied in reliance on section 605 as interpreted in the first *Nardone* case.⁹⁵ As for those states authorizing controlled wiretapping, such as New York, absent a reversal of the *Schwartz* doctrine, they remain free to admit as evidence in their criminal trials the information obtained by proper use of their statutes.⁹⁶

Electronic Eavesdropping

One of the unsuspected but very welcome by-products of World War II has been the tremendous development in electronic equipment. This equipment, developed to a great extent for espionage and counter-espionage use, found a natural post-war use in law enforcement activity, and has operated as a great stimulus for the development of even more sophisticated listening devices.⁹⁷ Today, it is indeed a rare American home that is not equipped with many modern electronic devices from broilers to television sets. This domestic wonderland is taken much for granted today, but it is certainly true that the average American little understands the "how" of his electronic wonders. Perhaps the general attitude is one of open-mouthed awe at the constant flow of magic produced by

⁸⁷ *Schwartz v. Texas*, 344 U.S. 199 (1952).

⁸⁸ See Criminal Law Comment, *supra* note 71, at 540.

⁸⁹ CAL. PEN. CODE § 653; (d) provides: "Except as proof in a suit or prosecution for violation of this section no evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section shall be admissible in any judicial, administrative, legislative or other proceeding."

⁹⁰ *People v. Maranian*, 350 Mich. 361, 102 N.W.2d 568 (1960).

⁹¹ *Commonwealth v. Bruno*, 203 Pa. Super. 541, 201 A.2d 434 (1964), *cert. denied*, 379 U.S. 965 (1965). The court found no violation of PA. STAT. ANN. tit. 15, § 2443 (1957), in the recording of a telephone message by the rightful receiver. The statute provides: "No person shall intercept a communication by telephone or telegraph without the permission of the parties to such communication. No person shall install or employ any device for overhearing or recording communications passing through a telephone or telegraph line with intent to intercept a communication in violation of this act. No person shall divulge or use the contents or purport of a communication intercepted in violation of this act. . . ."

⁹² *Commonwealth v. Murray* 206 Pa. Super. 298 213 A.2d 162 (1965). The court reached this result on the theory that no interception was involved in the overhearing of a telephone conversation on an extension phone.

⁹³ *People v. La Peluso*, 239 Cal. App. 2d 792, 49 Cal. Rptr. 85 (1966); *People v. Fontaine*, 237 Cal. App. 2d 320, 46 Cal. Rptr. 855 (1965). Illinois has recently determined that the Illinois Eavesdropping Act, ILL. CRIM. CODE § 14, which applies to wiretapping, requires the exclusion of evidence obtained through eavesdropping without the consent of all of the parties. *People v. Kurth*, 34 Ill. 2d 387, 216 N.E.2d 154 (1966).

⁹⁴ *Leogrande v. State Liquor Authority*, 25 App. Div. 2d 225, 268 N.Y.S.2d 433 (1966); *United States v. Pasha*, 332 F.2d 193 (7th Cir. 1964), *cert. denied*, 379 U.S. 839 (1964).

⁹⁵ *Nardone v. United States*, 302 U.S. 379 (1937).

⁹⁶ It should be noted, however, that three members of the Supreme Court, dissenting in the most recent consideration of the eavesdropping problem, *Lopez v. United States*, 373 U.S. 427 (1963), indicated a readiness to overrule *Olmsted v. United States*, 277 U.S. 438 (1928), thus making wiretapping a violation of constitutional rights to privacy created by the interaction of the fourth and fifth amendments. Such a ruling would require the exclusion of wiretapping evidence in state courts under the doctrine of *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁹⁷ See generally BRETON, *THE PRIVACY INVADERS* (1964); DASH, SCHWARTZ & KNOWLTON, *THE EAVES-DROPPERS* (1959).

modern science. This awe tends to turn to fear of the many publicized uses of electronic equipment on the part of law enforcement agencies.⁹⁸

The law enforcement use of electronic eavesdropping devices is merely a part of the constant effort to improve all equipment used for the prevention and detection of crime.⁹⁹ The electronics aids are used primarily as an extension of the senses of sight and hearing making it possible for an officer to see and hear what would be impossible with the naked eye and ear. With this improved ability comes, as a matter of course, better and more efficient law enforcement.

The philosophical question presented, and much debated today, is whether the undoubted improvement in law enforcement is bought at too high a price in terms of the resulting loss of individual privacy. It should be emphasized that no one claims a right to remain free from police surveillance, including eavesdropping, in order to enable him safely to commit acts prohibited by society through the criminal laws. It is equally true that no one desires to impinge on the constitutional rights of any person, be he saint or sinner. That some difficulty has arisen in squaring these two truisms can be charged to the absence of a clear delineation of the nature and extent of the constitutional right to privacy. The Supreme Court has not as yet undertaken a comprehensive discussion or definition of the right to privacy,¹⁰⁰ a right not spelled out in the Constitution. Nor has Congress chosen to enact legislation in this area,¹⁰¹ which would seem to be the best hope for stability and certainty in the future.

The methods of electronic eavesdropping available for law enforcement use today stagger the imagination, ranging from the rather conservative concealed microphones and recorders to the now-famous "olive" capable of broadcasting conversations from the luxurious depths of a martini.¹⁰² One of the most serious legal questions presented today is whether the law expounded by the Supreme Court in considering the use of relatively simple electronic devices is adequate to control the very sophisticated devices in use today and those on the drawing board for tomorrow. The difficult case-by-case development of the law in such a fast developing scientific area tends to create a time lag calling urgently for statutory treatment.

THE GOLDMAN-SILVERMAN RATIONALE

The Supreme Court first really considered the electronic eavesdropping situation in the *Goldman* case,¹⁰³ holding admissible in evidence in the federal courts evidence produced through the use of an electronic eavesdropping device¹⁰⁴ without any physical trespass. In specifically holding that such means of obtaining evidence does not violate the fourth amendment, the Court reached a result similar to that in the wiretap cases.¹⁰⁵ While section 605 has been interpreted as requiring the application of an exclusionary rule in the wiretap cases,¹⁰⁶ the Federal Communications Act has no application to cases not involving the interception of telephone and telegraph communications, and no comparable federal statute has

⁹⁸ This article is limited to a consideration of the problems created by law enforcement use of electronic and other eavesdropping devices. The general availability of eavesdropping equipment creates a much more serious problem in the non-official use of such equipment. For examples of such uses of eavesdropping equipment, see Lipset, *The Wiretapping-Eavesdropping Problem: A Private Investigator's View*, 44 MINN. L. REV. 873 (1960); Ruebhausen & Brim, *Privacy and Behavioral Research*, 65 COLUM. L. REV. 1184, 1191 (1965).

It would seem clear that such non-official use of eavesdropping equipment should be prohibited and punished. It is only in the law enforcement use of eavesdropping that a viable justification exists.

⁹⁹ The many developments in communications and scientific methods of investigation and identification are examples of the vast improvement in law enforcement equipment, methods, and operations.

¹⁰⁰ Justice Brandeis, dissenting in *Olmstead v. United States*, 277 U.S. 438, 478 (1928), said: "The makers of our Constitution . . . conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment." See the dissent of Mr. Justice Brennan in *Lopez v. United States*, 373 U.S. 427, 446 (1963).

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), a state statute forbidding the use of contraceptives was held to violate the fourteenth amendment. The Court discussed the "right of privacy" enjoyed by married couples, and remarked that the first amendment "has a penumbra where privacy is protected from governmental intrusion." *Id.* at 483. The Court also implied that the "right of privacy" is one of those rights retained by the people under the ninth amendment. See generally Beane, *The Constitutional Right to Privacy in the Supreme Court*, 1962 SUP. CT. REV. 212; Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

¹⁰¹ Congress is presently conducting hearings concerning eavesdropping, and has in the past conducted extensive hearings, but no specific action has been forthcoming.

¹⁰² For an excellent recent discussion of the methods and technology of eavesdropping, see Westin, *Science, Privacy, and Freedom: Issues and Proposals for the 1970's*, 66 COLUM. L. REV. 1003, 1004-10 (1966).

¹⁰³ *Goldman v. United States*, 316 U.S. 129 (1942).

¹⁰⁴ The device in question was a "detectaphone" listening device installed on the outer wall of the room.

¹⁰⁵ *Olmstead v. United States*, 277 U.S. 438 (1928).

¹⁰⁶ *Nardone v. United States*, 302 U.S. 379 (1937).

been enacted to apply to eavesdropping cases.¹⁰⁷ As a result, the rule of the *Goldman* case is the basic law in the electronic eavesdropping cases today.

It was not until the *Silverman* case,¹⁰⁸ almost twenty years later, that the Supreme Court was presented with the opportunity to examine and refine the trespass concept which had been carefully excluded in formulating the rule allowing the use of evidence obtained by means of electronic eavesdropping. Here a "spike mike" had been inserted by government agents into a party wall, making contact with a heating duct in the adjacent house, turning the entire heating system into a conductor of sound, and enabling the agents to overhear incriminating conversations which were then used as evidence. The Court held that this evidence was gathered in violation of the fourth amendment and must therefore be excluded from use in a federal criminal trial.¹⁰⁹ The decision was based not upon any local rules of trespass to property, but rather focused upon the "reality of an actual intrusion into a constitutionally protected area."¹¹⁰

Silverman is not at odds with the *Goldman* rule, but is rather a delimitation of the scope of that doctrine. Clearly, if the method of accomplishing electronic eavesdropping is by means of a trespass, the fourth amendment is violated and the resulting evidence, as well as any evidence constituting fruits of the illegal conduct, must be excluded from use in both federal and state criminal trials. The effect of *Silverman* is to refine the term "trespass" as used in the *Goldman* rule to mean "actual intrusion into a constitutionally protected area." Absent such an intrusion, evidence procured through electronic eavesdropping will be admissible in the federal courts, assuming, of course, that such evidence satisfies the other requirements of the law of evidence.

The "actual intrusion" element of the rule is normally referred to as physical penetration. Any physical penetration, no matter how small or insignificant, will constitute a violation of the fourth amendment resulting in the exclusion of the evidence so obtained. In *Silverman*, although the result was great, the actual penetration was slight. In another "spike mike" case¹¹¹ the penetration into the wall was no greater than that made by a thumb tack, but this was sufficient to constitute a violation of the fourth amendment. Even the lowering of a microphone down an air shaft opposite a grille in an apartment has been held to amount to a prohibited physical penetration where the air shaft was physically located within the area of the apartment.¹¹² Certainly, if the eavesdropping equipment is installed during the course of an actual physical unauthorized entry, the result will be exclusion of any evidence so produced,¹¹³ but this method of operation appears to be only a relic of the past. Equipment presently available to law enforcement officers obviates the necessity of making any such entry or penetration, and it should be a rare occasion today when such antiquated methods are used. This fact seems to leave the rule of the *Silverman* case operating in a vacuum. The cases in which the courts have considered the use of modern electronic devices requiring no physical penetration have uniformly followed the *Goldman* rule and allowed the product of the eavesdropping to be introduced into evidence.¹¹⁴

The "constitutionally protected area" referred to in *Silverman* relates to those areas which have been held in the general search and seizure cases to be within the protection of the fourth amendment, such as houses, automobiles, offices, and hotel rooms. Of particular interest is the apparent exclusion of jails from the protection of the fourth amendment¹¹⁵ as it has been a traditional technique to wire for sound both cells and interview rooms.

¹⁰⁷ The Federal Communications Commission has recently banned the use of radio transmitting microphones for eavesdropping purposes without the consent of both parties to the conversation, but the ban does not apply to "operations of any law enforcement officers conducted under lawful authority." 31 Fed. Reg. 3400 (March 1966), amending 47 C.F.R. § 15.11 (1966).

¹⁰⁸ *Silverman v. United States*, 365 U.S. 505 (1961).

¹⁰⁹ As a result of *Mapp v. Ohio*, 367 U.S. 643 (1961), such evidence gathered in violation of the fourth amendment must likewise be excluded from use in state criminal trials.

¹¹⁰ *Silverman v. United States*, 365 U.S. 505, 512 (1961).

¹¹¹ *Clinton v. Virginia*, 377 U.S. 153 (1964), reversing *per curiam* 204 Va. 275, 130 S.E.2d 437 (1963).

¹¹² *Cullins v. Wainwright*, 328 F.2d 481 (5th Cir. 1964).

¹¹³ In *Irvine v. California*, 347 U.S. 128 (1954), state officers made an unauthorized physical entry into defendant's house and installed a microphone. The evidence obtained by this "almost incredible" police conduct was used to convict defendant in the state courts. The Supreme Court held that the police conduct violated the fourth and fourteenth amendments, but refused to exclude the evidence so obtained under the rule of *Wolf v. Colorado*, 338 U.S. 25 (1949). Such evidence would be excluded today under the rule of *Mapp v. Ohio*, 367 U.S. 643 (1961), and *Wong Sun v. United States*, 371 U.S. 471 (1963). See *People v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905 (1955).

¹¹⁴ E.g., *People v. Anderson*, 145 Cal. App. 2d 201, 302 P.2d 358 (1956) (hearing aid device); *People v. Graff*, 144 Cal. App. 2d 199, 300 P.2d 837 (1956) (Fargo amplifier).

¹¹⁵ See *Lanza v. New York*, 370 U.S. 139 (1962); *United States v. Kahn*, 251 F. Supp. 702 (S.D.N.Y. 1966); *People v. Morgan*, 197 Cal. App. 2d 90, 16 Cal. Rptr. 838 (1961, cert. denied, 370 U.S. 965 (1962)).

CONCEALED MICROPHONES AND RECORDERS

Another phase of the eavesdropping problem, one that is not technically electronic eavesdropping at all, concerns the use of concealed microphones and recorders. This situation is most frequently found where an informer or undercover agent is equipped with electronic equipment for the purpose of transmitting and/or recording conversations with a suspect. The equipment in use today is easily concealed and capable of high performance. The benefits to law enforcement agencies of the use of such equipment are many. In some circumstances such equipment provides a desirable check on the actual activities of an informer; in all situations a verbatim record of entire conversations is possible. It is true that this is clandestine equipment and trickery is involved in its use. It is equally true that any party to a conversation may testify to its contents, and the electronic equipment makes available a more complete and accurate version of the conversation than would otherwise be possible.

The first of these cases to come before the Supreme Court resulted in a five to four decision¹¹⁶ upholding the introduction of evidence obtained through radio transmission of a conversation. The Court finding no physical intrusion by the informer equipped with a concealed transmitter found no violation of the fourth amendment. In the particular case, the informer did not testify himself, but rather a government agent was allowed to testify as to the contents of the conversation as overheard on a radio receiver. Such a case does not represent the traditional secret listening to a conversation between two unsuspecting persons, but involves the active collaboration of one of the parties to the conversation—the equivalent of the consent to monitor cases in the wiretapping area.¹¹⁷ The Court equated this use of electronic eavesdropping equipment with any other permissible police stratagem,¹¹⁸ and despite a strong dissent by Mr. Justice Frankfurter,¹¹⁹ refused to adopt any “finespun doctrines for exclusion of evidence.”¹²⁰

The same type of problem, this time involving a concealed pocket wire recorder returned to the Supreme Court in *Lopez v. United States*,¹²¹ the most recent consideration of electronic eavesdropping by the Court. The majority of the Court followed its prior holding in *On Lee*,¹²² and since the government agent using the device was present at the conversation with the consent of the defendant, no violation of the fourth amendment was found and the recording was held to be admissible in evidence.¹²³ *Lopez* represents, on its face, simply an adherence to the *On Lee* view that if a participant to the conversation can, and in this case did, testify as to the contents of the conversation, then it is only reasonable to allow the best possible evidence of the conversation—the verbatim recording.

¹¹⁶ *On Lee v. United States*, 343 U.S. 747 (1952).

¹¹⁷ See *Rathbun v. United States*, 355 U.S. 107 (1957).

¹¹⁸ The Court stated “We think the administration of justice is better served if stratagems such as we have here (the use of informers, accessories, accomplices, false friends, or any of the other betrayals which are ‘dirty business’) are regarded as raising, not questions of law, but issues of credibility. We cannot say that testimony such as this shall, as a matter of law, be refused all hearing.” 343 U.S. at 757-58.

¹¹⁹ Mr. Justice Frankfurter believed that sanctioning such “dirty business” makes for lazy and not alert law enforcement. It puts a premium on force and fraud, not on imagination and enterprise and professional training. . . . [T]hese short-cuts in the detection and prosecution of crime are as self-defeating as they are immoral. . . . Such encouragement to lazy, immoral conduct by the police does not bode well for effective law enforcement. Nor will crime be checked by such means.” 343 U.S. at 761-62.

¹²⁰ Frank, J., dissenting in the Court of Appeals, *United States v. On Lee*, 193 F.2d 306, 313-14 n.17 (1951), made the following often-quoted analysis of the problem: “A dictaphone, by its very nature, conducts an exploratory search for evidence of a houseowner’s guilt. Such exploratory searches for evidence are forbidden, with or without warrant, by the Fourth Amendment. . . . A search warrant must describe the things to be seized, and those things can be only (1) instrumentalities of the crime or (b) [sic] contraband. Speech can be neither. A listening to all talk inside a house has only one purpose—evidence gathering. No valid warrant for such listening or for the installation of a dictaphone could be issued. Such conduct is lawless, an unconstitutional violation of the owner’s privacy.”

Brennan, J., dissenting in *Lopez v. United States*, 373 U.S. 427, 464 (1963), was not so certain: “But in any event, it is premature to conclude that no warrant for an electronic search can possibly be devised. The requirements of the Fourth Amendment are not inflexible, or obtusely unyielding to the legitimate needs of law enforcement. It is at least clear that ‘the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment,’ *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 272 (separate opinion); see *McDonald v. United States*, 335 U.S. 451, 455; *Abel v. United States*, 362 U.S. 217, 251-52 (dissenting opinion), could be made a precondition of lawful electronic surveillance.”

¹²¹ 373 U.S. 427 (1963).

¹²² 343 U.S. 747 (1952).

¹²³ As Mr. Justice Harlan put it, “this case involves no ‘eavesdropping’ whatever in any proper sense of that term. The government did not use an electronic device to listen in on conversation it could not otherwise have heard. Instead, the device was used only to obtain the most reliable evidence possible of a conversation in which the Government’s own agent was a participant and which that agent was fully entitled to disclose.” 373 U.S. at 439.

¹²⁴ The Court has recently affirmed this position in *Hoffa v. United States*, 87 S. Ct. 408 (1966), where it stated: “Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer’s misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.” *Id.* at 413.

