

**FOREIGN INTELLIGENCE ELECTRONIC
SURVEILLANCE**

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HEARINGS
BEFORE THE
SUBCOMMITTEE ON LEGISLATION
OF THE
PERMANENT
SELECT COMMITTEE ON INTELLIGENCE
HOUSE OF REPRESENTATIVES
NINETY-FIFTH CONGRESS
SECOND SESSION
ON
H.R. 5794, H.R. 9745, H.R. 7308, AND H.R. 5632
THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1977

JANUARY 10, 11, 17, AND FEBRUARY 8, 1978



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**FOREIGN INTELLIGENCE ELECTRONIC
SURVEILLANCE**

H.R. 5794, H.R. 9745, H.R. 7308, and H.R. 5632

TUESDAY, JANUARY 10, 1978

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON LEGISLATION OF THE
PERMANENT SELECT COMMITTEE ON INTELLIGENCE,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9.07 o'clock a.m., in room 2362, Rayburn House Office Building, the Honorable Morgan F. Murphy, chairman of the subcommittee, presiding.

Present: Representatives Murphy (presiding), Mazzoli, and McClory.

Also present: Thomas K. Latimer, staff director; Michael J. O'Neil, chief counsel; Patrick G. Long, associate counsel; Bill Funk, and Bernard Raimo, professional staff members.

Mr. MURPHY. The meeting will come to order.

Will the witnesses who are going to testify please stand and raise your right hands, please.

Do you swear and affirm that the testimony you are about to give to the committee is the truth, the whole truth, and nothing but the truth?

Attorney General BELL. I do.

Mr. HARMON. I do.

Mr. ADAMS. I do.

Attorney General BELL. It is the only time I have ever taken an oath without protesting. I take the position that as a lawyer I am entitled to testify as I would in court, because I am a lawyer, but since it is in the Intelligence Committee, I am not protesting this morning. I don't want to lose my right to protest before other committees though.

Mr. MURPHY. Thank you, Mr. Attorney General. We appreciate your attendance here today and your assistance.

We are going to let the press take about 2 or 3 minutes of film and still pictures and then we are going to ask them to leave the room, if they would, during the testimony.

Mr. Mazzoli will be here. His plane was a little late.

[A brief recess was taken.]

Mr. McClory. I was listening to the news this morning, Mr. Chairman. It said the hearings were on the CIA relations with the press. I just wanted to be sure what the hearings are about this morning.

You see, I get my news from the media, and they indicated this was a hearing on the CIA and the press. I think that was last week's. I was here last week for those hearings.

Mr. MURPHY. I can assure my colleague that the hearings today are on the Foreign Intelligence Surveillance Act.

These hearings will come to order. By way of an introduction, let me begin these hearings by noting that the Permanent Select Committee on Intelligence is a brandnew committee. Today marks our first introduction to a very complex but very important area of intelligence activity, electronic surveillance for the purpose of collecting foreign intelligence.

Before the subcommittee today are four bills. All deal with electronic surveillance within the United States directed against any person, be he a U.S. citizen or not.

Three of the bills provide for a judicial warrant procedure to authorize these surveillances. Of these, the administration's bill,¹ introduced by Mr. Rodino, chairman of the Judiciary Committee, and the Railsback bill agree in nearly all respects.

The Kastenmeier bill also requires a warrant but greatly restricts the scope of activity that it can authorize.

Lastly, the McClory bill² provides for an entirely different approach, where the Attorney General, the Assistant to the President for National Security Affairs, and the President himself must personally approve each surveillance proposal.

All the issues presented by these bills are unresolved by the committee as we begin the hearing process. However, several points, including the uncertainty of present law in this area, the possibility that the communications of American citizens and permanent resident aliens may be intercepted as a result of the Government's foreign intelligence gathering, and a desire to place all the activities of the Government within the bounds of accountability established by law, argue for statutory action.

I particularly want to preface the remarks that Judge Bell will make this morning by applauding the cooperative spirit which this administration has exhibited in drafting its legislative proposal.

The Attorney General and all the other affected members of the administration have solicited and welcomed congressional participation in the drafting process.

It is my hope and that of the committee to continue that cooperative spirit in these hearings as well as in the committee's consideration in the future of related issues like charter legislation.

I would at this point like to yield to my colleague from Illinois, a member of the subcommittee, Mr. McClory, who I would hope will summarize his statement.

Mr. McCLORY. Thank you very much, Mr. Chairman.

I do ask leave to file my entire statement for the purpose of the record since it does elaborate on my position with regard to this entire subject.

Mr. MURPHY. Without objection, it will be entered into the record.

[The prepared remarks of Representative Robert McClory follow:]

¹ See appendix A.

² See appendix B.

PREPARED STATEMENT OF HON. ROBERT McCLORY

Essential to the defense and security of our Nation is the ability to gather and analyze foreign intelligence information. It is that information which is so vital to the day-to-day conduct of American foreign policy and necessary for insuring the security of this great Nation. The information must be timely, accurate, and kept secure.

These requirements, however, pose a serious problem unique to open societies which must have this information in order to safeguard the freedoms inherent in their democratic form of government. It is not the information which causes the problem. Rather, it is the means by which the information is collected which raise fundamental constitutional questions.

When two provisions of the Constitution appear to be in direct conflict, legislators must rise above partisan considerations and execute their talents in the best interests of this Nation.

The legislation which we are undertaking to consider in this Subcommittee today poses for us this precise dilemma. The most efficient and timely method to obtain foreign intelligence information is by the use of electronic surveillance. But electronic surveillance of American citizens or aliens who are in this country legally raises substantial questions in light of the guarantees provided by the Fourth Amendment to the Constitution. The conflict we must resolve is the President's power and, indeed, responsibility to conduct foreign affairs under the auspices of the Constitution and the right of the people to be protected from unwarranted search and seizure.

Most agree that it is time to establish legislative criteria which will permit the Executive to carry out its foreign affairs responsibilities with proper security and at the same time insure that the civil liberties of the American people are at all times safeguarded.

The Supreme Court has not resolved the question of whether surveillance without a warrant conducted for the purposes of gathering "foreign intelligence" is in violation of the Fourth Amendment or is precipitated by a Presidential power based primarily on Article II of the Constitution. Several authorities have concluded that the answer to this fundamental conflict is to require that all foreign intelligence electronic surveillance be conducted only after the judicial branch authorizes a warrant. I am not convinced that this resolves the fundamental issue at hand. It is imperative for the President to obtain accurate and timely foreign intelligence information. At the same time, the President's judgments about the necessity of the information must be presumed to be reasonable. And the reasonableness of a carefully weighed decision by the President without the necessity of prior judicial approval must satisfy the mandates of the Fourth Amendment.

What so many of the proponents of prior judicial approval of foreign intelligence surveillance fail to understand is the differences in the circumstances which necessitate "searches and seizures" for law enforcement and those necessary for foreign intelligence gathering. The purposes are, indeed, different; therefore, the procedures to authorize such "searches and seizures" should be different. To require a judicially determined probable cause standard for authorizing electronic surveillance to solve a crime is a long standing practice. When, however, obtaining national security information becomes the objective of the electronic surveillance, the standard for authorization must be based on different criteria.

It is with these considerations in mind that I have introduced H.R. 9745 which retains within the Executive—where it should be—the authority to approve national security foreign intelligence surveillance. This legislation would require approval of all electronic surveillance by the President, Attorney General, and the Assistant to the President for National Security Affairs. This approval is non-delegable. By requiring the consensus of the President and the two highest ranking national security officers to approve such surveillance, it is clear that this proposed statutory authority would only be utilized in the most narrow of circumstances.

The Supreme Court has never held that surveillance conducted for the purpose of foreign intelligence gathering must have prior judicial approval based on probable cause. The lower federal courts have spoken directly on the issue. In fact, just last year, the Ninth Circuit declared that "foreign security wire-

taps are a recognized exception to the general warrant requirement (of the Fourth Amendment)", *United States v. Buck*, 548 F.2d 871, 875 (9th Cir. 1977).

Moreover, it would be intolerable for courts, without the relevant information, to review and perhaps nullify the Executive's action on properly held secret information. And, even if the courts sit *in camera* it may well be impossible to safeguard this information.

As the Supreme Court has held, decisions involving foreign intelligence should be retained solely in the political departments of our government—the Executive and Legislative—for the issues involved “are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither the aptitude, facilities, nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.”

H.R. 9745 provides that the Executive will be checked—not by the Judiciary but by the Legislature. Annual reports of foreign intelligence surveillance must be made to the appropriate Congressional committee.

There are other differences between my bill and the Administration's versions. Some provisions of the Administration's bills would, in my opinion, severely limit our intelligence capabilities, for example, surveillance of an individual who is suspected but cannot be proven to be in contact with foreign intelligence groups would not be permitted under the Administration's bill. United States citizens who are recruitment targets of foreign intelligence groups would not be liable for electronic surveillance. This, also, would severely restrict our counterintelligence capabilities. Moreover, by requiring perhaps unrealistic standards for the information which may be sought by surveillance, these bills further restrict what may be vital intelligence activities relating directly to our national security.

The strengths and advantages of H.R. 9745 are clear. It is a bill which responds adequately and realistically to the major needs of foreign intelligence, in terms of scope, security and timeliness. There are numerous checks on possible future abuses of the authority being granted here, and safeguards for our civil liberties. The legislation provides procedures for necessary accountability and effective oversight by Congress and the courts. H.R. 9745 is a realistic balance between our necessary foreign intelligence and national security needs and the liberties which we are determined to defend through such activities.

Mr. McCLORY. Let me say that in my view, essential to the defense and security of our Nation is the ability to gather and analyze foreign intelligence information. It is that information which is so vital to the day-to-day conduct of American foreign policy and necessary for insuring the security of this great Nation. This information must be timely, accurate, and kept secure.

These requirements, however, pose a serious problem unique to open societies which must have this information in order to safeguard the freedoms inherent in their democratic form of government. It is not the information which causes the problem; rather, it is the means by which the information is collected which raises fundamental constitutional questions.

When two provisions of the Constitution appear to be in direct conflict, legislators must rise above partisan considerations and exercise their talents in the best interests of the Nation.

Most would agree that it is time to establish legislative criteria which will permit the Executive to carry out its foreign affairs responsibilities with proper security and at the same time insure that the civil liberties of the American people are at all times safeguarded.

The Supreme Court has not, up to this time, resolved the question which is confronting us here today.

It is with these considerations and others which are set forth in my statement that I have introduced H.R. 9745, which retains within the executive, where in my opinion it should be, the authority to approve national security foreign intelligence surveillance. This legislation would require approval of all electronic surveillance by the President, the Attorney General and the Assistant to the President for National Security Affairs. This approval is non-delegable. By requiring the consensus of the President and the two highest ranking national security officers, such surveillance would only be utilized in the most narrow of circumstances.

H.R. 9745 provides that the Executive will be checked, not by the Judiciary, but by the Legislature. Annual reports must be filed before the appropriate Congressional committee.

There are other differences between my bill and the administration's version, which I might say, is patterned after a version developed by former Attorney General Edward Levi. Some provisions of the administration's bill would, in my opinion, severely limit our intelligence capabilities. For example, surveillance of an individual who is suspected but cannot be proven to be in contact with foreign intelligence groups would not be permitted under the administration's bill. United States citizens who are recruitment targets of foreign intelligence groups would not be liable to electronic surveillance. This, also, would severely restrict our counterintelligence capabilities. Moreover, by requiring perhaps unrealistic standards for the information which may be sought by surveillance, these bills further restrict what may be vital intelligence activities relating directly to our national security.

The strengths and advantages of H.R. 9745, which is my bill, are clear. It is a bill which responds adequately and realistically to the major needs of foreign intelligence in terms of scope, security, and timeliness. There are numerous checks on possible future abuses of the authority being granted here, and safeguards for our civil liberties. The legislation provides procedures for necessary accountability and effective oversight by Congress and the courts. H.R. 9745 is a realistic balance between our necessary foreign intelligence and national security needs and the liberties which we are determined to defend through such activities.

Thank you, Mr. Chairman.

Mr. MURPHY. Thank you, Mr. McClory.

I would like to introduce the other member of our subcommittee, the very distinguished member from Kentucky, Mr. Mazzoli.

Mr. MAZZOLI. Thank you very much, Mr. Chairman. I have no prepared remarks. I may later submit prepared remarks for the record. I would like to welcome our distinguished witness and his colleagues today, and to thank you, Mr. Chairman, for having taken the leadership on a very important piece of legislation. As we all know, time is really pressing. We are in the second session of the 95th Congress. This bill is a very important one. It is the centerpiece of the new approach toward foreign intelligence, and with respect to our committee, one of its major pieces of legislation.

So I thank you for even calling these meetings during the so-called recess. I think it shows how intensely interested our committee and our chairman are in trying to get this bill moving.

So I think you are to be congratulated and we have a pretty full plate of fruit on the table for this one.

Mr. MURPHY. Thank you, Mr. Mazzoli.

Mr. Attorney General, let me on behalf of the committee welcome you here today and thank you for accommodating this committee.

[The prepared statement of Attorney General Bell follows:]

PREPARED STATEMENT OF GRIFFIN B. BELL, ATTORNEY GENERAL

Mr. Chairman and members of the committee, I am pleased to testify before you today in support of H.R. 7308. This legislation would authorize the use, subject to court approval, of electronic surveillance to obtain foreign intelligence and counterintelligence information within the United States.

In my view, this bill is one of the most important measures before Congress this year. As you know, foreign intelligence electronic surveillance has been conducted by our government for many years without explicit statutory authorization or regulation. While these surveillance techniques are extremely useful in gathering intelligence information, they also intrude upon the privacy of their subjects. Thus, their use raises a difficult problem, that of finding the proper balance between the vital need of this country to protect its security by collecting foreign intelligence information, and the equally important need to protect the civil liberties of persons in the United States and American citizens abroad.

Only in the last few years has this problem received the public attention that it deserves. The Executive Branch has in the past dealt with this problem in particular cases without the guidance of a public law that authorizes proper actions, prohibits the improper, and draws a clear line between the two. This bill is a first step toward changing that situation. I believe that it strikes a proper and reasonable balance between the vital interests at stake.

Clandestine intelligence activities might be considered an anomaly in a free society. Virtually all functions of our government are subject to exacting scrutiny by means of legislative oversight, judicial review, press comment, and ultimately, citizen control in the voting booth. On the other hand, clandestine intelligence activities, by their very nature, must be conducted by the Executive Branch with a degree of secrecy that insulates them from the full scope of these review mechanisms. Such secrecy in intelligence operations is essential if we are to preserve our society, with all its freedoms, from foreign enemies.

We are all aware that there have been abuses of electronic surveillance in the past. Strict internal measures taken by this Administration and the previous one are designed to prevent their recurrence. But no matter how effective these executive safeguards are, and I do believe they are effective, legislation would seem to be in order as an added protection.

This bill was developed by means of extensive consultation between members of the Executive Branch representing all the affected agencies and a substantial number of interested members of the Legislative Branch. The high degree of bipartisan cooperation among Executive and Legislative officials that led to the drafting and introduction of this bill has continued during its consideration by the Congress. The Senate Judiciary Committee held prompt hearings and has reported the bill, known as S. 1566, with a number of amendments that are fully acceptable to the Administration. The Senate Intelligence Committee has held hearings and will soon mark-up the bill.

I am particularly gratified by this Committee's prompt consideration of the legislation, exemplified by today's hearings. The debate is further enhanced by three other bills also before the Committee. I recognize the serious thought that has gone into all of these proposals—H.R. 5632, introduced by Representative Kastenmeier; H.R. 5794, introduced by Representative Railsback; and H.R. 9745, introduced by Representative McClory. While the Administration remains committed to H.R. 7308 as the best way to resolve the sensitive and difficult issues raised by foreign intelligence electronic surveillance, we have all benefited from the hard work of these Congressmen.

For the Committee's information and assistance, I am submitting copies of my testimony before the Senate Judiciary and Intelligence Committees. These statements discuss in greater detail some of the issues I am touching on here.

I would particularly call your attention to the improvements in this bill over a similar measure introduced in the last Congress. First, the current bill recognizes no inherent power of the President to conduct electronic surveillance. Second, a prior judicial warrant is now required for all targeting of Americans in the United States for electronic surveillance of their international communications. Third, judicial review authority in the warrant procedure is strengthened. I would like now to review briefly the major features of H.R. 7308.

The bill authorizes the Attorney General to approve applications for warrants to conduct electronic surveillance within the United States for foreign intelligence purposes. Applications would be made to one of seven district court judges publicly designated by the Chief Justice of the United States.

A warrant application may be approved only if the judge finds that the target of the surveillance is a "foreign power" or an "agent of a foreign power." These terms, defined in the bill, ensure that no United States citizen or permanent resident alien could be targeted unless there is probable cause to believe that he is engaged in clandestine intelligence, sabotage, or terrorist activities for or on behalf of a foreign power in violation of the law, or that he is, under the direction of a foreign intelligence service, clandestinely collecting or transmitting information or material under circumstances which indicate the transmission of such information or material would be harmful to the security of the United States.

The bill provides safeguards, termed "minimization procedures," to limit the acquisition, retention, and dissemination of information regarding United States persons that does not relate to the purposes for which surveillance was authorized. Moreover, in order to ensure that the information sought by surveillance is indeed "foreign intelligence information" necessary to our security, a warrant may be issued only if a certification to that effect is made to the court by the Assistant to the President for National Security Affairs or a similar official. If the target of surveillance is a United States person, that certification is reviewable by the court under the familiar "clearly erroneous" standard.

Because of differences in the types of targets for electronic surveillance, the bill creates two different types of warrants. A special warrant requiring disclosure of less sensitive information to the judge and allowing surveillance for up to one year is available where there is no involvement of United States persons. A more detailed warrant application is required for targeting U.S. citizens and permanent resident aliens, and surveillance is limited to 90 days. A procedure for emergency warrantless surveillance for up to 24 hours is provided. Extensions beyond the authorized 90-day or one year periods require re-application through the same procedures and with the same judicial findings as original applications.

Oversight is accomplished by means of annual reports to the Administrative Office of the United States Courts and to the Congress of statistics concerning applications and warrants. The President is committed to providing other information necessary for effective oversight to appropriate Congressional Committees in executive session.

In closing, I cannot stress too much the importance of the enactment of this legislation. As the Committee is aware, the process of drafting comprehensive statutory charters for the intelligence agencies is well underway both in the Executive Branch and in Congress. That process, however, requires exhaustive consideration of many difficult issues that remain unresolved. In contrast, most of the major policy questions involved in the wiretap bill have been resolved. If enacted, the bill would stand as a significant monument to our national commitment to democratic control of intelligence functions and would spur completion of charter legislation.

As President Carter noted when he announced this bill, "one of the most difficult tasks in a free society like our own is the correlation between adequate intelligence to guarantee our nation's security on the one hand, and the preservation of basic human rights on the other." It is a very delicate balance to strike, but one which is necessary in our society. In my view this bill strikes the proper balance. It sacrifices neither our security nor our civil liberties, and assures that the dedicated and patriotic men and women who serve this country in intelligence positions will have the affirmation of Congress that their activities are proper and necessary.

ATTACHMENT A

PREPARED STATEMENT OF HON. GRIFFIN B. BELL, ATTORNEY GENERAL OF THE UNITED STATES BEFORE THE SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES OF THE SENATE JUDICIARY COMMITTEE

Mr. Chairman and members of the committee, I am pleased to appear here today to testify in support of S. 1566, a bill to authorize applications for a court order approving the use of electronic surveillance to obtain foreign intelligence information within the United States.

There are many difficult questions involved in striking a balance between the need to collect foreign intelligence to secure the safety and well being of this nation and the concurrent need to protect the civil liberties of all persons in the United States and United States citizens abroad. Only in the last few years has this problem received the public scrutiny which it has so long deserved. Past administrations and this administration have confronted this problem daily in dealing with particular cases without the aid of legislation to authorize that which is proper, to prohibit that which is not, and to effectively draw the line between the two.

This bill is the first step in what will be for me and many others a continuing effort to fill that void. We in the Executive branch are well aware of the abuses of the past; internal measures have been taken both by the prior administration and by this administration to assure that those abuses cannot recur. Even if these safeguards are as effective as we believe, they have not been arrived at through the process of legislation.

This is significant for two reasons. First, no matter how well intentioned or ingenious the persons in the Executive Branch who formulate these measures, the crucible of the legislative process will ensure that the procedures will be affirmed by that branch of government which is more directly responsible to the electorate. Second, any lingering doubts as to the legality of proper intelligence activities will be laid to rest.

As you are aware, the bill before us has been the product of very close coordination between members of the Executive Branch representing all the affected agencies and members of this Committee, the Senate Intelligence Committee, and the House Judiciary Committee. As Senator Bayh said on the occasion of the President's announcement of this bill, this is one of the finest examples of cooperation between the Executive Branch and the Legislative Branch, and I hope that statement will be as accurate after the passage of this bill as it was at the time it was originally made.

I believe this bill is remarkable not only in the way it has been developed, but also in the fact that for the first time in our society the clandestine intelligence activities of our government shall be subject to the regulation and receive the positive authority of a public law for all to inspect. President Carter stated it very well in announcing this bill when he said that "one of the most difficult tasks in a free society like our own is the correlation between adequate intelligence to guarantee our nation's security on the one hand, and the preservation of basic human rights on the other." It is a very delicate balance to strike, but one which is necessary in our society, and a balance which cannot be achieved by sacrificing either our nation's security or our civil liberties. In my view this bill strikes the balance, sacrifices neither our security nor our civil liberties, and assures that the abuses of the past will remain in the past and that the dedicated and patriotic men and women who serve this country in intelligence positions, often under substantial hardships and even danger, will have the affirmation of Congress that their activities are proper and necessary.

Before discussing some of the more important provisions of the bill in any detail, I believe it would be helpful at this point to give an overview of the bill.

The bill provides a procedure by which the Attorney General may authorize applications to the courts for warrants to conduct electronic surveillance within the United States for foreign intelligence purposes. Applications for warrants are to be made to one of seven district court judges publicly designated by the Chief Justice of the Supreme Court. Denials of such applications may be appealed to a special three-judge court of review and ultimately to the Supreme Court.

Approval of a warrant application under this bill would require a finding by the judge that the target of the surveillance is a "foreign power" or an "agent of a foreign power." These terms, defined in the bill, ensure that no United States citizen or permanent resident alien may be targeted for electronic surveillance unless a judge finds probable cause to believe either that he is engaged in clandestine intelligence, sabotage, or terrorist activities for or on behalf of a foreign power in violation of the law, or that, pursuant to the direction of a foreign intelligence service, he is collecting or transmitting in a clandestine manner information or material likely to harm the security of the United States. The judge would be required to find that the facilities or place at which the electronic surveillance is to be directed are being used or are about to be used by a foreign power or an agent of a foreign power.

As a safeguard, approval of the warrant would also require a finding that procedures will be followed in the course of the surveillance to minimize the acquisition, retention, and dissemination of information relating to United States persons which does not relate to national defense, foreign affairs, or the terrorist activities, sabotage activities, or clandestine intelligence activities of a foreign power. Special minimization procedures for electronic surveillance targeting entities directed and controlled by foreign governments which are largely staffed by Americans are also subject to judicial review.

Finally, the judge would be required to find that a certification has been made by the Assistant to the President for National Security Affairs or a similar official that the information sought by the surveillance is "foreign intelligence information" necessary to the national defense or the conduct of foreign affairs of the United States or is necessary to the ability of the United States to protect against the clandestine intelligence, terrorist, or sabotage activities of a foreign power. Where the surveillance is targeted against a United States person, the judge can review the certification.

The bill creates two different types of warrants. A special warrant which will not require as much sensitive information to be given to the judge is only available with respect to "official" foreign powers—foreign governments and their components, factions of foreign nations, and entities which are openly acknowledged by a foreign government to be directed and controlled by that government. The other warrant is applicable to all U.S. citizens and permanent resident aliens.

The judge could approve electronic surveillance for foreign intelligence purposes for a period of ninety days. For a special class of foreign powers, the approval can be as long as one year. Any extension of the surveillance beyond that period would require a reapplication to the judge and new findings as required for the original order.

Emergency warrantless surveillances would be permitted in limited circumstances, provided that a warrant is obtained within 24 hours of the initiation of the surveillance.

For purposes of oversight, the bill requires annual reports to the Administrative Office of the United States Courts and to the Congress of various statistics related to applications and warrants for electronic surveillance. The President is committed to providing to the appropriate committees of Congress in executive session such other information as is necessary for effective oversight.

Turning now to specific provisions of the bill of particular importance, I would like to point out the three specific areas in which this bill increases protections for Americans as against a similar bill proposed last year (S. 3197).

First, the current bill recognizes no inherent power of the President to conduct electronic surveillance. Whereas the bill introduced last year contained an explicit reservation of Presidential power for electronic surveillance within the United States, this bill specifically states that the procedures in the bill are the exclusive means by which electronic surveillance, as defined in the bill, and the interception of domestic wire and oral communications may be conducted.

Second, the bill closes a gap that was present in last year's bill by which Americans in the United States could be targeted for electronic surveillance of their international communications. In this bill such targeting will require a prior judicial warrant.

Third, in the bill last year judges were never allowed to look behind the executive certification that the information sought was foreign intelligence in-

formation, that the purpose of the surveillance was to obtain such information, and that such information could not reasonably be obtained by normal investigative techniques. In this bill, when United States persons are the target of the surveillance the judge is required to determine that the above certifications are not clearly erroneous. While the clearly erroneous standard is not the same as a probable cause standard, it is the same basis of review which courts ordinarily apply to review of administrative action by executive officials, which administrative action may also directly and substantially impinge on the rights of Americans. We believe it is not unreasonable that where high executive officials with expertise in this area have certified to such facts, some degree of deference by the court is appropriate. This is especially so because the judges will be called upon to consider highly sophisticated matters of national defense, foreign affairs, and counterintelligence. The wide difference between such issues and the questions normally addressed by judges in warrant proceedings, conducted *ex parte* without an adversary hearing, is a major reason for adopting a standard other than probable cause.

Thus, the protections for Americans in this year's bill have been substantially increased over the protections of last year's bill.

The bill provides for warrant applications to be authorized by the Attorney General or a designated Assistant Attorney General. This provision will permit the option of eventually delegating some of the substantial administrative burden of reviewing individual case files. I am committed to personally reviewing and authorizing all electronic surveillance requests of the types covered by the bill until the bill has been signed into law and, after that, for a sufficient period to determine how the bill is working in practice and how the courts are interpreting the standards of the bill. The purpose of an eventual delegation of authority to make warrant applications would be to ensure that each individual surveillance request file receives a thorough review by an Assistant Attorney General whose time is not as constrained as that of the Attorney General. I would follow the same practice as I do now for applications for use of electronic surveillance in general criminal cases under 18 U.S.C. 2510 et seq. which are delegated to the Assistant Attorney General for the Criminal Division—I would receive weekly reports on applications authorized and refused. I would also direct my designee to consult with me on cases which present difficult policy problems in light of standards I would set for consideration of warrant applications.

In response to last year's bill, a concern was expressed involving the so-called non-criminal standard for the definition of an agent of a foreign power. A United States person may be made the target of an electronic surveillance under this bill, as I have said before, only if he engages in clandestine intelligence activities, sabotage activities, or terrorist activities for or on behalf of a foreign power which activities involve or will involve violations of federal criminal laws, or if he engages in activities under the circumstances described in Section 2521(b)(2)(B)(iii) found on page 4 of the Committee print.

This so-called non-criminal standard in Subparagraph (iii) is extremely narrowly drawn. There are few, I believe, who would maintain that the activity described therein should not be a basis for electronic surveillance or even the basis for a criminal prosecution. The objection to this subparagraph, I feel, is not based upon a belief that the subparagraph's standards are too broad, but rather that as a matter of principle a United States person should not be made a target of an electronic surveillance unless there is probable cause to believe he has violated the law.

As a principle this is a worthy goal, but it is important to keep certain factors in mind. First, this principle is not constitutionally required; there are numerous searches which the Supreme Court has found constitutional both with and without a warrant where there is no probable cause to believe a crime has been committed. These range from administrative searches and custom searches to stop-and-frisks and airport searches. In the case of *United States v. United States District Court* the Supreme Court indicated that the probable cause standard of the Fourth Amendment in intelligence searches did not necessarily mean probable cause to believe that a crime had been committed. Thus, it is our considered belief that the standard in Subparagraph (iii) is constitutional. Second, even though we might desire that the activities described in Subparagraph (iii) be made criminal, I believe that, depending upon the facts, it is possible that the activity described therein would not be held to be a

violation of any current federal criminal statute. On the other hand, when a United States person furtively, clandestinely collects or transmits information or material to a foreign intelligence service pursuant to the direction of a foreign intelligence service and where the circumstances surrounding this activity indicate that the transmission of the material or information would be harmful to our security or that the failure of the government to be able to monitor such activity would be harmful to the security of the United States, then I believe that whether or not that activity is today a violation of our criminal statutes, the government has a duty to monitor that activity to safeguard the security and welfare of the nation. Third, there is a certain danger in extending the criminal law, the purpose of which is to prosecute, convict and normally incarcerate the perpetrator, merely to satisfy the principle that electronic surveillance should not be undertaken absent a criminal violation.

The Department of Justice is undertaking at this time to review the espionage laws for the purpose of making them comprehensive in the areas in which prosecution is warranted and generally to rationalize this area of the law. This undertaking is quite difficult, as illustrated by the fact that the controversial espionage provisions of the former S. 1 were the result of just such an undertaking. I can only assure you today that we will do our utmost to draft revised espionage laws in such a way that the non-criminal standard might be repealed.

Another issue which has been the cause of some concern is the treatment of non-United States persons; that is, illegal aliens, foreign crewmen, tourists, temporary workers, and other aliens not admitted for permanent residence. Director Kelley will present to you persuasive reasons why the facts require different treatment for such persons whose contacts with or time within the United States is likely to be extremely limited. I would like only to make the point that it is our considered view that such differing treatment wholly conforms to the Constitution. There is no doubt that the Fourth Amendment protects aliens in the United States as well as United States citizens. And under this bill a prior judicial warrant is equally required for all aliens within the United States, whether permanent residents or not. The standards for this warrant are slightly different for certain aliens, however. The bill reflects generally a distinction between different types of persons or entities; that is, the showing for a foreign power is less than for a natural person; the showing for an alien who is an officer or employee of a foreign power is less than that which is required of other aliens; and the showing required for non-resident aliens is less than that for United States persons, which includes resident aliens. There is a rational basis for each of these distinctions, and this is sufficient to assure that the differing standards do not violate the Equal Protection Clause. Therefore, we believe this differing treatment is wholly in accord with the Constitution of the United States.

There have been some questions raised as to what agencies of the United States Government would be involved in electronic surveillance under the bill and what if any change this would mean from current operating procedures. I do not believe that this bill would make any change in which agencies would in fact conduct electronic surveillance or receive its product. Generally only two agencies would be engaging in electronic surveillance under this bill and that would be the FBI and the National Security Agency. Which agency would be involved might depend on various factors, including the nature of the target, the purpose of the surveillance (whether the purpose was for positive foreign intelligence or counterintelligence), and the type of electronic surveillance involved. The respective military services would have the power to engage in electronic surveillance for counterintelligence purposes on military reservations. The CIA is, of course, barred from conducting electronic surveillance within the United States. There is, however, a large degree of cooperation and coordination between the various intelligence agencies on particular electronic surveillances. For example, the need for a particular electronic surveillance might come from the State Department, the CIA might be the agency who had developed the particular equipment to be used, the FBI might be the agency to in fact conduct the electronic surveillance, the product of the surveillance might go to another agency for analysis, with only the analyzed product then going to the State Department. The bill does not make any specific limitations on which agency may conduct electronic surveillance, and I do not believe that such a limitation would be advisable. Not only are the organization, structure,

and duties of the intelligence community subject to some change, but the development of capabilities and technologies by differing agencies cannot be accurately predicted in advance. There will of course be restrictions on the dissemination of information obtained from electronic surveillance not only for security purposes but also to comply with the minimization procedures that the court would order. Again, I do not believe specific limitations as to specific agencies would be advisable in the statute itself.

There is, I know, a desire on the part of several members of both this Committee and the Senate Select Committee on Intelligence to extend statutory protections to Americans abroad who may be subjected to electronic surveillance. This desire is shared by the Administration. The Justice Department, in coordination with members of the various affected intelligence agencies, is actively at work on developing a proposed bill to extend statutory safeguards to Americans abroad with respect to electronic surveillance for intelligence or law enforcement purposes. There are, however, special problems involved in overseas surveillances, some of which arise out of the fact that the United States' legislative jurisdiction is limited overseas. In the next several months, again after close coordination with interested Members of Congress, we expect to be able to present proposed legislation on this subject.

In closing, I would urge that this bill be swiftly enacted into law as a significant first step toward outlining by statute the authority and responsibility of the Government in conducting intelligence activities.

ATTACHMENT B

PREPARED STATEMENT BY HON. GRIFFIN B. BELL, ATTORNEY GENERAL OF THE UNITED STATES BEFORE THE SUBCOMMITTEE ON INTELLIGENCE AND THE RIGHTS OF AMERICANS OF THE SENATE SELECT COMMITTEE ON INTELLIGENCE

I am pleased to appear before you today to testify in support of S. 1566, a bill to authorize applications for a court order approving the use of electronic surveillance to obtain foreign intelligence information within the United States.

I wish to take this opportunity to thank this Committee for holding these hearings promptly, without waiting for the Judiciary Committee's report of the bill. Given the crowded legislative docket facing the Senate, if S. 1566 is to pass the Senate this session, the same spirit of cooperation between the Administration and Congress, and indeed within Congress, which has been demonstrated thus far must continue.

Except for one matter, which I know concerns several of the Members of this Committee, I would like to submit my prepared statement before the Judiciary Committee as my prepared statement before this Committee. The one matter not covered in detail in that statement is the question of extending S. 1566 to cover all United States Government surveillances worldwide.

Before S. 1566 was introduced the Administration seriously considered proposing a bill which would cover all electronic surveillances, not just those within the United States. Because the work on a bill limited to surveillance in the United States was already far advanced and because there was a desire to enact legislation on this subject as soon as possible, it was decided not to attempt to expand the bill to cover overseas surveillances. It was expected to take several months to iron out the problems which are unique to overseas surveillances, and such a delay would have doomed any hope of legislation on electronic surveillance this year.

At the time S. 1566 was introduced, the Administration announced that it would undertake, in cooperation with interested Members of Congress, to draft separate legislation covering overseas surveillance. We have been engaged in that task for almost two months, and the issues are still not resolved within the Executive Branch. This is due to the number and complexity of the problems uniquely involved in overseas surveillances, and the difficulty in creating and maintaining meaningful safeguards in light of those problems.

While I am not prepared to go into great detail over these problems here, some of which could only be discussed in Executive session, I can say that many of the problems arise out of the fact that overseas there is a fair degree of cooperation between our Government and the police and intelligence services of other nations, and surveillances undertaken are not exclusively for our purposes. The level of cooperation in surveillances, moreover, can span the entire

spectrum from situations where we effectively can control all aspects of the surveillance to situations where we have virtually no control. Restrictions or limitations on such surveillances could result in the loss of cooperation. These cooperative ventures would require adjustments of one form or another in all aspects of S. 1566, if it were to be used as the vehicle for reaching overseas surveillances. It will not be a simple matter to apply to electronic surveillance abroad the provisions of S. 1566 relating to the standards for approval, the information to be given to the judge, and the limitations in the order itself.

A separate problem, not directly related to the joint operation problem is the standard under which Americans may be made the target of a surveillance. Under S. 1566 in almost all cases an American will have to be violating Federal law to be targeted for electronic surveillance. Yet in most cases our laws do not have extraterritorial effect, so that activity in the United States which would violate our laws, would not be a violation if committed abroad. Even more problematic is the fact that overseas there may be a need for electronic surveillance against Americans for positive foreign intelligence purposes, as opposed to counterintelligence purposes. An easy example is the American citizen who emigrates or defects to another country and rises to a position of power and influence in a foreign government.

In dealing with these problems one must keep in mind that overseas the foreign intelligence need for electronic surveillance is probably more critical than within the United States. The conditions under which our personnel must operate can include clandestine activities in hostile areas and often involves activities where our ability to engage in electronic surveillance at all is extremely fragile, because it must be covertly conducted in territory not under our control.

In raising these problems, however, I do not mean to suggest that they are insurmountable. I do not believe they are. I mention them only to illustrate what I believe to be the inadvisability of attempting to cover overseas surveillance in S. 1566. It just cannot be done by means of a few simple amendments. The yet unresolved problems, some of which I have mentioned, suggest that if S. 1566 were to be delayed pending their resolution, there would be no legislation this session.

I am, therefore, restating the Administration's commitment to draft separate legislation providing safeguards for Americans abroad from electronic surveillance by this Government for both intelligence and law enforcement purposes. I cannot provide a date by which such legislation will be ready, because it depends in part upon the resolution of some difficult policy problems. I can pledge, however, to move forward with my part of this project as expeditiously as I can responsibly do so. My staff has already reported to me on productive meetings that have been held with the staff of this Committee on this subject. In closing, I urge that this issue not be allowed to cause delay of the passage of S. 1566.

TESTIMONY OF HON. GRIFFIN B. BELL, ATTORNEY GENERAL OF THE UNITED STATES; ACCOMPANIED BY MR. JAMES ADAMS, DEPUTY ASSOCIATE DIRECTOR FOR INVESTIGATION, FEDERAL BUREAU OF INVESTIGATION; AND MR. JOHN HARMON, ASSISTANT ATTORNEY GENERAL, OFFICE OF THE GENERAL COUNSEL, U.S. DEPARTMENT OF JUSTICE

Attorney General BELL. Mr. Chairman and members of the committee, I am pleased to testify before you today in support of H.R. 7308. This legislation would authorize the use, subject to court approval, of electronic surveillance to obtain foreign intelligence and counterintelligence information within the United States.

Congressman McClory has alluded to the fact that former Attorney General Levi had a major part in developing this legislation in the last Congress. I want to pay tribute to Attorney General Levi.

That is a correct statement. Probably no single person in the history of the Nation has done more in the foreign intelligence field from the standpoint of developing guidelines and restrictions and controls on the intelligence system than did Attorney General Levi. The difference between his approach and my approach, which was generally the same as Congressman McClory's approach, is that we want to bring the court, deliberately bring the courts, the judiciary into the process because we have had a crisis in confidence as regards our intelligence system, and it has been my view that the American people trust the courts. They will feel more comfortable with the intelligence system, secret as it must be, if they thought the courts were in the process. That is the fundamental difference between the approaches.

I have nothing against Congressman McClory's bill. That would be an improvement over the present system. The question is do we want to bring the judiciary in.

In my view, this bill is one of the most important measures before Congress this year. As you know, foreign intelligence electronic surveillance has been conducted by our Government for many years without explicit statutory authorization or regulation. While these surveillance techniques are extremely useful in gathering intelligence information, they also intrude upon the privacy of their subjects. Thus, their use raises a difficult problem, that of finding the proper balance between the vital need of this country to protect its security by collecting foreign intelligence information, and the equally important need to protect the civil liberties of persons in the United States and American citizens abroad.

Only in the last few years has this problem received the public attention that it deserves. The executive branch has in the past dealt with this problem in particular cases without the guidance of a public law that authorizes proper actions, prohibits the improper, and draws a clear line between the two. This bill is a first step toward changing that situation. I believe that it strikes a proper and reasonable balance between the vital interests at stake.

Clandestine intelligence activities might be considered an anomaly in a free society. Virtually all functions of our government are subject to exacting scrutiny by means of legislative oversight, judicial review, press comment, and ultimately, citizen control in the voting booth. On the other hand, clandestine intelligence activities, by their very nature, must be conducted by the executive branch with the degree of secrecy that insulates them from the full scope of these review mechanisms. Such secrecy in intelligence operations is essential if we are to preserve our society, with all its freedoms, from foreign enemies.

We are all aware that there have been abuses of electronic surveillance in the past. Strict internal measures taken by this administration and the previous one are designed to prevent their recurrence. But no matter how effective these executive safeguards are, and I do believe they are effective, legislation would seem to be in order as an added protection.

This bill was developed by means of executive consultation between members of the executive branch representing all the affected agen-

cies and a substantial number of interested members of the legislative branch. The high degree of bipartisan cooperation among executive and legislative officials that led to the drafting and introduction of this bill has continued during its consideration by the Congress. The Senate Judiciary Committee held prompt hearings and has reported the bill, known as S. 1566, with a number of amendments that are fully acceptable to the administration.

The Senate Intelligence Committee has held hearings and will soon mark up the bill.

I am particularly gratified by this committee's prompt consideration of the legislation, exemplified by today's hearings. The debate is further enhanced by three other bills also before the committee. I recognize the serious thought that has gone into all of these proposals, H.R. 5632, introduced by Representative Kastenmeier; H.R. 5794, introduced by Representative Railsback; and H.R. 9745, introduced by Representative McClory. While the administration remains committed to H.R. 7308 as the best way to resolve the sensitive and difficult issues raised by foreign intelligence electronic surveillance, we have all benefitted from the hard work of these Congressmen.

For the committee's information and assistance, I am submitting copies of my testimony before the Senate Judiciary and Intelligence Committee.¹ These statements discuss in greater detail some of the issues I am touching on here. I would particularly call your attention to the improvements in this bill over a similar measure introduced in the last Congress. First, the current bill recognizes no inherent power of the President to conduct electronic surveillance, and I want to interpolate here to say that this does not take away the power of the President under the Constitution. It simply, in my view, is not necessary to state that power, so there is no reason to reiterate or iterate it as the case may be. It is in the Constitution, whatever it is. The President, by offering this legislation, is agreeing to follow the statutory procedure. So that was apparently a big issue in the last Congress, and I consider it to be a nonissue now.

Second, a prior judicial warrant is now required for all targeting of Americans in the United States for electronic surveillance of their international communications. Third, judicial review authority in the warrant procedures is strengthened.

I would like now to review briefly the major features of H.R. 7308. The bill authorizes the Attorney General to approve applications for warrants to conduct electronic surveillance within the United States for foreign intelligence purposes. Applications would be made to one of seven district court judges publicly designated by the Chief Justice of the United States.

A warrant application may be approved only if the judge finds that the target of the surveillance is a "foreign power" or an "agent of a foreign power." These terms, defined in the bill, insure that no U.S. citizen or permanent resident alien could be targeted unless there is probable cause to believe that he or she is engaged in clandestine intelligence, sabotage, or terrorist activities for or on behalf of a foreign power in violation of the law, or that he or she is under the

¹ See attachments A and B of Attorney General Bell's prepared statement.

direction of a foreign intelligence service, clandestinely collecting or transmitting information or material under circumstances which indicate the transmission of such information or material would be harmful to the security of the United States.

The bill provides safeguards, termed "minimization procedures," to limit the acquisition, retention, and dissemination of information regarding U.S. persons that does not relate to the purposes for which surveillance was authorized. Moreover, in order to insure that the information sought by surveillance is indeed foreign intelligence information necessary to our security, a warrant may be issued only if a certification to that effect is made to the court by the Assistant to the President for National Security Affairs or a similar official. If the target of surveillance is a U.S. person, that certification is reviewable by the court under the familiar "cleverly erroneous" standard.

Because of differences in the types of targets for electronic surveillance, the bill creates two different types of warrants. A special warrant requiring disclosure of less sensitive information to the judge and allowing surveillance for up to 1 year is available where there is no involvement of U.S. persons. A more detailed warrant application is required for targeting U.S. citizens and permanent resident aliens, and surveillance is limited to 90 days. A procedure for emergency warrantless surveillance for up to 24 hours is provided. Extensions beyond the authorized 90-day or 1-year periods require reapplication through the same procedures and with the same judicial findings as original applications.

Oversight is accomplished by means of annual reports to the Administrative Office of the United States Courts and to the Congress of statistics concerning applications and warrants. The President is committed to providing other information necessary for effective oversight to appropriate congressional committees in executive session.

In closing, I cannot stress too much the importance of the enactment of this legislation. As the committee is aware, the process of drafting the comprehensive statutory charters for the intelligence agencies is well underway, both in the executive branch and in Congress. That process, however, requires exhaustive consideration of many difficult issues that remain unresolved. In contrast, most of the major policy questions involved in the wiretap bill have been resolved. If enacted, the bill would stand as a significant monument to our national commitment to democratic control of intelligence functions and would spur completion of charter legislation.

As President Carter noted when he announced this bill, "One of the most difficult tasks in a free society like our own is the correlation between adequate intelligence to guarantee our Nation's security on the one hand, and the preservation of basic human rights on the other." It is a very delicate balance to strike, but one which is necessary in our society. In my view, this bill strikes the proper balance. It sacrifices neither our security nor our civil liberties, and assures that the dedicated and patriotic men and women who serve this country in intelligence positions will have the affirmation of Congress that their activities are proper and necessary.

Mr. Chairman, I would be glad to attempt to answer questions.

Mr. MURPHY. Thank you, Mr. Attorney General.

Your statement states the issue with clarity, and I agree that the charter legislation coming up is going to be very involved, and a very difficult task for this committee.

Attorney General BELL. We, at a very early date, should have Executive Order 11905 ready as rewritten. I think it will be of considerable assistance to the Congress in formulating the charter legislation.

Mr. MURPHY. We appreciate that. I know the President has stated that this is to be given priority, and we will be cooperating. Hopefully, we can get this bill out this year.

Mr. Attorney General, the ACLU has claimed that the noncriminal standard is unnecessary because activities which fall within its scope would be violative of the espionage laws. The Justice Department has claimed that the standard is necessary because not all activities within its scope would necessarily violate the espionage or other laws. Would it be acceptable to you to make the noncriminal standard a statutory presumption of a violation of the espionage laws in the same manner that after 24 hours a kidnaping is presumed to violate the Federal kidnaping law?

Attorney General BELL. This proposition just came to my attention this morning, Mr. Chairman, and I don't agree with the ACLU, but I am committed to trying to work out a compromise.

I would like to get back to the committee with an answer in writing to your question on the presumption. I am not willing—I think we have a good security system now, and as the Attorney General and really the agent of the President, I am not willing to jeopardize the present system, and I don't want to appear to be a hard-liner, but I am the one that has been mainly sponsoring this legislation. I would like to have a good system. I would like to have the public have additional safeguards, but I am not willing to do anything to jeopardize the security of the Nation, and that is the reason we don't agree with the ACLU's position, and they think—their view is one way and ours is another, but if we can find a compromise, we will do so. The Senate has asked us to do that, too, but at the end, the bottom line, I couldn't agree to anything that would make our security system less effective than it is now.

Mr. MURPHY. Mr. Attorney General, in your view would the term "clandestine intelligence activities for or on behalf of a foreign power" include the situation where a U.S. newspaper editor was a knowing KGB agent engaged in planting false and deceptive propaganda on behalf of the KGB for pay?

Do you believe such activity should be enough to subject one to electronic surveillance under this bill?

Attorney General BELL. That's a very difficult question. The fact that you have imported a newspaper editor into the hypothetical makes it even more difficult. I don't want to get into a first amendment problem. The clandestine intelligence activity for and on behalf of a foreign power included in the bill, I am not certain I can answer that. He is not collecting, he is planting. I think I will defer to my lawyer John Harmon here to see if we can get a clear answer to that. It is an unusual question.

Mr. MURPHY. In the administration bill you talk about the Chief Justice selecting seven judges around the country. Would this be totally left to his discretion?

Attorney General BELL. Excuse me?

Mr. MURPHY. Would this be totally left to the Chief Justice's discretion?

Attorney General BELL. It would be, it would be. I would attempt to work with the Chief Justice to be certain that a majority of them would be in the Washington area, because after all, that is where we are operating most of the time. Most of all this operation is in the Washington area, but this would have to be carefully thought out, and then the Chief Justice would have to think about how long he wanted these people to serve, would have to have security measures, would have to be provided, would have to check the personnel out which would be engaged in the process to the extent that they could get top clearance. There are a good number of things that would have to be done before we put this system in place.

Mr. MURPHY. Mr. Attorney General, the allegation has been made that judges, since they are insulated from a lot of things in their lives, and are forced to limit their contacts with people, may not be suited to this type of very detailed and specialized work in intelligence.

Do you have any views on that?

Attorney General BELL. As you know, I was a judge myself one time, and I handled some foreign intelligence matters on the bench. I never did find it to be a great puzzle of any sort, something that a man of normal intelligence ought to be able to face and resolve.

Since I have been Attorney General I have had occasion to defer a matter to a Federal district judge. The only difficulty I had was he didn't have any safe place to keep paper. We finally installed a safe in his chambers. I had suggested that he might want to place the papers in the FBI Building in Washington for safekeeping on a trust receipt, and the matter went off the track somewhere because his law clerk decided they didn't want to do it, and I later talked to the judge, and he didn't know we had made him that offer. That is the only thing that went wrong with it. But the papers are in a safe that we provided, and the case, which I will give you in executive session, was terminated successfully in the interests of the United States.

So I think these judges can handle it, and there are probably some judges on the bench who have had foreign intelligence experience either in the Government or in the military, which is the government, too, I needn't say, but I don't know that it is necessary to select someone on that basis.

I think that the series of Attorneys General, the top people in the FBI, had to learn foreign intelligence. There are a lot of lawyers in the Justice Department who have had to learn it, lawyers at the Defense Department, CIA, so I don't think it is an insurmountable thing. I would have some apprehension, naturally, in meeting with the Chief Justice about the people he selected.

Mr. MURPHY. This is not a question I was going to get into, but I could see down the line that if there are an excessive amount of applications being made for electronic surveillance and these applications are approved, the allegation would be made that the Chief Justice has got in-house judges, so to speak, people that are very friendly toward granting applications. Of course, there is no sure way of guaranteeing it, but I just wonder, would you consult with the Chief Justice as to the selection?

Attorney General BELL. I will. I intend to, and I would urge upon the Chief that he rotate these judges on a periodic basis; I think probably 3 years would be a reasonable time for a judge to serve in this capacity. I think 1 year would be too short. Three would probably be a good time.

I want to talk with him about that, and then we would have to put in some safeguards against judge shopping. The public would not like to see us do that.

Mr. MURPHY. I would hope that we just wouldn't select judges from this area. I mean, it is a pretty big broad country out there, especially west of the Appalachians. We might suggest that you go to the different areas, and take a judge from amongst the people, so to speak.

Attorney General BELL. That is going to be a difficult problem on the personnel who serves as the judge. I have to sign off on these things, and I find most of them reach my office between 6 and 7 at night on the last day. So we are going to have to get some judges working long hours to begin with. It's going to be hard to get papers to Chicago or Los Angeles. So I don't know how we are going to work this out.

It may be seven judges is too few. I can see how you would need probably three to five in the Washington area. You could use Virginia, the District of Columbia, and Maryland to get a cross section or balance; but if you wanted some more just to have them stationed around over the country, we probably ought to have more than seven, have one in Florida, one in Texas, one in Illinois, so forth, just when we needed them.

Mr. MURPHY. Well, I find that the farther you get from this city, the problems of the world and the country don't have the same seriousness or drama attached to them as they do in this town, and sometimes I think better reasoning and clearer judgment are brought to bear on an issue.

Attorney General BELL. As you know, I have stated publicly that I favor letting useful information come in through the iron curtain of I-495, and I also favor getting out of here and going to talk to the people over the country. I believe that very strongly.

But the intelligence apparatus is situated here in the Washington area, and so you would naturally have to go see judges in the Washington area. It has to go through the steps under this legislation. You have got to get it over to the National Security Council, and we have to process this first, and then we have got to go find a judge and present it.

Now, if we could get maybe 2 or 3 days' leadtime built into this system, maybe we could use judges in other parts of the country.

These are matters that we handle, not the sort of a thing where you need an input that you would need in the political area. You pretty well know whether something is in national security or not, once you see the facts, whether it is counterintelligence or just intelligence, or lawbreaking which involves national security.

So I think it wouldn't be too bad to have most of the judges here in this area.

Mr. MURPHY. Mr. McClory.

Mr. McCLORY. Thank you, Mr. Chairman.

[Pause.]

Attorney General BELL. Let me just say one thing. Mr. Harmon just called to my attention that I am the last person in the step before it reaches the judge, so I suppose I could set up some kind of a system to use some judges in other parts of the country if the committee thinks that is necessary.

Mr. MURPHY. It is my feeling, Mr. Attorney General, that people beyond I-495 think that everything is done here in Washington, and that we are all part of one great bureaucracy. In view of our past history and things that have been done in the name of national security, it would help if we could select judges from around the country. I know there are some good judges out there.

Attorney General BELL. Oh, yes.

Mr. MURPHY. I think the core of your statement is to get the people to trust in the Government. We can do this if we reached out to places other than New York or Washington, D.C., for these judges.

[Pause.]

Attorney General BELL. I was talking with Mr. Adams. We think we can work out something; sometimes where the judge needed additional information, you would have to send someone there. You couldn't talk over the telephone, but we think we can work this out. It may be that you ought to extend and enlarge the number from 7 to 9 or 11 so we can have some sufficient number, but I believe we can work it out so we can have some judges in other parts of the country participating.

Mr. McCLORY. Judge Bell, just as a preface to the questions that I am going to ask you, I want to first of all state very frankly and forthrightly that I am aware of certain abuses and certain excesses with respect to electronic surveillance of American citizens in the past. I think we have somebody in the audience today who will be a witness next week who was subjected to an electronic surveillance, under the guise of national security, for an extended period of time. It has been popularly, at least prominently described as an abuse or an excess, and it along with other instances has given rise to this reaction which is a result of this legislation which was advanced under the Ford administration and is continuing under this administration.

So recognizing that, I want to nevertheless ask questions which I think are extremely pertinent to this subject which is going to have a tremendous impact on the entire intelligence gathering and intelligence capability of our Nation. It also is going to involve much in the way of individual civil rights or fourth amendment rights against unlawful searches and seizures.

First of all, it is clear, is it not, that under the administration bill—which says that electronic surveillance which is covered will require a judge to issue a warrant—involves not only American citizens, and not only persons living in the United States under permanent residence requirements, but also involves foreign embassies, involves foreign agents, involves foreign governments and involves the homes and persons of foreign personnel who may or may not be foreign agents. It covers all persons, does it not?

Attorney General BELL. It does.

Mr. McCLORY. The only difference is with respect to so-called United States persons; the issue of probable cause is different. In other words, there is no probable cause really shown with regard to a foreign government or a foreign agent, is there? All you have to show is that the person is a foreign agent and state that the place where the electronic surveillance is going to take place is a facility, and then of course, indicate that you are going to minimize the communications that you are going to intercept, but the judge has to accept your representation and issue a warrant in that case.

Attorney General BELL. You have got to have some showing that you are going to collect intelligence.

Mr. McCLORY. Foreign intelligence, right.

Attorney General BELL. I do that every day. That is a difficult question. It is not just that you show it is a foreign power or a foreign agent. You have got to go one step further.

Mr. McCLORY. Well, let me say this quite frankly. You don't abuse or violate any American citizen rights at the present time under the authority that you exercise?

Attorney General BELL. I certainly have not.

Mr. McCLORY. No, and we don't want to. So under this legislation what we would do is we would continue a practice on an assurance that you are already performing as Attorney General.

Attorney General BELL. That's correct.

Mr. McCLORY. Now, who are the—

Attorney General BELL. But the American people may not think I am doing so well. Otherwise we wouldn't need this legislation.

Mr. McCLORY. So we are projecting some imagery and not some reality, perhaps.

Attorney General BELL. Well, in a democratic society people have to trust the Government. Otherwise you go under. We are trying to build up a system of trust.

Mr. McCLORY. Exactly, and when we exercise responsibility, we should have accountability, should we not?

Attorney General BELL. Right.

Mr. McCLORY. That is why we have the House and Senate Intelligence Committee, and you have no objection to that part of my legislation or the administration bill which requires accounting to the Congress with respect to wiretaps or other forms of electronic surveillance.

Attorney General BELL. None whatsoever. I have been accounting right along.

Mr. McCLORY. Right. I wonder if you feel that the accountability is adequate since it only requires an annual report. Wouldn't it im-

prove the situation—it would as far as I am concerned, as a member of this committee, if we had quarterly reports. Would you have any objection to that?

Attorney General BELL. None whatever.

Mr. McCLORY. Now, who are they—in your opinion, as the chief lawyer and the chief law enforcement officer of our country, who are “the people” that are referred to in the fourth amendment? Do you think they include foreign agents, foreign governments, foreign embassies?

Attorney General BELL. I don't think they include them, but they include resident aliens, and I have got some doubt about what the Supreme Court might do about others. It might be that they would apply to anyone in our country.

Mr. McCLORY. Now, under the Vienna Convention, don't all these embassies and these embassy personnel, don't they enjoy immunity when they are in our country?

Attorney General BELL. Well, they do from prosecution.

Mr. McCLORY. But they don't as far as electronic surveillance is concerned, in your opinion.

Are you uncertain about that?

Attorney General BELL. I have got very firm views, but I don't think I want to state my views publicly.

Mr. McCLORY. But there is uncertainty about that, is there not, as far as the policy of this administration is concerned?

Attorney General BELL. I would say there is some uncertainty. I don't know about as a policy of this administration. I would deny that. I mean, it has been said to me that I am often wrong, but seldom in doubt. But I have got my own views about the Vienna Convention.

Mr. McCLORY. Wasn't the policy of the last administration, notwithstanding the Vienna Convention, that we did have a right to electronically surveil foreign embassies, foreign personnel who were here?

Attorney General BELL. I don't know about the views of the last administration. I wouldn't want to comment on that, but I would say that there is some doubt about what the Vienna Convention means in this context, and I would think it was not only to our Nation but that doubt might be in the minds of other nations as well, so I don't think we are—I want to make the point, I don't think we are treating the convention any different from anyone else.

I think it is important to say that we are just not the only ones that are following the courts.

Mr. McCLORY. I assume a great deal of our intelligence activities are carried out because we have to respond to the intelligence activities other nations are exercising vis-a-vis our Nation. Recent reports which have reached me indicate that there are many, many more KGB agents filtering into this country than there ever were before, to the point where the FBI feels that it is not capable of monitoring all that these people are doing.

Do you question that?

Attorney General BELL. I don't question that at all. Now, we have opened our ports, 40 ports to the Russian ships and what you say is correct. It is a problem. Also, there is a problem in the visa program.

If you want to take—if you will permit me to give you one more problem.

Mr. McCLORY. I would like you, if you would, in presenting written information to this committee following the hearing, give me your interpretation of who the people are who are included in the fourth amendment.

Attorney General BELL. We would be glad to do that.

Mr. McCLORY. And indicate whether you think foreign agents and foreign governments are included among the people.

Attorney General BELL. I can tell you now I don't think that, but we will give you a definitive answer.

Mr. McCLORY. Well, aliens who are not here under any right or permanent residence.

Attorney General BELL. All right.

[The information referred to follows:]

DEPARTMENT OF JUSTICE,
Washington, D.C., April 18, 1978.

HON. EDWARD P. BOLAND,
Chairman, Permanent Select Committee on Intelligence, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: During the hearings on H.R. 7308, Representative McClory asked the Attorney General for his views on whether foreign agents, foreign governments, and aliens temporarily in the United States were among "the people" who the Fourth Amendment states shall be "secure in their persons, houses, papers, and effects against unreasonable searches and seizures." After examining the question, we have reached the following conclusions. First, aliens temporarily within the United States are protected by the Fourth Amendment even if illegally present or acting as agents of a foreign power. Second, foreign states as states have no rights against the United States under the Fourth Amendment. Third, the extent to which foreign diplomatic personnel are protected by the Fourth Amendment depends upon the extent to which the United States and the sending state have agreed to identify their presence and acts with the acts of the sending state.

As a preliminary matter, it is desirable to define the class of aliens whose rights are at issue. The bill defines individual United States persons to include United States citizens and aliens lawfully admitted for permanent residence as defined in § 101(a)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(20). Since a lawful permanent resident alien must be capable of becoming a citizen,¹ individual United States persons are all present or potential citizens. All other aliens lawfully or unlawfully present in the United States are under the bill non-United States persons (hereafter "NUSPs").²

1. INDIVIDUAL NON-U.S. PERSONS

As a fundamental attribute of sovereignty, all persons within the territorial jurisdiction of the United States are subject to its laws unless the Government has consented to allow them immunity. *Schooner Exchange v. McFadden*, 11 U.S. (7 Cr.) 116, 136 (1812). Conversely, all persons subject to the jurisdiction of the United States are entitled to the basic personal liberties guaranteed by the Constitution. See *Matthews v. Diaz*, 426 U.S. 67, 77 (1976); *Wong Wing v. United States*, 163 U.S. 228, 237-38 (1896); *Yick Wo v. Hopkins*, 118 U.S. 356, 372 (1886). Thus, an illegal alien can only be convicted of a crime, including the crime of illegal entry, under procedures conforming to the Fifth and Sixth Amendments. *Wong Wing v. United States*, *supra*. Similarly, illegal aliens enjoy the protection of the Fourth Amendment. See *United States v. Brignone*

¹ See Immigration and Nationality Act, §§ 101(a)(207), 212(a)(22), 8 U.S.C. §§ 1101(a)(20), 1182(a)(22).

² The Immigration and Nationality Act, § 1101(a)(15), 8 U.S.C. § 1101(a)(15) provides for 12 classes of aliens who may be temporarily admitted. The time they are permitted to remain is set out in 8 CFR § 214 (1977). Illegal aliens, of course, may be deported. Immigration and Nationality Act § 241(a), 8 U.S.C. § 1251(a).

Ponce, 422 U.S. 873, 882-83 (1975); *Illinois Migrant Council v. Pilliod*, 540 F.2d 1062, 1068 n. 5 (7th Cir. 1976); *Ai Yu Lai v. INS*, 445 F.2d 217, 219 (D.C. Cir. 1971).

While there is a paucity of case law in the area, the existing cases indicate that alien employees or agents of a foreign government are in the same position as other aliens. That is, unless the United States has consented to grant them immunity, they are fully subject to its laws while in its territory. *United States v. Egorov*, 222 F. Supp. 106, 107-08 (S.D. N.Y. 1963); *United States v. Melech*, 190 F. Supp. 67, 87-89 (S.D. N.Y. 1961). It would follow that they are within the protection of the Fourth Amendment.

The Supreme Court unanimously took this view in *Abel v. United States*, 362 U.S. 217 (1960). Through a defecting subordinate, the FBI knew that Abel was a Colonel in the KGB, the controller of an espionage operation, and an illegal alien.³ The FBI procured his arrest by the INS on an administrative deportation warrant and searched his hotel room after he had been arrested. He was convicted of espionage on evidence produced by the search. The Court held that the arrest and the subsequent search were valid under general principles of Fourth Amendment law; it expressly stated that "the nature of the case, the fact that it was a prosecution for espionage, has no bearing whatever upon the legal considerations relevant to the admissibility of evidence." *Abel v. United States*, *supra*, 362 U.S. at 219. While the four dissenters disagreed on the merits of the Fourth Amendment issue, they agreed that the Fourth Amendment applied to the case. *Id.* at 241-43 (Douglas, J.), 243-56 (Brennan, J.).

Colonel Abel is as clear a case as we are likely to see of a NUSP who is a known foreign agent. If the Fourth Amendment applied to his arrest and search, it is difficult to argue that any NUSP without an official immunity is not protected against unreasonable searches and seizures.

2. FOREIGN STATES

As stated above, the Constitution limits the power of the United States to act upon persons who are subject to its authority. As a nation among nations, however, the United States is neither subject nor sovereign, but one among equals. See *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304, 315-18 (1936); *Chinese Exclusion Cases*, 130 U.S. 581, 604-06 (1889); *Schooner Exchange v. McFadden*, 11 U.S. (7 Cir.) 116, 166 (1812). It was understood by the Framers that the United States, as an entity, derived its power to conduct foreign relations not from its domestic instrument of government but from its status in international law as an independent state. Rather than conferring on the United States the power to wage war and conduct diplomacy, the authors of the Constitution understood that they were only allocating those unquestioned powers among the branches of the national government and providing sufficient domestic powers to make them effective.⁴ Consistent with this understanding, the Supreme Court has held from the earliest times to the present that the United States as an entity possesses the full powers of a sovereign nation not by grant under the Constitution but under international law.⁵ See e.g., *Kleinienst v. Mandel*, 408 U.S. 753, 762 (1972); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Chinese Exclusion Cases*, *supra*; *Schooner Exchange v. McFadden*, *supra*; *Penhallow v. Doane*, 3 U.S. (3 Dal.) 54, 80-81 (Patterson, J.).

We believe it follows that the rights and duties of the United States and foreign sovereignties *vis a vis* one another derive not from the domestic law of either, but from the mutual agreements contained in treaties and the consensus known as customary international law. In particular, the rights of a foreign state with respect to the security of its premises and internal communications in the United States are products, not of the Fourth Amendment, but of treaties and international usage.⁶

³ See *United States v. Abel*, 258 F.2d 485, 487-89 (2nd Cir. 1958), *aff'd* 362 U.S. 217 (1960).

⁴ See 1 Farrand, *Records of the Federal Convention*, 19, 25 (Randolph), 316 (Madison), 323 (King), (1937 ed.); *The Federalist*, No. 15, at 156, No. 42, at 302-03 (John Harvard Library ed., 1961).

⁵ In sum, the United States possesses the full power to act with respect to foreign sovereigns from the point of independence. Nothing in the records of the Constitutional Convention indicates any attempt by the Framers to diminish this pre-existing power.

⁶ We note at this point that these rights are defined, for the most part, by the Vienna Convention on Diplomatic Relations, Art. 22.1, 24, 27, 23 UST 3227.

3. DIPLOMATS AND OTHER AGENTS OF FOREIGN STATES

The above two conclusions shape the third issue. On the one hand, individual NUSPS in the United States enjoy, as a general rule, the same protection of the Fourth Amendment as United States persons. On the other hand, the Fourth Amendment provides a foreign government no protection for its internal communications. Many of these communications, though not all, are the conversations of diplomats and other employees of the foreign state. Acquiring the internal communications of the foreign government means, in many instances, intercepting the conversations of these individuals. The question thus arises of what are the Fourth Amendment rights of these individuals when uttering the communications of the foreign state.

Foreign diplomatic personnel have a different status from other employees or agents. Under international law, as embodied in both the Vienna Convention⁷ and domestic statute,⁸ a diplomatic agent enjoys immunity from arrest and civil or criminal jurisdiction, and his residence and papers have the same inviolability as an embassy. The only remedy of the United States against his misconduct is diplomatic: to declare him *persona non grata* and require his recall.⁹ Individuals receive diplomatic status and immunities only by appointment of the sending state and consent of the United States.¹⁰

In effect, persons with full diplomatic status bear the same relation to the United States as the government they serve: they are not subject to domestic law, and our rights and remedies with respect to them are diplomatic only. Chief Justice Marshall, in *Schooner Exchange v. McFadden*, 11 U.S. (7th Cir.) 116, 138-39 (1812) explained why the United States consents to these privileges as follows:

The assent of the sovereign to the very important and extensive exemptions from territorial jurisdiction which are admitted to attach to foreign ministers, is implied from the consideration that, without such exemptions, every sovereign would hazard his own dignity by employing a public minister abroad. His minister would owe a temporary and local allegiance to a foreign Prince, and would be less competent to the objects of his mission. A sovereign committing the interests of his nation with a foreign power, to the care of a person whom he has selected for that purpose, cannot intend to subject his minister in any degree to that power; and therefore, a consent to receive him implies a consent that he shall possess those privileges which his principal intended he should retain—privileges which are essential to the dignity of his sovereign and the duties he is to perform.

In short, the United States and foreign states agree that their diplomats shall be treated as the personification of their respective nations in order that they may discharge their duties more effectively.¹¹ The individual with full diplomatic immunity is entitled to the same protections as the government which sent him.

Once the diplomat with full immunity is identified completely with the foreign state, it follows that he occupies its position with respect to the Fourth Amendment. By the consent of the United States and the sending state, his communications, like his acts, are treated as if they were those of the sending state. In our opinion, the rights of privacy of a diplomatic agent are derived not from the domestic law to which he is not subject, but from the agreement between states which is the reason and the condition for his presence within the United States.

A different question is presented with respect to those persons, NUSPs and residents alike, who are employed by a diplomatic mission but do not have full immunity.¹² As stated above, they enjoy the protection of the Fourth Amendment against unreasonable searches and seizures. There is no question that their non-official conversations may not be intercepted without grounds and

⁷ Vienna Convention on Diplomatic Relations, Art. 29-31, 23 UST 3227, see *Hollendo Lines Ltd. v. Moore*, 345 F.2d 968, (D.C. Cir. 1965).

⁸ 22 U.S.C. § 252, see *In re Baiz*, 135 U.S. 403, 420 (1890).

⁹ Vienna Convention on Diplomatic Relations, Art. 9.1, 23 UST 3227.

¹⁰ Vienna Convention on Diplomatic Relations, Art. 4, 9.1, 10.1(a), 23 UST 3227. United States persons employed by a foreign mission do not receive full diplomatic immunity. Vienna Convention, Art. 38.1, 23 UST 3227.

¹¹ See also Preamble, Vienna Convention on Diplomatic Relations, 23 UST 3227.

¹² This includes administrative, technical, and service staff, as well as United States persons in any position. Vienna Convention on Diplomatic Relations, Art. 37.2-4, 38.

authorization procedures sufficient to satisfy the Fourth Amendment. Neither may places unconnected with their official duties in which they have a privacy interest be invaded without meeting constitutional standards.

Their official conversations on diplomatic premises, however, are no more than the communications of their employer, the foreign state. Thus, as an institution, a state can only act through its employees. It is therefore inherent in the acquisition of the foreign state's communications that the privacy of the individuals speaking them be invaded. Because of our conclusion that the internal official communications of the foreign state are not protected by the Fourth Amendment, we believe that the unavoidable incidental invasion of the privacy of the speaker of those communications may not be held unreasonable under it.¹³

The answer, then, to the narrowly focused constitutional question is that electronic surveillance conducted under this bill will often involve the interception of communications of persons who do enjoy the protections of the Fourth Amendment. The safeguards written into this bill, particularly court-ordered minimization, are designed to protect as well the privacy interests of those who may be the subject of incidental interceptions which occur in the course of a legitimate surveillance. Even apart from the constitutional considerations, we think the bill, which as you know the Department of Justice supports, provides a mechanism for assuring that future Administrations do not abuse the substantial powers at their disposal in the name of preserving the national security.

Sincerely,

JOHN M. HARMON,
*Assistant Attorney General,
Office of Legal Counsel.*

DEPARTMENT OF JUSTICE,
Washington, D.C., April 18, 1978.

HON. EDWARD P. BOLAND,
*Chairman, Permanent Select Committee on Intelligence, Housing of Representatives,
Washington, D.C.*

DEAR CONGRESSMAN BOLAND: This is in response to your request to the Attorney General for the views of the Department of Justice on the question whether the warrant procedure in H.R. 7308 is unconstitutional by reason of vesting non-Article III powers in Article III judges. While we believe that your inquiry presents a difficult question, we conclude that Article III judges may legitimately perform the duties imposed on them by H.R. 7308.

H.R. 7308 establishes a "Special Court of the United States" to carry out the judicial duties specified in the bill. There is also established a Special Court of Appeals with jurisdiction to hear appeals from decisions of the Special Court. Both of these special courts are to be comprised of Article III judges designated by the Chief Justice. Decisions of the Special Court of Appeals are to be subject to review in the Supreme Court.

Under this framework, we believe that the special courts will be Article III courts. The use of Article III judges, their designation by the Chief Justice, and the reference in the bill to a "court of the United States," *see* 1 Moore's Federal Practice § 0.4[3] at 69-70 (1977), all indicate that H.R. 7308 intends to establish an Article III court. This same basic structure was used by Congress in establishing the Emergency Court of Appeals, *see* Emergency Price Control Act of 1942, ch. 26, § 204(c), 56 Stat. 32, which was clearly regarded as an Article III court. *See Lockerty v. Phillips*, 319 U.S. 182 (1943); 1 Moore's Federal Practice § 0.3[9] (1977). In addition, judicial doubts as to whether

¹³ It cannot be necessarily argued that because these individuals receive immunity for their official acts, they are identified with the foreign state while performing them. For instance, the United States does not recognize violation of the espionage laws as part of a foreign employee's official function, and the limited immunity is no bar to prosecution for such violation. *See United States v. Egorov*, 222 F. Supp. 106, 107-08 (S.D. N.Y. 1963); *United States v. Melikh*, 190 F. Supp. 87, 87-89 (S.D. N.Y. 1963); cf. Vienna Convention on Diplomatic Relations, Art. 41. Perhaps a significant amount of what may be the official duties of some foreign employees are not recognized as such by domestic law and thus activities by this type remain within the protection of the Fourth Amendment.

Article III judges could sit on non-Article III tribunals¹ would incline courts to decide that the special courts were being created under Article III. See *Glidden Company v. Zdanok*, 370 U.S. 530, 561 (1962).

If, then, the H.R. 7308 court is to be an Article III court, it will be subject to that Article's restrictions. The federal judicial power is confined by Article III to "cases" and "controversies". *Actna Life Insurance Co. v. Haworth*, 300 U.S. 227, 239 (1937); *Nashville Chattanooga & St. Louis Railway Co. v. Wallace*, 288 U.S. 249, 259 (1933); *Muskrat v. United States*, 219 U.S. 346, 356 (1911). The proceeding contemplated by H.R. 7308 differs in many respects from the usual sort of case or controversy brought before Article III courts. There will be no process or notice issued to the proposed target of an H.R. 7308 surveillance; there will be no adverse parties in court; the judge's ruling is not a resolution of contested facts, but rather a limited scrutiny of the government's assertions; and there is to be made no public record of the proceeding. Factors of this sort were cited by the Court in *United States v. Ferreira*, 13 How. (54 U.S.) 39, 46-47 (1851) in holding that the function of examining and adjusting claims arising under a treaty was not a judicial function.

We do not, however, believe that these factors preclude the proceeding under H.R. 7308 from constituting a case or controversy. Rather, we believe that the proceeding satisfies the basic and essential requirements of a case or controversy. This view is bolstered by the courts' flexible approach to the case or controversy requirement in other unusual contexts. Our conclusion is also supported by the fact that the proceeding under H.R. 7308 will not trammel upon the underlying aims of the case or controversy restriction.

A.

The Supreme Court has set forth the requirements of a case or controversy as follows:

A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised. * * *

Actna Life Insurance Co. v. Haworth, *supra* at 240-41 (citations omitted). The proceeding contemplated by H.R. 7308 satisfies some of these criteria more directly than others. For example, the question presented will not be a hypothetical or absent one; rather, a specific and concrete issue will be presented to the court for determination. In addition, since what is to be determined is the United States' authority to conduct electronic surveillance of a particular target, it seems evident that the question touches the legal relations of the parties.²

Several of the other specified criteria must be more fully explored. First, since there is to be no notice to the target of the surveillance, the initial authorization of the surveillance might never be challenged in subsequent proceedings. Since the validity of this order may thus not be litigated through the full appellate process, it could arguably not constitute an "immediate and definitive

¹ These doubts were first raised in dicta in *Ex parte Bakelite Corporation*, 279 U.S. 438, 460 (1929). A major purpose in Congress' declaring the Customs Court to be an Article III court, Act of July 28, 1953, § 1, 67 Stat. 226, was to eliminate the uncertainty thereby created whether Article III judges could be assigned to that court. See S. Rep. No. 261, 83rd Cong., 1st Sess. 2 (1953); H.R. Rep. No. 695, 83rd Cong., 1st Sess. 2, 5-6 (1953). See also 1 Moore's Federal Practice § 0.4[4] at 73 n. 2 (1977). The Court again mentioned the concern over the assignment of Article III judges to non-Article II tribunals, but did not elaborate on it, in *Glidden Company v. Zdanok*, 370 U.S. 530, 540, 561 (1962). At least one court, however, has upheld an assignment of an Article III judge to a non-Article III tribunal, albeit without any discussion of the concerns raised by the Supreme Court. *Beñitez Suarez v. United States*, 328 F.2d 473, 474 (1st Cir. 1964).

² We would also note that the Supreme Court makes no mention of procedural aspects—e.g., process or public proceedings and records—as essential to a case or controversy. The lack of such factors here, then, cannot be taken to vitiate the Article III nature of the H.R. 7308 proceeding. See also *In Re Summers*, 325 U.S. 561 (1945).

determination of the legal rights of the parties" usually required in a judicial proceeding. We do not, however, believe this to be the case. The order here does not suffer the sort of defects at which this requirement is aimed. It will not, for example, be subject to revision by the other branches of the government. See *Gordon v. United States*, 117 U.S. 697 (1864); *United States v. Ferreira*, *supra*. Nor would it constitute a prohibited advisory opinion. See *Muskrat v. United States*, *supra*. Rather, the judge's determination will have an immediate and conclusive effect, in that it serves to authorize or prohibit a particular surveillance. The same is true of warrant proceedings and proceedings for electronic surveillance under Title III, 18 U.S.C. §§ 2510 *et seq.*, and so we do not believe that the H.R. 7308 proceeding is constitutionally invalid on the ground that it is inconclusive.

A second problem arises in that the proceeding must be susceptible of a legal determination. While the judge's role in assessing the application under H.R. 7308 is limited, we still believe that he is able to exercise judgment on matters requiring a legal conclusion. The judge is required under the bill to apply standards of law to the facts of a particular case. For example, he must make certain determinations of probable cause; while his review may be somewhat restricted, his determination will be of the same sort made in other warrant proceedings. In addition, the judge is required to ensure that certain procedural requirements have been satisfied. While this review may be rather routine, it has been considered sufficient in other contexts so long as the judge may exercise independent judgment. See *Ullmann v. United States*, 350 U.S. 422 (1956); 13 Wright, Miller & Cooper, Federal Practice and Procedure § 3535 at 329 (1975).

The final, and most important, question is that of adversity. It is an essential prerequisite of a case or controversy to have at least two genuinely adverse parties, for otherwise there is no need for adjudication. See 13 Wright, Miller & Cooper, Federal Practice and Procedure § 3530 at 164 (1975). Moreover, the usual case or controversy involves the presence of the adverse parties and an opportunity for them to present arguments to the court, in order to promote a more accurate disposition of the matter. The proceeding under H.R. 7308 will obviously not allow for this latter criterion to be fulfilled, but we do not believe that this is an absolutely necessary requirement. The Supreme Court, in recognizing that cases or controversies may deal with the contentions of "present or possible adverse parties," *Muskrat v. United States*, *supra* at 357 (emphasis supplied), suggests that both adverse parties need not be present at the proceeding. The Court's decision in *Pope v. United States*, 323 U.S. 1, 11 (1944), is to this same effect, in that it states that a proceeding is no less a case or controversy simply because it is uncontested. *Cf. Stump v. Sparkman*, 46 U.S.L.W. 4253 (1978). Lower federal courts have also indicated that *ex parte* proceedings are legitimate cases or controversies. See *In Re Penn Central Transportation Company*, 384 F.Supp. 895, 911 (Sp. Ct. 1974); *United States v. Manning*, 215 F.Supp. 272, 291 (W.D. La. 1963) (3-judge court).

Instead, the basic requirement is that there be "adversity in fact." 13 Wright, Miller & Cooper, Federal Practice and Procedure § 3530 at 165 (1975). We think that requirement is satisfied here, for the interests of the United States and the target will inevitably be adverse to each other. The United States' interest is to institute electronic surveillance of a particular target. The interest of the target would, presumably, be that the surveillance not be conducted. The adverse interests are thus of the same sort that are present in any warrant or Title III proceeding. Indeed, the adversity present in a H.R. 7308 proceeding is more pronounced than in several types of proceedings held by the Supreme Court to constitute judicial proceedings. For example, the Court has held naturalization proceedings to constitute a judicial function. *Tutun v. United States*, 270 U.S. 568 (1926). While the United States could always be an adverse party in those proceedings, in most cases it is not; there are thus usually no conflicting interests presented to the court for resolution. As another example, the Court has held the process of issuing an order conferring immunity to be a judicial function. *Ullmann v. United States*, *supra*. However, all parties involved in such a proceeding may actually want immunity conferred, and so again there might be no adverse interests before the court. See Dixon, *The Doctrine of Separation of Powers and Federal Immunity Statutes*, 23 Geo. Wash. L. Rev. 501, 529-30 (1955); Comment, *Immunitization of Con-*

gressional Witnesses under the Compulsory Testimony Act, 22 U. Chi. L. Rev. 657, 662 (1955).

It is obvious from the above discussion that we rely heavily on the analogy to warrant proceedings to uphold the validity of the H.R. 7308 proceeding. The courts have often stated that these sorts of proceedings involve judicial functions. See, e.g., *Proulx v. United States*, 32 F.2d 760 (1st Cir. 1929); *United States v. Elliott*, 5 F.2d 292, 293 (9th Cir. 1925); *Veeder v. United States*, 252 F. 414, 418 (7th Cir. 1918); 11 *Cyclopedia of Federal Procedure* § 40.98 at 234 (3rd ed. 1974). One aspect of this comparison requires further discussion, however. While we have found no judicial authority explicating how a warrant proceeding fits within Article III, other authorities have taken the position that this constitutional requirement is met because a warrant proceeding either initiates the criminal law enforcement process, see Comment, *Immunization of Congressional Witnesses under the Compulsory Testimony Act*, 22 U. Chi. L. Rev. 657, 668 (1955), or is ancillary to further proceedings whereby the validity of the search may be fully contested. Taylor, *Two Studies in Constitutional Interpretation* 82, 86-88 (1969); Gordon, *The Judiciary Article of the Constitution and Wiretap Legislation*, 15 *Lawyers Guild* 63, 66 (1955); Rogge, *The New Federal Immunity Act and the Judicial Function*, 46 *Cal. L. Rev.* 109, 131 (1957). These elements will not always be present under H.R. 7308. In most cases the target of the proposed surveillance may not be subject to prosecution in the United States, and so the H.R. 7308 proceeding could not in these instances be justified as in aid of the court's jurisdiction over a forthcoming criminal case. In addition, unlike the procedure required in physical searches or in electronic surveillance, see *Fed. R. Crim. Pro.* 41(d), 18 U.S.C. § 2518(8)(d), H.R. 7308 will not require concurrent or subsequent notice. This lack of notice makes it unlikely that the surveillance will be subsequently challenged in court, and so H.R. 7308 cannot really be justified as ancillary to any further proceedings.

We do not, however, believe that these factors vitiate the validity of the H.R. 7308 proceeding. At the outset, we would note that it is not an invariable prerequisite to a warrant proceeding that it be aimed at a further criminal proceeding. The warrants required in *Camara v. Municipal Court*, 387 U.S. 523 (1967) and *See v. City of Seattle*, 387 U.S. 541 (1967) were not aimed at unearthing criminal conduct, but rather at securing compliance with minimum physical standards. See 387 U.S. at 535. Similarly, in *United States v. United States District Court*, 407 U.S. 297, 322 (1972), the Supreme Court recognized that warrants issued for domestic security surveillance might not be aimed at securing evidence of crime, but rather to prevent unlawful conduct or to prepare for some possible future crisis or emergency. We thus do not believe that the fact that the H.R. 7308 order will at times not necessarily underlie a subsequent criminal prosecution undermines our analogy to warrants for Article III purposes.³

Of course, in the usual warrant proceeding there will always remain the possibility of a later civil action to challenge the validity of a surveillance or search. We do not, however, believe that this fact is relevant for Article III purposes. We would note, first, that this is a rather speculative possibility. As a matter of speculation, it would always be possible for a target under an H.R. 7308 surveillance to learn of the surveillance and challenge it in court. While this latter possibility is undoubtedly more remote than the former, we doubt whether the Article III validity of a proceeding should hinge on such distinctions.

More fundamentally, however, we doubt whether the validity of the H.R. 7308 proceeding rests in any way on the possibility of a later civil or criminal action. For a proceeding before a court to constitute a case or controversy, it appears necessary to us that it do so on its own, rather than by reference to the possibility of later litigation. This speculative possibility is, in our view, insufficient to meet the requirement that there be a specific, live controversy

³ It might be argued that, while the warrants discussed above are not aimed at criminal activity, there always is the possibility that such activity will be uncovered by the surveillance or search. The warrant proceeding, then, could always be related in some way to the courts' criminal jurisdiction. However, the same would appear to be true of an H.R. 7308 proceeding. Even though it is not aimed at criminal activity, it would always remain possible to uncover evidence of such activity in the course of an H.R. 7308 surveillance.

in order for the courts to have Article III jurisdiction. If, then, the possibility of later litigation is not yet a case or controversy, it is difficult to see how it can afford a court a jurisdictional basis for acting on a preliminary matter. See *Application of United States Senate Select Committee on Presidential Campaign Activities*, 361 F.Supp. 1270, 1280 (D.D.C. 1973).

This conclusion finds support in several sources. The Supreme Court decisions upholding the Article III basis of other proceedings—e.g., naturalization and immunity orders—did not turn on the ground that these proceedings were in some way ancillary to, or part of, other litigation. See *Tutun v. United States*, *supra*; *Ullmann v. United States*, *supra*. Rather, the Court held that these functions were within the judicial power by looking at the proceeding itself and finding that it satisfied the criteria of a judicial function.

Several aspects of developing Fourth Amendment law support this conclusion. As noted above, the Supreme Court has indicated that Congress might fashion a warrant procedure for domestic intelligence, and not criminal, purposes. *United States v. United States District Court*, *supra*. The Court of Appeals for the District of Columbia, in *Zweibon v. Mitchell*, 516 F.2d 594, 648-49, 656-57 n.205 (D.C. Cir. 1975), suggested that warrants might be necessary in cases where foreign intelligence was sought, even with respect to such locations as embassies. A conclusion necessarily flowing from each of these decisions is that it was within the power of the courts to issue orders of this sort—*i.e.*, where orders were to be issued in *ex parte* hearings, with little or no purpose of obtaining evidence of crime, and where the continuing nature of the surveillance would preclude notice and hence any possible future legal challenge to the validity of the warrant. These decisions would thereby support the validity of the special court's undertaking the functions specified in H.R. 7308, although none of the decisions addressed this issue.

A second aspect of the developing Fourth Amendment law also supports this conclusion, and that relates to the question of notice. As we noted above, notice is statutorily required in both physical searches and in electronic surveillance, and several decisions in dicta indicate that this is constitutionally required. See, *e.g.*, *United States v. Donovan*, 97 S.Ct. 658, 669 n.19 (1977); *United States v. Bernstein*, 509 F.2d 996, 1000-01 (4th Cir. 1975). However, in the most recent decision directly addressing this issue, the court concluded that a failure to give the notice required by statute was not a violation of the Fourth Amendment. *United States v. Harrigan*, 557 F.2d 879, 883 (1st Cir. 1977). This may be particularly true where, as under H.R. 7308, national security interests are at stake. Title III allows notice to be postponed, and the legislative history indicates that, in national security cases, Congress intended to allow postponement of notice "almost indefinitely." S. Rep. No. 1097, 90th Cong., 2d Sess., 2 U.S. Code Cong. and Adm. News 2194 (1968). If, then, notice is not to be required, the consequences of a failure to give notice—the inability of the target to contest the warrant in later proceedings—must not be deemed necessary to the legitimacy of the initial issuance of the warrant. It thus seems unimportant to the Court's Article III jurisdiction that no proceedings are to follow the issuance of an H.R. 7308 order.

B.

For the reasons discussed above, we believe that the H.R. 7308 proceeding comports with the basic criteria usually set forth with respect to Article III. This conclusion is further supported by the overall approach taken by the courts in evaluating functions which, like the H.R. 7308 proceeding, present unusual Article III questions.

The Supreme Court's handling of the "case or controversy" requirement demonstrates the flexibility of this concept. See *Harris, The Judicial Power of the United States* 34-35 (1940). We have already discussed several instances in which the Court has extended this concept to unusual functions—*i.e.*, naturalization and immunity orders. Other such situations also exist. For example, the Court has held that the enforcement of administrative subpoenas is a judicial function, even if no specific charge or complaint or violation of law is then pending. *Interstate Commerce Commission v. Brimson*, 154 U.S. 447 (1894). Similarly, in *In Re Summers*, *supra*, the Court considered a state court's denial of a petition for an order for admission to practice law as a case or controversy. While the results in each of these cases might be dis-

tinguished from H.R. 7308, primarily on the ground that in each instance both parties were on notice of the proceeding and could take action to protect their interests, the decisions show that functions outside of those traditionally thought to be cases or controversies may yet be within the coverage of Article III.

This flexible approach seems particularly suited to a situation in which, as here, the function imposed on the courts does not appear to subvert the underlying aims of Article III. Two goals are served by the provisions of Article III: to safeguard the independence of the judiciary, *Glidden v. Zdanok*, *supra* at 582, and to ensure that the courts would not intrude into areas committed to the other branches of government. *Flast v. Cohen*, 392 U.S. 83, 95 (1968). In our view, neither of these goals will be thwarted by H.R. 7308. It seems, first, clear that nothing in the bill will result in less independence for the courts. As we discussed above, the H.R. 7308 courts are free to exercise independent and conclusive legal judgment on the same sort of question that is traditionally brought before the courts.

The question whether H.R. 7308 intrudes on the functions vested in other branches presents different considerations. The Executive Branch has assumed and exercised the role of authorizing surveillances for intelligence purposes; the position of the Department of Justice is that the Executive has the authority to order such surveillance on its own. The courts, relying on the Executive's constitutional responsibility in the area of foreign affairs, have generally upheld this position. *See, e.g., United States v. Butenko*, 494 F.2d 593 (3rd Cir. 1974) (en banc). It is possible to go one step further and argue, given the nature of the determinations which must be made in the approval of intelligence surveillance and in light of the Constitution's allocation of responsibilities in the area of foreign affairs, that the Executive has exclusive responsibility to approve foreign intelligence surveillance and that there is thus no place for the exercise of judicial functions.

We do not, however, believe that the H.R. 7308 proceeding will trammel upon powers exclusively reserved to the Executive. The courts have never regarded this area as one where they have *no* role to play. While the decisions generally allow the Executive Branch to proceed without a warrant in foreign intelligence matters, the courts still retain a role in assessing the reasonableness of the surveillance under the Fourth Amendment. *See United States v. Butenko*, *supra*; *United States v. Humphrey*, Crim. No. 78-25-A (E.D. Va. 1978). Indeed, at least one decision suggests in dicta that the courts must play a role in the authorization of such surveillance. *Zweibon v. Mitchell*, *supra*. Given this extent of existing judicial involvement in assessing foreign intelligence surveillance, and given the similarity of the required determinations to functions already exercised by the courts, it seems unreasonable to conclude that Congress, in the exercise of its powers in this area, may not vest in the courts the authority to approve intelligence surveillance. *Cf. La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 459-61 (1900). In sum, we conclude that the functions set forth in H.R. 7308 may properly be performed by Article III judges.

We believe that this responds to your inquiry on this matter. If you have any further questions, we shall be pleased to consider them.

Sincerely,

JOHN M. HARMON,
Assistant Attorney General,
Office of Legal Counsel.

Mr. McCLORY. In the Senate bill which you referred to, an amendment was placed in the bill requiring the judge, when he enters the order, with respect to electronic surveillance, to determine, to make the statement whether physical entry is required to reflect the surveillance.

What I want to ask is this: Do you think it is proper for a judge, for instance, if physical entry is necessary, if you have to break into someplace, to put on a wiretap, for a judge to enter an order authorizing physical entry into premises?

Attorney General BELL. I do.

Mr. McCLORY. Do you think that is proper?

Attorney General BELL. I think if you can't do that, you had better not undertake this duty.

Mr. McCLORY. And you think the judge, under circumstances where that is necessary, could or should include that in his order.

Attorney General BELL. I do. I don't mind him doing it. I don't think it is necessary, but if Congress, in its wisdom, thinks it is necessary, then include it. It sometimes will have to be done anyway, if you want to have that safeguard.

Mr. Harmon calls to my attention the fact that the same kind of provision is now in title III in that respect for wiretaps and criminal cases in this country, and they all involve American citizens.

Mr. McCLORY. Well, sure, if the judge issues a warrant then you go and break down the door of a house in order to undertake a search under some circumstances.

Attorney General BELL. I was merely making the point that it was not a horror.

Mr. McCLORY. I understand that there is authorization for emergency electronic surveillance were you unable to go to the judge and get the warrant, that you have got 24 hours leadtime, and then you would have to go to the judge and get the order, but tell me what would happen in this kind of a situation, and I am sure you could help me out on this.

An FBI agent gets an informant's tip that a foreign agent will be receiving in a particular phone booth a call regarding an important drop of information, and that the call will take place in 20 minutes. Are there procedures that would allow the agent to establish a tap in that phone booth, and if yes, what are those procedures?

Attorney General BELL. You are talking about legal procedures as opposed to electronic procedures?

Mr. McCLORY. No; I am talking about electronic procedures on that telephone.

Attorney General BELL. Well, I don't know about that. I don't have sufficient knowledge to know how you would do it in 20 minutes. You would have to get an engineer, I guess, to tell you. I can give you the legal procedure but not the electronic.

Mr. McCLORY. Well, it wouldn't be possible to follow the procedures either.

Attorney General BELL. You would have to do that under the 24-hour rule. If you could find me in 20 minutes I would have time to act, if you can locate me.

Mr. McCLORY. But if not, the FBI would be frustrated or helpless.

Attorney General BELL. They would be helpless, but it has been very few times they have been found helpless since I have been Attorney General. I don't know about in the past.

Mr. McCLORY. Well, I agree, and that is why I am interested to assure that we don't throw up any roadblocks or tie their hands in any way so that they cannot get vital information affecting our national security. Do you see—

Attorney General BELL. We have 24-hour provisions in title III now. We used it in a recent national event which involved domestic

activities which I will be glad to give to you in executive session, where we had to do something fast, and we did it in the 24-hour period, and by the end of 24 hours we had it in court.

Mr. McCLORY. Judge Bell, with respect to wiretaps relating to organized crime, we also have ex parte hearings on your application. How many of those have been denied by the judge to whom application has been made, any?

Attorney General BELL. Well, I would have to go and get the ACLU study that they gave to the New York Times to keep from giving an incorrect answer because they have got some study, but that study ignored the number that either I or the head of the Criminal Division had denied, that it so often is the case, it is one great fact left out of an article and to have a true reflection of the security of the system, of safeguarding the system, you would have to know how many we denied. I have personally denied title III, I know the head of the Criminal Division has, but I don't know, to give you the figure, I can't. If I can get it for you, we will furnish it in writing.

Mr. McCLORY. I would like to know the total number and the total number that were denied.

Since the court really doesn't pass on the subject of probable cause in most of these cases, even with respect to American citizens, the issue is not the same as it is in a regular probable cause application for a search warrant.

Isn't it correct that the presence of the court in these situations is to hold the executive accountable, and that you have a record there so that the accountability is—the executive is just not going to be able to escape any abuses or excesses that might be committed?

Attorney General BELL. I don't think so. The executives are already accountable. The purpose of having a court in it is to create an additional safeguard.

Mr. McCLORY. Are you representing that the court is going to consider the merits of these applications and exercise expertise with regard to intelligence in passing whether or not a warrant is issued?

Attorney General BELL. They are going to exercise the duty imposed on them by the statute, if it passes, and one of them is the foreign agent, to ascertain that fact, whether you can obtain foreign intelligence. If it is an American citizen involved, it is going to be more like probable cause that we now know in the law, so the court, yes, has duties, and on the American citizen, they are going to have to test it by the clearly erroneous standard. That is the way I understand the bill.

Mr. McCLORY. That is not the way most experts on this subject, I think, understand it.

Attorney General BELL. Well, according to whose ox is being gored. If you are against the bill you say you don't need it, either we won't act in good faith. There's a presumption that we conduct ourselves with dishonor and all the things that people say around Washington, but there are some honest people left, and we try to go, if we have to go to court we will go there and act as lawyers and do what good lawyers do. We will be fair with the court, candid, and we won't go unless we have a reason to go.

Mr. McCLORY. Well, there are honest people left, and there are honest people administering our laws. There is accountability in the executive, and there is accountability to the Congress. To now inject the courts into the situation strikes me as being an overreaction to the responsibilities of honest men.

Attorney General BELL. That might be true. I mean, there is a good deal of merit in your position, Congressman, that we are overreacting. I was—I am going to make a speech today at the Press Club at 12 o'clock, and I am going to say that I think the Watergate syndrome has almost ended, and I hope it has. I hope we are not overreacting. I have thought about that a lot, and I believe this is a good piece of legislation. I don't think it is overreacting, but you can certainly make that argument.

Mr. McCLORY. Does Canada or Great Britain have similar requirements for issuing warrants for electronic surveillance?

Attorney General BELL. No; they do not. They have much stricter official secrets laws than we do also.

Mr. McCLORY. Well, thank you very much. My questions are intended to help clarify the issues, and I appreciate your replying to them.

Attorney General BELL. I know that. I have a very high regard for your view, and I don't claim to have all of the wisdom. Debate is very good in our system when you are fashioning new laws and new approaches.

Mr. MURPHY. Mr. Mazzoli?

Mr. MAZZOLI. Mr. Chairman, thank you very much, and Judge Bell, and Mr. Harmon and Mr. Adams, welcome, and thank you very much for your assistance.

Judge, at the risk of getting myself drummed out of this committee, may I refer to the New York Times, even though it looks like maybe they are not exactly persona grata?

Attorney General BELL. No, no, I didn't mean to give that impression. They are a very great newspaper. I am not one of their favorites sometimes, and sometimes I am, and that is their business, to be a critic of public officials. They should do that.

No; I didn't mean to disparage the New York Times.

Mr. MAZZOLI. And I said it facetiously, as you gather.

In a piece last August 9, Tom Wicker reports on the American Bar Association meeting that occurred that same week in Chicago. I would like to refer to the article to set the stage and to make our record on things which I am pretty sure I know the answer to. At that time, Vice President Mondale is quoted as having said that the Carter administration:

Has rejected absolutely the doctrine that any Government official, including the President, is above the law. President Carter has made it clear that he and everyone else who serves under him has a duty to obey the law just like everyone else in America.

Now, does that in your judgment still remain the position and the articulation of the Carter administration?

Attorney General BELL. Absolutely.

Mr. MAZZOLI. And Judge, can I ask you, is that position articulated in any bill before this committee?

Attorney General BELL. Yes; it is.

Mr. MAZZOLI. Let me ask this also, referring to the same article. Mr. Wicker mentions that you were there in attendance at the same meeting where Vice President Mondale said: "For one thing he, (Mondale) said in his speech, with Attorney General Griffin Bell listening in apparent approval on the platform behind him, that it was necessary to 'prohibit any electronic surveillance without a warrant based on probable cause to believe that a crime is being or about to be committed'."

And I am aware that there was at that time last summer some apparent inconsistency or tension within the administration. Let me also further note that Vice President Mondale is further quoted as saying that the issue of criminal standards for foreign intelligence tap bill was unresolved.

Now, may I ask you, has the position of the Carter administration subsequently been resolved?

Attorney General BELL. It has not, and there is no tension. I hasten to say.

Mr. MAZZOLI. Thank you.

Attorney General BELL. The Vice President and I have different views. Mr. Wicker's remarks are reminiscent of the saying that the wish is the father of the thought. Mr. Wicker hoped that I was agreeing with the Vice President, but I was not agreeing with him. I have not agreed. It is the same statement I made in the beginning today, that I seek compromise, but I am not prepared—I haven't found one yet.

The Vice President and I, there is no tension between us. He would like to have a straight criminal standard, if we could find one, but I think if we can't find one he would have to make a choice between legislation and no legislation, and that is the choice the American people have, I think we would be better off to have the legislation, and I expect the Vice President would, too, if push comes to shove. It hasn't reached that point yet because a lot of people are still hoping for a compromise.

Mr. MAZZOLI. I meant tension to mean creative tension, where there is an ebb and flow of ideas that leads to a creative process.

Attorney General BELL. Debate.

Mr. MAZZOLI. A debate which leads to some sort of conclusion.

So is it fair for this committee to say that the Carter administration's views are represented in the bill which is before us as has been amended by the Senate of the United States, and that is that a criminal standard is not necessary with respect to foreign intelligence surveillance?

Attorney General BELL. Well, that is my view.

Now, the President has never signed off on the difference between my view and the Vice President's view. Of course, it never has reached that point where we need to get him to say I'm one way or the other, and I have been sponsoring the legislation as the Attorney General. I was there in the rose garden when we had the group, as you remember, to announce that we were going to do this. I testified a number of times, and I have never receded from the position that I am taking here today. If we can find a compromise, fine.

Now, the day may come when the President says, well, I decide to favor the Vice President against the Attorney General. That is not usually the way things are done.

Mr. MAZZOLI. I am aware of the fact that is the way the resolution would occur, and what the President would say.

Mr. McCLORY. Would the gentleman yield?

I think there are differences between the Kastenmeier bill and the administration bill. The Kastenmeier bill would require proof that a crime will be or is about to be committed, and that is on the administration bill.

Attorney General BELL. But Congressman Mazzoli was alluding to the speech the Vice President made.

Mr. MAZZOLI. Yes; I am alluding to something different.

Attorney General BELL. Which would appear to be in line with the Kastenmeier bill.

Mr. MAZZOLI. I am going to try to limit myself to just a couple more questions because we only have 5 more minutes, and the chairman may have another round of questions. Am I correct in assuming that the real points of difference that exist between the administration bill, the McClory bill, the Kastenmeier bill or any other bills on this subject are that the administration takes the position that the application of a foreign intelligence electronic surveillance should not be at the instance of the President by some inherent power or at the instance of the President in conjunction with agreement reached with the Attorney General; but that it should be by some mechanism involving a judicial warrant authorized by the court?

Attorney General BELL. Except for Congressman McClory's bill. The other bills would require judicial warrant. Congressman McClory's bill would put safeguards in the present system.

Mr. MAZZOLI. You mean Mr. McClory's bill would not require the judge or the courts to be involved whatsoever.

Attorney General BELL. That's right. He would build on the system we are now using by adding safeguards to that system, and his position, as I understand it, is that would be adequate. It is an over-reaction to import another branch of the Government into the process.

Mr. MAZZOLI. I believe I heard the gentleman from Illinois voice some concerns about the forthrightness of the Federal judiciary and Members of Congress with respect to foreign intelligence. It seems to me that if we leave it where we have it today, it is almost a guarantee of potential abuse. The abuse might not occur, but it almost insures and engraves in concrete the potentiality for abuse. I think that potentiality would not exist if the courts became involved. I understand this to be administration's position.

Judge Bell, as I understand it, you personally feel that the criminal standard is not necessary with respect to the issuance of a wire-tap order, and your rationale is that the espionage laws need to be redefined because some activities engaged in by these agents of a foreign power, or by the foreign power itself, may not be criminal violations. For example, the taking of economic information or market information might not be a criminal violation.

Now, I understand that there is a revision or a rehabilitation of the espionage laws in process.

Is that correct, Judge?

Attorney General BELL. It is in the review, but I don't know where they will come out and how many years it will take to change the espionage law. See, the debate on that will be as great as the debate on this. I don't disparage our form of government to say that it is ponderous, and we can't rely on that and do away with a part of our national security while the debate takes place. That's the position I take.

If we say, well, we don't need a criminal—I mean, we can just rely on criminal standards because someday we are going to change the espionage laws, well, there is no way to—I am not willing—there is no way to do that. I am not willing to live through the years that it will take the Supreme Court to pass on the constitutionality of the espionage law. We are talking about something that takes a long time, and if you will look at Sec. 2521(b)(2)(B)(iii) in the bill, that is as near to a criminal standard as anything could be.

Mr. MAZZOLI. What page is that, Judge Bell?

Attorney General BELL. Four.

Mr. MAZZOLI. Pursuant to the direction.

Attorney General BELL. Pursuant to the direction of the intelligence service of a foreign power. Now, you are acting at their direction. You knowingly collect or transmit information or material to the intelligence service of the foreign power in a manner intended to conceal the nature of such information or material or the fact of such transmission or collection. And then get this, under circumstances which indicate the transmission of such informational material would be harmful to the security of the United States, or that the lack of knowledge by the United States of such collection would be harmful to the security of the United States.

I take the position that that is as near to a criminal standard as I want. I am well satisfied that if somebody does that, they ought to have something done to them, and we are not going to do anything at all to them except surveil them.

I would be glad to put them in the penitentiary if they do that, but we are not saying that. I take the position, and the Vice President and I debate this every now and then, that I am more liberal than he is. I am not going as far. I am not saying we will put you in the penitentiary if you are doing this. I am saying I will only surveil you. So that makes me the liberal one in the group as I see it.

But I might say, my argument hasn't been well received so far.

Mr. MAZZOLI. You have still got a little way to go in getting that across.

Attorney General BELL. But I think it is a powerful argument that if somebody does those things, that it is not an intrusion on any right that they have to surveil them.

Now, at one time in the Senate when people got so worked up over this criminal standard argument, I suggested we put in parentheses (a crime) if it makes people feel better. It is a crime without a punishment.

Mr. MAZZOLI. So, what you feel, Judge, is that though there is not, in a sense, in a technical way, a criminal standard written into this bill before us, the truth of the matter, as you view this language in Sec. 2521(b)(2)(B)(iii) on page four of the bill, is that it is tantamount to a criminal—

Attorney General BELL. Exactly. It is tantamount to a crime, that's right. I think that is far enough.

Mr. MAZZOLI. I have a lot of other questions, but my time has expired, and I thank the Chairman, and the Judge and his colleagues.

Mr. MURPHY. Mr. Attorney General, I understand there is a great support in this country for the intelligence agencies, and I don't think anybody at this end wants to weaken it, or even make that suggestion. The idea behind charter legislation and this bill is not that there are an excess number of spies operating in the United States, but that some citizens of the United States' rights have been violated.

Attorney General BELL. Right.

Mr. MURPHY. And we are here to secure those. That is one of the reasons we are paid our salaries.

Attorney General BELL. Right.

Mr. MURPHY. We are here to see that the Bill of Rights and the Constitution is enforced for the citizens of the United States; and it just happens to be that in the name of national security, some violations of citizens rights have occurred, and we are here to correct them, and I think that the administration bill goes a long way in this regard by adding another layer or another check and balance in a government of checks and balances. The bill may require us to go that extra yard, to do that extra work, to take on an extra burden in order to keep track of spies and KGB agents. With 40 ports opened up to foreign intelligence agents, we are just going to have to work a little harder to preserve those freedoms that are guaranteed in the Constitution. It is as basic as that. As I understand the administration bill, it would add another layer of checks and balances. It may disrupt your schedule to have to build up for 24 hour surveillance warrants, or find a Federal Judge, or wake him up in the middle of the night, but that is not too high a price to pay for a democracy, and that is really the essence of what this is all about.

Attorney General BELL. That is a very good statement, and in a few words I can describe the position of the President, and President Ford before him. The cession of power, the ceding of power to the extent that we add another protective layer on to the system to safeguard the rights of the American citizen, and I think in the form of government that we have, such as we have, it is a rare thing to see a cession of power. Most people want to get more power. I think the last administration and this administration, the President—and I say the administration, that is, the President's power, we have had two President's in a row who are willing to cede power, and I think that is good. I think it ought to be a lesson. There is a lesson in that for a lot of people in public life.

Mr. MURPHY. There is a lesson in it especially for the Congress, which I think, over the past few years has ceded away too much of its power and too much of its oversight.

I know the Attorney General has a speech to give this afternoon, and I know we have the Director of Intelligence, Admiral Turner sitting in the room, so if you have a question or two—

Mr. McCLORY. I have a couple of more questions, yes.

I would just like to say that I am sure Mr. Carter's assertion that he is not above the law means he is not above any violation of existing

law, and would not violate the existing law, including the guidelines that are presently applicable. However, I think it should be pointed out that these applications for warrants to the court really, in my understanding of it, don't really go into the merits. They don't identify the defendants, or don't identify the persons, and the information is very secretive. It is very secretive with regard to the electronic surveillance which the President, the Attorney General and the National Security Agency are undertaking to perform.

Attorney General BELL. Let me say at this point, we would identify the people that we are going to surveil, but it is *in camera*. It is not a public identification. It is to the judge.

Mr. McCLORY. Well, that is extremely interesting. Would you use the court personnel—the court stenographers and reporters and the bailiff and the court personnel—with respect to guarding this secrecy?

Attorney General BELL. Well, I said we would have to work that out. When I was a judge I handled a foreign intelligence matter of a sensitive nature and I didn't have top security clearance, and my law clerks and secretaries, you know—

Mr. McCLORY. There is nothing in the bill that I see which imposes upon the judge any oath of secrecy or any of the court personnel. Do you think that the Congress has the authority to tell the judge that he can't talk to other judges or that he can't talk to his clerk or his assistant or his wife or whomever with regard to highly classified information that is going to be reposed in the judge in this *in camera* proceeding?

Attorney General BELL. I think that is a question we don't have to answer because I am not planning on handing any documents to any judge who has not received a top security clearance. If he doesn't want to be cleared, then he is not going to receive any papers. It is very simple. But that doesn't bother me.

What bothers me is how many other people are we going to clear in the courthouse.

I have a letter on my desk right now from a Federal judge in a large city who says that they have got a new clerk of the court, and he asked the FBI to investigate him, do a background on him, and the FBI refused unless the court administrative officer wanted to pay \$3,000, and of course, if you are going to check the clerk of the court, how many other people are you going to check. You know, this whole thing has to be worked out. I am aware that it is a problem.

Mr. McCLORY. Well, one other suggestion is that the Attorney General or the National Security Agency or the President should provide the personnel, the court reporters, and all the other court personnel, and that you just have the judge sort of standing alone surrounded by personnel from the executive branch.

How do you feel about that?

Attorney General BELL. Well, the bill says for us to seal and maintain under security measures these records in the court, established by the Chief Justice in consultation with the Attorney General and the Director of the CIA, of Central Intelligence. That just leaves it up to be worked out on a cooperative basis. It is something we would

have to work out, but you can be sure that I am not turning any papers over to anyone until we have worked it out.

Mr. MURPHY. Well, I think the arguments get down to this. Mr. McClory wants a standard applied to the judges that is a little bit better than we have here in the Congress about maintaining secret material.

Mr. MAZZOLI. Will the gentleman yield just at this point? We are not just quibbling at this point. I think it is very important. I don't think that the General wants to give any secrets away. I don't think anybody in the FBI or the Congress wants to give things away. I think if we accept the principle, and this is the debate this committee will have, whether we go your route and have the President and Attorney General or go this route and have the courts. That is the judgement. All the details I think could be worked out.

Attorney General BELL. We will report to you, you see, both Intelligence Committees. We will report on what system we set up, we will tell you in advance.

Mr. McCLORY. With regard to secrecy or with regard to maintaining secret intelligence, it is just a common truth that the more people you have involved, the greater risk of breaching the secrecy and confidence involved.

Mr. MURPHY. Well, Mr. Attorney General—

Mr. McCLORY. Well, I just want to ask one more question. I responded to him because I yielded to the gentleman. Isn't it true that there is no real assurance that the President and the executive would not abuse its authority. As a matter of fact, you could justify all kinds of abuse by saying I abused my authority, yes, but the court said it was OK, and that is a complete answer.

Now, is there any assurance—there is no guarantee, is there, that the mere fact that you involve the court in this instead of just involving the committee of the Congress, that you are not going to have abuses of the authority?

Attorney General BELL. Well, you could have an abuse if the Attorney General is a crook. If the Attorney General would go and state in his place, which is like saying something under oath to a judge and misleading him, you could have abuses, but it would surface. The thing about it is, we have to report to this committee. We have to report to the Senate, and give an accounting on who has been surveilled. So he would be caught.

But I can't guarantee that there won't be a crook. With 240 million people in the country—

Mr. McCLORY. But this legislation doesn't guarantee against abuses. Abuses could occur just as much with it as without it. As a matter of fact, it seems to me that the abuses could be committed and then attempted to be justified.

Attorney General BELL. No. I would have to say that the purpose of the legislation is that there would be less chance of abuse, less chance. You have got a situation now where the President can do it all in the White House. He has decided not to do that. In the last administration they got up this delegation to the Attorney General. President Carter adopted the same format or system and delegated it

to me, and so we have got it moved out of the White House, down to the Attorney General. Now, what we are going to do now is we are going to keep that system and we are going to make the Attorney General go to court.

Now, that is about all we can do, as I see it, but I can't tell you that there never will be another crook.

Mr. McCLORY. I am not questioning the purpose. I am questioning the results which we can't guarantee against.

Attorney General BELL. Right.

Mr. MURPHY. One last question, Mr. Attorney General.

To give us some idea of the frequency with which this bill may be used to target U.S. citizens, could you tell us how many U.S. citizens have been subject to a foreign intelligence electronic surveillance in the United States since you have become Attorney General?

Attorney General BELL. You said U.S. citizens?

Mr. MURPHY. U.S. citizens.

Attorney General BELL. Zero.¹

Mr. MURPHY. Thank you, Mr. Attorney General. We appreciate your coming down today, and we appreciate your testimony.

[Pause.]

Mr. MURPHY. Will the hearing come to order. Will the witnesses please stand. Do you swear and affirm that the testimony you are about to give to this committee is the truth, the whole truth and nothing but the truth?

Admiral TURNER. I do.

Mr. LAPHAM. I do.

Mr. MURPHY. Thank you.

Admiral Turner, we appreciate your taking time from what we know is a busy schedule. We understand and are aware of your meeting today down at the White House, and we will try to accommodate you as best we can and you can proceed with your statement.

[The prepared statement of Adm. Stansfield Turner follows:]

PREPARED STATEMENT OF ADMIRAL STANSFIELD TURNER,
DIRECTOR OF CENTRAL INTELLIGENCE

Thank you, Mr. Chairman and members of this Subcommittee, for your invitation to appear and express my views on proposed legislation governing electronic surveillance for foreign intelligence purposes. Last summer I appeared before the Senate Judiciary Committee and the Senate Select Committee on Intelligence to testify concerning S. 1566, the Senate counterpart of H.R. 7308. At that time I indicated my support for S. 1566, and for the judicial warrant requirement that is a central feature of that bill. I reaffirm that support today, and in the interest of saving time I would like to submit my previous Senate statements for the record, make a few additional remarks, and then proceed to answer any questions you may have.

We are concerned here with activities that have never before been regulated by statute, the whole field of national security surveillance, at least in its foreign intelligence aspects, having been left aside when the Congress enacted the Omnibus Crime Control and Safe Streets Act in 1968. To legislate comprehensively in this field, as H.R. 7308 and S. 1566 seek to do, is a difficult and complex business. To begin with, the foreign intelligence surveillance activities themselves are diverse, as to purpose, as to technique, and most importantly as to degree of threat they pose to the rights of Americans to communicate in private without fear of being overheard by their Government. Beyond this pattern of

¹ See appendix C for additional information on this subject.

factual diversity lie the hard legal and policy issues that have caused such long debate and heated controversy. Who are the permissible targets of this sort of surveillance; what circumstances justify the intrusion, particularly where the communications of Americans are concerned, and what level of proof should be required to demonstrate the existence of those circumstances; how should responsibility be fixed within the executive branch, and to what extent should the approval function be shared with the judicial branch; how long should such surveillance be allowed to continue; how should incidentally acquired information be controlled; and what happens if a party to an intercepted communication subsequently becomes a criminal defendant and demands to know whether he has been overheard, or if the Government seeks to use the fruits of surveillance as affirmative evidence of a criminal offense?

Among the various bills that have been introduced, it seems to me that H.R. 7308 and S. 1566 represent the best and the most careful accommodation of the various interests to be served. On the one hand, unlike H.R. 5632, which has a criminal law orientation, they recognize foreign intelligence surveillance activities for what they are in fact—namely, means of obtaining necessary information about foreign powers and their agents rather than aids in the detection and prosecution of a crime. Secondly, the provisions of these bills differentiate between the activities that are most likely to result in the acquisition of U.S. person communications, and therefore are most open to abuse and most threatening from a civil liberties standpoint, and those other activities, directed against official foreign power targets, that present very little likelihood that the privacy of American communications will be invaded or that private information about Americans will be acquired. It is in that regard, for example, that the bills provide for a two-tier warrant procedure, altering the approval and other requirements as between surveillance directed against official foreign power targets and the other permissible targets of surveillance. The distinctions made in this respect, which appear throughout the bills, are crucial and in my opinion mark a real improvement upon S. 3197, the forerunner of S. 1566 in the Senate and the counterpart of H.R. 5794. Additionally, and obviously a matter of key importance, the two bills contain an impressive array of safeguards designed to assure that U. S. persons are not monitored in the exercise of their First Amendment rights or because of legitimate political activities in which they may be engaged, and that no improper use is made of any information about Americans that might be picked up as a surveillance by-product.

I have said before that there are certain risks associated with the statutory approaches reflected in H.R. 7308 and S. 1566. The proliferation of sensitive information always involves risks, and the statutory procedures will unquestionably lead to such a proliferation. But on balance I believe the risks should be accepted, and while compliance will be somewhat onerous, I cannot say that any proper or necessary governmental purposes will be frustrated by these statutes or that vital intelligence information, having such value as to justify electronic surveillance as a method of collection, will be lost.

It should also be understood, as I am sure it already is by the members of this Subcommittee, that the CIA is not itself involved in the conduct of surveillance activities that will be authorized by these bills. However, as matters now stand I have a role in the process through which some of these activities are considered within the executive branch and are forwarded to the Attorney General for his approval, and I would expect to assume a comparable role as a certifying officer were this legislation to become law.

In sum, my overall view is that H.R. 7308 and S. 1566 strike the correct balances, and I believe those balances could easily be upset by the substitution of alternative legislative approaches.

ATTACHMENT A

PREPARED STATEMENT OF ADM. STANSFIELD TURNER, DIRECTOR OF CENTRAL INTELLIGENCE, ON S. 1566 BEFORE THE SUBCOMMITTEE ON INTELLIGENCE AND RIGHTS OF AMERICANS OF THE SENATE SELECT COMMITTEE ON INTELLIGENCE

Mr. Chairman and members of this subcommittee, I welcome this opportunity to testify concerning S. 1566, the Foreign Intelligence Surveillance Act of 1977. I have previously indicated my support for this important legislation in a prepared statement I presented in June to a subcommittee of the Senate Judiciary

Committee. At this time I would like to resubmit that statement, with one change noted on page 2, and add a few remarks concerning issues that you identified, Mr. Chairman, in your letter of 1 July inviting me to appear at this hearing, as being of special interest and concern to the Subcommittee. One of those issues has to do with the provisions in the bill covering the certifications that must be made by executive branch officials in support of warrant applications. The other has to do with the appropriateness of amending the bill so as to bring within its coverage electronic surveillance directed at U.S. persons abroad.

First, as to the certification process, I would expect to be among those officials appointed by the President to make the determinations called for by the bill, regarding the purpose and other aspects of a requested surveillance. Assuming my designation as a certifying authority, I would expect to carry out my responsibilities in much the same way that I do today in the absence of legislation.

As matters now stand, I chair an interagency panel that reviews certain requests to undertake electronic surveillance against foreign intelligence targets. Representatives of the Secretaries of State and Defense serve as the other members of that panel. Surveillance requests are considered at panel meetings attended by the members and other intelligence community officials. In each case the requests are supported by memoranda that justify the operations in terms of standards that closely resemble the targeting standards set forth in S. 1566. In no case is any request approved except after consideration at a meeting of the panel and except after review of the justification memorandum. During my term of office there has been no occasion in which approval was given to all requests considered at any one time, a point I make to indicate that the process is careful and selective. Approved requests are forwarded to the National Security Adviser to the President, and those that receive his endorsement are in turn forwarded by him to the Attorney General for review and final approval. Each final approval is valid for only 90 days, and consequently the entire review process is repeated at 90-day intervals with respect to each surveillance activity requested for renewal.

Should S. 1566 become law I can assure the Committee that I would continue to devote my personal attention to matters within my authority as a certifying official, and I envision that I would base my certifications on review and approval procedures akin to those that are already in use.

Second, as to the idea of broadening the provisions of the bill so as to make them applicable to electronic surveillance activities conducted abroad, I believe that such a step would be inappropriate and unwise. In my view the circumstances that are relevant to the gathering of foreign intelligence and counter-intelligence information abroad, including the acquisition of such information by means of electronic surveillance, are materially different from the circumstances surrounding such activities when conducted in the United States. A critical difference is that activities conducted abroad are heavily dependent on the cooperation of foreign governments and foreign intelligence services, and any enlargement of the scope of the bill to cover such activities could have far-reaching consequences in our relationships with those foreign governments and intelligence services.

In its present form the bill deals comprehensively with a large and complex subject, namely all types of electronic surveillance carried on in the United States that are not already regulated by other legislation. Electronic surveillance abroad is another large and complex subject in itself, and I believe it should be left to separate legislation, which as you know this Administration is now engaged in drafting.

ATTACHMENT B

STATEMENT OF ADM. STANSFIELD TURNER, DIRECTOR OF CENTRAL INTELLIGENCE, ON S. 1566 BEFORE THE SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES OF THE SENATE JUDICIARY COMMITTEE

Mr. Chairman: Thank you, Mr. Chairman and members of this subcommittee, for your invitation to appear and express my views on S. 1566, the proposed legislation which deals with electronic surveillance undertaken in the United States to obtain foreign intelligence. I have a brief statement that I would like to present and I will then be happy to expand on any particular aspect

of my statement or to respond to any other question which may be of interest to the subcommittee.

I support the proposed legislation. I support it because I believe it strikes a fair balance between intelligence needs and privacy interests, both of which are critically important. I support it as well because I believe it will place the activities with which it deals on a solid and reliable legal footing, and thus hopefully bring an end to the uncertainty about the limits of legitimate authority with respect to these activities, and about how, by whom, and under what circumstances that authority can rightfully be exercised. I favor the proposed legislation for additional reasons, not the least of which is my view that its enactment will help to rebuild public confidence in the national intelligence collection effort and in the agencies of Government principally engaged in that effort.

Electronic surveillance is of course an intrusive technique, involving as it does the interception of non-public communications. At the same time it is a necessary technique, and in my opinion a proper one, so far as concerns the gathering of foreign intelligence and counterintelligence within the United States. The fundamental issue therefore, as I see it, is how to regulate the use of electronic surveillance so as to safeguard against abuse and overreaching without crippling the ability to acquire information that is vital to the formulation and conduct of foreign policy and to the national defense and the protection of the national security. In part that is a legal issue. In larger part, however, the question is one of policy.

As matters now stand, electronic surveillance in the field of foreign intelligence is carried out without judicial warrant, under a written delegation of authority from the President and pursuant to procedures issued by the Attorney General. Under the delegation and the procedures, all surveillance requests must be submitted to the Attorney General. No surveillance may be undertaken without the prior approval of the Attorney General, or the Acting Attorney General, based on his determination that the request satisfies specific criteria relating to the quality of the information sought to be obtained, the means of acquisition, and the character of the target as a foreign power or agent of a foreign power. These criteria closely resemble the standards that would apply, by force of statute, were the proposed legislation to be enacted. Indeed, to the extent I have knowledge of these matters, I am not aware of any electronic surveillance now being conducted for foreign intelligence purposes under circumstances that would not justify the issuance of a judicial warrant were S. 1566 to become law, barring any significant amendments.

I am advised that the present practices conform to all applicable legal requirements, including the requirements of the Fourth Amendment. However, assuming as I do that the President has the constitutional power to authorize warrantless electronic surveillance to gather foreign intelligence, it must still be answered whether the present arrangements, under which the approval authority is reserved to the executive branch, represent the wisest public policy given the privacy values that are at stake and given the potential for the subversion of those values.

The proposed legislation reflects a conclusion that the existing arrangements do not represent the wisest policy and that the power to approve national security electronic surveillance within the United States should be shared with the courts. I accept that conclusion, as does the President, and I accept as well the warrant requirement that is the central feature of the bill. As the Director of Central Intelligence, of course, I am necessarily concerned about the capacity of the U.S. intelligence establishment to collect and provide a flow of accurate and timely foreign intelligence information, and I have a responsibility to prevent the unauthorized disclosure of the sources of that information and the methods by which it is obtained. I have therefore tried to assess what the enactment of S. 1566 might cost in terms of lost intelligence or reduced security. Based on my careful review of the bill, I cannot say to you flatly that there will not be such costs. It is possible, for example, that the bill's definitions of foreign intelligence information will prove to be too narrow, or will be too narrowly construed, to permit the acquisition of genuinely significant communications. It is likewise possible that justified warrant applications will be denied, or that the application papers will be mishandled and compromised. These possibilities are difficult to measure, but they are risks. In the end,

however, I think they are risks worth taking. The fact of the matter is that we are already paying a price, equally difficult to measure but nonetheless real, in terms of public suspicions and perceptions that surround the present arrangements. A release from these burdens of mistrust is itself a consideration that argues in favor of the bill. In addition, as I read the bill, specifically sections 2523(c) and 2525(b), the Director of Central Intelligence will have a role in determining the security procedures that will apply to the warrant application papers and the records of any resulting surveillance, and that is a responsibility to which I intend to devote serious attention.

As the subcommittee knows, much of the information that is likely to be obtained from electronic surveillance covered by this bill will not relate, even incidentally, to U.S. persons, with whose privacy rights the bill is specially concerned. Even so, an assurance that all such activity within the United States is conducted lawfully, under rigid controls, and with all accountability for the action taken, whether or not it impinges in any way on the communications of U.S. persons, would be a major step forward, and in my estimation this bill will provide that assurance.

In sum, I regard the proposed legislation as desirable and urge its early consideration and adoption.

TESTIMONY OF ADM. STANSFIELD TURNER, DIRECTOR OF CENTRAL INTELLIGENCE; ACCOMPANIED BY MR. ANTHONY LAPHAM, GENERAL COUNSEL, CENTRAL INTELLIGENCE AGENCY

Admiral TURNER. Thank you, Mr. Chairman and members of the committee. I am happy to be here because this is a very important topic to all of us. I was privileged to testify before the Senate Judiciary Committee on S. 1566, the Senate counterpart of H.R. 7308, last summer. With your indulgence, I would like to submit my previous statements for the record before that committee, make a few additional remarks, and respond to your questions.

Mr. MURPHY. Without objection, it will be received.¹

Admiral TURNER. We are concerned here in this series of bills with activities that have never before been regulated by statute, the whole field of national security surveillance, at least in its foreign intelligence aspects, having been left aside when Congress enacted the Omnibus Crime Control and Safe Streets Act in 1968. To legislate comprehensively in this field, as H.R. 7308 and S. 1566 do, is a difficult and complex business. To begin with, the foreign intelligence activities in themselves are diverse, as to purpose, as to technique, and most importantly, as to the degree of threat that they pose to the rights of the American people to communicate in private without fear of being overheard by their government. Beyond this pattern of factual diversity lie the hard legal and policy issues that have caused such long debate and heated controversy.

Who are the permissible targets of this sort of surveillance? What circumstances justify the intrusion, particularly where the communications of Americans are concerned? And what level of proof should be required to demonstrate the existence of those circumstances? How should responsibility be fixed within the executive branch, and to what extent should the approval function be shared with the judicial branch? How long should such surveillance be allowed to continue? How should incidentally acquired information be controlled? And what happens if a party to an intercepted com-

¹ See attachments A and B of Admiral Turner's prepared statement.

munication subsequently becomes a criminal defendant and demands to know whether he has been overheard, or if the Government seeks to use the fruits of surveillance as affirmative evidence in a criminal offense?

Among the various bills that have been introduced, it seems to me that H.R. 7308 and S. 1566 represent the best and the most careful accommodation of the various interests to be served. On the one hand, unlike H.R. 5632, which has a criminal law orientation, these bills recognize foreign intelligence surveillance activities for what they are, namely, means of obtaining necessary information about foreign powers and their agents rather than aids in the detection and prosecution of a crime. Second, the provisions of these bills differentiate between the activities that are most likely to result in the acquisition of U.S. person communications, and therefore are most open to abuse and most threatening from a civil liberties standpoint, and those other activities, directed against official foreign power targets, that present very little likelihood that the privacy of American communications will be invaded or that private information about Americans will be acquired.

It is in that regard, for example, that the bills provide for a two-tier warrant procedure, establishing different approval and other requirements for surveillance directed against official foreign power targets and for other permissible targets of surveillance. The distinctions made in this respect which appear throughout the bills are crucial, and, in my opinion, mark a real improvement upon S. 3197, the forerunner of S. 1566 in the Senate and the counterpart of H.R. 5794. Additionally, and obviously a matter of key importance, the two bills contain an impressive array of safeguards designed to assure that U.S. persons are not monitored when exercising their first amendment rights or because of legitimate political activities in which they may be engaged, and that no improper use is made of any information about Americans that might be picked up as a surveillance by-product.

I have said before that there are certain risks associated with the statutory approaches in these two bills. The proliferation of sensitive information always involves risks, and the statutory procedures will unquestionably lead to such a proliferation. But on balance, I believe that the risks can be accepted. While compliance will be somewhat onerous, I cannot say that any proper or necessary governmental purposes will be frustrated by these statutes or that vital intelligence information having such value as to justify electronic surveillance as a method of collection will be lost.

It also should be understood, as I am sure it is already, by the members of this subcommittee, that the CIA is itself not involved in the conduct of surveillance activities of the type authorized in these bills. However, I, in my role as the Director of Central Intelligence, do have a role in the process through which some of these activities are considered within the executive branch and are forwarded to the Attorney General for his approval, and I would expect to assume a comparable role to that which I now fulfill as a certifying officer were this legislation to become law.

In sum, it is my overall view that H.R. 7308 and S. 1566 strike the correct balances, and I believe these balances could easily be upset by the substitution of alternative legislative approaches.

Mr. Chairman, I am available for your questions.

Mr. MURPHY. Thank you, Admiral Turner.

Do you see where the administration bill in any way would hinder the operation of intelligence agencies in gathering information that they need to perform their function?

Admiral TURNER. It is my opinion that we can satisfactorily perform our functions under this bill. As I say, there are encumbrances, risks, onerous tasks to be performed as a result of this. I think that the benefit to the overall populace in terms of assurances against invasion of their privacy warrant those encumbrances.

Mr. MURPHY. Do you have any suggestions as to what the administration or the Chief Justice might do in selecting the judges that will hear the applications for warrants or as to the criteria the Chief Justice should use in selecting the particular judges?

Admiral TURNER. He should have a full sense of confidence that judges he selects are men who will keep private what must be kept private—and I would find it hard to think we had people in those positions who wouldn't. I would say that the primary concern in my view, is that the people selecting them have that sense of confidence that the information will be kept within the proper bounds.

Mr. MURPHY. Mr. McClory?

Mr. McCLORY. Thank you, and thank you for your statement, Admiral Turner, and thank you for the cooperation which you have been giving consistently to this committee, which I think is most helpful to our function.

Admiral TURNER. Thank you, sir.

Mr. McCLORY. This would be a substantial departure from the existing practice as far as intelligence gathering or intelligence-gathering activities are concerned, would it not?

In other words, you don't apply to any court now if you want to perform an intelligence function with regard to a foreign espionage agent, if you want to tail somebody, if you want to have an informant who would provide information for you, or where you get intelligence information in any other than by way of electronic surveillance? You don't go to the courts for any other kinds of intelligence gathering, do you?

Admiral TURNER. No, sir.

Mr. McCLORY. I know that while you say you are not involved in this legislation, there is a provision that says that in order to insure or provide for good security, that they are going to consult with you and the Chief Justice is going to consult with the Attorney General and the Director of Central Intelligence in order to insure that the information is sealed and they have security measures established, and you would, of course, undertake to perform that function.

Admiral TURNER. Oh, yes.

Mr. McCLORY. As a matter of just general principle, the more people you get involved in the dissemination of intelligence, the greater the risk of a breach of secrecy; there is no question about that.

Admiral TURNER. No, sir.

Mr. McCLORY. You would feel a lot safer, would you not, when you go to the matter of—when the Attorney General goes to the judge and asks for a warrant, if instead of having the judge's clerk there and the judge's bailiff and the judge's court reporter, and maybe others that he may feel he needs there, his clerk and his personal clerk, that if you had your own personnel there that you know are secure, that you can trust?

Admiral TURNER. Oh, yes. Minimizing the number of people who have to have access to this information is a basic security principle. I am not in a position, however, to pass judgment on what the judiciary is going to need in order to do their job. Whether they could do it under those circumstances satisfactorily or not. I don't know.

Mr. McCLORY. But it has been suggested by at least some who have studied and commented on this, that perhaps in order to assure security and still involve the court, that the Executive might provide the personnel to surround the judge for greater security.

Now, there are no violations of the law that are taking place at the present time, are there, as far as fourth amendment rights or any other individual civil rights of American citizens?

You wouldn't tolerate any violations of law, would you?

Admiral TURNER. Certainly not.

Mr. McCLORY. So, so far as you are concerned, we don't need any additional laws to guarantee against violation of that?

Admiral TURNER. What we are doing here, I believe, is creating a new law which would provide new protections, but we are not violating the existing laws. We are tightening laws here so that the American public will feel more confident. We are not only, today, in my opinion not violating laws. We are taking every human precaution not to violate the rights of Americans. This is making it more certain by codifying it into law.

Mr. McCLORY. While the American people may not feel the full confidence, you yourself are confident that their rights are not being violated by any activities in which you are involved?

Admiral TURNER. That is correct, sir.

Mr. McCLORY. Now, another reason or one of the main reasons, I think, for involving the court, is not because you are going to have the court pass upon the merits which will not be passed upon, let me inform you, insofar as these intelligence or these electronic surveillance interceptions are concerned. As a matter of fact, the application does not have to identify the individual, and of course, we wouldn't necessarily want to identify an individual as to where we were placing a tap, for instance, but if we describe the person adequately so that the judge gets the description, the individual doesn't have to be identified. I want to clear that up because I think there was some misunderstanding on that issue with the Attorney General. But, the main reason for involving the court, in my view, is that the Executive becomes accountable by a record which the court makes, and then if it is shown later that the Executive has abused his authority, that the court has a record.

Would it not, in your opinion, be an equal protection of the American people if the accountability was solely to the Congress, to the

committees of the Congress, just like this committee now is seeking to require accountability of your office and your department, your agency, and the other intelligence agencies?

Admiral TURNER. You mean that we would come to you with a request each time we were going to do this?

Mr. McCLORY. Well, the accountability in the bill would be an annual report to the court and to the Congress, and this report to the Congress, would not that be adequate accountability in your opinion?

Admiral TURNER. I think it is very difficult to draw the fine lines as to what is actually adequate.

Mr. McCLORY. That would provide some accountability.

Admiral TURNER. It may not provide increased accountability, because we do account to you on these matters today.

Mr. McCLORY. I am pleased with that, and I want to compliment this committee for measuring up to the standard of confidence for what is reported now.

Admiral TURNER. I certainly appreciate the fine relationships and the confidences that are exchanged and held here. I would only say one thing, that is, that the system whereby we give you a detailed annual report on these activities would give the assurances in an ex post facto way, whereas what is intended here by going to the court is prior approval, and I think it would be unduly cumbersome and perhaps jeopardizing the proper boundaries between legislative and executive branches to come here for a prior approval.

So I think the two checks complement each other, the ex post facto report to you and the prior approval of the court.

Mr. McCLORY. You wouldn't have any objection, would you, if the bill were amended to require quarterly reports to the Congress?

Admiral TURNER. I would like to think about that one, but basically no, other than again, we are proliferating the information. The more we report, the more we put it down in writing, and the more people's hands it passes through.

Mr. MURPHY. Mr. Mazzoli.

Mr. MAZZOLI. Thank you, Mr. Chairman.

Admiral Turner, it is nice to see you and Mr. Lapham.

Let me ask you, was the CIA called in during the drafting stage of this bill?

Admiral TURNER. Yes; right.

Mr. MAZZOLI. Mr. Lapham?

Admiral TURNER. Very, very actively.

Mr. MAZZOLI. So this represents a bill in which the CIA has had an input, and you as Director of Central Intelligence have had an opportunity to observe and to comment and possibly to criticize?

Admiral TURNER. Very definitely.

Mr. MAZZOLI. And so there are some things which perhaps are in this bill because of your observations and your wishes, so that is it fair to say that this bill represents in your judgement the best possible bill that could be brought up, given the nature of the subject matter and the push and pull of the whole debate process?

Admiral TURNER. I think it is quite fair to say that.

Mr. MAZZOLI. Thank you, sir.

My colleague from Illinois brought up the fact that you probably—it was sort of a leading question—would feel more secure and comfortable if fewer people had access to the information, and the judges and the court people weren't involved.

I think there is another side of that coin. I think it would be pretty obvious if President Carter were sitting there that he would say candidly that he would feel more secure if he didn't have to tell the Attorney General or didn't have to tell anybody and he could just push a button and some sort of an electronic gizmo would start over-seeing somebody. So I don't really think that is the question.

Do you believe that the issue before this committee is whether Stansfield Turner feels more secure with this process or whether this process is necessary to secure the rights of the American people?

Admiral TURNER. Certainly the latter, but I think the process that we have been going through for about a year and a half, and which I think will probably take another year and a half, is to determine what new forms of oversight are going to be applied to intelligence of all sorts, this being one case. There is no way you can have additional oversight of intelligence without taking additional risks of exposure. In each instance, whether it is quarterly reports on this subject, whether it is the report I gave your committee some weeks ago of very sensitive clandestine collection materials, or whatever else it may be, every form of oversight has a risk. In each case we are going to be balancing the value of the oversight to the risk we are taking.

I think the balance here is adequate.

Mr. MAZZOLI. And I think my colleague also mentioned that you, Admiral Turner, as Director of Central Intelligence and as head of the Central Intelligence Agency, would not tolerate violations of the law with regard to surveillance, and I appreciate that. And I am sure you would not.

I think the question that faces this committee is not what Stansfield Turner would tolerate or countenance, but indeed, what as an institutional matter would be countenanced or approved, and I think that is what we are trying to do.

We are trying to engrave on that tablet of stone certain immutable guidelines which would remain fixed no matter who sits in that spot as Director of Central Intelligence.

Admiral, let me ask you one final question.

As I understand the role of the CIA, you do not do anything in the United States by way of surveillance.

Is that correct?

Admiral TURNER. That is correct.

Mr. MAZZOLI. With regard to foreign intelligence surveillance, yours is done abroad.

Admiral TURNER. That is correct.

Mr. MAZZOLI. To the extent that it is done.

Admiral TURNER. With the sole exception that there are occasions when the FBI needs technical assistance from our skills in the CIA. With the approval of the Attorney General we can provide help to them, but it is all done under FBI aegis.

Mr. MAZZOLI. Is there anything that now guides you or your people with respect to foreign intelligence surveillance abroad, either of U.S. nationals or of non-nationals?

Admiral TURNER. Yes. It is not codified, but there are Attorney General guidelines that we must go through if we are going to conduct a surveillance overseas of either Americans or non-Americans—I'm sorry, just Americans.

Mr. MAZZOLI. Now, as far as non-Americans or foreign nationals, that is something separate and apart. That is something with more leeway?

Admiral TURNER. It is under my supervision and control. I maintain control on all clandestine activities. I have certain rules within the Agency as to levels of clearance for different types and different risk factors.

Mr. MAZZOLI. If we accept the fact that there is some need for a law covering foreign intelligence activities in the United States, either United States nationals or foreign nationals, is there an equal merit to having a bill which would provide some guidelines with regard to surveillance of Americans or foreigners abroad done in the name of foreign intelligence or national security.

Admiral TURNER. There certainly is, and the administration is developing and plans to submit to the Congress a bill to cover the rights of Americans abroad with respect to electronic surveillance, and we think it is a distinctly different issue. We think it is enough different than this issue that it should be treated separately, specifically because abroad you are working in another country and you generally need cooperation of the foreign intelligence services there.

Surveillance abroad involves a considerably different risk of disclosure. The statement I made earlier that I don't think this bill will frustrate our activities might not be a statement I could make if this identical bill were applied overseas. It might frustrate activities abroad.

Mr. MAZZOLI. If this kind of a bill were translated and a few words changed to apply to an overseas situation, it could frustrate us, where this bill, as it presently reads, with regard to its jurisdiction, does not in your judgment frustrate the proper needs of the intelligence community?

Admiral TURNER. That is correct, sir.

Mr. MAZZOLI. Let me also, Mr. Chairman, commend the Admiral for his willingness to come before not just this subcommittee, but the full committee many times, and to help us in trying to thread our way through a very difficult subject matter. I want to thank you.

Thank you, Mr. Chairman.

Mr. MURPHY. Admiral, would you have objection to allowing this committee and the Senate committee, on an annual basis, in fulfilling their oversight function to have a detailed statistical analysis of the surveillance under the bill plus access to original documents for some random sampling to test the validity of those statistics?

Admiral TURNER. No, sir.

Mr. McCLORY. I just want to make this statement, and I am sure you would agree with it. We have been talking most of the time about

protecting the rights of Americans under the fourth amendment, which is, of course, a concern of this legislation and something with which we are all concerned.

I also want to emphasize that a primary mission which you have is to protect the American people against foreign intelligence activities, intelligence gathering, and the more serious type of intelligence activities which jeopardize our national security, and I am talking about balancing these rights and interests. I am sure that we want to keep a very sharp eye on the national security interests of all the American people.

Admiral TURNER. Mr. McClory, I view our job as protecting American citizens from intrusions of their rights under the Constitution and protecting them from intrusions of their rights from foreign powers, individually or collectively as a nation. We are trying to strike that right balance there.

Mr. McCLORY. And then the action that we take here—you want to make sure that we don't tie your hands, frustrate or diminish your efforts to provide for our national security through your efforts against foreign agents, foreign governments, foreign espionage and all of the activities which threaten our national security.

Admiral TURNER. Yes, sir, and I respect and appreciate your concern for that, and I say again, I think these bills will not so frustrate us.

Mr. MURPHY. Mr. Mazzoli?

Mr. MAZZOLI. That's it.

Mr. MURPHY. Thank you, Admiral. We appreciate it.

The next witness will be Adm. Daniel J. Murphy and Ms Siemer.

Would you please stand and raise your right hand.

Do you swear and affirm that the testimony you are about to give is the truth, the whole truth, and nothing but the truth?

Admiral MURPHY. I do.

Ms. SIEMER. I do.

Mr. MURPHY. Admiral Murphy, would you like to go first?

[The prepared statement of Adm. Daniel J. Murphy follows:]

PREPARED STATEMENT OF THE DEPUTY UNDER SECRETARY OF DEFENSE FOR POLICY,
DANIEL J. MURPHY

Mr. Chairman and members of the committee, you have requested that the Department of Defense provide a detailed written statement for the record and a shorter summary statement for oral testimony in order to preserve the maximum amount of time for the Committee to put questions to the Department's witnesses. This statement records the Department's views on H.R. 7308, one of four bills currently before the Committee that would regulate the use of electronic surveillance for foreign intelligence purposes. The Department's views on H.R. 5632, H.R. 5794, and H.R. 9745 will be provided to the Committee in a supplementary statement. It is requested that this statement on H.R. 7308 and the supplementary statement on the other three bills be made a part of the public record of the proceedings of the Committee with respect to these bills.

H.R. 7308, introduced by Congressman Rodino, is the same as S. 1566 prior to amendment by the Senate Judiciary Committee. The Department's comments will address H.R. 7308 in its current form and each of the amendments added by the Senate Judiciary Committee. The overall approach taken by the bill is discussed first, then a section-by-section appraisal of the bill is set out, followed by an appraisal of the amendments.

The Department of Defense supports H.R. 7308. It represents a workable compromise with respect to the many divergent interests that must be accommodated in legislation to place restrictions on electronic surveillance for foreign intelligence purposes. H.R. 7308 and the companion bill in the Senate, S. 1566, were worked out in a long series of discussions between the Executive Branch and the Congress extending over two years. In the comments set out below, the Department outlines a number of significant problems with the bill not to indicate a lack of support, but to demonstrate to the Committee that the compromise represented by H.R. 7308 has been reached at substantial risk to the Department's intelligence operations. That risk we believe to be balanced by the protection for the rights of Americans contained in the bill. But the balance cannot survive if further burdens are added to intelligence operations by amendment in the course of the legislative process either here in the House or in the Senate. It must be remembered that effective intelligence-gathering is essential to the conduct of foreign affairs and the provision for the national defense and in this larger sense is also necessary to protect the rights of Americans.

I. OVERALL APPROACH

H.R. 7308 covers all means of electronic surveillance to acquire wire or radio communications and selected surveillance techniques such as beepers, television cameras, and microphones that have little relation to electronic surveillance. It applies restrictions to surveillance activities within the United States. No activities by the United States Government abroad are affected. The basic protection is the requirement of a judicial warrant for all surveillance regardless of whether the target is a United States person or a foreign national. The warrant system, so far as the Executive Branch is concerned, is put in the hands of the Attorney General. A special seven-judge court is designated to receive applications for warrants, and detailed standards are set out for applications and orders permitting surveillance.

This overall approach has two distinct weaknesses. First, the extension of coverage beyond American citizens, corporations and associations adds substantially to the risks of compromise of important intelligence sources and methods without any concomitant benefit for Americans. It is important that Americans have the assurance that when intelligence agencies seek information through electronic surveillance of Americans, there will be a judgment made by someone outside the Intelligence Community as to the importance, relevance and necessity of that surveillance to foreign intelligence purposes. However, when the intelligence agencies seek information through electronic surveillance of foreigners who are agents of foreign intelligence services or foreign entities that are directed and controlled by foreign intelligence services, there is no benefit to Americans from requiring such a judgment from someone outside the Intelligence Community. In many cases, the means of communication used by these foreigners and foreign entities are totally devoted to their intelligence work against the United States and Americans would have no access to them in any case.

The primary reason for extending coverage beyond American citizens and corporations to reach these foreign intelligence agents and the totally foreign organizations to which they belong or which they use is an attempt to provide an alternative to the use of the President's inherent power under the Constitution to conduct electronic surveillance without a warrant. If the bill covered only Americans, the President could exercise his inherent power, as consistent with the bill, with respect to foreigners. But by covering foreigners as well, the bill creates an alternative with a high risk and a very limited benefit for the rights of Americans.

Extension of the bill to cover foreigners carries with it very substantial risks of compromise of important and highly productive intelligence sources and methods. Detailed information about electronic surveillance will have to be put in written form, will be circulated more widely than would otherwise be the case in the Executive Branch in the process of preparing an application for a warrant, and will be circulated outside the Executive Branch to one of seven judges and possibly the employees in that judge's chambers. This information will identify the targets and means of electronic surveillance by the United States for foreign intelligence purposes. The most sophisticated and skilled

intelligence agents in foreign intelligence services will be trying to get that information. The very substantial additional risk entailed in extension of the bill beyond coverage for Americans is balanced by no concomitant benefit for Americans. The only benefit is to foreign intelligence services, foreign governments, and the corporations and other entities that are directed and controlled by them.

The second weakness of the overall approach is that the inclusion of beepers, television cameras, microphones and other surveillance devices makes the legislation more complex than if it were limited to electronic surveillance. The Senate Intelligence Committee plans to introduce several bills dealing with other aspects of intelligence activities than electronic surveillance. These miscellaneous surveillance devices, which belong in the realm of physical surveillance for counterintelligence investigations, rather than in electronic surveillance for positive foreign intelligence gathering, would be more appropriately dealt with elsewhere. It appears that they were included in the electronic surveillance bill only because it was contemplated at one time that this might be the only bill dealing with restrictions applicable to the entire Intelligence Community. If that approach is no longer practical and it is clear that other companion bills dealing with aspects of restrictions other than electronic surveillance will be necessary, then there is no need to clutter this bill with extraneous provisions.

II. SECTION-BY-SECTION APPRAISAL

Section 2521—Definitions

Sec. 2521(b)(1)—definition of foreign power.—This definition creates two kinds of entities directed and controlled by a foreign power—the first kind is openly acknowledged by the foreign power to be directed and controlled by it and the second kind is in fact directed and controlled but not openly acknowledged. This distinction becomes important in the warrant requirements because the requirements are more relaxed with respect to the “openly acknowledged” foreign entities, which, of course, are less dangerous to the United States precisely because they are openly acknowledged; and the requirements are far more stringent with respect to entities that are not openly acknowledged and that are a more serious threat to the national security. The distinction between “openly acknowledged” and non-acknowledged entities will be difficult to apply and questions will be resolved in favor of putting entities in the non-acknowledged category. If in fact it can be demonstrated that an entity is *directed and controlled* (both factors must be present) by a foreign government, and if it can be demonstrated that the information sought is legitimate foreign intelligence information (a requirement introduced by another section) then there appears to be little gained by treating organizations differently because of the acknowledgement, or lack thereof, of the foreign government. It would be more useful to subject *all* of these organizations to the standards now reserved only for organizations that are openly acknowledged.

Sec. 2521(b)(5)—definition of foreign intelligence information.—This definition sets the standards for determining whether information qualifies as foreign intelligence information and therefore can be sought by means of electronic surveillance authorized by this bill. This definition is important only for *targeting*, not for what is done with information after it is acquired. The latter is handled by minimization procedures under another section. This definition is key because if information does not qualify as foreign intelligence information, the intelligence agencies cannot seek to obtain it. They are not prohibited from obtaining it indirectly as a result of electronic surveillance properly targeted, but they cannot target a subject of surveillance specifically to obtain it.

The definition contained in S. 1566 and H.R. 7308 is too stringent. It limits unnecessarily valuable intelligence gathering without any concomitant benefit to Americans. The Department of Defense offered an amendment during hearings before the Senate Intelligence Committee. That Committee has yet to act on the bill. The same amendment is offered for consideration by this Committee. The revised text is set out in Appendix A to this statement.

The principle is simple. The current bill sets two standards with respect to foreign intelligence information in each of five categories. The substantive categories—(A) potential attack or hostile act; (B) national defense or conduct

of foreign affairs; (C) terrorism; (D) sabotage; and (E) clandestine intelligence activities of foreign governments—and are set out in the subsections of § 2521(b)(5) in that order. The two standards are: (1) a “relates to” standard—that is, the information must relate to the ability of the United States to deal with hostile acts, terrorism or one of the other substantive categories; and (2) a “necessary” or “essential” standard—that is, information must be necessary or essential to the ability of the United States to deal with hostile acts, terrorism or one of the other substantive categories.

The five categories are appropriate. The Department finds them workable, although it should be pointed out that the limitation to “grave hostile acts” in subsection (A) rather than just to “hostile acts” is a very substantial limitation in a very important area for the national defense.

The two standards are appropriate, but only when dealing with information concerning *Americans*. It is *not* appropriate to impose the second standard—that the information be necessary or essential—when dealing with information concerning only foreigners, or foreign governments. The amendment proposed by the Department of Defense segregates the two standards, and imposes the more stringent standard only when information about Americans is sought. Thus, for example, Section 2521(b)(5)(B) that deals with the national defense would be amended to read: Information with respect to a foreign power or a foreign territory which relates to, and *if concerning a United States person* is deemed essential to---

- (i) the national defense or the security of the Nation; or
- (ii) the successful conduct of the foreign affairs of the United States.

Under this amendment, if an intelligence agency sought to target an American, it would have to demonstrate that the information to be produced by the electronic surveillance was *essential* to the national defense. Similarly, if an intelligence agency sought to target a foreigner in order to get information concerning an American, it would have to demonstrate that the information to be produced by the electronic surveillance was *essential* to the national defense. If, however, the intelligence agency targeted a foreigner without any purpose of obtaining information about Americans, then it would have to demonstrate only that the information to be produced by the electronic surveillance was *relevant* to the national defense.

The difference between a standard of “relevant to the national defense” and a standard of “essential to the national defense” is enormous. The dictionary definition of “essential” is: Necessary to make a thing what it is; indispensable; requisite: as, water is *essential* to life.

H.R. 7308 requires the Secretary of Defense to make a certification that the information sought is foreign intelligence information. It would be impossible, in most circumstances, to meet the dictionary definition of “essential.” Since this is required for targeting, the intelligence could not be collected—even if it was important, significant, useful, or helpful to the national defense. If this requirement were applied diligently, a very large amount of intelligence would become unavailable to the Department of Defense and to the President and other decisionmakers in the national security area. Nearly all, if not all of this information would have nothing to do with Americans. It would be sought from electronic surveillance of foreign powers and foreigners who are agents of foreign powers and it would not contain any information concerning Americans. Therefore, the additional protection afforded by the second standard (as the bill is now drafted) offers protection only to foreign powers, not to Americans, and in so doing, prevents the Department of Defense from obtaining important and useful intelligence information. For this reason, the Department strongly urges the Committee to act favorably on the proposed amendment.

Section 2521(b)(6): definition of electronic surveillance.—Subsections (A), (B) and (C) of this section deal with electronic surveillance through the acquisition of wire or radio communications. Subsection (D) covers monitoring devices of all types, regardless of whether they are electronic. It also covers the acquisition of “informaton” of all kinds not limited to communications. This includes cameras, television, beepers, and even binoculars. These miscellaneous items might better be treated in separate legislation dealing with other kinds of limitations on intelligence activities because the restrictions in H.R. 7308 were drafted specifically for electronic surveillance of wire and radio communications.

Sec. 2521(b)(10): definition of United States.—A minor point: The reference to the Trust Territory of the Pacific Islands might be generalized because the trust is due to be dissolved within the next two years. The language might better read: "Under the territorial sovereignty or trusteeship of the United States, * * *"

Under this formulation, neither the Trust Territory nor the Canal Zone need be mentioned specifically.

Sec. 2524: Application for an Order

The Department of Defense offered to the Senate Intelligence Committee an amendment to Section 2524(a)(8) that would change this subsection to read: A designation of the type of electronic surveillance to be used according to the categories described in section 2521(b)(6).

That would eliminate the requirement that with respect to surveillance against foreign terrorists, foreign political organizations, foreign organizations covertly controlled by foreign governments, and agents of foreign powers that the intelligence agencies disclose the means by which the surveillance will be effected.

There are two important reasons for this amendment:

(1) With a single exception, a judge has *no* need for this information to make the determinations required by this bill; and (2) information about means of electronic surveillance is among the *most* sensitive information about intelligence sources and methods so that disclosure would cause grave damage to the Department of Defense intelligence capability. The risk introduced by the requirement in the current bill of disclosure of means of surveillance clearly outweighs any benefit from this requirement.

Information about the means by which surveillance is to be effected assists a judge in making the determination required under this bill in only *one* instance—when physical entry is to be used. This information can be required in a much more precise way by amending this subsection to include the following: And a statement whether physical entry is required to effect the surveillance.

This amendment was made by the Senate Judiciary Committee in its consideration of S. 1566 (see the version of the bill that accompanies Report No. 95-604) and is supported by the Department of Defense.

There is another problem with Section 2524 that should be noted. Sec. 2524(c) provides that a judge may require any information other than that specified in Sec. 2524(a) that is necessary to make the determinations required for the issuance of an order. This section would appear to be unnecessary because if a judge finds that not enough information is available to support the determinations required to be made, no order will be issued. Adding this section, therefore, does not give a judge any power that he or she does not already have. This section may be interpreted, however, as a direction from the Congress that judges are to be creative in looking out for new types of information that might be interesting or helpful in some way in making the required determinations. This would be a very serious detriment to the intelligence agencies because the risk of disclosure which is present even under the carefully limited terms of Sec. 2524(a) would be increased substantially if additional disclosure came to be required routinely.

Section 2525: Issuance of an order

This section mirrors Sec. 2524 which controls the application for an order and creates the same difficulties. Sec. 2525(b)(1)(D) should be amended in the same way as the Department of Defense proposed for Sec. 2524(a)(8). The last sentence of Sec. 2525(c) contains the same invitation to seek additional information as is described above with respect to Sec. 2524(c).

Sec. 2525(d) deals with emergency situations and permits the Attorney General to authorize warrantless surveillance. This might better be set off in a separate section clearly labelled "Emergency authorization for use of electronic surveillance" rather than being buried as a subsection of a section that deals with the issuance of orders by judges. This would permit the current provision to be broken down into subsections dealing with specific parts of the emergency power and would contribute to clarity and understanding.

III. SENATE JUDICIARY COMMITTEE AMENDMENTS

The discussion in this section refers to the amendments indicated on the version of S. 1566 that accompanies Report No. 95-604.

Sec. 2521(b)(2): Definition of "agent of a foreign power".—Two amendments clarify the requirement of "knowing" activity. These amendments do not change the substance of the provision and are helpful.

Sec. 2521(b)(7): Definition of "Attorney General".—The Department of Defense defers to the Department of Justice.

Sec. 2521(b)(8): Definition of "minimization procedures".—This amendment changes the current definition from procedures reasonably designed to minimize the dissemination of information about United States persons to procedures reasonably designed to prohibit dissemination of such information. This amendment appears to be unnecessarily stringent. Minimization procedures are approved by a federal judge in each instance of electronic surveillance. Some dissemination of information about United States persons that falls in this category may need to be "disseminated" in a very limited way within a particular agency, for example, to decipher or translate the information, to analyze it in order to make a determination that it "concerns" a United States person, or for other proper purposes. The current language permits such limited dissemination, but required that dissemination be minimized. A judge approves and supervises minimization. That protection should be sufficient.

Sec. 2524(a)(8): Application for an order

This amendment adds the phrase: "and a statement whether physical entry is required to effect the surveillance." As discussed above, this amendment achieves a useful purpose.

Sec. 2525(b): Issuance of an order

This amendment differentiates between types of foreign powers as to the content of the order on the type of information sought. With respect to the (A), (B), or (C) foreign powers (governments, factions, and openly acknowledged government entities) the amendment retains the current requirement that the order indicate the type of information sought to be acquired. With respect to the (D), (E) and (F) foreign powers, (terrorist, sabotage, and clandestine foreign intelligence activities) the amendment adds a requirement that the type of information be specified in one of the categories set out in Sec. 2521(b)(5)—that is, information on hostile acts, national defense, foreign affairs, and other specified matters.

This appears to be unnecessary and to increase the risk with respect to disclosure because if a single order is disclosed or compromised, more information will be affected. If a judge determines that the information sought is legitimate foreign intelligence information within the definition of this bill, there is no additional protection for Americans in having the judge put in the order what category of information this particular application sought.

Sec. 2525(b)(1)(D): Issuance of an order

This amendment is comparable to the amendment to Sec. 2524(a)(8). See comment above with respect to that section.

Sec. 2526(a): Use of Information

This adds a prohibition on use of information acquired from electronic surveillance for other than lawful purposes. This may be unnecessary.

Sec. 2526(c), (d), (e): Use of information

The Department of Defense defers to the Department of Justice with respect to these amendments.

Sec. 4(c)(3) at page 30: Conforming amendments

The amendment to Section 2511(2) adding subsection (e)(1) should be covered in Executive session.

Sec. 4(c)(3) at page 32: Conforming amendments

The Department of Defense defers to the Department of Justice with respect to this amendment.

ATTACHMENT—PROPOSED AMENDMENT TO S. 1566 SECTION 2521(B) (5)

(5) Foreign intelligence information means—

(a) information which relates to, and *if concerning a United States person* is deemed necessary to, the ability of the United States to protect itself against actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

(b) information with respect to a foreign power of foreign territory which relates to, and *if concerning a United States person* is deemed essential to—

(1) The national defense or the security of the Nation; or

(2) The conduct of the foreign affairs of the United States.

(c) Information which relates to, and *if concerning a United States person* is deemed necessary to, the ability of the United States to protect against terrorism by a foreign power or an agent of a foreign power;

(d) Information which relates to, and *if concerning a United States person* is deemed necessary to, the ability of the United States to protect against sabotage by a foreign power or an agent of a foreign power; or

(e) Information which relates to, and *if concerning a United States person* is deemed necessary to the ability of the United States to protect against the clandestine intelligence activities of an intelligence source or activities of a foreign power or agent of a foreign power.

TESTIMONY OF ADM. DANIEL J. MURPHY, DEPUTY UNDER SECRETARY FOR POLICY, DEPARTMENT OF DEFENSE; ACCOMPANIED BY MS. DEANNE SIEMER, GENERAL COUNSEL, DEPARTMENT OF DEFENSE

Admiral MURPHY. Yes, sir.

Mr. Chairman and distinguished members of the subcommittee, I appreciate the opportunity to appear today to provide the committee with the views of the Department of Defense with respect to proposed legislation regulating electronic surveillance for intelligence purposes, and as you know, with me is Deanne Siemer, the distinguished general counsel from the Department of Defense.

What I have, sir, is a short statement outlining the Department's primary concerns with the legislation which I would like to present orally. I also have a longer statement which has detailed comments on H.R. 7308, introduced by Congressman Rodino, and I would like to submit for the record, if that is satisfactory with the chairman.

Mr. MURPHY. Without objection it will be received.

Admiral MURPHY. Now, I feel that the longer statement is very important, Mr. Chairman, because it treats in detail the complex issues that confront you, and suggests where the balance should be struck between risks to intelligence activities and the benefits to Americans.

Let me start with two fundamental propositions. First, effective intelligence is very important to protecting the rights of Americans, and second, the legislation you have before you presents very substantial risks to the ability of the Department of Defense to produce effective intelligence. I think these were borne out both by the comments of Admiral Turner and the Attorney General.

Intelligence information is enormously important to the President, the Secretary of Defense and other policymakers in guiding this country's affairs and in protecting it from threats from foreign powers. National defense and foreign affairs matters affect the rights

of every American because only through wise decisions can we conserve our resources, protect our strengths and guarantee our citizens their right to life, liberty, and the pursuit of happiness.

The sources and methods we use to produce intelligence are very fragile. If they become unavailable, then the intelligence information they produce is also unavailable, and we must proceed uncertainly and sometimes to our detriment.

Some of the best intelligence agents in the world constantly work to discover or compromise our intelligence sources and methods. When they do, it is a substantial accomplishment for the foreign powers for whom they work.

Now, of course, we spend substantial time and effort to foil those efforts. We have elaborate security procedures within the executive department. We try very hard to limit the number of pieces of paper that contain information on intelligence sources and methods, and just as hard to limit the number of people who have access to those papers.

The legislation before you adds a new and unknown risk to our intelligence operations. It requires us to produce many new pieces of paper in the form of applications for court orders and the various supporting documents and justifications. These documents will contain some of the most sensitive information that we have. They will contain the descriptions of the targets of electronic surveillance, the nature of the information sought, and most importantly and most sensitive, the means we will use to get the information.

Disclosure or compromise of any one of those would be very costly to the effectiveness of the Department of Defense intelligence efforts.

Now, the size of the risk, as was discussed this morning, is really not known to us because the information is going to judges to be used in courthouses under security procedures devised by the Chief Justice.

So we could anticipate that the risk is very substantial.

Now, with all due respect to our judges, they are not accustomed to working under the security restrictions that characterize our intelligence operations. They have had no experience in preventing penetration by foreign agents. They are not subject to discipline by anyone for failing to observe whatever security precautions are established. This is not meant as a criticism. It is just a fact.

The balance between this new risk and the benefit of the new protections for the rights of Americans has been drawn in H.R. 7308 in such a way that we believe is essentially sensible and proper. We request your consideration of only one amendment in this regard. In section 2524(a)(8) with respect to the application for a court order, and section 2525(b)(1)(D) with respect to the actual issuance of a court order, both require disclosure of the means of surveillance. This includes very sensitive intelligence that we believe is essentially irrelevant to the determination that a judge is required to make under this particular bill. We would like to have you consider a very simple amendment to limit this disclosure to the designation of the type of electronic surveillance equipment to be used, according to the broad categories that are already in the bill.

We caution that even with this amendment, the balance between risk and benefit is very delicate, and that amendments that would add further risk for the intelligence community should be considered with the greatest of care.

The Department of Defense has another amendment to offer to the bill that we believe is of great importance to intelligence operations that has no effect on the protection of the rights of Americans. This is an amendment to the definition of the term "foreign intelligence information" that would make the very restrictive standard applicable only when we seek information about Americans or concerning Americans, and let us use the less strict standard when we seek information from foreigners or foreign entities about foreigners or foreign concerns.

Mr. MURPHY. May I interrupt at that point, Admiral Murphy?

If we took that amendment as you just stated it, and there were fewer restrictions on those people you just mentioned, what about their contacts with U.S. citizens and activities taking place inside the United States.?

Admiral MURPHY. We are really talking about the definition of the term "foreign intelligence information." Information must fall within this definition before we can target it. If out of that targeting we obtain incidental information about Americans, the section of the bill that requires minimization would protect that.

So it is really two different things. When you look at the bill you have to look first at the definition of foreign intelligence information before you can apply for a warrant under the bill. So we would think that by changing this and limiting the requirement that the information sought is "essential" to the national security be limited to those cases where Americans are involved.

In the case you are mentioning, I would think that—

Mr. MURPHY. I am talking about the byproduct.

Admiral MURPHY. That sort of information would be handled according to the minimization procedures established in the warrant. You would have to rely on minimization.

Mr. MURPHY. It would be minimization after the fact.

Admiral MURPHY. Yes, sir.

But this will always be the case. The judge would have no way of knowing that there would be communications intercepted which mention an American, and he would have to be relying on minimization procedures to protect such communications later on.

Mr. MURPHY. Go ahead. I didn't mean to interrupt.

Admiral MURPHY. Now, the amendment itself is in great detail in the comments we submitted for the record.

Mr. Chairman, I feel that with these two amendments included, the Defense Department would feel it can conduct its important intelligence business satisfactorily.

So I would like to emphasize that we feel very strongly that any further restrictions in the bill would seriously jeopardize our capability to produce important intelligence for the United States.

I thank you for this opportunity to express our views this morning, and I hope that you will give our concerns serious consideration

as you deliberate on the final version of this legislation to regulate electronic surveillance for foreign intelligence purposes.

Deanne and I will try to answer any questions that you might have.

Mr. MURPHY. Ms. Siemer, do you have any statement?

Ms. SIEMER. No, Mr. Chairman, I do not.

Mr. MURPHY. Mr. McClory?

Mr. McCLORY. Thank you, Mr. Chairman, and thank you, Admiral. I appreciate your testimony here this morning, and I think you focused our attention on the serious risks which are inherent in the legislation as presently drafted.

In reading your statement I wasn't quite able to follow your statement made to the committee with the written copy that I have been presented, but in looking at the written statement you have presented here, I have a little difficulty in reconciling your position in support for this legislation with the statement. In other words, you emphasize two very serious risks which I think are inherent in the legislation, and you also bring out the fact that judges, if they are called upon to consider the merits of electronic surveillance, really are coming into the picture with no expertise and adding to the very serious risks as far as the intelligence community is concerned.

I believe that the legislation, except as to American citizens or U.S. people, whatever you call it, is concerned, doesn't really get into the merits of the application for a warrant, and so we will exclude judges from that kind of expert judgment which I think they are for the most part incapable of performing. But, the fact that you bring out the dangers that are inherent in spreading of this information, and your suggestion for an amendment to further protect the methods—

Admiral MURPHY. The means.

Mr. McCLORY. The sources and methods—it seems to me a rather basic and important suggestion insofar as the legislation is concerned.

Do you feel, as it has been suggested by some who have commented on this overall subject, that it might be possible for the executive to provide the personnel to the judge who is going to pass on these applications for a warrant instead of throwing up a whole new security clearance group in the form of all of the judicial personnel of all of the seven persons that are involved here. Could we use the personnel of the executive branch to help guarantee that the information is kept secure when application is made to the court.

Admiral MURPHY. Yes, sir, I think that would be one way, and as was pointed out by the two previous witnesses, these are areas we have not looked into yet. That is going to take a lot of attention. I don't know if the judiciary would be any more willing to have the executive branch controlling their security than Congress would accept the executive branch controlling their security, but it is something I think that we should look into if this bill becomes law.

Mr. McCLORY. Now, do you feel that the Department of Defense is held accountable even though your decision as to whether or not to send a ship to the Mediterranean or to deploy forces for emergency security purposes does not have to be approved by the court?

Admiral MURPHY. Yes, sir.

Mr. McCLORY. And would you not feel that there is adequate accountability provided if the philosophy of the legislation that I am presenting, H.R. 9745, which would require the executive to account to the Congress with respect to electronic surveillance actions which it takes or has taken?

Admiral MURPHY. Well, I think the answer to that question given by the Attorney General and Stan Turner is as close to the mark as you can get. We are really considering how the American people are looking at the conduct of the intelligence community today, and there seems to be some comfortable feeling about warrants as opposed to not having warrants. It is quite evident that the President and the Attorney General have come down in favor of warrants as being the best way for the country to go, notwithstanding the fact that at this moment in history we are doing a very respectable job and are held accountable.

I don't think I am in a position to say that the American people would feel equally comfortable if we did not have warrants. The Secretary of Defense supports this legislation as something that is worthwhile and acceptable, but I want to emphasize that the balancing of risks and protection of the rights of Americans is very precarious as it stands here. That is why we ask for a minor change on eliminating the means of intelligence from the requirements of the warrant—to reduce the risk.

Mr. McCLORY. But the court gets involved as far as you are concerned.

Admiral MURPHY. Yes.

Mr. McCLORY. And the Department gets involved so far as you are concerned, in the element of accountability.

Admiral MURPHY. Yes, sir. How it is perceived by the American people.

Mr. McCLORY. Right.