In all of these cases one person is placing personal reliance upon one with whom he chooses to discuss criminal matters. If his choice is unfortunate, this is but a risk one must take. The Court has never gone so far as to exclude evidence obtained by an undercover agent or informer simply because a criminal was unaware of the true nature of the person with whom he was dealing,^{123A} and this is about the only basis on which the evidence in *On Lee* and *Lopez* could be excluded.

THE LOPEZ DISSENT: A RIGHT TO PRIVACY

The true significance of the *Lopez* case is to be found in the fact that it indicates the strong dissatisfaction with the *On Lee* holding on the part of four¹²⁴ of the then members of the Court, and further shows a willingness on the part of three¹²⁵ of the then members of the Court to create a general right of privacy on the basis of the interaction of the fourth and fifth amendments. Such a right of privacy, as indicated by the dissenters, would strike at far bigger game than the concealed radio and recorder cases: it would deal a death blow to all wiretapping and electronic eavesdropping. The view of the minority appears to be based upon an overwhelming fear that electronic eavesdropping will lead inevitably to a police state.¹²⁶ It is doubtful that most people would view the discussion of narcotics violations, as in *On Lee*, or the offering of a bribe to a government agent, as in *Lopez*, as privileged communications protected by a nebulous right to privacy. It is further doubtful that most people would believe that good government, in the sense of convicting criminals through the use of the most modern scientific means available, will lead us down the path to tyranny.

It appears certain that future attacks on the existing eavesdropping rules will follow the lead of the *Lopez* minority. Efforts will be made to formulate a right to privacy which would entail the exclusion of any evidence obtained through the use of electronic devices without the consent of the person against whom such evidence is offered. Such is not the rule today, but could well be established by legislation, or by decision of the Supreme Court based upon the interaction of the fourth, fifth and sixth amendments.¹²⁷

THE LAW IN STATE COURTS

On the state level, if evidence is obtained through the use of electronic eavesdropping devices accompanied by a physical intrusion into a constitutionally protected area, the evidence is inadmissible in a state criminal trial.¹²⁸ In addition, at least seven states presently have statutes prohibiting the use of electronic eavesdropping techniques in varying degrees,¹²⁹ and these statutes operate within those states as an extension of the constitutional doctrine. The most comprehensive of such statutes appears to be that of Illinois,¹³⁰ which prohibits any person, including law enforcement officers, from using any device capable of being used to hear or record oral conversation. The statute prohibits the hearing or recording of any oral conversation without the consent of all of the parties thereto,¹³¹ or the use or divulgence of any such information, and specifically provides that any evidence obtained in violation of the statute is inadmissible in any civil or criminal trial.

Despite such statutes, the suspicion persists, supported by some evidence,¹³² that electronic eavesdropping is still conducted by law enforcement officers as an aid to investigation of crime. Thus, we find ourselves in the unhappy situation of seeing our law enforcement agencies violate the law in a good faith attempt to enforce the law. No effective sanction for violation of eavesdropping statutes has yet been developed.¹³³ Prosecutions have been few as might be expected.

¹²⁴ Chief Justice Warren and Justices Brennan, Douglas, and Goldberg.

¹²⁵ Justices Brennan, Douglas, and Goldberg.

¹²⁶ "Electronic surveillance, in fact, makes the police omniscient; and police omniscience is one of the most effective tools of tyranny." 73 U.S. at 466.

¹²⁷ See *Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Massiah v. United States*, 377 U.S. 201 (1964).

¹²⁸ This result is required by the holding in *Mapp v. Ohio*, 367 U.S. 643 (1961).

¹²⁹ CAL. PEN. CODE § 653 h-j; ILL. CRIM. CODE § 14-1 to 14-7; MD. ANN. CODE art. 27, § 125A(a) (Supp. 1964); MASS. GEN. LAWS ANN. ch. 272, § 99 (Supp. 1964); NEV. REV. STAT. § 200.650 (1963); N.Y. PEN. LAW § 738; ORE. REV. STAT. § 165.540(1) (c) (Supp. 1965).

¹³⁰ ILL. CRIM. CODE § 14-1 to 14-7.

¹³¹ The statute reads "any party," but the Supreme Court of Illinois has recently held that any party who has not consented to the recording or radio transmission of his conversation may bar its admission in evidence against him. *People v. Kurth*, 34 Ill. 2d 387, 216 N.E.2d 154 (1966).

¹³² See BRETON, *THE PRIVACY INVADERS* (1964); DASH SCHWARTZ & KNOWLTON, *THE EAVESDROPPERS* (1959).

¹³³ See Foote, *Tort Remedies for Police Violation of Individual Rights* 39 MINN. L. REV. 493 (1955); Paulsen, *Safeguards in the Law of Search and Seizure*, 52 N.W. U.L. REV. 65, 72-74 (1957).

The prosecutor is in no position to antagonize the police, and indeed is the beneficiary of such illegal police conduct. The exclusionary rule which has been created as a control device over improper conduct of law enforcement officers has yet to prove its value. The chief result to date appears to be the failure to convict persons who would otherwise be convicted. If there has been any real effect on police conduct of criminal investigations, it has not yet become apparent; and so long as "clearing" crimes remains the standard of police efficiency it is doubtful whether the failure to convict will have much effect upon police practices.

Non-Electronic Eavesdropping

Not nearly as dramatic in impact as the electronic methods of eavesdropping, but equally important, are the common non-electronic methods in use today. Perhaps the oldest technique of crime investigation is the surveillance whereby a suspect is placed under observation and followed secretly wherever he goes. The surveillance may be loose or tight, for a short period or for extended periods, but in all cases it represents a form of eavesdropping. To date, there has been no indication that such methods of investigation violate any constitutional rights of the person under surveillance, and any evidence so obtained is admissible in a criminal trial.

It is unfortunate that the most celebrated surveillance case in modern times failed to reach a decision on the merits.¹³⁴ Such a decision would have provided answers to the many questions now surrounding the permissible scope and intensity of a surveillance, since these problems have not as yet received judicial consideration.

The overhearing of a conversation by non-trespassing government agents without the use of electronic aids has been upheld by the courts and the evidence so obtained admitted into evidence.¹³⁵ However, it would appear that if the eavesdropping is made possible by a trespass, the fourth amendment will be violated and any evidence so obtained will be excluded.¹³⁶ The same rule applies to "visual eavesdropping."¹³⁷ The propriety of law enforcement officers' use of visual aids has never been seriously questioned, and normally this use does not constitute eavesdropping at all.¹³⁸ The use of infra red lights which allow one to see in the dark without detection is a cause for some question, as is the use of concealed closed circuit television; but so far there has been no consideration of these devices by the courts.

The two-way mirror, although only recently receiving substantial publicity, is not a new device. For many years, for instance, it has been customary to equip interrogation and polygraph interrogation rooms with these devices allowing a person on the outside of the room to view the interior without disclosure. One federal court¹³⁹ has indicated approval of the use of evidence obtained by viewing an act of sodomy in a public washroom through a two-way mirror, but the holding is restricted to a situation where the view through the mirror is no greater than that afforded any member of the public entering the washroom. The two-way mirror has been used primarily in crime prevention activities as a general surveillance aid. This type of surveillance which extends to all members of the general public coming within the area of view is perhaps the most distasteful type of eavesdropping, and the courts have so reacted, even though varying results have been reached.¹⁴⁰

MAIL INTERCEPT

The security of the United States mail is quite generally accepted by the public. There are two types of surveillance which may be used with reference to mail. Mail intercept, which involves the opening of mail, is prohibited by federal statute,¹⁴¹ but from time to time some doubt has arisen as to whether this

¹³⁴ *Giancana v. Johnson*, 335 F.2d 366 (7th Cir. 1964), cert. denied, 379 U.S. 1001 (1965), decided on the basis of absence of federal jurisdiction. An abbreviated statement of the facts may be found at 335 F.2d 370 n. 1.

¹³⁵ *Anspach v. United States*, 305 F.2d 48 (10th Cir. 1962), cert. denied, 371 U.S. 826 (1962).

¹³⁶ See *Silverman v. United States*, 365 U.S. 505 (1961).

¹³⁷ See *McDonald v. United States*, 335 U.S. 451 (1948); *Brock v. United States*, 223 F.2d 681 (5th Cir. 1955).

¹³⁸ See *On Lee v. United States*, 343 U.S. 747, 754 (1952); *United States v. Lee*, 274 U.S. 559 (1927); *Hodges v. United States*, 243 F.2d 281 (5th Cir. 1957).

¹³⁹ *Poore v. Ohio*, 243 F. Supp. 777 (N.D. Ohio 1965).

¹⁴⁰ See *Smayda v. United States*, 352 F.2d 251 (9th Cir. 1965); *Britt v. Superior Court*, 58 Cal. 2d 469, 24 Cal. Rptr. 849, 374 P.2d 817 (1962); *Bielicki v. Superior Court*, 57 Cal. 2d 602, 21 Cal. Rptr. 552, 371 P.2d 288 (1962); *People v. Young*, 214 Cal. App. 2d 131, 29 Cal. Rptr. 492 (1963); *People v. Norton*, 209 Cal. App. 2d 173, 25 Cal. Rptr. 676 (1962).

¹⁴¹ 39 U.S.C. 4057; *POSTAL LAWS AND REGULATIONS* § 113. This prohibition is now limited to first class mail due to the recent repeal of 18 U.S.C. 1702(c).

prohibition has been strictly complied with by law enforcement officers. Mail cover is a form of surveillance consisting of the recording of the information contained on the outside of first-class envelopes, such as the name and address of the sender and the addressee and the postmark. In many cases where the identity or location of a particular person is unknown this information obtained through placing a mail cover on known associates of the person may provide very important investigative leads. This practice, which leaves the contents of the letter intact and undisclosed, has been held not to violate any constitutional rights of the person whose mail is so examined.¹⁴² With new developments allowing the contents of a letter to be read without disturbing the apparent integrity of the envelope, it can be expected that the courts will be called upon to refine the law as it presently exists.

Conclusion

The law governing eavesdropping has been developed on a hit and miss basis. It is apparent that a continuation of this approach is highly undesirable. What is needed is a comprehensive statute designed to apply to all methods of eavesdropping, both electronic and non-electronic, and applicable to methods in current use as well as those methods known to be under development. A clear and concise regulation of these practices, recognizing the right of the citizen to conduct his everyday affairs in privacy, but making it possible for law enforcement agencies to compete with the criminal element on equal terms is long overdue. It is true, and almost all authorities agree, that there has been a lack of solid factual data upon which to base adequate legislation. This information, however, may never become available due to the natural reticence of the people in possession of the actual facts, and thus it would seem to be a poor excuse for the failure of Congress to act in this area. It has been suggested by many people that the best answer might well be the adoption of a statute patterned after the New York procedure, permitting the issuance of a court order to law enforcement officers upon the establishment of probable cause.¹⁴³ Such a statute containing clearly defined elements of the right to privacy and safeguards against abuse would be a welcome solution to the present confusion and uncertainty.

ELECTRONIC EAVESDROPPING

"Bugs" in phones, furniture, cars, offices, and shirt pockets have become commonplace. Here is a survey of the field with detailed descriptions of what is currently available, how they work, and how they are detected.

(By Robert M. Brown¹)

In a sensational eavesdropping disclosure last July, U.S. officials charged two Communist Czechoslovakian diplomats with attempting to "bug" the offices of Under Secretary of State George W. Ball using the system shown in Fig. 1. In this approach, the receiver portion of the bug kept the transmitter from operating by allowing the power relay to remain normally open. When the receiver picked up a u.h.f. unmodulated carrier of a certain signal strength, the relay would close, thus supplying power to the transmitter. In this way, the useful operating life of the mercury-cell power supply was appreciably extended. To prevent interaction between the bug transmitter and the external trigger transmitter, the bug operated about 40 MHz higher in frequency.

¹⁴² See *Canaday v. United States*, 354 F.2d 849 (8th Cir. 1966); *United States v. Schwartz*, 283 F.2d 107 (3d Cir. 1960), *cert. denied*, 364 U.S. 942 (1961); *United States v. Costello*, 255 F.2d 876 (2d Cir. 1958), *cert. denied*, 357 U.S. 937 (1958).

¹⁴³ See Westin, *The Wire-Tapping Problem: An Analysis and a Legislative Proposal*, 52 COLUM. L. REV. 165, 200-08 (1952).

¹ Mr. Brown is the author of the book, "The Electronic Invasion" which will be issued this month by John F. Rider, Publisher, New York.

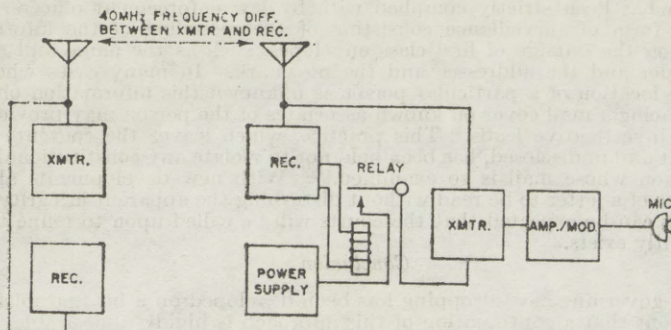


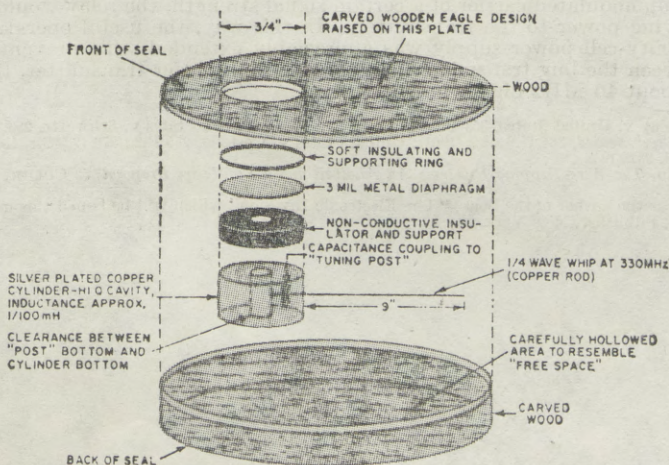
Fig. 1. In this bug, the u.h.f. carrier from a remote transmitter turns on the bug which operates about 40 MHz higher in frequency, thus extending the battery life considerably.

Interestingly, the plot was foiled not because of superior American counter-measure techniques (debugging methods) but because of the loyalty of a \$9000-per-annum Department worker who informed on the Czechs to the FBI.

Similarly, U.S. Ambassador Henry Cabot Lodge shocked the civilized world in 1960 when he displayed the now-famous Great Seal (or Eagle) bug at the UN after revealing that it had been in operation, surreptitiously relaying confidential top-level conversations to the Russians, since the Soviets had presented it to W. Averell Harriman, then United States Ambassador to the Soviet Union, back in 1945. Like the recent Czech attempt, however, it was not alert American personnel who "found" the bug, but instead astute British technicians who accidentally tuned across its frequency one day.

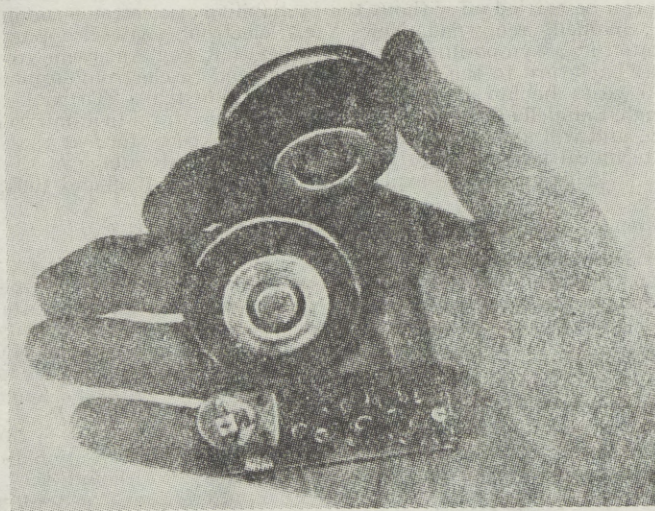
Operation of this bug is shown in Fig 2. Behind an opening concealed in the carving of the Great Seal was a silver-plated, high-"Q" resonant cavity coupled to a $\frac{1}{4}$ -wave antenna that was also concealed within the carving. A metal diaphragm directly behind the opening closed one end of the cavity. When this diaphragm was moved by changes in air pressure due to speech within the room holding the Seal, it would change the resonant frequency of the cavity. Thus, if the cavity was supplied with r.f. at its resting frequency, when the diaphragm moved, the cavity in essence became a modulated oscillator. The beauty of this system was that it required no maintenance, batteries, or other internal power supplies and it operated only when the cavity was supplied with an accurate source of r.f. which could come from almost any point.

Fig. 2. The "Great Seal" bug concealed a delicately tuned u.h.f. cavity requiring no wires, maintenance, or batteries.

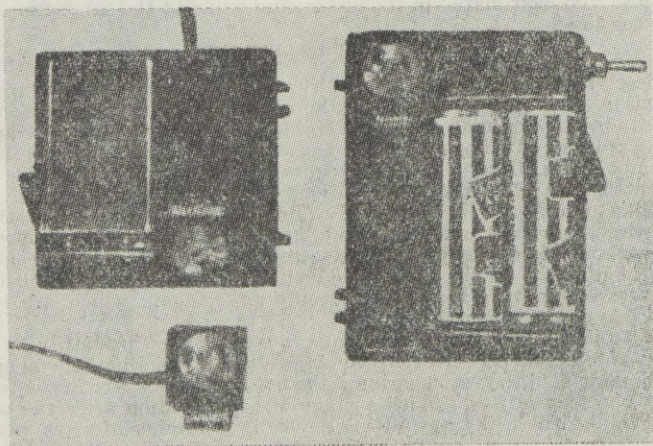


Outside the Embassy, a 330-MHz signal source located within an ordinary-looking van was aimed *via* a narrow-beam gain antenna at the Seal so as to excite the cavity. Another innocent-looking van, also equipped with a narrow-beam gain antenna aimed at the Seal, would then tune in on the bug and detect the now-modulated signal for recording.

After months of research and investigation, the British unearthed the cavity built into the wooden Seal and turned the matter over to the U.S. (Incidentally, the British technicians also found 60 hidden microphones in the American Embassy building in Moscow while looking for the Seal bug.)



Experimental transmitter (bottom) is reworked for mounting around conventional phone carbon mike (center), then potted (top) to make direct substitute for phone mike. This does not impair normal phone operation. Both sides of the phone conversation are radiated a distance of approximately 300 ft.