Mr. MURPHY. Would the gentleman yield?

Mr. McCLORY. Let me just ask one question.

As far as the judgment as to whether we need electronic surveillance of a foreign embassy or foreign agent, that has to be an executive department decision.

Admiral MURPHY. Yes, sir, it is, and it remains so as I can see under this bill.

Mr. MURPHY. Why is the means, the disclosure of the means—

Admiral MURPHY. Sir, I think if you have been briefed in executive session on this, you should understand the significance of revealing the means.

Mr. MURPHY. We have been briefed on how you do it.

Admiral MURPHY. I would be happy to answer in executive session, sir.

Mr. MURPHY. Mr. Mazzoli?

Mr. MAZZOLI. Thank you, Mr. Chairman.

I understand one of your recommendations would be to moderate the need to specify the means to be used in the surveillance. If it is a general thing, a beeper or pen register or whatever description, that would be sufficient?

Is that correct, sir?

Admiral MURPHY. Yes, sir.

Mr. MAZZOLI. Without going into the specifics or the details of the device involved?

Admiral MURPHY. The specifics of the technology.

Mr. MAZZOLI. Now, tell me about the second amendment. I gather that you would make a distinction between foreign nationals and U.S. citizens with respect to the definition and the need to specify, or to bring to the court certain materials, and I wonder if you would give me a little help on that.

Admiral MURPHY. Yes, sir.

Under your definition of foreign intelligence information you have five categories, and within that you have two standards. One is that it relates to the foreign policy or national defense of the United States, and in addition to that, you have the requirement that it be essential or necessary.

Mr. MAZZOLI. Is that in the disjunctive?

Admiral MURPHY. Well, "essential" is used in one paragraph and "necessary" is used in the other four, so I think in our case, either one.

Mr. MAZZOLI. There is going to be a problem.

Is that it?

Admiral MURPHY. It is a problem. You are going to put me in a position of having to recommend to the Secretary of Defense that this particular collection operation is essential or necessary to national defense when, frequently what you are going after is a very small piece which in itself, certainly isn't essential or necessary to national security, but in the context of other intelligence, or with the history of that same kind of a surveillance, can well be essential or necessary. It puts the decisionmaker in a very awkward position of approving a surveillance operation which may only be essential to the security of the United States when viewed in a broader context. I find that you are putting, personally putting me, as advising the Secretary of Defense, in a very awkward position to have to make that kind of a determination.

Mr. MAZZOLI. You would be willing to make it with respect to an American citizen.

Admiral MURPHY. Yes, sir.

Mr. MAZZOLI. Why would you be willing to make it, if it is that difficult and if it would impinge on national security?

Admiral MURPHY. Because I think it is absolutely essential to the rights of Americans.

Mr. MAZZOLI. On the other hand, this is convincing the American people that we are on the right track.

Admiral MURPHY. They have every right to feel confident that somebody other than intelligence—

Mr. MAZZOLI. This risk of making the case of essentiality with regard to an American citizen is one that you are willing to shoulder?

Admiral MURPHY. Absolutely.

Mr. MAZZOLI. You don't believe it correct to shoulder or try to discharge that risk with regard to foreign nationals?

Admiral MURPHY. Well, for two reasons. One, as I have mentioned, is that it is often going to be a very, very tough call for the intelli-

gence community. Second, it has no bearing whatsoever on the rights of Americans, and so has little value in this particular bill.

Mr. MAZZOLI. The Constitution would, in your judgment, have a greater aura of protection with regard to American citizens than it would with regard to people here in this country at this time who are not American citizens?

Admiral MURPHY. Well, I don't see it as a constitutional point, sir.

Mr. MAZZOLI. Well, why would you make a distinction between American citizens and foreign nationals if, in the end product, we are trying to protect national security? Wouldn't an American spy be just as necessary for us to surveil as a Russian sailor on some fish trawler?

Admiral MURPHY. We are really talking there about counterintelligence, and from the Defense point of view, there are no times when we carry out those operations against American citizens. We are always going after foreigners. And therefore, you can see why I would lean toward trying to make the decision process as simple as possible while protecting the American citizen.

Mr. MAZZOLI. So basically you are not going to worry about the first case because you won't even have those.

Admiral MURPHY. I am not involved in those.

Mr. MAZZOLI. So you want to change this structure for the Department of Defense because basically it is in the foreign nationals area that you are working anyway.

Admiral MURPHY. Yes; but with a purpose in mind, which is that you preserve the rights of Americans without hampering the legitimate intelligence activities of the Government.

Mr. MAZZOLI. Well, I am not so sure. If we are looking at it from the American citizen standpoint, what are they entitled to have as far as their own privacy is concerned. I think that is a question we have to wrestle with.

But let me ask you this, Admiral. You and Ms. Siemer maybe have talked this over. Would not this question of essentiality be one which could be judged in connection with that piece of information in relation to the whole which might be acquired; the individual piece of the mosaic might itself not appear to be essential to the national security, but could you not paint the picture to the judge and say this is the whole mosaic we are going to put together and this is one piece essential to the full picture?

Admiral MURPHY. Yes; we would try to do that, but again, the way your bill is written, the judge wouldn't necessarily have to go along with that.

Mr. MAZZOLI. So you would say necessary. You could make the case with a little piece of marble as a necessary element more so than as an essential element, or would you want to strike both "essential" and "necessary"?

Admiral MURPHY. Both should be stricken except where applicable to U.S. citizens.

Mr. MAZZOLI. And what would be the standard?

Admiral MURPHY. For targeting others, the standard should be "relates to".

Mr. MAZZOLI. It would relate to——

Admiral MURPHY. Yes; relate to. The warrant would still be required and we would have to prove that this relates to—

Mr. MAZZOLI. Terrorism or whatever.

Admiral MURPHY. Yes, sir.

Mr. MAZZOLI. Well, I can see a lot more strength in the argument with respect to the specificity on the bugging device or the surveillance device than I can with this; but I appreciate your bringing this to our attention.

Thank you.

Thank you, Mr. Chairman.

Mr. MURPHY. Admiral, I asked Admiral Turner when he was here whether he would have any objection to reporting to the Senate Permanent Select Committee or the House Permanent Select Committee on the number of surveillances that were done during the year.

Would you have any objection to reporting back to this committee the number of surveillances?

Admiral MURPHY. No, sir. You went on to ask Admiral Turner for a detailed analysis or sampling. I would prefer and I think you would prefer, as you mentioned before, trying to keep down the pieces of paper that were provided. I would much prefer to come over and brief you on anything you wanted to know about, in the interest of trying to limit the numbers of pieces of paper that are available.

Mr. MURPHY. So you have no objection other than you would like to do it orally rather than on paper.

Admiral MURPHY. Yes.

Mr. MURPHY. Would you favor an explicit statement in the bill or as legislative history that the Vienna Convention does not prohibit activities authorized by the bill?

Admiral MURPHY. That sounds like a legal question to me that the general counsel should handle.

Deanne?

Ms. SIEMER. The Vienna Convention does not prohibit activities authorized by the bill, in our opinion, and therefore we do not require an explicit statement in the bill or the legislative history.

There was, I believe, an opinion of the Office of Legal Counsel, I think last year, with which your committee is familiar, discussing this extensively, and I think that has settled that issue. I would hope that that issue is not raised again with respect to this bill.

Mr. MURPHY. Do any of my colleagues have any comments?

Mr. McCLORY. Admiral, at the present time you are operating or we are operating under the guidelines aimed at protecting individual rights while providing for electronic surveillance for foreign intelligence, are we not?

Admiral MURPHY. That's right, detailed procedures.

Mr. McCLORY. And you are not aware of any violations that have occurred since we adopted those guidelines a year and a half or two years ago?

Admiral MURPHY. No, sir.

Mr. McCLORY. And you would be concerned, would you not, of any procedures which were invoked which would unduly delay the securing of foreign intelligence once the decision was made that we required that?

Admiral MURPHY. Yes, we would have to have a system that would move expeditiously. It moves that way today, and I would guess that even under this bill, you could design a system that would move almost as expeditiously as we are moving today.

Mr. McCLORY. There might be some interest, or there might be some advisability in providing you a further opportunity to act almost immediately to utilize electronic surveillance if a threat to our national security was involved, would there not?

Admiral MURPHY. Yes, sir, and under the emergency section we are allowed to move under the 24 hour period. We feel that that should normally be adequate.

Mr. McCLORY. Thank you, and thank you, Mr. Chairman.

Mr. MAZZOLI. Thank you, Mr. Chairman.

Mr. MURPHY. Thank you, Admiral, Ms. Siemer. We appreciate it.

Admiral MURPHY. Thank you.

Mr. MURPHY. Mr. Carl Imlay.

Would you raise your right hand.

Do you swear and affirm that the testimony you are about to give before this committee is the truth, the whole truth, and nothing but the truth?

Mr. IMLAY. I do.

Ms. KAHN. I do.

TESTIMONY OF CARL H. IMLAY, GENERAL COUNSEL, ADMINISTRATIVE OFFICE OF THE U.S. COURTS; ACCOMPANIED BY MS. LISA KAHN, ADMINISTRATIVE OFFICE OF THE U.S. COURTS

Mr. IMLAY. Mr. Chairman and members of the subcommittee my name is Carl H. Imlay and I am General Counsel of the Administrative Office of the U.S. Courts. I might note first of all that I have Ms. Lisa Kahn with me, an attorney in my office. I might also note that I speak only for the Administrative Office of the U.S. Courts. I say that because the Judicial Conference of the United States has an interest in legislation involving the courts. The Judicial Conference of the United States has a committee on the Administration of the Criminal Law which will meet on February 2 and 3, of which I happen to be executive secretary, and it represents all of the circuits of the judiciary, and if any further communication from the Judicial Conference on this proposed legislation is desired, I would be very pleased to put this before the Judicial Conference.

Mr. MURPHY. We appreciate that suggestion.

Mr. IMLAY. Mr. Chairman, rather than read our prepared statement I thought perhaps if the Chair would allow it, I would submit it for the record and summarize it.

Mr. MURPHY. Without objection.

[The prepared statement of Mr. Carl H. Imlay follows:]

**PREPARED STATEMENT OF CARL H. IMLAY, GENERAL COUNSEL,
ADMINISTRATIVE OFFICE OF THE U.S. COURTS**

Mr. Chairman and Members of the Subcommittee, my name is Carl H. Imlay and I am General Counsel to the Administrative Office of the United States Courts. I am here today at the request of the House Select Committee on Intelli-

gence, to testify on proposed legislation which would govern electronic surveillance for foreign intelligence purposes. Of the four bills currently before the Subcommittee, I will be dealing primarily with H.R. 5794 and H.R. 7308, and will direct my comments to the procedure under these bills whereby judges are designated for the purpose of hearing applications for electronic surveillance orders. While it is not my intention today to specifically address the question of the desirability or necessity under the Fourth Amendment of securing prior judicial authorization (as opposed to executive authorization) of electronic surveillance to obtain foreign intelligence, my testimony addresses only those bills which in fact provide for such authorization. I will not, therefore, be dealing at any length with H.R. 9745, which provides for the joint authorization of electronic surveillance by the President, the Attorney General, and one or more executive branch officials. I might note, however, that even if the judicial authorization were not mandated for the interception of foreign intelligence information alone, a court order would nevertheless be a desirable safeguard in view of the possibility that in the course of an intelligence surveillance, information or evidence might be intercepted which could also serve as the basis for a subsequent criminal prosecution.

The fourth bill which is before the Subcommittee today is H.R. 5632. This bill proposes to amend various sections of chapter 119 of title 18 of the United States Code and would require that application be made for a court order approving interception of oral and wire communications for the purpose of securing foreign intelligence information. Such application would be made to a judge of the United States Court of Appeals for the District of Columbia Circuit who, upon finding that there was reason to believe that foreign intelligence information could be obtained by such interception, could issue an *ex parte* order authorizing interception for a period not to exceed 90 days. This procedure fails to require that a finding of probable cause be made by the court as is normally required as part of the warrant application procedure.¹ Furthermore, we feel that a Court of Appeals is an inappropriate forum for the authorization of warrant applications. Such applications would more suitably be addressed in a United States district court where cases of first impression are normally heard.

The remainder of my comments will be directed to H.R. 7308² and H.R. 5794, the two bills which provide for the designation of judges before whom applications for surveillance warrants can be heard. It is our opinion that, as they currently stand, these bills could raise constitutional questions in that they attempt to vest judicial authority in judges in their individual capacity rather than as members of any particular court. The judicial power of the United States is vested by virtue of Article III, Section One of the Constitution in "one Supreme court and in such inferior courts as the Congress may from time to time ordain and establish." As a necessary corollary, the judicial power is not vested in judges individually. It is not a power which a judge carries with him and can exercise apart from the court on which he serves.³ Section 2523 of H.R. 7308 and H.R. 5794, however, provides only that "The Chief Justice of the United States shall publicly designate seven district court judges each of whom shall have jurisdiction to hear applications for and grant orders approving electronic surveillance anywhere within the United States." No reference is made in the section to any court or tribunal on which these seven judges will serve. It is therefore, unclear from what source their authority is derived under the Constitution.

¹ See Rule 41, Federal Rules of Criminal Procedure; 18 United States Code § 2518(3).

² H.R. 7308 is identical to S. 1566 which was reported out of the Senate Judiciary Committee on November 15, 1977. Thus, those infirmities which we note in H.R. 7308 are also inherent in the Senate bill.

³ This conclusion, while not expressly stated in the Constitution, can be inferred from the fact that, as a general rule, United States district judges are said to possess no extraterritorial jurisdiction. See *Weinberg v. United States*, 126 F.2d 1004 (2d Cir. 1942), wherein a search and seizure of property in the Southern District of New York, made pursuant to an order of a district judge of the Eastern District of Michigan, was held illegal on the ground that the Michigan district court possessed no extraterritorial jurisdiction. See also *Toland v. Sprague*, 12 Pet. 300, 328-300, 9 L.Ed. 1093; *Employers Reinsurance Corp. v. Bryant*, 299 U.S. 374, 377, 57 S.Ct. 273, 81 L.Ed. 289; *Barrett v. United States*, 169 U.S. 218, 221, 18 S.Ct. 327, 42 L.Ed. 723; *Horn v. Pere Marquette R. Co.*, 151 Fed. 626, 631 (C.C. E.D. Mich.). In the *Horn* case, Judge Lurton observed: "Federal courts of different states are undoubtedly foreign courts as to each other in as full sense as are state courts of different jurisdictions."

A survey of the case law on the need for securing prior judicial approval of electronic surveillance lends support to the notion that a judge's authority is intended to be exercised through the court on which he sits. The Supreme Court in *United States v. United States District Court*,⁴ observed that courts are suitable arenas for dealing with the considerations involved in domestic security surveillance. And in *Berlin Democratic Club v. Rumsfeld*,⁵ where reference was made to the authority of the court over federal officials, the district court for the District of Columbia held that the court's authority was sufficient to require an official to present for approval in the United States a warrant for a wiretap "overseas," i.e. (in Berlin).

Since the judges designated under one of these proposed bills may lack jurisdiction to approve surveillance applications in their individual capacities, one obvious solution would be to appoint these judges to a special court having the requisite jurisdiction. Congress has in the past created such judicial tribunals to exercise a specialized jurisdiction by virtue of its Article III power to "ordain and establish courts."⁶ My office has prepared a draft section 2523, which we offer as a replacement for the existing § 2523 in H.R. 7308 and H.R. 5794. Our proposed section would establish a Special Court of Surveillance Authorization. Consistent with the procedure in the current version of § 2523, the Chief Justice of the United States would designate judges for the Special Court from among the existing judges of the United States district courts and circuit courts of appeals. However, rather than provide for a set number of judges, our proposal would allow the Chief Justice the flexibility to appoint up to fifteen judges to the hearing division of the Special Court, taking into consideration the volume of electronic surveillance applications at any given time. The provision in § 2523(b) for the designation of an additional three judges to comprise a special appellate tribunal is retained in our proposal, although where those judges were before to constitute a "special court of review," under our proposal they would instead constitute a separate review panel of the same Special Court.⁷

Our proposal also gives the Special Court the power to prescribe its own procedural rules, including such rules as are necessary to maintain the security of its records. This rulemaking power is intended as an alternative to the procedure contained in H.R. 7308 and H.R. 5794 whereby the Chief Justice in consultation with the Attorney General (and, in H.R. 7308, with the Director of the Central Intelligence Agency as well), is to establish necessary measures for maintaining the security of court records.

The Special Court is further permitted under our proposal to determine where to hold its sessions and it is authorized to appoint a clerk and such other employees as are necessary.

The judges on the Special Court are granted six-year terms subject to a single reappointment.⁸ Provision is made for staggering the terms of the judges in the hearing division by the Chief Justice so that there will be a number of experienced judges serving on that division at all times.

A difficult issue with which our proposal attempts to deal is the problem of insuring adequate safeguards on the secrecy of the Court's records while at the same time enabling an individual who has been indicted on the basis of information obtained in a domestic surveillance to seek review of the record of the surveillance application procedure. Our proposed section would permit the Special Court to order the production of such part of the record as may be pertinent for inspection by the indicted individual and his counsel, or for the *in camera* inspection by the United States district court before which the case

⁴ 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed. 2d. 752 (1972).

⁵ 410 F. Supp. 144 (D.D.C. 1976).

⁶ *E.g.*, The Emergency Court of Appeals was established by § 204 of the Emergency Price Control Act of January 30, 1942, P.L. 77-421, 56 Stat. 23, 31-33; the Special Railroad Reorganization Court was established by § 209(b) of the Regional Rail Reorganization Act, P.L. 93-236, 87 Stat. 985, 999-1000; and the Temporary Emergency Court of Appeals was established by § 211 of the Economic Stabilization Act Amendments of 1971, P.L. 92-210, 85 Stat. 743, 749.

⁷ The U.S. Court of Claims has a somewhat comparable division of hearing and appellate functions. See 28 U.S.C. §§ 175, 2503.

⁸ We assume that the judges who are designated, pursuant to chapter 13 of title 28, to sit on the Special Court will continue to serve as judges of the various district and circuit courts from which they came when the Special Court is not in session and when their six-year terms are completed. We did not, therefore, find it necessary to provide that these judge-designees would hold their offices during good behavior, as is normally the case for Article III judges.

is pending, or to make any other order which it deems appropriate to the protection both of the interests of the individual defendant and the security of the nation.⁹

Our proposed section 2523 is intended as an alternative to the procedures outlined in H.R. 5794 and H.R. 7308 for the designation of judges to hear applications for court ordered electronic surveillance. Our main interest in drafting an alternative section was to help the Congress to avoid potential constitutional difficulties regarding the proper exercise of judicial power which might arise should the current version of either H.R. 5794 or H.R. 7308 be adopted. We do not wish to suggest, however, that our amended version of these two bills is the only means by which constitutional procedures for the authorization of electronic surveillance applications for foreign intelligence can be implemented. A procedure such as is found in H.R. 5632 would be equally appropriate, provided that applications were made to the U.S. District Court for the District of Columbia rather than the U.S. Court of Appeals for the District of Columbia Circuit, and provided that the requisite probable cause standard is adopted.

While we note that the approach found in H.R. 5632 would be less expensive and less complex than the establishment of a special court, the decision of which approach is ultimately the most desirable is a policy decision to be made by the Congress.

Finally, it should be kept in mind that we are addressing only the problems raised by electronic surveillance within the territorial confines of the United States. The three bills which provide for court orders do not reach the interception of foreign intelligence outside this country where the privacy rights of American citizens are involved, as was the situation in *Berlin Democratic Club*. The problem of electronic surveillance abroad and the constitutional questions raised by such surveillance are separate issues which the Congress may wish to address at some future date.

I would like to thank the Subcommittee for this opportunity to appear before you today.

§ 2523 ESTABLISHMENT OF SPECIAL COURT OF SURVEILLANCE AUTHORIZATION

(a) There is hereby established a court of the United States to be known as the Special Court of Surveillance Authorization (hereafter in this chapter referred to as the "Court."). The Chief Justice of the United States shall designate, from among the judges of the United States district courts and circuit courts of appeals, no more than fifteen judges to sit as members of the hearing division and three judges to sit as members of the panel comprising the appellate division of the Court.

(b) The Court may prescribe its own rules of procedure for the conduct of its business, including rules regulating all measures as are necessary for the security of its records and their disposition on termination of the proceeding by final order. The Court shall have a seal, hold session at such places as it may specify, and appoint a clerk and such other employees as may be necessary.

(c) The judges of the Court shall be designated for six-year terms, except that the Chief Justice shall stagger the terms of the members of the hearing division originally chosen. No judge may serve more than two full terms.

(d) Any defendant alleging that he was indicted as a result of information obtained as a result of any domestic surveillance may file a motion with the Special Court of Surveillance Authorization seeking the production of the records of an application authorization procedure. The court may order that such part of the record as may be pertinent be produced for inspection by the defendant and his counsel, or for inspection *in camera* by the United States district court before which the case is pending, or make such other order as in its discretion is deemed appropriate properly to protect the interests of the defendant while safeguarding national security.

Mr. IMLAY. As an appendix to the written statement, we have submitted a proposed substitute for section 2523 of H.R. 7308 and of H.R. 5794. Now, this substitute amendment is a proposal for the

⁹ See *Giordano v. United States*, 394 U.S. 310 (1939) (Stewart J. concurring). See also *United States v. Reynolds*, 345 U.S. 1 (1952), setting out factors for limiting discovery in a civil case in which military matters affecting the national security might be exposed; *United States v. Bell*, 464 F.2d 667 (2d Cir. 1972); *United States v. Grunden, Jr.*, 25 U.S.C.M.A. 327, 54 C.M.R. 1053 (1977).

establishment of a Special Court of Surveillance Authorization. I should like to comment on this draft section by section and then respond to any questions that the committee has on these subjects, and I will refer the committee to this draft at the end of our prepared statement.

With respect to subparagraph (a) of the proposed section 2523, we would provide for the creation of a court to be known as the Special Court of Surveillance Authorization and also provide that the Chief Justice shall designate from among the existing district and circuit judges no more than 15 judges to sit as members of the hearing division and three judges to sit as members of an appellate division.

The provision for 15 judges to sit as members of the hearing division would allow for sufficient judges to meet the caseload and also provides for some rotation among the judges so that the burden would not be too great on any one judge.

While we do not know what the caseload of such a court would be at this time, I assume that 15 judges would be ample to handle such demands, and at the same time allow the assigned judges sufficient time to handle their shares of the caseloads in their own courts.

Mr. MURPHY. May I add something here. I asked the Attorney General how many applications have been made, and he said none.

Mr. IMLAY. Yes. Mr. Chairman, we fully realize that, and therefore we would have this elastic. If it is not necessary to convene the court, they would go along and manage their own caseloads which, judging from the national problems of the courts, would be considerable, so that this wouldn't tie up the time of judges. They could be called when necessary.

I would anticipate that at least some of the judges assigned to this court might be senior judges willing to take on this work. The judiciary has been highly successful in using senior judges for interdistrict and interdistrict assignment purposes and also for many tasks such as serving as chairmen and committee members of the Judicial Conference of the United States.

Now, provision is also made in our draft of the bill for three judges to sit as members of the panel comprising the appellate division of the court. This would be a substitute for the provision in H.R. 7308 and H.R. 5794, which would create a special three-judge appellate court.

We have explained in the formal statement our belief that this power of passing on surveillance applications is one that is in our view properly assignable to a court rather than to individual judges whose power derives from their membership in a court and not as an attribute of their individual commissions.

We have discussed this principle at some length in our prepared statement because we think it is critical to the legislative proposal. Of course, the proposal is that individual judges pass on these applications, which are assigned to no court. We think that the third article of the Constitution assigns the judicial power to courts and not to individuals. So this would create a special court which has been done in other instances in the past and present.

The necessity of judicial approval of surveillance applications in the domestic security context, as discussed by the Supreme Court in

the *Keith* case, was related to action to be taken by courts, not by judges in their individual capacities.

We have provided for the creation of one court having both hearing and appellate functions. This would be more economical insofar as cost is concerned, and would provide for a more unified administration of this special program through the office of a single clerk. I might also interject the notion that it would also tend to preserve the security that has been adverted to by prior witnesses, and I also might point out that the Supreme Court in the *Keith* case, that is, *United States v. United States District Court* did refer to this possibility of using executive branch personnel for the clerical and secretarial tasks to be performed for the judges. We wouldn't see any problem in having the court reporter, the bailiff and other functionaries of such a special surveillance court come from some other branch of government. It would also be necessary, obviously, to safeguard the records, and we could certainly have the cooperation of the executive branch in that.

Mr. MURPHY. You do that now in some *in camera* proceedings, do you not?

Mr. IMLAY. Yes; we do, and furthermore, our courts send their records to the Federal Records Centers, and it is deemed that the Court has custody of those records, even when they are sent over to the Records Center. So there wouldn't seem to be any great problem with that procedure.

In subsection (b) of section 2523, our proposal would allow the court to prescribe its own rules of procedure for the conduct of its business generally. We might note that this would allow the court to enact rules relating to the safeguard of highly sensitive documents. We think this rulemaking power should be given to the court itself, which will be able to administer its own program with some degree of flexibility.

The two bills, H.R. 5794 and H.R. 7308, provide in their respective sections 2523 (c) that security rules shall be established by the Chief Justice in consultation with the Attorney General, and in H.R. 7308, this provision would also include consultation with the Director of Central Intelligence, and we have doubts that that needs to be written into the law. We are sure—and I think we are sure that the courts have this well in mind. The Supreme Court said in the *Keith* case:

There is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues involved in domestic security cases.

See, that was domestic security cases.

Certainly courts can recognize that domestic security surveillance involves different considerations from the surveillance of "ordinary crime." If the threat is too subtle or complex for a senior law enforcement officer to convey its significance to a court, one may question whether there is probable cause for surveillance.

That is the quote from the opinion.

Now, rules can provide alternate ways for safekeeping documents both during the pendency of the application proceeding and following the ultimate termination of such proceeding.

Subsection (b) also provides that the court shall have a seal, a requisite for authentication of its papers of record, that the court

may hold a session at such places as it may specify, a provision intended to facilitate speedy disposition of applications; and provision for appointment of a clerk and such other employees as may be necessary.

I might say that there wouldn't be any particular problem with security clearance of a clerk. We do have full field investigations by the FBI of such persons as our U.S. magistrates and our Federal public defenders. I certainly wouldn't find that any real barrier.

The provision for a clerk would allow for necessary staff officers to distribute the work between the judges, to docket and process papers relating to various application procedures, to communicate with the judges when necessary and do the other tasks which any court must inevitably face.

We would anticipate that the court would generally be within the framework of chapter 41 of title 28, United States Code for budgeting supply, and housekeeping purposes.

Subsection (c) of section 2523 provides that the judges shall be designated for 6 year terms except that the Chief Justice shall stagger the terms of the hearing division judges originally chosen. This would give the judges time to acquire an expertise in the field and would allow the staggering of replacements so that a continuity of experience could be maintained in the court.

Subsection (d) of section 2523 is an innovation which we think deserves some study. In the contemplation of our draft, the approvals of these applications, both by the hearing division and the appellate division of the court, would be purely *ex parte* proceedings, and we would not assume that any person subject to surveillance would necessarily know one way or another whether the surveillance had actually occurred, or whether that surveillance had been authorized by the Special Court of Surveillance Authorization.

Where a criminal proceeding is instituted against a defendant in a situation where it is possible that an application might have been issued, it may be necessary that he at least know at an early stage whether the interception was the product of a domestic surveillance order. We would provide for a motion proceeding before this special court which would allow the special court to reveal so much of the record as might be essential to answer just those questions. We have suggested that the Special Court of Surveillance Authorization be given the duty of making such revelation itself rather than a criminal trial court which is trying a particular citizen who has been apprehended.

First, as recognized in section 2526 (c) of both bills, it may be necessary in most cases that the surveillance order be turned over to the trial court for viewing *in camera* so as to protect the sensitive contents of that order. Since these applications may be fairly broad in scope and relate to numerous persons, the Special Court would be better equipped to determine what portion of the record, including the final order, might be pertinent to the particular case of one person seeking such disclosure.

The Special Court might devise an abstract of its proceedings which could suffice to show that an authorization had in fact been

given for a particular interception, but which would not reveal sensitive details which could compromise national interest if imparted to unauthorized persons. At least the special court seems to be the more appropriate forum to make these considerations in the first instance.

In this connection, I might note one problem with section 2526(c) and (d) of both bills. These sections of the two bills contemplate that a district court would, prior to a criminal trial, not only review the circumstances of the surveillance, but would also make what is apparently a *de novo* review of a surveillance order.

It would not seem necessary that a second court review this surveillance order if the order has been properly passed on by the Special Court of Surveillance Authorization in the first instance, and if no showing of invalidity of the Court's order otherwise appears.

As noted in the *Keith* case, and I quote from page 321 of volume 407, U.S. Reports, "A prior warrant establishes presumptive validity of the surveillance and will minimize the burden of justification in postsurveillance judicial review."

It would be my view that if a valid order has been issued by the special court with opportunity for review by its appellate panel, that the validity of the surveillance authorization would be a matter of presumption in the criminal case. However, there would still be issues remaining as to whether the interception was made in conformity with the authorization. It would be that latter issue which the district court would have to resolve based on the particular facts before that court after first considering some documentation from the Special Court of Surveillance Authorization evidencing that the intercept in question was covered by the order.

I would therefore suggest that section 2526(c) of both versions of the bill as introduced be amended to conform to such procedure.

Finally, I note that the Administrative Office would be obligated pursuant to section 2527 of the bills to report to Congress on the number of applications and extensions and the number of orders and extensions granted, modified and denied.

While we have no problem with that requirement, as a matter of administration we would suggest that the report of the Attorney General to our office be made to us in January rather than in April as the bills would provide. This would conform such procedures to the present 18 U.S.C. §2519(2) and allow us to include these surveillance statistics together with our annual April report to Congress on interceptions of wire and oral communications.

We submit this report to Congress in April. If we had this additional data on domestic surveillances for foreign intelligence, we can include that in our annual report.

Mr. MURPHY. We are having a hard time getting it, and if you can get it, we would appreciate your giving it to us.

Mr. IMLAY. So, as I say, we make this suggestion in the interests of having a regular court rather than individual judges passing on these applications. When a judge gets his commission it assigns him to a particular court, and he loses his judicial robes when he crosses the district line except to the extent that he might be assigned within

his circuit by the chief judge of the circuit to another court, or by the Chief Justice from one circuit to another, but that would be an advantage.

Now, one thing that has come up in the testimony this morning relates to the ability of judges one, to maintain the secrecy of the proceeding, and the other relates to their expertise in this area. I think that we have in the Federal judiciary many judges who have a relevant background. One, for example, that I know of was a high officer in the Federal Bureau of Investigation. There are many who have been U.S. attorneys. There are many who, for one reason or another, have become familiar with security problems.

I think the judges could be relied upon to maintain the security of intelligence. I have seen very, very few departures—I probably have seen more having had 9 years in the Criminal Division at the Department of Justice, I have probably seen more in the Department than I have ever seen in the judiciary, and I think these are honorable men, and I think that they would be chosen with discretion.

Now, I don't see any problem at all in having the Chief Justice assign these judges. I don't think we have to bring them from the District of Columbia or Maryland or Virginia. We have many instances where we have to convene courts from long distances, in Judge Bell's fifth circuit, for example, you can look at the geography of the vast area of the South and realize that the appellate judges are coming from Texas to New Orleans and from the State of Georgia to New Orleans to convene a court. I don't think this would be a problem. We have the telephone, fast communication. I think we could have a fair cross section geographically of judges and still meet in Washington, D.C., or meet on an emergency basis. Much of this work could be done by telephone, the mechanical problems of calling the court together and so forth. This would not seem to be a great problem.

Mr. MURPHY. Any questions?

Mr. McClory?

Mr. McClory. Thank you, Mr. Chairman. Yes, I do have some questions.

I think that you have, Mr. Imlay, indicated some problems with this legislation in that you suggest a substantial change insofar as the construction of the court is concerned. I think it indicates that this is an innovation insofar as our district courts are concerned, and consequently we have a great many details to deal with.

I think you have referred very persuasively to the fact that the judges are investigated by the FBI before being appointed. Likewise, the clerks and the reporters and others are subject to FBI investigations. But, how would you feel—and I would like you to bring this up at the Judicial Conference as well—how would you feel about having the Congress or having the Attorney General, in connection with the Director of the CIA, impose requirements with regard to security clearances as far as the judges are concerned, impose regulations with regard to secrecy, impose regulations with regard to who is going to be able to be present in the *in camera* proceedings?

You mentioned that you thought there might be no objection to the executive branch providing these personnel in these kind of

selected cases, but I am wondering whether or not we can constitutionally impose these restraints on the judicial branch, and if we can, how does the judicial branch react to the impositions of these kinds of regulations and restrictions?

Mr. IMLAY. I haven't really explored that insofar as it pertains to the judges who would be selected, and now, there might be problems in restricting the selection by statute to certain individuals.

What I was referring to basically was really the statement of the Supreme Court in *United States v. United States District Court* that whatever security dangers clerical and secretarial personnel may pose can be minimized by proper administrative measures, possibly to the point of allowing the government itself to provide the necessary clerical assistance.

Mr. McCLORY. Well, it might be in connection with trying to secure this information that we would want to impose either by regulation or by legislation certain strictures as far as the court is concerned.

Now, what about this? What about a breach of security? At the present time, if we have a breach of security by a person in the executive branch, we have provisions for penalties. What if the judicial branch breaches security now?

Now, it hasn't come to your attention. You have seen much more, many more leaks in the Department of Justice than you have ever seen in the judicial branch, but what about the courts? Could we provide for additional disciplinary action insofar as the judges are concerned, if we delegate this kind of authority to the judges?

Mr. IMLAY. I might say this, that it has been assumed by many in the past that the remedy of impeachment is the only ultimate discipline that should be imposed against a judge for malfeasance in office. There is, as you know, a bill that would establish a judicial commission on discipline that is now pending in the Senate. That is pending somewhere on the horizon, but as of now, there is no effective measure to be taken against a judge except his removal and anything that the Judicial Conference chose to do in the way of at least clarifying the situation.

Mr. McCLORY. Without intending to be disparaging or critical in any way, there seems, nevertheless, to be a sort of an aura of infallibility which surrounds the court. Somehow or other it seems as though, if the Congress takes action and says well, first you have to take this or that to the court, that it is to protect all the individual human rights and civil rights, and assures their integrity and fidelity and all of the good things that we are searching for. On the other hand, we know that judges are only people, and I guess we have some examples right now of unusual antics on the part of some judges that were not anticipated at the time of their appointment. So I think we have to realize that what we are doing if we enact this legislation is delegating authority to judges who have the human weaknesses as well as the great strengths that we look for.

The other question, and it is relevant to that, that I would like you to pose to the Judicial Conference is this: We keep delegating more and more jobs to the judiciary. Somehow or other we think that we can answer our problems by saying, well, let the judge decide this: Give this to the judge, give it to the district judge, and so on.

Now, I would like to ask them whether they want to take on any more responsibility. We are at the point, Congressman Mazzoli and I, of trying to provide I think 134 additional Federal judges which we need desperately. We have got courts backlogged, and here we are talking about delegating a whole new role to the judiciary, and this may only be the start because I don't know of any comparable authority which is presently reposed in the Federal judiciary.

So would you ask them about it and report to us in due course as to how they feel about taking on this function, and whether, if they are willing to take it on, do they prefer to take it on in the concept that you have advanced here of the special court, which I think is a very thoughtful subject you have presented, or in the concept of the legislation itself?

Mr. IMLAY. I certainly will. I assume that the Chair would want me to take this up with the Judicial Conference.

Mr. MURPHY. Yes, sir, and there may be some other questions the staff will supply to you prior to your meeting.

Mr. IMLAY. Yes, sir.

Mr. MURPHY. Where is your meeting being held?

Mr. IMLAY. In New Orleans on February 2 and 3.

Mr. MURPHY. Mr. Mazzoli?

Mr. MAZZOLI. Thank you.

Mr. Imlay, was this suggestion of yours advanced to the Senate during its debate on this bill, the Senate committee?

Mr. IMLAY. No; it wasn't.

Mr. MAZZOLI. So this is something that has occurred since the Senate Judiciary Committee looked at this bill.

Mr. IMLAY. That's right.

Mr. MAZZOLI. Had you made any suggestions to them whatsoever regarding judicial review at that level?

Mr. IMLAY. No; we hadn't.

This is an innovation that comes about because frankly, I think, you know, since the judiciary is being involved, it would be healthy to have some expression.

Mr. MAZZOLI. No; in fact, I would have wished that maybe the Senate would come to grips with this and maybe they could help give us some wisdom.

What is the process by which the Judicial Conference decides to take an active role or make suggestions on legislation?

Mr. IMLAY. On an invitation of a Committee of Congress. They don't volunteer.

If the committee would see fit to ask the Judicial Conference to comment, these could be referred, since we are having the meeting in February.

Mr. MAZZOLI. In section 2523(b) of the bill which is before us it says there will be a special three-judge panel to review denials.

Mr. IMLAY. Yes.

Mr. MAZZOLI. Now, as I look at your 2523, I see nothing about reviewing denials.

Mr. IMLAY. Yes; that is very correct, and I meant to leave it somewhat loose because I would suggest to the committee that the possi-

bility of having this appellate body also consider all of these order, at least have the opportunity to respond or otherwise to pass on them.

Mr. MAZZOLI. So if I understand it correctly, there is no intention in your draft of 2523 to prohibit there being some opportunity for the Government to have a rehearing of a denial, just as you provide in this one new section for defendant whose rights have perhaps been violated by a surveillance.

Mr. IMLAY. That is correct.

Mr. MAZZOLI. Would there be a chance at some point of your sending to the committee what would be your best effort at language, or do you think that that opportunity of review of denial are somehow implicit in this?

Mr. IMLAY. I think we could provide for that. They could also be provided for by rule if this body is given the rulemaking authority, the Court could, by rule, provide for a review that is a little broader.

Mr. MAZZOLI. Well, could it not, if that is the case, provide for a review by defendant just as well? But if you are not going to have the specific words in providing for review of denial, I was wondering why the specific words of review of the information produced by the surveillances?

Well, anyway, I saw that—

Mr. McCLORY. Would the gentleman yield?

Just one more question that relates to that.

Mr. MAZZOLI. Yes, sir.

Mr. McCLORY. Under your bill, if you are thinking of expanding the Court's jurisdiction to include the section which my colleague made reference to, would it not also be appropriate for the defendant who may feel that he has been wrongfully bugged? For instance, we put a bug or an electronic surveillance of some kind in the Soviet embassy over here and then they found out—there are ways of finding out—they want to come into the court and remonstrate and try to get the bug off. Should not the legislation provide a remedy for the defendant, American or non-American?

Mr. IMLAY. Well, that would expand it, Mr. Congressman. That would expand this. I haven't gotten to that point.

Mr. McCLORY. Would you inquire with the Judicial Conference whether they think it should be expanded to include the judicial authority?

Mr. IMLAY. I certainly will.

Mr. MAZZOLI. I have no further questions, Mr. Murphy.

Mr. MURPHY. Thank you, Mr. Imlay.

The committee will adjourn until 9 o'clock tomorrow morning.

[Whereupon, at 12 o'clock noon, the committee recessed, to reconvene at 9 o'clock a.m., Wednesday, January 11, 1978.]

**FOREIGN INTELLIGENCE ELECTRONIC
SURVEILLANCE**

H.R. 5794, H.R. 9745, H.R. 7308, AND H.R. 5632

WEDNESDAY, JANUARY 11, 1978

**HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON LEGISLATION OF THE
PERMANENT SELECT COMMITTEE ON INTELLIGENCE,
*Washington, D.C.***

The subcommittee met, pursuant to recess, at 9:13 a.m., in room 2362, Rayburn House Office Building, Hon. Morgan F. Murphy (chairman of the subcommittee) presiding.

Present: Representatives Murphy (presiding), Mazzoli and McClory.

Also present: Michael J. O'Neil, chief counsel; and Patrick G. Long, associate counsel.

Mr. MURPHY. Gentlemen, before you sit down, would you raise your right hands, please.

Do you swear or affirm that the testimony you are about to give to this committee is the truth, the whole truth, and nothing but the truth.

Mr. SHATTUCK. I do.

Mr. BERMAN. I do.

Mr. POLLAK. I do.

Mr. MURPHY. This is the second day of hearings conducted by this subcommittee on the subject of foreign intelligence surveillance.

The witnesses before us today include Mr. John Shattuck, executive director of the American Civil Liberties Union Washington Office.

Mr. Shattuck is accompanied by Mr. Jerry Berman, also of the American Civil Liberties Union.

The second witness is Mr. Louis Pollak, dean of the University of Pennsylvania Law School.

The committee was also expecting the testimony of Mr. Robert Bork, former Solicitor General of the United States and presently professor of law at the Yale University Law School. Mr. Bork has been prevented by family illness from attending today.

We welcome you gentlemen, and if it is agreeable to both of you, we will hear both your statements, one after the other, and then proceed to ask questions of both of you.

Mr. Shattuck, would you begin, please?

[The prepared statements of Mr. John Shattuck and Mr. Jerry J. Berman follows:]

PREPARED STATEMENTS OF JOHN H. F. SHATTUCK, DIRECTOR, WASHINGTON OFFICE,
AND JERRY J. BERMAN, LEGISLATIVE COUNSEL, AMERICAN CIVIL LIBERTIES UNION

Mr. Chairman, we welcome this opportunity to testify before this Committee on legislative proposals to control electronic surveillance for foreign intelligence purposes. It is a matter of obvious importance to the nation and one of vital concern to the members of the American Civil Liberties Union, a nationwide, nonpartisan organization devoted to protecting individual rights and liberties guaranteed by the Constitution.

This legislation has been proposed for the same reasons that this new Intelligence Committee was constituted: the recognition, in the wake of Watergate and revelations of massive illegal programs conducted by the FBI, CIA, NSA and other U.S. intelligence agencies, that the Congress must exercise meaningful oversight and control of the intelligence community and enact legislation and charters for the agencies which insure that intelligence activities will no longer violate the civil and constitutional rights of Americans.

The enactment of legislation to prohibit warrantless and overbroad electronic surveillance would be a major step toward reform and would signify a resolve on the part of Congress to bring our intelligence agencies under the rule of law. Legislation setting forth a strict and narrow standard for the use of this most intrusive investigative technique would afford protection for the First and Fourth Amendment rights of citizens and would set a positive precedent for legislation defining the general investigative authority of U.S. intelligence agencies and the circumstances under which they may use other covert investigative techniques such as the search of private records and the use of informants.

We stress the interrelationship between wiretapping legislation and the proposed charters to emphasize at the outset that the Committee cannot view these bills in isolation. Whatever investigative standard is approved in the wiretap area will be a significant precedent with far-reaching ramifications. If Congress enacts wiretapping legislation with an overbroad or indefinite standard for employing this most intrusive of all investigative techniques, intelligence agencies will inevitably continue to violate the First and Fourth Amendment rights of citizens in a wide range of investigative areas. It is only logical that future charter legislation, governing the use of less intrusive covert techniques, will build on this precedent. This could result in broad investigative authority to conduct surveillance of political activity. If the wiretap standard is too low, Congress could end up authorizing rather than curtailing intelligence agency abuses.

THE CENTRAL ISSUE: THE CRIMINAL STANDARD

While four bills are under consideration by this Committee—H.R. 5632, H.R. 5794, H.R. 7308 and H.R. 9745—we will focus on H.R. 7308, the Administration proposal introduced on May 18, 1977 in both the House and Senate (S.1566).

Before we discuss our central objection to H.R. 7308 as presently drafted—its failure to set forth a criminal standard as the basis for all national security electronic surveillance and to restrict the application of this standard to serious crimes affecting national security—we want to commend certain features of the bill, particularly;

its elimination of any "inherent power" of the President to authorize warrantless national security wiretaps;

its requirement that all such wiretaps be conducted pursuant to a judicial warrant, making it clearly preferable to H.R. 9745 which permits warrantless electronic surveillance; and

its specifically as to the showing the Government must make to obtain a warrant to conduct electronic surveillance for foreign intelligence purposes.

Despite the positive aspects of the bill, which we strongly encourage the Committee to retain, H.R. 7308 is seriously flawed because it permits the Government to target persons for electronic surveillance without probable cause—or even a reasonable suspicion—to believe they are engaged in crime. Accordingly, we oppose the bill in its current form because we believe its low investigative standard would invite abuse and would be a dangerous precedent for future intelligence legislation.

THE NON-CRIMINAL STANDARD IN H.R. 7308

Before discussing the investigative standard for wiretapping which we believe is minimally necessary to satisfy the Constitution and curtail abuse, let us look at who could be routinely wiretapped under H.R. 7308. The bill authorizes continuous surveillance for three months or more of at least four classes of people who are not even reasonably suspected of engaging in criminal activity.

First, the bill permits surveillance of officers or employees of a foreign power without any showing that they are engaged in either criminal or intelligence activities. In effect, the bill declares open season on foreign employees of government corporations like Air France, who are subject to wiretap at any time simply because of their status. The second category of persons who can be tapped without any suspicion that they are committing crimes is foreigners engaged in undefined "clandestine intelligence activities" which might be harmful to the security of the United States. In the absence of any definition of "clandestine intelligence activities," there are no safeguards to protect innocent foreign businessmen, visiting foreign relatives, tourists, or any other foreign visitors to the United States from becoming the targets of "intelligence" wiretapping.

The third category of persons covered by the non-criminal standard is Americans who secretly collect or transmit information pursuant to the direction of a foreign intelligence service "under circumstances which indicate the transmission or collection of such information or material would be harmful to the security of the United States, or that lack of knowledge by the United States of such collection or transmission would be harmful to the security of the United States." This complicated formula amounts to a new, all-inclusive and overbroad definition of espionage, with the result that the President is given the authority to wiretap Americans whose conduct has not been made criminal by Congress.

Finally, the most disturbing category of persons whose lawful conduct can trigger surveillance is Americans or foreigners who knowingly aid or abet persons engaged in undefined clandestine intelligence activities or the secret transmission or collection of harmful information. These people are twice removed from the criminal standard: they can be tapped for aiding or abetting others whose conduct is lawful, and they need not even know the nature of that conduct so long as they are "knowingly" aiding the persons engaged in it. Under this standard Martin Luther King could arguably have been tapped, as he was, for "knowingly" associating with a person suspected of secret Communist activities, even though King knew nothing of those activities.

The non-criminal standard in H.R. 7308 would permit an Attorney General insensitive to civil liberties to define "clandestine intelligence activities," or the secret collection or transmittal of national security information, to warrant electronic surveillance similar to the so-called "Kissinger seventeen taps" on journalists and government employees. Surveillance similar to the "sugar lobby" taps of a Congressman and his aides in the early 1960's (based upon an allegation that a foreign country was attempting to influence congressional deliberations about sugar quota legislation) would arguably be permissible. Political activity protected by the First Amendment could be reached in a variety of circumstances, such as the fund-raising activities of American religious and civic groups on behalf of Israel, or the receipt of an honorarium to speak to a foreign lobbying group. In short, the wiretap net could be cast very widely over non-criminal conduct under H.R. 7308.

A CRIMINAL STANDARD: THE MINIMUM CONSTITUTIONAL REQUIREMENT FOR WIRETAPS

Why is it so important to limit the wiretapping authorized by H.R. 7308 to a "criminal standard"? A wiretap is probably the most intrusive and inherently unreasonable form of search and seizure. Even when a tap is placed on a person suspected of engaging in criminal activity, it offends the Fourth Amendment because it necessarily results in a "general search" of all private conversations, incriminating or not, which occur over the period of the surveillance. The surveillance technology itself severely impedes any kind of effective control, such as a conventional search warrant which (1) authorizes the seizure of tangible evidence, (2) "particularly describes" the things to be

seized, and (3) gives notice to the subject of the search except under narrowly defined "exigent circumstances." Cf. *Osborn v. United States*, 385 U.S. 323, 329-30 (1966).

The technology of electronic surveillance makes the search and seizure of telephone conversations infinitely more intrusive than the physical search of a home or a person, even when a tap is conducted pursuant to a court order. Statistics released recently by the Administrative Office of the U.S. Courts, for example, show that the average court-ordered federal wiretap in 1976 involved the interception of 1,038 separate conversations between 58 persons over a period of three weeks. These statistics demonstrate dramatically that even in the case of a *criminal* investigation—far more limited than the open-ended 90 day or one year "intelligence" investigations authorized by H.R. 7308—a wiretap search inevitably has a dragnet effect which strains the Fourth Amendment to the breaking point. As Justice Brandeis warned in *Olmstead v. United States*, 277 U.S. 438, 473 (1928), "discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet." Even where circumscribed within the confines of a criminal investigation, wiretapping represents an invasion of private speech and thought with almost no parallel.

Since wiretaps are inherently so intrusive, the ACLU has long maintained that they cannot be conducted at all without violating the Fourth Amendment. If this violation is to be minimized, no surveillance should be permitted unless a judicial warrant has been issued based upon probable cause to believe that the person to be tapped is engaged in crime. See *Katz v. United States* 389, U.S. 347 (1967).

Those who seek to justify a departure from the criminal standard for "intelligence wiretaps" quote the following passage from Justice Powell's opinion in *United States v. United States District Court*, 407 U.S. 297, 322-323 (1972):

"Different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens. For the warrant application may vary according to the governmental interest to be enforced and the nature of citizen rights deserving protection." Justice Powell's dicta are based on two leading administrative search cases, *Camara v. Municipal Court*, 387 U.S. 523 (1967) and *See v. Seattle*, 387 U.S. 541 (1967). In these cases the Court sanctioned the use of area warrants for municipal authorities to conduct inspections for housing code violations, not upon probable cause of a particular housing code violation, but upon general experience that dwellings in a particular area are likely to be in violation of the code.

The administrative search cases are a weak reed upon which to rest such a dangerous relaxation of Fourth Amendment standards. These cases did not involve a deliberate search for specific information, as does H.R. 7308. The searches were part of a general regulatory scheme to protect public health and safety. Second, none of these cases deal with potentially sensitive political activities. The Court has recognized the convergence of the Fourth and First Amendments: "Historically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power." *Marcus v. Search Warrant*, 367 U.S. 717, 724 (1961). See also *United States v. United States District Court*, 407 U.S. at 313. Third, the administrative search cases deal with a much less intrusive invasion of privacy. A walk-through of a dwelling seeking compliance with a housing code is hardly comparable to 90 days of electronic surveillance, gathering every communication—whether or not relevant—made from a particular facility.

The degree of intrusiveness is the decisive factor in determining the quality and degree of justification that must be provided for a search. A wiretap, of course, is the most intrusive of all searches and therefore requires strict adherence to the criminal standard.

FOREIGN NATIONALS AND THE FOURTH AMENDMENT

It is argued that foreign visitors and employees of a foreign power in the United States are less protected by the Bill of Rights than American citizens and resident aliens. This is one of the premises of H.R. 7308. There is little basis for it in constitutional law.

The Fourth Amendment, of course, refers not to the rights of citizens or residents, but to the "right of the people" to be free from unreasonable searches and seizures. Just as the term "person" in the Fifth Amendment has long been held to be "broad enough to include any and every human being within the jurisdiction of the republic," *Wong v. United States*, 163 U.S. 228, 242 (1896) (Field, J., concurring), the "people" who are protected by the Fourth Amendment have been held to include all persons within the territorial jurisdiction of the United States. More than fifty years ago, for example, the Supreme Court established that an alien could invoke the exclusionary rule in a deportation proceeding. *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149 (1923). The extension of full Fourth Amendment protection to foreign nationals has been long recognized by lower courts, e.g. *In re Weinstein*, 271 F.5 (S.D.N.Y. 1920), aff'd, 271 F.673 (2nd Cir. 1920) (Learned Hand, J.) and was noted by the Supreme Court in *Abel v. United States*, 362 U.S. 217 (1960). *Abel* involved a joint investigation by the FBI and Immigration officials of a suspected Russian spy. A search was made of the suspect's hotel room at the time of his administrative arrest preliminary to deportation, with the FBI conducting a subsequent search on its own. These searches turned up not only proof of *Abel's* alienage and illegal entry into the United States, but of espionage (coded messages, microfilms), and the government brought an espionage prosecution and obtained a conviction. *Abel* appealed on the ground that the evidence on which he was convicted was the fruit of an illegal search, and therefore should have been excluded.

The Supreme Court affirmed the conviction by finding that the search had been incidental to a valid deportation arrest and was therefore legal itself. But the important point is that it was assumed by the majority (and stressed by the dissenters) that aliens, even those who had entered this country illegally and who were engaged in espionage, were entitled to full Fourth Amendment protection.

Although a deportation arrest like the one conducted in *Abel* may be based on less than probable cause, an alien who is investigated for purposes other than deportation is fully protected by the Fourth Amendment. As the Seventh Circuit Court of Appeals recently stated, plenary Congressional powers to deport aliens "cannot be interpreted so broadly as to limit the Fourth Amendment rights of those present in the United States." *Illinois Migrant Council v. Pilloid*, 540 F.2d 1062 (7th Cir. 1976). By the same token, the border searches of automobiles for illegal aliens on less than probable cause, see, e.g. *United States v. Martinez-Fuerte*, 96 S.Ct. 3074 (1976), cannot be taken to permit sweeping and intrusive non-criminal surveillance of foreign visitors anywhere in the United States. See *Alameida-Sanchez v. United States*, 413 U.S. 266 (1973).

Even the argument that foreign power embassies and employees—as distinguished from a larger class of foreign visitors—can be subjected to broad surveillance is lacking in constitutional support and contrary to international law. There is little basis in Supreme Court case law for a distinction between types of foreigners lawfully in the United States. Moreover, the federal courts have long recognized the duty imposed by international law to "protect the residence of an ambassador or minister against invasion as well as any other act tending to disturb the peace or dignity of the mission or the member of the mission." *Frend v. United States*, 100 F.2d 691 (D.C. Cir. 1938), cert. denied, 306 U.S. 640 (1939). This obligation is more than a general principle of international law. The Vienna Convention on Diplomatic Relations, signed by the President and ratified by the Senate in 1974 expressly provides in Article 22 that:

(1) The premises of the mission shall be inviolable. *The agents of the receiving State may not enter them, except with the consent of the head of the mission.* * * *

(3) The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be *immune from search, requisition, attachment or execution.* [emphasis added.]

The Constitution expressly directs the President to carry out the laws and treaty obligations of the United States. Neither the Constitution nor the Vienna Conference Treaty will support the broad surveillance of foreigners which H.R. 7308 would permit. In considering the distinctions which the bill attempts to make between classes of foreigners lawfully in the United States, it is worth bearing in mind the Supreme Court's words of caution more than a century ago.

"The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances." *Ex Parte Milligan*, 4 Wall. 120, 121 (1866).

SHOULD CONGRESS CREATE A NATIONAL SECURITY EXCEPTION TO THE CRIMINAL STANDARD FOR WIRETAPPING?

Even if the Constitution were to permit a "foreign intelligence" exception to the criminal standard for wiretapping, the question would remain: Should Congress create such an exception? This question has been answered unequivocally in the negative by the Senate Select Committee on Intelligence Activities (the "Church Committee") and by Vice-President Mondale both at the time he was a member of the Church Committee and as recently as last August in an address before the American Bar Association. Furthermore, no evidence has been offered in the Senate hearings on S.1566, the counterpart to H.R. 7308, to justify any departure from the criminal standard, and Senator Kennedy, a principal sponsor of S.1566, has repeatedly expressed reservations about the bill's proposed exception to the criminal standard.

The Church Committee carefully reviewed the problem of national security wiretapping and reached the conclusion that "no American be targeted for electronic surveillance *except upon a judicial finding of probable criminal activity.*" *Intelligence Activities and the Rights of Americans*, Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, Book II, U.S. Senate, 94th Cong., 2d Sess. (1976), at 325 [emphasis added]. The extraordinary degree to which national security wiretaps have been misused for political purposes was well documented by the Committee and has been further demonstrated through successful litigation. *See, e.g., Zweibon v. Mitchell*, 170 U.S. App. D.C. 1, 516 F.2d 594 (D.C. Cir. 1975); *Halperin v. Kissinger*, 424 F.Supp. 838 (D.D.C. 1976); *Berlin Democratic Club v. Rumsfeld*, 410 F.Supp. 144 (D.D.C. 1976). In light of this history of wiretap abuses, the Church Committee concluded that if the existing criminal standard for wiretaps should prove to be too restrictive "to cover modern forms of industrial, technological or economic espionage not now prohibited," then the criminal laws should be amended rather than create a new dangerous basis for intrusive surveillance." Bk. II, at 326.

The rationale for the Church Committee's conclusion was incisively expressed by then-Senator Walter Mondale when he testified in July 1976 in opposition to the non-criminal standard in S.3197, the predecessor to H.R. 7308:

"[T]he fact is that if you give government the right to investigate Americans for things that are not crimes, there are ways of destroying persons without ever appearing in a courtroom * * * [I]f you cloak an administration with an ill-defined power to investigate Americans outside the law, and in total disregard of their constitutional rights, it is inevitable that the police will be used to achieve political purposes, which is the most abhorrent objective and feat that we sought to avoid in the creation of the Constitution and the adoption of the Bill of Rights. So I [see] the enormity of the dangers here, particularly where we pass legislation to permit it—up until now it has been their fault, but now we know, and if we authorize it from here on out, it is our fault."

Electronic Surveillance Within the United States for Foreign Intelligence Purposes, Hearings before the Subcommittee on Intelligence and the Rights of Americans, Select Committee on Intelligence U.S. Senate, 94th Congress, 2d Sess. on S.3197 (June 29, 1976), at 56-57.

As Vice President, Mr. Mondale reaffirmed his position on the importance of the criminal standard in a speech before the American Bar Association on August 5, 1977. The Vice President's statement on the criminal standard issue came after the Senate Judiciary Committee hearings on S.1566 had been completed, and in this respect it appeared to reflect an awareness within the Administration that a non-criminal exception in the bill is not necessary. In any event, the case for the exception has not been made.

The Administration has now had two opportunities to explain to Congress why a non-criminal standard is necessary. Neither occasion has produced any persuasive reasons why legitimate foreign intelligence investigations would be hampered by compliance with a criminal standard. As Senator Kennedy pointed out at the conclusion of the Senate Judiciary Committee hearings on

S.1566, the Administration witnesses did not meet their burden of proof. Hearings on S.1566 before the Committee on the Judiciary, U.S. Senate, 95th Cong., 1st Sess., June 14, 1977 [hereinafter "Judiciary Hearings"], at ——. No additional evidence to support the exception was offered at —— hearings conducted subsequently by the Subcommittee on Intelligence and the Rights of Americans of the Senate Select Committee on Intelligence.

Both Defense Secretary Harold Brown and CIA Director Stansfield Turner conceded before the Judiciary Committee that their agencies do not require authority to wiretap American citizens or foreign visitors not engaged in crime. As Secretary Brown put it, "the non-criminal standard is principally an FBI requirement rather than a DOD requirement." Hearings, at ——. This position was repeated at the Intelligence Committee hearings. Admiral Turner noted that any non-criminal surveillance the CIA would conduct would principally be directed against foreign powers and not against individuals. Hearings on S.1566 before the Subcommittee on Intelligence and Rights of Americans, Select Committee on Intelligence, U.S. Senate, 95th Cong., 1st Sess., July 21, 1977 (unpublished) [hereinafter "Intelligence Hearings"], at ——.

The arguments for the inclusion of a non-criminal standard in S.1566 and H.R. 7308 have come from the Department of Justice. Attorney General Griffin Bell at first suggested to the Judiciary Committee that a less strigent standard was needed for the investigation of foreign visitors (although the Ford Administration had decided it was *not* needed the year before) because of an increase in the number of "communist-bloc officials" travelling to the United States. But when asked by Senator Kennedy what specifically had changed in one year "in terms of the nature of the threat," the Attorney General could only suggest that "maybe you're dealing with a different set of people." Judiciary Hearings at ——. This assertion was not repeated in the subsequent hearings, although Senator Kennedy had invited the Department to attempt to show whether there was "an additional threat. . . to our security interests" that would warrant broader investigatory authority. *Id.* at ——.

Turning to the question of why it is necessary to authorize wiretaps on American citizens and resident aliens not engaged in crime, the Justice Department witnesses took the position that "the current espionage laws are not yet complete enough and clear enough to * * * reach all forms of espionage that need to be covered" [*Id.*, p. —]. They asserted that the "national defense" interests protected by the espionage laws are narrower than the "national security" interests protected by H.R. 7308. [*Id.*, pp. —]. As several other witnesses pointed out, however, the Supreme Court in the leading espionage case of *Gorin v. United States*, 312 U.S. 19, 28 (1941) has construed the terms "national defense" and "national security" to have similar meanings for a judge considering whether to issue a warrant. This point was brought out by the Attorney General himself, who stated in response to a request for an explanation of the supposed distinction between "national defense" and "national security": "I don't know if I can give you any more, other than to say: National security to me is broader than national defense". Judiciary Hearings, at ——.

This is the extent of the Administration's testimony to date relating to the need for a non-criminal standard in H.R. 7308. Following the Senate Judiciary Committee hearings on S.1566, Attorney General Bell sent a letter to the Committee responding to certain written questions. In this letter the Attorney General amplified his testimony by describing six hypothetical cases in which he asserted the government would be authorized to conduct a wiretap under S.1566, but not under the espionage laws. It is evident, however, that the espionage laws would be sufficient to authorize a wiretap in each case where it would also be authorized under the non-criminal standard in S.1566 and H.R. 7308 (see attached appendix).

THE APPROPRIATE STANDARD FOR H.R. 7308

H.R. 7308 should reflect the fundamental principle that no persons protected by the Constitution should be subjected to intrusive surveillance unless there is evidence that they are engaged in serious criminal conduct. Otherwise they should be left alone. In the context of national security, no persons should be targeted for electronic surveillance unless the Government has evidence they are engaging in criminal conduct which directly threatens national security.

To bring H.R. 7308 in line with this principle, we recommend the following alternatives:

1. Amend or Omit the Non-Criminal Standard for Americans

The non-criminal definition of "agent of a foreign power," Section 2521 (2)(B)(iii), should either be amended to reflect a criminal standard or omitted from the bill. To accomplish this, we call the Committee's attention to a proposed amendment to the companion bill, S.1566, which would add "likely to violate the criminal statutes of the United States" to this subsection. Alternatively, we refer to the recommendation of the Church Committee which calls for the omission of any non-criminal standard with the understanding that if certain conduct is considered dangerous to national security but not violative of the laws of the United States, amendment of the espionage laws should be considered. In any event, Congress should not set a dangerous precedent by authorizing the wiretapping of persons engaged in *lawful* conduct.

As we have pointed out, the Government has not met its burden of proof that this subsection is warranted. On the other hand, the government has interpreted this section far too broadly in arguing that *all of the hypothetical* cases can be reached under this standard. In either case this argues for deletion or amendment.

2. Amend the Criminal Definition of Agent of a Foreign Power Applicable to Americans

The criminal definition of "agent of a foreign power," 2521(B)(i) should be tightened considerably. First, to insure that the Government does not wiretap any Americans based on the speculation that they may one day in the indefinite future violate the law, the words "will involve" should be modified by the word "soon." More important, the section should be amended to insure that it will be invoked only when there is evidence of a crime directly affecting national security.

In the bill as introduced, the term "clandestine intelligence activities" is not defined and evidence of any criminal law violation can trigger a wiretap. Without specific definition, clandestine intelligence activity could be interpreted to mean any form of private political activity, including attending meetings or lobbying. It could apply to planning a demonstration against our involvement in a foreign conflict (like the Vietnam War) or lobbying for arms to Israel. Arguably, if picketing without a permit or civil disobedience were planned, persons engaging in these activities could be wiretapped. While this may seem far-fetched, we must remember that OPERATION CHAOS, COINTELPRO, and the NSA cable intercept programs were all based on such interpretations of "counterintelligence."

To avoid abuse, we believe that Congress should narrowly define "clandestine intelligence activity" in the bill and see that it reflects activity which amounts to evidence of possible espionage. In addition, Congress should specify in the subsection those national security crimes or related offenses which are proper concerns for counterintelligence investigative agencies—for example, those crimes listed in Section 2516 (1)(a) of the Omnibus Crime Control and Safe Streets Act having to do with national security.¹ In other words, the principle followed by Congress in Title III of the Safe Streets Act that all crimes do not warrant wiretapping should be followed in this legislation as well, since it would deter the government from engaging in overbroad surveillance. For example, to include the vague Foreign Agents Registration Act as a possible basis for wiretapping can result in extensive surveillance of lawful political activity and association. Enumeration of crimes would avoid this problem.

We emphasize that in the long history of executive authorization of national security wiretapping dating back to the 1940 order of President Roosevelt, the executive branch has always specified that wiretapping could only be conducted when there was evidence of espionage, treason, sabotage, or violations of the neutrality laws. See Warrantless FBI Electronic Surveillance, in *Book III, Final Report* of the Select Committee to Study Governmental Operations with respect to Intelligence Activities, 94th Congress, 2d Sess. Report No. 94-755. If Congress intends to reform intelligence activities, it would be unconscionable to authorize even broader surveillance than was permitted by executive order in the past.

¹ This is the underlying concept of H.R. 5032, which we endorse.

3. Amend the Conspiracy Sections Applicable to Americans

As we pointed out earlier, the conspiracy section of 2521(2) is far too broad. If the non-criminal standard remains in the bill, the conspiracy section should not apply to this subsection. A conspiracy to aid and abet others in what is by definition lawful conduct is two steps removed from criminal activity. As applied to criminal conduct, subsection 2521(B)(2)(iv) must be changed to cover only those who knowingly aid or abet any person whom they know to be engaged in activities described in the section. As presently drafted, a person could aid or abet a person in lawful activities and be wiretapped because the person is engaged in some other possible illegal or non-criminal "clandestine intelligence" activity.

4. Amend Definitions of Agent of a Foreign Power Applicable to Foreigners and Visitors.

Employees of a foreign government in the United States should not be subjected to wiretapping simply because of their status, and there should be no separate standard for foreign visitors and students. We believe that with adequate definition of "clandestine intelligence activities" and a clear relationship between such activities and national security crimes, the government will have sufficient authority to protect vital national security interests. The Constitution requires no less. Moreover, if we are to get at the problem of massive surveillance by foreign governments of the communications of United States citizens, we must not ourselves engage in similar sweeping surveillance.

In our testimony today, we have focussed on the critical issue presented by this legislation. However, in an attached appendix we suggest other important amendments that must be made in H.R. 7308, having to do with the procedure for approving wiretap authorizations, obtaining judicial certification for electronic surveillance, permitting a judge to go behind a certification, and insuring that intercepted conversations are minimized. We here call your attention to these important amendments and again reiterate our concern about the overbroad investigative standard in the current draft.

Under our constitutional system the wiretapping of persons who are engaged in lawful activity has no place. Moreover, in legislating controls over wiretapping, Congress must not set a precedent for legislated charters that would authorize continued intrusive surveillance of political activity by U.S. intelligence agencies.

ADDITIONAL AMENDMENTS

1. §2521(b)(6)(C) should be amended to delete the word "intentional".

Comment. The word "intentional" is an unnecessary qualification of "acquisition." It is not contained in subsections (A), (B) or (D) and should be deleted here.

2. §2521(b)(8) should be amended to add the following provision at the end of the section:

"Information obtained under the procedures of this chapter from a United States person who is not the target of surveillance shall not be maintained in such a manner as to permit its retrieval by the name of that person unless it is:

- (a) evidence of a crime; or
- (b) in a file maintained solely to respond to court orders related to electronic surveillance."

Comment: One way in which national security wiretaps have been abused is by the storing of information in the files of Americans who are overheard on the surveillance of foreign powers. The minimization procedures in §2521(b)(8) do not require minimization of surveillances directed at non-U.S. persons. Information acquired about a U.S. person can be stored so that it is routinely retrievable under the person's name. The amendment is intended to protect U.S. persons against such routine storage and retrieval practices.

3. §2524(a) should be amended to provide as follows:

"Each application for an order approving electronic surveillance under this chapter shall be made by the Attorney General in writing upon oath or affirmation to a judge having jurisdiction under section 2523 of this chapter. It shall include the following information—"

Comment: The requirement that all applications be made by the Attorney General should be an essential element in the legislative scheme of H.R. 7308, and must be restored to S.1566. Since the bill is a radical departure from the

Fourth Amendment, no further erosion of constitutional safeguards should be permitted by allowing wiretap applications to be made by any "federal officer."

4. §2524(a)(6)(7)(D), (7)(F), (8) and (10) should be amended to delete the clause, "When the target of the surveillance is not a foreign power as defined in section 2521(b)(1)(A), (B) or (C) * * *"

Comment: S.3197 required a factual description of the nature of the information sought and the method of surveillance to be provided to the judge with respect to all wiretap warrant applications. If the warrant procedure is to have meaning at all, the judge should be told what information is sought in all circumstances.

5. §2525(a)(5) should be amended as follows:

"(5) The application which has been filed contains the description and certification or certifications specified in section 2524(a)(7), the certification or certifications are not arbitrary or capricious, and a judicial finding has been made that the certification or certifications are correct on the basis of the statement made under section 2524(a)(7)(E)."

Comment: One of the principal new features of H.R. 7308 is supposed to be that it "provides for judicial review of the certification by Executive Branch officials that foreign intelligence information is sought" [Justice Department Memorandum accompanying 4/27/77 Draft, p. 1]. This claim is inflated. The "arbitrary and capricious" standard of review is an inadequate standard for Fourth Amendment purposes. Unlike an administrative proceeding in which such a standard is applied, the warrant application is made in an *ex parte*, non-adversarial setting. If the warrant procedure is to have any meaning at all, the judge must be permitted to probe the certification to determine whether there is probable cause to believe that it is accurate.

6. §2525(b)(1)(D) should be amended to delete the clause, "when the target of the surveillance is not a foreign power, as defined in section 2521(b)(1)(A), (B), or (C) * * *"

Comment. The court should be required in all cases to specify in the order the means by which the electronic surveillance will be effected.

7. §2525(b)(2)(B) should be amended to insert the word "may" between "person" and "furnish."

Comment. Private persons should not be required to cooperate in placing wiretaps. This provision should permit them to cooperate, thereby protecting them against liability. No penalty should attach to private persons who decline to assist in placing surveillances.

8. §2525(c) should be amended to eliminate the one year authorization period for foreign power surveillance and limit all authorizations to ninety days.

Comment. The extraordinary intrusions permitted by this bill are dramatically demonstrated in the provision authorizing surveillance of foreign power without review for one year periods. The ninety day periods permitted for United States persons are already far beyond the limits of Fourth Amendment reasonableness.

9. §2526(c) should be amended by deleting the last nine lines of the section, beginning with, "provided that, in making this determination * * *" and substituting in its place the following:

"In making such a determination, the court, after reviewing a copy of the court order and accompanying application *in camera*, shall order disclosed to the person against whom the evidence is to be introduced the order and application, or portions thereof, if it finds that there is a reasonable question as to the legality of the surveillance and that such disclosure would promote a more accurate determination of such legality, or that such disclosure would not harm the national security. If the court determines that the electronic surveillance of the person aggrieved was conducted unlawfully, it shall turn over the information obtained or derived from the surveillance to such person. If the court determines that the electronic surveillance of the person aggrieved was conducted lawfully, it shall turn over a copy of the court order and accompanying application to such person only if the Government enters into evidence information obtained or derived from the surveillance."

Comment. The procedure in the bill as it relates to the government using the fruits of an electronic surveillance in a trial raises serious *Alderman* and constitutional issues. Where the government seeks to use such evidence it should be required to disclose the warrant. Moreover, it is not sufficient for the court to suppress the evidence if illegally obtained; it must turn the evidence over to the defendant for a taint hearing.

10. §2527 should be amended to add the following at the end:

"(c) the periods of time for which applications granted authorized electronic surveillances and the actual duration of such electronic surveillances; and (4) the number of such surveillance terminated during the preceding year."

Comment. These important reporting provisions were contained in S. 3197 and should be reinstated in H.R. 7308 and S. 1566.

11. §4(a)(1) of the conforming amendments should be amended to delete the clause, "as otherwise authorized by a search warrant or order of a court of competent jurisdiction."

Comment. This clause would render meaningless the requirement that the procedures of this bill or Title III be followed for all electronic surveillance. Common law warrants which do not follow the procedures of this legislation should not be permitted to authorize any surveillance.

12. S.1566 should be amended to prohibit surveillance of U.S. persons overseas except pursuant to the procedures of the bill.

Comment. The record of the Church Committee and the Senate Intelligence Committee indicates that there is a substantial amount of warrantless wiretapping of U.S. persons overseas by federal intelligence agencies. The Constitution protects the rights of Americans overseas against actions by the U.S. Government, *Reid v. Covert*, 354 U.S. 1 (1957), and at least one court has held that warrantless wiretapping of Americans overseas is illegal under the Fourth Amendment. *Berlin Democratic Club v. Rumsfeld*, 410 F.Supp. 144 (D.D.C. 1976).

APPENDIX : THE JUSTICE DEPARTMENT HYPOTHETICALS

In response to questions posed by Senator James Abourezk, Attorney General Griffin Bell sent a letter to the Senate Judiciary Committee wherein he outlined six hypothetical cases which Justice Department officials contend warrant a departure from a criminal standard in the Foreign Intelligence Surveillance Act of 1977. According to the Justice Department, these cases could not be reached under current espionage laws. After studying the cases, it is our contention that in three of the cases outlined, a judge would issue a warrant under current espionage laws and that in the remaining three cases, a judge would not issue a warrant even under S.1566 as currently drafted. In sum, the Administration has not made a case for departing from the criminal standard in this Act.

Case Number One.—"A *Spinelli-qualified*² informant reports that A has, pursuant to a foreign intelligence service's direction, collected and transmitted sensitive economic information concerning IBM trade secrets and advanced technological research which ultimately would have a variety of uses including possible use in a sophisticated weapons system, but which is not done pursuant to a government contract. A is placed under physical surveillance and is seen to fill dead drops which are cleared by a member of a Communist Bloc embassy suspected of being an agent of its foreign intelligence service."

Comment: This case turns on whether commercial information such as an IBM trade secret which might be used in a sophisticated weapons system constitutes "national defense" information or information "relating" to the national defense under 18 U.S.C. 794. The Justice Department contends that it may not. However, the Supreme Court, in *Gorin v. U.S.*, 312 U.S. 19 (1941), stated: "National defense. . . is a 'generic concept of broad connotations, referring to the military and naval establishments and the related activities of military and naval establishments and the related activities of national preparedness.' We agree that the words 'national defense' in the espionage act carry that meaning." *Id.* at 28. Thus, if a court found that a person fit all of the other criteria of 2521 (b)(2)(B) and that the information being gathered was from an industrial source, it still would have no difficulty finding that there was probable cause to believe that 18 U.S. 794 was being violated.

Case Number Two.—"Pursuant to the physical surveillance of a known foreign intelligence officer, D is seen to clear dead drops filled by that officer. On the second Tuesday of every month B drives by the officer's residence, after engaging in driving maneuvers intended to shake any surveillance. Within one block

² *Spinelli v. United States*, 393 U.S. 410 (1969), states the requirements by which the reliability of an informant and his information must be tested for purposes of obtaining a search warrant.

of the officer's residence B always sends a coded citizen's band radio transmission. B is discovered to have cultivated a close relationship with a State Department employee of the opposite sex specializing on matters dealing with the country of the intelligence agent."

Comment: First it is not clear who the government wants to place under electronic surveillance. Unless the vague "conspiracy" section, 2521 (b) (2) (iii) remains in the bill, the state department employee could not be wiretapped. Of course, the conspiracy section should be stricken from the bill. The Justice Department does believe it has probable cause to tap B under S.1566. However, it would also have the authority to seek a warrant if 18 U.S.C. 794 were the standard.

The Justice Department seems to assume that it is necessary to know precisely what the content of the information is to establish what law is being violated, if any, in order to secure a warrant. However, the fact that the information is being passed to a "known foreign intelligence officer" should be sufficient to establish probable cause under 794. Moreover, 2521 (b) (2) (B) (i) does not appear to require that the court find that a particular statute will be violated but only that the activities "involve or will involve a violation of the criminal statutes of the United States." And given the very broad interpretation of the phrase "national defense" by the Supreme Court, it is doubtful that any court would pause to inquire into the contents of the material before issuing a warrant. Certainly since all other elements required by S.1566 have been met, a court would have probable cause to believe that a conspiracy to violate 18 U.S.C. 794 was underway.

Case Number Three.—"C, using highly sophisticated equipment developed in a hostile foreign country, taps data transmissions lines of several electronics corporations. These lines do not carry communications which can be aurally acquired, nor do they carry classified information, but the information carried, which is not available to the public, when put together, can give valuable information concerning components which are used in United States weapons systems."

Comment: This case, like Case Number One, turns on the meaning of "national defense" and "related" information in current espionage laws. Nothing in Section 793 of Title 18 limits such information to data that is classified or developed pursuant to contract. Again, given the Court's broad reading in *Gorin*, the "valuable information concerning components which are used in United States weapons systems" would be covered under 18 U.S.C. 794. Since all the other elements under 2521 (b) (2) (B) have been met, there would be probable cause to find that a conspiracy to violate Section 794 of Title 18 existed.

Case Number Four.—"D, a headwaiter in a fashionable Washington, D.C. restaurant, acts as a bookmaker and procurer for several well known and highly placed customers. A *Spinelli*-qualified informant reports that D has been instructed by a foreign intelligence service to relay all embarrassing and personally damaging information about these customers to a resident agent of the foreign intelligence service in Washington. The informant reports that at least one customer has been blackmailed in his job as a Government executive into taking positions favorable to the nation for which the resident agent works."

Comment: No warrant could be issued either under section 794 of Title 18 or under S.1566. D is not collecting or transmitting information of the kind referred to by S.1566 or section 794 of Title 18. If the Justice Department's argument is that by getting one kind of information, D could trade it for another, then the Justice Department is interpreting S.1566 in a way which eliminates the safeguards built into it. Moreover, one should also ask if it is necessary to tap this person. For example, his contact at the embassy could be tapped under the "foreign power" provision of S.1566 and D could be surveilled by less intrusive means. Those who come into contact with D could be warned.

Case Number Five.—"A *Spinelli*-qualified informant reports that E has, pursuant to the direction of a foreign intelligence service, engaged in various burglaries in the New York area of homes of United States employees of the United Nations to obtain information concerning United States positions in the U.N."

Comment: First of all, U.S. employees at the U.N. do not have advance information on U.S. positions at the United Nations. In any case, this situation is trivial. Such information should not be in an employee's home and E could be arrested for burglary. Or is the Justice Department assuming that E discusses his burglary targets on the phone?

Case Number Six.—“A telephone tap of a foreign intelligence officer in the United States reveals that F, acting pursuant to the officer's direction, has infiltrated several refugee organizations in the United States. His instructions are to recruit members of these organizations under the guise that he is an agent of a refugee terrorist leader and then to target these recruited persons against the FBI, the Date County Police, and the CIA, the ultimate goal being to infiltrate these agencies. F. is to keep the intelligence officer informed as to his progress in this regard but his reports are to be made by mail, because the U.S. Government cannot open the mail unless a crime is being committed.

Comment: As in Case Number Four, no tap would be permitted under S.1566. This is not the kind of information contemplated under the Act. A tap would not be permitted under section 794 of Title 18 as well. If F is to report in “by mail” is F going to do his recruitment by telephone? Does the Government plan to read S.1566 to permit the refugee organizations to be wiretapped to find out if they are infiltrated? These are dangerous readings of S.1566. The proper action is to allow the FBI, having this much information, to foil F's scheme.

In sum, the Justice Department is “reaching” for the exceptional case to establish the need for a deviation from the criminal standard. Contrary to all experience with judicial warrants in the wiretapping area, the Department presumes “strict construction” by judges will hamper legitimate intelligence. The Justice Department should be reminded that only seven judges, picked by the Chief Justice of the U.S. Supreme Court, will review these warrant requests. Of course, this does not give the Justice Department any certainty that all applications will be approved. But the criminal standard does not appreciably make the process more risky for the government. On the other hand, the non-criminal standard is a dangerous precedent for abuse.

**TESTIMONY OF MR. JOHN H. F. SHATTUCK, EXECUTIVE DIRECTOR,
AMERICAN CIVIL LIBERTIES UNION, WASHINGTON OFFICE,
ACCOMPANIED BY MR. JERRY J. BERMAN, LEGISLATIVE COUNSEL,
AMERICAN CIVIL LIBERTIES UNION**

Mr. SHATTUCK. Thank you, Mr. Chairman.

We of the American Civil Liberties Union welcome this opportunity to appear before this committee on an issue of obvious importance to the Nation and to the American Civil Liberties Union. Let me say at the outset that we look forward to working very closely with this committee in its important work on this issue and other issues in the months ahead.

Mr. Berman, who is the legislative counsel to the American Civil Liberties Union, and I have submitted a lengthy statement for the record, and I will try to cover as many of its points as possible orally, but certainly not all of them.

The wiretap legislation before you has been, in our view, proposed for the same reasons that this committee was constituted, and that is that the Congress must exercise meaningful oversight over the intelligence community to insure that intelligence activities no longer violate the rights of Americans.

The enactment of a bill to prohibit warrantless and overbroad wiretapping would be a major step toward intelligence reform, and would signify a resolve on the part of Congress to bring our intelligence agencies under the rule of law. We believe that legislation setting forth a strict and narrow standard for the use of this most intrusive of all investigative techniques would protect the first and fourth amendment rights of citizens and would set a positive precedent for charters defining the general investigative authority of the U.S. intelligence agencies.

I think it is important for us all to understand that wiretapping legislation and the proposed charters, which this committee will soon be addressing, are closely related, and the reason is that whatever investigative standard is approved in the wiretap area will be a significant precedent with far-reaching ramifications. If Congress enacts a wiretap bill with an overbroad or an indefinite standard, the intelligence agencies will continue to violate the first and fourth amendment rights of citizens in a wide range of other investigative areas where the intrusion is not so great as in wiretapping.

If the wiretap standard is too low, in other words, Congress could end up, in our view, authorizing rather than curtailing intelligence agency abuses.

In our statement this morning, Mr. Chairman, we will focus for the sake of simplicity on H.R. 7308, the administration's bill which was introduced last May, although in many instances our comments are also relevant to the other three bills that are pending before the committee, and we would be happy to supply more detailed comments on those bills at another time.

Before discussing our central concerns about H.R. 7308 as presently drafted, let me commend to the committee several key aspects of the bill which we think are important and very useful, particularly its elimination of any inherent power of the President to authorize warrantless national security wiretaps; its requirement that all such wiretaps be conducted pursuant to a judicial warrant; and its specificity as to the showing that the Government must make to obtain a warrant to conduct electronic surveillance for foreign intelligence purposes.

But despite the positive aspects of H.R. 7308 which we applaud and endorse, we believe the bill is seriously flawed in one key respect because it permits the Government to wiretap persons without probable cause or even a reasonable suspicion to believe that they are engaged in crime.

Let's look at those who could be routinely wiretapped under this bill. The bill authorizes continuous surveillance for 3 months or more of four classes of people who are not suspected of engaging in criminal activity. First, it permits surveillance of officers or employees of a foreign power without any showing that they are engaged in either criminal or intelligence activities. In effect, it declares open season on the employees of a foreign government or corporation who are subject to wiretap at any time simply because of their status, and with no additional showing.

The second category of persons who can be tapped without any suspicion they are committing crimes is foreigners who are suspected of being engaged in undefined clandestine intelligence activities which might be harmful to the security of the United States. In the absence of any definition of clandestine intelligence activities, we believe that there are few safeguards, if any, to protect innocent foreign businessmen, visiting foreign relatives, tourists or any other foreign visitors to the United States from becoming the targets of intelligence wiretapping.

The third category of persons who are covered by this noncriminal standard is Americans who are suspected of secretly transmitting

or collecting information pursuant to the direction of a foreign intelligence network or service.

Now, these taps are authorized under a very complicated formula, which is:

Under circumstances which indicate the transmission or collection of such information or material would be harmful to the security of the United States, or that lack of knowledge by the United States of such collection or transmission would be harmful to the security of the United States.

This formula, in our view, amounts to a new noncriminal definition of espionage, with the result that the President is given the authority to wiretap Americans whose conduct has not been made a crime by Congress.

Finally, the fourth category and perhaps the most disturbing one of persons who can be tapped under this bill even though they are not suspected of engaging in a crime, are those who knowingly aid or abet persons engaged in undefined clandestine intelligence activities, or the secret transmission or collection of information. These people are twice removed from the criminal standard: they can be tapped for aiding or abetting others whose conduct is lawful, and they need not even know the nature of that conduct so long as they are knowingly aiding the persons engaged in it. And I think it is fair to say that under this standard, Mr. Chairman, even Martin Luther King could arguably have been tapped, as he was, for knowingly associating with a person suspected of secret Communist activities, even though King did not know anything about those activities.

Now, the noncriminal standard in these four categories that I have just outlined would permit the Attorney General, if he were to be insensitive to civil liberties—and we by no means suggest that the current Attorney General is—to define clandestine intelligence activities or the secret collection or transmittal of national security information to permit the kinds of wiretapping that have generally been condemned as abuses, at least some of them.

For example, the so-called Kissinger 17 taps on journalists and Government employees suspected of leaking information could be arguably permitted if the definition of foreign intelligence network were nonexistent, as it is under this bill. And in fact, yesterday you recall, Mr. Chairman, the Attorney General said that he would have to think about this example. He wasn't sure whether or not it was covered by the bill, which I think indicates the problem.

Political activity protected by the first amendment could be reached in a variety of circumstances, such as the fundraising activities of Americans on behalf of Israel, something which many Americans have engaged in, or the receipt of an honorarium to speak to a foreign lobbying group which might arguably make someone an employee of a foreign power.

In short, I think the wiretap net in 7308 could be cast quite widely over noncriminal conduct, and we believe that is a dangerous precedent for this bill to set.

I would like to spend the next few minutes explaining why the criminal standard is so important, and I think the best way to start is to simply look quickly at the nature of wiretapping itself and its relation to the fourth amendment.

Wiretapping is the most intrusive and inherently unreasonable form of search and seizure. Even when a tap is placed on a person who is suspected of engaging in criminal activity, it offends the fourth amendment because it necessarily involves the interception of every conversation, incriminating or not, that occurs over the period of surveillance, which is generally at least 30 days under the criminal standard in title III.

A wiretap is far more intrusive than the search of a home or of a person, even when it is conducted pursuant to a court order, and I think this dramatically demonstrated by the recently released statistics of the Administrative Office of the U.S. Courts which show that in 1976 the average court-ordered Federal wiretap involved the interception of 1,038 separate conversations between 58 persons over a period of 3 weeks. So even in the case of a criminal investigation, far more limited than the open-ended 90 day or 1 year intelligence investigations authorized by H.R. 7308, a wiretap inevitably has a dragnet effect which strains the fourth amendment to the breaking point.

When the fourth amendment was adopted, and for a long time afterward, the only searches that could be conducted pursuant to it were for contraband or other items that could not legally be possessed, and the criminal standard was quite clear right from the outset. And when the Supreme Court did away with the contraband rule in 1967, it emphatically restated the basic principle, that searches and seizures must be conducted pursuant to a criminal standard, and that is the rule today. The only search and seizure cases in which the Supreme Court has upheld a noncriminal standard are the so-called administrative search cases, and these are clearly distinguishable from wiretap cases. First of all, administrative searches involve a very limited intrusion, such as the walk-through of an apartment in search of a housing code violation. Second, they don't involve the seizure of speech protected by the first amendment. And third, unlike an intelligence wiretap, they don't present a deliberate search for information unrelated to crime. Even a search at the borders for illegal aliens, or a housing inspection, is basically pegged to a law violation standard which we don't find in H.R. 7308.

In short, H.R. 7308 raises serious constitutional questions when it departs from the fundamental criminal standard that has always governed fourth amendment law.

The next question is whom does the fourth amendment protect? It is sometimes argued that foreign visitors and employees of a foreign power in the United States are less protected by the Bill of Rights than American citizens and resident aliens. This is one of the premises of H.R. 7308, but again, I think there is little basis for it in constitutional law.

The fourth amendment, of course, refers not to the rights of citizens or residents, but rather to the right of the people to be free from unreasonable searches and seizures, and the people who are protected by the fourth amendment have been held to include all persons within the territorial jurisdiction of the United States.

The leading fourth amendment case is *Abel v. United States* in which a Russian spy challenged the search of his apartment after his

arrest for engaging in espionage. The Supreme Court, in *Abel*, held that the search had been conducted incidental to a valid deportation arrest and was therefore legal itself, but the important point is that in that case the Supreme Court majority and the dissent all assumed that aliens, even those who enter this country illegally, are entitled to the full protection of the fourth amendment.

But even if the Constitution were to permit a foreign intelligence exception to the criminal standard for wiretapping, we believe that the question would remain—and it is certainly a question before this committee—should Congress allow such an exception, should it create such an exception in this bill?

This question has been answered unequivocally in the negative by the Senate Select Committee on Intelligence activities and by Vice President Mondale both at the time he was a member of that committee and as recently as last August when he addressed the American Bar Association.

Furthermore, we submit that no evidence has been offered to justify a departure from the criminal standard in H.R. 7308 in any of the hearings that have occurred on its counterpart S. 1566 in the Senate, or indeed before this committee.

The Church committee in the Senate carefully reviewed the problems of national security wiretapping and reached the conclusion that “no American be targeted for electronic surveillance except upon a judicial finding of probable criminal activity.”

I think the rationale for the Church committee’s conclusion was repeated by Senator Mondale when he testified in July 1976 in opposition to the noncriminal standard in the predecessor bill to H.R. 7308 in the Senate. As Vice President, Mr. Mondale has reaffirmed his position on the importance of the criminal standard, and his statement on the issue came after the Senate Judiciary Committee hearings on the parallel bill had been completed, and it appeared to reflect an awareness within the administration that a noncriminal exception in this bill is not necessary. In any event, the case for the exception, we submit, has not been made.

The administration has had two opportunities before these hearings to explain to Congress why the exception is necessary, and on neither occasion has it produced any persuasive reasons why legitimate foreign intelligence investigations would be hampered by a criminal standard.

Both Defense Secretary Harold Brown and CIA Director Stansfield Turner told the Senate Judiciary Committee that their agencies do not require authority to wiretap American citizens or foreign visitors not engaged in crime. The arguments for the inclusion of a noncriminal standard in this bill have come entirely from the Department of Justice.

I should say we were pleased to hear the Attorney General say yesterday that he has a good deal of flexibility on this matter and that he now regards the noncriminal standard as virtually, I think he said to Congressman Mazzoli, “tantamount to a crime.”

The main point of disagreement on this issue appears to be over whether the national defense language in the espionage laws is narrower than the national security considerations in H.R. 7308, and

although the Justice Department says it is, and says that it is concerned about the possibility of a narrow reading of the espionage laws and the criminal standard, the Supreme Court has held otherwise. In the leading case construing the espionage laws, *Gorin* against the United States, the Supreme Court defined the term "national defense" broadly enough to include any conceivable national security interest covered by the noncriminal standard in H.R. 7308.

Let me just quote very briefly from that definition. The Supreme Court said:

National defense is a generic concept of broad connotations referring to the military and naval establishments and the related activities of national preparedness. We agree that the words "national defense" in the Espionage Act carry that meaning.

That is the definition that would be operative in any criminal standard that would be put into this bill by amendment, and I think it is fair to say that it would cover virtually every interest that the bill now seeks to protect.

In fact, following the Senate Judiciary Committee hearings, the Attorney General sent a letter to the committee responding to certain written questions, and in that letter he amplified his testimony by describing six hypothetical cases in which he asserted the Government would be authorized to conduct the wiretap under this bill but not under the espionage laws, but in close examination of those hypotheticals, and in light of the *Gorin* decision, we think the espionage laws would be sufficient to authorize a wiretap in each hypothetical where it would also be authorized under the noncriminal standard in H.R. 7308, but in three of those hypotheticals, we feel that neither the noncriminal standard nor the espionage laws would be sufficient to authorize a wiretap.

How, then, should H.R. 7308 be amended? Let me just conclude by outlining briefly the areas in which we feel amendment is essential in this noncriminal standard area.

In general, the bill should provide that no person should be targeted for electronic surveillance unless the Government has evidence they are engaging in criminal conduct which directly threatens national security. First, the noncriminal definition of "agent of a foreign power" should either be amended to reflect a criminal standard or be omitted from the bill. To accomplish this, we suggest adding the phrase "likely to violate criminal statutes of the United States" to this subsection, that is (iii) of the existing noncriminal standard, 2521 (b) (2) (B) (iii).

Alternatively, we would refer to the recommendation of the Church committee which calls for the omission of any noncriminal standard with the understanding that if certain conduct is considered dangerous to the national security but does not violate the laws of the United States, amendment of the espionage laws should be undertaken.

Second, the criminal definition of "agent of a foreign power" should be tightened considerably. First, to insure that the Government does not wiretap any Americans based on the speculation that they may one day in the indefinite future violate the law, we suggest that the words "will involve" should be modified by the word "soon."

More important, the section should be amended to insure that it will be invoked only when there is evidence of a crime affecting national security.

To avoid abuse, Congress should narrowly define "clandestine intelligence activity." The word is now undefined in the bill and we think one of the principal concerns for the possibility of abuse, and we think it should see that that term reflects activity which amounts to evidence of possible espionage, again bearing in mind the broad reading of espionage that the Supreme Court has established.

In addition, Congress should specify those national security crimes or related offenses which are proper concerns for counterintelligence investigative agencies: For example, the crimes now listed in section 2516 of the Wiretap Act, the Omnibus Crime Control Act which have to do with national security.

In other words, the principle that Congress followed in enacting the wiretap act should be followed in this legislation, and that is that not all crimes warrant wiretapping. In this case, it is the national security interest that is at stake, so it should be national security crimes that are enumerated. For example, to include the vague Foreign Agents Registration Act as a possible basis for wiretapping could result in extensive surveillance of lawful political activity and association.

Third, as I pointed out earlier, the conspiracy section of the bill is far too broad and requires substantial amendment. And as applied to criminal conduct, this section must be changed to cover only those who knowingly aid or abet any person whom they know to be engaged in activities described in the section.

Fourth and finally, employees of a foreign government in the United States should not be subjected to wiretapping simply because of their status, and they should not be treated separately and foreign visitors and students should not be treated separately from others who are subject to a standard of reasonable suspicion to believe that they have committed a crime.

Now, in our testimony today, Mr. Chairman, we have focused on what we believe is the critical issue presented by this legislation, and we are prepared to amplify our views on this critical issue. I should point out for the record that our views are shared by a wide number of other organizations, including Common Cause, the National Urban League, and various others who have sent a letter to the Attorney General which we would like to submit for the record.¹

In an attached appendix to our prepared statement, we have suggested other important amendments that should be made in H.R. 7308, and we are prepared to answer questions about those. They relate to the procedure for approving wiretap authorizations, obtaining judicial certification and ensuring that interception of conversations are minimized.

In conclusion, let me say, Mr. Chairman, that under our constitutional system, the wiretapping of persons who are engaged in lawful activity has no place, and that in legislating controls over wiretapping, Congress must not set a dangerous precedent that would authorize continued intrusive surveillance of political or other lawful activities

¹ See appendix D.

by the intelligence agencies. After Dean Pollak has had an opportunity to present his statement, Mr. Berman and I would be happy to answer any questions that you may have.

Thank you.

Mr. MURPHY. Thank you very much, gentlemen.

Dean Pollak?

Mr. POLLAK. Congressman, I am happy to proceed in any way you wish, and if you would rather question Mr. Shattuck and—

Mr. MURPHY. If you have any comments, we would like to hear them, or you can give your statement.

[The prepared statement of Mr. Louis H. Pollak follows:]

PREPARED STATEMENT OF LOUIS H. POLLAK

Each of the four pending bills has the laudable objective of bringing within a statutory framework the hitherto substantially unregulated process of foreign intelligence surveillance. The four bills reflect three different approaches to the problem:

1. H.R. 5632 is in a sense the simplest of the three approaches, for it would incorporate the regulation of foreign intelligence surveillance into the existing statutory framework for judicial oversight of electronic surveillance conducted as an incident of federal and state law enforcement (Chapter 119 of Title 18). The simplicity of this approach is appealing, but it also has the serious limitation that electronic surveillance of foreign intelligence information not in aid of law enforcement falls wholly outside the bill. A President who felt constitutionally obligated to continue the hitherto unregulated electronic surveillance of foreign intelligence information would, presumably, not feel guided or constrained by H.R. 5632.

2. H.R. 5794 and H.R. 7308 build upon S. 3197 which received extended consideration in the Ninety-Fourth Congress. That proposal, a comprehensive legislative effort to insure judicial oversight of the process of foreign intelligence surveillance, was the product of close collaboration between Senator Kennedy and Attorney General Levi. That bipartisan initiative on issues of great magnitude and complexity reflected great credit on President Ford and Attorney General Levi on the executive side, and on Senator Kennedy and his fellow sponsors on the legislative side. It is very gratifying that President Carter and Attorney General Bell have committed the new administration to this important objective, as evidenced by the administration's support of H.R. 7308.

3. H.R. 9745 is, in my judgment, an inadequate approach. In excluding judicial oversight of surveillance of foreign intelligence information, the bill in effect simply would provide legislative ratification of the very system of unsupervised executive discretion which Presidents Ford and Carter properly believe to be incompatible with the preservation of fundamental constitutional guarantees.

TESTIMONY OF MR. LOUIS H. POLLAK, DEAN, UNIVERSITY
OF PENNSYLVANIA LAW SCHOOL

Mr. POLLAK. All right, fine.

Mr. Chairman, I first of all want to express my gratitude at the opportunity of testifying this morning on these very important issues. I am delighted to be able to join Mr. Shattuck and his colleague from the American Civil Liberties Union and regret that we don't have the pleasure of Professor Bork's company, too. I have been a colleague of Professor Bork's for many, many years and would have valued hearing his thoughts on this important legislation, but I understand that you anticipate that you will have the benefit of his testimony at a later time.

The mention of Mr. Bork reminds me that the very first thing I would like to say is that the legislation that we are considering—I

will focus on Mr. Rodino's bill, H.R. 7308, but with attendant attention to the other bills, including Congressman McClory's bill, Congressman Kastenmeier's bill and Congressman Railsback's bill—all of these take us back to what seems to me an enormously important initiative that was taken by President Ford's administration when Mr. Levi was Attorney General and Mr. Bork was the Solicitor General, in working primarily with Senator Kennedy and with other congressional leaders in a bipartisan effort to begin to introduce into a statutory framework this enormous area of theretofore essentially unregulated activity of governmental surveillance in the foreign intelligence field.

It seems to me that it was one of the actions taken by President Ford and the leaders of the Justice Department on a bipartisan basis with congressional leaders which deserves enormous credit, and I think it is equally to the credit of this administration—President Carter and Attorney General Bell—that they have continued to build on that very important initiative, as is reflected in their strong support for H.R. 7308 and its Senate analogue.

I, for my part, can't think of an initiative which would contribute more substantially to our sense that we are moving the rule of law forward than to bring within a legislative framework the supervision of investigative techniques of such great importance from a national security point of view, but also, as Mr. Shattuck has pointed out so very well, susceptible of abuses of a nature which can and ought to be restrained.

I, too, would like to focus on H.R. 7308, which would seem, with its Senate counterpart, to be the legislative initiative which, in its existing form or a form very close to it, is most likely of attainment of our common objectives, and I think that Mr. Shattuck has properly focused our attention on the principal problem that confronts Congress in the drafting of proper legislation. To what extent will it be possible for the Congress—in reconciling the national security interests and the Congress's responsibility in protecting individual rights—to what extent will it be possible for the Congress, in the resulting legislation, to adhere to something very close to the criminal standard which is customary for us in permitting judicial warrants looking in the direction of searches, or, in this area of wiretaps?

Now, before addressing myself directly to that issue, that tension—and I suppose it is a tension that might be described as characterizing the differences between H.R. 7308 and Congressman Railsback's bill on the one hand, and Congressman Kastenmeier's bill on the other—before addressing that issue directly, let me just say a couple of words about smaller issues.

First, I regard H.R. 7308 as it stands as building on and in certain significant respects improving its predecessor bill S. 3197, introduced into the last Congress by Senator Kennedy. That was the bill to which I have already referred that reflected the joint approach taken by President Ford and Attorney General Levi and Senator Kennedy and his cosponsoring colleagues.

The improvements that particularly come to my mind are two, one already referred to by Mr. Shattuck, which is to say the elimination of the language which either acknowledged or did not acknowledge

the inherent power of the President to do something or not to do something, depending on how one read that language, whose objective, I guess, was ambiguity.

I think the Congress does itself a service by not trying to legislate constitutional dilemmas, which I think in effect was the objective, a perfectly understandable objective, but an objective which I think is better served by eliminating the language entirely.

Second—and I guess this is a technical matter but I regard it as a matter which is of some importance—one of the flaws in S. 3197, in my view, was that it made no provision for the suppression of evidence taken in those emergency situations in which the Attorney General was authorized to wiretap in advance of getting a judicial order, and in which the Attorney General's application for an order was then denied or at least did not receive judicial approval, and I take it as a significant advance that on page 20, line 13 of Mr. Rodino's bill, the sentence beginning "In the event that" now provides for exactly that missing protection.

Mr. Shattuck had expressed his concern, a concern which I share, with what he sees as the looseness of the "conspires with or knowingly aids" language contained in section 2521(b)(2)(A)(iii) and again on page 4 at line 18, 2521(b)(2)(B)(iv).

You will remember, Mr. Chairman, that Mr. Shattuck illustrated his concern about what he thought the looseness of that language, by suggesting that it would have authorized the tapping, which unhappily did occur, apparently, of Rev. Martin Luther King. I would hope, Mr. Chairman, that if that language is not changed, this committee would make it clear and the Congress would make it clear that it is indeed not susceptible of that loose interpretation.

I would not read "knowingly aids or abets" in the way which Mr. Shattuck says we would be obliged to do. I would read it, and I would hope that if this is written into law, Congress would accept this language on the understanding, only on the understanding that "knowingly" there means "knowingly" in the sense of being deliberately aware of the activity which the aider or abetter or coconspirator is charged with having aided or abetted or conspired with.

Mr. McCLORY. Would the Chairman yield?

Mr. MURPHY. Surely.

Mr. McCLORY. For a clarifying question.

In Mr. Shattuck's statement, he said you could arguably involve Martin Luther King, Jr., in wiretapping because he "knowingly associated," and he is interpreting or defining the word "knowingly aided" which is in the bill to mean "knowingly associated." "Aiding" and "associating" mean two different things, don't they?

Mr. POLLAK. Well, they do to me, Congressman, and I am delighted to have your endorsement of that.

Mr. McCLORY. But I think in the report, if this bill is reported, that we should just state flatly that we do not mean "association" when we say "aiding."

Mr. POLLAK. I would regard that as very helpful, and without meaning to put words in his mouth, I imagine Mr. Shattuck would be willing to abandon his reading of the bill in favor of yours, Congressman.

Now, let me also add, I generally associate myself with the recommendations of a technical nature made to your committee yesterday by Mr. Imlay, the General Counsel of the Administrative Office of the U.S. Courts. Without going into them in detail, it seems to me that what he suggested with respect to the role of the judges who would be designated for special service under H.R. 7308 makes good sense.

May I finally turn to one very small technical matter before I address the central issue which Mr. Shattuck put before us. On page 22 of the bill, Mr. Chairman, in line 12 appears the phrase "if the Government affidavit asserts that an adversary hearing would harm the national security or the foreign affairs of the United States." This relates, Mr. Chairman, to that situation in which there is a judicial test of the propriety of the warrant which has resulted in a surveillance, and the judicial test arises because the Government seeks to introduce into a judicial proceeding or quasi-judicial proceeding evidence which is the fruit of that surveillance.

The question I would raise is simply this, Mr. Chairman. The reference in line 12 to an "affidavit" does not indicate who the affiant is to be, and given the nature of what is to be asserted by way of an affidavit, that an adversary hearing would harm the national security or the foreign affairs of the United States, I would respectfully suggest that that affidavit be required to be submitted by an official of very high rank indeed, so that it is not simply a matter of an Assistant U.S. Attorney submitting an affidavit of his with respect to matters which he could not possibly have any competence or responsibility to assert to except on information or belief. And perhaps the easiest way that could be done, indicating that the affiant would have to be one of the category of officials listed on page 13, lines 11 through 17, Assistant to the President for National Security Affairs or executive branch official appointed by the President with the advice and consent of the Senate, something of that kind.

Mr. McCLORY. Where would that be added?

Mr. POLLAK. That would simply be included, Congressman McClory, on page 22, line 12, where the phrase now appears "if the Government by affidavit asserts," I would simply change that to read "if the Government by affidavit made by"——

Mr. MURPHY. The Assistant to the President for National Security Affairs——

Mr. POLLAK. Exactly, or by simply referring to the category identified by the earlier section of the bill.

Now, Mr. Chairman, broadly speaking, I associate myself with Mr. Shattuck's concern that the legislation which emerges should be tied as closely as possible to a criminal standard. I think we have clear expressions of reluctance to abandon a criminal standard—from Senator Kennedy, from the Vice President—a recognition—in many quarters of at least the prudential problems and possibly the constitutional problems that result from any deviation from that standard.

At the same time, I do think we have to recognize that the governmental objective and executive responsibility is one that may be, in certain instances, perceived as going beyond law enforcement in a conventional sense, and it is in that sense that I could recognize a very

considerable unlikelihood that any President would feel that he could accept, he or she could accept the pattern which Congressman Kastenmeier's bill proposes as sufficient to carry out the Presidential responsibilities in this field. I may be wrong, but it seems to me we have to work within a system in which whatever legislation emerges is legislation which the President and the Attorney General and his senior Cabinet colleagues charged with National Security and Foreign Affairs responsibilities, feel they can live with.

Quite clearly, H.R. 7308 reflects that and perhaps as Mr. Shattuck indicates, the Attorney General is ready to work with your committee to move somewhat to bridge the gap between the bill as it stands and a criminal standard.

There is one thought that has occurred to me, Mr. Chairman, which may go at least in some measure to meeting the problem. If it be supposed that the administration is not able to come to the conclusion that a criminal standard at least with respect to American citizens and aliens permanently resident here would be sufficient in all events, I submit that what we really need to do is to come up with a bill which insists that there be no wiretapping of persons who are engaged in activities—especially American citizens and aliens permanently resident here—of persons whose activity is protected by the First Amendment; that is to say, persons whose activity may involve the collecting and disseminating of information but which nonetheless could not be made criminal because the First Amendment precludes it.

It strikes me that if we had that standard, then we would have gone a long way to maintain the kinds of constitutional values that I think Mr. Shattuck is properly concerned with.

So with that thought in mind, Mr. Chairman, I tried my hand at seeing what such a standard would look like set forth in statutory language, and I offer this, if you will, as an alternative way of reaching some of the objectives which I think this committee and others have indicated to be of importance.

Suppose we look, Mr. Chairman, at page 4 of the bill, that extraordinarily long paragraph that starts at line 4, Roman numeral (iii). What I will try to do is to complicate that further. Page 4, starting at line 4, that subsection (iii), if we go down to line 12, the language "under circumstances which indicate," then, Mr. Chairman, what I would do would be to provide this: "which indicate that (a)" and then retain the language that is there, "the transmission of such informational material would be harmful to the security of the United States, or that lack of knowledge by the United States of such collection or transmission would be harmful to the security of the United States; and (b)" and here I would introduce new language, "and (b) such transmission or collection, if it constituted activity defined as criminal by the statutes of the United States, would not be activity protected by the First Amendment of the Constitution."

And Mr. Chairman, the purpose of that would be to try to pre-empt, if you will, the question of whether the particular activity is criminal as defined by the current statutes of the United States, but

to be sure that, whether defined as a crime or not, the particular activity which triggers the surveillance is in any event not protected by the First Amendment.

Now, I don't suggest that it is always an easy job to determine whether particular activities are constitutionally protected or not, but at least that is what we select Article III judges for, and I would regard that as an appropriate determination for a court to be asked to make on the kind of presentation which is contemplated here.

I think, Mr. Chairman, that sufficiently indicates the line that I suggest as a way of in part meeting this problem. A similar formulation could be presented to modify the language on page 3 of the bill, the subparagraph (A) from lines 12 to 16—I won't—that obviously requires some adaptation of the kind of phrasing I have already offered. Whether to make that change too obviously involves very substantial prudential questions as to whether one would seek to tighten the bill in this respect, not only for the protection of American citizens and aliens permanently resident here, but nonpermanent aliens, and as I say, those policy considerations quite clearly can cut both ways. Mr. Shattuck has very compellingly indicated the reasons why one ought not to make distinctions of that kind, and I think this committee has heard important considerations which cut the other way.

I don't want to burden you with recapitulating that examination right now. I am simply trying to suggest ways in which the bill before us, whichever choice was received, could be modified if not fully to reach the criminal standard, at least to be sure that as to American citizens and permanently resident aliens we are protecting from surveillance those whose activities could not be denominated as criminal because they are protected by the First Amendment.

I think it would be appropriate, perhaps even overdue, Mr. Chairman, to pause now and to be responsive to questions.

Mr. MURPHY. Thank you, Mr. Pollak, and Mr. Shattuck, and Mr. Berman, did you want to add anything?

Mr. BERMAN. I just wanted to make a couple of points.

What I think is important here, and why we are pressing the criminal standards and the need for precision in definition of standard to define the investigative jurisdiction of foreign electronic surveillance, as we mentioned this morning, is that it does spread over and have set a major precedent for the charter, I think which may be the more important issue before this committee, especially with respect to Americans simply because I do not believe that much espionage is carried on by telephone conversations and that until, of course, technology can change, and with voice prints and so on it may be very easy to conduct electronic surveillance, but if we set up a noncriminal or a loosely defined standard of criminal activity in this statute for an intrusive technique, I think we are slipping over and setting a benchmark which says—that promises broader investigations with less intrusive techniques, and signals to the intelligence agencies from a committee which has to oversee them that intelligence and broad scale investigation of political activities to protect the national security is still the rule of the game in the United States.

So I think that the line by line pushing on this statute to see what is meant, to see whether it really is precise, and to bring it as close and within a criminal standard as possible is a worthwhile effort. I think the Attorney General recognized that yesterday in suggesting that he is prepared to compromise, that some companies and accommodation ought to be worked out because I think they also see the connection between this legislation which is the opening salvo of a broadscale series of regulations and legislative initiatives to bring the intelligence agencies under law. And I think that we should really get into some of the problems that we have with the noncriminal standard in terms of its drafting and why we think it is not precise enough, and even—and we do not—we also want to emphasize the criminal standard, which is the clandestine intelligence activity which involves or will involve a violation of the criminal law, we think raises some questions for this committee in terms of the jurisdiction that is being given to intelligence agencies.

We are not just talking about what has been called little (iii) in this bill.

Mr. MURPHY. Mr. Shattuck, Mr. Pollak suggests that when the Government presents an affidavit to the special court the affiant be either Assistant to the President or Director of National Security.

Do you think that would satisfy some of your objections to this, that it wouldn't be some Assistant District Attorney or State's Attorney? In this case it would be a U.S. District Attorney coming in with the usual affidavit that the person has been a reliable informant before and we have used him before.

I would like to have your comment on that.

Mr. SHATTUCK. Mr. Chairman, I think that suggestion certainly is a very constructive one and does focus on the issue, one of the issues in this bill which is who decides these very—

Mr. MURPHY. It fixes the responsibility, in my estimate. I think this is one of the needs of this legislation—I think it indicates this looseness of blanket coverage of national security. If you are pinpointing the Assistant to the President or the Director of National Security, you are naming people.

Mr. BERMAN. May I comment?

I think that is very important, especially when they have to testify to the fact that it is foreign intelligence information deemed essential to the national security of the United States. We are not talking about a definition of information which may be collected which amounts to classified information. There is nothing much in here that is properly classified within the executive or vital to the national security. It is deemed essential by whoever is coming into court, and we think that that ought to be supported by affidavits by the highest officials in this Government. This is really serious information affecting the national defense and the vital interests of this country.

I would still like to see that definition of information narrowed so that it doesn't include the successful conduct of foreign affairs of the United States, which I think is a rather broad definition of information which the Government is interested in in this national security intelligence wiretapping area, but I think that the two are related.

Mr. SHATTUCK. Mr. Chairman, let me just add one point to that, and that is something that I didn't bring out in the prepared statement that we submitted to you, but I think is terribly important.

Unlike almost any other legislation that Congress considers, this piece of legislation will not be very easy to oversee. In fact, it may be almost impossible to oversee. The way in which it is implemented, and the decisions that are made, and the representations that are made to the courts by the National Security Adviser to the President, or even the President himself, are going to be made in secret, and it will not be until we have another terrible national tragedy such as we had in Watergate in the recent past, before we discover that the standards in this bill were not working.

I think that is why we have focused so much of our attention on the question of standards, although recognizing, as Dean Pollak and others before the committee have, that it is important to fix responsibility at the highest levels for the representations that are made. But it is the standards that the Congress really should get right at the outset.

This bill cannot come back for revision two or three years down the road when we see how it is working because we simply aren't going to know how it is working, and I think you will notice in the kind of information that is to be provided to Congress about the operation of the bill, that there is very little if anything that relates to the specific representations that are going to be made to the courts in order to implement these surveillances. Instead, it is only the number of surveillances that are in place at any time, the number of applications that are made.

Mr. MURPHY. But you would agree, would you not, Mr. Shattuck, that there is another check and balance that we are bringing in a Federal judge, a designated Federal judge, granted, that the proceeding may be in executive session in the court, it is another check and balance that we don't have now.

Mr. SHATTUCK. No question about it, Mr. Chairman. We do applaud this advance, but I just wanted to focus on what I think is the central issue before you, and that is that this bill cannot come back for review after it is enacted. If the standards aren't clear and precise and narrow enough now, it will be very difficult for it to operate properly.

Mr. MAZZOLI. Mr. Chairman, will the gentleman yield?

Mr. MURPHY. Mr. Mazzoli.

Mr. MAZZOLI. That would appear to be a little contrary to what you said in your statement and what you said Senator Church's committee had recommended, that we do away with the non-criminal standard, and then, if in practice this proved to be a problem, come back and amend the law. So apparently you differ with him as to whether or not there can be revision of this bill later.

Mr. SHATTUCK. Well, I think that is, with all respect, Mr. Mazzoli, I think that is a separate point. In other words, the possibility of coming back and amending the espionage laws upon a recommendation from the Attorney General will exist without regard to any oversight that the Congress might or might not be able to employ.

Mr. MAZZOLI. Well, this is the Chairman's time, but it just seemed to me to be a little inconsistent.

Mr. MURPHY. I am going to try to stick closely to the 5 minute rule as I can.

Mr. McCLORY. Thank you, Mr. Chairman, and I appreciate this opportunity we have this morning.

I would like you to comment on this, if you would, Mr. Shattuck and Mr. Berman, just briefly. This is an advance, you say, but for the most part there is no indication that these courts are going to pass upon the merits; the question of probable cause as set forth in this legislation bears very little relationship to probable cause where you undertake to apply and secure a search warrant in the usual type of case.

Now, these are going to be special judges, everything is going to be secret, *ex parte*. If 1 of the 7 or 1 of the 15, however many there happen to be, doesn't seem to respond appropriately, the Government can just go to another one, so that judicial review is really a myth. It is really not a reality. There is no judicial review on the merits to protect any defendant, whether it happened to be a foreign power—there wouldn't be any review there—or an American citizen where it would be very peripheral.

It really gets down to the question, does it not, of this being a way of accounting, of making some kind of a record of how many there are and what is done and that sort of thing.

Now, the principal responsibility is really on the President, on the Executive. Why shouldn't the accountability stay and remain there as it does with regard to the exercise of other authority. He can abuse his authority as far as deploying troops. He can abuse his authority as far as all kinds of actions, such as criminal actions he might direct the Attorney General to take and so on. He ought to be held accountable.

Isn't it better to repose this accountability in the Executive and keep it there than to perhaps give him the opportunity to say well, I am not responsible for this abuse or excess. The judge okayed it.

Would you comment on that?

Mr. BERMAN. May I?

I think the whole, while we want this judicial check, we tend to agree with you that in most cases it will be pro forma if past history is any indication and national security interests are so vital and judges don't want to get into it.

However, we believe that in egregious cases which occurred in the past, that this additional check will make an Attorney General and an executive branch intent on short circuiting the law, think twice before taking an application to the court.

We don't know how to maintain simply executive accountability. That has not worked in the past, and that is why this committee was set up, to get Congressional accountability, and we believe that that record, which is made to a court, should be as full as possible, and we also consider that it is possible, as an amendment to this bill, that the intelligence committee, for example, should have access to

the, not just the tallies of wiretaps, but some of the records so that you can conduct an oversight under secure circumstances of what kind of wiretaps are being authorized.

Mr. McCLORY. That would be a good way to enforce accountability, to have legislative—

Mr. BERMAN. Legislative oversight, so I would amend this 2527 or whatever it is, to require that. If you can be kept currently informed of covert operations, you should be kept informed of national security wiretaps.

Mr. MURPHY. Let me interject something, if I can, at this time. Mr. McClory suggested the possibility of judge shopping. This bill prevents that. If the Government has been turned down before a judge, the Government's recourse is to appeal. It can't select another judge.

Mr. McCLORY. But the next time they don't go to the same judge.

Mr. MURPHY. That's the next time. It is a different case the next time. But the particular incident, the procedure provided for in the bill is to have the hearing.

Mr. BERMAN. Well, one of the ways to make the judicial role more effective but also to answer our problems with the fact that the need for a strict standard is—I don't think simply oversight is the answer unless you have a strict standard for whether it is for the executive to decide whether it is going to wiretap, or for a judge to review it. I mean, there ought to be, you have to have that standard in order to be meaningful, and I think that is what—one of the things you were getting at.

Mr. McCLORY. We have electronic surveillance now, do we not, with regard to organized crime cases, and the Attorney General goes to the judges.

Do you know of any cases where the judges have turned them down?

Mr. BERMAN. No.

Mr. McCLORY. No.

You made reference to the *Keith* case, and you referred to Justice Powell's opinion. Well, actually it is the court's opinion that you referred to in your statement, and the Court did distinguish, did it not, that there could be different standards with regard to foreign intelligence as opposed to domestic intelligence matters?

Mr. BERMAN. [Nods in the affirmative.]

Yes, but we don't know what those standards are.

Mr. McCLORY. You know, we have had a great controversy about warrantless searches and seizures under the OSHA act, and the ACLU has been very involved in this. You took the position out in Illinois that you were going to represent the business interests against having the OSHA agents come in without a warrant and do all kinds of offensive things.

Now you have blown hot and cold on warrants as far as the protection of American business is concerned.

Where do you stand today? How can you justify the lack of a warrant in regard to an American business interest with your demand for a warrant when it is the Soviet embassy or a Soviet agent who is involved in a wiretap?

Mr. BERMAN. We also are talking about warrants which may affect American businessmen under this legislation. I mean, this is a particular type of warrant, and I think it is distinguishable from the OSHA warrant, and we have tried to do that in the legislation.

I would hate to get us involved in an embroglio over OSHA, but certainly the American businessmen and American economic interests are also Americans under this legislation. We are trying to extend protection to them, and I think that we are talking, we don't only want to talk about the past and the COINTELPRO and CHAOS operations and 17 national security wiretaps. We are talking about an age in which economic and foreign policy and national defense are absolutely interrelated, when the President is talking about our lack of an energy policy affecting our foreign policy and positions overseas, you are closely linking whether I turn up or down the thermostat with foreign policy.

Mr. McCLORY. I see, but your position is entirely inconsistent, it seems to me, on the question of warrants in the enforcement of OSHA, and your position with regard to the legislation before us.

Mr. SHATTUCK. Mr. Chairman, if I could just add one point to that because I was somewhat more intimately involved in the OSHA case than my colleague Mr. Berman. I can assure you, Mr. Chairman, that if OSHA were to attempt to wiretap any business in the country for any reason, national security or otherwise, you would find us in there, as Mr. Berman suggests, defending the business interests.

The distinction between the OSHA case and the wiretaps before us in this bill is that the degree of intrusion is far less serious and the Supreme Court has generally upheld administrative searches, sometimes with a warrant, sometimes without, but always pegged on the degree of intrusion. The intrusion that we see in this bill, 90 day wiretaps, some of them up to one year for foreign powers, is extraordinarily different from the OSHA situation, and I, with all due respect, I think our position is consistent.

Mr. McCLORY. Are you in the Supreme Court now on the warrantless intrusion on American business in the OSHA case?

Mr. SHATTUCK. No, we are not, we have decided not to get in it because of the degree of intrusion.

Mr. McCLORY. I have further questions, but I will wait until the next round.

Mr. MURPHY. Mr. Mazzoli.

Mr. MAZZOLI. Thank you, Mr. Chairman, and thank you, gentlemen. Dean, it was nice to have a chance to hear your side of this tough issue.

I would like to comment just briefly on your suggestion, Mr. Berman, about having access by this committee and our counterpart to these court records. I think that is vital. I was frankly unaware that the bill was unclear on that point because Chairman Murphy and our full committee Chairman Boland have been very aggressive about being sure that the intelligence agencies are forthcoming with their information to give us an idea of just what is going on, and I would think that something like that could make a very healthy additional amendment to our bill.

Mr. BERMAN. We were unaware, too, until we read the reporting requirements, and they just do not go as far for the intelligence committee as they should.

Mr. MAZZOLI. I could not agree with you more, and I think that would be a basic element, for us to exercise the kind of oversight in the years ahead, to have some access to the records, not just the numbers and the permissions granted and the permissions denied, but the basic net effect of the kind of information submitted, the completeness of the record, the specificity that Mr. Shattuck talked about earlier.

Mr. Shattuck, in your prepared statement you said:

Both Defense Secretary Harold Brown and CIA Director Stansfield Turner conceded before the Judiciary Committee that their agencies do not require authority to wiretap American citizens or foreign visitors not engaged in crime. As Secretary Brown put it, "the non-criminal standard is principally an FBI requirement rather than a DOD requirement."

I would refer you, and you may have been here yesterday when Admiral Murphy was here, to Admiral Murphy's statement:

The compromise, the bill before us, represented by H.R. 7308, has been reached at substantial risk to the Department's intelligence operations. That risk we believe to be balanced by the protection for the rights of Americans contained in the bill, but the balance cannot survive if further burdens are added to intelligence operations by amendment in the course of the legislative process either here or in the Senate.

I would ask you if you could comment on that, because you infer from Secretary Brown's statement that he really doesn't care, and yet his deputy came in yesterday and indeed said they did care.

So what is your reaction?

Mr. SHATTUCK. I think the principal concern that Secretary Brown and Mr. Murphy yesterday were voicing with respect to this bill is that they be permitted to conduct, those agencies be permitted to conduct surveillance of foreign powers, under the first section of the bill, but not of American citizens. In other words, the agent of a foreign power in subsection (2), being any person other than a United States citizen or alien lawfully admitted for permanent residence, who is an officer or employee of a foreign power, it is in that area, as I understand the testimony—and I could certainly be wrong, not having attended, obviously, any of the executive sessions—the public testimony of Secretary Brown and Admiral Turner was that at the very most, that kind of surveillance was the kind of surveillance those agencies required, and not surveillance of American citizens.

Mr. MAZZOLI. Well, just like yesterday when I asked Judge Bell just what the Carter administration position is on this noncriminal standard, apparently there is no Carter position as such yet. There is still some debate and concern and Mr. Berman today mentioned that there might be some opportunity for give and take even to this day on it. Yet, yesterday, DOD said that this balance cannot survive if further burdened.

Now, let me ask you this question. I guess it is debatable, but do you think that going to a criminal standard adds further burdens?

Mr. BERMAN. I don't think it adds a further burden where the Department of Defense is concerned. I think that the Justice Depart-

ment might consider that an extra burden, but be prepared to accept it if it is the will of the Congress and whether or not we can reach a compromise. I don't think that DOD was talking about the American or permanent resident alien side of this legislation.

They were talking about foreign power.

Mr. MURPHY. They were talking about the means of the intrusion, were they not?

Mr. MAZZOLI. That was the second part.

Mr. BERMAN. It was bringing a foreign power intelligence wiretap under a judicial warrant and opening that up to other people to be involved in it. That, I think, was the burden that they were defining and not the American citizen counterintelligence, espionage side of this legislation.

Mr. MAZZOLI. Well, I gather from the way Admiral Murphy—and it is rather replete in his statement—I gather that he says that this bill which is before us is almost the bottom line as far as they are concerned as to how far they can go in limiting or fettering their opportunity to gather intelligence. His statement is to the effect that if you go to a criminal standard, which we will have to say is a higher standard, a more difficult standard, to bear, you are going this extra bit and adding a further burden.

But in any event, Mr. Shattuck, you today said in your statement that we are at a point where we should never permit the surveillance of people engaged in lawful activities, which is basically what this bill provides in your judgment.

I think where we have a problem—and I have it myself—is that what you would consider surveillance of people engaged in lawful activities, I would state as permitting surveillance of people engaged in noncriminal activity. I think there is a difference between lawful and noncriminal, just as people will say that a person was found innocent or not guilty. You can be not guilty when you are not innocent, because there are standards and court mechanisms and procedure.

Here I think the kind of activity which was defined as tantamount to criminal activity by Judge Bell yesterday is, in your judgment lawful. In his judgment it is not illegal because it has not been defined by the espionage laws. I am curious as to whether or not you recognize that there is a semantical problem here, and whether or not that can be cured by some word change, perhaps along the line that the Professor has suggested.

Mr. SHATTUCK. Well, I think Dean Pollak had an extraordinarily—as he often does when I appear with him—useful insight into the nature of the problem in the noncriminal standard here. It is true, I think, as you are suggesting, that in a way we are talking about words, but the nature of the abuses that are possible under that standard, I think, suggests that we need to focus on what we mean by protected noncriminal behavior, and I think that the use of the term "First Amendment" to make it clear that we are talking about an area of protection that is recognized by the law, and is not simply neutral, as "noncriminal" is, would go a long way toward solving this very difficult problem, which is not only one of abuse, but also of the standard that is going to be set for the future in other legislation.

This is my first opportunity to hear that standard, and we are going to look at it, but I commend Dean Pollak for suggesting it, and I think it might make sense.

Mr. MAZZOLI. Dean, would you have some comments on that general question. As I perceive the situation, Judge Bell says that this activity is wrong though it is not illegal. Mr. Shattuck indicates that this is lawful activity because it is not illegal, and there we are. Your language, of course, to that section will be studied by the committee, and I guess it was on that basis that you put it together.

Mr. POLLAK. Congressman, I thought it was a very perceptive question when you put it to Mr. Shattuck, and I thought it was even more perceptive when it evoked from Mr. Shattuck some indication that he thought well of my comments.

[General laughter.]

Mr. MAZZOLI. Well, that's good, and I thank you, Mr. Chairman. My time has expired.

Mr. MURPHY. Thank you, Mr. Mazzoli.

I would be interested, Dean, and Mr. Shattuck and Mr. Berman, about your observations with regard to the Fourth Amendment.

Do you think the Fourth Amendment covers foreign governments and employees here, on foreign corporations or employees here as defined in the bill?

Mr. SHATTUCK. I certainly do, and refer you to that portion of my statement which I very quickly summarized. The leading case is United States against Abel, and the general proposition not only in the Fourth Amendment area but in other areas of protection under the Bill of Rights is that those who are within the territorial jurisdiction of the United States have standing to raise violations of their constitutional rights and indeed can enforce them. I think that as a practical matter we recognize that the interests, the prudential interests, as Dean Pollak refers to them, may be different in the case of foreign governments and their presence in the United States, but as a constitutional matter, I find it very difficult to make the distinction which this bill makes, and I wanted to bring that to the attention of the committee because I think the committee should be very careful not to legislate what might raise serious constitutional questions.

I think that is about all I would have to add to my statement.

Mr. MURPHY. Dean, how would you perceive it?

Mr. POLLAK. I think, Mr. Chairman, the Fourth Amendment clearly protects all persons, as Mr. Shattuck has observed, but to say that the amendment protects all of us, no matter whether we are Americans or not, or if aliens whether they were admitted as permanent residents or not, to say that doesn't necessarily mean that the protection is identical for all categories.

I say that without urging that we should have a differential range of protection, but it does seem to me that this is, as Mr. Justice Black so frequently observed, this amendment is one which talks in terms of unreasonable searches and seizures, and I would suppose it is entirely likely that the Court might reason from that that what was a reasonable search with respect to a category of persons situated in one way would not be reasonable as to others, so that there might

indeed be greater protection for American citizens or those lawfully resident here, even as aliens, than for those whose connection with the country is somewhat more marginal, let alone those who are officially here only in their foreign capacities, who may have protections under international law, but perhaps very little under the Fourth Amendment.

So I guess where I wind up, Mr. Chairman, is with an acquiescence that surely the Fourth Amendment is all embracing but I am not persuaded that we can insist very successfully or expect judicial acquiescence in the proposition that the protections are going to work out to be identically the same for all persons, and it seems to me the recognition of that likely differential judicial response is apparent from the Court's reservation in the Keith case. In effect the Court there said: We are not at this point talking about what the President can do in the foreign intelligence field; that may turn out—when we are forced to define the Fourth Amendment's application in this other area—to be a somewhat different judgment.

Mr. MURPHY. Mr. Berman?

Mr. BERMAN. I don't want to respond to that question. I just wanted to, in the time of today, to focus again on—I don't want to leave—neither of us want to leave the understanding about the standards that we are talking about under this section, that we think they are precise. And let me—I would like to just spend a couple of minutes on why we are having trouble with both the criminal standard and the noncriminal standard.

Let me begin with the noncriminal standard. Alternatively, the Justice Department has said that this is so narrow that they can't use it. Then they came with the argument for spreading beyond the criminal standard, they came up with the hypotheticals, and we talked about those hypotheticals and attached an appendix to our testimony, and what is important is that we find that the espionage laws are very broad, especially after the Gorin decision, and that at least three of the important hypotheticals which the Justice Department cites over and over again we think are reached under a probable cause to believe standard, that three of the hypotheticals are reached without needing this subsection.

Now, what bothers us about whether this is a tightly drawn statute is we call your attention to the other three hypotheticals, four, five and six, which the Justice Department cites, one involving a head waiter who collects derogatory information and passes it back to an intelligence service; and another involving someone who infiltrates a refugee organization and is trying to turn those people around to infiltrate the CIA.

None of that—both of those examples do not talk about the collection and transmission, in the first instance, of information which is covered under this small (iii). I mean, that is not foreign intelligence information contemplated in those hypotheticals.

What we believe happens, once you slip beyond the criminal standard in legislation, is that the intelligence agencies begin to say well, it is whatever we need, whatever we suspect, whatever might relate to foreign intelligence and national security, we can begin to en-

compass under this statute, especially since the information contemplated here is so broadly defined. We don't know what an intelligence network is and so forth.

So we think that if it is—we would like to come back to it is tantamount to a crime, then add the provision that it is likely to involve the criminal law of the United States.

There is an alternative to that which is raised by the problems with the criminal standards, clandestine intelligence activities which involve or will involve a violation of the criminal law. That is clearly a criminal standard, but it is—the problem with it is the vagueness of the term “clandestine intelligence activities.” Yesterday I believe you came up with the example for the Attorney General of someone who is in the press and he is planting information in the New York Times and is that a violation of the law? Is that collection or transmission or espionage, and under the criminal standard here, I believe that case is reached. It is reached because he is doing it secretly, and that is all that “clandestine” means, and it is in violation of perhaps the Foreign Agent Registration Act, which is a very broad statute which is encompassed under the criminal statute here, and I think we can define First Amendment activity all we want under this little (iii) and be stuck with the Foreign Agent Registration Act under (i) which covers political activity very broadly and have political activity subjected to wiretap.

So—and then we see the need for defining clandestine intelligence activity in this statute. We have encouraged the Justice Department to try and define it, and the Senate Intelligence Committee to define it. It can't be one of those terms which, like subversive activities before us, took on a whole meaning over the years that no one ever intended. When Roosevelt said counterintelligence investigation in 1940—and this was an executive order, covered espionage, sabotage, treason and violation of the neutrality laws, that is all he meant. He didn't mean the whole criminal code of the United States, and subversive activities was, I think, his catch-all phrase about those narrow crimes.

Now we have a new vague term, “clandestine intelligence activities.” We have the whole criminal code involved in a counterintelligence jurisdiction, and I think that we are asking for trouble over the long run, not only in terms of potential abuse in terms of wiretapping, but of setting a very broad and vague standard for the charter which, as we know, under a different administration everyone who opposed the Vietnam war became an agent of a foreign power engaged in clandestine intelligence activities, and so we can encourage and reiterate our concern that there has not been as careful drafting—I don't care how long legislation has been around, more work can be done, more precision, and we can reach accommodation and compromises can cover everyone's interests without raising these serious borderline questions which set bad precedents.

Mr. MURPHY. The Attorney General yesterday used the phrase tantamount to criminal activity and Mr. Mazzoli brought it up today, and there has been some comment on it, and I am struggling here to try to find a definition or how that could possibly be defined. Then

Professor Pollak would exempt activities under the First Amendment, as I understand it.

Mr. POLLAK. And if I may say so, Mr. Chairman, in view of Mr. Berman's comments, with respect to clandestine intelligence activities, I want to make clear that my suggestion with respect to the First Amendment is one which I would also propose to carry into that subsection, too, so that the requirement of involving a violation of the criminal statutes of the United States would be a violation of those statutes not protected by the first amendment.

Mr. BERMAN. That could be handled another way. Either you define clandestine intelligence activity or you narrow the class of crimes that you have in mind as serious national security crimes in that first section. You really do talk about espionage, sabotage, treason, extortion, bribery. There is a narrow range which the Justice Department talks about, which our Government has talked about as foreign counterintelligence concerns since they began setting up an intelligence establishment around World War II.

It would be ironic for the Congress to establish an investigative standard broader than what J. Edgar Hoover and the CIA needed to put just about anyone under surveillance. And that is—we see that in the criminal standard and the slipping into an intelligence mentality in this bill in title III is exemplified by the last three hypotheticals.

Mr. MURPHY. Mr. McClory?

Mr. McCLORY. Thank you, Mr. Chairman.

Something that concerns me about putting all of this into the statute and having these actions which would follow the enactment of this legislation is this: we are signatories to the Vienna Convention. It guarantees to foreign embassies and foreign consular officers that their premises shall be inviolable, and that they shall not be subject to search. Diplomatic correspondence is likewise subject to this inviolability, and it is stated that diplomatic communications shall not be interfered with.

I am wondering whether or not we should enact legislation which really contravenes that and says that interception of communications which may be of a diplomatic nature, and I am thinking, for instance, of communications going in or out of some foreign embassy—whether we should authorize a judge to approve and countenance that.

The other thing that I am concerned about along this same line as far as our express language and legislation is concerned is language that the Senate put in which would require the judge in all cases to determine whether or not physical entry to the premises shall or shall not be made. In other words, if, following enactment of this legislation, we authorize some kind of installation of a bug or wire-tap or whatever, you can break in. Breaking and entering doesn't sound like very lawful conduct to me. Do we want to enact legislation which would authorize courts to enter orders that include that, to enter orders that appear to violate international law, a convention which is ratified by the Senate of the United States.

How do you feel about that?

Mr. POLLAK. Well, I would not like us, certainly, to be legislating in contravention of treaty commitments, but I am not clear—I don't

pretend to have any expertise on the Vienna Convention, but I am not clear, just from a quick reading of the provisions which you just read from Congressman McClory, and I think were excerpted in Mr. Shattuck's statement, I am not clear that the legislation that is before this Committee would authorize direct violations of that convention. Obviously it becomes a matter of definition as to what sort of surveillance would be authorized by orders under this legislation, and on the other hand, what the Convention means in insisting on the immunity of embassies and consular establishments from search, and the inviolability of diplomatic communications.

Ultimately, I suppose—well, let me put it this way. I would think, Congressman, that with a direct, explicit statement in the Convention of what the diplomatic privileges are, in effect, that we would be guaranteeing, it would require awfully flat language in this legislation to lead a judge to conclude that the judge was authorized to issue a warrant which would permit monitoring of the sort which the judge would regard to be inconsistent with the protections in that convention, and I don't see the general language that is in H.R. 7308 as necessarily being in conflict with the convention.

Mr. McCLORY. We are endeavoring, of course, to protect the interests of American citizens. We don't want to trample all their fourth amendment rights, and the purpose of my bill is to try to guarantee that we do not do that, and if there are violations, that we have accountability with regard to those who are responsible.

Now, with respect to communications between two foreign embassies in which a question of national security is alleged or suspected of being involved, or between a foreign embassy or a foreign agent and the country that he represents, no American citizen or no United States person is involved, and yet this would require the Attorney General, the President and the National Security Advisor to go to a judge and do all this, follow all these things.

Do you think that that is necessary? Is there any fourth amendment interest that is involved when we have just these foreign entities involved?

Mr. POLLAK. Well, Congressman, I guess we have to reduce the hypothetical to particulars, and particular people, the foreign powers are not just disembodied entities, sovereignties. They are persons somewhere here on American territory and I do believe that in that aspect they have some constitutional protections, though as I have tried to indicate, I think the range of their protections may be much more modest than the protections which those of us who are citizens have. But I can't—I don't think we should just be dismissing those protections out of hand, let alone, of course, the concerns which you have properly raised with respect to our international law commitments.

As to your more general question, Congressman, I do think that it is proper, whether in the particular instance that you put, or in the general category of instances which this legislation covers, to provide for our executive officials having to go to court to get approval of surveillance that they want to undertake.

You raised with Mr. Berman and Mr. Shattuck the general question shouldn't executive accountability stop at the door of the executive?

Why should we set up a framework which provides for, I think you or Mr. Shattuck used the term, pro forma judicial approval.

With all respect, I don't see what is contemplated here as anything like pro forma judicial approval, and I certainly don't see it as a device for bailing out the executive and permitting the Attorney General or his colleagues to say, well, a court okayed this so I am safe.

Quite to the contrary. It seems to me that a large factor which motivated Attorney General Levi and I am sure now Judge Bell, his successor as Attorney General, in wanting to see a structure of this kind in place, was a feeling that it was not alone up to the Attorney General, if you will, and the President to personally assure the proper resolution of our protections of individual rights on the one hand as against our clear interests in the security field on the other—that that ultimate balance should not be made by officials whose clear obligation to behave as vigorous executives was as strong as it is, that our recent history indicated too clearly what the risks were in putting that burden even on well intentioned executive officials.

It was my sense from what we know of the very important administration of the surveillance problem by Attorney General Levi and I think by Attorney General Richardson, that in effect, unaided by statute, the Attorney General was cast in the role of being the arbiter, having to decide whether to authorize surveillance sought by the intelligence community, and on occasion I believe that we know from the hearings that have been before this committee, Attorney General Levi and I am sure Attorney General Richardson before him, said no, you haven't made out the case.

And frequently, more frequently, I guess, they approved them.

I think what is contemplated by this legislation is a system in which we won't just get perfunctory applications passed on to judges who will perfunctorily approve them. Quite the contrary, if the executive department at its highest levels is put to the test of really demonstrating a need which will pass muster with an article III judge who is independently sitting there and in no way dependent on the executive branch of the Government, or, I may say, on the Congress, what you will get is recourse to the judiciary under this legislation only in those instances in which the Attorney General and his colleagues at that level are really convinced that the security interests of the United States require to that extent the sacrifices for a limited time and within limited proportions, of the interests that otherwise would prevail of protecting against electronic surveillance.

The existence of judicial oversight I am convinced, Congressman, will very much operate to the upgrading of the executive sense of responsibility in this area, and I don't think we should ask the Attorney General and his colleagues to carry both burdens any longer.

Mr. MURPHY. Along those lines, Dean Pollak, do you have any suggestions concerning what we talked about yesterday with Attorney General Bell, that he was going to consult with the Chief Justice in the selection of these judges.

Do you have any ideas, or any of you gentlemen, as to how that should be done, or the rotation, the number of judges, where the

judges should sit? Should they be from districts throughout the United States.

I would be interested in any of your comments on that.

Mr. POLLAK. I think I would be inclined to follow what I believe to be the pattern suggested in Mr. Imlay's testimony to you, really, that a special court be established, which would involve, of course, only quite temporary duty by any of the particular judges, that the duty be one distributed among a fair number of judges, whether it is 7 or 15, I don't know—that depends on more precise estimates of how much business will be involved, but these are determinations which the Chief Justice, and I think he is the proper appointive authority, would be best equipped to make.

I would think it would be a mistake to restrict the judicial responsibilities to judges who happen to be resident, have their judicial headquarters here in the District of Columbia. That suggests to me a restriction on what talents one would look for and what kind of distribution of experience and so forth that the Chief Justice ought to be able to weigh.

In that sense, for example, in Congressman Kastenmeier's bill, it seems to me perhaps not sensible to look to a particular court, and certainly not an appellate court. But I, in short, would look to a panel of judges selected from around the country, but yet expected to have the nationwide jurisdiction that could be given to them if they constituted for this purpose a special court, albeit an article III court.

Mr. SHATTUCK. Let me just briefly add to that, I think we generally concur with what Dean Pollak is suggesting. The problem on the authorization end here, on the warrant procedure, is the very narrow focus with respect to the judges who would be authorizing warrants, their location and the centralization of the authority to appoint them in the Chief Justice.

I think the bill should go, as Dean Pollak suggests, in the direction of geographic representation, getting judges involved from each judicial district, and further, getting the chief judge of each circuit involved in the process of appointing, selecting, if you will, those judges who could pass upon these warrant applications, and increasing the number sufficiently so that we are looking at this process as closely as possible as a regular warrant procedure, albeit it one with a special procedure attached, but a regular procedure which every judge, or as many as possible can get involved in.

Otherwise, I think the centralization of power and information that is suggested by the structure of the bill lends itself to the kind of rubber stamp abuse that Congressman McClory quite properly pointed out is a possibility here.

I do want to say that I don't want the ACLU's position to be misunderstood on that point. We do, I think, believe that a warrant procedure is virtually mandated by the Fourth Amendment with respect to wiretapping, and although the possibility of abuse, if only a few judges are involved, or a rubber stamp procedure is there, I think the mandate that goes from the Fourth Amendment virtually requires a warrant procedure, and I think the way to avoid rubber

stamping is to set a standard that would be applied by these judges in a way that they can understand it, and I think that gets us all the way back to the criminal standard issue. Judges are used to routinely approving and passing upon criminal standard issues, and if they are given something other than a criminal standard, I think they are generally going to defer much more than they should to those who are coming before them with information to justify the warrant.

So I think that the warrant procedure and the use of judges in this process relates very closely to the criminal standard issues that we have been identifying throughout.

Mr. MAZZOLI. Mr. Chairman?

Mr. MURPHY. Mr. Mazzoli.

Mr. MAZZOLI. Thank you.

I just have a couple of more questions or observations.

My colleague from Illinois, Mr. McClory, said earlier today, that the President can still abuse his authority and deploy troops. Well of course, we have in the meantime passed a War Powers Act which in one way or another requires an after-the-fact observation and activity by the Congress. So if the judges, you might say, become just a rubber stamp operation, I think that the professor put his finger on it. I think there would still be some force and some pressure on the Attorney General and on the President and National Security Agency to be sure that their cases are well prepared. I think that would act as a kind of stop, as a kind of moral suasion to be sure that you get yourself squared away. If we can add this thing we talked about, which is a report to the Congressional committee periodically, not just of numbers and statistics, but of the factual data that went into the decision to grant or not grant a warrant, then I think we are really approaching that time when they will be very very hesitant, very chary about coming up with anything short of a pretty good case.

But then it comes back to what you just said, Mr. Shattuck. If we don't give the judges some guidelines and some clear understanding of what they are to look for when this mass of information is dropped on their desk involving all kinds of electronic devices, I think that we then might find them almost having to go along with the experts because they have no other alternative.

And so, accordingly—I didn't realize you all had this appendix, and I have just had a chance to look over those six cases—I agree with you that the case number four and case number five are really de minimis or can be thrown out. Those, I think, were exception or so unusual as to not be involved in the kind of cases that they would—

Mr. BERMAN. It was the understanding that they believed this is covered under this legislation.

Mr. MAZZOLI. I understand.

I wonder if these are the kinds of cases that ought to be granted a warrant, under the circumstances; but even so, they apparently are within the ambit of this bill. But I am concerned a little bit about the two or three cases in which you constantly refer to the 1941 case of *Gorin v. the United States*, a case that must define espionage and

deal with it. Has that been updated? Have there been other cases that have been bottomed on this case?

Mr. BERMAN. There is the *Heine* case, which comes after that. Cases have elaborated on or distinguished it, but they haven't changed that standard, and what we are really talking about is the rather broad definition of national defense information.

Mr. MAZZOLI. You are a very well qualified lawyer. Don't you think—since you have argued here for the fact that if there were criminal standards, Gorin would cover Case No. 1 and Case No. 2—you could have shot some pretty good holes in that very same argument, though, and said that Gorin indeed doesn't cover it because of vagueness and what have you?

Mr. Shattuck?

Mr. SHATTUCK. The sufficiency of evidence to convict under the espionage laws is a very different standard and proposition than the sufficiency of evidence to initiate a wiretap or other search based upon reasonable suspicion or probable cause, but let's assume the lower standard of reasonable suspicion that there is a violation of that criminal statute, particularly the espionage law.

Now, it is in that respect that we are reading the Gorin language as broadly as the—I mean, the Gorin language is quite clear and should be read with respect to the authorization of the warrant, but not necessarily with the sufficiency of evidence to convict.

All right.

Mr. Berman?

Mr. BERMAN. One of the reasons why Gorin is read so broadly in terms of national defense information is because 794 also requires intent to harm the United States; scienter is part of the element of the crime. And so that left the court, well, if you have an intent to harm the United States, the information can be much broader, and the—which leads us to the probable cause to believe that a crime is being committed, you will never get the—you don't need that intent, you just need the circumstances which indicate that national defense information might be transmitted.

Mr. MAZZOLI. Furthermore, as you all know from listening to the testimony, the Department of Defense and the Justice Department have said they are really not trying to nail these people with a criminal charge anyway. They could care less about scienter. What they are really trying to do is to end the threat or to eliminate these people as foreign agents or whatever. So they are not concerned and that is why the obverse of that is that they say you really don't need a criminal standard because we are not going to do anything to these people anyway except get them out of the country or something, and—

Mr. BERMAN. Well, that may be rough and tough getting them out of the country.

Mr. MAZZOLI. Well, let me ask you this. If somebody were to come in and present this matter to you and ask for the ACLU's help to show that Gorin does indeed cover case number one—beyond the fact that they have to go to your board of directors to get authorization—would your personal feeling be to come in on behalf of Gorin to cover it?

Is that a fair question?

Mr. BERMAN. We believe that the Gorin decision made the espionage laws overbroad. I mean they are just, they are very vague and no one understands them. In fact, in the Ellsberg case, they threw 794, 793 together and said giving it to a Senator or anyone is a violation of the statute.

But—and we do not stand behind those espionage laws, but we think that they have been read in such a way that they do cover these cases, and our opinion would be, we have to go and amend these espionage laws, but we certainly don't add on top of vague espionage laws another that looks like espionage standard which doesn't amount to a crime, but they have this even broader, more vague alternative on top of the espionage laws.

Mr. MAZZOLI. I appreciate that, and I really thought that that would probably be your answer, in candor, that you would probably more or less oppose the construction of Gorin to cover the situation even though in the context of the appendix it proves out that the Government could get along with the criminal standard in this bill.

Mr. BERMAN. We are going to be just as strenuously moving to amend the espionage laws. We also want to appear in those adversarial, ex parte, in camera hearings.

Mr. MAZZOLI. Right.

Let me wind up by stating, and I think I probably speak for our full committee and this subcommittee, that we don't want to do anything that would put the Government in a position of being impotent to handle what amounts to a clearcut threat to the national security of the United States. I know that "national security" has been used as the sword and the bludgeon to defeat and to bloody a lot of people who need not have been bloodied. At the same time, it would be fanciful and completely Pollianish of us to think that we could exist without a capable intelligence mechanism, and we are really caught in that very dramatic dilemma. You all have been very helpful. Professor Pollak, your suggested language and your very interesting and thoughtful testimony has helped us a lot.

Yes, sir.

Mr. BERMAN. May I make one final comment?

Mr. MAZZOLI. Sure.

Mr. BERMAN. I think that we are, as American citizens, also equally interested in a viable intelligence establishment to protect the national defense.

One of the things that we have found, if you go back to the record of the Church committee, especially the fact that the FBI under another administration and for many, many years, ignored counter-intelligence, serious counterintelligence investigations to devote its time to political activities in the United States. One of the arguments for narrow, clearcut standards from the Congress and the executive to think through what it means by national security is that you stop wasting the resources of intelligence, and you start targeting on clear threats to the Nation and not have it slip over into what is easily becomes, you know, political snooping for the executive branch, you know, concern about the wrong opinions in this country. That has

been the tradition in the intelligence establishment. I don't think the two positions, civil liberties and viable intelligence are inconsistent.

Mr. MAZZOLI. Thank you very much, and thank you, Mr. Chairman.

Mr. MURPHY. Gentlemen, do you have any closing statements or anything to add?

Well, on behalf of the committee we want to thank you for your attendance here today. I think you have helped us.

As you know, we have a tough job in trying to balance these interests and we appreciate your help.

Mr. SHATTUCK. Mr. Chairman, let me just add that we are pleased to have been invited here and we do look forward to working closely, as closely as you wish, with the committee on this terribly important issue.

Thank you.

Mr. POLLAK. I would like to echo my sense of gratification for what your committee is doing. It is very important.

Mr. MURPHY. Thank you, Mr. Pollak, Mr. Berman and Mr. Shattuck.

[Whereupon, at 11:15 o'clock a.m., the subcommittee recessed, to reconvene at 9 o'clock a.m., Tuesday, January 17, 1978.]

**FOREIGN INTELLIGENCE ELECTRONIC
SURVEILLANCE**

H.R. 5794, H.R. 9745, H.R. 7308, and H.R. 5632

TUESDAY, JANUARY 17, 1978

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON LEGISLATION OF THE
PERMANENT SELECT COMMITTEE ON INTELLIGENCE,
Washington, D.C.

The subcommittee met, pursuant to recess, at 9:07 o'clock a.m., in room 2362, Rayburn House Office Building, the Honorable Morgan F. Murphy, chairman of the subcommittee, presiding.

Present: Representatives Murphy [presiding] and McClory.

Also present: Michael J. O'Neil, chief counsel; Patrick G. Long, associate counsel; Bill Funk, and Bernie Raimo, professional staff members.

Mr. MURPHY. Would you gentlemen all rise and raise your right hands, please.

Do you swear or affirm that the testimony you are about to give is the truth, the whole truth and nothing but the truth, so help you God?

Mr. WARNER. I do.

Mr. MILLER. I do.

Mr. SHEEHAN. I do.

Mr. HALPERIN. I do.

Mr. MURPHY. First of all, let me, on behalf of the committee, thank you gentlemen for coming out on a snowy, wet day to comment on what this committee considers to be a very important matter, and I suppose you do, too.

And gentlemen, I thought today what we would do is have all four of you gentlemen give your statements, and then we will open it up to questions.

Mr. Mazzoli is here, and Mr. McClory is on his way, and then we can get into some questioning.

So I will start off with Mr. Warner.

Would you like to be the first?

Mr. WARNER. Yes, that would be fine.

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**TESTIMONY OF MR. JOHN S. WARNER, LEGAL ADVISOR TO THE
ASSOCIATION OF FORMER INTELLIGENCE OFFICERS, AND FORM-
ER GENERAL COUNSEL, CENTRAL INTELLIGENCE AGENCY**

Mr. WARNER. Mr. Chairman, the Association of Former Intelligence Officers welcomes the opportunity to express its views on this vital legislation, and I personally am pleased at this opportunity to appear.

The foreign intelligence obtained through electronic surveillance is of huge and inestimable value to the President, our senior policy makers, and ultimately to the Congress and the American public. At the same time, because of the sources and methods involved, this type of intelligence is one of the most sensitive within the intelligence community. Nothing should be done which would put this means of collection at risk or which would impair the ability of the United States to continue these programs.

I shall speak to H.R. 7308 which we basically support. It establishes workable statutory guidelines for the intelligence community and provides necessary and desired protection for the rights of Americans. There are several areas where we believe the bill should be modified without in any way decreasing the protection afforded Americans.

The first of these is the requirement for a judicial warrant to obtain foreign intelligence by electronic surveillance of foreign governments or foreign entities that are directed by foreign intelligence services. Such a requirement meets no demonstrated need; to my knowledge, there have been no findings of abuse in this area.

It is well settled that the President has the inherent constitutional power to conduct electronic surveillance for national security purposes. It is the stretching of the meaning of the words "national security" involving Americans which is the abuse to be corrected, and the provisions of this bill appear well suited to this purpose.

In the area of collecting foreign intelligence from foreigners by electronic surveillance, placing restrictions on the President's constitutional power with no benefits to the rights of Americans is a disservice to the country and to some degree a weakening of the ability of the executive branch to carry out its defense and foreign affairs responsibilities. The clandestine collection of intelligence is a matter which the judiciary historically has held to be reserved solely to the executive. In *Totten v. United States*, 92 U.S.R. 105, an 1872 case, a former Union spy attempted to collect additional pay by filing suit, the Supreme Court held that no such suit could be maintained since secrecy in the clandestine procurement of information is of the essence, and therefore "public policy forbids the maintenance of any suit the trial of which will inevitably lead to the disclosure of matters which the law regards as confidential."

In other words, the Supreme Court said it had no jurisdiction over intelligence activities. *Totten* has been cited and relied upon repeatedly in court opinions in recent years.

In *United States v. Brown*, 484 F2d 418 (1973), the Fifth Circuit Court of Appeals stated:

Restrictions upon the President's power which are appropriate in cases of domestic security become artificial in the context of the international sphere."

In that same case, the Court went on to say that its holding "is buttressed by a thread which runs through the Federalist Papers, that the President must take care to safeguard the nation from possible foreign encroachment, whether in its existence as a nation or in its intercourse with other nations.

Furthermore, involving the courts in this process carries substantial risks of compromise of highly sensitive intelligence sources and methods. It is axiomatic that the more people who have access to sensitive information, the greater the risk of unauthorized disclosure. Speaking of disclosing classified documents, even though in an in-camera proceeding, the United States Court of Appeals for the Fourth Circuit said, "It is not to slight judges, lawyers or anyone else to suggest that any such disclosure carries with it serious risk that highly sensitive information may be compromised. In our own chambers, we are ill equipped to provide the kind of security highly sensitive information should have."—*Knopf v. Colby*, 509 F2d 1362 (1975).

Continuing for the moment our review of the judiciary attempting to rule on foreign intelligence activities involving only foreigners, one must ask, what expertise, body of experience and knowledge of intelligence requirements would judges rely on to approve or disapprove a request of the executive branch to conduct an electronic surveillance operation? There are extremely complex interagency relationships involving consumers, collectors and analysts of intelligence information which determine requirements for collection. The entire picture of this process and the substantive intelligence information which determines requirements for collection. The entire picture of this process and the substantive intelligence information involved simply cannot be capsuled in an application for a judicial warrant. In many cases, the need for information is premised on ongoing political negotiations with other nations which are not the province of the judiciary. The U.S. Supreme Court spoke to such issues in the well-known *Chicago and Southern Air Lines and Waterman Steamship Corporation* case, 333 U.S. 103 (1948), "But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. They are decisions of a kind for which the judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." In short, can the courts make worthwhile value judgements in this area? The answer is that they can't. A court approval in this sensitive area would merely be window dressing and a disapproval would be an improper intrusion into the sole province of the executive. The same court said, "It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret."

My next point concerns the definition of electronic surveillance contained in the proposed new section 2521(b)(6)(D). This could cover monitoring devices of all type such as cameras, television and even binoculars. By definition, the words "other than from a wire or radio communication" renders this type of acquisition nongermane to an electronic surveillance bill and the legal issues are quite different. This subsection should be dropped, and if there is a problem it should be studied elsewhere.

We also have trouble with the use of the word "essential" in the proposed section 2521 (b) (5) (B) insofar as it is applicable to foreign targets. We see no reason to apply so rigid a standard as opposed to, for example, "relevant" when dealing with foreigners. There is, in our opinion no logical reason to so restrict foreign intelligence collection. What is merely relevant when seeking information can be extremely important when collected and analyzed.

In order not to prolong this presentation with a number of other suggestions, I would like to say that we have other suggestions for changes that coincide with the detailed recommendations made by Deputy Under Secretary of Defense for Policy, Daniel J. Murphy before this committee on January 10. We endorse those recommendations.

In summary, we urge that non-existent problems not be solved by inhibiting the collection of foreign intelligence and creating serious risks of compromise of intelligence sources and methods with grave harm to the national effort.

Thank you.

Mr. MURPHY. Thank you, Mr. Warner.

We would like to hear from Mr. Sheehan now.

**TESTIMONY OF MR. ROBERT SHEEHAN, COMMITTEE ON FEDERAL
LEGISLATION, NEW YORK CITY BAR ASSOCIATION**

Mr. SHEEHAN. Mr. Chairman, my name is Robert Sheehan. I am a member of the Association of the Bar of the City of New York. I am here representing the association.

The comments contained in my statement, of which I will read a part and ask that the rest be entered into the record, are directed principally at H.R. 7308, introduced by Chairman Rodino, as that bill has undergone intense scrutiny in the Senate where it carries the denomination S. 1566.

As this committee is undoubtedly aware, our committee is charged with the responsibility of developing and presenting the views of the Association of the Bar of the City of New York on proposed Federal legislation. For the past several years, our committee has maintained a keen interest in the areas of domestic and foreign intelligence. In addition to commenting on previous versions of the legislation currently under consideration, we released last year a major report on legislative control of the FBI which touches upon many of the same questions raised by the present bill. A review of that report may provide further insight into our committee's views on these issues. Finally, a formal report on H.R. 7308, which will contain all of the comments which follow, will be forthcoming very soon.

To begin with, our committee applauds the basic intention underlying H.R. 7308, which is, we believe, to minimize, not encourage, electronic surveillance and to safeguard individual expectations of privacy against unwarranted Government intrusion. In 1976 we supported enactment, with modifications, of S. 3197, the predecessor to H.R. 7308. Three years ago the association also recommended passage of Senator Nelson's Surveillance Practices and Procedures Act in a

full report prepared by our committee and the committee on civil rights of our association.

While we do not deny the need for an effective foreign intelligence-gathering capability, disclosures of the past 2 years make it apparent that the kind of legislation we have supported since 1974 is also needed to protect individuals, whether citizens or aliens, from intrusion upon their fundamental rights and liberties. The judicial warrant procedure established by H.R. 7308 is certainly a major step in that direction.

We do not agree with the view that the bill legalizes more electronic surveillance than it inhibits. We are made uneasy, however, by recent indications that the warrant procedure established by the Omnibus Crime Control Act of 1968 for surveillance in domestic law enforcement may not be working, that surveillance applications and requests for extensions of surveillance are simply being rubber-stamped. As the Supreme Court reaffirmed last June in *United States v. Chadwick*, the judicial warrant is supposed to provide "the detached scrutiny of a neutral magistrate, which is a more reliable safeguard than the hurried judgment of a law enforcement officer." If we are not getting such detached scrutiny, the fault lies with the judges who are evading the responsibilities placed upon them by the Constitution and by the 1968 act, not with the judicial warrant procedure.

We believe the remedy lies in the careful selection of the judges who will hear warrant applications under the new law and in expanded congressional oversight provisions, not in abandoning the traditional concept of a judicial warrant. We remain convinced that a warrant procedure which makes surveillers stop, think and justify their intended actions, especially when coupled with other procedural safeguards and sanctions contained in H.R. 7308, is far more likely to minimize invasions of privacy than relying on undefined concepts and haphazard judicial review.

Our committee is thus in agreement with the purposes of H.R. 7308. Our 1974 report reviewed the historical background and considered the constitutional questions presented by such legislation. Our conclusion in the 1974 report, that legislation subjecting foreign intelligence surveillance to judicial warrant procedures does not unconstitutionally restrict presidential power, is consistent with the conclusion expressed by former Attorney General Levi in his March 1976 testimony before the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee.

We are gratified to note the elimination of section 2528 from S. 3197 and the corresponding repeal of section 2511(3) of chapter 119, both of which purported to recognize an inherent constitutional power of the President to conduct surveillance activities. The Supreme Court, in *United States v. United States District Court*, left open the question of whether there was any such inherent power with respect to foreign intelligence activities. The hearings and reports of the two select committees have made it clear that the FBI has always relied upon the alleged inherent constitutional power of the President to conduct intelligence activities for the reasons set forth in 18 U.S.C.

2511(3), that is, to obtain information "deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities" as the principal, if not sole, source of its power to engage in the very activities which new legislation should seek to eliminate. There is no reason why Congress should expressly recognize any such power in the text of the new legislation.

I would like to note the major concern of our committee with the legislation. Notwithstanding our support for the basic goals embodied in H.R. 7308, the members of our committee are troubled by five major features of the bill.

First: It would be an adoption of a noncriminal standard for permitting electronic surveillance against individuals in certain circumstances.

Second: The restriction of certain basic protections of individual privacy only to citizens and resident aliens, excluding all other persons.

Third: The absence of any requirement to justify before a judge the asserted need for surveillance or the likelihood that foreign intelligence information will be obtained.

Fourth: The possibility that the bill may be read to sanction the use of evidence obtained by foreign intelligence surveillance in criminal and other proceedings based only on *ex parte* determinations, without any adversary hearing of any kind.

And finally, the definition of electronic surveillance in 2521(b)(6) appears to be limited in a fashion so as to permit both wholesale interception of international communications to and from the United States and unfettered retention and dissemination of the information so obtained, so long as the communications of particular United States persons are not targeted.

In addition, we have numerous comments on sections of the bill that we think will be of aid to the committee in their consideration.

I would like to submit my full statement for insertion in the record.

Mr. MURPHY. Without objection, so ordered.

[The prepared statement of Mr. Sheehan follows:]¹

PREPARED STATEMENT ON ROBERT C. SHEEHAN, ON BEHALF OF THE COMMITTEE ON FEDERAL LEGISLATION, THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

I am gratified to be here today to present the views of the Committee on Federal Legislation of The Association of the Bar of the City of New York concerning the proposed Foreign Intelligence Surveillance Act.

The comments contained herein are directed at H.R. 7308, introduced by Chairman Rodino, as that bill has undergone intense scrutiny in the Senate where it carries the denomination S. 1566.

As this Committee is undoubtedly aware, our Committee is charged with the responsibility of developing and presenting the views of The Association of the Bar of the City of New York on proposed federal legislation of a diverse nature. For the past several years, our Committee has maintained a keen interest in the areas of domestic and foreign intelligence. In addition to commenting on previous versions of the legislation currently under consideration, we released last year a major report on Legislative Control of the FBI (Federal Legislation Report, May 1, 1977) which touches upon many of the same questions raised

¹ See appendix E for additional correspondence from the Association of the Bar of the City of New York.

by the present bill. A review of that report may provide further insight into our Committee's views on these issues. Finally, a formal Report on H.R. 7308, which will contain all of the comments which follow, will be forthcoming very soon.

To begin with, our Committee applauds the basic intention underlying H.R. 7308, which is, we believe, to minimize, not encourage, electronic surveillance and to safeguard individual expectations of privacy against unwarranted government intrusion. In 1976, we supported enactment, with modifications, of S. 3197 (Letter to Sponsors of S. 3197, July 1, 1976), the predecessor to H.R. 7308. Three years ago, the Association also recommended passage of Senator Nelson's Surveillance Practices and Procedures Act (S. 2820) in a full report prepared by our Committee and the Committee on Civil Rights (Federal Legislation Report No. 74-4, June 24, 1974). While we do not deny the need for an effective foreign intelligence-gathering capability, disclosures of the past two years make it apparent that the kind of legislation we have supported since 1974 is also needed to protect individuals, whether citizens or aliens, from intrusion upon their fundamental rights and liberties. The judicial warrant procedure established by H.R. 7308 is certainly a major step in that direction.

We do not agree with the view that the bill legalizes more electronic surveillance than it inhibits. We are made uneasy, however, by recent indications¹ that the warrant procedure established by the Omnibus Crime Control Act of 1968 for surveillance in domestic law-enforcement may not be working—that surveillance applications and requests for extensions of surveillance are simply being rubber-stamped. As the Supreme Court reaffirmed last June in *United States v. Chadwick*, — U.S. —, 45 U.S.L.W. 4797, 4799 (June 21, 1977), the judicial warrant is supposed to provide "the detached scrutiny of a neutral magistrate, which is a more reliable safeguard * * * than the hurried judgment of a law enforcement officer." If we are not getting such "detached scrutiny," the fault lies with the judges who are evading the responsibilities placed upon them by the Constitution and the 1968 Act, not with the judicial warrant procedure itself. We believe the remedy lies in the careful selection of the judges who will hear warrant applications under the new law and in expanded congressional oversight provisions, not in abandoning the traditional concept of a judicial warrant as a safeguard to personal liberties. We remain convinced that a warrant procedure which makes surveillers stop, think and justify their intended actions, especially when coupled with the other procedural safeguards and sanctions contained in H.R. 7308, is far more likely to minimize invasions of privacy than relying on undefined concepts and haphazard judicial review.

Our Committee is thus in agreement with the purposes of H.R. 7308. Our 1974 Report reviewed the historical background and considered the constitutional questions presented by such legislation. Our conclusion in the 1974 Report, that legislation subjecting foreign intelligence surveillance to judicial warrant procedures does not unconstitutionally restrict presidential power, is consistent with the conclusion expressed by former Attorney General Levi in his March 1976 testimony before the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee.

We are gratified to note the elimination of § 2528 from S. 3197, and the corresponding repeal of § 2511(3) of Chapter 119, both of which purported to recognize an inherent constitutional power of the President to conduct surveillance activities. The Supreme Court in *United States v. United States District Court*, 407 U.S. 297 (1972) left open the question of whether there was any such inherent power with respect to foreign intelligence activities. The hearings and reports of the two Select Committees have made it clear that the FBI has always relied upon the alleged inherent constitutional power of the President to conduct intelligence activities for the reasons set forth in 18 U.S.C § 2511(3) (*i.e.*, to obtain information "deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities") as the principal, if not sole, source of its power to engage in the very activities which new legislation should seek to eliminate. There is no reason why Congress should expressly recognize any such power in the text of new legislation.

¹ See H. Schwartz, "Taps, Bugs and Fooling the People" (Field Foundation, 1977); T. Wicker, "In the Nation," *The New York Times*, July 13, 1977, p. 29 and July 15, 1977, p. A.23.

A. THE COMMITTEE'S MAJOR CONCERNS

Notwithstanding our support for the basic goals embodied in H.R. 7308, the members of our Committee are troubled by five major features of the bill:

1. The adoption of a "non-criminal" standard for permitting electronic surveillance against individuals;
2. The restriction of certain basic protections of individual privacy only to citizens and resident aliens, excluding all other persons;
3. The absence of any requirement to justify before a judge the asserted need for surveillance or the likelihood that foreign intelligence information will be obtained;
4. The possibility that the bill may be read to sanction the use of evidence obtained by foreign intelligence surveillance in criminal and other proceedings based only upon *ex parte* determinations, without any adversary hearing of any kind; and
5. The definition of "electronic surveillance" in § 2521(b)(6) appears to be limited in such a fashion as to permit both wholesale interception of international communications to and from the United States and unfettered retention and dissemination of the information so obtained, so long as the communications of particular United States persons are not targeted.

Before discussing the points mentioned above, I might first express our concern over the bill's failure to state in clear, recognizable and unambiguous terms that the procedures set forth therein constitute the sole lawful means of obtaining foreign intelligence information through electronic surveillance, and that any other means are prohibited. We note with satisfaction the Senate Judiciary Committee's statement (S. Rep. No. 95-604, November 15, 1977, at 6) that this legislation, when combined with Title 18, Chapter 119, "constitutes the *exclusive means* by which electronic surveillance . . . and the interception of domestic wire and oral communications may be conducted." It is that exclusivity which, in the last analysis, wins our support. But we are concerned about the location of the exclusivity provision, which appears only deep after the semicolon in the second clause of § 4(c)(3)(f) of the bill. Subsection 4(c) is basically concerned with various conforming amendments to provisions of the 1968 Act which, as a group, carve out various exceptions to the mandatory warrant procedures. We would prefer to see the expression of this bill's basic intention, that there shall be no surveillance except in accordance with the procedures mandated by law, also appear in § 2522, which authorizes application for warrants under the new procedures. In our view, that is the proper place to make it clear that such procedures are the exclusive means of electronic surveillance and that any surveillance which is not in accordance with such procedures is prohibited.