Three units by Security Electronics. (Upper left) Battery-powered parallel phone tap operates when phone is picked up. Both sides of conversation transmitted about $\frac{1}{4}$ mile. (Upper right) Self-powered wireless mike picks up sounds within 35 ft. R.f. range about $\frac{1}{4}$ mile. (Bottom) Phone-powered series phone tap operates when phone is used. Transmits both sides of conversation $\frac{1}{2}$ mile. All of these units are used in conjunction with specially modified FM set.

To reduce the future possibilities of illicit r.f. intrusion, in some of our Embassies overseas use is made of elaborate "silent rooms" whose walls also contain layers of r.f. screening material. These rooms are thoroughly tested for acoustic and r.f. tightness in the United States, then disassembled and shipped to the required Embassies where they are reassembled within the confines of a normal room (of sufficient size to accommodate the silent room), and retested once more. Any power lines entering the silent room are thoroughly bypassed to remove the last vestige of possible r.f. exit. Even the doors are double-screened and have numerous electrical contact "fingers" to assure absolute r.f. screening. There are no phones or other electrical devices within the room, thus ensuring that confidential discussions can be carried on without the probability of electronic snooping.

Bernard Spindell, renowned New York electronic eavesdropping expert, publicly stated at a symposium last November that key American government officials are "backward to the sophistication of modern electronic espionage and at least 10 years behind the (eavesdropping) industry". To make matters worse, though, Spindell added that "the government is afraid to admit to its faults in this area, and will almost never call in outside 'experts' for fear that this disclosure of technical incompetence might work to the advantage of the civilian professional." This might well explain the revelations of 1960 and 1961.

THE ELECTRONIC EAVESDROPPING INDUSTRY

Electronic snooping in various stages of technical sophistication is today a big business for a relatively handful of U.S. companies (their number approaches 30, although less than 10 capture most large industrial and governmental sales). Some, like *Mosler Research Products* (Conn.), *Kei Corporation* (Mass.), and *Fargo* (Calif.), concentrate on "aiding" such Federal branches as the Bureaus of Customs and Narcotics, while the rest do an estimated \$20 million annually in the industrial and personal market areas. Headed by such names as *Continental Telephone & Supply Co.*, *Miles Wireless Intercom Co.*, *Security Electronics*, *R. B. Clifton*, *L. N. Schneider*, and *Silmar Electronics*, these companies specialize in equipment that often surpasses that offered the government through conventional channels yet is legally available to anyone with enough money. Although the suppliers are geographically headquartered in New York and Miami, the vast majority enjoy mail-order sales that are heavy in the Midwest and South and strongest in Southern California.

In addition to offering a diverse selection of electronic snooping devices (one even offers a mail-order course in modern eavesdropping), several have made the plunge into antibug or "countermeasure" equipment, which generally consists of r.f. field detectors and white-noise generating. Although the market for this type of apparatus is extremely small, it affords the intelligent distributor the opportunity to "go legitimate" in its advertising while at the same time creating convenient tax losses.

BUGGING THE TELEPHONE

While there still exist such antiquated devices as the phone pickup coil and other induction contraptions found in almost every electronic parts supplier's catalogues, today's telephone "listener" prefers a more professional approach. It should be pointed out, however, that because these high-impedance inductive pickups do not make an actual metallic contact to the phone line, they draw no current from the line, thus making them very difficult to detect by conventional telephone line monitoring equipment. Though the government still leans toward the direct wire taps and "third-wire" techniques (it is possible to rearrange the wiring within a desk telephone so as to render the microphone circuit active even when the phone is on the hook), the civilian eavesdropping establishment is busy with the not-so-dangerous all-electronic r.f. gadgets which are infinitely simpler and less costly to install.

Reverting to induction in some instances, one type used primarily by private investigators and industrial executives employs a modified induction coil operating from the magnetic field that exists around the hybrid transformer in the telephone to modulate the transmitter. With a stage of amplification after the coil, it is possible to disguise the FM transmitting device in a number of ways, permitting normal proximity to the phone without having the device spotted. Two such items, for example, operating in the standard 88- to 108-MHz FM band are a "diary" sold by New York's *L. N. Schneider* and an "ashtray" marketed by *Tritron* of Dallas, Texas. Powered by *Mallory* "Duracells," these 100-milliwatt bugs can run for weeks, continuously relaying both sides of a conversation to the

remote receiver. A variation on this theme consists of the same device with a subminiature *Sennheiser* microphone element added to take up the slack (normal room conversations) between phone calls. Thus, the eavesdropper has a combination room bug and telephone device.

By far the most popular, however, are the insertion bug-r.f. devices hooked directly to the phone line in one way or another. The most convenient of these consists of a transistor oscillator centered on 89 MHz and mounted on the backside of a standard carbon phone button. Carefully balanced so as not to disrupt the impedance of the telephone circuit, in practice the eavesdropper merely unscrews the regular mouthpiece cap from the phone and replaces the carbon button with the bug. Thus, both sides of all calls can be monitored. Since it is powered entirely by the phone current, the device can theoretically run forever on an automatic basis. See the upper photo on page 75.

The only drawback is its distance capability, restricted by lack of a suitable antenna. Normally, the device is coupled to the phone wires for an r.f. range of 200 to 2,500 feet. An example of such a device is shown in Fig. 3. In this circuit, note that the rectifiers do not use filters of any description. Therefore, the transmitter is modulated by a d.c. voltage that is an instantaneous function of the voice frequencies existing on the line. Such equipment costs from \$199.95 to \$250, depending upon the distributor.

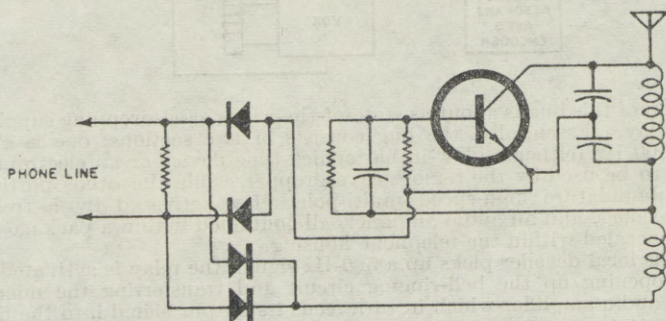
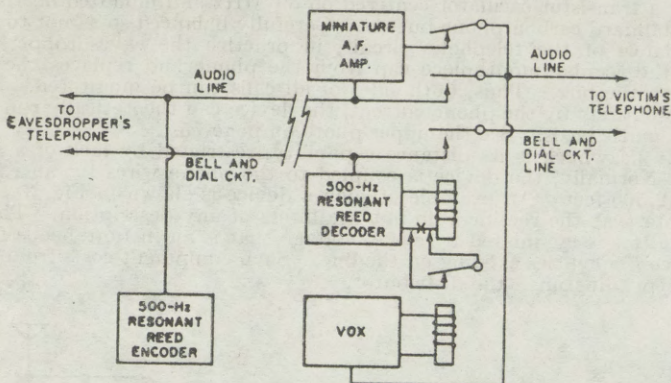


Fig. 3. Typical insertion bug mounts directly within the mike cavity of the telephone and derives both its power supply and modulation from the phone as it is being used.

Most insertion devices, however, are priced between \$70 and \$200 and are identical to the unit just described except that they must be concealed in the phone base, at the terminal, or elsewhere on the line. These are frequently more practical, since a small length of wire cut in wavelength multiples can be employed effectively as the antenna, although they necessitate a somewhat more time-consuming installation. Typical of these is *Security Electronics'* SE-419 which measures only 1.5" x 0.7" x 0.7" but which can put out an 89-MHz signal for up to one mile. A series coupled unit, it sells for \$150 and employs another r.f. linear amplifier stage.

The most publicized phone bug, however, uses no r.f. field whatsoever yet achieves remote monitoring without the necessity of tapping the line. Dubbed the "harmonica bug," this ingenious configuration stands as the ultimate in bugging devices. Consisting of a subminiature resonant-reed decoder relay (such as the *Bramco Controls* model) and a miniature single-stage a.f. amplifier, the unit (see Fig. 4) is wired into the base of the victim's phone or at his terminal block on the premises.

Fig. 4. The "harmonica" bug makes use of the fact that a short time interval occurs just after dialing the last digit and before the remote phone rings. The name was coined because, originally, a harmonica was used to generate the trigger tone that caused the relay to operate.



Operation of this bug is about as state-of-the-art as eavesdropping suppliers can provide today. Essentially, the bug consists of two sections: one is a remote source of 500 Hz (either a blow-in harmonica-type device or an electronic audio oscillator) to be used by the remote eavesdropper, while the other portion contains a subminiature high-speed multi-pole relay activated by a frequency-sensitive decoder, and an audio amplifier, all contained within a package capable of being concealed within the telephone housing.

When this local decoder picks up a 500-Hz signal, the relay is activated, simultaneously opening up the bell-ringing circuit and transferring the microphone line to the audio amplifier which in turn feeds its output signal into the line that is returning to the eavesdropper.

In use, the eavesdropper dials the rigged remote telephone. However—and this is important—just after dialing the last digit, there is a time lapse of 2 to 3 seconds before the remote phone bell rings. During this period, the eavesdropper transmits his 500-Hz trigger tone down the line. The remote bell is deactivated before it can ring, and the remote microphone signal is now amplified and fed back to the eavesdropper. If another party dials the number during a period of surveillance, he will get a normal "busy" signal. In most cases, this does not arouse suspicion.

The VOX circuit shown below the resonant-reed circuit of Fig. 4 is presently being developed and should be available shortly. This circuit continuously monitors the voice circuit on the phone line, and if it "hears" a strong sound, such as when the phone is lifted from the cradle, the VOX circuit takes the bug out of the line, causing the phone to rapidly drop back to a normal operating condition.

VOX, as used here and in other parts of this article, is an abbreviation for voice-operated switch. In this type of circuit, use is made of the charge/discharge time constant of a large-valued resistor and capacitor combination when it is charged by the input signal and discharged by an active element (such as a semiconductor or vacuum tube) that in turn controls a switching relay. The relay, in turn, controls an external circuit. The elements of the VOX are arranged so as to operate the relay immediately upon receipt of a signal, while the adjustable time delay permits the relay to remain operative for some predetermined time after the signal ceases. This can occur during normal lulls in the conversation. Thus, the VOX is operative during all times that speech is taking place.

Although others have attempted to duplicate the original circuitry (e.g., Continental Telephone's "Infinity Transmitter"), the original is still the device employed by professional eavesdroppers. Price varies from \$699 to \$1000, depending upon supplier.

As a defense against this type of bug, in some sensitive areas use is made of a white-noise generator that saturates the local phone line with a random noise signal (which sounds like a loud waterfall) when the telephone is not actually

on the cradle. This electrical noise effectively masks any microphone signal being picked up if such a bug is used. Of course, when the local phone is physically lifted from the cradle, the white-noise signal stops, enabling normal conversation.

ROOM BUGS: MICROPHONES

Since room transmitters are more prone to visual detection than insertion of telephone bugs, miniaturization has become the vogue among modern keyhole listeners. Although a variety of cute items flood the market today (the "cuff-link," "tie clasp," "fountain pen," etc.), their use is generally restricted to the portable personal recorder set and they are not really practical for room observation. The primary reason for this is that the same European microphone element can be purchased retail for \$3 while the mounted cuff links and other devices generally cost anywhere from \$25 to \$50 apiece.

By and large, the most popular miniature design is the tiny rectangular model distributed in America by *Telephone Dynamics Corp.* for the hearing-aid market (see Fig. 5), although a few bug manufacturers use *Astatic* and *Electro-Voice* elements. The preferred types are magnetic designs which weigh less than one-fifth of an ounce; they are rated at a -60 dB sensitivity or so at 1000 Hz under a standard 2000-ohm load, since these preclude the need for matching transformers and are fairly rugged in terms of temperature variations and physical jarring. Most eavesdropping manufacturers simply mount the microphone atop an FM oscillator module and leave it at that, although a few interesting exceptions exist.

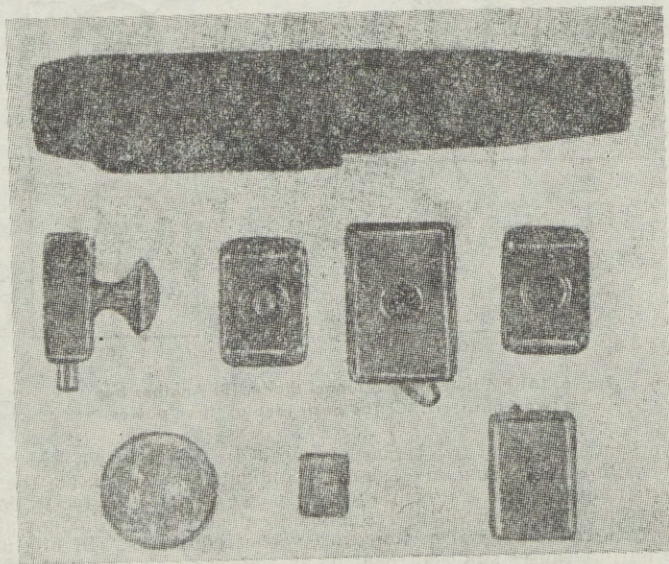


Fig. 5. A selection of tiny mikes commonly used in bugs. The sizes can be established by comparing with the dime.

One of these is the fastening of a slender, hollow, flexible plastic tube to the front of the microphone element, resulting in something that looks very much like a snake (which is what it is called). This permits modern keyhole listening in deluxe fashion, though the preferred method is to drill a tiny hole through the wall, inserting the spaghetti tube for proper acoustical pickup. (This same technique, by the way, was what the Soviet technicians employed in the U.S. Embassy building in Moscow in some sixty places. The plastic tubing is extremely difficult to detect, since the remote microphone/amplifier stages are sufficiently far from the front of the tube so as to preclude effective detection by means of metal locators, the most widely used technique employed by U.S. government departments.) Almost everyone "home-brews" his own snake microphone, although one can be purchased commercially from *Continental Telephone* for about \$30.

The spike microphone, another popular variation, is nothing more than a vibration or conductance device (similar in operation to a phono cartridge and attached needle) which is constructed in such a way as to render the spike as the extension of the normal contact surface. This type, too, sells for about \$30. Also of 2000-ohm characteristics, the spike microphone has been used in emergencies by detectives and police investigators but is not generally employed since the conductance theory has never quite proven itself in the field. As one user explains, "Everything is fine until someone on the third floor flushes a toilet. That can ruin the most rugged pair of eardrums".

ROOM BUGS: TRANSMITTERS

Basically, these units consist of little more than a miniature microphone and a minimum-performance v.h.f. oscillator, "modified" from wireless microphones found in many electronic construction magazines.

On the whole, though, a wealth of comparatively sophisticated circuitry can be found if one knows where to look. Electronic research and development shops often fill in during slack periods with "custom-engineered" bugs for the larger suppliers, many of whom use the latest in high-powered v.h.f. semiconductors to achieve sought-after miniaturization and increased range capability. The general "minimum" range is 150 feet, although many transmit up to one-half mile from conventional transistor radio batteries.

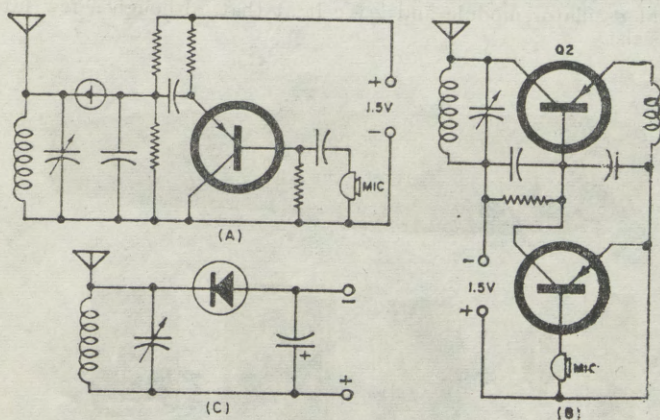


Fig. 6. (A) FM bug using a tunnel diode. (B) Another bug using two transistors. (C) The basic idea of "free power."

Fig. 6 shows an example of two typical designs. In the first (A), FM modulation is produced by the varying audio signal changing the anode bias of the tunnel diode. With tunnel diodes, the characteristic curve is never perfectly linear in the negative resistance region, so the resonance frequency of the diode is affected enough to create an FM signal in step with voice frequencies. In Fig. 6B, the microphone output causes sufficient changes in the resistance of Q1 to vary the bias of Q2. With Q2's base-to-collector capacitance altered accordingly, once again frequency-modulated r.f. results.

Still in the developments stage is the so-called "free-power" bug transmitter, widely publicized as the ultimate in present-day eavesdropping. As indicated in Fig. 6C, in theory it is essentially a tuned circuit followed by a diode rectifier and hefty storage capacitor. When the circuit is tuned to a high-powered local commercial broadcasting station, sufficient d.c. power can be generated to operate a very-low-power bug almost indefinitely. In practice, unfortunately, this proves to be less than enough for most FM transmitter circuits.

Bugging devices are available in a number of exotic styles, although most buyers are concerned with the transmitter element itself, leaving the concealment to individual circumstances. A few exceptions, however, are worth noting. *Continental Telephone* offers for \$150 a "beautiful decorator" bedroom lamp with a built-in FM transmitter that uses the a.c. line cord as its inductively coupled antenna.

Mosler Research Products makes available an exquisite framed reproduction of a church-in-the-valley scene. A tiny hole drilled through the wooden frame per-

mits voices to reach the transmitter, which is crystal-controlled in the 70- to 72-MHz region. Large long-life batteries are strategically clamped in place to help balance the weight throughout the instrument, which is presented as a "gift" to the victim.

Of course, a radio or TV set can not only very easily conceal a bug but can also power it even when the front-panel "on-off" switch is turned off. In this case, the bug's power supply is connected to the a.c. line *before* the set's power switch. Also, in many cases it is possible to use the set's own loudspeaker as a microphone when the set is not in use.

In testimony before the Senate Judiciary Subcommittee on Administrative Practices and Procedures in Washington, D.C. on February 18, 1965, New York's Manny Mittleman revealed his "perfect bug". (See Fig. 7.) Designed primarily to conserve battery drain, this modified room bug has a built-in VOX circuit that can be adjusted for sensitivity and delay.

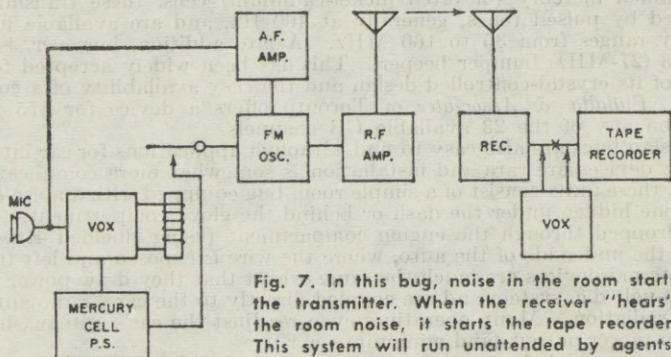


Fig. 7. In this bug, noise in the room starts the transmitter. When the receiver "hears" the room noise, it starts the tape recorder. This system will run unattended by agents.

Once installed, the device is activated by the first click of the doorknob and operates whenever there is a sound in the room. It does not operate when there is silence (such as when the room is empty or at night when everything is quiet); therefore, it conserves battery capacity.

Note also that there is another VOX circuit used at the remote receiver. The addition of this element now makes the over-all system completely automatic, as the tape recorder will only start up when a signal is received from the bug. This not only conserves tape but requires no human monitoring, thus saving expensive operative time. Of course, the tape recorder is transistorized so is no warm-up time and no loss of speech beginnings.

Mittleman remarked that "a private detective can install this several days in advance of whatever action he is interested in (for example, such as in an unoccupied motel room), and then when people get there it will turn itself on the minute they put their hand on the doorknob and it will stay on for as long as they continue to talk, walk around, or what-have-you." It can be purchased from *Steckler Sales Co.* (New York) for \$450.

THE VOX PHENOMENON

Since a great deal of electronic eavesdropping is conducted by private agencies and independent investigators, it frequently becomes profitable for the client to "rent" the equipment and do the job himself, thus avoiding paying both the rental rate plus the \$100-per-day-per-man fees imposed for the agents. Additionally, the agencies themselves often find FM-receiver monitoring not only tedious and time-consuming but also costly. The answer, quite naturally, lies in automation.

Simple voice-actuated relay circuit configurations like those sold for tape-recorder add-on applications are uniquely suited for this work. By coupling the VOX between the monitor receiver and tape recorder (as shown in the receiver portion of Fig. 7), virtually no manned listening is required except to periodically check frequency variations caused by declining battery currents and to make sure the tape hasn't run out.

Professional systems of "double-VOX," such as shown in Fig. 7, command the top rental fees since they cannot ordinarily be purchased commercially but rather must be custom-tailored. With this arrangement, another VOX circuit is added to the bug itself (as with Mittleman's "perfect bug"), which is crystal-

controlled in design. By careful trial and error methods, current drain on the VOX is reduced to absolute minimum, greatly extending the life of the system and further reducing the likelihood of false starts at the receiving end.

ELECTRONIC "TAILING"

Two devices are currently sweeping the electronic surveillance marketplace: the bumper beeper and the high-powered car bug, both of which are elementary in design yet rugged and durable for practical use. Vehicular eavesdropping is generally split into two categories—"quick slap" and "internal"—which are determined by the time one has to make the installation and what distance requirements must be met.

Naturally, the quick-slap packages are the most popular, since they only necessitate the rapid affixing of a strongly magnetized boxed transmitter to the underside of the vehicle, letting the antenna wire trail as it may. Powered by self-contained mercury (or often nickel-cadmium) cells, these transmitters are modulated by pulsed tones, generally at 400 Hz, and are available in various frequency ranges from 35 to 160 MHz. A late addition, however, is the CB channel 3 (27-MHz) bumper beeper. This has been widely accepted for tailing because of its crystal-controlled design and the easy availability of a compatible receiver. *Fudalla & Associates* of Toronto offers a device for \$75 that will operate on any of the 23 available CB channels.

Quick-slap bugs are also easy to find, although applications for car intelligence-gathering devices are rare and installation is somewhat more complicated. Essentially, these units consist of a simple room bug equipped with a noise-canceling microphone hidden under the dash or behind the glove compartment. Antenna wire is dropped through the engine compartment (using shielded RG-58/U *en route*) to the underside of the auto, where the wire is exposed and left trailing.

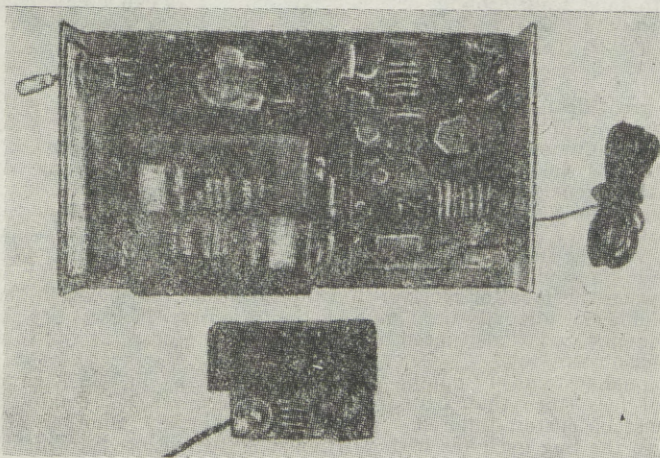
The internal devices are much the same except that they draw power from the car's 12.6-volt d.c. system and are coupled directly to the car's radio antenna for effective radiation. Many operatives even readjust the car's antenna height for maximum power output (and minimum s.w.r.).

These same vehicle-buggers also make a point of adding an "S" meter to their mobile monitor receivers, which they find of great help in approximating distances. Others install another radio antenna on the opposite (left or right front) fender, phase the antennas correctly, and then take careful note of the resultant null when the suspect's car is directly in front of or in back of the bugger's auto.

ELECTRONIC COUNTERMEASURE EQUIPMENT

As indicated earlier, countermeasure (or debugging) equipment is not used to the extent that the mass media would lead one to believe, but it does exist and is interesting at least from a technical viewpoint.

Two examples of tailing beepers. (Top) Large high-powered unit (shown uncased) is self-powered and attached to car by strong magnets. Antenna trails under car. Bottom unit is powered by vehicle battery and is mounted within car.



Certain design packages are on the market for bug detection which concentrate for the most part on r.f. transmitting bugs, although a few exist for telephone direct-line wiretaps. For example, for \$250 one New York supplier has a re-packaged telephone lineman's monitor meter, which samples the load on the line. If this load exceeds the level that the average phone in use actually consumes, a deflection past the clearly marked spot on the meter signals the wiretap. For practical purposes, however, it is good to remember that very few professional eavesdroppers would allow this to happen, since it would also trigger a "general area" meter at the downtown business office and the vicinity would soon be swarming with curious phone company investigators.

Metal locators also have their drawbacks, since metallic wall studs, steel reinforcements, and even finishing nails will register positively, necessitating a meticulous checkout of every reading. Most industrial paranoids abandoned this technique long ago.

This leaves detection up to r.f. field detectors, which amount to little more than souped-up (two or three stages of transistor amplification) field-strength meters. These devices may be quite simple, but they do work in close proximity to the concealed transmitter.

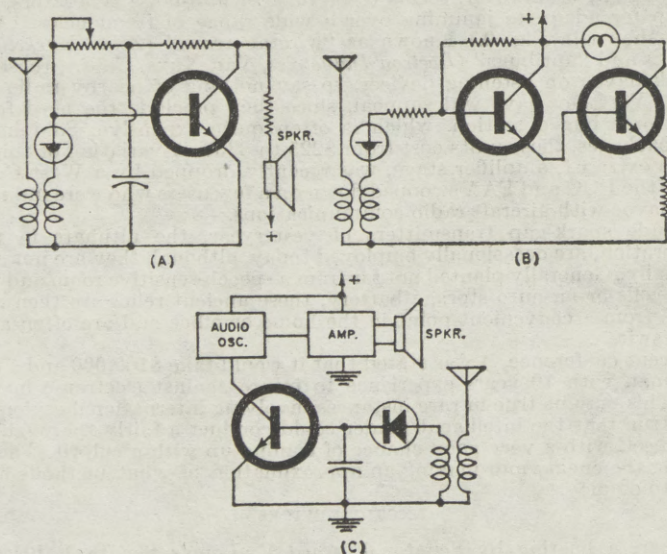


Fig. 8. Examples of r.f. field detectors. (A) The audio oscillator is triggered into operation by the tunnel diode. (B) When the tunnel diode detects an r.f. field, the light comes on. (C) The audio oscillator is turned on when the transistor saturates due to operation of the r.f. detector.

Tunnel diodes have also proved of use here. The circuit shown in Fig. 8A, for example, uses a tunnel as a broadband (untuned) r.f. detector. Essentially, this circuit is a normally quiescent audio oscillator that triggers into operation when a low-level r.f. signal is presented to the tunnel diode. In operation, the potentiometer is adjusted until the device is just on the fringe of bursting into audio oscillation. The detector is then moved around the suspect area until the antenna picks up an r.f. field. When this happens, the tunnel diode triggers the audio oscillator on, creating the loudspeaker tone. The potentiometer also acts as a sensitivity control and is adjusted so as not to trigger on any local broadcast station that may be coming into the same area. These detectors cost about \$250 and are a specialty item of Houston's *Dee Co.* (Similar units have been sold for use as automobile sunshade-mounted devices for detection of police speed radars.)

A flasher variation as shown in Fig. 8B is also available, though few are in actual use. In operation, the actual indicator unit is placed on a desk while the antenna is located on the door jamb. When an operating r.f. bug passes the antenna (for example, carried within an innocent-looking package or concealed

in a pocket ready for surreptitious installation), the indicator lamp will flash a silent warning that an electronic eavesdropping device is within the premises.

A third, non-tunnel-diode approach is shown in Fig. 8C. Here a conventional transistor audio oscillator is used as the tone source. The output feeds a conventional audio amplifier and loudspeaker. The ground lead of the oscillator circuit is taken through a transistor switch which is normally cut off so that the oscillator does not operate. When an r.f. signal is picked up by the untuned antenna system, it is rectified in the diode, filtered, and then passed to the switch transistor. The positive-going voltage causes the transistor to saturate, closing the ground circuit and allowing the audio oscillator to operate. A commercial version of this was L. N. Schneider's "012 Bug Detector," priced at \$39.50 (no longer available).

The most widely accepted device today is known as the feedback detector. Nothing more than a tunable, broad-band (40 to 300 MHz) receiver with speaker output, the gadget screams with feedback in the presence of a tuned-in room bug. These sell anywhere from \$150 to \$650 and frequently come equipped with "S" meters to aid in locating r.f. telephone bugs. Interestingly, price seems to have nothing to do with receiver linearity or sensitivity.

The latest craze, however, seems to be in r.f. white-noise generators, suitably souped up for adequate jamming over a wide range of frequencies. (A typical circuit is shown in Fig. 9.) Known as "wiretap traps" (*Zelux Marketing*, New York City) and "antibugs" (*Dectron Industries*, Van Nuys, Calif.), these gadgets can wreak havoc on listening devices, to say nothing of nearby radio and TV reception. Yet they have wide appeal, since they preclude the need for visual and electronic bug detection, which is often quite expensive. Sold in various types of packages, these units cost from \$225 to \$350. A variation of this design, having an extra r.f. amplifier stage, was recently dropped by a West Coast supplier after the FCC and FAA swooped down on a few users who were unknowingly creating havoc with aircraft radio communications.

The crude spark-gap transmitters of yesteryear, the ultimate in powerful hash generation, are occasionally employed today, although they are not available commercially. Generally planted not far from a speech-sensitive room and powered from dry cells or an auto storage battery, these ancient relics are then remotely controlled from a convenient point in the home or office and are often activated by a wall switch.

At a recent conference, it was stated that it would take \$100,000 and a counter-measure man with 10 years experience to insure against electronic invasion of privacy. This may be true in rare instances involving international espionage, but it is also true that the intelligent reader could conduct a fairly thorough investigation himself with a very good chance of coming up with a culprit. The trick is in knowing the enemy and making an approximation of what methods he would be likely to employ.

EXOTIC DEVICES

Last year, a hearing by Senator Edward V. Long's Senate Judiciary Subcommittee made public the now-famous martini-olive FM transmitter, that had a maximum range of only 20 feet, thus having very limited application. Likewise, the sugar-cube microphone commonly discussed, is only a microphone—and not a transmitter.

Except for laboratory developments, the smallest commercially available bug contains a single v.h.f. transistor, is powered by a flat hearing-aid battery, and measures $1" \times \frac{3}{4}" \times \frac{1}{4}"$. Yet it requires an antenna wire and has a maximum range of about 200 feet. As subminiaturization goes, it is expected that this design will continue to be used for some time before becoming obsolete, despite work being done with IC's.

Several electronic companies have indicated success with the creation of physically small antennas, and bug designers have been following these developments avidly.

Some have suggested going to a higher frequency where more efficient antennas could be used. This presents some problems, which are not insurmountable, however. As the frequency goes up, the amount of r.f. power becomes limited, while r.f. absorption by neighboring metal objects (and some types of non-metallic objects) greatly reduces the power that is left, thus again reducing operating range.

One answer is the Gunn-type semiconductors where r.f. power can be raised somewhat to overcome a few of these problems. However, other conditions now enter the picture. Multiple reflections from surrounding terrain and changing

antenna patterns with movement of the transmitter or metal objects around the transmitter all contribute to plague the higher frequency unit. It has been estimated that power level advances will not be made until after 1970 at the earliest.

Limited only by the size of the external components required (battery, mike), the introduction of the IC heralds the day of the really small, easy to conceal bug. It only remains for enterprising engineers to solve these problems to match the tiny electronic circuits that can be created.

Of all the exotic devices, the laser-beam eavesdropper is furthest from reality. Experts in laser research and development predict that it will be a minimum of 20 years before any tangible results are realized, although fiction (and often the news) media would lead the public to think it was just around the corner.

Micro-reflectors consisting of Angstrom-thick reflective paint that is not optically visible has been developed, although its use as a window-pane reflector for laser snooping right now is pure sensationalism. Additionally, audio filtering is presently nowhere near the level required for such work.

One problem in the future of electronic eavesdropping lies in working out the flaws in audio-frequency filters and in raising the power levels of r.f. transmitters to something more than the 250 mW of present types. *Miles Wireless Intercom, Ltd.* has already announced that it had developed the ultimate in audio filters, capable of distinguishing and separating voices from typewriter clatter, passing cars, air conditioners, and overhead airplanes. *Electro-Voice* has had, for quite some time, a long-range "shot-gun" mike with specially cut tubes for key voice frequency range response. It should only be a matter of time before practical snooping devices result.

Now that the reader has had a good look at modern electronic eavesdropping, he is urged to use his own judgment in distinguishing between the real and the fictional and to bear in mind that even the most devoted Ian Fleming fans often come from Missouri.

In conclusion, this article has concentrated on the strictly technical aspects of this topic. On the matter of the ethics involved in using eavesdropping equipment, that would require another article even larger than this one.

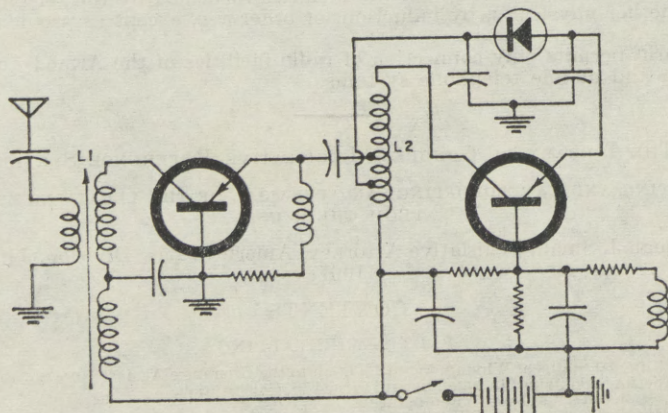


Fig. 9. R.f. white noise generators are supposed to flood area with r.f. noise, jamming any radio bugs in the room. The use of such devices is frowned upon by government officials because they interfere with legal communications.

Legal Aspects

Transmitting Bugs: On April 8, 1966 the FCC adopted certain amendments to its Rules that were designed to prohibit eavesdropping. Although entered as a specific regulation (Part 2, Subpart H, Section 2.701), the Commission also spelled out the same ruling in Part 15 in two separate instances.

"No person shall use, either directly or indirectly, a device required to be licensed . . . for the purpose of overhearing or recording the private conversa-

tions of others unless such use is authorized by all persons or parties engaging in the conversations."

Additionally, this exception was entered:

"... this section shall not apply to operations of any law enforcement officers conducted under lawful authority."

This, however, only affects the use of those devices already functioning on the frequencies already under direct control of the FCC. Obviously, the Commission cannot apprehend all violators, since the vast majority of such equipment is extremely low power and used only for short periods of time.

On September 19, 1966 Congressmen Gallagher and Moss introduced legislation (H.R. 17826 and 17827) aimed at the ultimate destruction of the eavesdropping industry:

"A bill to prohibit the shipment in commerce of electronic eavesdropping and wiretapping devices."

In essence, the legislation if enacted would give exception to law enforcement agencies and "any department, agency, or instrumentality . . . authorized to use such devices by Federal statute." It would take effect 180 days after passage.

The bills were promptly referred to the Committee on Interstate and Foreign Commerce, where they remained as Congress closed in November.

Telephone Devices: In this area no legislation is currently pending, although Sen. Edward V. Long's (Dem.-Mo.) Senate Judiciary Subcommittee is expected to propose drastic measures late in 1967.

Presently, the only agency which can become involved is the FCC, which holds as a violation of Rules Section 605 the "unauthorized interception" of telephone communications by induction-coupled devices or direct wiretaps. But for the FCC to take action there must be a clear effort to divulge the information obtained by eavesdropping or in any other way make evident its "beneficial" value.

Although seldom enforced, many telephone companies have policies that read similar to this one issued by the Wisconsin Telephone Company:

"No equipment, apparatus, circuit, or device not furnished by the telephone company shall be connected with the facilities furnished by the telephone company, whether physically, by induction, or otherwise, except as provided in this tariff."

The tariff permits only connection of radio facilities of the Armed Forces, the railroads, and mobile telephone systems.