I turn now to our Committee's major concerns about the standards of surveillance and the required showing to obtain a warrant under the bill. As the bill is structured, the definition section is crucial to its scope, particularly the definitions of "foreign power," "agent of a foreign power," and the term "clandestine intelligence activities." In their present form, these definitions are in some respects at odds with the approach The Association of the Bar has consistently adopted. As expressed in our 1974 Report (p. 14):

"This Association has been on record since the early '60's in favor of the proposition that individual privacy must be protected by establishing a narrowly and clearly defined area of permissible electronic surveillance. Running through our successive reports there appears as well to have been a continuing minority view that the prohibition against electronic surveillance should be absolute."

With this approach in mind, in our comments on S. 3197 we questioned the vague definition of the phrase "agent of a foreign power"—particularly the absence of any requirement that the individual to be surveilled have knowledge of the involvement of a foreign power and that such involvement be apparent and direct. We are pleased to note that H.R. 7308 refines the definition of that term to require "knowing" action undertaken "for or on behalf of" a foreign power. The Committee nevertheless remains troubled that, under H.R. 7308, individuals may still be subject to electronic surveillance without any showing that they are engaged in, or likely to be engaged in, criminal activity. Even with respect to United States citizens and resident aliens, § 2521(b)(2)(B)(iii) would permit electronic surveillance based upon alleged conduct—

clandestine collection or transmission of information to a foreign intelligence service—which is not clearly criminal. Our Committee has always been wary of making any exceptions to a strictly criminal standard where individual privacy is at stake and we are not persuaded of the need to depart from that position in this bill.

We are likewise disturbed that the bill's full protection of individual privacy is extended only to United States citizens and resident aliens. The Fourth and Fifth Amendments protect all "persons" and do not distinguish between United States citizens or resident aliens on the one hand, and other individuals within our borders on the other.² We hope that Congress will act to insure that the rights and liberties enunciated in the Constitution are equally available to all individuals who come within our borders. Under the present definition of "agent of a foreign power," thousands of innocent aliens—such as employees of foreign national airlines and other businesses owned or controlled by foreign governments, as well as tourists who simply happen to be employees of foreign governments or entities controlled by foreign governments, would be subject to electronic surveillance, without any further showing, the moment they arrive in the United States.

We would thus strongly urge adoption of a standard which treats all individuals alike, and requires a probable cause showing of *criminal* clandestine intelligence activity to justify a warrant. Recognizing, however, that the enactment of this bill must reflect a balancing of interests between constitutionally protected liberties and the responsibility of the Executive Branch to protect national security, the Association would support enactment of H.R. 7308 even with the present definitions and the "non-criminal" standard. However, illustrative of the strength of the Association's preference for a strict criminal standard, I should note here that the Civil Rights Committee of the Association would not support this legislation with the "non-criminal" standard and would prefer to see no legislation rather than enactment of this bill. That Committee's views will be set forth in a separate letter to the Committee.

We would also urge the following changes to minimize the threat to individual privacy inherent in the present definitions:

(a) We noted in response to S. 3197 that the phrase "clandestine intelligence activities" lacked any clear meaning, especially when used together with "sabotage" and "terrorism" which carry definite connotations of clear and present danger to domestic well-being. We are pleased that both "sabotage" and "terrorism" have been expressly defined in H.R. 7308, but are disappointed to find no comparable attempt to define the much vaguer term "clandestine intelligence activities." A satisfactory definition, which embodied the concept of "significant threat to the national security," appeared in the Senate Judiciary Committee's report on S. 3197 (S. Rep. No. 94-1035, at 24). We believe that this phrase, like the other operative terms in the bill, should be given an express definition in the legislation itself, not relegated to a committee report.

(b) While we similarly approve the attempt to make more explicit the definition of the term "foreign power," we are troubled by the expanded scope of that term, especially since the bill now places practically no burden of proof on the applicant, and grants practically no power of review, where the target of the surveillance is a "foreign power" as defined. While we can understand that there may be some need for a different standard where the target is in fact a foreign government entity (or the equivalent), as noted in our 1974 Report (p. 12), the Fourth Amendment does not lose its force simply because foreign intelligence gathering may be involved. Wiretaps and bugs on foreign embassies, for example, must necessarily extend to those individuals who communicate with the embassies. We wonder if the national interest would really be threatened by requiring our Government to justify in court at least *some* need for surveillance of foreign embassies each time such surveillance is sought.

Whatever may be said concerning surveillance of foreign governments, we are not convinced that a need has been shown for treating in the same category all entities "directed and controlled" by foreign governments—for example purely business corporations, such as airlines, or United States

² *United States v. Toscanino*, 500 F.2d 267, 280 (2d Cir. 1974); *Au Yi Lau v. United States Imm. & Nat. Serv.* 445 F.2d 217, 223 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 864 (1971).

corporations engaged solely in commercial and trade activities on behalf of foreign governments—without requiring the applicant to show probable cause to believe that the target is in fact engaged in intelligence activities. Absent such evidence of need, we would favor treating such corporations in the same way as individual “agents of a foreign power.”

(c) As we urged in connection with S. 3197, we believe that the judge who passes on an application should be made aware of the *sources* of the applicant's alleged knowledge as to the facts required to be set forth in the application and the basis for believing such sources to be reliable. While we do not urge the disclosure of the identity of confidential informants, we do believe that information showing the reliability of sources will often be essential for the court to make any meaningful findings as required by the Act. *See, e.g., Spinelli v. United States*, 393 U.S. 410 (1969). At the very least, information as to sources of the applicant's knowledge should be within the scope of the “other information” which the judge may require under § 2524(c).

(d) The probable cause finding required under § 2525(a)(3) should include a third element—a finding that there is probable cause to believe that the information sought to be obtained will in fact be “foreign intelligence information” as defined in the bill. Without that third element, the warrant procedure does not really protect against surveillance instituted under this Act, but which is really designed to obtain information totally unrelated to foreign intelligence purposes, when the applicant could not obtain a warrant under existing law. Thus, while it is certainly some improvement over last year's bill to permit the court—where the target is a “U.S. person”—to review the basis for the certification specified in § 2524(a)(7), we are not at all satisfied with the rigid standard of “not clearly erroneous”—especially since the finding can be based only on the facts set forth in the certification itself. If there is in fact a growing tendency for rubber-stamping such applications, we believe that the “not clearly erroneous” standard amounts, in effect, to no review at all. That standard may be appropriate for appellate review of factual findings after an adversary trial on a full record, but we cannot conceive of any situation in which, based only upon the minimal amount of information which the applicant must place before the judge, and with no one to present an opposing view, the certification could ever be held “clearly erroneous.”

What is really required is that, instead of simply filing a certification which can be disturbed only if found to be “clearly erroneous,” the applicant should be required to show probable cause to believe that the information sought is likely to be “foreign intelligence information” and that such information cannot be obtained by other means.

Without these changes, we do not think the bill can completely “curb the practice by which the Executive Branch may conduct warrantless electronic surveillance on its own unilateral determination that national security justifies it,” as claimed in the Senate Judiciary Committee's Report (S. Rep. No. 95-604, at 8).

(e) As we urged last year, we think the bill would be strengthened by requiring the surveillance order to include an express finding that the procedures of the Act have been fully complied with. It is one thing to legislate a set of procedures and to enact civil and criminal sanctions for violating them, but there would be more protection if the judge in issuing the warrant were required at that point to satisfy himself that there had been no procedural violation.

Our fourth major concern has to do with the provisions of § 2526(c) which can be read to permit the elimination of any adversary hearing prior to the use of information, obtained by foreign intelligence surveillance, against an individual in a trial, hearing or other proceeding. Notice and an opportunity to be heard is the mainstay of our system of due process. This bill would appear to permit such a hearing to be dispensed with, and a completely *ex parte* determination made, solely upon the filing of a government affidavit asserting “that an adversary hearing would harm the national security or the foreign affairs of the United States.” We find the provision to be abhorrent to basic concepts of due process and believe that there is a substantial possibility that it is unconstitutional, at least with respect to criminal proceedings. If the Government truly believes that an adversary hearing would harm the country, its choice should be to forget about using the information, not to forget about due process.

We do not oppose the requirement that, in appropriate cases, the surveillance application, order and transcript of surveillance be reviewed initially *in camera* (although we prefer the language of S. 3197 which permitted the judge to disclose portions thereof to the aggrieved person upon finding that disclosure "would substantially promote a more accurate determination of the legality of the surveillance," to the language of H.R. 7308 which would require a finding that such disclosure "is necessary for an accurate determination"). We would, therefore, favor retention of the *in camera* review, but strongly urge elimination of the language which can be read to avoid the holding of any adversary hearing prior to use of the information against an individual.

Our last major concern arises out of the limitations on the definition of "electronic surveillance." Although we do not profess to have the technical expertise to assess fully the impact of the definition in § 2521(b)(6), it appears to us that the definition excludes from the bill's coverage routine interception, by the National Security Agency for example, of every telephone call from the United States to a foreign country, so long as a particular United States person is not targeted and the call is intercepted at a location outside the United States or at a point when it is not being sent by wire. Thus, since the exclusivity provision of § 4(c)(3) is limited to "electronic surveillance" as so defined (plus interception of *domestic* wire communications under Title 119), the bill would not cover wholesale interception of all international telephone calls, either from a ship stationed in international waters or from a point in the United States if the interception occurs while the calls are being transmitted by microwave or by satellite. In such cases, not only would the interception not be covered by the bill's warrant procedure, but there would be no controls on retention, dissemination or use of any information so obtained, because the "minimization" provisions of the bill are also tied to the definition of "electronic surveillance." Our interpretation of this definition is confirmed by the Senate Judiciary Committee's Report (S. Rep. No. 95-604, at 33-35).

We can see no justification for permitting wholesale electronic surveillance against all of us at once when we strictly limit such surveillance against identified individuals and groups. Even if the technical capability has not yet been developed to intercept at a point outside the United States, record and analyze all international telephone calls, such an eventuality seems to us to be disturbingly within the realm of possibility.

Even if wholesale interception of international calls is to be permitted, the bill should at least be amended to include additional safeguards against retention, use or dissemination of information obtained from such interception. To accommodate the needs of our intelligence agencies, the contents of any such communications which constitute foreign intelligence information should be disseminated or used *solely* for foreign intelligence purposes. But so long as the information has not been obtained pursuant to the judicial warrant provisions of Titles 119 or 120 and the person sending, or the intended recipient of, such communication has a reasonable expectation of privacy, dissemination even for criminal law enforcement purposes should be prohibited. Adoption of such a restriction would at least ensure that the law enforcement apparatus of the country must continue to abide by the Fourth Amendment in using information obtained by wholesale, intrusive electronic surveillance methods.

B. ADDITIONAL COMMENTS AND SUGGESTIONS

We have the following additional comments and suggestions for improvement of the bill, many of which were set forth in our letter of July 1, 1976 addressed to S. 3197. We present these comments section by section.

1. *Section 2521.* Most of our comments on the definition section were included in our discussion of the Committee's major concerns. We add only the following:

(a) We applaud the attempt to make the definition of "foreign intelligence information" more explicit than was the case in S. 3197. Nevertheless, for the reasons stated by former Senator Tunney in presenting his dissenting views in 1976 (S. Rep. No. 94-1035, 94th Cong., 2d Sess., at 135-36), we would favor insertion into § 2521(b)(5)(A) of the phrase "with respect to a foreign power or foreign territory," which now appears only in subsection (B) of that definition.

(b) With the major reservation previously expressed, we were pleased to see the expansion, from the version appearing in S. 3197, of the definition of

"electronic surveillance" (§ 2521(b)(6)) to include interception of wire and radio communications sent by or intended to be received by United States persons within the United States. But we share Senator Bayh's view that this definition does not go far enough and ought also to cover interception by their own government of communications sent or received by United States persons while outside the United States.

2. *Section 2523.* Especially in view of recent indications that some judges may not be fulfilling their responsibilities under the 1968 Act, we believe that several changes should be made to strengthen the section with respect to designation of judges and their conduct under this bill:

(a) As we noted in 1976, we believe it would be wise to limit the service of such judges to finite terms, such as three years, in order to permit fresh approaches and fresh insights to be brought to bear on these problems.

(b) Also in order to permit the application of diversified approaches, we favor a requirement that the number of designated district judges be increased to ten, to be selected from each of the ten judicial circuits by the Chief Judge of each circuit. Selection by the Chief Judge of each circuit, rather than the Chief Justice of the United States, avoids placing the Chief Justice of the United States in the position of having to pass upon petitions for certiorari from the determinations of the very judges he has personally selected. Likewise, we favor a requirement (which is probably implicit anyway) that the three judges designated to serve on the special court of review not include any of the judges designated to hear applications and grant orders.

(c) The prohibition against submitting the same application to different judges for the same electronic surveillance once denied is a sound addition to the bill. However, the provision for a special court of review in effect constitutes an opportunity to "try again," since § 2523(b) does not give the special court any standard for review, other than to determine whether "the application was properly denied." We would not favor *de novo* review by the special court and thus urge that the bill set forth the requirement for a reversal of denial of an application, such as a holding that the denial was an "abuse of discretion."

(d) As we said in 1976, we also favor a requirement that the written statements of the district judges and of the special court of review, explaining the reasons for denials of warrants, be published, with suitable redaction to prevent the disclosure of the identity of proposed targets of surveillance and other confidential details. We would be content to leave to the discretion of each court precisely what material should be omitted from the published statements, but we think that publication of the statements, and the development of a body of law under the Act, would substantially further its purpose.

3. *Section 2524.* Most of our comments concerning the warrant procedure itself are set forth above in the statement of our major concerns. We have the following additional comments:

(a) Even if there is some need for a less rigorous standard when the target of surveillance is a foreign power, as defined, rather than an individual, we are not convinced of the need for excepting foreign power surveillance from each of the requirements from which it is now excepted. For example, we do not see why the applicant should not be required to set forth the basis for his belief that the information sought is foreign intelligence information or that normal investigative techniques are insufficient. We would recommend further consideration of the need for each of these distinctions.

(b) Section 2524(c) of S. 3197 provided that the judge may require the applicant to furnish "such other information or evidence as may be necessary to make the determinations required by § 2525." S. 1566 eliminates the phrase "or evidence." We are concerned that this change may be read as an indication of intent to prohibit the judge from requiring the "additional information" to be presented in the form of sworn testimony or other competent evidence. We understand that there was no such intention (and we would seriously question any such intent). We would, therefore, urge that the phrase "or evidence" be restored to § 2524(c) or at least that the legislative history make clear that there was no intent to preclude the judge from taking evidence.

4. *Section 2525.* We have the following additional comments on this section of the bill:

(a) While, as noted above, we question the extremely narrow standard of reviewability of the certification set forth in § 2525(a)(5), even if that

standard is to be retained, we do not understand the reasoning behind limiting the review to cases where the target is a "United States person." In all other similar sections of the bill, where a distinction is made in the statutory standards, the distinction is between "foreign power" and "agent of a foreign power." Because, as noted, we think that non-United States persons have rights and liberties worthy of protection, we would at least urge that the judicial review afforded in § 2525(a)(5) be extended to all applications where the target is not a "foreign power" as defined.

(b) We appreciate that there may be rare emergency situations in which the procedures set forth in § 2525(d) will be required. Because we share with many of the sponsors of the bill the assumption that such situations will be rare, we would urge that the bill require the Attorney General to report to this Committee (or some other suitable congressional oversight committee) each time the emergency powers are used, at the same time as an application is made for the after-the-fact warrant provided for in the bill. We believe that such a prompt reporting requirement will go a long way to insuring that the emergency power is not abused.

5. *Section 2526.* We have the following additional suggestions concerning the section on use of intelligence information:

(a) In its present form, § 2526(a) purports to limit the use of information obtained by foreign intelligence surveillance to "the purposes set forth in section 2521(b)(8)" or for criminal law enforcement. But § 2521(b)(3) contains only the bill's definition of "minimization procedures" and does not set forth any specific descriptions of the manner in which such information may be used, much less any restrictions governing such use. Misuse of intelligence information has been an abuse at least as serious and far-reaching as those involved in the gathering of such information. Legislation which regulates the intelligence-gathering process, but is practically silent on the permissible uses of intelligence, accomplishes only half the job. Regulating the use of intelligence information is neither impractical nor without precedent. Section 552(b) of the Privacy Act of 1974 (5 U.S.C. § 552a(b)), governing permissible uses of personal data in agency files, provides a model of such an effort which could be adapted with appropriate deference to the sensitive nature of foreign intelligence information.

(b) We are also concerned about the language in § 2526(a) which would permit the use of information acquired from electronic surveillance for enforcement of the criminal law only "if its use outweighs the possible harm to the national security." The bill does not specify who is to make the judgment between the interests of law enforcement and possible competing interests of "national security." If that judgment is left to those who conducted the surveillance, the statute might have the effect of preventing the use of information acquired from such surveillance as evidence to prosecute violations of the Act itself. At the very least, we would favor an amendment to provide that such a determination may be made only by the Attorney General.

(c) We support the concept of "minimization procedures" as set forth in the bill, as one method of insuring the least possible intrusion upon individual privacy and liberties. We do, however, believe that the provisions with respect to minimization in H.R. 7308 do not go far enough. Specifically, we recommend the following:

(i) We note with approval the Senate Judiciary Committee's amendment to S. 1566 (which is not reflected in H.R. 7308) which makes it clear that the required notice of intention and judicial review prior to use or disclosure of intelligence information applies to state and local proceedings, as well as to federal courts and agencies. However, while it permits the disclosure of intelligence information to state and local law enforcement authorities (§ 2526(b)), even as amended, the provision still does not require such state and local authorities to observe the notice of intention procedure which § 2526(c) would place upon federal authorities. As we understand the bill, "the Government" as used in § 2526(c) refers only to the federal government, so that only federal agencies would be required to notify a court of intention to use or disclose the information, and obtain that court's advance determination of the legality of the surveillance. State and local authorities would only be required to obtain advance authorization of the Attorney General under § 2526(b), but no advance judicial determination. We can see no reason for such a distinction and we note that the provisions of Chapter 119 (particularly §§ 2515 and

2518(10)) are not so limited. We would thus urge that § 2526(c) be made applicable to use or disclosure of intelligence information by state and local, as well as federal, authorities.

(ii) While we can anticipate the arguments in favor of permanent retention of information accidentally acquired which is neither "foreign intelligence information" nor evidence of a crime, we believe that, in the long run, there is no justification for preserving such information in government files where it can only be misused and put to no legitimate use. (See this Committee's Report on the Privacy Act of 1974, Federal Legislation Report No. 74-9, November 15, 1974.) Accordingly, we would propose that the bill include a requirement that, within a specified time after the termination of a surveillance in cases where such extraneous information is obtained, notice of that fact be given to the target of the surveillance (at least where the target is not a "foreign power") and such person be given the right to demand destruction of all such non-foreign intelligence information. To guard against dangerous or premature disclosure of the existence of ongoing investigations, this section could contain the same procedures for judicial postponement of the notice requirement as now appear in § 2526(a). An even broader notice requirement, together with similar provision for judicial postponement, was included in the 1974 Nelson bill, and was supported by our 1974 Report. We again urge the adoption, as part of the required minimization procedures, of the notice requirement suggested above.

(iii) We are concerned that § 2526(b), which provides that minimization procedures shall not be deemed to preclude retention and disclosure of information incidentally acquired which is evidence of a crime, might permit law enforcement agencies to conduct illegal domestic surveillance under the guise of foreign intelligence surveillance, where they cannot meet a "probable cause" standard to obtain warrants for surveillance. We thus believe that the bill should contain an additional proviso that information or evidence incidentally obtained in the course of foreign intelligence surveillance, while it may be disclosed to the appropriate domestic law enforcement agencies, would remain subject to all of the established statutory and Fourth and Fifth Amendment protections and restrictions upon admission into evidence or other use in the criminal law enforcement process. The second sentence of § 2526(a) accomplishes this result only in part, since many of the protections we have in mind might not be properly characterized as "privileges" or as pertaining to "privileged information." We believe the full protection noted above is what is really required.

(d) Just as we do not approve a distinction between "United States persons" and other individuals with respect to the availability of judicial review of the certification under § 2525(a)(5), we do not approve the same distinction in § 2526(a). Although the sentence (not reflected in H.R. 7308) which was added to the end of § 2526(a) by the Senate Judiciary Committee helps somewhat, that section would still permit information acquired from electronic surveillance concerning persons who are not citizens or resident aliens to be used for undefined purposes at the discretion of the acquiring officials, with the only restriction being that such purposes be "lawful." As we have said before, the protections of the Fourth and Fifth Amendments apply to all persons, not only citizens and resident aliens, and we can see no reason to give federal officials undefined latitude in the use against individuals of information obtained from electronic surveillance. If there are "lawful purposes"—such as deportation proceedings—which apply only to foreigners, they should be expressly stated. But, perpetuation of a distinction with respect to use of intelligence information between "U.S. persons" and all other individuals is, in our view, unjustified and may create constitutional infirmities.

(e) As we said in our comments to S. 3197, we think that the court's determination under § 2526(c) should include a specific finding that the procedures of this Act were complied with when the surveillance was undertaken.

(f) For the reasons stated in our 1974 Report, we believe the notice requirement of § 2526(d), with respect to emergency surveillance which is subsequently not approved by the court, is an essential protection without which we would question the emergency power. We think, therefore, that the court should retain absolute discretion over any applications for dispensing with the required notice. Accordingly, we would urge that the verb "shall" in the last sentence of § 2526(d) be changed to "may."

6. *Section 2527.* We think that the Attorney General's annual report to Congress is an essential feature of the bill, providing the basis for a continuing oversight to insure that the statutory procedures are working as intended. We were thus dismayed to see that H.R. 7308 contemplates an even briefer, less meaningful, annual report than would have been required by S. 3197. We urge restoration of the portions of the required report which appeared in S. 3197—such as listing the number of surveillances terminated and the number currently in effect, and would also suggest inclusion of the following additional information:

(a) A summary of the reasons given during the year by the designated judges for denial of applications for surveillance. (This would be especially valuable in the event our suggestion that such statements by the judges be published is not adopted.)

(b) A statement of the total number of uses of the emergency power of § 2525(d) and the number of times subsequent court approval was not obtained.

(c) As to each of the surveillances terminated during the year, a statement of the time each remained in effect.

(d) A description of all pending civil and criminal proceedings for alleged violations of the Act and the position taken by the Justice Department with respect to each.

Section 7. Civil and Criminal Sanctions. We support the inclusion of criminal sanctions for willful violations of the statutory procedures and civil remedies for damage caused by surveillance not undertaken in compliance with the statute. We cannot emphasize too strongly that a bill of this sort without criminal and civil sanctions is not a meaningful response to the abuses recently brought to light. We note especially that § 4(a) of the bill has been amended, as we urged in 1976, to make the scope of the crime enunciated in 18 U.S.C. § 2511 co-extensive with the scope of the new bill's definition of "electronic surveillance." However, two specific criticisms of the civil remedy which we enunciated in 1976 still apply:

(a) We recognize that the civil remedy is keyed to the existing remedy created under the 1968 Act (18 U.S.C. § 2520). But we think the opportunity should be taken to make the civil damage provisions of § 2520 more meaningful. In today's economy, and considering the kinds of serious intrusions upon personal privacy which have been disclosed by the Senate and House Select Committees, a damage award limited to \$1,000 is neither meaningful compensation nor sufficient inducement for individuals to undertake federal court litigation to vindicate their rights. We believe that plaintiffs should be permitted to prove actual damages in an amount equal to the actual injuries they have suffered and that the formula of \$100 per day or \$1,000 per violation should be a minimum rather than a ceiling. While we approve of the provision for punitive damages in egregious cases, the natural reluctance of judges to impose punitive damages makes that provision no substitute for actual compensatory damages in cases where unauthorized surveillance has, as sometimes happens, ruined an individual's social life, seriously interfered with his livelihood or caused provable damage to his reputation or his emotional stability.

(b) Even more important, the denial of standing to commence civil damage actions to anyone meeting the definition of an "agent of a foreign power" in effect limits the civil damage remedy to violations which resulted in surveillance of a person as to whom the Act does not permit surveillance. All other violations of the statutory procedures—such as filing false applications, misuse of the emergency powers, or even failure to obtain a warrant at all—would be immune from the civil sanction so long as the injured party is someone who *could* have been subject to surveillance if the Act was complied with. Thus, innocent individuals, such as non-resident aliens working in foreign embassies or U.N. missions, could be made targets of surveillance in violation of the statutory mandates or victims of unauthorized disclosure of intelligence information, and *could* suffer damage thereby, and be powerless to seek redress. Where such violations and resulting damage can be proven, we see no reason to deny standing to maintain an action.

We note in passing that this amendment preventing an "agent of a foreign power" from seeking civil remedies is so broadly drawn that a U.S. corporation which is owned by a foreign government would be denied monetary recovery from a U.S. competitor which conducts industrial espionage against the hapless company in violation of the antiwiretapping provisions of Chapter 119 of Title 18.

* * * * *

On behalf of the Federal Legislation Committee, I am deeply grateful to the Committee for permitting me to express these views. It should be obvious that there are numerous ways in which our Committee believes that the Foreign Intelligence Surveillance Act can and should be strengthened to maximize the protection of cherished rights and liberties. But as Chief Justice Burger wrote in the *Chadwick* case, requiring surveillers to obtain a judicial warrant goes a long way toward "protect[ing] people from unreasonable government intrusions into their legitimate expectations of privacy." (45 U.S.L.W. at 4790.) Thus, we believe that H.R. 7308 represents an important step toward ending the kind of abuse of the intelligence process which only serves to discredit our nation, and it has our full support.

Mr. Miller?

**TESTIMONY OF MR. ARTHUR S. MILLER, PROFESSOR, NATIONAL
LAW CENTER, GEORGE WASHINGTON UNIVERSITY**

Mr. MILLER. Yes, sir.

Thank you, Mr. Chairman.

I submitted a brief statement to your staff. I find that I would like to scratch paragraph No. 9 in that formal statement because I find on further study that I spoke too quickly.

I would like to interpolate a few sentences from time to time as I go through this brief statement, if I may.

Mr. MURPHY. Sure.

Mr. MILLER. I appreciate the invitation, Mr. Chairman, to testify on the troublesome question of electronic surveillance for foreign intelligence purposes. As you know, this is a public policy question and thus a constitutional question of interest, importance, and complexity. I have studied the five bills sent with your letter of January 4, and I have the following comments to make. They are in outline form, but I will expand on them should the committee so desire.

First: It is long past the time when Congress should have legislated in the area of electronic surveillance for foreign intelligence purposes. For too long Congress has left such matters to the Executive. In general, therefore, each of the bills under consideration has the same worthy purpose.

Second: There can be no doubt about the need for the United States to counteract the intelligence-gathering activities of foreign powers and to take action to counteract the rising tide of terrorism.

Third: I favor the requirement that judicial approval be obtained before electronic surveillance can be undertaken. My reasons include, first, leaving such matters up to the Executive provides little opportunity for any check upon the abuse of power; and second, judicial approval would seem to comport with the command of the fourth amendment.

Fourth: Having said that, I want to go on and suggest that we should not harbor any delusions that judges will in fact operate as any substantial check upon what the Executive wishes to do. I speak of the Executive, but of course refer in the main to the intelligence agencies. I have no data on the question, but I should think that rejection by a judge of a request to wiretap, using that term in its generic sense, in domestic matters is a relatively rare occurrence. I may be wrong on that conclusion, and would be pleased to be cor-

rected if your committee has accurate information along those lines. Judges, as a group, are not noteworthy for opposing the Executive, particularly when the banner of "national security" is raised. In saying that, I do not mean to denigrate the judiciary. With *Balzac*, I believe that "to distrust the judiciary marks the beginning of the end of society." And the judiciary is, at times, our only line of defense against governmental despotism and arbitrariness. It is, however, one thing to distrust the judiciary and quite another thing to suggest that, as Professor John Griffith has said in his recent book "The Politics of the Judiciary," "the judges are an integral part of the government of the State." He goes on and says this, "the judiciary in any modern industrial society, however composed, under whatever economic system, is an essential part of the system of government and its function may be described as underpinning the stability of that system and as protecting that system from attack by resisting attempts to change it."

The point, to repeat, is not to distrust the judiciary, but to say that even the requirement for a court order is not a panacea. Perhaps that is as much as can be done or perhaps it is even as much as should be done, but we should not delude ourselves that judges are eager to protect individual rights and liberties when those who speak in the name of the state, the executive branch, utter the magic words of "national security."

Fifth: Let me make one other matter clear: I am not denigrating the intelligence community. Despite the many recent revelations about its misdeeds and even crimes, I do not suggest that if H.R. 7308 becomes law, officers in the executive branch will not live up to its letter and spirit. In this connection, I would be rather more comfortable if the Executive opposed rather than supported H.R. 7308. I tend to get nervous when executive officials readily agree to something that ostensibly circumscribes their behavior. The question here is the old one, *cui bono*? Who, indeed, benefits by H.R. 7308?

I don't think you have an answer to that, and I would be happy to expand on that later.

The further point here is this: How can it be known that the Executive is acting properly? In the final analysis, both Members of Congress and Federal judges, to say nothing of the general public, know only what the Executive chooses to tell you and them and us. We have the most open government in the world; but surely what we know is only a smidgen of what might be known. We must face the harsh fact that we are asked to trust governmental officials, most of whom are known only to themselves, their friends, their families and their superiors in the various agencies. Are they entitled to our trust?

On that question I must confess I have no answer. I don't know. I hasten to confess that I have no answer other than that given in general terms in H.R. 7308, to the ancient and never answered question: who watches the watchman?

I would like at this time, Mr. Chairman, to call attention to a statement by former President Nixon which was given in the interview with Mr. Frost last summer, last spring, and an article by Mr.

Nixon which was printed in the Sunday, June 5, 1977 issue of the Washington Star the title of which, "On Going Beyond the Letter of the Law."

With the committee's permission, I would like to submit that for the record.

Mr. MURPHY. Without objection.

[The information referred to appears as appendix F:]

Mr. MILLER. Sixth, in this connection, speaking about who watches the watchman, the provision for reports to Congress of only the numbers of surveillances granted and denied means that you will have abdicated your responsibilities. To know only the total number of surveillances is to know next to nothing. H.R. 5794, to take another bill, calls for more information. Given, however, the extraordinary nature of the circumstances, perhaps congressional ignorance is the best that can be expected. Again, however, let me suggest that a report such as called for in H.R. 7308 is more a charade than a reality.

Seventh: I should think that when Congress is delegating such broad discretionary powers to the Executive and the judiciary, it would want to be more specific about which agency can perform electronic surveillance. Is the intention to give carte blanche authority to any executive agency?

And if I may interpolate here, sir, just briefly, we are all aware of the recent revelations concerning the Central Intelligence Agency about mail opening and that type of thing. I think in glancing at Mr. Turner's statement, his statement is that they conduct no internal surveillance.

I wonder why the committee does not want to make that part of the law.

Eight: The minimization procedures are more wind than substance, for the language in which they are written is a series of high-level abstractions into which the bureaucracy can and probably will read about anything it wishes.

I have dropped my paragraph No. 9 which I submitted to the committee before, Mr. Chairman, and new paragraph No. 9 reads as follows. Section 2522 of H.R. 7308—and I would like to take a quick look at that, if I might, I really can't understand it.

[Pause.]

Mr. MILLER. It reads as follows: "Applications for a court order under this chapter are authorizing electronic surveillance"—that doesn't make sense, that first sentence, that first two lines there.

Mr. MURPHY. The staff tells me it is a misprint.

Mr. MILLER. Well, in my copy it doesn't make sense.

Mr. MURPHY. The staff informs me it is a typographical error and it doesn't make any sense.

Mr. MILLER. Thank you. I just wanted to call attention to that in the present form.

New paragraph No. 10, then, despite the statement made—

Mr. MURPHY. You can see how open and honest this committee is.

Mr. MILLER. Well, as a former consultant to Senator Ervin, sir, I believe in openness in government.

New paragraph No. 10, despite the statement which I made in paragraph No. 1 above, there is a serious problem that arises when

Congress seeks by legislation to limit the Executive. In colloquial language, you may be giving away too much. In this connection, I think the committee may wish to examine the War Powers Resolution of 1973 and the Budget and Impoundment Control Act of 1974, both of which seem to me to be concessions to executive power that possibly should not have been made in the manner they were. The same might well be said for the National Emergencies Act of 1976. The point is very simple: Despite a worthy purpose and an equally worthy effort to put meaningful but not excessive checks on the Executive, matters can go awry. You may be conceding too much power to the other end of Pennsylvania Avenue.

New paragraph No. 11—I am going to add a paragraph 12 if I might, or a couple of sentences. I should like to state that I have read the formal testimony given by representatives of the American Civil Liberties Union and find myself in substantial agreement with what they said.

New paragraph No. 12, and I don't want to get into any discussion at the present time unless the committee wants, I do not agree with Mr. Warner's statement about the inherent power of the President. I do believe that the power is in the Congress. I think there is power in the article 1, section 8, to legislate on these matters, if you want a constitutional warrant to legislate on these matters and to put whatever restraints the Congress wishes to place upon these. I am not going, with your permission, sir, to the details of the legislation. Mr. Sheehan, I think, has done a fine job on that. I would rather go into my general points.

Thank you very much.

Mr. MURPHY. Thank you, Professor.

[The prepared statement of Professor Arthur S. Miller follows:]

PREPARED STATEMENT OF PROFESSOR ARTHUR S. MILLER

I appreciate the invitation to testify on the troublesome question of electronic surveillance for foreign intelligence purposes. As you know, this is a public policy question—and thus a constitutional question—of interest, importance, and complexity. I have studied the five bills sent with your letter of January 4th—H.R. 7308, H.R. 5632, H.R. 9745, H.R. 5794, and S. 1506—and have the following comments to make. These are in outline form; but I will expand on any part of these remarks, should the Committee so desire.

1. It is long past the time when Congress should have legislated in the area of electronic surveillance for foreign intelligence purposes. For too long Congress has left such matters to the Executive. In general, therefore, each of the bills under consideration has the same worthy purpose.

2. There can be no doubt about the need for the United States to counteract the intelligence-gathering activities of foreign powers and to take action to counteract the rising tide of terrorism.

3. I favor the requirement that judicial approval be obtained before electronic surveillance can be undertaken. My reasons include:

(a) Leaving such matters up to the Executive provides little opportunity for any check upon abuse of power;

(b) Judicial approval would seem to comport with the command of the Fourth Amendment.

4. Having said that, I want to go on and suggest that we should not harbor any delusions that judges will in fact operate as any substantial check upon what the Executive wishes to do. (I speak of the Executive, but of course refer in the main to the intelligence agencies.) I have no data on the question, but I should think that rejection by a judge of a request to wiretap (using that word in its generic sense) *in domestic matters* is a relatively rare occurrence.

I may be wrong on that conclusion, and would be pleased to be corrected if your Committee has accurate information along those lines. Judges, as a group, are not noteworthy for opposing the Executive, particularly when the banner of "national security" is raised. In saying that I do not mean to denigrate the judiciary. With Balzac, I believe that "to distrust the judiciary marks the beginning of the end of society." The judiciary is (at times) our only line of defense against governmental despotism and arbitrariness. It is, however, one thing to distrust the judiciary and quite another thing to suggest that, as Professor John Griffith of the London School of Economics and Political Science said in his recent *The Politics of the Judiciary*, "the judges are * * * an integral part of the government of the State." Griffith further says: "the judiciary in any modern industrial society, however, composed, under whatever economic system, is an essential part of the system of government and * * * its function may be described as underpinning the stability of that system and as protecting that system from attack by resisting attempts to change it."

The point, to repeat, is not to distrust the judiciary, but to say that even the requirement for a court order is not a panacea. Perhaps that is as much as can be done or even that should be done but we should not delude ourselves that judges are eager to protect individual rights and liberties when those who speak in the name of the State—the Executive Branch—utter the magic words of "national security."

5. Let me make one other matter clear: I am not denigrating the intelligence community. Despite the many recent revelations about its misdeeds and even crimes, I do not suggest that if H.R. 7308 becomes law officers in the Executive Branch will not live up to its letter and spirit. In this connection, I would be rather more comfortable if the Executive opposed, rather than supported, H.R. 7308. I tend to get nervous when Executive officials readily agree to something that ostensibly circumscribes their behavior. The Question here is the old one, *cui bono*? Who, indeed, benefits by H.R. 7308?

The further point here is this: How can it be known that the Executive is acting properly? In the final analysis, both Members of Congress and federal judges, to say nothing about the general public, know only what the Executive chooses to tell you and them and us. We have the most open government in the world; but surely what we know about it is only a smidgen of what might be known. We must face the harsh fact that we are asked to trust governmental officers, most of whom are known only to themselves, their friends, their families, and their superiors in the various agencies. Are they entitled to our trust? I don't know. And I hasten to confess that I have no answer other than that given, in general terms, in H.R. 7308, to the ancient and never-answered question: Who watches the watchmen?

6. In this connection, the provision for reports to Congress of only the numbers of surveillances granted and denied means that you will have abdicated your responsibilities. To know only the total number of surveillances is to know next to nothing. H.R. 5794 calls for more information. Given, however, the extraordinary nature of the circumstances, perhaps Congressional ignorance is the best that can be expected. Again, however, let me suggest that a report such as called for in H.R. 7308 is more of a charade than a reality.

7. I should think that when Congress is delegating such broad discretionary powers to the Executive and the judiciary, it would want to be more specific about which agency can perform electronic surveillances. Is the intention to give *carte blanche* authority to any Executive agency?

8. The "minimization procedures" are more wind than substance, for the language in which they are written is a series of high-level abstractions into which the bureaucracy can (and probably will) read about anything it wishes.

9. Why is there no provision for sanctions against those Executive officers, of whatever status, who may breach the requirements of H.R. 7308? Should not that question be faced? This involves the question of both civil and criminal liability.

10. Section 2522 of H.R. 7308 seems garbled to me. At the very least, it is unintelligible.

11. Despite the statement made in No. 1, above, there is a serious problem that arises when Congress seeks by legislation to limit the Executive. In colloquial language, you may be giving away too much. In this connection, I think you may wish to examine the War Powers Resolution of 1973 and the

Budget and Impoundment Control Act of 1974, both of which seem to me to be concessions to Executive power that possibly should not have been made in the manner they were. The same may be said for the National Emergencies Act of 1976. The point is simple: Despite a worthy purpose and an equally worthy effort to put meaningful but not excessive checks on the Executive, matters can go awry. You may be conceding too much power to the other end of Pennsylvania Avenue.

12. Finally, I should like to state that I have read the formal testimony given the other day by representatives of the American Civil Liberties Union, and find myself in substantial agreement with what was said there.

TESTIMONY OF MR. MORTON HALPERIN, PROJECT ON NATIONAL SECURITY

We will next hear from Mr. Halperin.

Mr. HALPERIN. Mr. Chairman, first let me apologize for not preparing a statement.

As the committee knows, the Attorney General in testimony before this committee indicated that he did not have a fixed position on whether or not there needed to be a so-called noncriminal standard in this bill. I am hopeful that, in fact, that issue will be resolved in a way that permits this bill to have the kind of broad support that I think it should have since it is in fact dealing with a major abuse and regulating a practice which has gone on unregulated for far too long.

Let me assume, therefore, in my comments that that problem has in fact been resolved, and touch on some related issues and some other issues that I think this committee should look at.

First, it seems to me important in addition to eliminating any provision for wiretapping other than under a criminal standard, to tighten the noncriminal standard to make it clear that this bill can only be used when in fact the conduct directly relates to the national security of the United States, that it cannot be used simply for any violation of the criminal law under a very loose definition of the term national security. I am referring to the so-called criminal section of the bill which is, as now written, is in fact extraordinarily broad in permitting wiretapping of American citizens.

Second, I think the conspiracy provision needs to be tightened to make it clear that the person engaged in aiding or abetting or conspiring with needs to know all of the elements that the person who he is aiding or abetting has to know in order to be wiretapped under this bill. It should not be sufficient, as I think it might be, as the bill is now written, that you know you are aiding and abetting somebody. You should have to know that that person is in fact an agent of a foreign power engaged in clandestine intelligence activity, sabotage, or terror, whatever the requirements of the section are.

My understanding is that is the intent of the provision. I think as it appears in H.R. 7308 and even as it appears in the Senate version, it is not yet entirely clear, and I would urge the committee to tighten up that language.

On the question of foreign visitors; the new exception that has been written into the bill this year to permit them to be wiretapped under a lesser standard, I would prefer, as several of the speakers

have, to see that eliminated completely. I think at the very least some way should be found to in fact limit the application of that provision to communist bloc countries. The Attorney General's testimony before this committee and other committees has made it clear that the reason that the Justice Department and the FBI put forward that provision is, as the FBI Director put it, the large number of Russian visitors and Russian seamen who have come into the United States in the last few years.

If the intention of the bill is to permit surveillance simply of people who might well be agents of Soviet intelligence, I think it is not beyond the ingenuity of drafters to draft the provision which is in fact limited to such people but does not offend the sensibilities of the State Department in identifying particular countries as enemies. My understanding is that that has, in fact, been the main block to drafting that provision in a more narrow way, and I think some way can and in fact should be found around that.

As to other provisions, I would like to associate myself both with the statement presented to this committee by Mr. Shattuck and Mr. Berman several days ago, and with the statement, with the exception of the conclusion, of Mr. Sheehan's statement to this committee this morning.

Let me focus on two other issues which I think in the debate about the noncriminal standard have not gotten the attention that they deserve. The first one has to do with the authority implicit in this bill to index information about American citizens under the name of that citizen, if the information in fact relates to the national defense or the national security of the United States.

Now, Mr. Warner told us this morning that there had been no abuses relating to wiretaps on embassies. That is unfortunately not the case. There have in fact been substantial abuses relating to wiretaps on embassies involving the indexing and the retrieval of information about the political views of American citizens from embassy wiretaps. There are a number of cases in the courts in which citizens have discovered that the Government had compiled extensive files on them based on their conversations with embassy officials.

The most dramatic case of that, and the one that is clearly documented by the Church committee report, involved the situation in which first President Johnson and then President Nixon asked the FBI what it knew about the antiwar views and antiwar activities of members of the Congress of the United States. The FBI discovered that most of what it knew about those antiwar activities came from embassy wiretaps, came from conversations that members of the Congress of the United States had had with officials of embassies which had been recorded by the FBI and indexed under the names of the members of Congress. The FBI put together a report, sent it to President Johnson, summarizing what it knew about those views. The President found the report very interesting. He ordered and received periodic updating of those reports, and Mr. Nixon continued to receive similar reports.

Now, I find it difficult to believe that anybody would argue that that is not an abuse of the process of embassy wiretaps.

The bill seeks to deal with the issue by minimization but it does it in a way which seems to me in fact to authorize exactly what happened in that situation. On page 8 of the bill in the section dealing with minimization, there is a provision that says that procedures must be established reasonably designed to insure that information which relates solely to the conduct of foreign affairs shall not be maintained in such a manner as to permit the retrieval of such information by a reference to a United States person without his consent who was a party to a communication acquired pursuant to this chapter.

Now, if you look just above there, there are the six reasons why one can wiretap, six kinds of information defined as information which would justify a wiretap, and (C) is to provide for the conduct of the foreign affairs of the United States, (B) is to provide for the national defense or the security of the Nation.

If one reads that list in conjunction with the statement relating solely to the conduct of foreign affairs, the implication of that paragraph is to authorize and certainly not to prohibit the maintenance of files which would permit the retrieval of information about the United States person if the information relates, for example, to the national defense of the United States or the national security of the United States. It can only be prohibited, or there would only be a need to attempt to minimize it if the information relates solely to the conduct of the foreign affairs of the United States.

I would urge the committee to add to the bill a blanket prohibition, with some limited exceptions, prohibiting the indexing of information obtained from these wiretaps under the names of United States persons who are not the subject of the surveillance. I think otherwise this bill will authorize the maintenance of information about the political views and the political activities of American citizens who in the exercise of their First Amendment rights engage in telephone conversations to foreign embassies or who otherwise engage in conversations which are picked up on the surveillance programs.

The other issue that I would call your attention to has to do with the possible use of this information in court proceedings, and here it seems to me that the bill is attempting to have it both ways. On the one hand, the Justice Department has argued that the purpose of this bill is intelligence gathering, not criminal investigations. On the other hand they want to use this information, be able to use this information in criminal proceedings, but to do so in a way that violates the normal procedures for the introduction of evidence obtained from a search warrant in criminal proceedings. This which would normally require that the warrant and the fruits of the search be turned over to the defendant so that he or she is in a position to challenge the constitutionality of the warrant procedure.

I don't think the Government can in fact constitutionally, and I certainly don't think it should be permitted to have it both ways. If the Government wants to use evidence obtained from a wiretap in a criminal proceeding, it should be provided to follow the normal rules of criminal procedure which involve an adversary testing of the adequacy of the warrant procedure. The statement of Mr. Shat-

tuck and Mr. Berman has a proposed substitute language to deal with that problem which I would urge the committee to look at.

Let me make two final points, if I may, Mr. Chairman.

First, I think we should not be carried away with enthusiasm by one of the changes that has been made this year to permit courts to review the warrant, the adequacy of the warrant on United States persons, because the standard is clearly erroneous, and the notion that a judge would find an *ex parte* application clearly erroneous seems to me the height of fantasy. In a situation where a court is reviewing an adversary proceeding in an agency, a clearly erroneous standard then makes sense. Where you have an ad hoc *ex parte* judicial proceeding, I think in fact we have not made much progress in the clearly erroneous standard.

I would prefer to have the court review the full scope of the application under the normal standard of probable cause. I recognize that that is not likely to happen, but I am simply saying that we should not view this as a major advance.

The other point that I would make is that I think that there is a gap, as has been pointed out, in the failure to cover international communications and overseas communications of American citizens. I think one could argue that this bill leaves that situation in the realm of inherent Presidential power the way the Safe Streets Act left all national security warrants. I would simply urge this committee to join with Senator Bayh in the Senate Intelligence Committee in insisting that the administration put on the table a bill which would regulate overseas communications and international communications of American citizens before this bill is reported to the Floor of either House so that we have the assurance that such legislation will in fact move through the Congress following the enactment of this legislation.

Thank you.

Mr. MURPHY. Thank you, Mr. Halperin.

Mr. Warner, you suggest that when the target of surveillance is a foreigner, there is no benefit to the rights of Americans; innocent Americans, however, may be in contact with a foreigner.

Isn't there a need to insure that when the intelligence agencies target the foreigners, they do so for the purpose of obtaining foreign intelligence information, not information about domestic activities of Americans communicating with them.

The question is this. You suggest there be a different standard for foreigners than there is for Americans, but you necessarily, by tapping those phones of foreigners, bring in Americans, do you not?

Mr. WARNER. Occasionally, of course. Of course.

Mr. MURPHY. Well, what safeguards do these Americans have?

Mr. WARNER. Well, I had thought that your minimization provisions went a long way to deal with that problem. Now, maybe they are not tight enough, but that seems to me to be the answer to that particular point.

Mr. MURPHY. And you also suggest in your statement that these judges have no expertise in intelligence, and are not trained in intelligence, and wouldn't be able to act intelligently on an application for electronic surveillance.

Do you think that the application is that difficult that a judge couldn't handle that, especially in an *ex parte* application?

Mr. WARNER. I don't believe he has a good basis for making a judgment as to whether this intelligence is necessary or needed. He simply has to accept the certification that it is needed. So that is part of my basis for saying, this is, in part, just windowdressing.

Mr. MURPHY. In other words, you think that the judges would just, as a matter of fact, grant the application requests?

Mr. WARNER. I think they will. They have no basis to turn it down. If they turn it down, it is clearly arbitrary. I just don't believe that they have the skill and the background and the full knowledge of the requirements needed by our policymakers to make an informed judgment.

Mr. MURPHY. Well, I don't want to put words in your mouth, but I think you are suggesting that you think the procedure of applying to judges for a wiretap would be worthless. Am I correct?

Mr. WARNER. I don't believe it would be of much value, no.

Mr. MURPHY. And you suggest that we keep what we are doing now, that the executive do it on his own authority?

Mr. WARNER. That is correct.

Mr. MURPHY. Now, Mr. Sheehan, I haven't read that 1974 report. I am anxious to read it. I am sure the staff has a copy of it here.

What is your view of the application procedure before the Federal judge?

Mr. SHEEHAN. We think that there should be a third element added to the probable cause standard. There should be a requirement that there be a finding of probable cause that the information to be obtained will in fact be foreign intelligence information, the judgment that Mr. Warner says the judges would be ill-equipped to make. I don't think it is particularly difficult, especially on an *ex parte* showing, for a judge to understand arguments dealing with whether the person to be surveilled in fact is likely to be the recipient of, or have, foreign intelligence information. One doesn't have to disclose information in the application, doesn't have to disclose secrets. It merely has to disclose the area which is involved. We have some fear that in the future a law enforcement purpose might be attempted to be served in a case where there is no probable cause showing of criminal activity under the normal standards for obtaining a warrant. For example, someone in the executive branch might make someone a target of a criminal investigation, but select the new sections in order to avoid having to obtain a warrant based upon a probable cause showing. Without requiring a showing that foreign intelligence information is likely to be gathered, it is difficult for—impossible for—the judge to make a determination about what the true purpose of the application is. It would be, I think, a great safeguard if the judge were able to understand the real thrust of the application, instead of only being able to note the identity of the person—the thrust of the information likely to be obtained is the heart of the matter.

Mr. MURPHY. Would your association in New York have any figures on how many denials of warrant requests there have been under Title III of the Safe Streets Act?

Mr. SHEEHAN. The information is available. I have seen it. I don't want to quote it authoritatively, but the percentage of cases, as I recall, was quite small in which the judges had denied the applications.

Mr. MURPHY. Denials were few?

Mr. SHEEHAN. The denials were a small percentage of the total applications.

But I can refer you to an article by Herman Schwartz of the Field Foundation, 1977, which I believe contains the data.

Mr. MURPHY. Even where the standard is a criminal standard and a much stricter standard than we are asking for in H.R. 7308, the percentage of denials is small.

Mr. SHEEHAN. I think that is correct, although this bill would help in some ways by selecting specific judges. In these cases, the judges might become, over time at least, more familiar with the procedures and become more expert in the area. So, their determinations may well be made after fuller consideration than presently exists. Although I am not an authority in the criminal area, I would suspect there would be a good deal of judge shopping by the district attorneys if any judge in a Federal District is capable of granting a warrant. Any district attorney would quickly come to learn which judges will look more closely at applications.

Mr. MURPHY. It has been suggested in testimony previously received by this committee that an Intelligence Surveillance Court with the judges selected by the Chief Justice be established.

What would your feelings be on that?

Mr. SHEEHAN. Selected by the Chief Judge of each district or the Chief Justice?

Mr. MURPHY. No, the Chief Justice.

Mr. SHEEHAN. I don't think that we would object. I am not sure what additional help it would be over and above the provisions already contained in the bill which require specification of one judge from each district. In some sense you already thereby have such a court. Admittedly, you wouldn't necessarily have a court of appeals that is an expert. That would be one helpful aspect.

I think that proposal might be helpful. I don't think it goes to the heart of the bill, frankly, or to the problems involved, given the fact the bill already contains an attempt at educating the specific judges as to procedures.

Mr. MURPHY. Let me ask the panel as a group one last question before I turn my time over to Mr. McClory.

Do you think that this committee and its counterpart in the Senate would have the authority to go into these applications, if this bill passed, to go into the *ex parte* hearings to review the transcripts on a yearly basis, quarterly basis, half year basis?

Mr. SHEEHAN. I would strongly recommend that. The more ability the oversight committee has to monitor the activities of the Federal judges, the more it would be able to educate itself on the questions you are now asking. You have no true grasp of what the likely result would be in connection with the denial of applications.

Mr. MURPHY. How do you feel about that, Mr. Warner?

Mr. WARNER. I think it is an excellent idea.

Mr. MURPHY. I served on the Pike Committee with Mr. McClory and I read the Church Committee's findings. CIA has been blamed for a lot of covert activities and different actions that took place, and one of the reasons I wanted the Pike Committee's report published and voted to have it published was that I thought that the CIA came out pretty good in the report in the fact that they resisted executive pressures in a number of instances. Where the intelligence agencies, through later disclosures, were embarrassed, they were actually against the covert activities and fought against it.

Mr. WARNER. That's correct.

Mr. MURPHY. And were ordered by their superior in the executive. But the trouble is that none of these men, directors of the CIA, or their subordinates, had any place to go to complain. The oversight committees in the Congress were not functioning, and the leaders of the intelligence agencies had no place to turn.

Mr. WARNER. For years, Mr. Chairman, the agency would come to the people on the Hill here who had oversight responsibilities, although the term wasn't in vogue then, please, we would like to sit down with you and brief you about what we are doing so that you will know what we are doing. Oh, we are too busy. Sorry.

Mr. MURPHY. So you would like to have the oversight committees very active and be able to review these *ex parte* hearings before a Federal judge in applications for wiretaps?

Mr. WARNER. I am not sure it is really necessary, but I think it would be a welcome step.

Mr. MILLER. May I comment on that, sir?

Mr. MURPHY. Yes.

Mr. MILLER. I have had a little bit of experience in working on the other side of the Hill with the other body, particularly with Senator Ervin's Watergate Committee. I think you have a real problem here to sanitize the material if this indeed is going to be secret under this, how much is going to be kept from Congress, who in fact is going to be notified in Congress. It is my experience, very limited experience, that the Congress is a gigantic sieve through which information flows all the time, and I think there is a real problem. I get a little nervous, with all due respect to Mr. Warner, when he so readily agrees to this. You know, I get a little nervous with these things when the executive readily agrees to things which I think circumscribe in general their behavior, and how much is going to be told, who is going to know, under what basis, under what conditions? You have got some tough questions to answer. If you answer the questions in general yes, you should know more, I agree with it, but you have got to ask and answer the tougher questions, the detail questions.

Mr. HALPERIN. Mr. Chairman, can I comment?

Mr. MURPHY. Of course, in an open society you have that danger, Professor, but if we don't have the oversight Committees, at least them looking at this work of the intelligence agencies, we will fall right back into where we were before.

Mr. MILLER. I agree with that, sir. It is a much tougher problem than the inference I drew from the previous statements of my associates here. It is a much tougher problem than saying come up to the

Hill and tell us. I recall, I think it was former Secretary Stans in the Watergate hearings, saying "I don't want to know and you don't want to know," telling one of his associates. I think it is quite true what you said a few minutes ago, that a number of members of Congress have in the past refused to learn about activities. I have no data on that except what has been in the press. I think it is a much tougher problem than what is suggested, and I would repeat, the more people who know—and this is very sensitive material—the more people who know, the more chance there is for someone to let it out.

Now, how it is—I can't—I couldn't understand, for example, certain things of letting out full data unless it is on a very selective basis. The gentlemen with me may disagree on that, but I have other problems with that.

Mr. MURPHY. Mr. Halperin?

Mr. HALPERIN. I think one ought to distinguish two things. I think the bill ought to contain a clear authority for the committee to get any information relating to wiretaps that it feels it needs for its oversight function, but I think I would be opposed—and I doubt whether this committee wants to ask, based on that authority, routinely, to receive all of the applications. It seems to me that you will need to evolve over time an oversight procedure which on the one hand, deals with the possibility and danger of abuse and guards against it by oversight, but which on the other hand does not involve the further passage to additional people of information about who is being surveilled, what is being learned on the surveillances and so on.

So I think the bill ought to establish a clear authority to get what you need, but you would not in the legislation say what you want to get, because I think that is going to have to evolve over time.

Mr. MURPHY. I yield over my 15 or 20 minutes of time.

Mr. McCLORY. Thank you, Mr. Chairman. The testimony this morning has been very interesting and helpful to us.

I would like to say that a number of the witnesses here have given valuable testimony in support of my bill, H.R. 9745, for which I am very grateful, even though they failed to make any reference to that very valuable piece of proposed legislation.

As a matter of fact, the testimony that you provided, Mr. Warner, strikes me as being similar to a brief in support of my bill, and I appreciate that.

I have some difficulty in reconciling your opening flat statement that you give in general support for H.R. 7308, and then coming along and demonstrating very clearly, it seems to me, that the judiciary really has no function and no purpose in this legislation whatever.

I agree with you entirely; historically and at the present time they have no expertise. The problem of involving more people in this exercise creates greater risks of divulgence of secrets, as Professor Miller made reference. It seems to me that what we should do is to repose responsibility and accountability where it belongs, in the executive branch of the Government, but with the additional protections which are inherent in the establishment of the two Select Committees on Intelligence.

I might say that in my legislation, in addition to the annual reports, which I would assume we would perhaps establish quarterly reports, there is a further paragraph that says that this committee can impose any other duties with regard to reporting or get any other information with regard to this subject, depending upon what we feel the needs are to protect the American people and to advance the opportunities for protecting the national security.

I would like to call your attention, Mr. Halperin, to the fact that my bill does provide for the protection of United States persons overseas as well as here, and I would appreciate your study of that legislation and your expression with regard to that subject, and indeed, just ask you this question:

Do you not feel that the legislation which I propose—I think you looked at H.R. 9745—would be a vast improvement over the situation as it is now?

Mr. HALPERIN. In some ways it would, and I would applaud the ways in which your bill is more precise than the other legislation before the committee and would urge the committee to incorporate those changes into the other bill.

I am frankly concerned about a procedure whereby Congress would grant to the President authority to engage in this most intrusive kind of surveillance without a judicial warrant. I say that not because I have great confidence that judges will reject the warrants, but for the reason that the Attorney General emphasized in his testimony: namely, I think that, like hanging, the need to go to a judge for a judicial warrant sobers the mind. I think that executive branch officials simply treat situations in which they have to go to a court, sign an affidavit for a warrant, differently than decisions that are made within the executive branch. I think this envisioned a problem which has not been mentioned, which is that wiretaps require the cooperation of the telephone company. They also in some cases require the cooperation of other private citizens. I think in general that is a problem, but I think in particular private citizens and the telephone company should not be in a position where they need to cooperate based simply on the decisions of the executive branch of Government. We know that in the past Presidents and Attorneys General have caused the telephone company to be instructed to cooperate in such wiretaps on grounds that most people would now agree would be abuses. I don't think private citizens should be required to cooperate or private corporations required to cooperate in intruding in other people's lives simply on the say of the executive branch of Government. I think only with the concurrence of a magistrate should they be required to do so.

Mr. McCLORY. You are presenting sort of a practical, nonjudicial, nonconstitutional statement in that way. I would like to call your attention to what I regard as the most authoritative, scholarly study on this subject, which appeared in the summer of 1976 issue of Law and Contemporary Problems, a Quarterly Law Review Journal of the Duke University School of Law. As a matter of fact, you, Mr. Halperin, have an article which follows that of Phillip A. Lacovara, a very distinguished student of the law and of this subject. I would

like this to be made a part of our file, not part of the record of proceedings, but part of our file.

Then I would just like to read this one paragraph. It is entitled "The Limits of Judicial Power," something I think we have to deal with directly here. He writes:

It would appear that on balance a warrant requirement could only be beneficial, but it would be an error to assume that a warrant requirement would go very far in securing domestic liberty and in preventing the types of abuses mentioned at the outset of this discussion given the necessarily circumscribed role of the magistrate described above. In this bill, it seems clear that we cannot rely primarily upon the judiciary for the development of the law in the area of foreign intelligence searches. Indeed, as to national security searches, generally, as Judge Goldberg noted in a concurring opinion in *The United States v. Brown*, the development of the law is impeded by the fact that the factual predicates of judicial decisions cannot be revealed, that individual judges must often act in ignorance of related decisions by their colleagues. Thus, if workable standards are to be developed, and the development of the law is the process by which general principles become particularized, the responsibility will fall in large part on the Congress and upon the executive branch.

And it seems to me that unless we would take the enlarged position which I judge Professor Miller would take, where you lay the whole thing before the judge, all of the facts, and you rely on his expertise with regard to electronic surveillance, and you rely on his wisdom and his ability to provide the kind of security that you want in a situation—

Mr. MILLER. May I interpolate, sir?

Mr. McCLORY. I don't think you are going to get any benefits which are beyond the benefits that you get from imposing standards on the executive with a review or oversight by a responsible committee of the Congress.

Mr. MILLER. The only thing I wanted to say—and I am sorry to interrupt you, sir—is I didn't state quite what you said. I said that in my judgment, in the present provisions in 7308, doesn't seem to me to be much more than a possible rubber stamp. I didn't say what would be a proper procedure, and I don't know.

I am sorry to interrupt you, sir.

Mr. McCLORY. No, that's all right.

No, I want you to say what you intended to say. However, I interpreted what you said as a judicial review as being something which was going to justify, be able to justify the electronic surveillance, that they were going into the merits of the situation in some way which, under this legislation, they wouldn't be going into at all. I question the wisdom of therefore injecting the judiciary into this.

With respect to the executive and with respect to the Congress, we have got—well, with respect to the President we have got the process of impeachment, as we know. With respect to the President and the Congress, we have got the ballot box. With regard to the judiciary, we have got life tenure and relatively little public control in comparison to that which we have over the executive and the legislative branch.

Mr. MILLER. Well, with all due respect, sir, I don't think that your bill has any accountability in it whatsoever. There is none, as far as I see it, as far as Congress is concerned, and I don't think that when

a bunch of executive branch officials get together and say we want to do some surveillance there is going to be much dissent within it. They are going to take whoever wants to say it. I can't pinpoint it, but with all due respect, I think that you have to have some major accountability. The best that the people have been able to come up with is a judicial warrant. What I said is that it is no panacea, because I think that the data that are available on domestic matters, domestic criminal matters, show that judges tend to be rather complaisant, to go along with the request for a wiretap. I don't think that that is any particular panacea, but I think it is better than trusting the executive.

And one more thing, I don't like it when the executive, including the Attorney General, comes up and says I like this bill. You know, that makes me nervous, if you will excuse me, nervous as hell.

Mr. MURPHY. Why does that make you nervous?

Mr. MILLER. Well, any time I find the executive approving bills that purportedly circumscribe the executive's behavior, I wonder why.

Mr. MURPHY. Well, the why is the public outcry, the editorial outcry, and the abuses from the Church and the Pike committee that have come out. That is the reason why.

Mr. MILLER. Mr. Chairman, with all due respect, I don't think that public outcry has been—I don't detect—I was down in Florida for a month, all of December. I didn't hear one word about it. There is no outcry in Florida about it.

Mr. MURPHY. Well, when Mr. Carter was running for election, one of the premises of his campaign was that there would be no more abuses.

Mr. MILLER. Well, I have learned, with all respect to the Chief Executive, to take campaign statements for what they are.

Mr. MURPHY. Well, his chief law enforcement officer was sitting right where you are a couple of days ago, and he is for judicial review.

Mr. MILLER. Let me give you an analogy, if I might, on this point.

One of the pressing constitutional questions today is the question which came up in the *Atkins* case on the judges' suit to increase salary, which the Supreme Court denied review on this week. The Attorney General wrote an opinion a year ago, signed by Mr. Bell, said it is OK to have a legislative review, or legislative veto, Congressional veto on reorganization plans. That is when he wanted his reorganization bill. But, he said, I don't think it might be OK in other circumstances. As Mr. Halperin said a moment ago, the executive seems to want it both ways. You know, it is OK to have it one way and another way, and I just don't see that you have any substantial checks in this particular bill.

Mr. MURPHY. Well, what would you have us do?

Mr. MILLER. Well, the only other thing, I wonder if you have thought about—and the reason I mention it is because the former Assistant to President Roosevelt, Mr. Cohen, made a speech 2 or 3 years ago saying that in certain decisions, the President should have sort of a council of state sitting by to review important decisions. You are talking about Government officials, whether they are execu-

tive, legislative or judicial, making all of these decisions. My point is that judges are government as well as Congress, and I think there is much more cooperation than conflict between the branches, and wonder whether or not it might be possible to think in terms of these very delicate, and I would admit, very important matters, you couldn't set up some way, an independent review board of non-governmental officials.

Mr. MURPHY. But who would appoint them?

Mr. McCLORY. Who are they responsible to?

Mr. MILLER. Ultimately you come back to the question of trust, you know. We have learned, it seems to me, oh, in the last how many years—and I go back without regard to party, without regard to administration, we have learned not to trust Government officials, particularly executive branch officials.

Mr. MURPHY. This board you are talking about, who would appoint them?

Mr. MILLER. Well, you don't have the constitutional authority, under *Buckley v. Valeo* for Congress to appoint them, Federal officers, if they are Federal officers.

Mr. MURPHY. So the executive would appoint them.

Mr. MILLER. If so, if confirmed by both houses. You could set up any system you wanted.

Mr. MURPHY. Well, if you are suspicious of all their other actions, who do you think they are going to appoint, taking your line of thought?

Mr. MILLER. One thing you might do is Congress start reviewing the nominations for public office much more than being a big, fat rubber stamp up here, as they are on so many things that they do over on the other side of the Hill.

Mr. MURPHY. You just said that you are suspicious of Government officials, but you talk about the executive and the Congress. Who else would appoint or approve?

Mr. MILLER. Well, the most you can do is hope that the Congress would take a hard look with the press at all nominees, and ultimately you have no answer beyond that. Let me recall the statement of Mr. Nixon, which I submitted, as you permitted, for the record. He dealt with the question when it is permissible on the part of the executive to go beyond what he says is the letter of the law. That is, I think, true not only of former President Nixon, it is true of every president who has ever sat at 1600 Pennsylvania Avenue.

Mr. McCLORY. It didn't begin with Watergate.

Mr. MILLER. I have not read the book, but the matter of alleged inherent power of a President goes back to George Washington.

Mr. McCLORY. Would the chairman yield?

I would just like to point out that in your case, Mr. Halperin, and in all of the cases, not wiretap cases, but other types of activities of the intelligence community which were reviewed by the House Select Committee on Intelligence, the temporary committee, Mr. Pike's committee, it wasn't that there was authority in the law or in the regulations or in the guidelines for either the abuse of electronic surveillance practiced in your case, or in the other instances. The guidelines and the regulations and the law were there, but it was

the abuses of the existing situation. So, if we are talking about the changes in the law, we are talking about changes in the law which will be fine as long as all of the conditions are met, and these safeguards are observed. But there is no assurance that all these safeguards will prevent abuse.

I think the fact that there have been none or very few denials of warrants with regard to organized crime activities under the existing law would indicate that there would never be, or rarely ever be, any denial of a warrant in this *ex parte, in camera*, nonadversary type of a proceeding in which the subject of probable cause wouldn't be involved in the historic, legal sense. I just question whether or not involving all three branches of Government in something that requires speed and requires fast decisionmaking frequently—whether we want to have such distrust in our executive and such distrust in our Congress, and such complete trust in the judiciary that we want to transform our system as this legislation would do.

I do have one legal question which I would like to pose, and this is: Assuming for the moment that the Fourth Amendment protects all people, and it should be pointed out that the Fourth Amendment does not require a warrant, but rather, that all searches and seizures be reasonable—the courts have clearly recognized that no warrant is required under exigent circumstances, in border searches and in automobile searches—why do you feel that a warrant is required for foreign intelligence electronic surveillance, especially when you consider that the nonwarrant searches I just mentioned strike a balance between mere practicalities of a given situation and the Fourth Amendment, while foreign intelligence gathering derives from the Constitution itself, Article 2, and therefore involves a balancing between two separate sections of the Constitution, article 2 and the Fourth Amendment.

Mr. MILLER. May I ask for a clarification? What part of article 2 are you referring to?

Mr. McCLORY. Article 2 would be the executive.

Mr. MILLER. But what specific part?

Mr. McCLORY. National security with regard to—

Mr. MILLER. I don't think it contains the term "intelligence" or "national security."

Mr. McCLORY. I think it refers to protecting the national defense or the national security, but—

Mr. MILLER. I don't believe so, sir. He is the Commander-in-Chief. He shall take care the laws are faithfully executed. The executive power shall reside in the President of the United States. He shall appoint ambassadors and he shall commission officers and a few other things such as that.

I don't think that that term appears in the Constitution. No, sir, I don't believe it does.

Mr. McCLORY. In the cases which are reported on the President's authority over the subject of foreign intelligence, they have always referred to Article 2.

Mr. MILLER. Well, the cases, sir, the Supreme Court in the Keith case, *The United States v. the U.S. District Court*, left the question open, said they are not going to decide that at all. So the Supreme Court has not ruled on the matter.

Mr. WARNER. A number of other courts have.

Mr. McCLORY. Would you want to address yourself, though, to the Constitutional question.

Mr. SHEEHAN. I would, Mr. McClory.

The Fourth Amendment says that the people shall be secure in their persons, houses and effects from unreasonable searches and it says no warrants shall issue except upon probable cause. The only exceptions that the courts have cut from that requirement have involved the personal safety of police officers when there is an emergency situation—this bill in fact also provides for emergency situations—and exceptions in cases in which people are crossing the borders.

The exceptions have been for emergency situations, in general—moving automobiles for example—cases where it is not possible to go into court and obtain a warrant and still have time to go back and conduct the search. The exceptions are for cases where you either have no search or you have no warrant, due to the peculiar circumstances. The courts have not been willing to expand upon the exceptions in cases where there is time for the person to go to court and obtain the warrant. The issue for the courts basically is: Can they have a practical role to play, can they be reached, can the issue be brought to them for decision—if so, they have insisted that the issue be brought to them for a decision. Accordingly, the exceptions carved from the Fourth Amendment protections are strictly on account of emergency because the courts recognize that if they insist upon their role in such cases, they are saying there shall be no search whatsoever.

Mr. McCLORY. There is no authority—there are no decisions yet which have held that a warrant is required with regard to foreign intelligence.

Mr. SHEEHAN. I believe there is a case.

Mr. MILLER. No Supreme Court case.

Mr. WARNER. I know of no court that has ruled that the President didn't have power to conduct a tap against another government. No court has ruled that way, and a number of courts have said it is within the power of the President to do so.

Mr. McCLORY. We ask this question once again, and that is this, that if for instance the CIA or FBI or someone else determines that—that someone tips them off that in the next 20 minutes a foreign agent is going to be communicating at a telephone booth with some person who is going to commit some action against our national security, some terrorism, some destruction, would there be authority to tap that without any warrant, without involving all of these—

Mr. WARNER. In my opinion, yes, sir.

Mr. MILLER. Doesn't 7308 provide for that, sir?

Mr. McCLORY. It provides for 24-hour emergency action, but you have to go through these three steps during this period.

Mr. MILLER. But still you have 24 hours to do it.

I don't believe the Constitution prevents them, and I think Mr. Nixon was correct in saying that the Constitution permits extraordinary action of this type. We may not like that, but I think it happens to be a fact.

I do think, however, when the Supreme Court gets around to ruling on it—let me comment just briefly on the *Keith* case, it was argued in the court of appeals by the Department of Justice that there was inherent power to wiretap in that particular situation. That argument, as I understand it, was dreamed up by the former Solicitor General, Mr. Griswold. When it got to the Supreme Court, they dropped that argument. They did not rely upon inherent power to wiretap. The Court ruled eight to nothing, with Justice Rehnquist disqualifying himself, that that particular episode was improper. There is a direct statement in it that they were not ruling on foreign intelligence matters.

As for lower court cases, the two leading cases in this area, to my mind, are the *Butenko* case and the *Zweibon v. Mitchell*, and at best, they go in a somewhat different direction.

Mr. WARNER. Well, I don't agree with your characterization of the *Butenko* case. *Zweibon* is different because that opinion went on 125 pages, and they swung all over the matter.

Mr. MILLER. Yes, that is true, sir. I agree with that.

Too many law clerks for Federal judges, that is one reason.

Mr. HALPERIN. May I?

Mr. McCLORY. Yes, Mr. Halperin.

Mr. HALPERIN. I think there are several different issues embodied in your question. First, it seems to be absolutely clear that Congress has the authority to require a warrant even for foreign embassy taps, and both Mr. Levi and Mr. Bell have, I think, agreed to that.

Second: In the absence of any congressional action, I think it is an open question as to what the courts will do, as to whether they will approve warrantless wiretaps on people connected with foreign powers or on embassies. The courts of appeals have split. There are three decisions. I find most persuasive the argument in the *Zweibon* case which in effect says all exceptions to the warrant have been based on a showing of need for the exception to the warrant requirement, and that the executive branch has simply argued that it has the authority to proceed without a warrant, but has not made the case that it needs to proceed without a warrant and that the courts therefore should not sanction any exception to the warrant procedure absent a showing of need, which the executive branch has not yet made.

I think one does have to distinguish between foreign embassies and agents of foreign powers who may be United States citizens, and it seems to me very likely that the courts would not ever approve, and never have, no court has approved a warrantless wiretap on an American citizen, and I don't think they ever would. My guess is they would approve embassy wiretaps.

I think it is also clear that legislation of the kind you suggest would make it much more likely that the courts would accept warrantless wiretaps because they would then be done on the basis of both congressional and executive branch authorization. That is one of the reasons I don't like this, your proposed legislation, because I think it would enhance the probability that the court would accept, particularly for American citizens, an intrusion without a warrant, which I think would be a mistake.

Mr. WARNER. Mr. McClory, one of the reasons I didn't speak up in favor of your bill in toto was it did not provide for warrants for American citizens. I am with Mr. Halperin on this one. I believe that intruding on an American citizen, targeting an American citizen should be preceded by a warrant, and I believe it is very likely, in my mind, that a court would so hold in the absence of legislation.

Mr. MURPHY. How about inadvertently?

Mr. WARNER. Inadvertent is quite different in my opinion.

Mr. McCLORY. Would you mind sending to the committee some comment on my bill with suggestions for amendments, because it seems to me you are talking much more in support of H.R. 9745 with amendments than you are talking about H.R. 7308 with a great many amendments which would bring it back to look like mine.

Mr. WARNER. Well, you are quite right, sir. There has been testimony in the last year, there have been no taps on Americans in the foreign intelligence field. All 1977 taps were against foreigners and foreign institutions, so the real effect of 7308 is going to be in the foreign area.

Mr. McCLORY. Let me ask this question. This kind of troubles me because, of course, we are talking about electronic surveillance, and it is a little broader than wiretapping because it includes radio and other types of communications. These get pretty sophisticated sometimes. I suspect they get pretty sophisticated going in foreign embassies, and yet this legislation, all this legislation would require an intrusion, or would require a number of steps in order to intercept these types of communications.

Do you think that there is immunity insofar as foreign electronic surveillance is concerned, that we can't touch in this legislation? In other words, we don't have Americans, we don't have foreign agents involved in this kind of electronic communications, but we have foreign embassies and foreign agents, and whether they are intruding on our communications or not we don't know, do we, and are we—

Mr. WARNER. We are trying very hard, I assure you.

Mr. McCLORY. Are we able to protect ourselves through this legislation, or are they immune from these kind of provisions?

Mr. MILLER. Immunity for whom, sir? I didn't understand it. There was immunity for the foreign intelligence?

Mr. McCLORY. The foreign embassy, in a sense, doesn't that represent a part of the foreign country here, and we can't go into the Soviet embassy with a court order, can we, and put a wiretap on them, if they have immunity?

Mr. MILLER. Well, I am not privy to what our intelligence services do to the Soviet embassy, but I would be appalled if they did not do everything possible to find out what is going on inside.

Mr. McCLORY. Well, what about the Soviets or other countries as far as their actions against our citizens?

Mr. MILLER. I am told by reading the press only that they have sophisticated electronic gear on the roof of their embassy, that they pick up a lot of communications, particularly overseas communications, and long distance telephone calls in this country.

Mr. McCLORY. And has there been any court order authorizing that, or would they have to comply with this legislation?

Mr. WARNER. No, sir, they wouldn't. That's rather a diplomatic matter.

Mr. McCLORY. Well, then, you are going to hamstring our electronic surveillance but any other country is going to be able to just tap anybody's or intercept anybody's communications.

Mr. WARNER. If they have the ability.

Mr. McCLORY. Sure.

Mr. MILLER. I don't see any hamstringing in any of this legislation that I was furnished by your staff, sir, of the intelligence community.

Mr. McCLORY. How do you feel, Mr. Warner?

Mr. WARNER. No. 1, I feel the fourth amendment doesn't apply to the Soviet embassy.

Mr. MILLER. I would agree. Insofar as the Soviet embassy having to get a warrant, Mr. McClory, I think I saw your tongue in your check on that one.

Mr. HALPERIN. Could I—I think there is a serious issue having to do with the Vienna Convention and whether, in fact, a judge can issue a warrant for a wiretap on an embassy, at least where there is not a showing that that country is in fact violating the Vienna Convention in our embassies.

Now, the Justice Department, as you were told, has written a very scholarly report explaining why the Vienna Convention does not apply. Unfortunately that scholarly report is secret, and so it is impossible to know how it reaches with great authority, the conclusion—

Mr. McCLORY. How do you know about that?

Mr. HALPERIN. Oh, the fact that it exists is not secret, and the conclusion is not secret. It is just the learned reasoning that is secret, and I would at the very least urge this committee to get the benefit of that learning.

Mr. WARNER. I would urge the committee also to get that opinion.

Mr. HALPERIN. I would also urge you to make it public, I might add, at least the legal reasoning ought to be susceptible to public debate, if not the facts contained in it.

Mr. WARNER. Well, Mr. Chairman, I was not going to raise the Vienna Convention, but since it has been raised, this is another reason why I feel very strongly about this not requiring warrants in tapping foreigners, because with seven judges, one of them is going to say the Vienna Convention doesn't permit this, and to get ourselves in the ridiculous position where a judge turns down an application for a tap on a foreign embassy, I just don't understand.

Mr. SHEEHAN. Well, as usual, I think the issue involves the definitions; and, it is not only foreign embassies we are talking about. We are talking about noncriminal standards in particular: looser standards in general throughout the bills that apply to agents of foreign powers. The definition of agents of foreign powers does not necessarily comprehend people who are entities of foreign governments, nor even aliens, nor even nonresidents. In some cases it would even encompass U.S. citizens. That is the provision in section 2521 (b) (2), where under (B), it talks about a person who knowingly engages in clandestine intelligence activities. You have not faced the difficult task of defining the term clandestine intelligence activities.

You faced up to it as to terrorism and sabotage since the last draft of this bill, but we are left to guess, and the courts are left to guess as to exactly what clandestine intelligence activities means. Second, you talk about persons who conspire or aid—well, in the amended Senate bill it says, “knowing such person is engaged in activities described in subsection (2)” which of course refers back to the undefined term “clandestine intelligence activities.” We don’t know exactly when you legislate about aiding and abetting, whether you are referring to aiding and abetting the person in connection with the “clandestine intelligence activity” or merely aiding and abetting a person knowing he is engaged in intelligence, clandestine intelligence activities.

Take as an example, a mother who pays the college tuition of her son who goes to a university, knowing that her son is engaged in activities with the PLO, terrorist activities of the PLO, criminal activity. Now, should she be wiretapped without a warrant? She is a U.S. citizen, let us presume. Well, she is aiding and abetting him. She is paying his way through school, funding him and thereby helping his activities. Or should you be required to go to court and say to the court, “there are sufficient reasons for a wiretap—because this person is aiding and abetting a person engaged in clandestine intelligence activities, and therefore we should have a warrant against her.” It seems somewhat obnoxious in terms of the constitution to simply say that since the mother is aiding and abetting her son in some way, knowing of, not necessarily connected with the activities that we are concerned with, that she be subject to a wiretap. I think the bill’s aiding and abetting clause at least should be made clear on that point.

In general, the Association feels strongly that in every case not involving a foreign power—strictly limiting that term entities, embassies, entities—there should be a requirement for some showing of criminal activity. We join with the ACLU in this, although we come to a different conclusion on the bill without the clause. The Civil Rights Committee of our Association feels very strongly on it, and would actually oppose the legislation unless it contains a standard requiring criminal activity as to all persons.

Mr. MURPHY. Let me ask the panel a question, one final question.

The administration hasn’t suggested a role for our committee, the Senate or the House, in requesting information. What would be your suggestions as to what this committee and its counterpart in the Senate demand in the way of oversight and detailed reporting from the agencies?

Mr. WARNER. Well, sir, I don’t think it should be specified in legislation. I think that the powers of the two committees are broad enough already, and that procedures can evolve because you may not today know precisely what you want, and let these evolve, because you know you are going to get cooperation. Your powers are broad enough anyway, and let it evolve, because maybe you would work out together a meaningful way to report while still maintaining the necessary security.

Mr. MURPHY. Professor Miller?

Mr. MILLER. I would tend to agree with the problem of getting too specific as far as information is concerned. I would agree with

Mr. Warner to that extent. I don't mean to downgrade or to bad-mouth or to denigrate any member of the executive branch. There is a report from the Senate, issued in 1974 about the ways in which the executive branch does not furnish information to Congress. It is about an inch thick and it is a large report, and of those ways, there are literally hundreds of them. This is a survey, admittedly incomplete, showing literally hundreds of ways in which the executive does not comply with requests for information. I think you have a real problem.

Executive privilege, by the way, is one of the least used means of denying information to the Congress.

Now, you have a question, ultimately here, which might be raised, for that matter, of executive privilege. It follows the argument which Mr. Warner has made that there is some nature of inherent power in the executive to do these matters. You have certainly some language in *United States v. Nixon* which the Supreme Court has recognized an area of Presidential confidentiality. Now, you have a problem there, but you have a much broader problem in getting information out of the agencies, the departments, the bureaus, and so forth, and there are many ways in which the Congress routinely is denied information.

I am not suggesting that it would be in this case. I don't know. I don't know how you can check on it. I don't know how you can say, is this all. We do know instances in the past where matters have kept completely secret from the Congress, from the American people, and from the Congress, actions taken by the executive, important actions, the bombing in Cambodia, for example, and other matters.

So I think there is a big problem there. I would agree with Mr. Warner to summarize, about the problem of getting too specific. You run into nitpicking lawyers' arguments that that's all you list, and therefore you are not going to get anything more than what you have listed.

So, some procedure ought to be evolved by which committees from this side of the Hill and the other side of the Hill can be made privy to it. Now, whether it is the whole body of the House and the whole body of the Senate, I have grave doubts. I don't think that you can answer it on a yes-or-no basis, and I don't think that you have any ready or quick answer.

Mr. MURPHY. Mr. Sheehan.

Mr. SHEEHAN. Mr. Chairman, I think this question goes to the point of trust in the Government that Mr. McClory raised. I don't think anybody is looking to the judiciary as the main stopgap in the bill. It is a means of allowing the people to feel that another body has looked at the question, therefore justifying some trust in the procedures.

For the same reason, on the point you are making, the oversight committees have to become actively involved. I don't think it is practical, as we discussed before, for the oversight committees actually to go into court and to read transcripts. It is just not the kind of activity that the Congress usually does in oversight committees. Congress is usually the recipient of the information. I think the earlier versions of this bill which required more detailed annual reports by the Attorney General would give Congress an idea under

each section as to what percentage of the applications were denied. Even if you wanted to keep secret the absolute number of applications, you still would get some feel for how the provisions are working. Statistical reports might well tell you whether the judiciary was really becoming a part of the process, or whether they were merely rubberstamping applications.

Second: In connection with emergency applications—where there is a requirement to go to court within 24 hours—there is a particular danger. The bill says, we will allow a narrow exception for emergencies, but within 24 hours you have to appear in court.

Now, if the Attorney General doesn't act, I think that Congress ought to be notified by the Attorney General that such a case happened, so that you will have very quick knowledge that a case has occurred in which a tap was undertaken and in which the Attorney General disapproved it. Congress would then learn of misjudgments—at least in the Attorney General's eyes—as to what is required by the legislation, without having to wait for an annual report issued a year later. (In the interim there may occur four or five such instances—perhaps a very significant number, to you—where people within the intelligence agency have mistaken the meaning of Congress as interpreted by the Attorney General. I think immediate reporting would help to get you involved more quickly.

If you look back at the earlier bills dealing with the annual report to the Congress, I think you will find provisions which would enable Congress to obtain sufficient information. I don't think, if you rely on active participation, it will necessarily work out. That is out of the mode of what Congress is normally used to doing.

Mr. McCLORY. Can I just make this sort of concluding observation to reflect my view as far as the involvement of the judiciary in this.

It seems to me that a number of the arguments that we have heard this morning in support of judicial approval of or authorization for electronic surveillance authority rest not on the exercise of any real judicial authority, not on a real review of the merit of the situation, and not on a decision in which the exercise of the wisdom or the protection or the judicial temperament or the other elements that go into supporting a judicial decision are involved.

Instead, we have, as brought out very forcefully in the article by Mr. Lacovara, the involvement of a new agency. We have a kind of accountability. We have a record with which we might at some future time confront the executive for some alleged abuse of authority in the electronic surveillance field, and it raises, then, my question whether we want to involve the judiciary in a new role.