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WIRETAPPING AND EAVESDROPPING: AN APPRAISAL OF THE LEGAL ISSUES ARISING FROM THEIR USE

(By Norman J. Small, Legislative Attorney, American Law Division, January 27, 1967)

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PART I

WIRETAPPING

I. *Constitutional status of wiretapping in relation to the guarantee against unreasonable searches and seizures contained in Amendment 4 to the United States Constitution.*

Inasmuch as the installation of taps to telephone wires leading into a residence or an office entails no physical intrusion or trespass upon such property, the gathering of incriminating evidence by federal law enforcement officers through the employment of such means accordingly does not give rise to an unreasonable search and seizure proscribed by Amendment 4. A bare majority of five of the nine Justices presiding on the Supreme Court in 1928 so ruled in *Olmstead v. United States*, 277 U.S. 438. Although federal officers, in having recourse to this method of criminal detection in the State of Washington, had violated the laws of the latter whereunder interception of telephone messages was a misdemeanor, that fact was accorded no significance by the Supreme Court for the reason that under the common law, or collateral, rule of evidence then in effect in Washington and applied by federal courts, the admissibility at the trial of incriminating evidence was "not affected by the illegality of the means by which it was obtained". The Court did acknowledge, however, that Congress "may protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials, by direct legislation." (Emphasis supplied.)

To date this holding has never been overruled, but the narrow margin by which it was decided cannot be overlooked by those presently aligned in favor of legislation which would sanction wiretapping, subject to judicial supervision, by federal and state law enforcement officers in combatting and detecting the commission or attempted commission of specific crimes. If the Court, as presently constituted, is predisposed in favor of the views championed by the minority of four dissenting Justices in the *Olmstead* Case, then manifestly wiretapping will cease to be a constitutionally permissible investigative device; and such reversal of the *Olmstead* ruling will render nugatory all efforts expended in the enactment of the aforementioned legislative reform. Worthy of notation in this connection, however, is the assessment of the *Olmstead* holding by certain commentators who have ventured the prediction that had that case arisen in a state which by law authorized wiretapping, the dissenting Justices would have ruled otherwise. However, only one of the opinions of these dissenting Justices lends any support to this conclusion, that of Justice Holmes.

II. *Congressional regulation of wiretapping*

Prior to the *Olmstead* ruling Congress had included within the Radio Act of 1927 (44 Stat. 1162, 1172 § 27) a provision as to interception and divulgence of radio communications and subsequently, in 1934, in transferring to the "newly constituted Federal Communications Commission" jurisdiction over both wire as well as radio communications, it incorporated into the Federal Communications Act an amplified provision which reads as follows:

47 U.S.C. 605—*Unauthorized publication or use of communications.*—No person who, as an employee, has to do with the sending or receiving of any interstate or foreign communications by wire or radio shall divulge or publish it or its substance to any one other than the addressee or his authorized representative or to authorized fellow employees, save in response to a subpoena issued by a court of competent jurisdiction or on demand of other lawful authority; and "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any one."

(Emphasis supplied.)

III. *Judicial construction of 47 U.S.C. 605*

In two decisions rendered shortly after the enactment of § 605 the Supreme Court ruled (1) that federal officers are embraced within the concluding prohibition thereof, specifically, that "no person not being authorized by the sender shall intercept . . . and divulge or publish the . . . contents . . . of such intercepted communication to any one"; and (2) that evidence procured by such officers directly from wiretapping as well as (3) evidence legitimately procured by said officers as a by-product of wiretapping shall be inadmissible in federal courts (*Nardone v. United States*, 302 U.S. 379 (1937), *Nardone v. United States*, 308

U.S. 338 (1939)). This bar to the introduction of wiretap evidence in federal courts subsequently was amplified to preclude the admissibility therein of information initially obtained by wiretapping on the part of state officers independently of any federal participation therein and thereafter tendered to federal agents (*Benanti v. United States*, 355 U.S. 96 (1957)). During the interim between the previously cited cases the Court also ruled that § 605 also operates as a bar to the introduction in federal courts of evidence obtained by the interception of intrastate as well as interstate telephone communications. Inasmuch as both intrastate and interstate messages "pass indiscriminately over the same wires", an interceptor, other than a person employed by communications carriers, "cannot distinguish between the two types of messages, and consequently, 'the only practicable way to protect interstate messages from interception and divulgence is to prohibit the interception of all messages', local as well as interstate (*Weiss v. United States*, 308 U.S. 321, 328 (1939)).

Although a contention that wiretapping by state law enforcement officers pursuant to a state judicial order authorized by the constitution and laws of the state did not contravene § 605 was unmistakably rejected in *Benanti v. United States*, *supra.*, pp. 103-106, the Court nevertheless elected, in *Pugach v. Dollinger*, 365 U.S. 458, 459 (1961), to reaffirm the principle earlier enunciated in *Schwartz v. Texas*, 344 U.S. 199 (1952) to the effect that a federal court may not enjoin the use in a state criminal court of evidence obtained by wiretapping in violation of § 605. Although the federal statute was strictly construed as not clearly invalidating state laws expressly sanctioning wiretapping in the admission in state courts of evidence thus obtained, the latter holding was attributed to "the traditional reluctance of a federal court to meddle in state criminal court proceedings" (*Pugach v. Dollinger*, *supra.*, p. 462).

However, when a police officer, without the knowledge and consent of the sender of an extortion threat by telephone, overhears the same on a regularly used telephone extension placed at his disposal by the receiver of such communication, such interception and subsequent divulgence of such message in a criminal trial in a federal court does not give rise to any violation of § 605. "Each party to a telephone conversation takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation." (*Rathbun v. United States*, 355 U.S. 107, 110, 111 (1957)).

IV. Interpretation accorded § 605 by the Department of Justice

Notwithstanding criticism thereof as ill-founded and erroneous, "it has long been the position of the Department of Justice that the mere interception of telephone communications is not prohibited by federal law". The "only offense under the present law [section 605] is to intercept any communication and divulge or publish the same. Any person, with no risk of penalty, may tap telephone wires . . . and act upon what he hears or make any use of it that does not involve divulging or publication". (Statement of Attorney General Robert L. Jackson, House Committee on the Judiciary, Hearings before Subcommittee No. 1 on H.R. 2266 and H.R. 3099; 77th Congress, 1st Session, page 18 (1941); quoted by Richard C. Donnelly, Comments and Caveats on the Wiretapping Controversy, 63 Yale L. J. 799, 800 (1954); (emphasis supplied).

This interpretation of Section 605, which is the present position of the Department of Justice, was once described by a congressional committee as "strained and overtechnical" [S. Rept. No. 2700; 81st Congress, 2nd Session, p. 5 (1950)]. It makes two postulates. First, since the section uses the terms "intercept . . . and divulge or publish," both events must occur before there is a violation. Second, the entire Federal Government, or at least the Department of Justice, is an entity. Therefore, an investigator does not "divulge or publish" when he passes wire tap information on to his associates and superiors inside the government. Apparently, only a disclosure to the world at large constitutes divulgence or publication.

There are a number of holes in the Department's argument. The Supreme Court in the first *Nardone* case stated that "the plain words of Section 605 forbids anyone, unless authorized by the sender, to intercept a telephone message, and direct in equally clear language that no person shall divulge or publish the message or its substance to any person [302 U.S. 379, 382] . . ." In the New York *Coplon* case, on the other hand, both Judge Ryan [*United States v. Coplon*, 88 F. Supp. 921, 925 (1950)] and Judge Learned Hand [*United States v. Coplon*, 185 F. (2d) 629, 636 (1950)] indicated that interception alone is unlawful. Furthermore, the Department's interpretation ignores the provision of Section 605 which enjoins the "use" of intercepted communications for anyone's benefit. Obviously, without either divulging or using, wire tapping would be just an idle past time.

Other agencies do not share the Department of Justice's interpretation of Section 605. The Treasury Department . . . takes the position that wire tapping itself is prohibited, and the Federal Communications Commission assumes that since Section 605 prohibits the "use" of information gained by wire tapping, this, in effect, bars any wire tapping. Faced with a conflict among interested agencies, it is strange that the Department of Justice has never sought a court test of its position in a proceeding where the question could be squarely raised, i.e., a criminal prosecution of a wire tapper. This failure can perhaps be explained, in part, by a reluctance to prosecute citizens for illegal practices utilized by government agents rather than by any genuine belief in the soundness of the Department's interpretation of Section 605. (*Donnelly, op. cit.*, pp. 800-802; see *United States v. Gruber*, 39 F. Supp. 291; aff'd., 123 F. (2d) 307 (1941) for the only reported prosecution of a wire tapper prior to 1941, as stated by Edward Bennett Williams, *The Wiretapping-Eavesdropping Problem: A Defense Counsel's View*. 44 Minn. L. Rev. 855 (1960)).

Without conceding that its own restrictive interpretation thereof may have contributed to present widespread dissatisfaction with § 605, the Department of Justice concurs with those critics who maintain that the law "is intolerable [and that] . . . it adequately protects the privacy of no one. To prosecute successfully [thereunder] the Government . . . must prove both interception and disclosure [and] under these circumstances there is a good deal of illicit wiretapping" (Former Attorney General Nicholas deB. Katzenbach before Senate Committee on the Judiciary, Subcommittee on Criminal Laws and Procedures. Hearings on S. 2189, etc. March 22, 1965; 89th Congress, 2nd Session, p. 34). To date, however, those disenchanted with § 605 have been unable to agree on the form which the amendatory legislation should take. On the one hand, those wedded to the more effective protection of privacy would supersede § 605 with a total ban on wiretapping. Aligned in opposition are those who would tighten existing prohibitions against unauthorized interception by private snoopers while sanctioning a limited form of wiretapping under strict judicial surveillance on the part of federal and state law enforcement officers. Hereinafter presented is a summation of the arguments which have been advanced in support of, and in opposition to, the latter recommendation.

V. To wiretap or not to wiretap

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If you do not give the people the right to tap a wire, you are merely giving the enemies of your country the right to a secret dispatch case that you cannot possibly discover. You are giving the enemy every bit of technological progress.

Gambling, moreover, has many close links with the "hard core" underworld. Gambling is the very heartbeat of organized crime both on a local and national scale.

The social order depends almost entirely on punishment by law and requires the capture, conviction and severe treatment of as many culprits as possible.

Prosecuting attorneys have been in accord in their advocacy of a total ban on private wiretapping. By prosecuting the latter we would underscore the distinction between unauthorized wiretapping used for personal nefarious profit, and authorized wiretapping as an aid to the enforcement of the laws.

States that ban all types of wiretapping give lip service to the ideal

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Wiretapping is used only to combat gambling or only to investigate minor offenses. Officers, however, play this fact down, and contend that it is used principally for investigating major crimes. But wiretapping done by plainclothesmen in large part is aimed at bookmakers' operations and at prostitution.

There is also reason to believe that a law allowing wiretapping in limited situations would provide an opening wedge for permitting wiretapping in all cases.

Prosecutions for unlawful wiretapping have not been limited to private acts. Law enforcement officers have been prosecuted and convicted.

Equipment essential to effect wiretapping is readily procurable and will always be available for use by private citizens.

Law enforcement officers can never be certain that they have detected all

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and that's all. The total ban, with what amounts to complete lack of enforcement, results in unchecked snooping, officially and privately with complete immunity.

In some cases wiretapping may be the easiest way to secure evidence. Alternative methods of investigation would be more expensive.

The Secret Service often are unable to close cases on counterfeiting because distributors of counterfeit items, upon arrest, have refused to make the necessary admissions identifying their sources of supply and the latter cannot be kept under effective surveillance other than by recourse to interception of communications emanating from, or addressed to, the latter.

If wiretapping presents a risk of invasion of privacy, the answer is not to abolish wiretapping, but to impose more stringent restrictions on wiretapping than are now imposed on search and seizure.

There can be no justification of a total prohibition against wiretapping by law enforcement officers; for wiretapping is an effective weapon against criminal activity. Wiretapping is not an unfair or coercive procedure. It does not tend to produce the conviction of innocent people. Rather it tends to insure the conviction of guilty people. It is an "ear" witness of crime, almost, if not as good as, an eye witness.

Wiretapping is a necessary and important investigative method for the detection and prevention of serious crimes. Today our nation needs more than ever every weapon it can use to destroy those who would destroy us. The immunity which present law gives to spies and traitors in using the telephone to carry out their plans of intrigue and subversion deserves to be, and must be, stopped.

When authorized under careful restrictions, wiretapping is not "dirty business" at all; but a common sense solution by Congress which will protect the liberty and security of all the people from those who wish to see it impaired.

Trapping criminals today is difficult unless you are at liberty to tap their messages. Convicting them is practically impossible unless you can use the wiretaps in court.

Surveillance of wires by law enforcement officers under strict supervision in cases involving national security as well as other heinous crimes in an essential

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illegal wiretapping. Detection is impossible after the tap has been removed.

If wiretapping were forbidden, an extra agent might have to be assigned to shadow the suspect, or a little more time or care taken to assure that the arrest will be made after the suspect has passed incriminating documents to a fellow-spy. It is not even certain that these alternatives would in the long run prove more expensive or less efficient than wiretapping. Moreover, the convenience of the law enforcement officer is not synonymous with public interest or necessity.

Even ardent proponents of wiretapping recognize the costs and dangers that are involved and see themselves as taking calculated risks to meet the necessities of national defense or of a broader war on crime.

No Attorney General has proffered data or instances where wiretapping is the only feasible way of acquiring information of crimes affecting the national security, or where, without the use of wiretaps, the course of an investigation would have been seriously impeded.

This argument proves too much. It shows the operation of Gresham's law in law enforcement. It substantiates the conviction that the process of government must necessarily be a "dirty business" unrestrained by moral considerations. It runs counter to the principles underlying our society.

It does not appear that wiretapping is always a necessary and important investigatory method. The Government frequently claims that wiretapping does not yield information of any probative value. (*United States v. Weinberg*, 108 F. Supp. 567, 569 (1952); *United States v. Flynn*, 103 F. Supp. 925, 933 (1951)). One FBI officer previously characterized wiretapping as "archaic and inefficient" (53 Harvard L. Rev. 863, 870n, (1940); and a handicap or barrier in the development of sound, ethical, investigative techniques.

"Writs of assistance and general warrants are but puny instruments of tyranny and oppression compared with wiretapping" (Brandeis, J., dissenting

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and reasonable adjustment between the rights of the individual and the interests of society. "A standard which would forbid the reception of evidence obtained by other than nice ethical conduct by government officials would make society suffer and give criminals greater immunity than has been known heretofore" (*Olmstead v. United States*, 277 U.S. 438, 468 (1928)).

It is impossible to cope with the jet age criminal with a horse and buggy prosecutor. With proper safeguards the right to wiretap is essential; for the prosecutor must be able to employ modern tools in fighting crime.

Experience in the states where interception of telephone calls by law enforcement officers is sanctioned has demonstrated that the liberties of decent citizens have not been interfered with or impaired.

The fact that the wiretapping technique has been abused by private snoopers affords no reason for believing that it will be abused by federal law enforcement officers. Of course, abuse is inherent in any grant of governmental power. It is always easy to conjure up extreme and even oppressive possibilities in the exercise of authority; but the Congress which creates and sustains governmental agencies can be trusted to correct whatever defects experience may reveal.

How can we preserve the safety and liberty of every one in this nation unless we pull federal prosecuting attorneys out of their strait jackets and permit them to use intercepted evidence in the trial of security cases and other heinous offenses?

Except for a short period during 1940, every Attorney General over the last 25 years has favored authorization of wiretapping by federal officers in security cases and other heinous crimes.

The innocent will be protected adequately under the proposed legislation by prohibitions against the use of the evidence insofar as it pertains to innocent parties. The intercepted evidence will not be published, if at all, until a grand jury has indicated the accused for specific crimes; and thereafter only relevant wiretap infor-

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in *Olmstead v. United States*, 277 U.S. 438, 476 (1928)).

It may be easier to catch spies by wiretapping than by other methods. But law enforcement also would be easier if we could use torture, general search warrants, mass arrests, and indefinite police detention. It also would be easier to convict spies if we would suspend the privilege against self-incrimination and the right to counsel guarantees. The difficulty is that we destroy exactly what we are seeking to preserve when we try to protect democracy with totalitarian tools. The discrediting and suspicion of the law enforcing branch which arises from the occasional use of wiretapping more than offsets the good which is likely to come of it.

The principle underlying our society is that the goal of efficiency in law enforcement is subordinate to the preservation of personal liberty. Occasionally this principle frustrates the true interests of justice by releasing the guilty; but this kind of self-denial on the part of government is an essential characteristic of a free society. Although wiretapping may help the FBI to bring spies and saboteurs to heel, similar assistance could be expected from opening the mails and practicing the third degree. No doubt a great deal could be learned by placing recording devices in confessionals, in physicians' consulting rooms, and in lawyers' offices. But a society which countenances these techniques ceases to be free.

While law enforcement officers may attempt to practice self-restraint in wiretapping, the influence of power corrupts the best intentions. "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. . . . The great dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without consideration" (Brandeis, J., dissenting in *Olmstead v. United States*, 277 U.S. 438, 479 (1928)).

The crucial difference between wiretapping and accepted law enforcement practices lies in the extent to which wiretapping invades the privacy of wholly innocent people. It is standard practice of the police to tap public telephones which may be used by suspects. These taps may record one conversation involving a gambler and

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mation will be admitted by the trial judge. Prosecuting attorneys have reiterated that in their experience they have never witnessed any case in which an innocent person has been harmed by wiretap evidence. The protection against blackmail afforded by wiretapping supplies one of the strongest arguments in favor of legislation authorizing this method of detection.

The law presently admits evidence obtained and supplied by informers; by eavesdroppers at someone's key hole or window; by an officer concealed in a closet; by installation of a recording device on the adjoining wall of a hotel room or office; by transmitters concealed on an officer's person; and by authorized search and seizure. There is little, if anything, to distinguish between these approved methods of obtaining and admitting evidence and wiretapping. Yet evidence disclosed by the latter is now inadmissible.

The apposite contention on the "con" side embraces a shocking argument; for it applies equally to the warrant requirements for search and seizure. This argument in effect states that judges will not do their duty. If that is true, we have something more serious to worry about than wiretapping. If judges cannot be expected to do their duty, then any legislation totally banning wiretapping will prove ineffective since it will be the same judge and the same law enforcement officers who will interpret and apply such a law. The remedy for individual abuse is criminal prosecution or impeachment or action at the polls; and not the strangulation of the judicial and prosecution functions.