I don't find any precedent for this kind of judicial involvement in this kind of a climate, in this kind of a procedure, and we do have an overworked judiciary. We have a judiciary that already is involved in all kinds of civil and criminal activities, and to put it in the role of involving itself in something that has traditionally, historically, and constitutionally, in my opinion, been an executive department function seems to me to be a step that we should take very, very warily and reluctantly, and only if there is no other way of providing the kinds of protection that I want—and that all my

colleagues here want—in order to protect the rights of individual American citizens against intrusions on their privacy.

Mr. WARNER. You stated my position very well.

Mr. McCLORY. Thank you.

Mr. MILLER. I think, if I may make just a footnote to that, that the Congress has had before it now, and one House has passed a bill for another, I think, 158 Federal judges. I don't agree with the Chief Justice, by the way, that judges are overworked. In many respects I agree with Justice Douglas that they are not overworked, particularly the Supreme Court. I don't think that this is any onerous burden, if the figure of 77 means anything. It doesn't take much time for even 1 person to decide 1 year.

There are 4,000 applications for review made to the Supreme Court every year. That is an average of about 50 decisions a week that a Supreme Court Justice has to make; 77, in this area, is miniscule in my mind.

Mr. MURPHY. Mr. Halperin, what would your views be as to the surveillance of Americans overseas?

Mr. HALPERIN. I think there should be a legislative warrant. In fact, I believe one is now required based on court decisions in which the judge held that the same fourth amendment protections applied overseas, and that at least for those people protected by the *Keith* decision, a warrant was required.

And I think the legislation ought to require for Americans overseas—I don't think foreigners overseas are protected by the Constitution. I think Americans overseas are fully protected by the Constitution against the actions of the U.S. Government and that the same kinds of procedures should apply.

Now, the intelligence agencies say the situation is sufficiently different that they should embody it in an additional piece of legislation, and I don't see any objection to that provided that legislation is in fact forthcoming and can be dealt with by the Congress on an expeditious basis following this legislation. But I think the principle should be the same. An American overseas is entitled to the same protection that he or she is entitled to in the United States.

Mr. WARNER. I would agree with that, Mr. Chairman.

Mr. SIEGHEAN. Mr. Chairman, the Association of the Bar has taken a position fully consistent with Mr. Halperin's statement. In addition, we have noted the problem under the bill as to communications which are not wholly foreign but which are from the United States to a foreign country. Unless an American citizen is targeted, if such communications are intercepted on a wholesale basis, there is no regulation whatsoever under this bill. There is nothing in this bill which would stop every single telephone call from the United States to every foreign country being intercepted.

Mr. HALPERIN. Can I comment on that because I think the record ought to be clear.

As I understand the bill, it deals with what in effect is called the NSA's vacuum cleaner approach; that is, it picks up every cable or every telephone call or whatever—but that it can—the fact that it has the cable in its computer would still not permit it to pull out a U.S. conversation under this bill without a warrant, if it did it at

least by targeting the name of the U.S. person. In other words, I think there are issues raised on the fact that it can put it in the computer, and it can pull it out by putting in the words "Vietnam," "drugs," "narcotics," or whatever, and I think your next bill has to deal with that, but I think it should at least be clear that under this bill, even though it is in the computer, they cannot pull it out of the computer by putting into the computer the name of the U.S. person.

Mr. SHEEHAN. I think that is clear. I think that the watch-list approach has been prohibited by the bill. That was the abuse which occurred to which the bill has addressed itself. Yet, I am worried that the computer can pick up particular phrases, such as "Republican National Convention" or other words for review of the whole conversation, without any limits whatsoever on dissemination of such conversations. I don't see any harm in having additional legislation deal with this problem, but I strongly support Mr. Halperin's statement that that legislation should be on the table at the time that this bill goes before the Congress. There is a very major loophole in the bill as it now stands pending other legislation—one could insert a provision temporarily saying that dissemination of that information cannot be used for any other purpose than for foreign intelligence purposes. At least in that way it would avoid problems with warrantless wiretapping and fourth amendment problems in connection with criminal trials or other procedures.

Mr. MURPHY. Thank you, gentlemen, very much.

We appreciate your coming down.

[Whereupon, at 10:55 o'clock a.m., the committee recessed subject to the call of the Chair.]

FOREIGN INTELLIGENCE ELECTRONIC SURVEILLANCE

H.R. 5794, H.R. 9745, H.R. 7308, and H.R. 5632

WEDNESDAY, FEBRUARY 8, 1978

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON LEGISLATION OF THE
PERMANENT SELECT COMMITTEE ON INTELLIGENCE,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:01 o'clock a.m., in room H-405, The Capitol, the Honorable Morgan F. Murphy, chairman of the subcommittee, presiding.

Present: Representatives Boland, Murphy (presiding), Mazzoli, Mineta, McClory, Robinson, and Ashbrook.

Also present: Michael O'Neil, chief counsel, Patrick Long, associate counsel; William Funk, professional staff member; Bernard Raimo, professional staff member; and Louise Drueuth, clerical assistant.

Mr. MURPHY. Good morning, ladies and gentlemen.

The subcommittee is pleased to welcome as its first witness this morning the senior Senator from Massachusetts, the Honorable Edward M. Kennedy.

Senator Kennedy is the author of S. 1566, which has been endorsed by this administration as the Foreign Intelligence Electronic Surveillance bill it supports. He has worked long and hard to bring this bill to the Senate floor and recently presided over its endorsement by the Senate Judiciary Committee.

Senator, we appreciate you taking the time to be with us this morning.

At this point I would yield to the distinguished chairman of our committee, whose face, I am sure, is not unfamiliar to you, for a few words of welcome.

Mr. BOLAND. Mr. Chairman, thank you very much.

As Chairman Murphy has said, this subcommittee has the problem of determining the best legislation that ought to be reported to the Congress and passed by the Congress in the matter of foreign intelligence electronic surveillance.

As we would all agree, this is not a very easy subject. It is a very difficult and very, very complex one.

No. None has been more active, certainly, on the other side in this area than the senior Senator from Massachusetts. His voice has been raised, of course, with reference to the constitutionality of this, the protection of the constitutional rights of individuals, and I think that is his greatest concern. Of course, that is the concern of everyone involved in this legislation.

As the Senator knows, this subcommittee has been holding hearings on this matter, and Mr. Murphy, Mr. Mazzoli, and the ranking minority member, Mr. McClory, have spent a good number of hours looking at the proposal.

It is the hope and desire of the chairman of this committee and I am sure this opinion is shared by other members, that we will have some action taken relatively early in this session of the Congress. It has had a difficult road in the past, but one of the obstacles in the Senate, as I understand it, has now been surmounted and the bill is now before the Intelligence Committee of the Senate.

We hope to get some action on this not too long after these hearings are completed. We will mark it up and I presume there will be a reference to the Judiciary Committee which perhaps may also want to act on it.

In any event, Senator, I am delighted to welcome you here to the narrow confines of this committee. Of course this committee values your comments, expertise, and knowledge in this field, which we know is considerable.

Thank you, Mr. Chairman.

Mr. MURPHY. Thank you, Mr. Chairman.

Before we begin, I would like to introduce our ranking member, Mr. McClory, my colleague from Illinois, and Mr. Kenneth Robinson from the State of Virginia.

Mr. McCLORY. Mr. Chairman, may I just add my word of welcome here this morning.

I have worked with Senator Kennedy on many subjects of our mutual interest. I am looking forward to getting a Federal criminal law recodification bill out of this Congress, as well as some legislation dealing with this subject of foreign intelligence surveillance.

I might say that while I take a different approach, for the time being, at least, with respect to the subject we are dealing with, I think we both recognize the need for reposing responsibility appropriately, and also for providing for accountability with regard to the exercise of this extremely sensitive subject. Notwithstanding my possible disagreement to the approach to this subject, I certainly do not want to indicate any disagreement with the aims or objectives.

I am delighted to have the Senator's testimony here this morning and to continue to work with him on this and other subjects relating to our national security, our domestic tranquility, and the general subjects in which we have heretofore indicated a mutual interest.

Thank you, Mr. Chairman.

Mr. MURPHY. Ken, do you have anything to say?

Mr. ROBINSON. Thank you, Mr. Chairman, but not at this point.

Mr. MURPHY. Senator, you may proceed.

**STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM
THE STATE OF MASSACHUSETTS**

Senator KENNEDY. Thank you very much, Mr. Chairman and members of the committee.

What I would like to do is go through my opening testimony. Then, if it is agreeable with the committee, I would like to go through

the legislation. In that way, rather than beginning directly with the legislation, I think I can give you some sense and feel as to where we are in the Senate and how we have gotten there, and the matters which have been the most troublesome to us during the course of our consideration.

I want to thank you, Mr. Chairman and members of the committee, for the opportunity to address you on a matter of vital concern to all of us—the subject of foreign intelligence and electronic surveillance. With the creation of this permanent standing committee, the House joins the Senate in recognizing the need to exercise oversight responsibility with respect to our Nation's intelligence activities.

The abuses of recent history sanctioned in the name of national security and documented in detail by the Church committee highlight the need for more effective congressional oversight. You have the major responsibility for seeing to it that history does not repeat itself, that civil liberties and the rights of our citizens are not bargained away in the name of national security. I wholeheartedly endorse your efforts and offer you my support.

Mr. Chairman, today this committee continues the hearings on H.R. 7308, the Foreign Intelligence Surveillance Act of 1977, introduced by Congressman Rodino. This bill, which I introduce in the Senate as S. 1566, benefits from broad bipartisan support. It has been endorsed and supported not only by this administration, but by the Ford administration as well. Both Attorney General Bell and Attorney General Levi have been most cooperative and helpful in the drafting of this legislation.

The bill constitutes a major step forward in bringing needed safeguards to the unregulated area of foreign intelligence surveillance. H.R. 7308 is designed to strike a balance between the protection of our national security and the protection of our human liberties and rights. It is a recognition, long overdue, that the rule of law must prevail in the area of foreign intelligence surveillance.

No one has to tell you, Mr. Chairman, of the dismal record of the Congress in failing to deal with the issue of electronic surveillance. For the past 6 years, I have joined with others in the Senate in an unsuccessful effort to place some meaningful statutory restrictions on the so-called inherent power of the Executive to engage in such surveillance.

Legislation has been introduced by Senator Mathias, Senator Nelson, the late Senator Philip Hart, and me. Until last year, such legislation was not even reported out of the Judiciary Committee. Seven sets of hearings have been conducted in the past 6 years. Speeches have been made only to fall on deaf ears; inquiries made of the executive branch have been ignored or answered in a half-hearted way.

S. 3197, legislation drafted last year with the help of Attorney General Levi, was overwhelmingly approved by both the Senate Judiciary Committee and the Senate Intelligence Committee. Unfortunately, time ran out before the full Senate or the House could act.

The sad fact is, Mr. Chairman, that despite over 6 years of effort, Congress has yet to enact a statute controlling foreign intelligence electronic surveillance.

H.R. 7308, building upon last year's effort, achieves a major breakthrough in the long debate. It is the culmination of past efforts and present hopes.

This legislation would, for the first time, substitute carefully prescribed accountability and oversight for the arbitrariness of the past. The bill would require that all foreign intelligence electronic surveillance be subject to a judicial warrant requirement based on probable cause.

For an American citizen to be surveilled, there must be probable cause that he is an agent of a foreign power—a citizen acting for or on behalf of a foreign power—and engaging in sabotage, terrorism, or clandestine intelligence activities.

Thus, the courts, not the Executive, ultimately rule on whether the surveillance should occur.

The bill would require that before such surveillance could occur, a named executive branch official, such as the Secretary of Defense, certify in writing and under oath that such surveillance is necessary to obtain foreign intelligence information.

These statutory provisions are the very heart of the legislation. They relegate to the past the wiretapping abuses aimed at Joseph Kraft, Martin Luther King, Jr., and Morton Halperin. They prevent the National Security Agency from randomly wiretapping American citizens whose names just happen to be on a list of civil rights and antiwar activities.

The legislation provides the type of accountability which has heretofore not existed. It would, for the first time, expressly limit whatever inherent power the executive may have to engage in surveillance in the United States. In so doing, the bill ends a decade of debate over the meaning and the scope of the "inherent power" disclaimer clause currently found in title III. Until last year, there had never been a willingness on the part of the executive to limit any inherent power which may exist.

H.R. 7308 would also provide civil and criminal sanctions to those who violate its provisions. It requires that all extraneous information, unrelated to the purposes of the surveillance, be minimized. It mandates that before any information obtained can be used at a subsequent criminal trial, the trial court must again find that all statutory wiretap procedures have been met. The defendant must also be given access to portions of the material to be introduced as evidence.

As important as any individual provision in the bill is the fact that, at long last, legislation placing foreign intelligence electronic surveillance under legal controls has a reasonable chance of becoming law.

On November 15, the Senate Judiciary Committee, after making important improvements in the bill—which hopefully will be considered favorably by the House Members—overwhelmingly approved S. 1566 and sent it to the Senate Intelligence Committee, where, Senator Bayh assures me, prompt action is expected.

I am aware of the concerns expressed by some about various provisions of the bill. I and others in the Congress have shared these very concerns over the years. However, many of the criticisms

voiced when this legislation was first introduced have been corrected by amendment to the Senate bill. Thus, for example, either the Attorney General or the Deputy Attorney General must personally sign off on each application; the application must state whether "physical entry is required to effect the surveillance," thereby notifying the court whether or not a break-in is necessary in order to install the surveillance device. Use of the information obtained by the surveillance is further restricted—even in the case of non-American citizens—to "lawful purposes;" and any testing of new electronic surveillance equipment, tests which are not covered by this legislation, cannot be directed against specific American citizens without their consent.

I still have one major reservation with the legislation, Mr. Chairman, a reservation which, hopefully, is on the verge of being resolved; that concerns the issue of the so-called noncriminal standard found in section 2521 (b) (2) (B) paragraph (iii) on page 4.

Both S. 3197 last year and the two bills this year currently retain a narrowly restricted provision allowing for electronic surveillance in the absence of a statutory recognition that the activity is criminal.

I stress the absence of a statutory recognition that the activity is criminal because I am personally convinced that the disputed language in the bills does reach the level of criminal espionage activity. During the Senate Committee hearings on S. 1566, I questioned officials of the Justice Department at length concerning the meaning and the scope of the disputed language. On the basis of their testimony, I am more convinced than ever that the section requiring, as it does, knowing, secret transmission of information to a foreign intelligence network, where such information "would be harmful to the security of the United States," reaches criminal conduct, and that the statute should expressly reflect that fact.

Nevertheless, the Justice Department disagrees, and this provision, as drafted, remains a major stumbling block to prompt passage of the legislation.

I have worked closely in recent weeks with Senator Bayh of the Senate Intelligence Committee and Attorney General Bell in an effort to develop mutually acceptable alternate language. I believe that such language is very close to being finalized and urge the committee to consider it.

The language would be a substitute for that section. It would form an explicit statutory recognition of criminality. It would also call for a lower standard of criminal conduct than the traditional "probable cause that a crime is being committed."

Instead, the alternate language would speak in terms of probable cause that a person is engaged in "clandestine intelligence gathering activities that involve or may involve a criminal violation;" all other clandestine intelligence activities that "involve, or are about to involve" a criminal violation; or sabotage or terrorism that "may" involve a crime.

This language goes a long way in striking a proper balance between the legitimate interests of national security and civil liberties. It is a criminal standard; but the standard which must be met for a warrant to be issued is closer to "reasonable suspicion" than evi-

dence of an ongoing existing criminal enterprise. It is, I believe, a major breakthrough in the 8-year effort to develop legislation in this area.

Mr. Chairman, some argue that this legislation is regressive and does not provide sufficient protection for civil liberties. Others maintain that it goes too far and will inhibit our intelligence activities. I disagree on both counts.

Legislation can hardly be labeled regressive which for the first time places strict statutory controls on foreign intelligence electronic surveillance. The judicial warrant and executive certification procedures guarantee the type of external and internal controls which I and others have long advocated.

I am not completely satisfied with every single facet of the legislation. For example, as I have repeatedly stated, I harbor reservations concerning the sections in this bill—absent in S. 3197—which provide less protection to transient visitors, such as teachers, students, and tourists, than to American citizens. Such a double standard offends my notion of the fourth amendment, which speaks in terms of all “persons” and not just American citizens.

But those who would defeat this bill because they are not satisfied with every provision in it ignore the fact that today there is no statute at all. The courts currently have no role to play whatsoever in this area; Executive whim is the only controlling factor. Congressional efforts at providing any safeguards have been exercises in futility.

Despite my own reservations with a few provisions of the bill, I remain even more uncomfortable leaving the American people with no legislative protections whatsoever in this area.

Nor will H.R. 7308 undercut the effectiveness of our intelligence agencies. Many of those who are suspicious of the warrant and certification procedures prefer the old way of doing business—electronic surveillance by Presidential fiat. But they ignore the fact that the legislation has built-in safeguards to preserve the flexibility and secrecy of our intelligence effort. For example, the notice requirement is very limited, as is the power of the court to examine the validity of the certification in cases involving embassies and certain entities controlled by foreign governments. The requirements of what must go into the warrant application are similarly limited. And H.R. 7308 is inapplicable to most overseas and National Security Agency surveillance.

Mr. Chairman, this legislation was not fashioned to please either the intelligence community or civil liberties groups. Rather, this legislation is designed to strike a balance, a careful balance that will protect the security of the United States without infringing on the civil liberties and rights of the American people.

I believe the time has at last arrived when Congress and the Executive together can fill one of the last remaining loopholes in the laws governing wiretapping in the United States. One should view this bill for what it is, a major effort by the Congress, long overdue, to place foreign intelligence electronic surveillance under the rule of law.

This bill achieves that goal, and I urge its enactment.

Mr. MURPHY. Thank you very much, Senator.

Senator KENNEDY. Mr. Chairman, if we could go through the various provisions of the bill. Then, if that is agreeable with the committee, we might get more specific.

Mr. MURPHY. That is agreeable to the Chair, Senator. But before we begin that, I would like to introduce Congressman Ron Mazzoli from Kentucky.

Mr. MAZZOLI. Good to see you, Senator.

Mr. MURPHY. This is Congressman Norm Mineta from California.

Mr. MINETA. Nice to see you today, Senator.

Mr. MURPHY. Over here is John Ashbrook from Ohio, on my left.

Mr. ASHBROOK. Good morning, Senator.

Senator KENNEDY. Good morning, gentlemen.

Mr. Chairman, I think in the area of the definitions there are a whole series of requirements that have to be met. We have tried to break those down in my opening statement. The easiest way to describe the bill is as follows: "who" it is that is covered, second, "what" is covered, third, "where" is it covered, "when" and "how" is it covered? Then we can go through some of the procedures. If we can get into that we will get a better understanding.

On pages 2 and 3, the "foreign power" is defined in the various sections, A, B, C, and D. It would obviously include an embassy. The PLO I think would be included in (B). I think the entity might include Aeroflot Airlines or perhaps other kinds of entities. (D) and (E) I think would again apply to the type of activities of the PLO.

Agent of a foreign power—the first part of this covers non-American citizens, such as Soviet employees. The American citizens are covered by the (B) section, "any person." We draw the distinction between the non-American and the American citizen and give different types of protections to each. I referred to that in my statement.

So, what we have here, then, is the "entity" itself, which is defined in the foreign power section, and then under "person," the criteria that will be used for American persons and non-American persons.

Mr. MURPHY. Senator, at this point, if we might pause, one of the issues presented in the Justice Department testimony before this committee was the definition of persons under the fourth amendment and whether it includes foreign nations. In your statement you make reference to that and say that you believe all persons are covered.

Senator KENNEDY. I think the provisions that we had in last year's legislation were preferable. Attorney General Bell feels strongly about this. We asked for materials in terms of travellers, visitors, and tourists in this country. I think that is one of the provisions that is preferable in last year's bill.

Let me just run through these provisions and get back, in the time that is available, to answer your questions.

We have tried in the "who" area to draw the distinction as to the relative types of activities of foreign powers which should be covered. On page 4 we get into the standard. It seems to me difficult under the noncriminal standard that is stated on page 4 that you could have any activity that was not espionage. If, at the direction of an intelligence service, someone "knowingly collects" information

with the intention to conceal, which is harmful to the security of the United States, or that the lack of it would be harmful to the security of the United States—I think if it looks like a duck, walks like a duck, and quacks like a duck, it is a duck. I think that that is a criminal standard.

But we are beyond that and I think we have developed good language now that will meet those particular civil liberties concerns. But I wanted to give the reasons why we moved S. 1566 out of the Judiciary Committee to the Intelligence Committee. I think that the language submitted here today to deal with this is better, more effective language. It is a criminal standard, but lowers the threshold. It is acceptable, as I understand it, to the intelligence community.

So, first of all, we have the “who.”

Then, on page 5, we go into the “what,” the foreign intelligence information. It gives the definition of foreign intelligence information. I think it is important to consider this: “Information which is deemed necessary to the ability of the United States to protect itself against actual or potential attack”; then it considers that which is “essential to the national security of the Nation”; and “the successful conduct of the foreign affairs.” That was always raised as a question—what falls under this term “foreign affairs.”

To relate the definition of foreign affairs, you have to get back to the “who” and that gets back to the careful kinds of definitions and the criteria which are used in terms of the foreign power or the agent of the foreign power.

So, the top part of page 6, then, is foreign intelligence information. So the “who” and “what” is covered in terms of the information is provided for. Then we get to “where.”

On the bottom part of page 6 we have the Bayh addition which relates to NSA. What is not covered by this bill are U.S. citizens abroad, under sections (B) and (D) and nontargeted sweeps by the NSA. But targeted sweeps by the NSA would be covered by this bill. That was included by the Bayh committee.

We did not feel that in terms of the Judiciary Committee we would deal with it—it is, I think, a very complex issue and there is going to have to be more attention given to it. The Justice Department was unprepared to go beyond that area. But I think it was an important addition that was added on the bottom of page 6 by Senator Bayh.

Obviously on the top, in (B) are the traditional areas—the FBI tapes by wire communication. (C) deals with radio communications. It is unrealistic to me to think that you are going to have agents who are going to be involved in radio communications wholly within the United States, but that is in there nevertheless.

(D) is the bugging devices and interception of oral communications.

Then, Mr. Chairman, we go over the applications the “how” it is covered. This would be over on page 12, that is, the application for the order.

This is with the approval of the Attorney General, on authority conferred on the Attorney General by the President. You have to have the description in the application. You have to have the

evidence that the target is a foreign power or agent of a foreign power, which is described in the top portion of page 13. You have to satisfy the certification procedure.

Congressman McClory mentioned the accountability; now we are talking about internal and external accountability. We have the Attorney General and we also have specifically added in the bill a deputy, if specified in writing. We have the certification, and that is going to have to be by someone like the Secretary of Defense, which is spelled out on line 20: "national security or defense," which will probably be the Secretary of Defense, or perhaps the FBI Director.

But there are these two people—the Attorney General and the individual who has to make the certification. This is a double requirement in writing by people who have been approved, with the advice and consent of the Senate.

As we go through the next part on page 14, and this is important, it states how long the surveillance may continue. That is specified on line 19. It says, "stating the period of time." That is included as 1 year, in terms of the embassies, which can be renewed, to 90 days in terms of Americans, which can be renewed, or 24 hours, which cannot be renewed, in terms of an emergency.

Then, notice the top of page 16, Mr. Chairman. "The judge may require the applicant to furnish such other information as may be necessary to make the determinations required by section 2525."

If the judge thinks more information is necessary and required, he has the authority and the power to add to that which is an additional protection.

Now, in the next area, the issuance of the order, obviously the judge must find that there is probable cause. Again, you have the judge, on lines 15 finding probable cause that the target is a foreign power, and that the facilities or place is directed or being used.

The judge must find this.

On the top part of page 17, we have the standard which would be used for looking behind the certification. The judge cannot look behind if it is a foreign embassy. But, "if the target is a U.S. person, the certification or certifications are not clearly erroneous on the basis of the statement made" under the section, then the judge must validate the certification. This is the clearly erroneous standard. So, the judge, unlike the bill that we had last year, has the power to look behind the certification. This protection, would not be applicable for the traditional embassies.

I think that is an important improvement on the bill from last year.

Now let's go over to page 19. We have considered who is covered, what is covered, where it is covered, and how it will be covered, the standard that will be used in terms of probable cause, the certification procedures. On page 19 we go through the "when" as I have reviewed, the 90 days, the 1 year, and the emergency provisions, which are spelled out on page 20.

Then, Mr. Chairman, we go into the "use of the information." There are only two uses, only two ways in which the information can be used. One can be for foreign intelligence purposes, and I think we understand that in terms of the opportunities for the

double agent, or in criminal law. Those are the only purposes for which the information can be used in terms of American citizens. If it is non-Americans, it can be used for any "lawful" purposes. I think further examples are unnecessary because this committee is surely well aware of the types of situations in which this can be used.

Then, Mr. Chairman, we continue back through pages 24 and 25 and review the requirements that are included in this legislation for the availability of information to the defendant. I can elaborate on those particular provisions.

The court privately decides whether the wiretap application was valid and meets all the requirements, and in making the determination, the court may show the documents to the defendants only "if necessary." If the Government says, for example, that it tapped on March 3, 4, and 5, the judge may want to make a determination on whether such a person was in the country at that time. He may say, "Were you in the country on March 3, 4, and 5." That would be sort of a typical example.

If the wiretap is found to be legal, it is likely that the evidence pertaining to the specific trial would be turned over to the defendant and nothing more. If it is illegal, I believe, that all of the information would have to be turned over, or the Justice Department would have to drop its case—which I would think would probably be the case. That is reviewed on pages 25 and the top of 26.

Concerning, "Report of electronic surveillance," that is your job, Mr. Chairman. What information should be repeated to the Intelligence Committee or to the Congress. We have left that open.

Now we get back to the questions of testing. We don't prohibit testing, but we prohibit testing against any single target. That was an addition that we added in the committee and I hope it would be considered. So, testing in terms of sweeps is not prohibited, but testing is prohibited if there is targeting of an individual American citizen without his consent.

Then there is the repeal of the inherent power on line 20—the most important feature of this legislation.

Mr. Chairman, we can get back into any of the particular provisions, but I did want to go into some of the details. As I mentioned to you, we have tried in these areas to define very, very precisely the question of foreign power, what is the standard, when it can be used, how it can be used, the procedures, the internal and external checks, the process in terms of the court—I didn't mention the spelling out of the seven judges, though I think you are very familiar with that—the minimization procedures, and the ability to look behind the certification, and also how the evidence could be used in the courts.

That, basically, is the legislation that we have drafted.

Mr. MURPHY. Thank you very much, Senator. I think your statement is very encompassing.

Senator, some critics of this legislation say that in requiring the Attorney General or his Deputy to sign off on this application, and in creating a special court, we are inhibiting, delaying, and in some way hurting or lessening the effectiveness of our intelligence agencies

in their ability to rapidly collect information. Some critics of this legislation say its provisions would be too time consuming and that our national security interests may be harmed.

How would you respond to that?

Senator KENNEDY. I think, Mr. Chairman, that we probably have to look at practical experience.

I think it is generally understood that in the areas of foreign entities, foreign embassies, there has been a process which has been followed which has never really been challenged and which is well established and basically supported by each administration, by the intelligence committees, and by the Congress and the American people.

I don't see any additional kinds of burdens under S. 1566. We provided 1 year and that can be extended. I think that in this area it doesn't seem to me to be a serious burden, and the standard which would be used can be easily and readily met. So I think there is no problem.

If we have the other process, talking about emergencies, there is 24 hours which cannot be renewed. But it does seem to me that that provides for an immediate kind of emergency. The 90-day period can be extended over a period of time. I think that the numbers that we are talking about in this area are not burdensome.

Attorney General Levi indicated that he had signed off on each and every application. He read the full record because he felt that it was an important enough issue.

We also indicated that the Attorney General can assign this responsibility. I was reluctant to do it, as was Attorney General Levi. But if the Attorney General is not immediately available, there is the opportunity for the Deputy to move ahead on it.

I think we have tried to deal with that issue. You are obviously dealing with both the necessity of time and also the accountability issue, and this seems to me to be a reasonable balance.

Mr. MURPHY. In light of the time factor, Senator, I am going to limit my questions.

Mr. Boland, do you have any questions?

Mr. BOLAND. Thank you, Mr. Chairman, but no, I do not.

Mr. MURPHY. Mr. McClory.

Mr. McCLORY. Thank you, Mr. Chairman.

I just want to point out, first of all, that I don't think that anyone wants to provide, either by legislation or otherwise, authority to provide electronic surveillance according to the whim of the executive.

Senator KENNEDY. Exactly.

Mr. McCLORY. But your suggestion that unless we enact such legislation, Executive whim will be the only controlling factor, I think may relate to another period in time and certainly doesn't relate to the current period or the current need.

The question, it seems to me, that we should get down to is whether or not we want to repose some new role in the judiciary, which heretofore it has never assumed, and that is to pass upon the wisdom or the propriety of electronic surveillance information or interception of foreign intelligence communications.

I would certainly suggest that this involves an entirely new role for the judiciary insofar as its passing upon the validity or the propriety of electronic surveillance.

Are you aware of any precedent for investing this kind of authority with regard to our national security in the judiciary?

Senator KENNEDY. Well, not specifically as stated, Congressman.

Of course, what we have tried to do—and these are complex, involved, and sensitive items—I think judges generally are dealing with items which are certainly similar in terms of their complexity. I think perhaps the protection of individual rights and liberties is similarly important, terms of the title III wiretaps at the present time.

I think what we have attempted to do is, by permitting the appointment of the seven judges, to develop the kind of both expertise and sensitivity on these particular types of issues which is lacking today.

I think you are correct in indicating that this is a new procedure. But I think it is an appropriate kind of function for the judicial branch to at least insure adequate protections under the fourth amendment.

Mr. McCLORY. We are talking about two different things when we talk about intercepts or electronic surveillance of foreign powers as contrasted to U.S. persons, are we not?

Senator KENNEDY. That's right.

Mr. McCLORY. I feel myself that the President, of course, has the initial responsibility with regard to our national security. Does he have the right to limit his own authority in this area? Can he just voluntarily say that he does not have the authority to do what heretofore the Constitution has vested in him and his predecessors, and can he be limited to the extent that he has to go to the judiciary before he can exercise this authority?

Senator KENNEDY. Congressman, you could get a panel here of extremely wise constitutional scholars who would take up your whole morning on that issue.

We have tried to review that and study it. I think the Judiciary Committee has an important record of review in that area.

The question is, can they legislate away whatever is basically inherent.

I am satisfied myself, although I think perhaps there are others who have differing views, that with this kind of statement and the repeal of the inherent power clause that foreign intelligence wiretaps must follow this statutory procedure—and also, as Attorney General Levi had indicated and also Attorney General Bell, that this in effect will limit whatever inherent power exists in this area.

Now there are constitutional authorities who question whether that can be done.

I am very well satisfied myself that Attorney General Levi's and Attorney General Bell's positions, as well as those of many other constitutional scholars on this issue, are that they are satisfied that the statute will limit it even though such power would continued to exist in the absence of such a statute. I am satisfied on it. I think it might probably be a minority, though not an insignificant, and a thoughtful one that might find otherwise.

Mr. McCLORY. I know that you are interested in persons being authorized to exercise their freedom of conscience. Nevertheless, in this legislation, in your bill, in the administration bill, we would be building up a whole area of secret and hidden judicial hearings and decisions. In other words, this whole procedure before the court, the seven judges and the three appellate court judges and the Supreme Court, if it reaches to that level, it will all be secret.

Now, what is going to be the position with regard to the dissenting judge, for instance, in the court of appeals. What if he dissents from the opinion and nevertheless the wiretap is put on, or the wiretap is denied—whatever the case happens to be—or, say, four Judges of the Supreme Court out of the nine are dissenters to this very sensitive and critical area of national security?

Are they going to be bound by the secrecy of the proceedings, or are they going to be free to blow the secret and announce their position, justify their dissent, and exercise the kind of judicial disagreement that traditionally has been exercised by the court?

Senator KENNEDY. First of all, I would say that you make a comment about the development of a process or a procedure which is basically held in secrecy. The fact of the matter is that there are absolutely no protections now.

Talk about secrecy, why I served with Sam Ervin for 4 years and we couldn't get the FBI under the secrecy of our committee to come up and tell us what was going on. I mean, talk about a veil of secrecy and unaccountability and what was happening in the country. That was a very difficult period.

Mr. McCLORY. But the President and the Attorney General would have to level with the court, would they not, with regard to this application?

Senator KENNEDY. Yes. The procedures that have been outlined here also concern the denial by a seven-man court and the process of appealing to the Supreme Court.

As I said, I think we can raise all kinds of strawmen on this. The best estimate is that there will be very few cases a year.

Mr. McCLORY. I think I have put a real question to you. I don't think it is a strawman, Senator.

Senator KENNEDY. I think it is a strawman. I think it is clear that both in terms of the legislative history and those who support it, there is going to be deference paid to the executive in gathering intelligence under this bill. I think it is a strawman.

In this limited area involving American citizens, I think we are establishing a procedure in which individual rights and liberties under the fourth amendment are going to have to be carefully protected.

If you are talking about involving the judicial system to insure that those liberties are going to be adequately protected, then I am for it. But I do not think that the bill will hamper the intelligence community or intelligence gathering, which is essential in terms of our security.

Obviously you and others have a different view.

Mr. MURPHY. The gentleman's time has expired.

Mr. MAZZOLI.

Mr. MAZZOLI. Thank you, Mr. Chairman.

Senator, welcome, and thank you for your statement.

Let me commend you on your detailed knowledge of this bill. With the number of things you have to contend with, I think it is remarkable that you have such a knowledge of the specifics of the bill.

Let me make mention of one thing. In your statement you deal with the new criminal standards. At the committee meeting where Attorney General Bell appeared before us, I asked him about that very section, 2521(b).

Senator KENNEDY. May I mention something additional on this point?

Mr. MAZZOLI. Surely.

Senator KENNEDY. I will submit this language as a substitute for that particular provision. Do you have the new language?

Mr. MAZZOLI. I think we do. I believe it was circulated to the committee.

Senator KENNEDY. Oh, fine.

Mr. MAZZOLI. When I was speaking with Attorney General Bell, I talked with him about that section of the bill on page 4, section 2521(b)(3). If my recollection is correct, he suggested that that language was tantamount to a criminal standard, and that is exactly as you suggested here: That while the words don't appear in there and there could be some argument made, the fact of the matter is that those people who do what is done on page 4 have engaged in criminal activity. If we can restate it—and the suggested language of yours would seem to drive to that point—I think we might solve the problem and have a criminal standard without having to completely rework this bill.

Senator KENNEDY. There were not examples given to our committee—and you can review the record on this—where they could give us an example under this criteria that didn't violate the law.

Now this new language, if we could just go through it—(i) is the standard which is used in the gathering of information: "knowingly engaged in clandestine intelligence activities for or on behalf." That would be gathering intelligence. There is a different standard in terms of any other clandestine intelligence activities which would basically be disseminating and that would be "about to." We have a different kind of criteria with disseminating, rather than gathering. As to sabotage and terrorism—I think you obviously want the same threshold as found in title III. This part is still somewhat troublesome to me and I hope it will be changed.

Then, the fourth paragraph deals with a conspiracy which I have no objection to if we have a criminal standard. If we don't have a criminal standard, then I don't see how we can possibly justify conspiracy.

So, I think this is a very important breakthrough. There is the criminal standard, conspiracy as well. You tailor the threshold standard to the areas which are most sensitive in terms of intelligence, which is both gathering and disseminating. As to terrorism, I hope the threshold will be raised to title III.

I would hope you would give this serious consideration.

Mr. MAZZOLI. Senator, did you say there was a lower standard with respect to dispensing? Wouldn't involve or about to involve be a higher standard rather than a lower one?

Senator KENNEDY. Yes.

Mr. MAZZOLI. Let me ask you this question. It bears on what Congressman McClory has talked about in several of our committee meetings. When you set up the panel of seven judges, you could have a rubberstamp operation and, therefore, Congressman McClory says why have this if we can have something else. I disagree with him. I think we have to have judicial involvement.

Mr. McCLORY. Would the gentleman yield?

Mr. MAZZOLI. Let me finish my question first because my time is about to expire.

Let me ask you this, Senator.

To what extent do you think this committee and Senator Bayh's committee on your side ought to have some kind of oversight on exactly how these judges operate and to the extent that they have information, access to that information?

Senator KENNEDY. I think in section 2527, reports on electronic surveillance, we leave to you a decision on exactly what you want from the Attorney General on this.

I would hope that you could set out the procedures in here where you would get the type of information necessary to have effective oversight.

Mr. MURPHY. Senator Kennedy, for the record, both Attorney General Levi and Attorney General Bell have approved of these procedures, have they not?

Senator KENNEDY. Yes. The answer is affirmative.

Mr. McCLORY. Would the chairman yield to me for just one point?

Mr. MAZZOLI. My time has expired, Mr. Chairman.

Mr. MURPHY. Mr. McClory.

Mr. McCLORY. My point is this. You might have seven patsies. You might have seven judges who would all go along with what the President wanted if you have that kind of Chief Justice and he names that kind of panel. Or, you might have the opposite, judges who would test and challenge every one of the applications and perhaps make it difficult, if not impossible, to exercise any authority on this.

Mr. MURPHY. And you might have an executive abusing its power.

Senator KENNEDY. Yes, you might have any of those. But the critical point is this—you don't have anything now.

Mr. McCLORY. But if you have an executive abusing his power and you have patsies, then you will just have an excuse for a copout.

Senator KENNEDY. But you will have accountability internally through the certification.

You are going to have someone's signature, which you don't have now and which you have not had in the past. You are going to have two signatures, and they are going to be called up here in terms of this process. You are going to be able to have them come on up here and explain why they certified.

Mr. McCLORY. But the court is going to be a recordkeeping agency and not a judicial body.

Senator KENNEDY. Well, I think you want it both ways, Congressman. You either want them as patsies or you fear they will ob-

struct the intelligence effort. I am prepared to have a greater sense of confidence in the judicial process in S. 1566.

Mr. MURPHY. Gentlemen, I'm sorry, but I have to interrupt. Our time is limited and we must go on.

Mr. Ashbrook, it is now your time. Do you have any questions?

Mr. ASHBROOK. Yes, Mr. Chairman, thank you.

Senator, it seems to me that if we are going to require criminal standards in the bill, then we ought to properly rewrite or redefine the espionage laws first.

Now, you have worked in both of these fields; fields you are now testifying on. Your bill, S. 1437, is a recodification of the criminal laws. What did you do in the espionage area in that recodification of the criminal laws? To what extent does it relate in?

Senator KENNEDY. Sir, we didn't address that issue, because it is enormously complex and provocative. At the present time the Justice Department is doing a review—I believe a 3-year review—of the whole area of espionage laws. We could not make a judgment in S. 1437. There were strongly divided views within the committee. We recodified the existing law and the court interpretations of it. I think we have to deal with the issue, but we are unable to do so at this time, given the study which is being done in the Justice Department. They do not think they will submit it for probably another year.

Mr. ASHBROOK. I guess it seems to me that that ought to be a basic part of the criminal law. If we are going to define a criminal standard here, it ought at least in some way relate to the recodification.

Now, jumping to the Smith Act and the McCarran-Walter Act, I understand that for all intents and purposes what was left by the courts has been junked by your Senate committee. Is that reasonably accurate?

Senator KENNEDY. Yes.

Mr. ASHBROOK. Do we end up with a void in the whole area of subversion?

For example, take the FALN in New York, which appears to be engaging in bombings and other terrorist activities. There is no evidence that it is in any way under the direction of, reporting to, or a part of any foreign operation. Where do we end up in surveillance, wiretapping, and the things we are talking about on a group such as that?

Senator KENNEDY. This bill would deal only with foreign intelligence. Of course, you have title III which deals with criminal activity and that would clearly be applicable in your example.

So, if they were violating various provisions under title III, wiretapping would be permitted. That provides for both warrant and warrantless situations. Title III spells out, for example in terms of warrantless taps, if it involves national security. Then you have the warrant provisions under title III, also.

Mr. ASHBROOK. How does the 1968 act get into your recodification?

Senator KENNEDY. We basically restate it.

There was some minor refining in terms of the warrantless provisions.

I think there are around five areas today in terms of warrantless emergency taps which have been reduced, I believe, to three. We have left in obviously emergency taps in terms of murder and certain other types of high risk crimes.

Mr. ASHBROOK. But it doesn't mention, the 1968 act, specifically acts of subversion, terrorism, domestic terrorism, and that type of activity, does it?

Senator KENNEDY. I would think under foreign power here—

Mr. ASHBROOK. I am talking strictly about domestic situations.

Senator KENNEDY. Well, if it is strictly domestic, this bill doesn't apply.

Mr. MURPHY. I think title 18 would apply to that.

Mr. ASHBROOK. I am somewhat concerned that when you rewrite the law in S. 1437 and you spell out specifically provisions that relate to foreign espionage surveillance, intelligence activities, and so forth, that you make sure this area doesn't fall through the cracks. I hope you don't have to hang by grappling hooks on three or four sections of the bill that do not really relate to it in the first place.

I just point that out because I think there is some connection between the two and I want to make sure that we don't leave it hanging.

Senator KENNEDY. Under title III now, any offense punishable by death or imprisonment under the following chapters—chapter 37—relating to espionage, chapter 105, relating to sabotage, and 115, relating to treason, and chapter 102, relating to riots, those basically are a restatement of current law. In terms of the fact situation of a domestic group with explosives, I think it would probably be a violation of existing law.

Mr. ASHBROOK. Let's take a bigger look at it down the line.

That is all I have, Mr. Chairman. Thank you.

Mr. MURPHY. The gentleman's time has expired.

Mr. Mineta.

Mr. MINETA. Thank you, Mr. Chairman.

Senator Kennedy, I would like to thank you for the leadership which you exhibited in this vital area.

I would just like to touch on one short part of this, and that is whether or not the Vienna Convention on Diplomatic Relations applies to the kind of electronic surveillance that is authorized by this bill. Have the provisions of the Vienna Convention been either reconciled or taken into account by this bill?

Senator KENNEDY. I am not sure. Let me give you an answer for the record, please.

I will give you a responsible and more complete answer for the record.

[The information referred to follows:]

February 10, 1978

Honorable Norman Y. Mineta
U.S. House of Representatives
Washington, D.C.

Dear Norman:

This is in response to your question during my testimony on February 8, as to the relationship between the Vienna Convention and H.R. 7308.

It is my understanding that the Vienna Convention on Diplomatic Relations declares diplomatic premises, property, personnel, and correspondence to be "inviolable", and adds that host countries "shall permit and protect free communication on the part of the mission for all official purposes." Nevertheless, former Attorney General Edward Levi testified before the House Judiciary Committee that the Justice Department had concluded that the activities authorized in S. 3197 did not violate the Convention. Inasmuch as the activities authorized by H.R. 7308 are the same as those in the former Administration bill, I continue to rely on the Justice Department's opinion that such activities are not barred by the Convention. It is my understanding that the present Administration has reached the same conclusion with respect to S. 1566 and H.R. 7308.

It is possible, however, given the bare language of the Convention, that a judge might decide otherwise. Therefore, it might be advisable to make clear in the legislation itself, or its history, that the activities authorized by the legislation are indeed proper notwithstanding international law or treaty.

Sincerely,

Edward M. Kennedy

Copy to Honorable Edward P. Boland
Chairman
Select Committee on Intelligence

Honorable Morgan F. Murphy
Chairman
Subcommittee on Legislation

Mr. MINETA. That's all I have, Mr. Chairman.

Thank you.

Mr. MAZZOLI. Mr. Chairman, I have one further question, if I may ask it.

Mr. MURPHY. Yes, Mr. Mazzoli.

Mr. MAZZOLI. I have just one quick followup question.

Senator, in section 2527 that you refer to, about the reporting and the information that the Intelligence Committees will get, is it your understanding from that that we would have the detailed information and knowledge of specifically what the court had before it or would it be just a report of numbers?

Senator KENNEDY. I think you ought to decide what you need.

Mr. MAZZOLI. We could put it in, then?

Senator KENNEDY. That is fine with me. Whatever you and the Senate members wish is fine with me. I think you would want to get information, you would want accountability, you would want to have effective oversight. I would certainly support whatever you felt you needed.

Mr. McCLORY. Mr. Chairman, may I ask one more question?

Mr. MURPHY. Yes, Mr. McClory.

Mr. McCLORY. I want to indicate that while I strongly oppose involving the courts insofar as foreign powers are concerned, as far as U.S. persons are concerned, I might have a different view.

What I would like for you, if you would kindly furnish this information, is this: Under Article III, do you or your counsel regard this proceeding before the court as a case or controversy under which the court can constitutionally exercise this authority with regard to U.S. persons?

Senator KENNEDY. Well, it would be clearly before the court in S. 1566.

Mr. McCLORY. Well, I know that it is in the legislation. But constitutionally?

Senator KENNEDY. I will get back to you and give you our best judgment in terms of the constitutional issues.

[The information referred to follows:]

EDWARD M. KENNEDY
MASSACHUSETTS

United States Senate

WASHINGTON, D.C. 20510

February 10, 1978

Honorable Robert McClory
U.S. House of Representatives
Washington, D.C.

Dear Bob:

This is in response to your question during my testimony on February 8, as to whether Federal judges could constitutionally exercise the functions assigned to them by H.R. 7308; or whether those functions do not involve "cases" or "controversies" and therefore are beyond the constitutional jurisdiction of Article III courts.

This is obviously a question which legal scholars could debate at length, but in my view the Supreme Court decided this issue in United States v. United States District Court, 407 U.S. 297 (1972). In that case the Court held that the Fourth Amendment required a prior judicial warrant for electronic surveillance in domestic security intelligence cases. Indeed, the Government argued in that case that a warrant should not be required because the purpose of the surveillance was to gather intelligence, not evidence of a crime. Nevertheless, the Court concluded that a warrant was required and went on to suggest that Congress could fashion such a warrant with standards different from those applicable in criminal cases. Because there does not appear to be any distinction between domestic security intelligence warrants and foreign intelligence warrants -- at least as far as the "case" or "controversy" question is involved -- it would appear that the judiciary can constitutionally issue warrants in "intelligence" cases even though no criminal prosecution is intended.

Sincerely,



Edward M. Kennedy

Copy to Honorable Edward P. Boland
Chairman
Select Committee on Intelligence

Honorable Morgan F. Murphy
Chairman
Subcommittee on Legislation

Mr. McClory. I would appreciate that, too. Thank you.

Mr. Murphy. Senator, we very much appreciate your appearance here today. We know that your time is limited and we appreciate your very excellent statement.

Senator Kennedy. I am just delighted that we are very close, hopefully, to trying to deal with this issue after 10 years.

I want to thank your committee, too, for extending me this courtesy.

Mr. Murphy. Thank you, Senator.

Our next witness is the Honorable Charles E. Wiggins. It is very nice to see you, sir.

We welcome the distinguished gentleman from California to the committee. He is one of the most distinguished lawyers in the House and a very capable Member of the Congress. I have had the pleasure of serving with him on the Select Committee on Crime. Chuck, we welcome your testimony and comments about this important legislation pending before the Congress.

STATEMENT OF HON. CHARLES E. WIGGINS, A U.S. REPRESENTATIVE FROM THE STATE OF CALIFORNIA

Mr. Wiggins. Thank you, Mr. Chairman.

I do appreciate the opportunity of offering some observations about an inordinately complex subject.

I apologize, Mr. Chairman, for not having a written statement. It is my intention to speak from notes only. Perhaps it would be well, before you print this record, if I be given some opportunity to clean up my remarks.

It is my intention, Mr. Chairman, to comment upon the major concepts contained in the Senate bill and also in H.R. 9745, introduced by your colleague, Mr. McClory, rather than some of the technical details which are fully worthy of comment, but about which I am not prepared to testify at this time.

The whole issue of foreign intelligence surveillance draws into question several major constitutional rights and powers. Among them, for example, is the right of the President to conduct the The proper role of the judiciary under Article III is also involved incidentally, which is not explicit in the Constitution, but it is clear from other explicit language that such right and power is vested in the President of the United States.

Drawn into question is the power of the President as Commander-in-Chief and the War Powers that might be incidental to that status. The proper role of the judiciary under Article III is also involved in this question, as are the rights of persons, of people, or citizens under the fourth, fifth, and even perhaps the sixth amendments to the Constitution.

As is so often the case, Mr. Chairman, there is an internal tension, if not an outright inconsistency, in the application of these various constitutional provisions to the issue of foreign intelligence gathering.

The control over the gathering of foreign intelligence proceeds from the premise that the President alone should not have the unreviewable power in this field. There are basically two proposals on the table to regulate the power of the President. One, which is embodied in the Senate bill, grants to the judiciary a review function. The other alternative proposal, embodied in Mr. McClory's bill, creates a review mechanism within the executive branch itself.

Of the two, it is my opinion that the latter, that is, the McClory bill, is superior as a matter of policy, and perhaps because it may be mandated by the Constitution itself. Let me explain why.

As a point of beginning, Mr. Chairman, it is necessary to separate the purposes for which the collection of foreign intelligence is undertaken. On the one hand, the collection of foreign intelligence information may be a part of an ongoing investigation leading to criminal charges. In that case, I personally see no problem in involving the judiciary in a warrant process. It is the traditional function of the judiciary to authorize warrants preliminary to, but as a necessary part, of a criminal proceeding which can clearly be characterized as a case or controversy under Article III of the Constitution.

The normal rules with respect to the issuance and review of warrants by a defendant may require some special tailoring in this field because it is possible that both the application for a warrant and the contents of any material gathered will be of such a sensitive character that it would be contrary to the national interest to disclose that information either to the defendant or to his counsel, as is customary in a traditional criminal proceeding.

At the present time, as you know, the Government has a duty to disclose the application and, perhaps, the entire record to the defendant. If the Government feels that granting that right to the defendant is contrary to the interests of the United States, the option is to dismiss the proceeding.

Whether or not under either bill it is possible to deny to a defendant in a traditional criminal setting access to the application and to the contents of the material collected, raises extraordinarily difficult due process questions. It implicates fourth amendment concerns and it also implicates fifth amendment concerns, particularly with respect to the rights of a defendant to so-called Brady information, that is, material which may be exculpatory to the defendant and which is in the possession of the Government. The Government now, as you know, has a fifth amendment duty to disclose that information, and if it fails to do so, the defendant is entitled to have the charges dismissed.

However, I think that it may be possible, by limiting the scope of the exclusionary rule in certain types of national security or espionage cases, to deal with this problem. I am presently uncertain, although I have read the cases, as to whether or not the exclusionary rule is a constitutional standard or whether it is simply a rule of evidence adopted by the judiciary. But I think it is the latter.

The defendant now seeks access to the application for a warrant and to the contents of any material obtained for purposes of exercising his rights to suppress that evidence by reason of the fact that it may be illegally collected. In other words, the defendant is seeking to apply the exclusionary rule.

If, in fact, the exclusionary rule can be modified in certain classes of cases, the defendant would not necessarily have a right to the content of the application or the content of any material obtained as a result of a search. But, if the statute or the state of the law requires that the content of an affidavit be disclosed, I cannot conceive of any circumstances justifying an *in camera* review and an *ex parte* denial of that right to the defendant. As you know, the Senate bill involves just exactly that process, and it may well be violative of due process.

I note that the Senate proposal seeks to avoid the constitutional issue by asserting that the contents of the application shall not be disclosed, "except as may be required by the due process clause." In other words, it does not really confront the issue.

The exclusionary rule may not be constitutionally mandated, and if not, it perhaps is possible to carve out an exception to the right to suppress in national security cases. If so, I would urge the committee to examine that possibility as a means of denying to the defendant access to both the application and the contents of the search in national security cases.

So far, Mr. Chairman, I have been speaking of the traditional criminal case. But foreign intelligence gathering may also be undertaken for another purpose. It is possible that it will be for the purpose of collecting pure intelligence, unconnected with any foreseeable prosecution.

I believe, as apparently does Mr. McClory, that it is inappropriate to involve the Judiciary in overseeing this activity. As we all know, the judicial power, under the Constitution, under Article III, extends to cases of controversies. It doesn't extend beyond that.

The essence of a case or controversy is an adversary proceeding between contending parties, in which the Judiciary plays a neutral role and decides the issues as between those contending parties.

The Senate bill involves a procedure in which the executive branch is pitted against the Judiciary. Those are the two adversaries. It is clearly a deviation from the norm of a case or controversy. In a pure intelligence-gathering case in which no criminal prosecution is ever contemplated, the Government seeks to avoid notice to the person surveilled at all cost. The last thing in the world the Government wants is a criminal trial or notice to the defendant. No trial or adversary proceeding is contemplated at all. The entire process is, and must be, clandestine in nature.

The Senate bill would, nevertheless, require a special judicial panel to approve this surveillance. The approval and any appellate review would be entirely *ex parte*, not involving the person surveilled at all.

It is my view that the process contemplated in the Senate bill cannot be squared with Article III.

Now, Mr. Chairman, I am mindful that the Attorney General has a contrary view. I am mindful that the former Attorney General has a contrary view. Those prestigious authorities tend to cite as the outer reach of judicial power the situation which was tested in *ex parte Siebold* in which the Congress authorized the Judiciary to appoint election commissioners, largely in the South. The Supreme Court condoned it, even though the appointments were clearly extra-judicial.

I don't wish to rely upon that judicial aberration as stating the true rule. The Library of Congress has researched this question and it, too, relies upon similar cases, which I regard as judicial aberrations. The real standard, often stated, is that a case or controversy involves an adversary proceeding. That is the essence of it. Beyond question, there is not contemplated an adversary proceeding in connection with the collection of pure intelligence in which a criminal prosecution is neither contemplated nor wanted.

Accordingly, Mr. Chairman, I think that the better approach is to crank in internal controls, a mechanism, within the executive branch. We may do that by statute, in my opinion. We can affect what has been characterized as an inherent power on the part of the executive. We can have any manner or means of reviewing the judgment of the Attorney General or the President of the United States by officials within the executive branch.

I think that it is better left there as a matter of policy. It pins political accountability upon the President of the United States for his conduct. His excesses can be subject to review by this committee. The Congress of the United States has an oversight power, and we are exercising it more aggressively with every passing day.

We will not do violence to the normal role of the Judiciary by leaving a review mechanism within the executive branch subject to oversight by the Congress. I regard that as a preferable alternative.

Thank you, Mr. Chairman, for the opportunity of testifying.

Mr. MURPHY. Mr. Wiggins, again let me compliment you on your statement. As you said, you have no written statement and were testifying only from notes, but as usual, yours was a very erudite presentation.

It is your opinion, then, that the contemplated legislation, as envisioned by the Senate bill and Mr. Rodino's bill in the House, is outside the scope of the Judiciary.

Mr. WIGGINS. That's correct, Mr. Chairman.

I think that it is wholly appropriate for Congress to legislate to narrow the authority of the executive in terms of who may be surveilled, how it may conduct surveillance, when it may conduct surveillance; but the Judiciary cannot pass judgment on that executive act because it does not involve a case or controversy, in the pure intelligence-collecting area.

Mr. MURPHY. I understand that Mr. Wiggins, Congressman Drinan, and other members of this committee have a Judiciary Committee hearing to attend. So, I think we will hear from Congressman Drinan and then ask some questions of both witnesses. Will that be all right with the committee?

Mr. McCLORY. Does Mr. Wiggins feel that he can stay?

Mr. WIGGINS. Well, we all know that there is an important bill, and not a very good one, before the Judiciary right now, and I would like to get back as soon as possible to save the Republic. But I know that many of you, too, have those same pressures.

Mr. McCLORY. Well, I have just one question.

Mr. ASHBROOK. Mr. Chairman, I don't have any questions. I agree basically with everything Mr. Wiggins said.

Mr. McCLORY. I just want to ask this. Do you think there would be greater accountability under the McClory bill or greater accountability under the administration bill?

Mr. WIGGINS. It would be difficult, Congressman McClory, to pin responsibility on the President for conduct which has been condoned by the Judiciary. The ultimate burden, then, would be borne by judges and not by the executive branch.

I think that it would be far more difficult for this committee to conduct oversight with respect to whether the judge should or should not have approved an application than it would be with respect to overseeing the executive branch.

Mr. McCLORY. Thank you very much. Thank you, Mr. Chairman.

Mr. MURPHY. Mr. Mazzoli?

Mr. MAZZOLI. I have no questions, but I did want to make two observations. One is to say that as usual a very clear and important presentation has been given, which adds another aspect or dimension to the problem.

My second comment is perhaps in the nature of an observation-type question. Are you satisfied, yourself having served on the impeachment committee and having gone through that kind of situation, having been in Congress for the few years during the so-called excesses, that a combination of restraints in the statutes and aggression on the part of oversight by the Congress can solve the problem without the need to involve the Judiciary?

Mr. WIGGINS. Well, Ron, I like the idea of an independent review. But my wishes are limited by the Constitution. It matters not whether I think it is a good idea to have a judge looking over the shoulder of the Attorney General if that power is not a judicial function conferred upon that judge by the Constitution itself.

I am satisfied that this Congress, if it is sufficiently aroused, can do anything. We can hold the Chief Executive and any branch of the Government to account if we believe excesses occur.

Now, I want to make a note here that this bill focuses on electronic surveillance, which is one way to get information. But I would hope that this committee, in particular, would view the whole problem of collecting information in the foreign intelligence area without narrowing it to electronic techniques. Burglaries, for example, are not covered, and I would think that they ought to be considered because it may well be an aspect of foreign intelligence gathering that should be regulated. But it is not, at least not by this bill.

Mr. MAZZOLI. Thank you very much.

I have no further questions.

Mr. WIGGINS. I don't mean to use burglaries in a legal sense. Maybe it is lawful to enter under those circumstances.

Mr. MAZZOLI. Yes, I understood your meaning.

Mr. MURPHY. Thank you very much, Chuck. We appreciate your coming by and giving us the benefit of your testimony.

Congressman Drinan, we welcome you to the committee.

**STATEMENT OF HON. ROBERT F. DRINAN, A U.S. REPRESENTATIVE
FROM THE STATE OF MASSACHUSETTS**

Mr. DRINAN. Mr. Chairman and members of the subcommittee, I am pleased to testify on this very important matter in which I have been involved for at least 5 years.

In 1968, when Congress first authorized the use of electronic surveillance, it put aside the issue that is now before this subcommittee.

The Omnibus Crime Control and Safe Streets Act left in place whatever Presidential power existed to engage in surveillance without warrants in national security cases.

Since 1968, many observers have studied the matter of electronic surveillance very carefully. A subcommittee of the Judiciary Committee, where I serve, has conducted numerous hearings over the past several years. This subcommittee undoubtedly will continue to study this matter. Based on my experience on this subcommittee, and also based upon my experience for many years as a teacher of criminal procedure, I would like to share some thoughts with you.

I think we have to go to the premises of the legislation of the three or four bills before you. This subcommittee should not assume the correctness of any of those premises which undergird the various proposals. Each of the premises must be examined thoroughly and without preconceived notions about the need for employing electronic surveillance to gather so-called foreign intelligence information. Before the Judiciary Subcommittee, Mr. Levi of the prior administration provided very little hard evidence of the necessity for these bills. Official representations, both in public and in executive sessions, amounted to little more than generalities couched in terms of protecting the Nation from foreign attack.

Mr. Chairman, if I may stress one point, it is precisely this: That I have asked at least a dozen very important witnesses to give me some examples why this type of intrusion is essential to the national security. They have not been able to provide any evidence, either in executive or in public session.

The national experience and the disclosures of the recent past show all too clearly that Presidents and Attorneys General have used national security as a pretext for snooping into the lawful activities of political opponents or persons perceived to pose a threat to their political security.

I should note that persons who have served in the executive branch in the area of national security have questioned the value of electronic surveillance as a tool for obtaining foreign intelligence information. Morton Halperin, for example, who worked for several years in the White House and in the Defense Department on national security matters, testified before our Judiciary Subcommittee. He took a very dim view of the value of intelligence gathered by electronic surveillance. He said this: "Such surveillance has extremely limited value and can in no sense be called vital to the security of the United States."

Mr. Halperin based that view on his personal experience with such data and on his knowledge that "the American Government has many other sources of information of significantly greater value."

I would like to underscore Mr. Halperin's testimony that the United States has other sources of information which are of much "greater value" than electronic surveillance. These alternative sources of intelligence should be carefully explored by this subcommittee.

My information is that these other sources provide nearly all, if not all, of the useful intelligence information and that electronic surveillance is only of marginal importance.

Let me speak secondly, Mr. Chairman, about the constitutional considerations.

The subcommittee must weigh the value of and the need for intelligence information gathered from electronic surveillance against the intrusions into constitutionally protected rights, such as privacy, association, and speech. I continue to believe that any electronic surveillance, whether approved by a court or not, violates the Constitution, because such interceptions of private conversations can never satisfy the particularity requirement of the fourth amendment. I think we should recall the exact words of the fourth amendment. Before one can obtain a warrant under the fourth amendment, the applicant must submit a sworn statement, "particularly describing the place to be searched and the person and things to be seized."

Invariably an application for a tap or a bug cannot be that specific; it cannot describe with any type of particularity all of the persons to be overheard and the conversations to be recorded.

That is the real evil, Mr. Chairman, of electronic surveillance. It is indiscriminate. It brings within its scope conversations of the innocent as well as those allegedly guilty.

It is this indiscriminate quality of electronic surveillance that is most to be feared. Even physical surveillance, which some find offensive, is a much more targeted intelligence gathering technique than electronic surveillance. At least physical observation is more or less restricted to the person who is the object of the Government's interest.

Electronic surveillance does not have these inherent limitations. Minimization provisions, which attempt to reduce the unnecessary intrusions into privacy, are generally inadequate. I will mention that in just a moment.

Let me go on next to the international implications. This came up with Senator Kennedy, and I am very familiar with the Vienna Convention and the secret document that interprets that.

Obviously the subcommittee should evaluate, in considering legislation in the national security area, its international implications.

In 1972, the Vienna Convention on Diplomatic Relations, ratified by the Senate in 1965, came into force in the United States. The Convention requires that the premises of a diplomatic mission and its personnel, including their private residences, be "inviolable". Articles 22, 24, 27, 29, and 30 of that Convention stipulate that inviolability.

In effect, this treaty prohibits electronic surveillance of foreign emissaries and the premises they occupy. It also authorizes any signatory to apply its provisions "restrictively" if its missions in another nation are being tapped or bugged. Despite the existence of this Convention, the bills pending before this subcommittee do not appear to take account of its provisions nor seek a reconciliation with its terms.

When former Attorney General Levi appeared before my subcommittee, he testified that "the treaty does not cover the subject matter of the bill." He based that opinion on a memorandum prepared by the Office of Legal Counsel in the Justice Department. Mr. Levi and the Department steadfastly refused to make that memorandum public, although they offered it to members of our subcommittee to read *in camera*.

Mr. Chairman, I read that document and I found it unpersuasive.

I do not know whether this subcommittee has yet examined the Vienna Convention and the secret Justice Department memo interpreting it. I would urge you to read that document and to explore very carefully the implications of the convention and the memo in the context of pending legislation.

I asked the present Attorney General to release for publication that particular document. He wrote back, that is, Mr. Griffin Bell, stating once again that it is secret; it is classified. Obviously your subcommittee could and should get that memorandum.

Let me talk about the key question now of the criminal standard.

Let me begin with the question whether a criminal standard of probable cause should govern any authorization for surveillance.

In a letter to me, Chairman Boland asked me to address that issue and he enclosed a copy of a draft amendment purporting to graft a criminal standard onto the administration proposal, H.R. 7308.

Initially, I should state unequivocally that any surveillance bill must have a criminal standard if the restrictions of the Constitution are to be faithfully observed. It may be that there is room under applicable Supreme Court decisions to adjust that standard so as to require something less than probable cause. In some contexts, for example, the Supreme Court has approved a "reasonable suspicion" test to permit a limited intrusion into a person's privacy.

But, in all cases, the standard must relate to evidence of criminal conduct. That is what existing law under title III of the 1968 act requires. Before any tap or bug can be authorized, the judge must find, among other things, "probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense" as enumerated in title III.

With the possible exception of the bill introduced by Congressman Kastenmeier, the pending bills do not incorporate that standard across the board in all circumstances.

As drafted, H.R. 7308 does not uniformly require a criminal standard in order to obtain a surveillance authorization. That is its major deficiency, as other witnesses have testified.

The draft amendment which Chairman Boland sent we would not, in my judgment, abate that criticism. Indeed, in some instances the amendment is less restrictive than the language it would displace. For example, H.R. 7308 presently defines "agent of a foreign power" to include, among others, "any person who knowingly engaged in clandestine intelligence activities for or on behalf of a foreign power, which activities involve or will involve a violation of the criminal statutes of the United States."

The amendment sent to me by the chairman would insert the word "gathering" between "intelligence" and "activities," and would substitute the word "may" for "will." Insertion of the word "gathering" arguably narrows the scope of the section, but replacing "will" with "may" arguably broadens it.

Furthermore, H.R. 7308 does not appear to require any criminal standard for agents of foreign governments who are not U.S. citizens or resident aliens. The draft amendment would not alter that definition at all. Thus, the draft would impose a criminal standard in some

circumstances, but it would not impose one across the board. Consequently, my criticism of earlier bills that they authorized surveillance without probable cause relating to criminal activity is equally applicable to the pending bills, including H.R. 7308.

This bill and the draft amendment are generally drifting in the right direction, but both have a long way to go, it seems to me, before they can pass constitutional muster.

Mr. Chairman, I have other things in my statement that I will just touch upon, and if I may, I would like to have the entire statement placed in the record.

Mr. MURPHY. Without objection, it will be included in the record. [The prepared statement of Congressman Drinan follows:]

PREPARED STATEMENT OF REPRESENTATIVE ROBERT F. DRINAN

Mr. Chairman and members of the Subcommittee, I am pleased to appear before you regarding a matter of the highest importance for the Nation. The question whether and to what extent Congress should approve the use of electronic surveillance to obtain foreign intelligence information is of no little moment and its resolution cannot be lightly undertaken. In 1968, when Congress first authorized the use of electronic surveillance, it put aside the issue now before this Subcommittee. By enacting Section 2511(3) of Title 18, contained in the Omnibus Crime Control and Safe Streets Act, Congress left in place whatever presidential power existed to engage in surveillance without warrants in national security cases. It is now time for Congress to settle, once and for all, the reach of presidential authority.

CRITERIA FOR EVALUATING PENDING BILLS

Since 1968, many observers have studied the matter of electronic surveillance very carefully. The House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice, of which I am a member, has conducted numerous hearings over the past several years. This Subcommittee undoubtedly has examined the hearings which we published on this subject. Based on that experience, as well as my prior employment as a teacher of criminal law, I would like to share my thoughts with you on the matter.

(1) *Need for legislation*

First it is critical that the Subcommittee not assume as correct any of the premises which undergird the various proposals which are pending (H.R. 5632, H.R. 5794, H.R. 7303, and H.R. 9745). Each of the premises must be examined thoroughly and without any preconceived notions about the need for employing electronic surveillance to gather so-called foreign intelligence information. In testimony before the Judiciary Subcommittee, the prior Administration provided very little hard evidence of the necessity for these bills. Official representations, both in public and executive sessions, amounted to little more than generalities couched in terms of protecting the nation from foreign attack. That is not a sufficient basis upon which to authorize the broad powers sought by the Executive Branch. The national experience and disclosures of the recent past show all too clearly that Presidents and Attorneys General have used national security as a pretext for snooping into the lawful activities of political opponents or persons perceived to pose a threat to their political security. In the context of those abuses, we must proceed with extreme caution in this very sensitive area.

I should note that persons who have served in the Executive Branch in the area of national security have questioned the value of electronic surveillance as a tool for obtaining foreign intelligence information. On April 24, 1974, Morton Halperin, who worked for several years in the White House and the Defense Department on national security matters, testified before our Judiciary Subcommittee. He took a very dim view of the value of intelligence gathered by electronic surveillance. "In my judgment," he noted, "such surveillance has extremely limited value and can in no sense be called vital to the security of the United States." Mr. Halperin based that view on his personal experience

with such data and on his knowledge that "the American Government has many other sources of information of significantly greater value." I would like to underscore Mr. Halperin's testimony that the United States has other sources of information which are of much "greater value" than electronic surveillance. These alternative sources of intelligence should be carefully explored by this Subcommittee, if it has not already done so. My information is that these other sources provide nearly all of the useful intelligence information, and that electronic surveillance is only of marginal importance.

(2) *Constitutional considerations*

Second, the Subcommittee must weigh the value of and the need for intelligence information gathered from electronic surveillance against the intrusions into constitutionally protected rights, such as privacy, association, and speech. I continue to believe that any electronic surveillance, whether approved by a court or not, violates the Constitution because such interceptions of private conversations can never satisfy the particularity requirement of the Fourth Amendment. It should be recalled that, to obtain a warrant under the Fourth Amendment, the applicant must submit a sworn statement, "particularly describing the place to be searched, and the person and things to be seized." Invariably an application for a bug or a tap cannot be that specific; it cannot describe with particularity all the persons to be overheard and all the conversations to be recorded.

This is the real evil of electronic surveillance; it is indiscriminate. It brings within its scope conversations of the innocent as well as the allegedly guilty. It is this indiscriminate quality of electronic surveillance that is most to be feared. Even physical surveillance, which some find offensive, is a much more targeted intelligence gathering technique than electronic surveillance. As least physical observation is more or less restricted to the person who is the object of the Government's interest. Electronic surveillance does not have these inherent limitations. Minimization provisions, which attempt to reduce the unnecessary intrusions into privacy, are generally inadequate. Later in my testimony I will address the minimization sections in pending legislation.

(3) *International implications*

A third factor which this Subcommittee should evaluate in considering legislation to authorize electronic surveillance in the national security area is the international implications. In 1972 the Vienna Convention on Diplomatic Relations, ratified by the Senate in 1965, came into force in the United States. The Convention requires that the premises of a diplomatic mission and its personnel, including their private residences, be "inviolable" (see Articles 22, 24, 27, 29, and 30 of the Convention). In effect this treaty prohibits electronic surveillance of foreign emissaries and the premises they occupy. It also authorizes any signatory to apply its provisions "restrictively" if its missions in another nation are being tapped or bugged. Despite the existence of this Convention, the bills pending before this Subcommittee do not appear to take account of its provisions, nor seek a reconciliation with its terms.

When former Attorney General Levi appeared before the House Judiciary Subcommittee on June 2, 1976, he testified that the "treaty does not cover the subject matter of the bill (then H.R. 12750, now H.R. 5794)." He based that opinion on a memorandum prepared by the Office of Legal Counsel in the Justice Department. Mr. Levi and the Department steadfastly refused to make that memorandum public, although they offered to allow members of our Subcommittee to read it *in camera*. I read that document and found it unpersuasive. I do not know whether this Subcommittee has yet examined the Vienna Convention and the secret Justice Department memo interpreting it. If not, I urge you to explore carefully the implications of the Convention and the memorandum in the context of pending legislation.

ANALYSIS OF PENDING BILLS

In my judgment the three factors which I have outlined are critical considerations in evaluating any legislation which would authorize electronic surveillance for gathering foreign intelligence information. I would hope this Subcommittee will agree that those factors are of great importance and must be examined carefully. Apart from this tri-partite analysis, which should precede any reporting of legislation, I also wish to raise some specific objections to features of the bills pending before you.

(1) *Criminal standard*

Let me begin with the question whether a criminal standard of probable cause should govern any authorization for surveillance. In his letter of February 3, Chairman Boland asked me to address that issue, and enclosed a copy of a draft amendment purporting to graft a criminal standard on to H.R. 7308, the Administration's proposal. Initially I should state unequivocally that any surveillance bill must have a criminal standard if the restrictions of the Constitution are to be faithfully observed. It may be that there is room, under applicable Supreme Court decisions, to adjust that standard so as to require something less than probable cause. In some contexts, for example, the Supreme Court has approved a "reasonable suspicion" test to permit a limited intrusion into a person's privacy. But in all cases, the standard must relate to evidence of criminal conduct. That is what existing law under Title III of the 1968 Act requires. Before any tap or bug can be authorized, the judge must find, among other things, "probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense" enumerated in Title III. With the possible exception of H.R. 5632 (introduced by Representative Kastenmeier), the pending bills do not incorporate that standard across the board in all circumstances.

As drafted, H.R. 7308 does not uniformly require a criminal standard in order to obtain a surveillance authorization. That is its major deficiency, as other witnesses have testified. The draft amendment which Chairman Boland sent me would not, in my judgment, abate that criticism. Indeed in some respects the amendment is less restrictive than the language it would displace. For example, H.R. 7308 presently defines "agent of a foreign power" to include, among others, "any person who knowingly engages in clandestine intelligence activities for or on behalf of a foreign power, which activities involve or will involve a violation of the criminal statutes of the United States." Section 2521(b)(2)(B)(i). The amendment sent to me by the Chairman would insert the word "gathering" between "intelligence" and "activities," and would substitute the word "may" for "will." Insertion of the word "gathering" arguably narrows the scope of the section, but replacing "will" with "may" arguably broadens it.

Furthermore H.R. 7308 does not appear to require any criminal standard for agents of foreign governments who are not United States citizens or resident aliens. The draft amendment would not alter that definition at all. Thus the draft would impose a criminal standard in some circumstances, but it would not impose one across the board. Consequently my criticism of earlier bills that they authorized surveillance without probable cause relating to criminal activity is equally applicable to the pending bills, including H.R. 7308. This bill and the draft amendment are generally drifting in the right direction, but both have some distance to go before they pass constitutional muster.

It should be noted in passing that the distinction drawn in the pending bills between citizens and resident aliens on the one hand, and all other persons within the United States on the other has little constitutional support of which I am aware. The protections of the Fourth and Fifth Amendments, for example, extend to all *persons*, not merely citizens and resident aliens. Many people in the United States are neither citizens, nor resident aliens, nor spies. Tourists, lecturers, business people, scholars, and many others regularly visit this country for purposes unrelated to clandestine activity. As I understand the bill, they would not receive the special protection which the proposal appears to give to citizens and resident aliens. As I read H.R. 7308, including the draft amendment, the criminal standard would not apply across the board to all persons who might be subject to surveillance under the bill. In testimony before the Judiciary Subcommittee on May 22, 1975, former Secretary of State Dean Rusk attempted to draw a distinction between diplomatic personnel, who are immune from criminal prosecution, and all other United States residents. Although I reject that distinction also, it does have some greater logic than the distinctions drawn in H.R. 7308 between citizens and resident aliens and all other persons in the United States.

(2) *Definitions*

There are, to be sure, other objections to H.R. 7308 and the other pending bills. The definitions of "foreign intelligence information" and "foreign power" are much too broad. For example, "foreign intelligence information" includes any information "deemed essential . . . to the successful conduct of the foreign

affairs of the United States." Section 2521(b)(3)(B). That definition has virtually no limits. There are many topics of conversation which every Secretary of State would consider essential to the conduct of foreign policy.

The definition of "foreign power" is also overly broad. It includes, among others, foreign governments, factions of foreign governments, foreign political parties, and foreign military forces. This means that a conversation between an American citizen and an officer or employee of a foreign political party is potentially a subject for surveillance. The reach of that section is far too expansive. The definition, in fact, raises the question whether the bill could be used to engage in surveillance involving so-called third country disputes which spill over into the United States. As I read the bill, the Attorney General could obtain a court order to overhear conversations of persons belonging to "a faction of a foreign nation" even though the subject matter only marginally related to the direct interests of the United States. In short, the critical definitions are too broad to be meaningful restrictions on the Attorney General's authority to obtain warrants for electronic surveillance.

Additionally H.R. 7308 does not require the Government, in its application for a court order, to identify the person who is the subject of the application. It requires only a "description of the target of the electronic surveillance." Section 2524(a)(3). Thus the Attorney General may withhold from the judge the name or names of the persons sought to be covered. The bill allows the judge to continue that concealment in the court order, which need include only "a description" of the persons targeted for the surveillance. Section 2525(b)(1)(A).

(3) *Minimization*

Furthermore, H.R. 7308 contains only vague and inadequate provisions relating to "minimization," the overhearing of conversations unrelated to "foreign intelligence information." The proposal merely requires the Government to advise the judge of the steps it will take to minimize such intrusions. Experience under present law demonstrates the inadequacy of such provisions. The statute should identify the particular measures to be taken to minimize unnecessary invasions of privacy. The Attorney General should be required at least to promulgate minimization regulations or guidelines which would be applicable in all cases.

But the most serious deficiency in the minimization area is that H.R. 7308 and the other bills do not limit the use of overheard conversations which are unrelated to the purpose of the surveillance. Section 2526(b) of the bill states:

The minimization procedures required under this chapter shall not preclude the retention and disclosure, for law enforcement purposes, of any information which constitutes evidence of a crime if such disclosure is accompanied by a statement that such evidence, or any information derived therefrom, may only be used in a criminal proceeding with the advance authorization of the Attorney General.

When Government agents obtain evidence of crime through electronic surveillance not intended for that purpose and which may be totally unrelated to the alleged criminal activity, they should not be allowed to use it for prosecutorial purposes. Such "fruit of the forbidden tree" should not be available to prosecute the party for conduct which may not be even remotely connected to the object of the surveillance. This is especially true when it is considered that the criminal standard, where it does appear in these bills, is not uniformly required for obtaining a surveillance warrant in the first instance.

(4) *Procedural safeguards*

In this same vein, H.R. 7308 makes no provision for notifying innocent persons whose conversations have been recorded or overheard merely because, for example, they called the embassy of a foreign country for travel information. Any time these "foreign intelligence" taps result in the interception of conversation unrelated to the subject of the surveillance, the innocent victim should be notified, or the records destroyed, or both. The Administration's proposal does not mandate any destruction of data or recordings which are worthless or unrelated to the purpose of the surveillance.

In this context, the bill should provide for a public advocate to protect the rights of innocent parties. Since H.R. 7308 authorizes *ex parte* applications to a special court and permits *ex parte* extensions of existing bugs or taps, some mechanism is necessary to protect the rights of third parties who are unwit-

tinely caught in the Government's dragnet surveillance. If such an office were established, I would have greater confidence that the privacy of United States residents would be more fully secured.

A provision for a public advocate takes on added importance when the "renewal" features of H.R. 7308 and the other bills are examined. The Government may seek an unlimited number of 90 day extensions for any surveillance authorized under the bill. Thus the intrusion into the privacy of United States residents could go on for years, without anyone knowing about it. In addition the bill also authorizes the Attorney General to approve emergency surveillance when a court order cannot be obtained in the needed period of time. The Attorney General must then submit the normal application to the judge within 24 hours. If the judge denies the application, the bill gives the court the discretion to notify the innocent victims of the initial 24 hour surveillance. But the Government, again at an *ex parte* proceeding, may request that such notice be postponed for 90 days (the original Levi bill had a 30-day provision). Thereafter, once more through an *ex parte* proceeding, the court is prohibited from serving notice if the Government has made a further showing of "good cause." This exception makes a mockery of the limited notice rule in emergency surveillance situations, and further supports the need for a public advocate to be present at all these *ex parte* hearings.

(5) *Participation of third parties*

Finally H.R. 7308 requires employees of communications companies, landlords, custodians, and others to provide whatever assistance is necessary for the Government agents to effectuate the surveillance. Section 2525(b)(2)(B). I vigorously oppose any such provision that requires innocent workers to participate in this "dirty business" of bugging and tapping, as Justice Brandeis once called it. If such persons want to provide assistance to Government agents on a voluntary basis, that is up to them individually. But this bill would *require* their involuntary participation. That is totally offensive, in my judgment, to a democratic society based on respect for individual rights.

CONCLUSION

In summary, Mr. Chairman, the bills pending before your Subcommittee, with the possible exception of H.R. 5632, are not calculated to accommodate the sensitive matters involved in this legislation. They do not, moreover, strike the proper balance toward the important constitutional rights they infringe. While H.R. 7308, taken as a whole (including draft amendment), is a bit better than its predecessor, the bill nonetheless contains enough deficiencies to reject it, which I hope this Subcommittee will do. If, on the other hand, you become convinced that legislation is needed in some form, that the Vienna Convention will not be offended, and that the constitutional rights of the people can be preserved, then I would urge that you consider incorporating the proposal into the existing standards under Title III of the 1968 Act. For very limited purposes, you could consider adjusting the "probable cause" requirement of Title III to reflect a lesser, but still, criminal standard.

In the absence, though, of a criminal test for surveillance authorizations, applied across the board, I would suggest that existing law would better serve the Republic, provided that the so-called "reservation clause" in Section 2511(3) of Title 18 is repealed. Unsupported appeals to "national security" should not determine whether H.R. 7308 or any other bill becomes public law. As the District Judge in the *Pentagon Papers* case cogently observed: "The security of the Nation is not at the ramparts alone. Security also lies in the value of our free institutions." I should add that an integral part of our free institutions is the security of the people from intrusions by Government agents into their privacy, intrusions which these bills would unnecessarily authorize.

Mr. DRINAN. Let me speak about the definitions.

I have very severe objections to the loose definitions of such key terms as "foreign intelligence information" and "clandestine." Also, I have the most severe reservations concerning the minimization that is provided for in the bill.

It contains only vague and inadequate provisions relating to the overhearing of conversations unrelated to foreign intelligence information. The proposals suggest that there is really nothing that can be done for the innocent victim whose conversations are intercepted: Some individual, a U.S. citizen, who calls a foreign embassy, for example, requesting information.

I also have the most severe difficulties with the procedural safeguards such as they are in H.R. 7308. There is really no provision for a final cutoff of the number of extensions. The Government may seek an unlimited number of 90-day extensions for any surveillance authorized under the bill. Thus the intrusion into the privacy of U.S. residents could go on for years without anyone knowing about it.

This is all in *ex parte* proceedings, obviously, when the Government gets a warrant from the judge, and those that are being wire-tapped need not know about this for years and years.

In conclusion, Mr. Chairman, I would say that these bills are not calculated to accommodate the sensitive matters involved in this legislation. I agree with Mr. Wiggins that the courts are an inappropriate vehicle for anything not related to crime.

If there is probable cause of crime on the part of some foreign entity, existing law allows the Government to go into court and get any warrant that is necessary for law enforcement purposes. I don't think that any of these bills should be passed because this would be a sharp deviation from the Constitution. It would be a total departure from everything that we have done. I think that unsupported appeals to the national security should not panic the Congress into enacting a bill which the intelligence community wants because the intelligence community obviously is engaged in widespread wire-tapping by all of the sophisticated devices known to man. I don't think the Congress should place the courts in the business of sanctioning all of this widespread electronic surveillance that goes on for national security. I don't think that the courts should be brought into it. I think it would be a disaster if any of these bills were passed.

Mr. MURPHY. Thank you, Congressman Drinan.

In your statement you say that all persons are protected by the fourth amendment, do you not? The implication, would be that foreign spies, too, are protected by the fourth amendment, and without applications for electronic surveillance. I kind of get the drift from your statement that you are not in favor of any type of electronic surveillance. Perhaps I am wrong.

Mr. DRINAN. That is the purest position that some people can embrace. But under the existing law of 1968, the administrative branch of Government, including the Defense Department and the State Department, has the right to go into a court and give probable cause as to why a spy is engaged, or about to be engaged, in criminal activity and in that case will have no problem whatsoever in obtaining a warrant. The Federal courts virtually never deny a warrant for wiretapping that is presented with some showing of criminality.

Mr. MURPHY. Well, the basis of these bills, Bob, are that there were abuses in the past by the Executive. But I take it from your statement that you want to leave that prerogative with the Executive, with no safeguards.

Mr. DRINAN. Well, assuming that they have the right to do it in the first place, and that they are doing it, and that they want to get themselves—if I may phrase it this way—out of the state of sin. They want the judicial blessing to do what is dubiously valid in the first place.

I think that under the Vienna Convention, they cannot do this. After all, if we had said solemnly in a treaty ratified by the Senate that every place of residence and business of foreign nationals is "inviolable," just what do we mean? The document that I urge you to examine—the memo of law to which I referred—is not persuasive as to why they think this is permissible. They can't say that everybody else does it, that the Embassy in Russia is bugged and wire-tapped. That does not justify an interpretation of our Constitution which is contrary to anything that any interpreter of the Constitution has said for 200 years.

Mr. MURPHY. Are you of the opinion that the President has no inherent power, then, in the field of national security and other areas?

Mr. DRINAN. He certainly has all of the rights that exist under existing law. If they can demonstrate, Mr. Chairman, that they have inadequate powers under existing American law, then I will listen to them. I have listened for 3 or 4 years, now, and I have asked them *in camera* and everywhere just to give me examples of the need for this bill. They say that this information, tapping the Romanian Embassy, for example, is essential, that it is essential that we know what they are thinking. Well, that is contrary to every sense of justice that I have and to the law.