New York authorities maintain that this is emphatically not the case. They affirm that they do not make applications for wiretaps unless they are confident that they are legally justified in so doing. Under New York law, they must submit to a court an affidavit in which they state under oath that they

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500 conversations involving entirely innocent persons whose most personal affairs are thus laid bare. Moreover, the fruits of wiretapping all too often become a matter of public record. No search warrant could possibly involve so sweeping an intrusion into private affairs. Wiretapping is a hunt for evidence, i.e., incriminating admissions, and since no one can forecast when the incriminating admission will be made, the hunt may go on for months, as against the limited temporal authority granted by the search warrant for tangible things.

Another difference between wiretapping and the ordinary search warrant is that the victim seldom learns that his wires have been tapped. One may move for suppression or return of evidence seized under an invalid warrant; but one may never even discover the tapping of his wires.

We should not fight subversives, spies, saboteurs, or traitors by initiating such methods. Wiretaps will be used to harm innocent persons; privacy will be invaded; people will become apprehensive about using the telephone; and the authority conferred on federal officers to wiretap will prove susceptible of abuse.

Exactng the requirement of a prior judicial authorization as a condition precedent to the installation of a wiretap will not prove to be an adequate safeguard. This requirement will not be effectively enforced for the reason that judges will tend to rubber stamp the requests of law enforcement officers.

No adequate safeguard against arbitrary and indiscriminate wiretapping is afforded by the statutory requirement of a court order sanctioning tapping.

It would be of interest to speculate as to what chance wiretapping legislation would have if it required the Government to notify each person, not in-

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have reason to believe that they can obtain evidence of crime by tapping. Sufficient facts must be tendered in support of that conclusion, and in addition the officers must subject themselves to examination by the court for the purpose of justifying the issuance of an order authorizing installation of a tap. Only when these requirements have been met satisfactorily, does a New York Court grant the order.

The requirement of a judicial order sanctioning tapping affords protection against fishing expeditions or merely spying.

Granted that invasion of privacy is repugnant to all Americans, nevertheless the safety of the Nation and of its people must remain paramount.

When holders of party lines are privileged to listen in, it no longer can be maintained that telephone conversations are conducted in strict privacy. Moreover, substantial doubts arise as to whether telephone users remain entitled to any right of privacy when the facilities which they daily employ have become instrumentalities for the consummation of crimes.

The fallacy in the position of those who oppose wiretapping is that it treats three "invasions" (interception of innocent conversation, invasion of privacy, and "dirty business") as absolutes, when throughout the entire constitutional history of this country the effort put forth has been to balance the right of the individual against the need for public security. Every objection raised against wiretapping can just as readily be made against many other police tactics which are accepted today as proper and essential to effective law enforcement and crime prevention such as the informer, eavesdropping, installation of recording devices on walls adjoining a hotel room or office, authorized search and seizure, fingerprinting, photographing, blood testing, etc.

All of the latter entail basic invasions of privacy, and all of these are essentially "dirty business". In many of these, conversations or activities of innocent persons are incidentally overheard or observed. Indeed, the outcry against wiretapping is surprising when one considers the general acceptance of search and seizure; for the latter entails an invasion of the sanctity of the home. Moreover, searches and seizures often have revealed innocent but embarrassing information concerning persons other than the householder. Yet no

involved in an alleged offense, whose communications would be intercepted. If the presumed answer to this question is correct, permissive wiretap legislation can be passed and kept on the books only so long as the people affected are kept in ignorance of its operation.

Sometimes it is said that innocent people have nothing to fear from their conversations being overheard. But this ignores the nature of the conversation as well as the fact that most people have some aspects of their lives that they do not wish to expose. Free conversation often is characterized by exaggeration, obscenity, agreeable falsehoods and the expression of antisocial desires or views not intended to be taken seriously. The unedited quality of conversation is essential if it is to preserve its intimate, personal and informal character.

Wiretapping is a plague on the Nation, a far more serious intrusion into privacy than the general writs of assistance used in the colonial days. With its use all the intimacies of one's private life can be recorded. This is a practice which strikes as deep as an invasion of the confessional.

There never has been a showing that we would catch fewer criminals or that criminal activities would increase in the event that wiretapping is made unavailable. A traitor who risks death if apprehended is certainly not going to be deterred by the knowledge that his telephone may be tapped. At most he will avoid use of the telephone.

Law enforcement cannot be tightened for the guilty without enmeshing the innocent. The escape of an occasional or even many individuals because of procedural safeguards that we accord to the accused is a tolerable price to pay for the preservation of an atmosphere of freedom and respect for individuality.

Congress should not act until proponents of wiretapping have carried the burden of proof that the threat to national security is great enough to justify departure from the normally sound policy of prohibiting wiretapping altogether.

Our national survival through four terrible decades of war and revolution

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one has suggested abolishing the right of search for this reason.

is almost alone sufficient to raise doubts regarding the present alleged necessity of a resort to wiretapping for self-preservation.

PART II

EAVESDROPPING

VI. *The devices employed*

Inventions designed to enable private persons or government agents, without detection, to overhear and record the conversations of others are being perfected with such rapidity that a definitive enumeration thereof is scarcely practicable. Independently of the fact that the employment of any one of them generally may be productive of an invasion of the privacy of the unsuspecting victim at whom they are directed these devices, in terms of the searches and seizures guarantee of Amendment 4, are susceptible of a dual classification; namely (1) those which necessitate an intrusion, or trespass by stealth or otherwise, into the home, office, or hotel room, etc. of the victim for the purpose of "planting" a microphone or other radio electronic broadcasting or recording instrument; and (2) those which are operative without such entry for the purpose of detecting conversations on the part of such occupants.

Within the first classification are (a) tape and wire recorders coupled with microphones; (b) microphones wired to recorders located at a point distant from the room in which the microphone is installed; (c) a "spike mile" *driven into a wall* to pick up conversation from an adjoining room; (d) tiny radio transmitters powered by batteries or powered by connections in a telephone or in a wall socket, or in a lamp in which they may be concealed which transmit conversations in the room in which they are installed to receivers or recorders far remote therefrom; and (e) reflectors "planted" in a room to be monitored at which a radio beam, located at a remote point, may be beamed and which is capable of transmitting back to the operator of the beam conversations which occur in said room.

Recently described in the *New York Times* (December 26, 1966, p. 14, col. 1) is a "harmonica bug" which is a tiny transmitter that fits under the dial inside a telephone and turns that instrument into an open microphone that will pick up whispers anywhere in a large room and send them across country over an open telephone circuit. The "harmonica bug", which responds to the command of a harmonica, may be activated as follows. An eavesdropper dials the number of the phone in which the "harmonica bug" is installed. In the instant before the ring he blows the single tone on his harmonica into his phone. At the other end, the harmonica signal automatically disconnects the phone line from the telephone and connects the line instead to the tiny "harmonica bug" inside the telephone. This takes place without the knowledge of the people in the room in which the telephone containing the "harmonica bug" is attached. When the eavesdropper is finished listening, he hangs up. The "bug" connection is broken and normal telephone service resumes.

Of course, insofar as any of the electronic eavesdropping devices enumerated in the preceding paragraphs are capable of being utilized to overhear conversations in the streets or in outdoor arenas no improper entry or trespass generally occurs. Likewise, no questionable intrusion or trespass is involved when any of the former or the following devices are installed by government or by private entrepreneurs in public buildings, offices, and conference rooms or in mercantile establishments and hotels for the purpose of surveillance or for the purpose of monitoring conversations of employees, customers, guests, or, in short, private citizens. To be added to the devices hitherto described which may be employed effectively for the last mentioned purposes, or more particularly, surveillance, are T.V. cameras, regular and infrared cameras, and two-way mirrors. As to the cameras, some are capable of adjusting their own lenses and advancing their own film. Cameras also may be radio controlled and can be made to sense the closeness of a human body and turn themselves on only when people are around. Through the use of electronic light simplifiers these cameras are even capable of photographing human beings in dark rooms (John G. Marinuzzi. *Bugs and Birds—The Eavesdropping Revolution*; as contained in Senate Committee on the Judiciary. Subcommittee on Administrative Practice and Procedure, Hearings on Invasion of Privacy (Government Agencies); 89th Congress, 1st Session; February 18-24; March 2-3, 1965, pp. 321-327).

VII. Federal legislation pertaining to eavesdropping other than by wiretapping

To date no laws have been enacted.

VIII. Federal administrative regulations pertaining to electronic eavesdropping

Exempting therefrom "the operations of any law enforcement officers conducted under lawful authority," the Federal Communications Commission, on February 28, 1966 (31 Fed. Reg. 3400 (March 4, 1966)) promulgated the following regulations which are designed to outlaw the use by private citizens of low-powered radio eavesdropping devices and other devices unless licensed by the Commission pursuant to authority vested in it by 47 U.S.C. 301.

47 CFR 2.701—No person shall use, either directly or indirectly, a device required to be licensed by § 301 of the Communications Act, for the purpose of overhearing or recording the private conversations of others unless such use is authorized by all of the parties engaging in the conversation.

47 CFR 15.11—No person shall use, either directly or indirectly, a device operated pursuant to the provisions of this part for the purpose of overhearing or recording the private conversations of others unless such use is authorized by all of the parties engaging in the conversation.

47 CFR 15.220—As provided in § 15.11, the use of a low power device for eavesdropping is prohibited.

IX. Legal issues arising from the employment of eavesdropping devices by federal agents

(a) *Existing precedents.*—Suggested by the few precedents thus far recorded is the conclusion that incriminating evidence obtained by eavesdropping on the part of federal officers will be admissible in a federal prosecution to the extent that such evidence was acquired by means not entailing any unlawful intrusion, by stealth or otherwise, of a house, office, or hotel room for the purpose of "planting" therein a detection device capable of effecting the overhearing or the recording of conversations on the part of occupants or suspects entering the same. Thus, in *Goldman v. United States*, 316 U.S. 129 (1942) eavesdropping by the use of a detectaphone, a nonelectronic device having a receiver so delicate as, when placed against a partition wall, to pick up and amplify voices in an adjoining office was held not to be within the prohibition of Amendment 4. Nor does that Amendment apply to statements made by an accused in his own premises to an "undercover agent" whose identity was not suspected and who had on his person a radio transmitter which communicated the statements to another federal agent outside the building (*On Lee v. United States*, 343 U.S. 747 (1952)). Likewise, when an offer to bribe is made in private, the fact that the revenue agent offeree did not intend to accept did not convert the agent's presence into an illegal invasion, and, hence, did not render improper use by the agent of a recorder concealed on his person to corroborate the substance of the conversation had with the defendant and which the agent was entitled to disclose (*Lopez v. United States*, 373 U.S. 427, 441, 446 (1963)).

On the other hand, when a listening device cannot be employed effectively without an intrusion of the suspect's premises, the results yielded thereby have been excluded as the product of an unreasonable search and seizure. Thus, incriminating evidence overheard by means of an electronic listening device such as a "spike mike" pushed through the party wall of an adjoining house until it reached heating ducts in the house occupied by the defendant is inadmissible, for such eavesdropping was effected by an unauthorized penetration of the defendant's premises (*Silverman v. United States*, 365 U.S. 505 (1961)). Meriting notation as another example of eavesdropping effectuated by an unlawful entry is *Irvine v. California*, 347 U.S. 128, 139, 142, 149 (1954), which was decided before the absorption of the Fourth Amendment into the due process clause of the Fourteenth and which led to the sustaining of a conviction which today would be condemned as violative of the guarantee against unreasonable searches and seizures. Therein the Court upheld a conviction of a horse-race bookmaker against whom evidence was obtained by three separate entries of his home through use of a forged key and installation of a hidden microphone therein with wires extending therefrom to a neighboring garage where California policemen were enabled to overhear and record conversations of the defendant when at home.

If *Massiah v. United States*, 377 U.S. 201 (1964), a six-to-three decision, is possessed of enduring value, conceivably federal agents may be precluded from resorting to electronic eavesdropping as a means of obtaining incriminating evidence directly from a defendant while free on bail during the interval between his indictment and trial. In the latter holding the Court ruled that when federal

narcotics agents, without the defendant's knowledge, obtained a confederate's consent to install a radio-transmitter in the latter's automobile and thereby were enabled to overhear defendant's damaging admissions to the confederate while riding with the latter, later introduction at the defendant's trial of said incriminating statements, elicited in the absence of his attorney, amounted to the equivalent of a denial of his constitutional right to counsel under the Sixth Amendment. Of lesser significance is a dictum, supported by only three Justices, to the effect that "official surveillance [being] . . . the order of the day" in prison, a cell therein "shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room", and, consequently, the surreptitious recording of a conversation between petitioner and his brother in a cell does not give rise to an unreasonable search and seizure (*Lanza v. New York*, 370 U.S. 139, 142, 143, 144, 147, 150 (1962)).

Upon reassessment, judicial condemnation of surreptitious surveillance on the part of federal agents which is not attended by an impermissible intrusion would seem to hinge on the prospect for a reversal of the first three of the previously enumerated decisions. In each of these dissents were recorded, three in the *Goldman* case, four in the *On Lee* ruling, and three, in the *Lopez* holding. In the latter, four justices, three of whom are now sitting on the Court, were of the confirmed opinion that *On Lee v. United States* "was wrongly decided" and "that that decision has lost virtually all its force as authority" (*Lopez v. United States*, *supra.*, pp. 441, 442). To what extent, if any, converts to this dissenting view will be recruited as a consequence of the newly announced constitutional right of privacy which a bare majority of five Justices deduced from Amendments 1, 3, 4, 5, and 9 in the factually unrelated case of *Griswold v. Connecticut*, 391 U.S. 479 (1965), remains, of course, a matter of conjecture. Equally unpredictable is the likelihood that evidence of the increasing frequency with which federal agents resort to eavesdropping will induce additional Justices to re-evaluate the social implications of this method of criminal detection and ultimately to expound the views of the dissenters, especially those of Justice Brennan. The latter maintains that:

Electronic surveillance strikes deeper than at the ancient feeling that a man's home is his castle; it strikes at freedom of communication, a postulate of our kind of society Electronic surveillance destroys all anonymity and all privacy; it makes government privy to everything that goes on In the light of these circumstances I think it is an intolerable anomaly that while conventional searches and seizures are regulated by the Fourth and Fourteenth Amendments and wiretapping is prohibited by federal statute, electronic surveillance . . . , which poses the greatest danger to the right of private freedom is wholly beyond the pale of federal law This Court has by and large steadfastly enforced the Fourth Amendment against physical intrusions into person, home, and property by law enforcement officers. But our course of decisions, it now seems, has been outflanked by the technological advances of the very recent past If we continue to condone electronic surveillance by federal agents . . . , we shall be contributing to a climate of official lawlessness and conceding the helplessness of the Constitution and this Court to protect "rights fundamental to a free society". (*Lopez v. United States*, *supra.*, pp. 470, 471).

(b) *Legal issues involved in a pending case: United States v. Baker*, U.S. District Court for the District of Columbia; *Crim. no. 39-66* (December 20, 1966).—The defendant in the instant case is confronted with an indictment charging evasion of income taxes. As the result of the voluntary disclosure to the Supreme Court by the Solicitor General on May 24, 1966, in a prosecution involving one, Black, a former business associate of the defendant, that federal agents had installed a listening device in Black's hotel suite in Washington, D.C., for the monitoring of conversations therein, defendant was alerted to the fact that inasmuch as he had a key to, and did use, the same hotel suite, the conversations monitored may have included several in which he was a participant (*Black v. United States*, 35 LW 3164 (November 8, 1966)). Alleging that the Government, in violation of his constitutional rights protected by Amendment 4, had obtained certain evidence against him by means of electronic surveillance, defendant moved for the suppression of that evidence.

The Government conceded that its electronic surveillance did violate the defendant's constitutional rights in that some of the telephone conversations recorded at the hotel suite in Washington, D.C., were those in which defendant was a participant. However, the Government contends that none of the defendant's conversations thus electronically recorded led to information which resulted in the

indictment now lodged against him. After the defendant had been furnished with excerpts from recordings of these conversations in which he had participated, and had been given an opportunity to interrogate representatives of the Government who had participated in the recording of the conversations in which he was a party, the trial judge reached the following conclusions.

(1) It has not been established that any of the defendant's recorded conversations had any causal connection with, or relationship to, the indictment.

(2) In view of the Government's concession of illegality, the defendant's motion to suppress those conversations in which the defendant was a participant will be granted. Included among those suppressed, in addition to the conversations in the Washington hotel suite, were several other telephone conversations monitored in like manner in Las Vegas, Nevada, and Miami, Florida, in which the defendant was a participant.

(3) In view of the defendant's special standing with reference to the Black suite at the Hotel Carlton, in Washington, additional conversations recorded at that point respecting certain unknown participants will be delivered to the defense by the Government, and will be suppressed (pp. 4, 5, 8, 9, 10, 11, 12).

Commentators who have attempted to assess this case have been tempted to make the following observations. Since electronic eavesdropping, even when effected by an unlawful entry, rarely can be detected, a defendant against whom incriminating evidence has been acquired in this manner is virtually dependent upon the good faith and honor of the law enforcement officers to acknowledge employment of methods that subjected him to a denial of his constitutional rights. Whether or not the following conclusion is fair to the National Government in the instant case, the contention nevertheless has been advanced that unless a prosecutor has been "caught in the act, something that seldom happened and then usually by the stroke of luck", the prosecutor will not be tempted to confess openly that his colleagues had engaged in illicit eavesdropping. Moreover, when thus "caught in the act", a prosecutor invariably may be expected to argue that the illicit "eavesdropping was unproductive", and therefore "the case against the defendant" has not been "tainted by the fruits of the poisonous tree".

Commenting on the latter practice, an unidentified attorney has been quoted as follows: "It's like letting a thief inventory his own booty. You catch them bugging you and then they claim to have heard nothing worthwhile and you are supposed to take them at their word, because they are the Government and therefore they supposedly have no reason to lie" (*New York Times*, January 8, 1967, sec. IV, p. 6 cols. 7-8).

(c) *Other legal issues not resolved by pertinent precedents.*—In texts and articles devoted to an appraisal of the extent of official engagement in the practice of eavesdropping, the assertion has been made that proprietors of hotels, presumably as the result of a disposition to cooperate with law enforcement officers in combating crime, have wired for sound a limited number of their hotel rooms; and upon being alerted by the police that a suspect is likely to request accommodations thereat, will assign the latter, upon his appearance, to a room thus equipped. If upon the vacating of such room by the suspected guest, the hotel proprietor collects a recording of all conversations made in that room during the period of occupancy and, upon a play-back of such recording, ascertains that the latter implicates the guest in federal criminal activities, the question to be considered is whether federal authorities, upon being presented with a gift of such recording by the hotel proprietor, may introduce the same in evidence against the suspect in a subsequent trial in federal court. No prior collusion involving the federal authorities and the hotel owner having been established, the former presumably have not been tainted by the irregular means employed by the latter to amass evidence against the accused former guest and, on the basis of one old search and seizure precedent, *Burdeau v. McDowell*, 256 U.S. 465 (1921), will be privileged to use the incriminating evidence at the trial. The proscription of the Fourth Amendment forbidding unreasonable searches and seizures affords protection only against governmental action but not against intrusions by private citizens. Dissenting therein, Justices Brandeis and Holmes, however, were of the opinion that "respect for law will not be advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play" (*Burdeau v. McDowell*, *supra.*, p. 477).

If, as disclosed at recent investigations, government agencies continue to wire for sound conference rooms utilized for meetings with private citizens accompanied by their attorneys and in employing the electronic equipment installed therein to record, during intermissions when official negotiations are suspended, conversations between a citizen-client and his attorney, such breaches of the latter's

privacy may be condemned as so offensive to the concepts of fair play and fair procedure embraced within the due process clause as to preclude subsequent use in federal court of incriminating admissions thus obtained (*Snyder v. Massachusetts*, 291 U.S. 97, 116, 117 (1934)). Perhaps the unfavorable publicity sustained by the agencies thus exposed will contribute to the speedy termination of such practices; and accordingly will obviate the need for protracted study of the ethical and legal implications thereof.

X. *Eavesdropping by state officers*

The Constitutional issues and the obstacles which will confront state officers who resort to electronic eavesdropping presumably will differ in no way from those encountered by federal officers. The Supreme Court's refusal to review state court admissions of wiretap evidence being currently under reexamination, it is highly unlikely that the Court will be guided by the same standard in disposing of appeals from state courts which have permitted the introduction of evidence obtained by electronic methods of eavesdropping. Of course, in the limited number of states which have enacted laws proscribing eavesdropping by means other than by wiretapping, state officers who disobey such enactments will also be guilty of violating the aforementioned regulations of the Federal Communications Commission. Whether sanctions for the latter violations will be imposed remains to be seen.

XI. *Eavesdropping by private citizens*

Except in the few states which have imposed criminal penalties as a deterrent, individual victims of the practice of eavesdropping must depend for relief entirely upon such private civil remedies as the statutory and decisional law of their state affords. Whether such remedies have been adequately developed in all jurisdictions is dubious. However, commentators are of the opinion that utilization of eavesdropping equipment for purposes of industrial espionage by entrepreneurs engaged in interstate commerce constitutes an unfair competitive practice such as will presently support a private right of action for damages under the antitrust laws (15 U.S.C. 1). If this be the case, Congress also would be empowered to supplement this civil right of action by a further amendment of the antitrust laws converting such use into a criminal violation thereof. Of course, all private eavesdroppers using a "low power communication device" or a device not licensed by the Federal Communications Commission will offend the regulations promulgated by the Commission.

Senator LONG. This particular subject is scheduled again for April 4.

At this time, the committee will stand in recess.

(Whereupon, at 11:05 a.m., the subcommittee was recessed.)

The consensus of opinion of Indiana State Police officers that I have contacted with on the subject of wiretapping is that it should be handled in much the same manner as the issuance of a search warrant—that is, the limited use of wiretapping by law enforcement agencies after application to and approval by a judicial officer.

Very truly yours,

L. O. V. Long, Senator

APPENDIX

LETTER TO ALL GOVERNORS RE S. 928

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE,
February 28, 1967.

DEAR GOVERNOR: As you may know, we have conducted a long series of hearings on electronic eavesdropping, particularly relating to the Federal Government but also concerned with uses by states and private persons as well. To put it mildly, our findings have caused considerable concern in the Congress for the future privacy of all our citizens.

Our concern has been more than shared by President Johnson as well as many other national leaders.

On February 8, 1967, I introduced the Right of Privacy Act of 1967 (S. 928), which had been sent to the Congress by Acting Attorney General Ramsey Clark. We are hopeful of wide bi-partisan support for this legislation.

Except for cases involving national security, the bill would outlaw all wiretapping and most other forms of electronic eavesdropping, federal and state, public and private. To be fully effective, the federal law would need to be supplemented by new state laws.

We would certainly welcome your views on the proposed legislation, especially as to any suggested improvements. For your information, there is enclosed two copies of an excerpt from the Congressional Record, containing the text of the bill and an explanation thereof. If you have objection to having your views made public, please so inform us in your reply.

Kind regards.

Sincerely,

EDWARD V. LONG, U.S. Senator.

LETTERS FROM GOVERNORS RE S. 928

STATE OF IDAHO,
OFFICE OF THE GOVERNOR,
Boise, March 9, 1967.

Hon. EDWARD V. LONG,
U.S. Senator, Missouri,
Senate Office Building, Washington, D.C.

DEAR SENATOR LONG: The State of Idaho appreciates the opportunity to comment on the Right of Privacy Act (Senate Bill 929) introduced in the U.S. Congress.

I am sending you enclosed copy to the Idaho Attorney General for his review and for comment.

I appreciate receiving the information.

Sincerely,

DON SAMUELSON, Governor.

INDIANA STATE POLICE,
Indianapolis, Ind., March 16, 1967.

Hon. EDWARD V. LONG,
U.S. Senate, Washington, D.C.

DEAR SENATOR LONG: Your letter of February 28, addressed to Governor Branigin, has been forwarded to this office for reply.

I agree that the right to privacy is one of the most precious rights of American citizenship, but the right for a law-abiding citizen to be protected against the growing criminal element of our society is also important.

The consensus of opinion of Indiana State Police officers that I have conferred with on the subject of wiretapping is that it should be handled in much the same manner as the issuance of a search warrant—that is, the limited use of wiretapping by law enforcement agencies after application to and approval by a judicial officer.

Very truly yours,

ROBERT A. O'NEAL, *Superintendent.*

THE STATE OF NEVADA,
EXECUTIVE CHAMBER,
Carson City, Nev., March 21, 1967.

Hon. EDWARD LONG,
U.S. Senator,
Subcommittee on Administrative Practice and Procedure,
Washington, D.C.

DEAR SENATOR LONG: I have your letter of February 28th which was concerned with the Right of Privacy Act of 1967 (S. 928). You also enclosed an excerpt from the Congressional Record containing the text of the Bill.

As you must be aware, here in Nevada wiretapping is an area of extreme sensitivity. This state was long subjected to a series of illegal wire-taps which may be without precedent as far as the extensiveness of the tapping operations were concerned.

We all agree, I think, that abuses of the right to privacy are not condonable under any circumstances. The flagrant abuses of that right which prevailed here over several years were without justification and are cause for shame.

Nevertheless, I do not think these incidents should be used to deprive law enforcement totally of the use of the new and sophisticated electronic devices. I raise this point for the reason you state in your letter that "except for cases involving national security, the bill would outlaw all wire-tapping and most other forms of electronic eavesdropping, federal and state, public and private."

While abuse of the right to privacy might be reprehensible, in what position will we find ourselves if we deprive law enforcement of the controlled and proper use of wire-taps or eavesdrops in connection with capital offense crimes, such as kidnapping, heinous offenses which might be in progress, extortions, where such proper and controlled wire-tap or "bug" might spare a victim an injury or save his or her life?

After a careful review of the matter, it appears to me that the state jurisdictions, within the terms of your bill, should have permissive legislation enabling law enforcement, under the control of the courts, to conduct wire-taps and electronic eavesdrops in cases where these devices may be the only effective method of solution or prevention in cases where human life might be in danger, or in instances where the criminal uses electronic devices to accomplish his crime, or makes contact with a potential victim.

I do not consider that the dismal failures of certain public officials, which led to rampant invasions of privacy, should be reason for disenfranchising the great majority of our honest and conforming law enforcement officials from the use of this equipment, under controlled circumstances.

Thank you for the opportunity to express myself on this matter.

Sincerely,

PAUL LAXALT, *Governor of Nevada.*

STATE OF NEW HAMPSHIRE,
Concord, March 15, 1967.

Hon. EDWARD V. LONG,
Chairman, Subcommittee on Administrative Practice and Procedure,
U.S. Senate, Washington, D.C.

DEAR SENATOR LONG: I have read with interest your February 8, 1967 remarks in the Congressional Record on the Right of Privacy Act of 1967 (S. 928). I share your concern for the "future privacy of all our citizens" and I commend you and the President for taking the initiative in this vital area.

In broad terms, S. 928 does not make unlawful wire interrogation with the consent of "at least one sender or receiver" of any wire communication and does not make unlawful any eavesdropping with the consent of "at least one party

to the conversation". You may be interested to know that the Judicial Council of New Hampshire, in its soon to be published report to the 1967 Legislature, recommends the adoption of a proposal which, in general terms, makes unlawful wire interception and eavesdropping which does not have the consent or knowledge "of all parties" to the conversation.

S. 928 does not purport to make unlawful wire interception and eavesdropping ordered by the President to protect the security of the United States. The bill recommended by the Judicial Council provides for wiretapping and eavesdropping on an ex parte court order "to save human life, or where the punishment for the offense committed or to be committed is punishable by death, life imprisonment, or imprisonment of twenty-five years or more."

As you know, *Berger v. New York* is pending before the United States Supreme Court. The case involves the issue of the constitutionality of electronic surveillance made pursuant to an ex parte court order.

The wire interception and eavesdrop area of the law teems with fundamental constitutional problems which are unresolved but which your committee hearings and S. 928 will help resolve in the best interest of the people.

Sincerely,

JOHN W. KING, Governor.

NORTH DAKOTA, EXECUTIVE OFFICE,
Bismarck, March 6, 1967.

Hon. EDWARD V. LONG,
Senate Office Building, Washington, D.C.

DEAR SENATOR LONG: Thank you for inviting me to express my views toward legislation to curb electronic eavesdropping.

I would agree that electronic eavesdropping has reached serious enough proportions that it must be curbed. I would also agree that cases involving national security should not be handicapped by a ban on electronic eavesdropping.

I am also strongly of the belief that we are suffering far more from interstate crime than we are suffering from indiscriminate use of electronic eavesdropping. I therefore would favor electronic eavesdropping against interstate crime.

I believe that in the mistaken belief that we are protecting the private citizen who has nothing worth hearing by eavesdropping methods, we are also protecting an insidious, costly leech on our society known as interstate crime. I believe that the Justice Department should not only be allowed to use eavesdropping to fight interstate crime, but they should be ordered to use this equipment.

Thank you for allowing me to express my opinion.

Sincerely yours,

WILLIAM L. GUY, Governor.

OFFICE OF THE GOVERNOR,
STATE CAPITOL,
Salem, Oreg., March 23, 1967.

Hon. EDWARD V. LONG,
U.S. Senator,
Washington, D.C.

DEAR SENATOR: We, too, are very much concerned about the use of any illegal device or method that may be used to obtain information or evidence by police officers or private persons. We are, however, of the opinion that police officers and/or prosecuting attorneys in their efforts to prevent and solve serious criminal offenses as well as matters involving state and national security should have some means, under court control, of intercepting communications under certain conditions.

The Oregon law in this regard has been effective in safeguarding the rights and privacy of our citizens and has also been effective in curtailing the growth of organized crime in our state.

The law permits a judge of a circuit or district court to issue an ex parte order for the interception of telecommunications, radio communications or conversations upon verified application of a district attorney who must set forth fully the facts and circumstances upon which the application is based and stating in part that:

(a) There are reasonable grounds to believe that a crime directly or immediately affecting the safety of human life or the national security has been committed or is about to be committed.

(b) There are reasonable grounds to believe that evidence will be obtained essential to the solution of such crime, or which may enable the prevention of such crime.

(c) There are no other means readily available for obtaining such information. For your further information we are enclosing copies of Oregon Statutes dealing with this matter.

Sincerely,

TOM MCCALL, *Governor.*

INTERCEPTION OF COMMUNICATIONS

141.720 Order for interception of telecommunications, radio communications or conversations. (1) An ex parte order for the interception of telecommunications, radio communications or conversations, as defined in ORS 165.535, may be issued by any judge of a circuit or district court upon verified application of a district attorney setting forth fully the facts and circumstances upon which the application is based and stating that:

(a) There are reasonable grounds to believe that a crime directly and immediately affecting the safety of human life or the national security has been committed or is about to be committed.

(b) There are reasonable grounds to believe that evidence will be obtained essential to the solution of such crime, or which may enable the prevention of such crime.

(c) There are no other means readily available for obtaining such information.

(2) Where statements are solely upon the information and belief of the applicant, the precise source of the information and the grounds for the belief must be given.

(3) The applicant must state whether any prior application has been made to obtain telecommunications, radio communications or conversations on the same instrument or from the person and, if such prior application exists, the applicant shall disclose the current status thereof.

(4) The application and any order issued under this section shall identify fully the particular telephone or telegraph line, or other telecommunication or radio communication carrier or channel from which the information is to be obtained and the purpose thereof.

(5) The court shall examine upon oath or affirmation the applicant and any witness the applicant desires to produce or the court requires to be produced.

(6) Orders issued under this section shall not be effective for a period longer than 60 days, after which period the court which issued the warrant or order may, upon application of the officer who secured the original warrant by application, in its discretion, renew or continue the order for an additional period not to exceed 60 days. All further renewals thereafter shall be for a period not to exceed 30 days.

141.730 Proceeding under expired order prohibited. Any officer who knowingly proceeds under an order which has expired and has not been renewed as provided in ORS 141.720 is deemed to act without authority under ORS 141.720 and shall be subject to the penalties provided in subsection (2) of ORS 141.990, as though he had never obtained any such order or warrant.

141.740 Records confidential. The application for any order under ORS 141.720 and any supporting documents and testimony in connection therewith shall remain confidential in the custody of the court, and these materials shall not be released or information concerning them in any manner disclosed except upon written order of the court. No person having custody of any records maintained under ORS 141.720 to 141.740 shall disclose or release any materials or information contained therein except upon written order of the court.

165.646 Definitions applicable to interception of communications. As used in ORS 41.910, 141.720 to 141.740 and 165.540:

(1) "Conversation" means the transmission between two or more persons of an oral communication which is not a telecommunication or a radio communication.

(2) "Person" means any person as defined in ORS 174.100 and includes public officials and law enforcement officers of the state, county, municipal corporation or any other political subdivision of the state.

(3) "Radio communication" means the transmission by radio or other wireless methods of writing, signs, signals, pictures and sounds of all kinds, including all instrumentalities, facilities, equipment and services (including, among other things, the receipt, forwarding and delivering of communications) incidental to such transmission.

(4) "Telecommunication" means the transmission of writing, signs, signals, pictures and sounds of all kinds by aid of wire cable or other similar connection

between the points of origin and reception of such transmission, including all instrumentalities, facilities, equipment and services (including, among other things, the receipt, forwarding and delivering of communications) incidental to such transmission.

165.540 Interception of communications. (1) Except as otherwise provided in ORS 141.720 or subsection (2) to (5) of this section, no person shall:

(a) Obtain or attempt to obtain the whole or any part of a telecommunication or a radio communication to which such person is not a participant, by means of any device, contrivance, machine or apparatus, whether electrical, mechanical, manual or otherwise, unless consent is given by at least one participant.

(b) Tamper with the wires, connections, boxes, fuses, circuits, lines or any other equipment or facilities of a telecommunication or radio communication company over which messages are transmitted, with the intent to obtain unlawfully the contents of a telecommunication or radio communication to which such person is not a participant.

(c) Obtain or attempt to obtain the whole or any part of a conversation by means of any device, contrivance, machine or apparatus, whether electrical, mechanical, manual or otherwise, if all participants in the conversation are not specifically informed that their conversation is being obtained.

(d) Obtain the whole or any part of a conversation, telecommunication or radio communication from any person, while knowing or having good reason to believe that such conversation, telecommunication or radio communication was initially obtained in a manner prohibited by this section.

(e) Use or attempt to use, or divulge to others any conversation, telecommunication or radio communication obtained by any means prohibited by this section.

(2) (a) The prohibitions in paragraphs (a), (b) and (c) of subsection (1) of this section shall not apply to officers, employees or agents of a telecommunication or radio communication company who perform the acts prohibited by paragraphs (a), (b) and (c) of subsection (1) of this section for the purpose of construction, maintenance or conducting of their telecommunication or radio communication service, facilities or equipment; nor shall such prohibitions apply to public officials in charge of and at jails, police premises, sheriffs' offices, penal or correctional institutions, except as to communications or conversations between an attorney and his client.

(b) Officers, employees or agents of a telecommunication or radio communication company who obtain information under paragraph (a) of this subsection shall not use or attempt to use, or divulge to others such information except for the purpose of construction, maintenance, or conducting of their telecommunication or radio communication service, facilities or equipment.

(3) The prohibitions in paragraph (a), (b) or (c) of subsection (1) of this section shall not apply to subscribers or members of their family who perform the acts prohibited in subsection (1) of this section in their homes.

(4) The prohibitions in paragraph (a) of subsection (1) of this section do not apply to the receiving or obtaining of the contents of any radio or television broadcast transmitted for the use of the general public.

(5) (a) The prohibitions in paragraph (c) of subsection (1) of this section do not apply to a law enforcement officer who uses a listening or recording device, machine or apparatus to obtain a conversation between himself or someone under his direct supervision and a person whom he has reasonable cause to believe has committed, or is engaged in committing, a crime involving narcotic or dangerous drugs as defined and made punishable by the laws of this state or of the United States.

(b) Except to a superior officer or other official with whom the officer is cooperating in the enforcement of narcotic or dangerous drug laws, in an examination by a magistrate under ORS 133.040, or in a presentation to a federal or state grand jury, the conversation obtained under paragraph (a) of this subsection shall not, without a court order, be divulged to others before the preliminary hearing or trial in which the conversation is introduced as evidence against the suspected person.

(c) As used in this subsection, "law enforcement officer" means an officer employed by the United States, this state or a municipal government, or a political subdivision, agency, department or bureau of those governments, to enforce narcotic or dangerous drug laws. A law enforcement officer may obtain a conversation under paragraph (a) of this subsection only when acting within the scope of this employment and as a part of his assigned duties.

(6) (a) Violation of paragraph (a), (b) or (c) of subsection (1) of this section is punishable, upon conviction, by a fine of not more than \$3,000 or by imprisonment in the penitentiary for not more than three years, or by both.

(b) Violation of paragraph (d) or (e) of subsection (1) paragraph (b) of subsection (2), or paragraph (b) or (c) of subsection (5) of this section is punishable, upon conviction, by a fine of not more than \$1,000 or by imprisonment, or both, such imprisonment to be in the penitentiary for not more than three years or in the county jail for not more than one year.