I don't think we have to reach the question whether they have this inherent power. They are doing it, but I am not about to vote for Mr. McClory's bill which authorizes the Secretary of Defense or the Secretary of State to just sign off without a warrant whatsoever and tap somebody for a month, or 90 days, or forever.

Mr. MURPHY. Mr. McClory.

Mr. McCLORY. Father Drinan, you are saying precisely what I said at the White House when this program was announced by President Carter and supported by the Attorney General and by others, except you have said it much more eloquently than I, and that is that we have adequate law at the present time. The existing law is sufficient to protect the Executive power with regard to our national security, and we should certainly not involve the courts in something which is nonjudicial and which is not a case or controversy under Article III of the Constitution. Consequently, we don't need additional legislation.

Now, I would gather from the standpoint of the Vienna Convention, it would be very offensive for us to enact legislation. In fact, the Vienna Convention may be being violated now by the executive and by the other nations, and this is being flouted indiscriminately. But to put something in the statute books to announce positively that we are going to violate the Vienna Convention would be extremely unwise from the legislative standpoint.

Mr. DRINAN. The only people who want this bill are in the intelligence community. They are afraid that there are going to be some more Morton Halperins who will drag them into court. Even if this

bill goes through, it will be tested in the courts and will be deemed to be unconstitutional.

Mr. McCLORY. As a distinguished lawyer and former dean of a great law school, would you respond to this question which I posed to Senator Kennedy?

I suggested that by enacting the administration bill, we would be developing a whole body of secret law—

Mr. DRINAN. Exactly.

Mr. McCLORY [continuing]. Of hidden law, which nobody would ever know about. And, in addition to that, how would a dissenting judge who had violent opposition, for instance, to abuse of fourth amendment rights or other constitutional rights of a U.S. person, act? What would his position be? Is he compelled to forever live with this agony of dissent because he is bound to secrecy, because the record is secret? Or, what would happen if he did express himself and make his position known, as in an exercise of conscience where he felt he was protecting some rights and prerogatives of individuals?

Mr. DRINAN. Judges would do that. In fact, if this bad bill ever did get through, I would hope that no Federal judge would sit on this special court and be subject to this.

This is what is in my statement: This bill does not require the Government to identify the person who is the subject of the application. Thus, the Attorney General may withhold from the judge the names of the persons sought to be covered. The bill allows the judge to continue the concealment in the court order so that the judge really does not know what he is doing.

Mr. McCLORY. There is no probable cause in the traditional constitutional sense of probable cause for issuing a warrant, is there, in this legislation?

Mr. DRINAN. No, and even if you strike the magic words that Senator Kennedy was talking about, I don't know whether that is going to solve the problem. He says that reasonable suspicion—and I don't know whether or not that will wash—but if there is reasonable suspicion now that foreign nationals are about to commit a crime, I am certain that they could get themselves a warrant.

Mr. McCLORY. Are you aware of any precedent for involving the courts in such a nonjudicial function, when there is no case or controversy involved?

Mr. DRINAN. No, except that you could say we have not been doing this wiretapping until the international situation developed.

Mr. McCLORY. I understand that back in 1872, the Congress endeavored to delegate to the Federal courts administrative functions which were nonjudicial, and the Supreme Court held in *Heyburn's* case that that was a violation of Article III of the Constitution and that Congress could not repose that kind of authority in the Federal courts.

You do not disagree with that concept, do you?

Mr. DRINAN. I am familiar with the case, but I am not certain that it proves too much in this connection because the situations are entirely different. The intelligence community continually makes the argument—and they made it before my subcommittee in the

Judiciary Committee—that they just have to have this intelligence. People came from Fort Meade and told us in Executive session all about the sophisticated devices by which they just pick up anything they want to know. They say that other nations are doing it, so we have to have this knowledge. They say that they have the power to do it and that they want somehow the judicial blessing.

But I agree with you totally, that this is inappropriate for the courts to get involved in. But the key question that is up to the executive to decide eventually is do they have this power, and if so, to what extent.

Mr. McCLORY. Well, why do you say that the earlier case, which would have involved a nonjudicial function as being held unconstitutional, would not be a precedent for holding this legislation unconstitutional?

Mr. DRINAN. Well, it is not entirely clear in my mind that this is an entirely nonjudicial function. I would hold that. But I think that reasonable people could argue that the courts somehow should be involved. At least Mr. Levi made that argument, and he is a lawyer of some note.

Mr. McCLORY. Thank you. Thank you, Mr. Chairman.

Mr. MURPHY. Mr. Mazzoli.

Mr. MAZZOLI. Thank you, Mr. Chairman.

Father, it is good to hear from you. You and Congressman Wiggins have been very stimulating as far as challenging not just the words of the bill, but the fundamental reason for it.

Maybe you can help me a little bit on something. I sense a kind of inconsistency in your statement in that I am sure you are not satisfied with the way things are being done today, and yet this bill, which at least seeks to correct some of the abuses and limit some of the wild swinging of the past, is still not adequate. I just wonder, are you satisfied with leaving things as they are today? If you are not, then what would you propose to make today's bill better?

Mr. DRINAN. I would propose that they tell you people and they tell the Judiciary Committee how much they are doing of this, with what reason, and with what result. It is not even necessary. They just got involved in the thing. They are spooks and spies who know they are going to get hit with lawsuits, as they did with some people. I am not satisfied with the present and I think we ought to define the law and tell them to obey the law.

Mr. MAZZOLI. Are you saying that electronic surveillance ought not be permitted? If you could write the law, what would you do?

Mr. DRINAN. I would say that the law is adequate right now and that the State Department, the CIA, and the FBI are held to what the Congress set forth in 1968. If they say, well, we can't bother about getting warrants on probable cause of criminality, if they want to say that, they have to have information that is not otherwise obtainable, so let them prove their case. I have listened to them now for 3 years and they don't have a case. I am totally dissatisfied with the violation of law in which they are engaged. They want to say that we have to have this information; we have all this apparatus at Fort Meade; we are doing it. And, they want us to validate it. I am not about to do that.

Mr. MAZZOLI. I guess perhaps the difference here is that apparently you have satisfied yourself from studying the matter and listening to the testimony that there really is no need to have any kind of surveillance by electronic means for foreign intelligence purposes. There just is no need because we can gather that information by some other kind of mechanism—human intelligence or whatever.

Well, if we accept the fact that there is a fairly substantial body of thoughtful study concluding that there is a need for having electronic observation of foreign nationals and of American citizens who are involved somehow in foreign intelligence gathering, then is it your judgment that the bill that is before us is a step in the proper direction?

Mr. DRINAN. No, it is a step in the wrong direction. If that assumption is made, and the courts initially have nothing to do with it, then the State Department will have to so assert and have the courts eventually validate it. If the President says he has, for national security reasons, as Mr. Wiggins suggested, this inherent pool of power that he can do things that are forbidden by the Constitution, and there is no indication that the courts are going to go along with it—

Mr. MAZZOLI. What is forbidden by the Constitution?

Mr. DRINAN. Wiretapping, without a warrant, for noncriminal purposes.

Mr. MAZZOLI. Well, if we then make this constitutional by putting a warrant procedure in for noncriminal kinds of wiretapping, would we not then conform this situation to the Constitution?

Mr. DRINAN. But we can't make it constitutional. As I said before, even if the bill passes, there is a good chance that it will be declared unconstitutional. But you can't do that, unless you want to repeal the Fourth Amendment.

The Fourth Amendment says that the individual desiring this must particularly describe the place to be searched and the person and the things to be seized. The Attorney General does not even have to mention the name of the person.

Mr. MAZZOLI. That is an interesting point. Would it not be possible if one of these seven judges is unsatisfied with the lack of specifics, and he says that he is not going to sign it, then would not the Attorney General have to go back to the drawing board and obtain the information from the intelligence community or risk not getting the chance to wiretap? It would seem to me, with that kind of background and if we require the specifics to be reported to this committee and its counterpart in the Senate, to assure ourselves that these people aren't just signing off as a routine measure, then we would at least have some protection for the rights of the people who are sought to be surveilled. This would, in a sense, be trying to protect their Fourth Amendment rights.

Mr. DRINAN. That's what the intelligence community wants to say. But we got along without all of this network until 1950 or 1955. Just because the CIA says it is necessary, that does not make it so; let them prove it. They have to show that in the following instances if we did not have electronic surveillance, something bad would have

happened. There is no indication that that is so. If all the electronic surveillance stopped this afternoon, they would still have sources of information, perfectly legal, that would give them all the information they would want.

Mr. MAZZOLI. I thank you, Congressman, very much.

Mr. McCLORY. May I pose one more question, Mr. Chairman?

Mr. MURPHY. Yes.

Mr. McCLORY. The Fourth Amendment to the Constitution, which relates to search and seizure, really has two parts to it. One is the right of the people to be secure in their homes. The second is that there be no warrants, except upon probable cause.

Now, with respect to the first part, there is authority to exercise an executive role, even though there is no need for a warrant. In other words, surprise visits to a factory, for instance, to check on—

Mr. DRINAN. OSHA compliance.

Mr. McCLORY. —whether or not the legislation and the executive rules and regulations are being complied with do not constitute a violation of Fourth Amendment rights. You could account for many other instances, too. I am suggesting that with regard to the executive department wiretaps, there can be wiretaps or interceptions of communications involving foreign espionage which are unrelated to the question of search and seizure and the issuance of a warrant for probable cause with regard to United States persons.

Mr. DRINAN. First, there is a case involving OSHA where what they did was declared unconstitutional. You just can't waltz in under all circumstances. But you are quite right that standards less than a full probable cause of criminality may in some situations suffice, for example, with suspected illegal aliens.

But I am not about to say that the people in the executive department, just because they assert that they have to know more about what foreigners are doing here, can just do that. The courts are not about to say that either.

Well, you know the arguments. For different reasons we come to the same conclusion that the Fourth Amendment would be severely abridged if this were foisted on the courts.

Mr. McCLORY. Thank you, Mr. Chairman.

Mr. MURPHY. Thank you, Congressman Drinan.

Mr. DRINAN. Thank you very much, Mr. Chairman and members of the committee.

Mr. MURPHY. This committee stands adjourned until 2 o'clock this afternoon.

[Whereupon, at 10:58 o'clock, a.m., the subcommittee recessed, to reconvene at 2 o'clock, p.m., the same day.]

AFTERNOON SESSION—(2:10 P.M.)

Mr. MURPHY. The hearings on the electronic surveillance legislation regarding the intelligence community will come to order.

One short announcement before we hear our two distinguished witnesses. Regrettably Mr. Robert Bork, former Solicitor General of the United States, and now professor of law at Yale University, is unable to be with us this afternoon. He is snowbound in Connecticut along with millions of others.

We will include his testimony for the record, when U.S. mail is resumed from New Haven.

Mr. MURPHY. General Walters, former Deputy Director of the CIA, was called out of town unexpectedly.

Mr. McCLORY. Mr. Chairman?

Mr. MURPHY. Yes.

Mr. McCLORY. I hand delivered a letter to you earlier today from the former Attorney General of the United States, Herbert Brownell. Mr. Brownell would have liked to have appeared but unfortunately he is not available at the present time. I would like leave for his letter to be made part of the record.

Mr. MURPHY. Without objection the letter will be included in the record.

[The information referred to follows:]

LORD, DAY & LORD

25 BROADWAY

NEW YORK, N.Y. 10004

TELEPHONE: (212) 344-8480

CABLE: LORDATTY, NEW YORK

TELEX: 12-8210 (WU)

02580 (WU)

HERBERT BROWNELL
COUNSEL

R PALMER BAKER, JR.
HENRY B FOREST BALDWIN
EUGENE F CANNONIAN
JOHN F HARRY, JR.
DAVID N BOITONS, JR.
PETER S BRITELL
F BEDGWICK BROWNE
JOHN W CASTLES Sr
RICHARD B COHEN
GENEVIVE L FRANKMAN
SAMUEL S FRIEDMAN
JOHN D GARRISON
VINCENT R GILMCRE
FLOYD W HARTER
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NEIGH F KEANE
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J EDWARD STEINERBURG
GORDON B SRIVACK
MARK THOMAN
CHARLES S WALKER, II
JOHN K WATSON, JR.

February 1, 1978

The Honorable Morgan F. Murphy
Chairman
Subcommittee on Legislation
United States Capitol
Room H-405
Washington, D. C. 20515

Dear Congressman Murphy:

I understand that your Subcommittee on Legislation of the House Permanent Select Committee on Intelligence will shortly be considering S. 1566 and H.R. 9745 relating to foreign intelligence surveillance. If you deem it appropriate, I request that you include this letter in the record of the hearings.

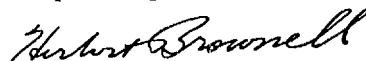
During my years as Attorney General (1953-1957), the problems involved in electronic surveillance to obtain foreign intelligence information were under active consideration. Based on the state of the law as it existed at that time, and the experience of the Federal Bureau of Investigation, I concluded and so advised the Bureau that the Department would continue the practice of allowing such surveillance to be undertaken without the necessity of any prior court order -- a practice which had been in effect since the administration of President Franklin D. Roosevelt and had been continued in effect by succeeding presidents, and set forth under Executive Order. I was convinced then

and still am of the opinion that the requirement for such a court order would be an unnecessary and undesirable interference with the constitutional powers of the President. On this aspect of the legislation which you are considering, I favor the provisions of H.R. 9745 and oppose the requirement for judicial intervention as set forth in S. 1566.

I am aware of the complicated constitutional and policy problems that are involved and, accordingly, believe it is very much in the public interest for your Subcommittee to grapple with the advisability of establishing guidelines by legislation. I am confident that all of the conflicting arguments surrounding this problem have been brought to the attention of the Subcommittee and merely note that I am aware and have reviewed the recent developments in this area which are so carefully outlined and considered in "Law and Contemporary Problems," a quarterly published by the Duke University School of Law, in the article "Presidential Power to Gather Intelligence" by Philip A. Lacovara in Volume 40, No. 3, summer of 1976.

I believe that the United States and its citizens would in the long run be better protected if the electronic surveillance to obtain foreign intelligence information is undertaken by authority of the President without requiring that a court order be obtained to validate the surveillance. I favor the requirement that such surveillance should be subject to the prior written approval of the Attorney General and the Assistant to the President for National Security Affairs, and that such approval should not be delegable. I would not favor a requirement that the President must personally give prior written approval in each instance. I think the President's proper role should be to set the policy by executive order and that the implementation of the policy should be made by the two highest ranking national security officers, mentioned above. I also favor the provision in the proposed legislation that annual reports of foreign intelligence surveillance must be made to the appropriate congressional committees.

Respectfully submitted,


Herbert Brownell

HB:MC

Mr. MURPHY. Our first witness will be Mr. Phillip Lacovara.

Mr. LACOVARA. Thank you, Mr. Chairman. I have a prepared statement which I furnished to the committee, and in the interest of saving time, perhaps it would be best for me just to deliver some excerpts from it.

Mr. McCLORY. If the gentleman would yield, I might say that your essay, your Law Review article, was previously made part of the files of this committee and is now in the possession of the committee.

[The prepared statement of Mr. Lacovara follows:]

PREPARED STATEMENT OF PHILIP A. LACOVARA¹

Mr. Chairman: I am pleased to appear this afternoon to offer my comments on the four bills before the Subcommittee that would impose statutory controls on the gathering of foreign intelligence information by the use of electronic surveillance.

My interest and experience in this field stem principally from my tenure as Deputy Solicitor General with responsibility for the government's criminal and internal security cases before the Supreme Court and as Counsel to Watergate Special Prosecutors Archibald Cox and Leon Jaworski. Several of the investigations conducted by the Special Prosecutor's Office had to grapple with the scope of the President's power to protect the "national security." Even prior to that time I had occasion to try to develop standards and procedures for intelligence collection when I was Special Counsel to the New York City Police Commissioner in the early 1970's.

On several occasions I have had the opportunity to explain in some depth my analysis of the constitutional and public policy issues raised by the use of electronic surveillance to gather foreign intelligence. In January 1976 I delivered a paper at the Duke University symposium on presidential power: "*Presidential Power to Gather Intelligence: The Tension Between Article II and Amendment IV*". The paper has now been published in 40 Law & Contemp. Prob. 106 (1976). In addition, in April 1976 and July 1976 I testified before, respectively, a subcommittee of the House Judiciary Committee and before the Senate Select Committee on Intelligence on legislation similar to some of the bills before the Subcommittee this afternoon.

I would like to submit for the record copies of my article and of my July 1976 Senate testimony. Those documents amplify the points I shall discuss this afternoon. Some of the criticisms and comments I offered in my prior testimony concerning earlier versions of the present legislation have been incorporated in the current bills. For example the new bills contain a provision that an application for a surveillance order, once denied by a judge, cannot be taken to successive judges but can only be appealed. Most of the points made there, however, continue to apply.

I favor the overall approach taken by what are called "the Administration" bills, H.R. 7308 and its Senate companion S. 1566, and support the enactment of a bill substantially similar to them. H.R. 7308 would build upon existing law governing the use of electronic surveillance for enforcement of the criminal law, as contained in Title III of the 1968 Crime Control Act, 18 U.S.C. §§ 2510 *et. seq.* and would adjust the standards and procedures so as to make them appropriate for pursuit of the distinct goal of securing information for foreign policy and national defense purposes.

In my opinion, H.R. 7308 reflects a reasonable and responsible accommodation of the governmental and individual interests at stake, and I regard it as distinctly preferable to the other pending bills. I also believe that it presents no major constitutional problems.

There are, however, several areas in which the Subcommittee should consider possible improvements to H.R. 7308, some of which are suggested by the other bills before the Subcommittee. In the balance of my statement I would like to review the principal features of H.R. 7308 and address some of the areas of possible improvement.

COMMUNICATIONS COVERED BY THE BILLS

The types of "electronic surveillance" that would be regulated under H.R. 7308 are rather cleverly defined in proposed Section 2521(b)(6) to focus on *certain* purely internal United States communications or on interceptions taking place within the United States. Some types of electronic intelligence gathering would not be covered at all, however, and the Subcommittee should understand that the bill is *not* all encompassing. For example, if the interception is not physically made in the United States, broad scale monitoring of international radio and cable traffic would be unregulated so long as no particular citizen or resident alien is being targeted. This allows "vacuum cleaner" methods of intelligence collection to take place without control. In

¹ Partner, Hughes Hubbard & Reed, Washington, D.C.

addition, the interception of purely domestic wire transmissions would not be covered if technology permits the interception to be done outside United States territory—*e.g.*, by surveillance ship off shore or by satellite.

Moreover, radio transmissions, even those wholly within the United States, would not be covered at all if the parties do not have a “reasonable expectation of privacy”—an exception whose scope is uncertain under present constitutional law and might well swallow up the “rule” itself. That is, it is arguable that no one who is broadcasting a message on an easily scannable radio frequency can reasonably assume that no one else is listening.

These definitions have clearly been crafted to leave many types of intelligence collection activities completely *outside* the coverage of the bill. I confess to continuing skepticism about the justification for complete exemption of these activities. If these omissions are to be preserved, the Subcommittee should insist on some convincing explanation from the intelligence agencies for adopting a selective approach to the regulation of ELINT (electronic intelligence) collection.

In addition, the provision that certain communications will be covered only if made under circumstances in which a person has a “reasonable expectation of privacy” still troubles me. Use of this standard in the context of criminal investigations, from which it is borrowed, is meaningful because the courts monitor it in practice through the “exclusionary rule,” which bars the admission into evidence of any information improperly seized by a warrantless search or surveillance. In the context of foreign intelligence gathering, however, a criminal prosecution is not the likely object, and thus judicial review is improbable. Accordingly, the judgment when a person has a “reasonable expectation of privacy” and when he does not is left to the virtually unfettered discretion of government agents. A more precise definition of the class of interceptions to be excluded from coverage, or at least an illustrative enumeration of them in a committee report, would be valuable.

INFORMATION COVERED

The definition of the types of “foreign intelligence information” accessible by the use of electronic surveillance is substantially the same in all of the bills under consideration. The object of the surveillance must be information essential to the national defense or the conduct of foreign affairs, or deemed necessary to the ability of the United States to project against potential or actual attack, terrorism, sabotage, or intelligence activities by a foreign power. Even though this definition is somewhat open-ended, I believe that it is appropriate, in light of the other restrictions imposed by the bills, to leave some discretion within the political and diplomatic judgment of the Executive Branch.

PERSONS COVERED

I also believe that the definitions of “foreign powers” and “agents of foreign powers” adopted by H.R. 7308, specifying the permissible targets of court-approved surveillance, are reasonable. The most controversial issue is the permissibility of conducting foreign intelligence surveillance of American citizens without probable cause to believe they are engaged in *criminal* activities. For reasons explained in my Duke article, I believe the Fourth Amendment permits “reasonable” surveillance in non-criminal contexts and that this authority extends to American citizens. While I am not suggesting that Congress should push intelligence gathering to the constitutional extremes, I view it as important to make the line-drawing judgment as a matter of sensitive, informed choice.

Proposed Section 2521(b)(2)(B) comes quite close to requiring a showing of criminal involvement—the comparable provisions of S. 1566 are even more restricted—and thus in my opinion is well within the zone of constitutional validity. The Senate Judiciary Committee amendment to Section 2521(b)(2)(B)(iv) in S. 1566 requires that an American citizen may be the object of a surveillance only if he conspires with or aids or abets a foreign agent who is engaged in sabotage, terrorism, or clandestine intelligence activities and knows that the person he is conspiring with or assisting is engaged in such activities. To the extent there is a difference between this type of activity and personal criminal involvement, the distinction is a subtle one.

Furthermore, I understand that there is a proposal before the Senate Intelligence Committee, which is now considering S. 1566, to replace the definition of the term "agent of a foreign power," insofar as it would apply to United States persons, with an even narrower definition than the Senate Judiciary Committee adopted. Apparently this Subcommittee is also considering the proposal. The proposal would permit electronic surveillance of U. S. persons only where there is probable cause to believe they are involved in, or about to be involved in, criminal espionage, sabotage, or terrorism. Although I understand the concern that animates this proposal, I question its need and its wisdom.

As I mentioned, both H.R. 7308 and S. 1566 already come quite close to conditioning surveillance of an American citizen on probable cause to believe that he is involved in a criminal enterprise. If this further change is adopted, actually requiring a showing of criminal complicity, much of the rationale for the legislation before the Subcommittee will evaporate. This is already ample authority under Title III of the 1968 Act to use electronic surveillance in those criminal contexts and many others. The whole point of this legislation, as it began at least, was to regularize and regulate the use of these techniques for collection of foreign intelligence information, whether or not criminal activity is under way. The premises underlying that approach were twofold: First, the government has a legitimate need for information relating to our foreign relations and national defense even though the sources of that information may not be personally involved in criminal conduct. This premise is evident from the definition of the types of "foreign intelligence information" that may permissibly be sought. Second, the acquisition of the information should be carefully controlled to insure against abuse.

The substitute definition being considered, however, necessarily denies that first premise, and in my judgment there is neither a constitutional need nor a practical justification for doing so. The existing language, which as I mentioned is already restricted to *virtually* criminal conduct, seems to me to be quite adequate to codify our legitimate concern for the civil liberties of American citizens and resident aliens. Overlaying the presently rather narrow scope of permissible targets of surveillance is a relatively limited definition of the types of "foreign intelligence information" that may be sought. The federal courts can be trusted to enforce these limitations. I am satisfied, therefore, that H.R. 7308, as presently drafted, reflects a much sounder accommodation of the interests involved, and suggest that adoption of the substitute language would transform this lengthy congressional consideration of refined standards and precise procedures into a largely pointless exercise.

EXECUTIVE PROCEDURES

Under H.R. 7308 the Attorney General or any assistant attorney general specially designated in writing by the Attorney General would have the authority to determine whether electronic surveillance should be sought. Mr. Rallsback's bill, H.R. 5794, on the other hand, would only authorize the Attorney General or acting Attorney General to approve requests for a surveillance order. It strikes me that S. 1566, by allowing approval by the Attorney General, acting Attorney General, or the Deputy Attorney General, has adopted a rational accommodation between the need to ensure accountability and high level scrutiny of surveillance requests and the arguable impracticality of placing the whole burden on the Attorney General.

All of the bills are deficient, however, in failing to specify who is authorized to *execute* surveillance warrants. Section 2524 merely provides that a "federal officer" must apply for one. The Subcommittee should consider whether only certain federal officers, such as trained FBI agents, should be permitted to execute the surveillance. Similarly, the Subcommittee may wish to provide for supervision of the surveillance by Justice Department lawyers to ensure that minimization procedures and other requirements are being followed properly. This could be particularly worthwhile in light of the omission of any provision for subsequent judicial supervision or review of such requirements, except in the rare instance where information derived from a surveillance is to be used in court.

It also would seem to me worthwhile to include a provision similar to Section 2526 in Mr. McClory's bill, H.R. 9745, requiring that all records per-

taining to surveillance authorizations be retained for a certain period of years. My experience with the Watergate affairs leads me to believe that a requirement that certain records be made and kept by the Executive Branch concerning each proposed surveillance would be an effective additional guarantee of proper government conduct.

In the same vein, the reporting requirements embodied in the proposed Section 2527 of H.R. 7308 may be inadequate because all that is required is a report to Congress on the total number of applications made and the total number of orders granted, modified or denied. This somewhat skimpy information, without any substantive content, will not allow Congress very effective oversight in this sensitive area. At least the legislation should include a clause such as proposed Section 2524(b) of H.R. 9745, which states that nothing in the Act shall be deemed to limit the information-gathering authority of the House and Senate Intelligence Committees.

JUDICIAL FUNCTION AND PROCEDURE

A key issue before the Subcommittee is whether to require a judicial warrant for surveillance, as in H.R. 7308 and S. 1566, or simply some sort of executive branch order, as in H.R. 9745. For the reasons explained in my Duke article, *see* 40 Law & Contemp. Prob., *supra*, at 113-123, I believe that an executive warrant procedure would meet the minimum constitutional requirements. Thus, I view Mr. McClory's approach as constitutionally permissible. As a policy matter, however, it is my view that a person seeking to initiate an electronic surveillance should have to articulate his reasons to a neutral person, even though the resultant review of the application may be quite narrow. This process makes a judicial warrant preferable. Such a requirement would also inspire greater public confidence that the rights of the people are not being secretly abused.

Even though the judicial function under the bills is quite limited, it has content. While the standard to be applied is not identical to the "probable cause" test in criminal cases, H.R. 7308 and S. 1566 require that, in the case of surveillance of a U.S. citizen or resident alien, the judge must determine whether the certifications in the application by the Executive Branch are "clearly erroneous." And in all cases the judge must determine whether there is probable cause to believe that the target is a foreign power or agent and that the facilities or place at which surveillance will be directed are, or are about to be, used by a foreign power or agent. The judge also must pass upon the sufficiency of the minimization procedures.

The latter provision, I might add, involving judicial assessment of the minimization procedures, is desirable but insufficient. Some method of periodic or final reporting to the judge would be advisable to allow monitoring of compliance with the procedures set out.

There are a number of technical points the Subcommittee may wish to consider concerning the procedures to implement the requirement of judicial warrants. First, I see merit to the proposals in H.R. 5794 to limit the duration of a judge's designation to entertain applications under the Act and to allow the Chief Justice to promulgate procedures for assignment of the judge who will pass upon a particular application. Second, the language of proposed Section 2523(a) of H.R. 7308 implies that the record of a judge's denial of an application for an order shall be transmitted to the special court of review upon motion by the government to transmit it. This language should be clarified to follow the presumed intent of the Subcommittee that the record be transmitted automatically upon the government's filing of a notice that it is appealing to the special court of review. For an appeal mechanism to be meaningful, the appellate court must have the record available to it. A formal motion seems superfluous.

INHERENT PRESIDENTIAL POWER

Another very difficult issue in this area is the extent to which, if at all, the President has inherent power to authorize electronic surveillances in national security cases *without* a warrant, and what restrictions Congress may place on any such power.

H.R. 7308 and S. 1566 deal with the issue in two ways. First, they would repeal the current provision in Title III of the Crime Control Act of 1968,

18 U.S.C. § 2511(3), which states that the Act does not affect any constitutional power of the President to order national security surveillance. Second, the bills would provide that the old and new electronic surveillance provisions in Title III and the proposed legislation are the exclusive means by which the United States government may engage in electronic surveillance—except for those types that are not covered, and thus are presumably left to Executive discretion. See proposed Section 2511(2)(f), as added by Section 4(c)(3) of H.R. 7308.

I support this approach. Existing Section 2511(3) is an ambiguous reservation of uncertain dimension. In order to avoid confusion and potential abuse, it is far more desirable to follow the plan of the various bills and (a) define procedures that *must* be followed in specific circumstances and (b) decide what *other* circumstances, if any, are to be left to Executive discretion. As I mentioned earlier, however, there are separate issues to be considered in deciding where the dividing line should be drawn, or indeed whether *any* prerogatives should be left to *unregulated* Presidential discretion.

Finally, I regard the provisions regulating the President's power to gather foreign intelligence as within the constitutional power of Congress. The framers of the Constitution granted Congress and the President mixed, shared, interdependent powers in the areas of foreign affairs and national defense. See A. Sofaer, *War, Foreign Affairs and Constitutional Power* 1-60 (1976). Without denying the President's responsibilities as Commander-in-Chief, the proposed legislation simply defines the manner in which the President may carry out his powers in these areas. There is no doubt that Congress can exert reasonable regulation over the manner in which the President exercises his national security powers, and that, when it does so, the President may not act outside those provisions. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *New York Times Co. v. United States*, 403 U.S. 713, 740-748 (1974) (Marshall, J., concurring).

CONCLUSION

While there are some points on which improvements can be made and while some further questions must be addressed, I support the basic concept and terms of H.R. 7308.

STATEMENT OF PHILIP A. LACOVARA, ESQ., HUGHES HUBBARD & REED

Mr. LACOVARA. Thank you, Mr. McClory. I was going to call the subcommittee's attention to the Law Review article to which Mr. McClory just referred as setting forth at much greater length—

Mr. MURPHY. It has been called to our attention on many occasions, Mr. Lacovara, and I haven't had a chance to read it yet, but I am going to.

Mr. LACOVARA. I am not sure whether I should be happy or embarrassed.

Mr. MURPHY. Well, you have a following.

Mr. LACOVARA. I will let that be the committee's judgment.

I also supplied to the committee a copy of testimony I gave before the Senate Intelligence Committee a year and a half ago which also discusses some of the larger questions and some of the technical points.

I would like to say in addition, Mr. Chairman, that I am particularly pleased to be back up here on the House side of the Capitol, although I had not expected to be on this side of the witness table when I next came back. With those preliminaries out of the way, I would like to make several points, one of which is that as I see the various bills before the subcommittee, there is not a comprehensive

coverage of all types of electronic surveillance that might be used for gathering foreign intelligence. The definitions of "electronic surveillance" seem to me rather cleverly designed to include certain techniques of intelligence gathering or the use of those techniques under certain circumstances, and to avoid applying the provisions of these bills to other types of electronic surveillance or other circumstances in which electronic surveillance might be used for gathering foreign intelligence.

I can only assume that this reflects a conscious decision by the draftsmen of the bills to leave some types or some circumstances of foreign intelligence gathering through electronic surveillance outside of the ambit of either these bills or of title III of the 1968 Omnibus Crime Control Act, which applies to electronic surveillance for law enforcement purposes.

For example, as I understand the bills, an interception that is not physically made within the United States would not be covered if there is an effort to intercept international radio and cable traffic. The bill places that kind of electronic intelligence gathering outside of its ambit, and therefore the intelligence agencies would be permitted without pursuing the procedures, as I understand them, to conduct what I call vacuum cleaner operations, monitoring all international radio or cable traffic so long as there is no targeting on a specific American individual? The subcommittee is presumably familiar with the techniques that are used, and the methods for retrieval of information that can be collected in that way.

In addition, it appears to me that it may be feasible to collect domestic wire transmissions without complying with the provisions of this bill since the bills only apply to interceptions of domestic wire transmissions when the interceptions are made within the territory of the United States. It is conceivable at least that technology permits interceptions to be made offshore or by satellite, and therefore there would be no coverage of those interceptions by the bills.

Finally, and perhaps of greatest concern, the bills also apply to what is called bugging, the installation of a surveillance device to pick up oral conversations only under circumstances where the target of the surveillance has what is called a "reasonable expectation of privacy." That phrase is in quotes. That phrase is borrowed from the criminal cases which use it as a test for determining whether or not, under the Fourth Amendment, a search warrant is necessary in criminal investigations.

As I outline in my statement, however, the use of a rather open-ended phrase like "reasonable expectation of privacy" in a setting in which there is likely to be no later judicial monitoring, such as, for example, through the evaluation of evidence at a criminal trial, leaves to enforcement or intelligence agents an almost unfettered discretion to make the judgments whether the target of the bugging has a reasonable expectation of privacy.

It is easy to imagine situations in which, as a policy matter, there should be legislative control over the intelligence gathering, even though there might not be a constitutional imperative to have a search warrant. For example, people talking in a restaurant or walking down the street or at a baseball game might not have a

reasonable expectation of privacy in the constitutional sense, but perhaps the subcommittee would want to regulate the ability of the intelligence agencies to install microphones under the table at the restaurant, for example, or to use parabolic microphones to look down the street to intercept the conversations of those persons. As I indicated, I believe it is important for the subcommittee to appreciate that, as I read the bills, not all kinds of electronic intelligence gathering would be covered.

Another principal feature of the bill is the scope of the types of information that can be made the objective of the surveillance. That comes under the heading of the definition of "foreign intelligence information." Basically the bills would authorize efforts to intercept information that may relate to the national defense, or to oppose criminal enterprises involving sabotage or espionage, or to obtain information that is deemed essential to the conduct of our foreign relations.

In the last of those categories, where information may be sought because it relates to the conduct of foreign relations, there can be, I think, the greatest concern about overreaching. In my judgment, however, it is a permissible line for the subcommittee to draw to permit the executive branch to seek, through the use of electronic surveillance, information that senior officials of the executive branch certify will be necessary to the conduct of our foreign relations. I note that the bill does provide that at least where an American citizen or a resident alien is involved, the officer applying for a surveillance warrant must explain to the judge the reasons why the executive has concluded that information of this type can be gained from the United States person.

It seems to me, therefore, that in light of the compelling need for the Government to make its foreign policy judgments with as much information as necessary, the line drawn in these bills, enforced as it is by judicial monitoring, is a legitimate policy line to draw.

Probably the most controversial aspect of the bills is the extent to which, if at all, American citizens should be the permissible targets of electronic surveillance for foreign intelligence purposes, even though they may not be personally involved in criminal activity.

For reasons that I explained at length in my Duke Law Review article, and I discuss more briefly in my prepared statement, it is my judgment that the Fourth Amendment permits the Government, through the use of reasonable techniques, to obtain information from American citizens, necessary to the conduct of national defense or foreign policy, even though the source of that information is not personally involved in criminal activity.

The issue is somewhat minimized, as I see it, Mr. Chairman, because the principal bills before the subcommittee this afternoon come quite close to requiring criminal culpability on the part of a U.S. person before he can be made the permissible target of an electronic surveillance. I also understand that the Senate Intelligence Committee and this subcommittee have before them some language which would in fact require that an American citizen be subject to a finding of probable cause to believe that he is involved in criminal activity before he can be made the target of surveillance.

This is, I think, essentially a matter of policy for the Congress to make. I do not believe, however, that a line of that type is required by the Constitution, either by the First Amendment or the Fourth, and I have some serious reservations about whether it is the proper line to draw. I think there may be a number of situations in which American citizens, perhaps acting in good faith, or at least acting short of the criminal culpability line, may be the permissible subjects of intelligence gathering by the Government.

I can visualize situations in which American citizens might have information highly important to the national defense or to the conduct of foreign relations, even though that information does not relate to any personal criminal misconduct on their part, and I would consider it permissible under the Fourth Amendment to use electronic surveillance as a last resort and under court supervision, as these bills would require, to obtain that information if the political executive makes the determination and certifies it to the court and explains to the court that it is imperative in the national interest to do so.

Mr. MURPHY. May I interrupt you right at that point because you raise an issue with your last statement which is the reason I made reference to your Duke Law Review article. Mr. McClory's bill would not require a judicial review of an American citizen being looked at by the intelligence agencies, and he cites your Law Review article in support of his thesis.

From your experience, what is your view as to whether or not we should have a separate court, an Article III court of maybe seven judges, hear an application signed by the Attorney General, Deputy Attorney General or his designee, and review the executive's wire-tapping or electronic surveillance of an American citizen?

Mr. LACOVARA. There are two levels to my response, Mr. Chairman. One is that I believe that Mr. McClory's approach would probably pass constitutional muster. The cases in the Supreme Court on the subject do not squarely resolve the issue but if one can try to read the entrails of a dove, I think it is fair to predict that the Supreme Court would, if pressed, hold that the President has independent constitutional authority to conduct warrantless electronic surveillances for truly foreign intelligence purposes.

Therefore, Mr. McClory's approach to regularize the procedures within the executive branch would probably be sufficient under the Constitution.

The second level of my response, though, involves a distinct issue: What should be done to regulate the conduct of such intelligence gathering. It is there that I do part company with Mr. McClory, for the reasons that I explain in my article. In my judgment, it is important, not only as a symbolic function, to involve the neutral branch, the judicial branch, in the judgment whether or not there are grounds for conducting foreign intelligence gathering. On the basis of my experience in Watergate and as I mentioned in the outset of my prepared statement, my experience as special counsel to the police commissioner in New York where I had to monitor a very large domestic intelligence section, I consider it very therapeutic to require people who are about to launch an enterprise in a sensitive

area to commit themselves to writing and to justify what they are proposing to do to someone outside the agency. That, I think, is probably the most useful and important function that a court serves. It is not so much that there is some judicial expertise that would be critical here, but that there will be a process by which the executive has to justify to itself and then justify to an outsider what it is that is proposed to be done. As long as it seems reasonable on its face, I have no doubt that the judge will endorse that, but I think this process will help to filter out some abuses.

Mr. MURPHY. There is a further argument made that an application to a Federal judge, an Article III judge, is not really a case or controversy in the sense of the word and that it really should not properly be brought before them.

Mr. LACOVARA. I have heard that argument. I believe Mr. Wiggins asked me that very question 2 years ago in other hearings.

Mr. MURPHY. He made that argument this morning.

Mr. LACOVARA. I made a submission to the Judiciary Subcommittee, Mr. Kastenmeier's subcommittee, on that question in April of 1976, and I prepared a memorandum of law in which I reached the conclusion that this type of application would constitute a case or controversy for Article III purposes. It is, in essence, no different, Mr. Chairman, from an application for a search warrant under Rule 41 of the Federal Rules of Criminal Procedure. *Ex parte* proceedings—

Mr. MURPHY. Injunction, temporary restraining order?

Mr. LACOVARA. —are familiar to our jurisprudence from the earliest days of our republic. United States judges have entertained in *ex parte* proceedings and, as reflected in the bills, there is also some reasonable prospect that the activities of that judge will relate at some later point to a judicial proceeding, for example, the admissibility of evidence that may be derived from the intelligence surveillance or a civil suit that may be brought at least by a U.S. person challenging the validity of that surveillance. So my judgment is that this would be within the constitutional jurisdiction of an article III court.

Mr. MURPHY. I didn't mean to digress but you hit on an issue that was discussed this morning.

Please proceed.

Mr. LACOVARA. Thank you, sir.

I was emphasizing that ominous controversial question whether or not U.S. citizens can be the subject of foreign intelligence surveillance even short of criminal complicity; the bills before the committee come quite close to requiring criminal complicity in any event, and I suggest that it would be unwise and unnecessary to go even further than that and actually to impose a requirement that there be probable cause to believe that the American citizen is involved in criminal activities.

The whole predicate for legislation of this type is to deal with the situation which is not dealt with by Title III of the 1968 Crime Control Act. Title III deals with electronic surveillance in criminal investigations. The types of criminal misconduct that would be involved under the proposed amendments being considered by the

Senate Intelligence Committee and by this subcommittee are crimes that are already covered by existing law, Title III.

The purpose of legislation of this sort is to recognize that there is a legitimate governmental interest in obtaining foreign intelligence information, irrespective of whether an American citizen is involved in a crime, and to impose reasonable, sensitive limits and procedures and standards for the pursuit of that information. Although I will obviously defer to the executive officers who have the constitutional responsibilities in this area, I would be quite surprised, and I might say a bit dismayed, if they reached the conclusion that their responsibilities could be effectively implemented with a limitation on surveillance activities that confined electronic surveillances for foreign intelligence purposes to persons who are actually involved in criminal activities.

The final point that I would like to advert to, Mr. Chairman, involves the role of the courts in this process. I know that Ambassador Silberman sees this judicial role as being an inappropriate one. While I do not necessarily consider the judicial role imperative, I consider it highly desirable, and if Congress is going to go to the extent of establishing procedures for regularizing foreign intelligence gathering, I think there are no sound reasons for excluding the courts from the process. In my judgment, there are many more weighty reasons for including the courts in the process.

Arguments about expertise do not trouble me here in light of the types of functions the courts would have to serve. Arguments about leaks in the judicial branch I think are highly illusory. Arguments about impairment of the President's Article II prerogatives I think miss the point. It has been understood, from the earliest days, that in the exercise of all of his powers under Article II of the Constitution, the President is subject to Congressional regulation. Congress regularly tells the President, as indeed it tells the courts, how they must go about performing their functions.

And I think apart from the cases that are cited in my Law Review article on this point, I would commend to the subcommittee's attention a book that is referred to in my testimony this afternoon which I think about as effectively as possible shows that it was the intention of the Framers of the Constitution and was the understanding of the early Presidents and early Congresses, that the war and foreign affairs powers were not assigned exclusively to the executive branch, but rather were mixed or shared between the executive and the legislative, and this was a conscious choice.

Mr. McCLORY. What about the judiciary?

Mr. LACOVARA. The judiciary has a much smaller role, but the courts while abdicating—well, strike the word “abdicating”—while renouncing a role in making basic political judgments, have seen it within their realm to interpret treaties, for example, and to define principles of international law.

Mr. McCLORY. If the Chairman would just yield for this comment, we have already, you know, we have enacted a War Powers Act, and we have established the Select Committee on Intelligence to review virtually all the activities. We do have the legislature very actively involved now in the war powers, in the foreign affairs, and in intelligence.

Mr. LACOVARA. Mr. McClory, if I may respond to that, I wrote a review of the book to which I was just referring. It is a book by Prof. Abraham Sofar of Columbia Law School, commissioned by the American Bar Association at the height of the Vietnam War to discuss the then quite troublesome question: What were the relative roles of Congress and the President in the warmaking?

I wrote a review of that book in the Summer 1977 issue of Harvard Journal of International Law, and the theme that I discussed was the validity of the War Powers Resolution in light of the history that Professor Sofar put together.

Mr. McCLORY. But can you comment on any role that the judiciary has in the war powers or foreign affairs?

Mr. LACOVARA. The roles that the courts have played to date mainly have been limited to interpreting the law and applying the law as it is made by the Congress in legislation and the President in treaties. The judicial role, however, does go somewhat beyond that and, indeed, reaches into the very subject that we have this afternoon. The Supreme Court and the courts of appeals have felt it quite within their judicial province to decide whether or not foreign intelligence electronic surveillance is or is not constitutional, so that the courts have already established a track record in this field by saying it is within the judicial province, at least, to pass upon these questions.

Mr. McCLORY. Can I just ask one more question which might enable you to comment a little more fully on this, and that is: What if, for instance, we provided that in addition to the War Powers Act, which the President has authority to deploy troops for 60 or 90 days and then he has to get approval of Congress, what if we added to that legislation and said that in addition to that the President must go to the court or a selected court and get the court's approval before he deploys he troops?

Do you think that would be a valid exercise of our authority and would be constitutional?

Mr. LACOVARA. That would be a troublesome case to make. I don't know what kind of judgment you would be asking the court to make. I might interject that I think that is quite distinct from the issues that we have before us today because they are much closer to the kinds of functions that the courts do traditionally perform; namely, deciding whether or not surveillances or searches should be authorized under the fourth amendment or implementing statutes.

If you assume that you could satisfy the Article III requirement of an actual case or controversy and did not get into the purely advisory opinion field, I assume that Congress could establish a set of standards which would limit the circumstances under which the President could deploy military forces, and then leave it to the court as fact-finder to determine whether or not those circumstances had been satisfied. I would certainly think that would be—

Mr. McCLORY. That is my bill.

Mr. LACOVARA. Well, I apologize for not having recognized it, sir. I think that might well be constitutional, and I don't mean to commit myself either on the constitutional merits or on the policy merits here today.

Mr. McCLORY. Excuse me.

Mr. MURPHY. Proceed, Mr. Lacovara.

Mr. LACOVARA. The final point, Mr. Chairman, involves what to do about the reservation of arguable inherent Presidential power which was carefully contained in the original 1968 bill, as subparagraph (3) of section 2511 of title 18. This has been a source of considerable debate and confusion over the past 10 years, on the question whether or not there is an inherent Presidential power to engage in this kind of activity without congressional authorization or in defiance of congressional restriction.

My recommendation is that section 2511(3) ought to be repealed, as the various bills would propose to repeal it. If Congress is going to regularize or regulate foreign intelligence gathering, it should do so comprehensively and not leave in force an ambiguous provision of uncertain dimension which I think is the source of potential abuse and is not, in my judgment, justified by any compelling governmental necessity.

If we ever come to a point where the President conscientiously concludes that the circumstances are so grave that the provisions that Congress has enacted cannot be complied with, the President is going to act in accordance with his conscience anyway, and a mere reservation in the statute is going to make little difference. The President, as we know from Watergate, will have to take the consequences for the correctness or incorrectness of his actions; but I do not see that there is a legitimate justification for suggesting that, apart from the exercise the Congress is going through, the President may have some additional power that falls completely outside of the legislative framework.

With those comments, Mr. Chairman, I generally support what I believe is the principal bill before the Committee today, the bill offered by Mr. Rodino. I say that only because it is quite close to the one that has already been approved on the Senate side, and in my brief experience, that gives legislation a little momentum on this side as well. I recommend enactment of something at least along those lines.

Mr. MURPHY. Thank you, Mr. Lacovara. We appreciate it.

We agreed that we would hear from Mr. Silberman and then hold questions.

Ambassador Silberman.

**STATEMENT OF THE HONORABLE LAURENCE SILBERMAN, DEWEY,
BALLENTINE, BUSHBY, PALMER & WOOD**

Ambassador SILBERMAN. Thank you, Mr. Chairman.

It is interesting, as I listen to Mr. Lacovara, an old friend, how much we agree on the underbrush and how much we disagree on the major issues.

I am going to quickly read most of my testimony, in part because I find that the views that I express are really quite different from virtually all of the testimony before this Committee. I recognize I am swimming upstream, but I am absolutely convinced that the administration bill, if passed, would be an enormous and fundamental mistake which the Congress and the American people would have reason to regret.

As a former Deputy Attorney General and former Ambassador, I have had extensive opportunity to consider the nature of the problems with which this committee is grappling. Indeed, it was Attorney General Saxbe, under whom I served, who initiated a process which has, in truth, led to this committee's proceedings. Although it is not generally known, indeed, it may not be publicly known at all, in the fall of 1974 Attorney General Saxbe refused to approve any further national security electronic surveillance that required the Attorney General's sanction unless and until the President issued an order which delineated the Attorney General's authority and articulated guidelines for the exercise of that authority.

Saxbe was thus the first Attorney General to assert the need for a written conceptual framework governing national security electronic surveillances. As you might imagine, his action precipitated a hasty effort on the part of the administration to draft such an order, an effort in which I was deeply involved. The Executive order that followed was subsequently superseded by a new Executive order—E.O. 11905—publicly issued in 1976, which reflected continuing experience.

However, a good deal of the language in various bills before this committee has as its genesis the initial executive order issued by President Ford, and I recognize many of the problems.

Moreover, as Acting Attorney General in the winter of 1975, I had the unpleasant duty to examine the official and confidential files of the FBI, the existence of which had just been disclosed by the press. These files revealed, to my never to be forgotten shock, abundant examples, stretching back through Roosevelt's administration—that, of course, is Franklin Roosevelt—of misuse of the President's national security authority to engage in electronic surveillances. Most, if not all of this, has become publicly known by virtue of subsequent congressional investigations.

Finally, as Acting Attorney General—albeit for a short time—I did make some of these determinations as to whether or not to authorize electronic surveillance for national security purposes.

After having thought a good deal about the problems this committee is addressing, I firmly believe the egregious abuses of the past will almost certainly not occur whether or not the Congress legislates at all on this subject. I am convinced that the single most important deterrent to executive branch malfeasance is the prospect of subsequent disclosure. The extensive publicity and accompanying criticism, which previous administrations as well as the law enforcement and intelligence bureaucracies have recently discovered, will effectively deter serious future abuses of national security electronic surveillance. That is not to say that I believe legislation to be inappropriate; I simply wish to put the scope of the problem in perspective.

Much of the discussion about this kind of electronic surveillance has assumed that the interests at stake are only the privacy of individuals on the one hand and the protection of national security on the other. The question—the crucial question of the appropriate distribution of power and authority within our Government has not, in my judgment, been given the explicit attention it deserves. I

hasten to say that I find the notion that the President's constitutional authority to conduct foreign affairs and to command the armed forces precludes congressional intervention into the manner by which the executive branch gathers intelligence, by electronic or other means, to be unpersuasive, and in that respect I agree with my colleague here to the left. But to concede the propriety of a congressional role in this matter is by no means—and this is the burden of my testimony—to concede the propriety or constitutionality of the judicial role created by the administration's bill.

Since I believe the judiciary's role in national security electronic surveillance should be circumscribed, I strongly support the general thrust of Congressman McClory's bill, H.R. 9745. Of course, as we can discuss later, that still retains a potential judicial role in various kinds of cases which will review postsurveillance the propriety of the executive branch's determination.

I have no doubt that Congressman McClory's bill would amply protect against future executive branch abuses of power. H.R. 9745 sets forth tough, substantive, and procedural standards, indeed, in some respects I think too restrictive, but most importantly, that bill would fix record responsibility on senior executive branch officials, the President, and his political appointees, who, when they act, would surely be aware of the likelihood of future exposure if they should be tempted, as in the past, to direct surveillance at the wrong people for the wrong reasons.

But would not prior judicial approval insure even greater protection? Mr. Lacovara, in an excellent 1976 article, argued that prior judicial approval will force articulation "of the reasons for a proposed search in language that will be convincing beyond the circle of the President's immediate advisors." Perhaps. And perhaps that is a mixed blessing. Under the administration's bill, the President and his senior advisors are not likely to pay very close attention at all to questions of electronic surveillance for national security purposes. The presurveillance judicial warrant requirement will permit senior executive branch officials to avoid the degree of responsibility which Congressman McClory's bill would place upon them. The greater the authority given to the courts in this area, the less responsibility which will be exercised by the executive branch. I am absolutely convinced it will operate under the principle "when in doubt, try for the warrant." Pass the decision to the judiciary.

As Mr. Lacovara's article implies—and I think he should be commended for this—the real issue presented by the bills before this Committee is: Should executive power be further reduced, and if so, which branch of government should gain at the executive's expense? If one believes, as I do, that the so-called imperial Presidency was actually in decline almost from the time it was discovered, and in some respects the most recent executive abuses were actually precipitated by that decline, and that today the chief threat to American democracy is the imperial judiciary, one views any new delegation to the judiciary with apprehension.

Many of those who have opposed presurveillance warrants have argued that the judiciary is incapable of making the kinds of policy judgments necessary in gathering intelligence or conducting foreign

policy. I do not make that argument. Unfortunately, judges are all too capable of these functions. As Justice Powell said in the *Keith* case, responding to a similar argument concerning internal security:

We cannot accept the government's argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society.

Although I have the greatest respect for Justice Powell, and I reluctantly agree with the holding in *Keith*, because insuring domestic security can come too close to repressing domestic dissent, I nevertheless, find Justice Powell's offhanded observation terribly sad. Courts do, in truth, deal regularly with the most difficult issues in our society, but they should not. They are, it will be recalled, not responsive to the democratic political processes and the most difficult issues are political.

Not surprisingly, Judge Wright in the *Zweibon* case, in a rationale which really serves as the basis for congressional action, seized upon Justice Powell's unfortunate language to make the same argument in the national security field; that judges are perfectly capable of employing that "analytical ability or sensitivity of foreign affairs necessary to evaluate recommendations" for electronic surveillance. Indeed, Judge Wright went further to assert that judges were even better equipped than Attorneys General to make such determinations. The Attorney General, according to Judge Wright, is chosen only for his "ability as a lawyer rather than as a diplomat." I must say I took particular exception to that since I served as both—and Attorneys General have not gained much tenure in recent years—and he's right about that—whereas "a Federal judge has lifetime tenure and could presumably develop an expertise in the field of foreign affairs if consistently resorted to for authorizations for foreign security wiretaps."

Since Judge Wright and many of those who argue as he argues, places no apparent value on political accountability—Attorneys General, after all, are responsible to elected Presidents. I might say that I just read in today's paper that the Carter Justice Department has written a memorandum indicating that his campaign promise to take the Attorney General out of the political process and make him independent of the President is unwise and unconstitutional. I agree with the Justice Department on that issue. He might as easily suggest, and I am referring to Judge Wright, that the judiciary take over all foreign affairs responsibilities to balance their increasing dominance of domestic affairs.

But it is not just greater expertise which Judge Wright offers us in behalf of the Federal judiciary. In contrast to the executive branch, Judge Wright and others contend that judges bring to the task of balancing national security interests against individual privacy claims a "neutral and detached attitude." I might note that my friend Phil Lacovara used the term "neutral" in his testimony. Detached from political accountability, yes; neutrality—hardly. It is particularly ironic that the most activist Federal appeals judge on behalf of the most activist Federal appeals court in the United States would make that claim. Few American legal scholars,

whether or not in sympathy with decisions of the U.S. Court of Appeals for the District of Columbia, would deny that that court has over recent years, ranged as far as any court from what Professor Wechsler of Columbia calls neutral principles. I don't mean to criticize this court; I do mean to make the point that the judiciary is neither theoretically nor actually more neutral than the executive, or for that matter, the Congress, in reaching answers to the difficult questions which national security electronic surveillance presents. It can as easily be argued that the judiciary will outweigh the interests of individual privacy claims because it is, after all, the protection of those claims on which judicial authority is based, as it can be argued that the executive will unduly emphasize national security. And since judges are not politically responsible, there is no self-correcting mechanism to remedy their abuses of power.

The appropriate institution to oversee the President's use of electronic surveillance for national security purposes, in my judgment, is the Congress. The crucial distinction between Congressman McClory's bill and the administration's is that the former—Congressman McClory's—implies, indeed virtually guarantees, continued congressional oversight through the intelligence committees of required procedures and substantive standards; whereas, in my judgment, the administration's bill would delegate all of that authority to the judiciary.

H.R. 7308 is cut from a familiar pattern; Congress once again would act as a conveyor belt, transferring authority from both the executive and itself to the judiciary, under the illusion that it is Congress which would be asserting authority. But once the magic wand of a presurveillance judicial warrant is invoked, Congress will surely abdicate any responsibility for continuing oversight.

Now, although I am generally concerned about the growth of judicial power at the expense of both congressional and Presidential authority, I maintain that the administration's bill, if passed, would be a particularly unfortunate addition to this trend.

First: Because, as Congressman McClory put it in his opening statement, the subject matter is so closely tied to national security policy formulation as to be inappropriately put to the judiciary. The scope of judicial review for targeted U.S. persons under the administration bill clearly propels the judiciary into policy determinations of breathtaking scope.

For instance, in reviewing whether the executive's determination is "clearly erroneous" as to whether information sought is "foreign intelligence information," the courts will be invited, indeed, be obligated, to consider the following:

First: What information is necessary to protect the United States against attack or other grave hostile acts? That is part of the definition of foreign intelligence. And that implies authority to determine which foreign countries are hostile to the United States, and I am certain after careful reading of some of these judicial opinions, there are certain judges who would be delighted to make that determination. But I think it is wrong.

Second: What information, with respect to a foreign power, is deemed essential to the defense of the Nation or the successful

conduct of foreign affairs, which implies authority to determine what is the successful conduct of foreign affairs? Prior judicial determinations on these staggeringly broad questions would presumably be binding on the executive, even where the target is a non-U.S. person. That is to say, if the executive goes before the judiciary with a set of facts and a hypothesis relating to a U.S. person, and this secret judicial procedure results in a decision which articulates a certain rationale on these questions, presumably the executive would be bound when it comes back up there even under a circumstance where it is seeking surveillance of a non-U.S. person.

Truly, under the administration's bill, Judge Wright might get what appears to be his wish: The judiciary would gain the opportunity to decisively influence the foreign policy of the United States.

But even if the "clearly erroneous" standard of review were eliminated, I would oppose prior judicial scrutiny of this kind of electronic surveillance—prior judicial scrutiny I emphasize, gentlemen. In the first place, I doubt whether the judiciary can be held to the limitations of the probable cause standard of the Ford Administration's bill. We have seen too many recent examples of legislation which grants the judiciary authority only to insure executive branch procedural regularity. Invariably, I am sad to say, that under such legislation, the courts reach, as they did in the environmental field, for substantive review authority as well.

Moreover, despite the efforts of draftsmen to cast both the Ford and Carter bills in terms of criminal activity, much of the foreign intelligence information is not sought for criminal law purposes. Even where the activity surveilled might be criminal in nature, the executive often chooses not to prosecute.

This, gentlemen, I think is an important point which has not seen much inquiry in all of the hearings. The notion is that the underlying activity is criminal and therefore we should have a criminal standard, but what is missed, whether or not it is criminal, is that the executive doesn't seek this information in order to show a crime or to prosecute a crime, but for entirely different reasons, and that makes all the difference. And that is also why the traditional prior judicial scrutiny for domestic wiretaps is so clearly inappropriate here. In fact, the criminal law "probable cause standard" has been artificially engrafted onto the executive intelligence gathering for the sole purpose of granting authority to the judiciary.

The administration's bill would limit jurisdiction to seven super judges appointed by the Chief Justice. This interesting device was chosen, I assume, to counter concerns for maintaining security as well as to develop judicial expertise in foreign affairs. But I find it troubling. Is the Chief Justice to appoint only those judges he believes to be sound on national security matters? Should he exclude from this select group judges like Judge Gibbons of the third circuit who has already expressed a view in the *Ivanov* case, that the Vienna Convention may limit certain activities respecting foreign embassies. I cannot, perhaps in this open hearing, go into this at a full extent, but there is a lurking legal question, gentlemen, which the executive branch has determined, and indeed, Congress has determined one way in all of the proposed legislation, but which the

judiciary might well decide entirely differently with respect to the meaning of the Vienna Convention, and a judicial ruling might cut out crucial and important electronic surveillance aspects which are conducted by the executive branch.

The need for this special device, the seven super judges, suggests the impropriety of the entire delegation to the judiciary; when matters cannot be entrusted to any Federal judge, they should be entrusted to no federal judge.

Even more troubling is the secrecy with which judicial deliberations are to be encased. As I have emphasized, judges are not elected. Surely that needs no emphasis in this room. The legitimacy of their actions, therefore, depends even more than the actions by either the executive or legislative branches, on public decisionmaking. To be sure, aspects of the judicial process have traditionally been kept from the public; various hearings *in camera* and even the applications for warrants in domestic criminal proceedings fall within that category.

But—and it is a big but—normally that part of the judicial proceeding hidden from the public is ancillary to a public trial; a criminal search warrant application will be part of an investigative proceeding which, since probable cause is shown, will likely, almost invariably, indeed, gentlemen, lead to a criminal trial; and under Title III of the Omnibus Crime Control Act, targets of the wiretaps are subsequently notified. That is not done here. Of course, it couldn't be done. Here virtually an entire phase of judicial activity will go underground. Those of us not in Government will never know how the judiciary exercises the supervisory authority over national intelligence gathering which the administration bill grants it. This consideration, in my view, also weighs against presurveillance judicial warrants.

Finally, I should like to explicitly question the constitutionality of the administration bill, and here I must unfortunately disagree with my friend. First: It denies any inherent authority on the part of the executive to conduct warrantless electronic surveillance, despite the fact that the Supreme Court has specifically reserved that question and a number of appeals courts have held it exists. The U.S. Court of Appeals for the District of Columbia is an exception. Among those who have found inherent executive authority is the fifth circuit. Judge Bell writing for this court in 1973 said: "Restrictions upon the President's power which are appropriate in cases of domestic security become artificial in the context of the international sphere." Apparently where Judge Bell stands depends on where he sits.

The Ford Administration bill, at least—and you know, gentlemen, I disagree with the Ford Administration bill also—but at least it wisely recognized that if such inherent power existed, inherent meaning beyond congressional control, it would likely be invoked in circumstances not specifically contemplated by proposed legislation. Therefore, the Ford Administration bill contained a reservation for this executive authority which is probably constitutionally compelling. To have said, as did the Senate Judiciary Committee's report, that this administration bill resolves this constitutional ques-

tion by simply denying the existence of any inherent executive authority is folly. If this constitutional authority exists, and I believe it does, Congress cannot legislatively repeal it.

Moreover, and here is the point on which I disagree with Mr. Lacovara, and I gather that ex-Solicitor General Bork, who I talked to yesterday on the phone, also disagrees on this issue. For the information of this panel, I have found out in the last few days, as I have reached my own conclusion but was concerned why no one else seemed to raise this issue, I determined that in fact in the Ford-Levi Justice Department there was serious question as to the constitutionality of their bill, but no memorandum was ever issued, and I don't see any opinion from the Justice Department in this administration which definitively deals with this very troublesome issue that I gather Congressman Wiggins mentioned this morning.

Although I have not had an opportunity to exhaustively research the question, nor for that matter as far as I can determine has the Justice Department in any official manner, I question whether the courts can accept authority to make determinations required by the administration bill. The task of the judiciary under this legislation seems much closer to rendering the traditionally prohibited advisory opinion than to the constitutionally sound adjudication of cases and controversies under Article III. Although it is true that judges have traditionally issued search warrants *ex parte*, they have done so as part of a criminal investigative process which they have traditionally supervised in many ways, and for the most part, leads to a trial, a traditional adversary proceeding. Here, however, as I have already indicated, it is more likely that the warrant will be issued to gain information for entirely different purposes, not traditionally the business of the judiciary.

Of course, the broader the scope of judicial inquiry into executive determinations as to the need for information sought through electronic surveillance, the more dubious the constitutionality. The court is brought further and further away from its traditional responsibilities. For that reason, the "clearly erroneous" standard in the administration bill, that is to say, those issues on which the court can make a judgment as to whether it is clearly erroneous, is surely the most constitutionally vulnerable aspect of that legislation.

Thank you, gentlemen.

Mr. MURPHY. Thank you, Mr. Silberman. That was a very informative and thought-provoking statement.

Let me ask you this. You keep talking about the judiciary and its function and the executive and its prerogatives and what it has inherent under the Constitution.

How about the citizen and the Bill of Rights and the violations that took place? What protection has been shown him and where does the Bill of Rights come into all of this?

Ambassador SILBERMAN. Well, I think you have to balance all three considerations, and I am very troubled about the individuals' claims to privacy. As I have said, my honest view is the disclosure of the past abuses is probably the greatest deterrent to any egregious abuses in the future. Beyond that, I thoroughly support Congress-

man McClory's bill, or his general approach to that bill. As I say, I think there are aspects of his bill which go too far, particularly the acceptance of the "knowingly" standard. And I can discuss that if you wish. But I am absolutely convinced that Congressman McClory's bill will effectively protect the individual American citizen and will properly balance his or her rights to privacy against national security concerns.

But I think someone is going to be troubled about the interrelationship between the branches of our Government and I think the Congress—if you will forgive me—has been all too willing to ignore the fact that the target of its onslaught, the executive branch, has already gotten a great deal weaker, and it is the judiciary which is usurping power in this country.

Mr. MURPHY. It seems to me, from my service on the Pike Committee that there was testimony taken that the reason a lot of these abuses came about and the reason they were put into execution was that those in the intelligence community that wished to object to directions by the executive—the President, the Secretary of State, the Director of the National Security—had no place to go.

Ambassador SILBERMAN. You surely don't suggest that they are going to be walking into court to oppose the executive branch under the administration's bill.

Mr. MURPHY. Well, the fact that the Attorney General, or his designee, or the Secretary of State would have to sign an application for electronic surveillance which would be reviewed, might deter that type of action that brought about all of this.

Ambassador SILBERMAN. Well, my own view is that Congressman McClory's bill does exactly what you said, and beyond that I think this is a crucially important consideration. I firmly believe that it is essential to keep Congress involved in this process. If you will forgive me, I think the administration's bill is a congressional copout. You pass the law once and then you quit and you turn it all over to the judiciary, whereas Congressman McClory would force the Intelligence Committees of the House and the Senate to maintain a continuing responsibility, to play a continuing role in making judgments as to whether the executive branch determinations are correct, and I think that is healthy for our Government and healthy for our system.

I don't mean to suggest to go back to the time of unbridled executive determination. As I make very clear, I don't have any sympathy with the notion that inherent Executive power in this area precludes Congress. I only made the small point—relatively small point—that the Senate bill and the administration bill going out of its way to declare that there is no area of executive authority left is folly because I think there probably is.

Let me give you an example, because it was an example that used to worry me when I was Deputy Attorney General, because as Deputy Attorney General you have civil disturbance responsibility for the Government. Suppose—and we used to do little drills on this problem—suppose the FBI comes to you and you are Deputy Attorney General, and tells you that they believe a terrorist group has an atomic bomb in a particular block in Georgetown and suppose

you even get a blackmail threat from such a group, and the FBI has reason to believe, we have reason to believe they are in this block. We don't know which house. We think they are in telephone communication with their superiors.

Would you tap all the phones in all the houses in that block as Deputy Attorney General or Attorney General?

I don't have the slightest doubt that you would, but you would be acting illegally under the administration's bill. And if you are putting the executive in a corner—and this was discussed to a certain extent in the third circuit *Ivanov* case—if you are putting the executive in a box where he either protects the essential security of the United States and acts illegally or doesn't protect it at all, then I don't think you are legislating wisely.

Mr. MURPHY. We have got a vote, so I am going to hold my question and yield to Mr. McClory.

Mr. McCLORY. Thank you, Mr. Chairman. I want to say the testimony that both you gentlemen have given is excellent. I think it has been illuminating insofar as our present problem is concerned.

I might say, Mr. Lacovara, I also had some extensive experience in Watergate, and one of the principal subjects which was involved there was whether or not we had to go to the judiciary in order to determine whether or not the President of the United States was in contempt of the Congress for failure to respond to a congressional committee's subpoena. The Judiciary Committee, after considering the question of whether or not the courts should be involved in that kind of a proceeding, decided that impeachment was indeed exclusively a congressional function and there was no need to go to the judiciary. It was Article III which I authored which was adopted by the committee as one of the three articles of impeachment. The position which I am continuing to maintain here was born in part out of my experience in the so-called Watergate era—primarily, in my own case, the impeachment proceedings.

I don't think there is any question about it—from your article, from your testimony, and from just the reading of the bills themselves—we would be casting the courts in an entirely new role with respect to the administration's proposal here. The question with regard to probable cause would be extremely different from what it is with respect to applications for warrants at the present time, and we would be developing a whole new legal subject which has not been considered at the present time.

The question which strikes me further is the question of a big body—and I think Mr. Silberman referred to it—of hidden or secret law which nobody would know anything about, which would be held secret. One of the questions I asked earlier this morning, which I think poses a very serious problem for us was this: If the administration bill should be passed, what happens to the dissenting judge who believes sincerely that the electronic surveillance should not be applied, or that if it is denied, that it should be applied?

Is he bound by the secrecy which is imposed by this legislation or is he free to exercise the prerogatives of his judicial office and go public with this secret information?

Do we have any answer to that?

Mr. LACOVARA. There is nothing in the bill that addresses specifically the security restrictions that would be imposed upon the judge. It provides generally for the Chief Justice, in consultation with the Attorney General and Director of Central Intelligence, to promulgate security standards, but does not reach what may be a constitutional question whether or not a judge can be muzzled.

I concede, Mr. McClory, that even a bill which I support has some—

Mr. McCLORY. Problems.

Mr. LACOVARA. Has some problems with it, but the concerns I think you mentioned do not strike me as overwhelming concerns. For example, the secret law point is really no different from allowing intraexecutive decisions to be made on the subject. There would be no more opportunity for the law to evolve if the executive branch is acting wholly within itself than there would be under the system I propose. Indeed, the judges who would be designated by the Chief Justice presumably could have access to the precedents of the other judges in the group.

Mr. McCLORY. We can take steps with regard to the divulging of secrets by representatives of the executive branch, and we can take steps also, disciplinary measures, as far as Members of the Congress; but if, as you indicate, there would be no restraint on the judiciary to divulge information which he receives in secret, our efforts to retain secrecy would be frustrated.

Mr. LACOVARA. I am not sure that the constitutional question, which I acknowledge exists, would be answered against the power to impose secrecy restrictions, even on the judges, but that is a problem. This is not an ideal situation.

But I think that H.R. 7308 is a better approach to the problem than the others, including Ambassador Silberman's suggestion, and I do disagree that the bills that would give a judicial role are so radical a departure from the past judicial function that we should be led to conclude that judges should not or could not be authorized to perform these functions.

Mr. McCLORY. Do we have a precedent for this?

Mr. Chairman, I wonder, I do have a few more questions I would like to pose.

Mr. MURPHY. If the witnesses would wait—

Mr. McCLORY. We will be back in 5 minutes.

[A brief recess was taken.]

Mr. MURPHY. The meeting will come back to order.

Who had the floor?

Mr. McCLORY. I believe I still had some time, Mr. Chairman.

Mr. Lacovara, I don't believe I find the exact clauses there, but even in your testimony you made reference to the fact that the court's role would be symbolic, and I think in your article you imply this is a good forum for establishing accountability, that they would be a reporting agency, and witnesses before our committee have spoken in support of the administration bill on the ground that the public is demanding is—they don't talk about the constitutional basis for it. They don't talk about there being any precedent for it, but this would satisfy the public if we inject the court into this new role.

Would you comment on that?

Mr. LACOVARA. Mr. McClory, I have—

Mr. McCLORY. Would you both comment on that.

Go ahead, you first.

Mr. LACOVARA. I have never been motivated by a desire solely to offer sops to the public. However, public perceptions can sometimes illuminate public policy issues. I do think there is, therefore, a legitimate basis to consider what I believe is a fact; that the public would feel that foreign intelligence collection was being more responsibly administered if the relatively limited role assigned to the courts here were to be included in any final legislation. I do think that is a legitimate factor. I would not urge you solely to respond to some hostile editorials.

I did not suggest in my article that the role of the courts would be purely symbolic. I mentioned that that is one factor in the equation, but I think it is a legitimate one. What we are concerned about here is, among other things, the protection of civil liberties, and from the earliest times, the courts have been viewed as the primary bulwark for the protection of civil liberties.

It ought not to be that way. I think Ambassador Silberman and I agree 100 percent, or "1000 percent," to use a more recent political exchange, that the executive and the Congress ought to be no less sensitive to civil liberties concerns, but for whatever reason, the courts have shown themselves to be most consistently capable and willing to protect civil liberties interests. I therefore think the role of the courts in this system would be a legitimate and a worthwhile one.

Coming to the question that—

Mr. McCLORY. Is there a Bill of Rights—

Mr. LACOVARA. Yes, sir.

Mr. McCLORY. Is there a Bill of Rights issue involved as far as foreign policy in this area?

Mr. LACOVARA. Wholly different questions, Mr. McClory, I think are raised if we are talking solely about conducting foreign intelligence operations directed at foreign powers. I did not get into those subdivisions in my testimony.

I would think that if the executive branch was satisfied that solely foreign powers are going to be subject to electronic surveillance, much of the baggage proposed by H.R. 7308 or any of the other bills, for that matter, might be unnecessary. No one is really concerned about the civil liberties of foreign diplomats or foreign agents, I think. On the other hand, we know that American citizens do communicate with foreign powers as defined in the bill. They also communicate with them for wholly legitimate reasons, and for that reason it may be sensible to have some sort of monitoring system that regulates even foreign intelligence activities directed at foreign powers within the United States.

But I did want to respond, if I may, Mr. McClory, to the question you were raising before the vote: Whether or not the role that would be assigned to the courts would be a wholly novel and unprecedented one because of the involvement of the courts in a delicate foreign relations setting and the use of a probable cause standard

designed originally for criminal cases in a noncriminal setting? I think the answer is that it is not all that unprecedented, and in my Duke article I do address that question and note that the Supreme Court on a number of occasions in recent years has specifically not only permitted, but indeed required, the use of warrants in noncriminal settings.

These are the so-called administrative search cases and the border search cases where the object of the governmental activity is not the enforcement of a criminal law but the implementation of some other policy such as enforcing health standards, making sure that fire regulations are met, preventing the infiltration of illegal aliens. The Supreme Court has said that where fourth amendment rights of privacy and physical security and integrity are implicated in implementing those programs, warrants are necessary, and the probable cause standard can be adjusted so that what has to be shown is not probable cause to believe something about the specific target of an inspection, but rather probable cause about a program or an area. So the courts have been dealing with these types of broadened notions of fourth amendment warrants in the last 10 years.

Mr. McClory. That's because there are two parts to the fourth amendment, aren't there? There is the prohibition against unreasonable searches and seizures, and then there is the further provision, which is something we are talking about in this bill, to get warrants.

Mr. Lacovara. The courts have answered that apparent dichotomy, Mr. McClory, and I have familiarity with it because I unsuccessfully argued the border search case on behalf of the United States, arguing that no warrant should be necessary. What the courts have said is that, although it appears that the fourth amendment has two parts, one prohibiting unreasonable searches and the other requiring that warrants only be issued on the basis of probable cause, the warrant clause should be read into the reasonableness standard, and a warrantless search is presumptively unreasonable unless it is conducted under exigent circumstances. So they have said that our system assumes that unless there is a warrant, the search is *ipso facto* unreasonable.

Ambassador SILBERMAN. May I respond to that, too, Congressman McClory?

First: Let me say that I think that decision which Phil Lacovara, not by his fault, lost in the Supreme Court reveals this judicial reach for power. The notion that no search can be reasonable without a warrant, I believe, has not a great deal of constitutional or historical support but reflects this drive on the part of the judiciary to constantly reach out for more and more jurisdiction. Even though Mr. Lacovara lost that case doesn't mean the argument doesn't still have force in the national security area. I have a feeling if he argued that case in the national security area, he would win. I am sure he would.

But going back to the question of the executive concern for civil liberties—and here I can speak with some authority having tried to make some of the decisions myself—I don't think the executive,

the Attorney General, or Acting Attorney General as I was, when he makes a decision to authorize or to decline electronic surveillance, forgets the individual American. I don't know where this notion comes from.

Now, sure there have been abuses. Sure, there have been difficult cases. But most of the abuses in the past have had a political tinge to them, an effort on the part of the executive branch to misuse the national security surveillance authority.

Mr. McCLORY. They abused existing regulations, existing law.

Ambassador SILBERMAN. Exactly, exactly, and I don't have any doubt that your bill would stop that. In fact, I don't have any doubt that the present system would stop it, but yours would put the Congress in the appropriate role of continuing oversight.

Mr. MURPHY. Mr. Mazzoli.

Mr. MAZZOLI. Thank you, Mr. Chairman.

I would like to welcome our two witnesses. You have been very helpful.

Mr. MAZZOLI. In response to Mr. McClory you concentrated on assuring him the symbolic role of having an independent body, an outsider, looking at these wiretap requests. I think that should be further emphasized. You used the term "therapeutic" and when you were legal advisor to the police commissioner of New York you found it was very therapeutic to have outsiders looking over your shoulder. It requires you to justify things to yourself first, and then to further justify them to the outsider. Could you, for a few moments, expand on that? I think that is very important because as we are talking here there apparently are some constitutional questions about whether or not the courts can be involved, and I think this therapeutic matter is very important.

Mr. LACOVARA. The point that I was trying to make, Mr. Mazzoli, is this. Partly as a result of the experience I had in the New York Police Department, partly as a result of my observations in Watergate, and partly as a result of my experience as a practicing lawyer, it has become evident to me that positions that people instinctively arrive at or even those they arrive at after a moderate amount of cerebration and discussion, do not necessarily withstand analysis when they come to writing them down and justifying them in some sort of systematic way. As a practicing lawyer, for example, trying to prepare a brief, I find that a proposition or an objective may seem wholly reasonable until I sit down and try to explain why that should be reasonable and to demonstrate why one should get from point A to point D by going through points B and C.

The intellectual process here is extremely important in making sure that the executive branch officials who may feel that there is some good reason to install an intelligence device targeted on a particular person or place, have to think that through and meet the standards that are in the bill to explain why they think certain information will be obtained, why is it not possible to obtain it in some other way without using this admittedly intrusive technique, and then after going through that process, to present it to somebody who is neutral, not in the sense that he is a computer or an automation who has no predilections or personal feelings, but some-

one who is neutral in the sense that he has no personal axe to be gored. He is presumably a loyal American citizen who would like to see our national security protected; he is also a judge who has a responsibility to uphold the Constitution. He, therefore, is more likely, I think, to provide a balanced assessment of that analysis than is somebody wholly within the executive branch whose responsibilities are basically those of commander in chief or chief law enforcement officer, although as my friend and I agree, there ought to be at least equal sensitivity toward civil liberties.

Mr. MAZZOLI. Could you suggest ways that we might receive from the court more than simply the raw numbers on how many applications, how many rejects, and how many accepts?

Mr. LACOVARA. One of the points that I made in my prepared statement to which I did not advert in my summary, Mr. Mazzoli, is that I think the provision in H.R. 7308 is deficient in simply suggesting that reports of numbers should be presented to Congress. I think that, as Ambassador Silberman emphasized, continuing congressional oversight may be at least equally important in the overall monitoring of the performance of any new system for national security surveillance. I think the new Permanent Intelligence Committees are the appropriate oversight bodies which should insist on a rather regular report of the circumstances and details, sanitized, perhaps.

Mr. McCLORY. Would the gentleman yield just for this one?

Mr. MAZZOLI. Yes.

Mr. McCLORY. I just want to ask: Wouldn't you feel better, maybe both of you, if we had quarterly reports instead of annual reports with regard to the exercise of electronic surveillance, whether there is a court or no court?

Mr. LACOVARA. Yes.

Ambassador SILBERMAN. I would agree.

Mr. MAZZOLI. Yes.

Mr. LACOVARA. I would also point out that in my view, and as demonstrated by the exchanges we have had this afternoon, no bill that the subcommittee or that the Congress comes up with is necessarily going to be perfect, and I think continuing oversight is important to make sure that there is an ability to fine tune promptly, or if it turns out it is necessary, to scrap it and come up with a wholly new system. So quarterly reporting would fit in well with that objective.

Mr. MAZZOLI. Thank you.

Mr. Ambassador, I was intrigued by one thing you said, and I wonder if perhaps you can explain it to me. At one point in your testimony you said that if we had the supersecret judges the public will never know, in your terms, about why, how, whom.

Let me ask you: What does the public know now and what would it not know under the procedures suggested by our bill, and what would it know by your suggestions?

Ambassador SILBERMAN. A fair question. I would suggest that the public at this point, with respect to the abuses of the last 30 years, knows virtually everything largely because the congressional committees reported it, I think wisely.

My own view—strange that I should be arguing this here to you, gentlemen—is that Congressmen are much more effective, partly because they are elected, at determining the kind of information the public ought to know than is the judiciary.

My God, we all know that the judiciary deliberations are absolutely secret whereas your deliberations are not, at least largely not. Beyond that, you do represent the people. And I think the more the Congress's role here is real, substantive, and that doesn't mean just receiving quarterly reports but a continuing responsibility—the better off we are. If the monkey is on your back rather than on the judiciary, then I am convinced the American people will know that which they need to know.

Mr. MAZZOLI. The one thing which I would like a further response, to so long as we have some time, is the fact that under the procedure, if there is any legislative procedure, any statutory procedure, then there would be a certain mechanism, certain reports would be required, certain steps that must be taken, certain points at which we would have oversight, and with our oversight, then, to inform the public and then they would know.

Under the current situation, we have the executive with an alleged inherent power that some say exist and some say don't. There is a great gulf, now, that we really can't cross because there is the separation of the branches, and I really think that our ability, with deference to you, sir, to gain the information which we can sanitize and convey to the public is less now than it would be under the new bill or any bill.

Ambassador SILBERMAN. Well, I think under Congressman McClory's bill you would have all the authority you need. I would be perfectly in agreement with notions of increasing that relationship and increasing the obligation of the executive branch to report to the intelligence committees under circumstances where secrecy can be maintained, which of course is true with respect to the intelligence committees. I see no reason why it should be kept secret from you.

I have a feeling that under those circumstances, since you do represent the people, you do stand for the people, that people are more directly protected than they are when lifetime tenured judges have that responsibility. I find it very hard to understand why you can't get all the information you need from the executive branch. You have all the power, as we have seen in recent years, that you need to compel that.

Let me go on to a point which I would like to make which is partly in response to Mr. Lacovara's point and partly in response to yours and Congressman McClory's. I think with respect to the role of the judiciary you have got a paradox, a paradox which was really recognized in Mr. Lacovara's initial article. Either you are giving them basically a symbolic role in large part to appease the public—and indeed, the public we are talking about is not the public as a whole but a relatively small number of people who are interested in this subject—either you are going to give them the symbolic role, in which case you are stealing legitimacy from the judiciary without giving them a real role, or else, as is absolutely my judgment, under the administration bill you are giving them substantive determina-

tion of basic policy questions. I made the point in my opening testimony that the clearly erroneous test leads the judiciary right into the most basic kinds of questions, and I would defend that argument against any challenge. I think they are propelled right into it, and although "clearly erroneous" is supposed to be a limited test, I defy virtually anyone to go back and read Supreme Court opinions of the last 15 years and not conclude that in the context of using that limited standard, the courts have made pretty fundamental policy judgments.

Mr. MAZZOLI. Thank you. We could go on all afternoon. I wish we had the time. It has been very fascinating and very interesting.

Mr. MURPHY. I have two questions and they are both for Mr. Silberman.

One is, could the cases and controversy issue be resolved by declaring the seven judges as a special legislative court under Article I of the Constitution?

Ambassador SILBERMAN. That's an interesting question. I suppose that gets you around the question of delegation under Article III. I am not sure, but—of course, I still have all the institutional problems with that which I testified to, but you might get around the case or controversy question, true.

Mr. MURPHY. And you wanted to discuss your concern about the knowing standard in Mr. McClory's bill and the administration bill.

Ambassador SILBERMAN. Well, it's in all the bills.

I tell you why I am so troubled about that. It is based on the notion that surveillance is a punishment, and therefore it should only apply to people who commit crimes. Now, while I would yield to no man in my desire to protect American citizens or American persons against inappropriate surveillance, or intrusion into their private lives, I nonetheless do not believe surveillance is a punishment for a criminal act. And therefore, there are certain hypotheticals, such as the one I gave you about the bomb in Georgetown, where perfectly innocent people may have to be surveilled, and where I think it is justifiable.

Now, there was an example given in the Senate report which really stunned me. The example is that an individual purloins secrets from the Pentagon or from other defense agencies of the United States, in order to sell them to a contractor in the United States who would like to get competitive information as to what another contractor, a subcontractor to the Pentagon, is doing, but it is information of the highest secrecy. It is not espionage, not a criminal act. He is just a scoundrel.

Now, that individual in fact in this hypothetical is giving that information to the KGB, but he doesn't know it. That is to say, the KGB has masqueraded as a competitor of the subcontractor. Now, the Senate report triumphantly points out that in that situation, the knowingly standard would preclude surveillance.

Well, frankly I think it is idiotic. I think that is exactly the kind of case where you would want surveillance for all sorts of reasons, and it is no answer to say that after all, the executive branch can protect itself by telling the individual that he is really turning that information over to the KGB, because in fact you may want to pro-

vide the KGB with disinformation. That is part of the game, part of the business. Or you may regard it as a possible risk to tell that individual that he is turning information over to the KGB because he is liable to behave in such a fashion which endangers his life.

So that is just one example, but I really think we can go on to hundreds of examples, and here I think I agree with Mr. Lacovara, where the knowingly standard is designed as if what was in mind here is a punishment on people rather than keeping in mind the necessities with which the executive branch was going to be faced.

Mr. McCLORY. Would the chairman yield?

Mr. MURPHY. Yes.

Mr. McCLORY. If a person consents to having his phone bugged or if he consents to some interception, there is no need for requiring any permission or any authority, is there?