STATE OF UTAH,
OFFICE OF THE GOVERNOR,
Salt Lake City, March 23, 1967.

Hon. EDWARD V. LONG,
U.S. Senate, Washington, D.C.

DEAR SENATOR LONG: Thank you for giving me the opportunity to express my views on the proposed Right of Privacy Act of 1967 (S. 928).

First, let me state that I am a strong advocate of the Constitutional rights of privacy as stated in Amendment IV, which describes "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. . . ." This right may not be violated except "upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

There is no doubt in my mind that violations against privacy, as proscribed by the Constitution, would have included not only "papers and effects"; but also personal communications through telephonic or wire means, if these had been in existence at the time. Since these specific means of personal communication were not mentioned, I support measures that will bring them under the basic Constitutional right of privacy.

However, in regard to the specific measures of S. 928, I feel that it extends protection for personal communications through wire beyond that intended by Amendment IV of the Constitution, in that it provides *no means* whereby these communications may be "searched" or intercepted, while Amendment IV provides that papers and effects may be "searched" after suitable proof is given before a competent court that such a search is necessary. The one exclusion to this right of privacy stated in S. 928 is in cases of national security.

Although I do not feel the irrational fear that our nation is "being taken over by criminal elements" as some have expressed, I also believe that we cannot ignore the probability that crime will continue to grow as an anti-social force as our nation becomes more densely populated. For that reason, I believe that society must give itself the proper tools to cope with criminal activities, including the benefits of scientific and technical advancement, so long as the use of these new tools are limited by our normal Constitutional procedures.

Senate Bill 928, I believe, goes too far and does not allow society the benefit of scientific and technical advancement in its crime prevention and detecting attempts. Our "national security" is as closely related to criminal acts perpetrated within our nation by our citizens as it is to acts of foreign powers and agents. To proscribe protection for our people from these criminal acts is, I believe, short-sighted.

I, therefore, suggest that S. 928 should be re-written, allowing wiretapping and other forms of electronic eavesdropping, federal and state, *by public bodies only*, after suitable warrants for such action are granted upon sufficient proof of necessity by a court of competent jurisdiction.

I agree with the outlawing of wiretapping or other forms of eavesdropping by private bodies. Acts of this type do not offer the public protection necessary under our Constitutional guarantees.

You have my permission to make these views public.

Cordially,

CALVIN L. RAMPTON, Governor.

STATE OF WEST VIRGINIA,
OFFICE OF THE GOVERNOR,
Charleston, March 7, 1967.

Hon. EDWARD V. LONG,
U.S. Senate, Senate Office Building,
Washington, D.C.

DEAR SENATOR LONG: Thank you for your letter concerning State legislation to complement and assist proposed Federal legislation forbidding electronic eavesdropping and wiretapping.

I share your concern about this growing threat to our personal liberties and right of privacy. However, our Legislature is in the last week of a session, limited to sixty days by our State Constitution, and no new bills can be offered at this time. The Legislature will next meet in January 1968.

If you could keep me advised on the types and form of State activity which would supplement the Federal program against invasion of privacy, I would be glad to consider such legislation at the State level in our next session.

Sincerely,

HULETT C. SMITH, Governor.

THE STATE OF WISCONSIN,
EXECUTIVE OFFICE,
Madison, March 31, 1967.

Hon. EDWARD V. LONG,
U.S. Senate,
Senate Office Building,
Washington, D.C.

DEAR SENATOR LONG: I am responding to your letter seeking my views on "The Right of Privacy Act of 1967." I have been much concerned as have most public officials with the very serious problem of rising crime in this country and am fully committed to any legislation or programs either at the State or federal level that show reasonable promise of help to solve that problem. I am equally concerned that the rights of all our citizens be fully protected. There are many sincere people, however, who believe that in recent months and years our courts and some of our legislative bodies in their ardor to protect the rights of certain individuals by restricting the action of the police may have overlooked and endangered the rights of millions of others to the full protection of our laws.

Modern technology has developed new and marvelous tools to make this a better world. It is characteristic of man that he often abuses himself and his fellow man with the product of his own ingenuity. I believe, to be more specific, that your committee has been of great value in uncovering many misuses of electronic and other devices and that they have often been used wrongly for the invasion of the privacy of our citizens. However, I suggest that a closer look should be taken at the uses of these devices that could be beneficial to society under proper control before we pass prohibitory legislation that would stifle such uses.

In other words, at this time, I would urge further study and caution before a law such as the one Attorney General Clark has sent to Congress is passed. I am quite in agreement with the majority of the members of the President's Commission on Law Enforcement and Administration of Justice, when after careful consideration of this problem, they recommended that "Congress should enact legislation dealing specifically with wiretapping and bugging." All members of the Commission agreed on the difficulty of striking the balance between law enforcement benefits from the use of electronic surveillance and the threat to privacy its use may entail. They further agreed that striking this balance presents important constitutional questions now pending before the U.S. Supreme Court in *People v. Berger*, and any congressional action should await the outcome of that case.

A majority of the members of the Commission believe that legislation should be enacted granting carefully circumscribed authority for electronic surveillance to law enforcement officers to the extent it may be consistent with the decision of the Supreme Court in *People v. Berger*, and, further, that the availability of such specific authority would significantly reduce the incentive for, and the incidence of, improper electronic surveillance."

This appears to me to be a reasonable position on this very vital problem at this time and I urge continued study of the matter.

Sincerely,

WARREN P. KNOWLES, Governor.

STATE OF FLORIDA,
OFFICE OF THE GOVERNOR,
Tallahassee, Fla., April 24, 1967.

Hon. EDWARD V. LONG,
U.S. Senate, Washington, D.C.

DEAR SENATOR LONG: I share your concern for the privacy of all of our citizens. I have reservations, however, as to whether all of the measures contained in the Right of Privacy Act of 1967 which was introduced in the Senate by you on February 8, 1967, are necessary and, in fact, some may be undesirable. The Bill, as I understand it, would apply the prohibitions contained in it against the police authorities of the various states, but not to the Federal Government in cases involving national security.

It seems to me that a situation could result in which wiretapping and the forbidden equipment would be used extensively by criminals, even though illegal, and the police officers would be handicapped in combating crime in their inability to use the same measures. Please understand that I am not advocating that the use of electronic eavesdropping or wiretapping be permitted by state or Federal law enforcement agencies.

I believe that the measures set forth in the Bill introduced by you should be applied to all private use of electronic or wiretapping equipment by private individuals or agencies, but, I think strictly controlled use by the law enforcement authorities should be permitted.

I realize that this is a most difficult field in which to legislate since the citizen's right of privacy must be weighed against the necessity of society to protect itself from the criminal elements, but, I do not think we should tip the scales in favor of the criminal.

I appreciate your asking me for my views and I have no objection to your making them public.

Sincerely,

CLAUDE R. KIRK, Jr., Governor.

EXECUTIVE CHAMBERS,
Honolulu, Hawaii, March 29, 1967.

Hon. EDWARD V. LONG,
Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR SENATOR LONG: This is in reply to your letter of February 28, 1967, with regard to the Federal Right of Privacy Act of 1967.

Enclosed is a copy of a similar act which was adopted in Hawaii in 1957. There is also a telephone company tariff on file with our Public Utilities Commission filed pursuant to F.C.C. regulations, which forbids the attachment of unauthorized recording devices to telephone and requires a warning signal to be sounded.

In addition to our present law, we support federal legislation in this area, since it will restrict use of listening devices on transpacific telephone conversations and other wire communications which we cannot control locally.

We agree that national defense policy requires an exception for cases involving national security.

Warmest personal regards. May the Almighty be with you and yours always,
Sincerely,

JOHN A. BURNS.

§ 309-30. Accessories.

Evidence of aiding and abetting prostitution held sufficient * * * 470, 381 P.2d 685.

RAPE

§ 309-31. Rape; penalty.

Juvenile defendants, criminal proceedings against; "consent" of juvenile court. 14 H. 455, 355 P.2d 46; 45 H. 604, 372 P.2d 356.

Submission of case under two distinct theories of guilt justified where evidence is sufficient to sustain conviction under either. 45 H. 478, 370 P.2d 739.

Instruction on intoxication of victim. 45 H. 478, 370 P.2d 739. Cautionary instruction. 47 H. 444, 390, P.2d 759.

Resistance: Unconscious victim. 47 H. 185, 389 P.2d 146. Degree of resistance depends upon circumstances. 47 H. 444, 390 P.2d 759; 48 H. 381, 402 P.2d 679.

§ 309-32. Rape, sodomy, etc.

Distinction between assault with intent to rape and attempt to rape 45 H. 778, 770 P.2d 739.

SODOMY

§ 309-34. Sodomy defined; penalty.

Per os, sex of parties involved, corroboration. 43 H. 23.

Revised Laws of Hawaii 1955, 1965 Supp.

[CHAPTER 309A]

TELEPHONE CONVERSATIONS

Obscene language over telephone. § 302-2.

[§ 309A-1.] **Recording telephonic conversations; misdemeanor.** Any person other than a telephone company operating in its regular course of business who records a telephone conversation being held by other parties without first informing such other parties that their conversation is being recorded and identifying the person who is recording the conversation, shall be guilty of a misdemeanor. [L. 1957, c. 176, s. 1.]

Penalty. § 259-1.5.

[§ 309A-2.] **Party line; refusal to yield in emergency.** Any person who willfully refuses to immediately relinquish a party line when informed that such line is needed for an emergency call to a fire department or police department or for medical aid or ambulance service, or any person who secures the use of a party line by falsely stating that such line is needed for an emergency call, shall be guilty of a misdemeanor. [L. 1957, c. 190, pt. of s. 1.]

Penalty. § 259-1.5.

[§ 309A-3.] **Definitions.** "Party line" as used in this chapter means a subscriber's line telephone circuit, consisting of two or more main telephone stations connected therewith, each station with a distinctive ring or telephone number.

"Emergency" as used in this chapter means a situation in which property or human life is in jeopardy and the prompt summoning of aid is essential. [L. 1957, c. 190, pt. of s. 1.]

See also § 314-2 (j).

[CHAPTER 309B]

[TELECOMMUNICATIONS SERVICE]

[§ 309B-1. **Telecommunications service; unlawful charge; penalty.**] Any person who willfully obtains or attempts to obtain, or aids and abets another to obtain or to attempt to obtain, any telecommunications service: (a) by charging such service to an existing telephone number or credit card number without the authority of the subscriber thereto or the legitimate holder thereof; or (b) by charging such service to a nonexistent false, fictitious, or counterfeit telephone number or credit card number or to a suspended, terminated, expired, cancelled, or revoked telephone number or credit card number; shall be imprisoned for not more than one year or fined not more than \$1,000, or both. [L. 1961, c. 165, s. 1.]

CHAPTER 311

TRAFFIC VIOLATIONS

§ 311-1. Careless or heedless operation of vehicle or riding of animals; penalty.

(Correction.) Instruction singling out "unavoidable accident." 32 H. 728.

Charge in language of statute held insufficient. 41 H. 591.

Statute requires no more than ordinary negligence as standard of guilt. 46 H. 245, 377 P.2d 688. Standard not affected by point system law. 46 H. 345, 379 P.2d 592.

Substantial evidence test applies to review of evidence; this test not altered by Hawaii rules of criminal procedure. 46 H. 245, 377 P.2d 688.

See also annotations to § 291-10.

§ 311-6. Repealed. L. 1965, c. 153, s. 1(h).

§ 311-20. Gross weight, axle and wheel loads. No motor vehicle or other power vehicle or combination of such vehicles equipped wholly with pneumatic tires, which has a total gross weight, including vehicle and load, in excess of the following requirements shall be operated or moved upon any public road, street or highway within the State, except as hereinafter provided.

(a) The total gross weight of any such vehicle or combination of vehicles shall not exceed that determined by the following formula:

"W" = $800 (L + 40)$; in which "W" is the total gross weight, including vehicle and load, and "L" is the distance in feet between the first and last axles of the vehicle or combination of vehicles.

(b) The total gross weight upon any two or more consecutive axles of any such vehicle or combination of vehicles, when the distance between the first and last axles of the two or more axles is eighteen feet or less, shall not exceed that determined by the following formula:

"W" = $700 (L + 40)$; in which "W" is the total gross weight imposed upon the highway by the group of axles under consideration, and "L" is the distance in feet between the first and last axles of the group of axles under consideration;

COMMONWEALTH OF PENNSYLVANIA,
GOVERNOR'S OFFICE,
Harrisburg, April 13, 1967.

Hon. EDWARD V. LONG,
U.S. Senate, Washington, D.C.

DEAR SENATOR LONG: I have before me your recent letter asking my views on S. 928 which you introduced in the Congress. I understand this bill would completely outlaw the use of wiretapping and other electronic listening devices except in situations involving national security.

My views, in summary, are:

I oppose S. 928.

I wholeheartedly endorse the legitimate use of any technological instrument as a weapon against crime, including the use of both "wiretapping" and any "electronic listening device," provided such use is under the strict control of courts of competent jurisdiction, and is restricted to use by legitimate law enforcement officers to ferret out specific onerous crimes and criminal conspiracies.

The national security is today being threatened by crime more so than ever before in our history, as evidenced by the recent report of the President's Commission. We must not limit an effective war on crime just as we would not restrict a total effort against any foreign aggression.

If we allow the use of electronic devices to prevent an enemy nation from endangering our national security, why should we prohibit the use of such devices to prevent or help eliminate a present domestic danger? If necessary, we would rely upon our Armed Forces to overcome subversion either from within or without. Crime today in the United States presents a clear and present danger which must be overcome.

The effects upon the community of narcotics, gambling, prostitution and other criminal activity, the interstate character of such activity, and the use of modern technology by criminals are well-known and well-documented.

In my view, we must utilize every weapon to eliminate crime from our society, preserving, of course, those ancient rights guaranteeing due process to all citizens. Therefore, I urge the adoption of such measures as will allow the use of these devices under appropriate order of courts of competent jurisdiction.

Sincerely,

RAYMOND P. SHAFER.

GOVERNOR OF TEXAS,
April 3, 1967.

Hon. EDWARD V. LONG,
U.S. Senate, Washington, D.C.

DEAR SENATOR: Thank you for your letter of February 28, 1967, requesting my opinion on electronic eavesdropping and your request for suggested changes.

I have studied your bill carefully and hope you will believe that the following comments are given in an attempt to be helpful.

In my message to the Texas Legislature earlier this year, I set out my beliefs in this area. I said:

"The citizens of Texas over the past months have shown increasing concern about an insidious threat to their privacy: eavesdropping. Their concern mirrors a national uneasiness as well. The Congress and, most recently the President, have echoed their alarm.

"I propose that eavesdropping in any form be prohibited in this State. Exceptions would be authorized *only* in well-defined situations where the public

interest justifies use of such equipment. Then law enforcement officials would be permitted to use this form of criminal detection only upon application to and approval of a State District or Appellate Judge."

If I read your suggested legislation correctly, the exceptions I recommended would be illegal.

As you know, peace officers are required by the current trend in court opinions to rely more and more on extrinsic evidence. No longer can they use their skill as interrogators to secure confessions that will convict in the courthouse.

Also, you are no doubt aware that a criminal, already acting outside the law, is not concerned over violating additional statutes. So, while the legislative restriction on law enforcement officers would be effective, persons for whom this law is intended would probably continue to use this means for securing information. After all, all the criminal wants is the information. The law enforcement officer needs it for the purpose of taking it into the courthouse where he can secure a conviction. Thus, he must expose what, under your statute, would be his illegal activities.

I would suggest that you make the necessary changes in your bill that would allow peace officers in proper situations and under court supervision to secure information in this manner.

I hope these comments are helpful.

With kindest regards.

Sincerely,

JOHN CONNALLY.

STATE OF WASHINGTON,
OFFICE OF THE GOVERNOR,
Olympia, April 3, 1967.

Hon. EDWARD V. LONG,
U.S. Senate, Washington, D.C.

DEAR SENATOR LONG: This is in reference to your letter of February 28th regarding proposed legislation regarding the Right of Privacy Act of 1967.

I have discussed this matter with Chief Will Bachofner, of the Washington State Patrol, and we are in general agreement with the bill as introduced. However, it appears that the use of such equipment is oftentimes a most worthwhile tool in the field of law enforcement. We would, therefore, recommend that the bill be amended to include discriminate use by law enforcement officers under certain conditions. We would further suggest that prior to such usage, authority must be granted by the presiding Superior Court Judge within the county concerned. This would tend to eliminate any possible misuse of the equipment.

Thank you for inviting our suggestions regarding this matter.

Sincerely yours,

DANIEL J. EVANS, *Governor.*



interest justify use of such equipment. Then law enforcement officials would be permitted to use this form of criminal detection only upon application to and approval of a State District or Appellate Judge.

If I read your suggested legislation correctly, the exceptions I recommended would be illegal.

As you know, police officers are trained by the current trend in court opinions to rely more and more on circumstantial evidence. No longer can they use their skill as investigators to secure confessions that will convince the jury. Also, you are not aware that a criminal already within the law is not concerned over obtaining additional status. So, while the legislative action on law enforcement officers would be effective, persons for whom this law is intended would probably continue to use the means for securing information. After all, all the criminal wants is the information. The law enforcement officer needs it for the purpose of taking it into the courtroom where he can secure a conviction. Thus, the most exposed what, under your statute, would be the illegal activities.

I would suggest that you make the necessary changes in your bill that would allow police officers to proper situations and under court supervision to secure information in this manner.

I hope these suggestions are helpful.
With kindest regards,

Very truly yours,
James J. Wayne, Esquire

STATE OF WYOMING
OFFICE OF THE ATTORNEY GENERAL
Cheyenne, Wyoming 82002

Hon. Thomas V. Loken
U.S. District Court, District of Columbia

Dear Mr. Loken: This is in reference to your letter of February 22, 1974, regarding proposed legislation regarding the Right of Privacy Act of 1974.

I have discussed this matter with Mr. John W. Loken, Jr., of the Wyoming State Patrol, and we are in general agreement with the bill as introduced. However, it appears that the use of such equipment is often used in a most serious way for the field of law enforcement. I would, therefore, recommend that the bill be amended to include circumstances use by law enforcement officers under certain conditions. We would further suggest that prior to such use, authority must be granted by the presiding Superior Court Judge within the county concerned. This would tend to eliminate any possible misuse of the equipment.

Thank you for inviting our suggestions regarding this matter.

Sincerely yours,

James J. Wayne, Esquire