Ambassador SILBERMAN. But no, Congressman McClory, I am thinking of a situation where you can't talk to the individual. You don't want to talk to the individual.

Mr. McCLORY. Well, I am talking about a further case.

Ambassador SILBERMAN. Of course you can.

Mr. McCLORY. I am talking about a case where, for example, I met some Soviet spy and I would like you to listen in on my phone because he is going to call me and he is trying to employ me or induce me to cooperate with him and I would just like you to listen in. There is no need for any kind of a warrant or anything for a person who consents to a wiretap, is there?

Ambassador SILBERMAN. No problem.

Mr. McCLORY. Now, what about this, and this is the question I would like to ask. A person secures employment at the White House or secures employment at the CIA, or wherever, and in connection with his employment, he agrees that his phone may be tapped regularly, all the time, or whenever the agency wants to do it.

Would that be permitted, do you think, so that we would avoid all of this business of having to get a court order or go through the mechanics of the McClory bill in order to have a wiretap on that person's phone?

Ambassador SILBERMAN. I don't know the answer under your bill and I suspect that would be litigated.

Mr. McCLORY. Do you have an opinion on that, Mr. Lacovara?

Mr. LACOVARA. Assuming the waiver is valid, I think it would probably remove that situation from under this bill, or Title III, even for criminal enforcement purposes. I suppose it would be a legitimate condition of employment and thus would be a valid waiver.

Ambassador SILBERMAN. I have a doubt on what your seven judges would say on that, depending on which seven judges you pick.

Mr. MURPHY. Gentlemen, we appreciate your testimony today. You really provided us with very enlightened testimony.

[Whereupon, at 3:54 o'clock p.m., the subcommittee recessed subject to the call of the Chair.]

APPENDIX A

95TH CONGRESS
1ST SESSION

H. R. 7308

IN THE HOUSE OF REPRESENTATIVES

MAY 18, 1977

Mr. RODINO introduced the following bill; which was referred to the Committee on the Judiciary

NOVEMBER 4, 1977

Rereferred jointly to the Committee on the Judiciary and the Select Committee on Intelligence

A BILL

To amend title 18, United States Code, to authorize applications for a court order approving the use of electronic surveillance to obtain foreign intelligence information.

- 1 *Be it enacted by the Senate and House of Representa-*
- 2 *tives of the United States of America in Congress assembled,*
- 3 That this Act may be cited as the "Foreign Intelligence Sur-
- 4 veillance Act of 1977".

- 5 SEC. 2. Title 18, United States Code, is amended by
- 6 adding a new chapter after chapter 119 as follows:

I-O

1 **“Chapter 120.—ELECTRONIC SURVEILLANCE WITH-**
2 **IN THE UNITED STATES FOR FOREIGN INTEL-**
3 **LIGENCE PURPOSES**

“Sec.

“2521. Definitions.

“2522. Authorization for electronic surveillance for foreign intelligence purposes.

“2523. Designation of judges authorized to grant orders for electronic surveillance.

“2524. Application for an order.

“2525. Issuance of an order.

“2526. Use of information.

“2527. Report of electronic surveillance.

4 **“§ 2521. Definitions**

5 **“(a) Except as otherwise provided in this section the**
6 **definitions of section 2510 of this title shall apply to this**
7 **chapter.**

8 **“(b) As used in this chapter—**

9 **“(1) ‘Foreign power’ means—**

10 **“(A) a foreign government or any component**
11 **thereof, whether or not recognized by the United**
12 **States;**

13 **“(B) a faction of a foreign nation or nations,**
14 **not substantially composed of United States persons;**

15 **“(C) an entity, which is openly acknowledged**
16 **by a foreign government or governments to be**
17 **directed and controlled by such foreign government**
18 **or governments;**

19 **“(D) a foreign-based terrorist group;**

20 **“(E) a foreign-based political organization,**

1 not substantially composed of United States persons ;

2 or

3 “(F) an entity which is directed and con-
4 trolled by a foreign government or governments.

5 “(2) ‘Agent of a foreign power’ means—

6 “(A) any person, other than a United States
7 citizen or an alien lawfully admitted for permanent
8 residence (as defined in section 101 (a) (20) of the
9 Immigration and Nationality Act), who—

10 “(i) is an officer or employee of a foreign
11 power;

12 “(ii) knowingly engages in clandestine
13 intelligence activities for or on behalf of a for-
14 eign power under circumstances which indi-
15 cate that such activities would be harmful to
16 the security of the United States; or

17 “(iii) conspires with or knowingly aids or
18 abets a person described in paragraph (ii)
19 above;

20 “(B) any person who—

21 “(i) knowingly engages in clandestine in-
22 telligence activities for or on behalf of a foreign
23 power, which activities involve or will involve
24 a violation of the criminal statutes of the United
25 States;

1 “(ii) knowingly engages in activities that
2 involve or will involve sabotage or terrorism
3 for or on behalf of a foreign power;

4 “(iii) pursuant to the direction of an in-
5 telligence service or intelligence network of a
6 foreign power, knowingly collects or transmits
7 information or material to an intelligence serv-
8 ice or intelligence network of a foreign power
9 in a manner intended to conceal the nature of
10 such information or material or the fact of such
11 transmission or collection, under circumstances
12 which indicate the transmission of such infor-
13 mation or material would be harmful to the
14 security of the United States, or that lack of
15 knowledge by the United States of such collec-
16 tion or transmission would be harmful to the
17 security of the United States; or

18 “(iv) conspires with or knowingly aids or
19 abets any person engaged in activities described
20 in subsections B (i) through (iii) above.

21 “(3) ‘Terrorism’ means activities which—

22 “(A) are violent acts or acts dangerous to
23 human life which would be criminal under the laws
24 of the United States or of any State if committed
25 within its jurisdiction; and

5

1 “(B) appear to be intended—
2 “(i) to intimidate or coerce the civilian
3 population,
4 “(ii) to influence the policy of a govern-
5 ment by intimidation or coercion, or
6 “(iii) to affect the conduct of a govern-
7 ment by assassination or kidnapping.
8 “(4) ‘Sabotage’ means activities which would be
9 prohibited by title 18, United States Code, chapter 105,
10 if committed against the United States.
11 “(5) ‘Foreign intelligence information’ means—
12 “(A) information which relates to, and is
13 deemed necessary to the ability of the United States
14 to protect itself against, actual or potential attack or
15 other grave hostile acts of a foreign power or an
16 agent of a foreign power;
17 “(B) information with respect to a foreign
18 power or foreign territory, which relates to, and
19 because of its importance is deemed essential to—
20 “(i) the national defense or the security
21 of the Nation; or
22 “(ii) the successful conduct of the foreign
23 affairs of the United States;
24 “(C) information which relates to, and is
25 deemed necessary to the ability of the United States

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1 to protect against terrorism by a foreign power or
2 an agent of a foreign power;

3 “(D) information which relates to, and is
4 deemed necessary to the ability of the United States
5 to protect against sabotage by a foreign power or
6 an agent of a foreign power;

7 “(E) information which relates to, and is
8 deemed necessary to the ability of the United States
9 to protect against the clandestine intelligence activ-
10 ities of an intelligence service or network of a foreign
11 power or an agent of a foreign power.

12 “(6) ‘Electronic surveillance’ means—

13 “(A) the acquisition by an electronic, mechan-
14 ical, or other surveillance device of the contents of
15 any wire or radio communication sent by or in-
16 tended to be received by a particular, known United
17 States person who is in the United States, where
18 the contents are acquired by intentionally target-
19 ing that United States person, under circumstances
20 in which a person has a reasonable expectation of
21 privacy and a warrant would be required for law
22 enforcement purposes;

23 “(B) the acquisition by an electronic, mechan-
24 ical, or other surveillance device, of the contents of
25 any wire communication to or from a person in the

1 United States, without the consent of any party
2 thereto, where such acquisition occurs in the United
3 States while the communication is being transmitted
4 by wire;

5 “(C) the intentional acquisition, by an elec-
6 tronic, mechanical, or other surveillance device, of
7 the contents of any radio communication, under
8 circumstances in which a person has a reasonable
9 expectation of privacy and a warrant would be
10 required for law enforcement purposes, and where
11 both the sender and all intended recipients are
12 located within the United States; or

13 “(D) the installation or use of an electronic,
14 mechanical, or other surveillance device in the
15 United States for monitoring to acquire informa-
16 tion, other than from a wire or radio communication,
17 under circumstances in which a person has a reason-
18 able expectation of privacy and a warrant would be
19 required for law enforcement purposes.

20 “(7) ‘Attorney General’ means the Attorney Gen-
21 eral of the United States (or Acting Attorney General
22 or an Assistant Attorney General specially designated
23 in writing by the Attorney General.

24 “(8) ‘Minimization procedures’ means procedures
25 which are reasonably designed to minimize the acquisi-

1 tion, retention, and dissemination of any information
2 concerning United States persons without their consent
3 that does not relate to the ability of the United States—

4 “(A) to protect itself against actual or poten-
5 tial attack or other grave hostile acts of a foreign
6 power or an agent of a foreign power;

7 “(B) to provide for the national defense or
8 security of the Nation;

9 “(C) to provide for the conduct of the foreign
10 affairs of the United States;

11 “(D) to protect against terrorism by a foreign
12 power or an agent of a foreign power;

13 “(E) to protect against sabotage by a foreign
14 power or an agent of a foreign power; or

15 “(F) to protect against the clandestine intelli-
16 gence activities of an intelligence service or net-
17 work of a foreign power or an agent of a foreign
18 power;

19 and which are reasonably designed to insure that in-
20 formation which relates solely to the conduct of foreign
21 affairs shall not be maintained in such a manner as to
22 permit the retrieval of such information by reference to a
23 United States person, without his consent, who was a
24 party to a communication acquired pursuant to this

9

1 chapter; and if the target of the electronic surveillance
2 is a foreign power which qualifies as such solely on the
3 basis that it is an entity controlled and directed by a
4 foreign government or governments, and unless there is
5 probable cause to believe that a substantial number of
6 the officers or executives of such entity are officers or
7 employees of a foreign government, or agents of a
8 foreign power as defined in section 2521 (b) (2) (B),
9 procedures which are reasonably designed to prevent the
10 acquisition, retention, and dissemination of communica-
11 tions of unconsenting United States persons who are not
12 officers or executives of such entity responsible for those
13 areas of its activities which involve foreign intelligence
14 information.

15 “(9) ‘United States person’ means a citizen of the
16 United States, an alien lawfully admitted for permanent
17 residence (as defined in section 101 (a) (20) of the
18 Immigration and Nationality Act), an unincorporated
19 association a substantial number of members of which
20 are citizens of the United States or aliens lawfully ad-
21 mitted for permanent residence or a corporation which
22 is incorporated in the United States, but not including
23 corporations which are foreign powers.

24 “(10) ‘United States’ when used in a geographic

1 sense means all areas under the territorial sovereignty of
2 the United States, the Trust Territory of the Pacific
3 Islands, and the Canal Zone.

4 **“§ 2522. Authorization for electronic surveillance for for-**
5 **eign intelligence purposes**

6 “Applications for a court order under this chapter are
7 authorizing electronic surveillance under this chapter, such
8 powered the Attorney General to approve applications to
9 Federal judges having jurisdiction under section 2523 of this
10 chapter, and a judge to whom an application is made may
11 grant an order, in conformity with section 2525 of this
12 chapter, approving electronic surveillance of a foreign power
13 or an agent of a foreign power for the purpose of obtaining
14 foreign intelligence information.

15 **“§ 2523. Designation of judges authorized to grant orders**
16 **for electronic surveillance**

17 “(a) The Chief Justice of the United States shall public-
18 ly designate seven district court judges, each of whom shall
19 have jurisdiction to hear applications for and grant orders
20 approving electronic surveillance anywhere within the
21 United States under the procedures set forth in this chapter,
22 except that no judge designated under this subsection shall
23 have jurisdiction of the same application for electronic sur-
24 veillance under this chapter which has been denied pre-

1 viously by another judge designated under this subsection.
2 If any judge so designated denies an application for an order
3 authorizing electronic surveillance under this chapter, such
4 judge shall provide immediately for the record a written
5 statement of each reason for his decision and, on motion of
6 the United States, the record shall be transmitted, under
7 seal, to the special court of review established in subsection
8 (b).

9 “(b) The Chief Justice shall publicly designate three
10 judges, one of whom shall be publicly designated as the
11 presiding judge, from the United States district courts or
12 courts of appeals who together shall comprise a special
13 court of review which shall have jurisdiction to review the
14 denial of any application made under this chapter. If such
15 special court determines that the application was properly
16 denied, the special court shall immediately provide for the
17 record a written statement of each reason for its decision
18 and, on petition of the United States for a writ of certiorari,
19 the record shall be transmitted under seal to the Supreme
20 Court, which shall have jurisdiction to review such decision.

21 “(c) Proceedings under this chapter shall be con-
22 ducted as expeditiously as possible. The record of proceed-
23 ings under this chapter, including applications made and
24 orders granted, shall be sealed and maintained under secu-

1 rity measures established by the Chief Justice in consulta-
2 tion with the Attorney General and the Director of Central
3 Intelligence.

4 **“§ 2524. Application for an order**

5 “(a) Each application for an order approving elec-
6 tronic surveillance under this chapter shall be made by a
7 Federal officer in writing upon oath or affirmation to a judge
8 having jurisdiction under section 2523 of this chapter. Each
9 application shall require the approval of the Attorney Gen-
10 eral based upon his finding that it satisfies the criteria and
11 requirements of such application as set forth in this chapter.

12 It shall include the following information:

13 “(1) the identity of the Federal officer making
14 the application;

15 “(2) the authority conferred on the Attorney
16 General by the President of the United States and the
17 approval of the Attorney General to make the
18 application;

19 “(3) the identity or a description of the target of
20 the electronic surveillance;

21 “(4) a statement of the facts and circumstances
22 relied upon by the applicant to justify his belief that—

23 “(A) the target of the electronic surveillance
24 is a foreign power or an agent of a foreign power;

25 and

13

1 “(B) the facilities or the place at which the
2 electronic surveillance is directed are being used, or are
3 about to be used, by a foreign power or an agent of a
4 foreign power.

5 “(5) a statement of the proposed minimization pro-
6 cedures;

7 “(6) when the target of the surveillance is not a
8 foreign power as defined in section 2521 (b) (1)
9 (A), (B), or (C), a detailed description of the nature
10 of the information sought;

11 “(7) a certification or certifications by the Assist-
12 ant to the President for National Security Affairs or an
13 executive branch official or officials designated by the
14 President from among those executive officers employed
15 in the area of national security or defense and appointed
16 by the President with the advice and consent of the
17 Senate—

18 “(A) that the information sought is foreign
19 intelligence information;

20 “(B) that the purpose of the surveillance is to
21 obtain foreign intelligence information;

22 “(C) that such information cannot reasonably
23 be obtained by normal investigative techniques;

24 “(D) including a designation of the type of
25 foreign intelligence information being sought ac-

14

1 cording to the categories described in section 2521
2 (b) (5) ;

3 “(E) when the target of the surveillance is
4 not a foreign power, as defined in section 2521 (b)
5 (1) (A), (B), or (C), including a statement of
6 the basis for the certification that—

7 “(i) the information sought is the type of
8 foreign intelligence information designated; and

9 “(ii) such information cannot reasonably
10 be obtained by normal investigative techniques;

11 “(F) when the target of the surveillance is a
12 foreign power, as defined in section 2521 (b) (1)
13 (A), (B), or (C), stating the period of time for
14 which the surveillance is required to be maintained;

15 “(8) when the target of the surveillance is not a
16 foreign power, as defined in section 2521 (b) (1) (A),
17 (B), or (C), a statement of the means by which the
18 surveillance will be effected, and when the target is
19 a foreign power, as defined in section 2521 (b) (1)
20 (A), (B), or (C), a designation of the type of elec-
21 tronic surveillance to be used according to the categories
22 described in section 2521 (b) (6) ;

23 “(9) a statement of the facts concerning all pre-
24 vious applications that have been made to any judge
25 under this chapter involving any of the persons, facilities,

15

1 or places specified in the application, and the action
2 taken on each previous application; and

3 “(10) when the target of the surveillance is not
4 a foreign power, as defined in section 2521 (b) (1)
5 (A), (B), or (C), a statement of the period of time
6 for which the electronic surveillance is required to be
7 maintained.

8 If the nature of the intelligence gathering is such that the
9 approval of the use of electronic surveillance under this
10 chapter should not automatically terminate when the de-
11 scribed type of information has first been obtained, a descrip-
12 tion of facts supporting the belief that additional information
13 of the same type will be obtained thereafter.

14 “(b) The Attorney General may require any other
15 affidavit or certification from any other officer in connection
16 with the application.

17 “(c) The judge may require the applicant to furnish
18 such other information as may be necessary to make the
19 determinations required by section 2525 of this chapter.

20 **“§ 2525. Issuance of an order**

21 “(a) Upon an application made pursuant to section
22 2524 of this title, the judge shall enter an ex parte order as
23 requested or as modified approving the electronic surveil-
24 lance if he finds that—

25 “(1) the President has authorized the Attorney

16

1 General to approve applications for electronic surveil-
2 lance for foreign intelligence information;

3 “(2) the application has been made by a Federal
4 officer and approved by the Attorney General;

5 “(3) on the basis of the facts submitted by the
6 applicant there is probable cause to believe that—

7 “(A) the target of the electronic surveillance is
8 a foreign power or an agent of a foreign power; and

9 “(B) the facilities or place at which the elec-
10 tronic surveillance is directed are being used, or
11 are about to be used, by a foreign power or an agent
12 of a foreign power;

13 “(4) the proposed minimization procedures meet
14 the definition of minimization procedures under section
15 2521 (b) (8) of this title;

16 “(5) the application which has been filed contains
17 the description and certification or certifications, speci-
18 fied in section 2524 (a) (7) and, if the target is a United
19 States person, the certification or certifications are not
20 clearly erroneous on the basis of the statement made
21 under section 2524 (a) (7) (E).

22 “(b) An order approving an electronic surveillance
23 under this section shall—

24 “(1) specify—

17

1 “(A) the identity or a description of the target
2 of the electronic surveillance;

3 “(B) the nature and location of the facilities or
4 the place at which the electronic surveillance will be
5 directed;

6 “(C) the type of information sought to be
7 acquired;

8 “(D) when the target of the surveillance is not
9 a foreign power, as defined in section 2521 (b) (1)
10 (A), (B), or (C), the means by which the elec-
11 tronic surveillance will be effected, and when the
12 target is a foreign power, as defined in section 2521
13 (b) (1) (A), (B), or (C), a designation of the
14 type of electronic surveillance to be used according
15 to the categories described in section 2521 (b) (6);
16 and

17 “(E) the period of time during which the elec-
18 tronic surveillance is approved; and

19 “(2) direct—

20 “(A) that the minimization procedures be
21 followed;

22 “(B) that, upon the request of the applicant, a
23 specified communication or other common carrier,
24 landlord, custodian, contractor, or other specified

1 person furnish the applicant forthwith any and all
2 information, facilities, or technical assistance, neces-
3 sary to accomplish the electronic surveillance in
4 such manner as will protect its secrecy and produce
5 a minimum of interference with the services that
6 such carrier, landlord, custodian, contractor, or
7 other person is providing that target of electronic
8 surveillance;

9 “(C) that such carrier, landlord, custodian, or
10 other person maintain under security procedures
11 approved by the Attorney General and the Director
12 of Central Intelligence any records concerning the
13 surveillance or the aid furnished which such person
14 wishes to retain;

15 “(D) that the applicant compensate, at the
16 prevailing rate, such carrier, landlord, custodian, or
17 other person for furnishing such aid.

18 “(c) An order issued under this section may approve
19 an electronic surveillance not targeted against a foreign
20 power, as defined in section 2521 (b) (1) (A), (B), or
21 (C), for the period necessary to achieve its purpose, or for
22 ninety days, whichever is less; an order under this section
23 shall approve an electronic surveillance targeted against a
24 foreign power, as defined in section 2521 (b) (1) (A), (B),
25 or (C) for the period specified in the certification required

1 in section 2524 (a) (7) (F), or for one year, whichever is
2 less. Extensions of an order issued under this chapter may
3 be granted on the same basis as an original order upon an
4 application for an extension made in the same manner as
5 required for an original application and after new findings
6 required by subsection (a) of this section. In connection
7 with applications for extensions where the target is not a
8 foreign power, as defined in section 2521 (b) (1) (A),
9 (B), or (C), the judge may require the applicant to submit
10 information, obtained pursuant to the original order or to
11 any previous extensions, as may be necessary to make new
12 findings of probable cause.

13 “(d) Notwithstanding any other provision of this chap-
14 ter when the Attorney General reasonably determines that—

15 “(1) an emergency situation exists with respect to
16 the employment of electronic surveillance to obtain for-
17 eign intelligence information before an order authorizing
18 such surveillance can with due diligence be obtained, and

19 “(2) the factual basis for issuance of an order
20 under this chapter to approve such surveillance exists,
21 he may authorize the emergency employment of electronic
22 surveillance if a judge designated pursuant to section 2523
23 of this chapter is informed by the Attorney General or his
24 designate at the time of such authorization that the decision
25 has been made to employ emergency electronic surveillance

1 and if an application in accordance with this chapter is
2 made to that judge as soon as practicable, but not more than
3 twenty-four hours after the Attorney General authorizes
4 such acquisition. If the Attorney General authorizes such
5 emergency employment of electronic surveillance, he shall
6 require that the minimization procedures required by this
7 chapter for the issuance of a judicial order be followed. In
8 the absence of a judicial order approving such electronic
9 surveillance, the surveillance shall terminate when the infor-
10 mation sought is obtained, when the application for the
11 order is denied, or after the expiration of twenty-four hours
12 from the time of authorization by the Attorney General,
13 whichever is earliest. In the event that such application for
14 approval is denied, or in any other case where the electronic
15 surveillance is terminated without an order having been
16 issued, no information obtained or evidence derived from
17 such surveillance shall be received in evidence or otherwise
18 disclosed in any trial, hearing or other proceeding in or
19 before any court, grand jury, department, office, agency,
20 regulatory body, legislative committee or other authority
21 of the United States, a State or political subdivision thereof.
22 A denial of the application made under this subsection may
23 be reviewed as provided in section 2523.

24 "§ 2526. Use of information

25 "(a) Information concerning United States persons

1 acquired from an electronic surveillance conducted pursuant
2 to this chapter may be used and disclosed by Federal officers
3 and employees without the consent of the United States
4 person only for purposes specified in section 2521 (b) (8)
5 (A) through (F), or for the enforcement of the criminal
6 law if its use outweighs the possible harm to the national
7 security. No otherwise privileged communication obtained
8 in accordance with, or in violation of, the provisions of this
9 chapter shall lose its privileged character.

10 “(b) The minimization procedures required under this
11 chapter shall not preclude the retention and disclosure, for
12 law enforcement purposes, of any information which con-
13 stitutes evidence of a crime if such disclosure is accompanied
14 by a statement that such evidence, or any information
15 derived therefrom, may only be used in a criminal proceed-
16 ing with the advance authorization of the Attorney General.

17 “(c) Whenever the Government intends to enter into
18 evidence or otherwise use or disclose in any trial, hearing,
19 or other proceeding in or before any court, department, officer,
20 agency, or other authority of the United States, any informa-
21 tion obtained or derived from an electronic surveillance, the
22 Government shall prior to the trial, hearing, or other proceed-
23 ing or at a reasonable time prior to an effort to so disclose
24 or so use the information or submit it in evidence notify the
25 court in which the information is to be disclosed or used or,

1 if the information is to be disclosed or used in or before
2 another authority, shall notify a court in the district wherein
3 the information is to be so disclosed or so used that the Gov-
4 ernment intends to so disclose or so use such information.
5 Whenever any court is so notified, or whenever a motion is
6 made pursuant to section 3504 of this title, or any other
7 statute or rule of the United States to suppress evidence on
8 the grounds that it was obtained or derived from an unlawful
9 electronic surveillance, the court, or where the motion is
10 made before another authority, a court in the same district
11 as the authority, shall notwithstanding any other law, if the
12 Government by affidavit asserts that an adversary hearing
13 would harm the national security or the foreign affairs of the
14 United States, review in camera and ex parte the applica-
15 tion, order, and so much of the transcript of the surveillance
16 as may be necessary to determine whether the surveillance
17 was authorized and conducted in a manner that did not vio-
18 late any right afforded by the Constitution and statutes of
19 the United States to the person aggrieved: *Provided*, That,
20 in making this determination, the court shall disclose to the
21 aggrieved person portions of the application, order, or tran-
22 script only where such disclosure is necessary for an accurate
23 determination of the legality of the surveillance. If the court
24 determines that the electronic surveillance of the person ag-
25 grieved was not lawfully authorized or conducted, the court

1 shall in accordance with the requirements of law suppress
2 that information which was obtained or evidence derived un-
3 lawfully from the electronic surveillance of the person
4 aggrieved.

5 “(d) If an emergency employment of the electronic
6 surveillance is authorized under section 2525 (d) and a sub-
7 sequent order approving the surveillance is not obtained,
8 the judge shall cause to be served on any United States per-
9 son named in the application and on such other United States
10 persons subject to electronic surveillance as the judge may
11 determine in his discretion it is in the interest of justice to
12 serve, notice of—

13 “(1) the fact of the application;

14 “(2) the period of the surveillance; and

15 “(3) the fact that during the period information
16 was or was not obtained.

17 On an ex parte showing of good cause to the judge the serv-
18 ing of the notice required by this subsection may be post-
19 poned or suspended for a period not to exceed ninety days.
20 Thereafter, on a further ex parte showing of good cause, the
21 court shall forego ordering the serving of the notice required
22 under this subsection.

23 **“§ 2527. Report of electronic surveillance**

24 “In April of each year, the Attorney General shall re-
25 port to the Administrative Office of the United States Courts

1 and shall transmit to Congress with respect to the preceding
2 calendar year—

3 “(1) the total number of applications made for
4 orders and extensions of orders approving electronic
5 surveillance; and

6 “(2) the total number of such orders and extensions
7 either granted, modified, or denied.”

8 SEC. 3. The provisions of this Act and the amendment
9 made hereby shall become effective upon enactment: *Pro-*
10 *vided*, That, any electronic surveillance approved by the
11 Attorney General to gather foreign intelligence information
12 shall not be deemed unlawful for failure to follow the proce-
13 dures of chapter 120, title 18, United States Code, if that
14 surveillance is terminated or an order approving that sur-
15 veillance is obtained under this chapter within ninety days
16 following the designation of the first judge pursuant to section
17 2523 of chapter 120, title 18, United States Code.

18 SEC. 4. Chapter 119 of title 18, United States Code, is
19 amended as follows:

20 (a) Section 2511(1) is amended—

21 (1) by inserting “or chapter 120 or with respect
22 to techniques used by law enforcement officers not
23 involving the interception of wire or oral communica-
24 tions as otherwise authorized by a search warrant or

1 order of a court of competent jurisdiction," immediately
2 after "chapter" in the first sentence;

3 (2) by inserting a comma and "or, under color of
4 law, willfully engages in any other form of electronic
5 surveillance as defined in chapter 120" immediately
6 before the semicolon in paragraph (a);

7 (3) by inserting "or information obtained under
8 color of law by any other form of electronic surveillance
9 as defined in chapter 120" immediately after "contents
10 of any wire or oral communication" in paragraph (c);

11 (4) by inserting "or any other form of electronic
12 surveillance, as defined in chapter 120," immediately
13 before "in violation" in paragraph (c);

14 (5) by inserting "or information obtained under
15 color of law by any other form of electronic surveillance
16 as defined in chapter 120" immediately after "any wire
17 or oral communication" in paragraph (d); and

18 (6) by inserting "or any other form of electronic
19 surveillance, as defined in chapter 120," immediately
20 before "in violation" in paragraph (d).

21 (b) (1) Section 2511 (2) (a) (i) is amended by insert-
22 ing the words "or radio communication" after the words
23 "wire communication" and by inserting the words "or other-
24 wise acquire" after the word "intercept".

1 (2) Section 2511 (2) (a) (ii) is amended by inserting
2 the words "or chapter 120" after the second appearance of
3 the word "chapter", and by striking the period at the end
4 thereof and adding the following: "or engage in electronic
5 surveillance, as defined in chapter 120: *Provided, however,*
6 That before the information, facilities, or technical assistance
7 may be provided, the investigative or law enforcement
8 officer shall furnish to the officer, employee, or agent of the
9 carrier either—

10 "(1) an order signed by the authorizing judge
11 certifying that a court order directing such assistance
12 has been issued; or

13 "(2) in the case of an emergency interception or
14 electronic surveillance as provided for in section 2518
15 (7) of this chapter or section 2525 (d) of chapter 120,
16 a certification under oath by investigative or law en-
17 forcement officer that the applicable statutory require-
18 ments have been met,

19 and setting forth the period of time for which the electronic
20 surveillance is authorized and describing the facilities from
21 which the communication is to be acquired. Any violation
22 of this subsection by a communication common carrier or
23 an officer, employee, or agency thereof, shall render the
24 carrier liable for the civil damages provided for in section
25 2520."

1 (c) (1) Section 2511 (2) (b) is amended by inserting
2 the words "or otherwise engage in electronic surveillance,
3 as defined in chapter 120," after the word "radio".

4 (2) Section 2511 (2) (c) is amended by inserting the
5 words "or engage in electronic surveillance, as defined in
6 chapter 120," after the words "oral communication" and
7 by inserting the words "or such surveillance" after the last
8 word in the paragraph and before the period.

9 (3) Section 2511 (2) is amended by adding at the
10 end of the section the following provisions:

11 "(e) Notwithstanding any other provision of this title
12 or sections 605 or 606 of the Communications Act of 1934,
13 it shall not be unlawful for an officer, employee, or agent
14 of the United States in the normal course of his official duty
15 to conduct electronic surveillance as defined in section 2521

16 (b) (6) of chapter 120 without a court order for the sole
17 purpose of—

18 "(i) testing the capability of electronic equipment,
19 provided that the test period shall be limited in extent
20 and duration to that necessary to determine the capabil-
21 ity of the equipment, that the content of any communi-
22 cation acquired under this paragraph shall be retained
23 and used only for the purpose of determining the capa-
24 bility of such equipment, shall be disclosed only to the
25 persons conducting the test, and shall be destroyed upon

1 completion of the testing, and that the test may exceed
2 ninety days only with the prior approval of the Attor-
3 ney General; or

4 (ii) determining the existence and capability of
5 electronic surveillance equipment being used unlawfully:
6 *Provided*, That such electronic surveillance shall be lim-
7 ited in extent and duration to that necessary to determine
8 the existence and capability of such equipment, and that
9 any information acquired by such surveillance shall be
10 used only to enforce this chapter or section 605 of the
11 Communications Act of 1934 or to protect information
12 from unlawful electronic surveillance.

13 “(f) Nothing contained in this chapter, or section 605
14 of the Communications Act of 1934 (47 U.S.C. 605) shall
15 be deemed to affect the acquisition by the United States
16 Government of foreign intelligence information from inter-
17 national communications by a means other than electronic
18 surveillance as defined in section 2521 (b) (6) of this title;
19 and the procedures in this chapter and chapter 120 of this
20 title, shall be the exclusive means by which electronic surveil-
21 lance, as defined in section 2521 (b) (6) of chapter 120, and
22 the interception of domestic wire and oral communications
23 may be conducted.”

24 (d) Section 2511 (3) is repealed.

29

1 (e) Section 2515 is amended by inserting the words "or
2 electronic surveillance, as defined in chapter 120, has been
3 conducted" after the word "intercepted", by inserting the
4 words "or other information obtained from electronic surveil-
5 lance, as defined in chapter 120," after the second appearance
6 of the word "communication", and by inserting "or chapter
7 120" after the final appearance of the word "chapter".

8 (f) Section 2518 (1) is amended by inserting the words
9 "under this chapter" after the word "communication".

10 (g) Section 2518 (4) is amended by inserting the words
11 "under this chapter" after both appearances of the words
12 "wire or oral communication".

13 (h) Section 2518 (9) is amended by striking the word
14 "intercepted" and inserting the words "intercepted pursuant
15 tion has been intercepted, or about whom information has

16 (i) Section 2519 (3) is amended by inserting the words
17 "pursuant to this chapter" after the words "wire or oral
18 communications" and after the words "granted or denied".

19 (j) Section 2520 is amended by deleting all before sub-
20 section (2) and inserting in lieu thereof: "Any person other
21 than a foreign power or an agent of a foreign power as
22 defined in sections 2521 (b) (1) and 2521 (b) (2) (A) of
23 chapter 120, who has been subject to electronic surveillance,
24 as defined in chapter 120, or whose wire or oral communica-

30

1 tion has been intercepted, or about whom information has
2 been disclosed or used, in violation of this chapter, shall (1)
3 have a civil cause of action against any person who so acted
4 in violation of this chapter and”.

APPENDIX B

95TH CONGRESS
1ST SESSION

H. R. 9745

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 25, 1977

Mr. McCLORY introduced the following bill; which was referred jointly to the
Committees on the Judiciary and Select Committee on Intelligence

A BILL

To amend title 18, United States Code, to provide a mechanism
for the authorization of electronic surveillance to obtain
foreign intelligence information.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That this Act may be cited as the "Foreign Intelligence
4 Surveillance Act of 1977".

5 SEC. 2. Title 18, United States Code, is amended by
6 adding a new chapter after chapter 119 as follows:

I

1 **“Chapter 120.—ELECTRONIC SURVEILLANCE TO**
2 **OBTAIN FOREIGN INTELLIGENCE INFORMATION**

“Sec.

“2521. Definitions.

“2522. Authorization of electronic surveillance to obtain foreign intelligence information.

“2523. Use of information.

“2524. Report of electronic surveillance.

“2525. Geographic applicability of chapter.

“2526. Retention of records.

3 **“§ 2521. Definitions**

4 “(a) Except as otherwise provided in this section the
5 definitions of section 2510 of this title shall apply in this
6 chapter.

7 “(b) As used in this chapter the following definitions
8 shall apply:

9 “(1) The term ‘foreign power’ means—

10 “(A) a foreign government or any component
11 thereof, whether or not recognized by the United
12 States;

13 “(B) a faction of a foreign nation or nations,
14 not substantially composed of United States persons;

15 “(C) a group, which is openly acknowledged
16 by a foreign government or governments to be
17 directed and controlled by such foreign government
18 or governments;

19 “(D) a foreign-based terrorist group; or

20 “(E) a foreign-based political organization,
21 not substantially composed of United States persons.

3

1 “(2) The term ‘agent of a foreign power’ means—

2 “(A) any person who—

3 “(i) is an officer or employee of a foreign
4 power;

5 “(ii) knowingly engages in clandestine
6 intelligence activities for or on behalf of a for-
7 eign power under circumstances which indicate
8 that such activities would be harmful to the
9 security of the United States;

10 “(iii) knowingly engages in activities that
11 involve or will involve sabotage or terrorism for
12 or on behalf of a foreign power; or

13 “(iv) conspires with or knowingly aids or
14 abets any person engaged in activities described
15 in clauses (i) through (iii) of this subpara-
16 graph.

17 “(3) The term ‘terrorism’ means activities which—

18 “(A) are violent acts or acts dangerous to
19 human life which would be criminal under the
20 laws of the United States or of any State if com-
21 mitted within its jurisdiction; and

22 “(B) appear to be intended—

23 “(i) to intimidate or coerce the civilian
24 population,

4

1 “(ii) to influence the policy of a govern-
2 ment by intimidation or coercion, or

3 “(iii) to affect the conduct of a govern-
4 ment by assassination or kidnaping.

5 “(4) The term ‘sabotage’ means activities which
6 would be prohibited by title 18, United States Code,
7 chapter 105, if committed against the United States.

8 “(5) The term ‘foreign intelligence information’
9 means—

10 “(A) information which relates to, and is
11 deemed necessary to the ability of the United States
12 to protect itself against, actual or potential attack or
13 other grave hostile acts of a foreign power or an
14 agent of a foreign power.

15 “(B) information with respect to a foreign
16 power or foreign territory, which relates to, and
17 because of its importance is deemed essential to—

18 “(i) the national defense or the security
19 of the Nation; or

20 “(ii) the successful conduct of the foreign
21 affairs of the United States.

22 “(C) information which relates to, and is
23 deemed necessary to the ability of the United States
24 to protect against terrorism by a foreign power or
25 an agent of a foreign power;

1 “(D) information which relates to, and is
2 deemed necessary to the ability of the United States
3 to protect against sabotage by a foreign power or
4 an agent of a foreign power;

5 “(E) information which relates to, and is
6 deemed necessary to the ability of the United States
7 to protect against the clandestine intelligence activ-
8 ities of an intelligence service or network of a foreign
9 power or an agent of a foreign power.

10 “(6) The term ‘electronic surveillance’ means—

11 “(A) the acquisition by an electronic, mechani-
12 cal, or other surveillance device, of the contents of
13 any wire or radio communication, sent from and
14 intended to be received in the United States, with-
15 out the consent of any party thereto, under circum-
16 stances in which a person has a reasonable expecta-
17 tion of privacy, while the communication is being
18 transmitted or received;

19 “(B) the acquisition by an electronic, mechani-
20 cal, or other surveillance device, of the contents of
21 any wire or radio communication sent from or in-
22 tended to be received in the United States, without
23 the consent of any party thereto, under circum-
24 stances in which a person has a reasonable expecta-

6

1 tion of privacy, while the communication is being
2 transmitted or received;

3 “(C) the acquisition by an electronic, mechani-
4 cal, or other surveillance device, of the contents of
5 any wire or radio communication, neither sent from
6 nor intended to be received in the United States,
7 without the consent of any party thereto, under cir-
8 cumstances in which a person has a reasonable ex-
9 pectation of privacy, while the communication is
10 being transmitted or received; or

11 “(D) the installation or use of an electronic,
12 mechanical, or other surveillance device for monitor-
13 ing to acquire information, other than from a wire
14 or radio communication, without the consent of any
15 party thereto, under circumstances in which a person
16 has a reasonable expectation of privacy.

17 “(7) The term ‘minimization procedures’ means
18 procedures which are reasonably designed to minimize
19 the acquisition, retention, and dissemination of any in-
20 formation concerning United States persons without their
21 consent that does not relate to the ability of the United
22 States—

23 “(A) to protect itself against actual or poten-
24 tial attack or other grave hostile acts of a foreign
25 power or an agent of a foreign power;

1 “(B) to provide for the national defense or
2 security of the Nation;

3 “(C) to provide for the conduct of the foreign
4 affairs of the United States;

5 “(D) to protect against terrorism by a foreign
6 power or an agent of a foreign power;

7 “(E) to protect against sabotage by a foreign
8 power or an agent of a foreign power; or

9 “(F) to protect against the clandestine intelli-
10 gence activities of an intelligence service or net-
11 work of a foreign power or an agent of a foreign
12 power;

13 and which are reasonably designed to insure that in-
14 formation which relates solely to the conduct of foreign
15 affairs shall not be maintained in such a manner as to
16 permit the retrieval of such information by reference to a
17 United States person, without his consent, who was a
18 party to a communication acquired pursuant to this
19 chapter; and if the target of the electronic surveillance
20 is a foreign power which qualifies as such solely on the
21 basis that it is an entity controlled and directed by a
22 foreign government or governments, and unless there is
23 probable cause to believe that a substantial number of
24 the officers or executives of such entity are agents of any
25 foreign power, procedures which are reasonably de-

1 signed to prevent the acquisition, retention, and dissem-
2 ination of communications of unconsenting United States
3 persons who are not officers or executives of such entity
4 with responsibility for those areas of its activities which
5 involve foreign intelligence information.

6 “(8) The term ‘United States person’ means a
7 citizen of the United States, an alien lawfully admitted
8 for permanent residence (as defined in section 101 (a)
9 (20) of the Immigration and Nationality Act), an
10 unincorporated association a substantial number of mem-
11 bers of which are citizens of the United States or aliens
12 lawfully admitted for permanent residence or a corpo-
13 ration which is incorporated in the United States, but
14 not including corporations which are foreign powers.

15 “(9) The term ‘United States’ when used in a geo-
16 graphic sense means all areas under the territorial sov-
17 ereignty of the United States, the Trust Territory of the
18 Pacific Islands, and the Canal Zone.

19 “(10) The term ‘surveillance certificate’ means a
20 document which includes the following:

21 “(A) a Statement identifying or describing the
22 target of the electronic surveillance, including a
23 statement that the target is or is not a United States
24 person.

25 “(B) A statement of the facts and circum-

1 stances relied upon by the President to justify the
2 belief that—

3 “(i) the target of the electronic surveil-
4 lance is or is not a United States person;

5 “(ii) the target of the electronic surveil-
6 lance is a foreign power or an agent of a foreign
7 power; and

8 “(iii) the facilities or the place at which
9 the electronic surveillance is directed are being
10 used, or are about to be used, by a foreign power
11 or an agent of a foreign power.

12 “(C) A statement of the proposed minimization
13 procedures.

14 “(D) When the target of the surveillance is not
15 a foreign power, a detailed statement of the nature
16 of the information sought.

17 “(E) A statement that the information sought
18 is foreign intelligence information.

19 “(F) A statement that the purpose of the sur-
20 veillance is to obtain foreign intelligence informa-
21 tion.

22 “(G) A statement that such information can-
23 not reasonably be obtained by normal investigative
24 techniques.

1 “(H) A statement designating the type of
2 foreign intelligence information being sought accord-
3 ing to the categories described in section 2521 (b)
4 (5).

5 “(I) When the target of the surveillance is
6 not a foreign power, a statement of the basis for
7 the certification that—

8 “(i) the information sought is the type
9 of foreign intelligence information designated;
10 and

11 “(ii) such information cannot reasonably
12 be obtained by normal investigative techniques.

13 “(J) A statement of the period of time for
14 which the surveillance is required to be maintained.

15 “(K) When the target of the surveillance is
16 not a foreign power, a statement of the means by
17 which the surveillance will be effected, and when
18 the target is a foreign power, a statement desig-
19 nating the type of electronic surveillance to be used
20 according to the categories described in section 2521
21 (b) (6).

22 “(L) If the nature of the intelligence gather-
23 ing is such that the approval of the use of electronic
24 surveillance under this chapter should not automati-

1 cally terminate when the described type of infor-
2 mation has first been obtained, a statement of facts
3 supporting the belief that additional information of
4 the same type will be obtained thereafter.

5 **“§ 2522. Authorization of electronic surveillance to obtain**
6 **foreign intelligence information**

7 “(a) Electronic surveillance to obtain foreign intel-
8 ligence information may be authorized by—

9 “(1) the issuance of a surveillance certificate
10 signed by—

11 “(A) the Attorney General, and

12 “(B) the Assistant to the President for Na-
13 tional Security Affairs or an executive branch of-
14 ficial or officials designated by the President from
15 among those executive officials employed in the
16 area of national security or defense appointed by
17 the President with the advice and consent of the
18 Senate; and

19 “(2) the issuance of a certification signed by the
20 President that such electronic surveillance would be in
21 accordance with this chapter.

22 “(b) Electronic surveillance authorized under this
23 chapter may only be performed according to the terms of a
24 surveillance certificate.

1 “(c) Electronic surveillance may be authorized under
2 this chapter to last for the period necessary to achieve its
3 purpose, or—

4 “(1) for ninety days, whichever is less, if the tar-
5 get of the surveillance is not a foreign power;

6 “(2) for one year, whichever is less, if the target
7 of the surveillance is a foreign power.

8 “(d) Electronic surveillance authorized under this chap-
9 ter may be reauthorized in the same manner as the original
10 authorization, provided that all statements required to be
11 made under section 2521 (b) (10) be based on new findings.

12 “(e) Notwithstanding any other provision of this
13 chapter, when the Attorney General reasonably determines
14 that—

15 “(1) an emergency situation exists with respect to
16 the employment of electronic surveillance to obtain
17 foreign intelligence information before the provisions of
18 subsection (a) of this section may be followed; and

19 “(2) the factual basis exists for the issuance of a
20 surveillance certificate under this chapter to approve
21 such surveillance,

22 he may authorize the emergency employment of electronic
23 surveillance if the President or his designate is informed
24 by the Attorney General at the time of such authorization
25 that the decision has been made to employ emergency elec-

1 tronic surveillance and if the otherwise mandated procedures
2 of this chapter are followed as soon as practicable, but not
3 more than forty-eight hours after the Attorney General
4 authorizes such acquisition. If the Attorney General author-
5 izes such emergency employment of electronic surveil-
6 lance, he shall require that the minimization procedures
7 required by this chapter be followed. If electronic surveil-
8 lance is authorized under this subsection, it shall terminate
9 when the information sought is obtained, or after the
10 expiration of forty-eight hours from the time of authorization
11 by the Attorney General, whichever is earliest. In the event
12 that an ultimate determination is made that the requirements
13 of subsection (a) of this section would not have been met, all
14 information obtained or evidence derived from electronic
15 surveillance authorized under this subsection shall be de-
16 stroyed within forty-eight hours of such determination,
17 though a record of the facts surrounding the Attorney Gen-
18 eral's authorization and the making of such ultimate determi-
19 nation shall be made and preserved with all other records
20 generated under this chapter.

21 **“§ 2523. Use of information**

22 “(a) Information concerning United States persons
23 acquired from an electronic surveillance conducted pursuant
24 to this chapter may be used and disclosed by Federal of-
25 ficers and employees without the consent of the United

1 States person only for purposes specified in section
2 2521 (b) (7) (A) through (F), or for the enforcement
3 of the criminal law if its use outweighs the possible harm
4 to the national security. No otherwise privileged commu-
5 nication obtained in accordance with, or in violation of, the
6 provisions of this chapter shall lose its privileged character.

7 “(b) The minimization procedures required under this
8 chapter shall not preclude the retention and disclosure,
9 for law enforcement purposes, of any information which
10 constitutes evidence of a crime if such disclosure is accom-
11 panied by a statement that such evidence, or any informa-
12 tion derived therefrom, may only be used in a criminal
13 proceeding with the advance authorization of the Attorney
14 General.

15 “(c) Whenever the Government intends to enter into
16 evidence or otherwise use or disclose in any trial, hearing,
17 or other proceeding in or before any court, department,
18 officer, agency, or other authority of the United States, any
19 information obtained or derived from an electronic surveil-
20 lance conducted pursuant to this chapter, the Government
21 shall, prior to the trial, hearing, or other proceeding or at a
22 reasonable time prior to an effort to so disclose or so use the
23 information or submit it in evidence notify the court in
24 which the information is to be disclosed or used or if the
25 information is to be disclosed or used in or before another

15

1 authority, shall notify a court in the district wherein the
2 information is to be so disclosed or so used that the Govern-
3 ment intends to so disclose or so use such information.
4 Whenever any court is so notified, or whenever a motion is
5 made pursuant to section 3504 of this title, or any other
6 law or rule of the United States to suppress evidence on the
7 grounds that it was obtained or derived from an unlawful
8 electronic surveillance, the court, or where the motion is
9 made before another authority, a court in the same district
10 as the authority, shall, notwithstanding any other law, if the
11 Government by affidavit asserts that an adversary hearing
12 would harm the national security or the foreign affairs of
13 the United States, review in camera and ex parte the docu-
14 ments required by section 2522 (a) and so much of the
15 transcript of the surveillance as may be necessary to deter-
16 mine whether the surveillance was authorized and conducted
17 in a manner that did not violate any right afforded by the
18 Constitution and laws of the United States to the person
19 aggrieved, but, in making this determination, the court shall
20 disclose to the aggrieved person portions of these documents
21 or transcript only where such disclosure is necessary for an
22 accurate determination of the legality of the surveillance. If
23 the court determines that the electronic surveillance of the
24 person aggrieved was not lawfully authorized or conducted,
25 the court shall, in accordance with the requirements of law,

1 suppress that information which was obtained or evidence
2 derived unlawfully from the electronic surveillance of the
3 person aggrieved.

4 **“§ 2524. Report of electronic surveillance**

5 “(a) In April of each year, the Attorney General shall
6 transmit to Congress with respect to the preceding calendar
7 year the total number of authorizations and the total number
8 of reauthorizations made under section 2522.

9 “(b) Nothing in this chapter shall be deemed to limit
10 the authority of the Select Committee on Intelligence of the
11 United States Senate or the Permanent Select Committee on
12 Intelligence of the United States House of Representatives
13 to obtain such information as may be needed to carry out
14 their respective duties.

15 **“§ 2525. Geographic applicability of chapter**

16 “The provisions of this chapter shall apply to all elec-
17 tronic surveillance to obtain foreign intelligence information—

18 “(a) if a target of such surveillance is a United
19 States person; and

20 “(b) when a target is not a United States person, if
21 the communication to be acquired is sent from or in-
22 tended to be received within the United States, and the
23 communication is to be acquired within the United
24 States.

1 **“§ 2526. Retention of records**

2 “All surveillance certificates, all documents used to sup-
3 port the issuance of surveillance certificates, and all other
4 documents and records generated under this chapter shall be
5 retained for a period of at least twenty years and shall be
6 stored at the direction of the Attorney General under con-
7 ditions approved by the Director of Central Intelligence.”

8 SEC. 3. The provisions of this Act and the amendments
9 made by this Act shall become effective upon the date of
10 enactment of this Act, but any electronic surveillance ap-
11 proved by the Attorney General to gather foreign intelligence
12 information shall not be deemed unlawful for failure to fol-
13 low the procedures of chapter 120 of title 18, United States
14 Code, if that surveillance is terminated or an authorization
15 that surveillance is obtained under this chapter within ninety
16 days following such date of enactment.

17 SEC. 4. Chapter 119 of title 18, United States Code, is
18 amended as follows:

19 (a) Section 2511 (1) is amended—

20 (1) by inserting “or chapter 120 or with respect
21 to techniques used by law enforcement officers not in-
22 volving the interception of wire or oral communications
23 as otherwise authorized by a search warrant or order

1 of a court of competent jurisdiction," immediately after
2 "chapter" in the first sentence;

3 (2) by inserting a comma and "or, under color of
4 law, willfully engages in any other form of electronic
5 surveillance as defined in chapter 120" immediately
6 before the semicolon in paragraph (a) ;

7 (3) by inserting "or information obtained under
8 color of law by any other form of electronic surveillance
9 as defined in chapter 120" immediately after "contents
10 of wire or oral communication" in paragraph (c) ;

11 (4) by inserting "or any other form of electronic
12 surveillance, as defined in chapter 120," immediately
13 before "in violation" in paragraph (c) ;

14 (5) by inserting "or information obtained under
15 color of law by any other form of electronic surveillance
16 as defined in chapter 120" immediately after "any wire
17 or oral communication" in paragraph (d) ; and

18 (6) by inserting "or any other form of electronic
19 surveillance, as defined in chapter 120," immediately
20 before "in violation" in paragraph (d).

21 (b) (1) Section 2511 (2) (a) (i) is amended by insert-
22 ing "or radio communication" immediately after "wire
23 communication" and by inserting "or otherwise acquire"
24 immediately after "intercept".

1 (2) Section 2511 (2) (a) (ii) is amended by inserting
2 "or chapter 120" immediately after the second appearance
3 of "chapter", and by striking the period at the end thereof
4 and inserting in lieu of such period the following: "or engage
5 in electronic surveillance, as defined in chapter 120, but
6 before the information, facilities, or technical assistance may
7 be provided, the investigative or law enforcement officer
8 shall furnish to the officer, employee, or agent of the carrier
9 either—

10 " (1) an order signed by the authorizing judge certi-
11 fying that a court order directing such assistance has been
12 issued pursuant to this chapter;

13 " (2) a letter signed by the Attorney General stating
14 that the statutory requirements of chapter 120 have been
15 followed; or

16 " (3) in the case of an emergency interception or
17 electronic surveillance as provided for in section 2518 (7)
18 of this chapter or section 2522 (e) of chapter 120, a cer-
19 tification under oath by investigative or law enforcement
20 officer that the applicable statutory requirements have
21 been met,

22 and setting forth the period of time for which the electronic
23 surveillance is authorized and describing the facilities from
24 which the communication is to be acquired. Any violation of

1 this subsection by a communication common carrier or an
2 officer, employee, or agency thereof shall render the carrier
3 liable for the civil damages provided for in section 2520.”.

4 (c) (1) Section 2511 (2) (b) is amended by inserting
5 “or otherwise engage in electronic surveillance, as defined in
6 chapter 120,” immediately after “radio”.

7 (2) Section 2511 (2) is amended by adding at the end
8 the following:

9 “(e) Notwithstanding any other provision of this title or
10 section 605 or 606 of the Communications Act of 1934, it
11 shall not be unlawful for an officer, employee, or agent of the
12 United States in the normal course of his official duty to
13 conduct electronic surveillance as defined in section 2521 (b)
14 (6) of chapter 120, without a court order issued pursuant to
15 this chapter or an authorization under section 2522 of chap-
16 ter 120, for the sole purpose of determining the existence and
17 capability of electronic surveillance equipment being used
18 unlawfully, but such electronic surveillance shall be limited in
19 extent and duration to that necessary to determine the exist-
20 ence and capability of such equipment, and that any informa-
21 tion acquired by such surveillance shall be used only to en-
22 force this chapter or section 605 of the Communications Act
23 of 1934 or to protect information from unlawful electronic
24 surveillance.

1 “(f) The procedures in this chapter and chapter 120 of
2 this title shall be the exclusive means by which electronic
3 surveillance, as defined in section 2521 (b) (6) of this title,
4 and the interception of domestic wire and oral communica-
5 tions may be conducted.”.

6 (d) Section 2511 (3) is repealed.

7 (e) Section 2515 is amended—

8 (1) by inserting “or electronic surveillance, as
9 defined in chapter 120 of this title, has been conducted”
10 after the word “intercepted”;

11 (2) by inserting “or other information obtained
12 from electronic surveillance, as defined in chapter 120;”
13 immediately after the second appearance of “communi-
14 cation”; and

15 (3) by inserting “or chapter 120 of this title”
16 immediately after the final appearance of “chapter”.

17 (f) Section 2518 (1) is amended by inserting “under
18 this chapter” immediately after “communication”.

19 (g) Section 2518 (4) is amended by inserting “under
20 this chapter” immediately after each appearance of “wire or
21 oral communication”.

22 (h) Section 2518 (9) is amended by striking out “in-
23 tercepted” and inserting “intercepted pursuant to this chap-
24 ter” immediately after “communication”.

1 (i) Section 2519 (3) is amended by inserting "pur-
2 suant to this chapter" immediately after "wire or oral com-
3 munications" and immediately after "granted or denied".

4 (j) Section 2520 is amended by striking out "Any
5 person" and all that follows through "violation of this chapter
6 shall" and inserting in lieu thereof: "Any person other than
7 a foreign power or an agent of a foreign power as defined in
8 sections 2521 (b) (1) and 2521 (b) (2) (A) of chapter 120,
9 who has been subject to electronic surveillance, as defined in
10 chapter 120, or whose wire or oral communication has been
11 intercepted, or about whom information has been disclosed
12 or used, in violation of this chapter, shall (1) have a civil
13 cause of action against any person who so acted in violation
14 of this chapter and".

APPENDIX C

JAN 20 1978

Honorable Morgan F. Murphy
Chairman, Subcommittee on Legislation
House Permanent Select Committee on
Intelligence
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

On Tuesday, January 10, 1978, I appeared before the Committee to testify concerning the foreign intelligence electronic surveillance legislation. During the hearing I was asked whether any electronic surveillance had been directed against American citizens without a warrant on the grounds of national security during my tenure.

I answered that there had been no such surveillances against American citizens. In so responding, I was referring only to wiretaps and microphone surveillance, traditional forms of electronic surveillance.

I believe it is important for the Committee, and the public, to know the facts concerning use of a related investigative technique, television surveillance. This technique is not "electronic surveillance" in the traditional sense, but it does raise similar legal issues and is included in the definition of that term in proposed legislation.

In one instance, with the President's approval I authorized the use of television surveillance of a U.S. citizen in connection with a national security investigation. Once this investigation is complete, I will be prepared to discuss the matter with the Committee in executive session.

Sincerely,

Griffin B. Bell
Attorney General

APPENDIX D

April 19, 1977

The Hon. Griffin Bell
Attorney General of the United States
Department of Justice
Washington, D.C.

Dear Judge Bell:

We understand that the Department of Justice is considering legislation to govern the initiation of wiretaps outside the procedures required by Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. Sections 2510-20). This legislation apparently would reflect the general approach of S.3197, the "Foreign Intelligence Surveillance Act of 1976," the bill that was considered but not enacted by the 94th Congress.

As you may know, opposition to S.3197 was based on the view that in several crucial respects the bill was not compatible with the requirements of the Fourth Amendment. It was widely perceived that the bill would have lowered the standard for initiating a wiretap in three major ways:

1. The legislation would have permitted wiretapping of American citizens and others without probable cause to believe that they were engaged in criminal activity.
2. A judge reviewing a wiretap application under the bill would not have been permitted to probe the government's certification that the factual prerequisites for placing a tap had been satisfied (e.g., whether the information likely to be obtained would be "foreign intelligence information").
3. The bill would have reserved Congressional judgment on whether the President has an inherent power to conduct warrantless wiretaps.

Because of these three major substantive defects in S.3197, enactment of such a bill would have been an unfortunate response to the massive record of abuses by the intelligence agencies that has recently been compiled. S.3197 would have preserved many of the legal doctrines upon which such activities as the CIA's CHAOS program, the NSA's unrestricted interception of international communications and the FBI's COINTELPRO operations were predicated. It would have been a terrible irony if Congress and the Administration, in their first important act in this area since Watergate and

April 19, 1977
The Hon. Griffin Bell

page 2

the Church Committee revelations, were to have expanded the authority of intelligence agencies at the expense of civil liberties.

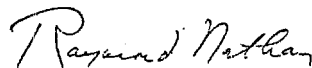
In developing the Justice Department's position on "national security" wiretap legislation, it is important that the mistakes in drafting S.3197 not be repeated by this Administration. If the three principal problems in the prior bill are not favorably resolved in the new proposal, we will not hesitate to oppose the bill strongly.

We would appreciate the opportunity to meet with you to discuss in greater detail our views on this important question.

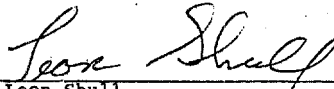
Yours sincerely,



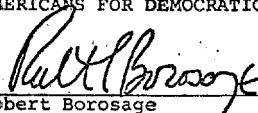
John H.F. Shattuck
AMERICAN CIVIL LIBERTIES UNION



Raymond Nathan
AMERICAN ETHICAL UNION



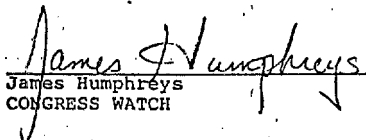
Leon Shull
AMERICANS FOR DEMOCRATIC ACTION



Robert Borosage
CENTER FOR NATIONAL SECURITY
STUDIES



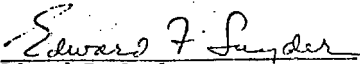
David Cohen
COMMON CAUSE

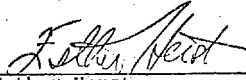


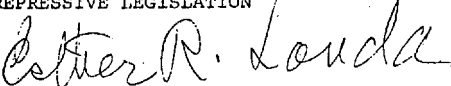
James Humphreys
CONGRESS WATCH


April 19, 1977
The Hon. Griffin Bell

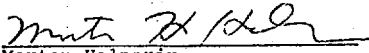
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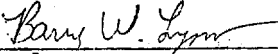

Edward F. Snyder
FRIENDS COMMITTEE ON NATIONAL
LEGISLATION


Esther Herst
NATIONAL COMMITTEE AGAINST
REPRESSIVE LEGISLATION


Esther R. Landa, National President
NATIONAL COUNCIL OF JEWISH
WOMEN


NATIONAL URBAN LEAGUE


Morton Halperin
PROJECT ON NATIONAL SECURITY
STUDIES AND CIVIL LIBERTIES


Barry Lynn
UNITED CHURCH OF CHRIST


Edith Villastrigo
WOMEN STRIKE FOR PEACE

July 12, 1977

Dear Senator:

We are writing to you concerning S.1566, the Foreign Intelligence Surveillance Act of 1977 currently pending before the Judiciary Committee. We have strong reservations about this bill and believe that it should not be reported out of Committee in its present form.

As you know, S.1566 is the successor to S.3197, the foreign intelligence wiretap bill that was considered but not enacted by the 94th Congress. Opposition to S.3197 was based on the view that the bill was not compatible with the Fourth Amendment. In four critical ways S.1566 reflects and magnifies these defects.

First, it permits wiretapping of American citizens and other persons who are not engaged in nor suspected of criminal conduct, such as espionage or any other crime endangering the national security. Second, unlike S.3197, it treats foreign visitors to the United States as a special class who can be wiretapped on an even lower "non-criminal" standard than American citizens or resident aliens, if they are suspected of engaging in undefined "clandestine intelligence activities." Third, as drafted, the bill includes a catch-all conspiracy section which allows surveillance of any person who aids or abets in any way persons engaged in clandestine intelligence activities. Fourth, the bill does not set forth sufficient procedures to minimize overhearing or recording conversations of people who are not the target of electronic surveillance and does not adequately safeguard against the government's acquisition, retention, or use of such information about the lawful views and activities of American citizens.

By adopting a non-criminal standard, the bill ignores the careful conclusion of the Church Committee that the only way to guard against wiretap abuses is for "no American [to] be targetted for electronic surveillance except upon a judicial finding of probable criminal activity." Significantly, as we point out in a memorandum attached to this letter, the Administration has not demonstrated the need to depart from a criminal standard. Further, the Administration has not explained the need for including all foreign visitors as a special class for wiretapping, even though

July 12, 1977

this obviously denies equal protection to "persons" protected by the Constitution and is a license to gather information on American citizens who have contacts with foreign visitors. Without more careful minimization criteria, the bill can be read to authorize some of the kinds of surveillance activities which the Congress and the public so recently deplored.

For these reasons, we urge you to support amendments requiring a criminal standard for all wiretapping conducted under S.1566 and which prohibits the government from gathering and using information on Americans who are monitored but are not the subjects of lawful surveillance.

Because time is of the essence, we would like to meet with you at your earliest convenience to discuss this important legislation.

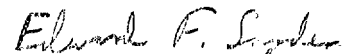
Yours sincerely,



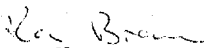
John Shattuck
AMERICAN CIVIL LIBERTIES UNION



Fred Wertheimer
COMMON CAUSE



Edward F. Snyder
FRIENDS COMMITTEE ON NATIONAL LEGISLATION



Ronald Brown
NATIONAL URBAN LEAGUE



Morton Halperin
PROJECT ON NATIONAL SECURITY STUDIES
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Edith Villastrigo
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WOMEN STRIKE FOR PEACE

Esther Herst
Esther Herst
NATIONAL COALITION AGAINST REPRESSIVE LEGISLATION

Robert Borosage
Robert Borosage
CENTER FOR NATIONAL SECURITY STUDIES

Nancy Ramsey
Nancy Ramsey
WOMENS INTERNATIONAL LEAGUE FOR PEACE AND FREEDOM

Danny Sheehan
Danny Sheehan
NATIONAL JESUIT SOCIAL APOSTALITE

Leon Shull
Leon Shull
AMERICANS FOR DEMOCRATIC ACTION

Mark Green
Mark Green
CONGRESS WATCH

Dorothy Samuels
Dorothy Samuels
COMMITTEE FOR PUBLIC JUSTICE

Judiciary Committee Hearings on S.1566
June 13-14, 1977

A major focus of the Senate Judiciary Committee hearings on S.1566 was the broad authority given by the bill to wiretap American citizens not suspected of crimes and the bill's even broader non-criminal authority to tap foreign visitors to the United States even if they are not employed by a foreign power. In both of these areas S.1566 contains fewer restrictions on wiretapping than did S.3197, the bill introduced last year by Senator Kennedy and supported by Attorney General Edward Levi and the Ford Administration. As Senator Kennedy put it in summarizing S.1566, "[t]here has been movement--and I would feel in the wrong direction, frankly--from the legislation of last year." [Hearing Transcript ("Tr."), June 13, p. 25].

In opening the hearings on June 13, Senator Kennedy expressed as follows his principal reservations about S.1566:

I have never been satisfied with the explanations offered to justify a retreat from the requirement of 'probable cause of a crime.'

Similarly, I question the provisions of S.1566 which provide less protection to transient visitors--professors, students and just plain tourists--than to American citizens and permanent resident aliens. Such a distinction offends my notion of the Fourth Amendment, which speaks in terms of all 'persons,' not just American citizens. S.1566 provides a double standard which constitutes a deplorable retreat from last year's bill. [Tr. June 13, p. 5].

At the hearings, Attorney General Griffin Bell, FBI Director Clarence Kelley, Secretary of Defense Harold Brown and CIA Director Stansfield Turner were all questioned closely about the need for including these broad non-criminal standards in the bill. As Senator Kennedy pointed out toward the end of the second day of hearings, the Administration witnesses did not meet their burden of proof [Tr. June 14, p. 67].

Both Secretary Brown and CIA Director Turner conceded that their agencies do not require authority to wiretap American citizens or foreign visitors not engaged in crime. As Secretary Brown put it, "the non-criminal standard is principally an FBI requirement rather than a DOD requirement" [Id., p. 78]. Admiral Turner agreed that the CIA would be satisfied if the non-criminal standard were "focused more in the direction of foreign powers" [Id. p.29].

The Attorney General was asked why he perceived a need for broader non-criminal surveillance than former Attorney General Levi and the Ford Administration. He agreed that "[w]e have receded from the standard of last year in the sense that it is a lesser standard--less stringent" [Id., p. 25]. In terms of wiretapping foreign visitors, the Attorney General attempted to justify the "less stringent" standard by citing FBI statistics concerning the rise in the number of "communist-bloc officials" travelling to the United States over the period of 1961 to 1977. But in response to Senator Kennedy's question about the specific difference between last year's situation and the circumstances today--"What has changed in terms of the nature of the threat?"--the Attorney General offered no explanation other than, "maybe you're dealing with a different set of people." [Id., p. 27].

Pressed by Senator Kennedy for information to justify the departure for foreign visitors in S.1566 from the uniform standard of S.3197, James Adams, Assistant Director of the FBI, again cited the Bureau's statistics about Soviet visitors to the United States. Adams, however, was unable to indicate how many visitors suspected of clandestine intelligence activities have been deported in recent years. Unsatisfied with this response, Kennedy observed that "[w]e had this similar kind of trend, evidently, last year. We had an Attorney General who drew different conclusions from what this Administration has drawn. It seems to me we should find out whether there has been an additional threat which is posed to our security interests or whether there hasn't" [Id., p. 48]. No further information about any such "additional threat" has been offered by the Attorney General or the FBI witnesses.

Turning to the question of why it is necessary to authorize wiretaps on American citizens and resident aliens not engaged in crime, the Justice Department witnesses took the position that "the current espionage laws are not yet complete enough and clear enough to . . . reach all forms of espionage that need to be covered" [Id., p. 59]. At first, the witnesses attempted to explain this "gap" in the criminal law in terms of "modern forms of espionage, like industrial espionage" [Id., p. 59]. But as Senators Kennedy and Abourezk noted, the existing espionage laws cover any clandestine intelligence gathering activity--including the gathering of economic or industrial information--that is "harmful to the security of the United States" [Id., p. 73].

When further pressed for an explanation of the need for a non-criminal standard, the Justice Department witnesses asserted that the "national defense" interests protected by the espionage laws are narrower than the "national security" interests protected by S.1566 [Id., pp. 74-75]. As several other witnesses pointed out on the second day of hearings, however, the Supreme Court in the leading espionage case of Gorin v. United States, 312 U.S. 19, 28 (1941) has construed the term "national defense" to be "a generic concept of broad connotations" [Tr., June 14, pp. 65-66]. Under these circumstances, "national defense" and "national security" would have similar meanings for a judge considering whether to issue a warrant. This point was brought out by Senator Abourezk in his questioning of the Attorney General, "I don't see the distinction, and I would like to have an explanation, if you have one." In response, the Attorney General stated, "I don't know if I can give you any more, other than to say: National security to me is broader than national defense" [Tr., June 13, pp. 77-78].

This is the extent of the Administration's testimony relating to the need for a non-criminal standard in S.1566. Following the hearings Attorney General Bell sent a letter to Senator Abourezk responding to certain written questions. In this letter the Attorney General amplified his testimony by describing six hypothetical cases in which he asserted the government would be authorized to conduct a wiretap under S.1566, but not under the espionage laws. In all six cases, however, the espionage laws would be sufficient to authorize a wiretap where it would be authorized under the non-criminal standard in S.1566 (see attached appendix).

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APPENDIX E

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
42 WEST 44TH STREET
NEW YORK 10036

COMMITTEE ON CIVIL RIGHTS

GEORGE M. HASEN
CHAIRMAN
59 MAIDEN LANE
NEW YORK 10038
(212) 344-5500

BEVERLY M. WOLFF
SECRETARY
28 REMBEN STREET
BROOKLYN 11201
(212) 697-8200

January 17, 1978

The Hon. Morgan F. Murphy
Chairman of the Subcommittee on
Legislation
House Select Committee on Intelligence
United States House of Representatives
Washington, D.C. 20515

Dear Congressman Murphy:

We understand that your Subcommittee has received from the Committee on Federal Legislation of the Association of the Bar of the City of New York its critique of the provisions of the proposed Foreign Intelligence Surveillance Act of 1977 (H.R. 7308). Our Committee on Civil Rights associates itself, generally, with that critique, but we disagree with it in one important respect.

Both the Committee on Federal Legislation and the Committee on Civil Rights are concerned because the standards imposed by H.R. 7308 for obtaining a warrant to engage in electronic surveillance do not, in some instances, require a probable cause showing of criminal conduct. It is the considered judgment of the Committee on Civil Rights that a criminal standard is essential to the bill and, unlike the Committee on Federal Legislation, we believe that unless H.R. 7308 is amended to provide such a standard, it should not be enacted.

We think it is important to remember why this legislation is needed. Clearly it is not needed to empower government agencies to carry on electronic surveillance. Rather, the need is for legislation which will limit and control electronic surveillance and the consequent government intrusion into the private lives of American citizens. The findings of Congressional committees which over the last several years have investigated intelligence agency abuses have made this need abundantly clear. Based on such findings, the Church Committee specifically concluded that no American should "be targeted for electronic surveillance except upon a judicial finding of probable criminal activity" and, further, that targeting "an American for electronic surveillance in the absence of probable cause to believe he might commit a crime is unwise and unnecessary." (Intelligence Activities and the Rights of Americans, Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, U.S. Senate, 94th Cong., 2nd Sess. (1976), at 325.)

Further, the Supreme Court has warned of the danger to First Amendment rights inherent in national security surveillances:

"National security cases . . . often reflect a convergence of First and Fourth Amendment values not present in cases of 'ordinary' crime. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to

constitutionally protected speech. 'Historically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power,' Marcus v. Search Warrant, 367 U.S. 717, 724 (1961). History abundantly documents the tendency of Government -- however benevolent and benign its motives -- to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security.' Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent." United States v. United States District Court, 407 U.S. 297, 313 (1971).

Notwithstanding these warnings, H.R. 7308 would permit the electronic surveillance of United States citizens and other persons for 90 days or more without any showing that they are engaged in, or likely to be engaged in, criminal activity. Section 2521(b)(2)(B)(iv) would go even further and would permit the electronic surveillance of individuals who "knowingly" aid and abet persons whose conduct may be entirely lawful.

Surely, the burden of justifying such a departure from basic Fourth Amendment principles -- if indeed it can be justified -- ought to be on the proponents of such provisions. And, surely, they ought to be able to specify precisely those lawful activities of American citizens which are so vital to the safety of the nation that the

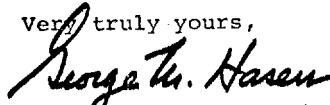
Government must be permitted to surreptitiously gather information about them and, worse, to do so by such an intrusive method as electronic surveillance. In our opinion, however, two Attorneys General have been unable to sustain that burden, and the few examples which have been offered of lawful activity requiring electronic surveillance are simply unconvincing. In our view, the necessity of a non-criminal standard has not been demonstrated, and it should, therefore, be rejected.

There is another and perhaps even more important reason why such a standard should not be accepted. If, in this first legislative attempt to control searches in national security matters, Congress authorizes the most intrusive and least precise of techniques -- electronic surveillance -- where no crime is involved, what justification will there be for barring in similar situations more specific methods such as surreptitious entry and mail openings? And if a non-criminal standard is necessary to protect the national security where the connection with a foreign power can be as tenuous as that provided in H.R. 7308, what arguments can be made against a similar standard in domestic situations where the perceived danger to national security may be just as great?

H.R. 7308 represents in some respects an advance over earlier proposals, but in our view, if a non-criminal standard is retained, enactment of this legislation will legitimize the very conduct it ought to prohibit and will constitute a serious blow to civil liberties.

If permitted by your procedures, it would be appreciated if this letter were made a part of the record of the hearings of your Subcommittee on this bill.

Very truly yours,



George M. Hasen, Chairman
Committee on Civil Rights

cc: Members of the Subcommittee
on Legislation

[APPENDIX F]

[From Comment, Sunday, June 5, 1977]

NIXON—ON GOING BEYOND THE LETTER OF THE LAW

(By Richard Nixon)

Discussions of whether presidents are above the law, dormant after the impeachment debates of 1973-74, arose again after former President Nixon's recent interviews with David Frost. (See text excerpts below.)

In response to widespread criticism of his remarks, Mr. Nixon has submitted this article to The Washington Star, expanding on his views. The article is also being made available by The Star to other newspapers.

Because of widespread misinterpretations of the comments I made on the inherent powers of the presidency in one of my recent television interviews, I feel I ought to set the record straight by stating in my own way what I believe those powers are. I would hope that the debate over my views could center on what those views are, not on the way they have been represented by columnists and cartoonists on the basis of fragments of one conversation. Others will have differing views, but the issue is a serious one which I hope can be seriously debated.

First, I do not believe and would not argue that a president is "above the law." Of course, he is not. The question is what is the law and how is it to be applied with respect to the president in fulfilling the duties of his office. Precedents over the years have sanctioned some degree of latitude in the use by presidents of emergency measures to meet emergency situations. I believe such latitude is necessary, and at times vital.

My insistence that this latitude does not place presidents "above the law" is not a semantic quibble. To me, it is a vital distinction which goes to the heart of our constitutional system.

The laws serve as a constraint on presidents, as they do on all other officials and all other citizens. When I stated, in the Frost interview, that "when the president does it, that means that it is not illegal," I was speaking within a very limited context of emergency actions, and I was referring to that traditional latitude provided in dealing with emergencies.

[Edited excerpts from Nixon-Frost interview broadcast May 19, 1977]

LEGAL OR ILLEGAL?

Frost. So, what in a sense you're saying is that there are certain situations, and the Huston Plan or that part of it was one of them, where the president can decide that it's in the best interests of the nation or something, and do something illegal.

Nixon. Well, when the president does it, that means that it is not illegal.

Frost. By definition.

Nixon. Exactly. Exactly. If the president... approves an action because of the national security, or in this case because of a threat to internal peace and order of significant magnitude, then the president's decision in that instance is one that enables those who carry it out, to carry it out without violating a law. Otherwise, they're in an impossible position.

Frost. But where do we draw the line? If you're saying that presidential fiat can mean that someone who does one of these black bag jobs, these burglaries, is not liable to criminal prosecution, why shouldn't the same presidential power apply to somebody who the president feels, in the national interest, should murder a dissenter? Now, I'm not saying it's happened. I'm saying: what's the dividing line between the burglar not being liable to criminal prosecution, and the murderer? Or isn't there one?

Nixon. Because, as you know * * * there are degrees, there are nuances, which are difficult to explain, but which are there. As far as this particular matter is concerned, each case has to be considered on its merits.

Frost. So, that in other words, really, the only dividing line, really, you were saying in that answer, really, between the burglary and murder is the president's judgment?

Nixon. Yes * * *.

In speaking of "the law," I mean the term to encompass the law in its entirety: the Constitution, the statutes, and that overlay of interpretation and usage which maintains the law as a living instrument. Every day, courts are required to interpret the written law in light of experience. Presidents have a comparable responsibility.

Sometimes the letter of one law conflicts with the spirit of another. In such cases, a president must choose which to follow. It was to this choice that Lincoln referred when he argued in 1864: "By general law life and limb must be protected, yet often the limb must be amputated to save a life, but a life is never wisely given to save a limb. I felt that measures, otherwise unconstitutional, might become lawful by becoming indispensable to the preservation of the Constitution through the preservation of the nation. Right or wrong, I assumed that ground and now avow it."

The argument over how broadly the inherent powers of the presidency should be construed is one of the oldest in our nation's constitutional history. Jefferson relied on the inherent powers of the office in making the Louisiana Purchase. History ratified his claim, even though lawyers and scholars debated it. Truman relied on inherent powers when he seized the steel industry in 1952, in order to avert a crippling war-time labor walkout. The Supreme Court ruled that he had exceeded his powers. Yet even in that case, three members of the court—led by Chief Justice Fred M. Vinson—argued that he had acted within his authority, and that the seizure should be upheld.

In his dissent, Vinson argued that the presidency "was deliberately fashioned as an office of power and independence. Of course, the framers created no autocrat capable of arrogating any power unto himself at any time. But neither did they create an automaton impotent to exercise the powers of government at a time when the survival of the republic itself may be at stake."

It is in the middle ground between those extremes—between the concepts of autocrat and automaton—that the argument really centers. It is not over whether a president has unlimited discretionary power or no discretionary power, but rather how much, what kind, and in what circumstances. This is necessarily a gray area, precisely because the powers we are debating are those needed to deal with unforeseen circumstances which often threaten uncertain consequences. Thus there is no way in which these powers can be codified satisfactorily, or exercised in a way which will not be subject to legitimate debate.

My own perspective on these powers was different when I was in the White House than it was when I was in Congress—just as many of my critics construed the powers more broadly when Franklin Roosevelt or Harry Truman was president, and more narrowly when I was president. My point here is not that one or the other view is right, but rather that the debate often turns less on what the powers are than on who happens to be exercising them. This in turn illustrates the subjective way in which the powers are viewed, and also the subjective way in which each president necessarily approaches their use.

The Constitution requires the president to "take care that the laws be faithfully executed." President Benjamin Harrison once described this duty as "the central idea of the office." Each person will have his own view of what "faithful" execution of the laws means. My own view—supported by the practice of past presidents—is that it means executing them in a manner faithful to the nation's vital interests. It does not mean executing them mindlessly or mechanically. In emergency situations it means executing them so in a manner faithful to the spirit of our basic laws, and yet at the same time faithful to that basic trust which a people repose in their chief executive trust that he will do what is necessary, in their interest and in their name, when their safety or the security of the nation itself is threatened.

Faithful execution sometimes requires finding appropriate ways to apply the laws to meet particular circumstances. We have always recognized, for example, that exceptions have to be made in wartime. In dealing with a major threat to the public safety, a president who let himself be paralyzed by the strict letter of the law would violate his oath: that would *not* be faithful execution, because his ultimate responsibility under law is to the nation and its citizens.

Discretionary power in administering or executing the laws is not unique to the president. Prosecutors sometimes elect not to enforce a particular statute, when the surrounding circumstances persuade them that to do so

would result in an injustice rather than justice, or when it would compromise other national interests—for example, by revealing intelligence sources. A lot of jurisdictions still have archaic laws on the books, so bizarre that no one expects them to be enforced.

The point is that the law is not a precision instrument. Those who write the laws can never foresee all the circumstances in which those laws might be applied. Therefore, those charged with executing them need some measure of latitude, some room for the exercise of judgment, for prudent response, for protecting the public interest—for adapting the statutory laws to the laws of necessity and to the rule of reason. We have traditionally provided that latitude.

To maintain that anything at all—anything without limit—which a president might order thereby became legal would be absurd, and I doubt that anyone would seriously assert such a claim. But it would be equally absurd to maintain that there is no area of discretion in which a president can take emergency actions to meet emergency situations, and, by his sanction, protect subordinate officers against legal penalties.

This range of discretion is not unlimited. It has to be bounded by the limits of common sense, of necessity, and of fidelity to the basic concepts of our Constitution and of our body of statute law, as interpreted by the courts. These limits do not protect against all abuse, but they do protect against substantial abuse—and no system, however circumscribed, can be perfect.

The nature of power is that it will sometimes be abused, even unwittingly—by the executive, by the legislature, and by the courts themselves. But the exercise of power is not necessarily the abuse of power, even when that exercise results in a technical breach of statutory limits. It may be, and frequently is, an effort to reconcile conflicts between law and necessity. As Thomas Jefferson wrote in 1810,

“A strict observance of the written law is doubtless one of the high duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of saving our country when in danger, are of a higher obligation * * * to lose our country by a scrupulous adherence to the written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.”

The so-called Huston Plan—which we never put into effect, though my approval of it was in effect for five days until I rescinded that approval—was, quite specifically, targeted at an organized, clandestine campaign of violence in which people were being killed and communities terrorized. Because it was organized and directed nationally, combatting it was a federal responsibility. It was getting worse, and we had no idea how much worse it was going to get.

The principal groups targeted were the Weathermen and the Black Panthers, both products of the fad in the late 1960s of preaching hate and romanticizing violence, even murder. Both groups openly preached murder and terrorism. In 1970, there were 50,000 bomb threats, and 3,000 actual bombings in the United States. In the first half of 1970, there were almost as many guerilla acts of sabotage and terrorism as there were in the entire 12 months of 1969.

A decade ago, a high FBI official reported in a secret memo (since made public by the Senate Intelligence Committee) that the results of just one illegal surreptitious entry had been used to “bring about (the) near disintegration” of the Ku Klux Klan. Was that breach of the law by the FBI right or wrong? Was the Klan's threat to individual liberties sufficient to justify that intrusion on its members' liberties?

The same question posed by the Klan's activities was posed by those of the Weathermen. When a New York townhouse blew up in March 1970, it turned out to have been a bomb factory operated by the Weathermen. Did saving the lives threatened by the Weathermen's bombs justify intruding on the Weathermen's liberties?

These are questions presidents confront. In the real world, where the price of not acting may be paid in the lives of innocent citizens, the answers are not easy.

War abroad, organized violence and terror at home—these were the emergencies we faced in 1970. Future presidents will face other emergencies. They

may be less serious, or they may be more so. The one thing certain about them is that their nature cannot be predicted with certainty. All we can be sure of is that they will occur.

Because we cannot forecast what form they will take, we cannot prescribe in advance what measures will be needed to deal with them successfully. That is why we must leave this gray area of discretionary authority, this residue of inherent powers that are not spelled out because they cannot be.

Any system of government based on the ideal of freedom must, of necessity, be a structure of balances. We seek to balance freedom and order; legislative, executive and judicial powers; federal, state and local responsibilities; the role of government and the rights of the citizen. Any balance struck is going to be, to some extent, unsatisfactory. This is the nature of balancing. But unless we maintain a balance, we risk sacrificing either our liberty or our safety.

Presidents are elected not merely to be automatons, but to exercise judgment. The decisions that reach a president's desk are, by definition, the close decisions. Those which admit of easy, black-and-white answers, are decided at a lower level.

It would be disastrous if, in an excess of prohibitory zeal, we were to tie the president's hands now and in the future, limiting him merely to the mechanical function of executing the precise letter of the law written in other times and for other circumstances. We have to place some faith in his judgement. We have to give him room for maneuver. We have to weigh the potential for abuse if we do allow him to act, against the potential for disaster if we do not allow him to act.

A president has basic responsibilities, rooted in the Constitution and refined through nearly two centuries of national experience, for the safety and well-being of the nation and its people. He is not an autocrat. He does not rule by fiat. His powers are not unlimited. But neither can he be powerless to go beyond the strict letter of existing law—in a limited way, and at times of special need—and still meet these larger responsibilities. The result is a situation somewhat anomalous by nature, one that allows for no precise definition, but one in which the letter of the law and the light of experience must both be the sometimes conflicting guideposts by which he steers.

This is quintessentially an area in which we must follow the dictates of common sense, recognizing that faithful execution of the laws is not always literal execution of the laws. Nearly two centuries of usage have sanctioned this range of discretion. It is a limited range, but a vital one, and impossible to codify because it does deal with the unforeseen. In an emergency, we must not have our chief executive so paralyzed by laws written for other circumstances that he cannot act in these circumstances.

In each situation, there will be differing judgments about what necessity requires. But a president cannot escape the need to make those judgments. He can and should be held accountable for the wisdom with which he makes them. But to fail to make them would be an abdication of his prime responsibility—to ensure the security of the nation and the safety of its people.

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