SURVEILLANCE

HEARINGS

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-FOURTH CONGRESS

FIRST SESSION

ON

THE MATTER OF WIRETAPPING, ELECTRONIC EAVESDROPPING, AND OTHER SURVEILLANCE

FEBRUARY 6, 18; MARCH 4, 18, 21; MAY 22; JUNE 26; JULY 25; AND SEPTEMBER 8, 1975

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CONTENTS

SURVEILLANCE

THURSDAY, FEBRUARY 6, 1975

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 10:10 a.m., pursuant to call, in room 2141, Rayburn House Office Building, Hon. Robert W. Kastenmeier [chairman of the subcommittee] presiding.

Present: Representatives Kastenmeier, Danielson, Drinan, Badillo, Railsback, Wiggins, and Cohen.

Also present: Bruce A. Lehman, counsel; Timothy A. Boggs, professional staff member; and Thomas E. Mooney, associate counsel.

Mr. KASTENMEIER. The subcommittee will come to order. The Subcommittee on Courts, Civil Liberties, and the Administration of Justice is meeting this morning on the matter of wiretapping, electronic eavesdropping, and other surveillance conducted by the Government.

In the past there have been occasional intermittent revelations of unethical conduct by Government investigators. However, in recent weeks and months we have been confronted with a plethora of revelations cascading upon us on almost a daily basis concerning secret surveillance and intelligence gathering reaching into the private lives of Americans.

Meanwhile congressional and public concern has been welling up about the stories of eavesdropping and snooping which fill our daily papers. Our job as a subcommittee is to learn what is happening and develop legislative remedies.

Much has been made about surveillance of public officials lately. However, the concern, the threat does not end there. For example, last year the Federal Bureau of Investigation admitted conducting surveillance of the mail of a 16-year-old New Jersey schoolgirl after she wrote a letter to the Socialist Workers Party as part of a class project. If this young woman is not secure from the Government spy, what can we assume about those more actively involved in the intellectual and political life of the Nation?

Of course, surveillance has not stopped with reading other people's mail. As testimony before this subcommittee last spring demonstrated, the forms of eavesdropping on private lives have included wiretapping of telephones, the use of surreptitious entry, and the bugging of homes.

The most insidious form of surveillance of all is the so-called warrantless wiretap or electronic surveillance which is conducted without the subject ever knowing that his privacy is being or has been invaded. And, warrantless wiretapping is normally conducted with regard to the subjects' political activities, raising the gravest questions of first- and fourth-amendment violations. It is warrantless wiretapping and electronic eavesdropping with all the variations made possible by modern technology which could form the cornerstone of a future police state.

On April 24, 26, and 29 of last year, our subcommittee began its inquiry with regard to surveillance by holding hearings on wiretapping and electronic eavesdropping. During those hearings the subcommittee heard a wide range of testimony, including that of Government witnesses such as Assistant Attorney General Henry Petersen, as well as spokesmen for the FBI and the Department of Defense. A former FBI agent turned private investigator, William Turner, testified about his knowledge of both Government and private snooping. Colleagues from the Congress also testified on over 13 different bills then pending in the subcommittee. We also heard from the chief security officer of the American Telephone and Telegraph Co., and two of the individuals who will appear here this morning, Attorneys Leon Friedman and John Shattuck. Unfortunately, we were unable to continue to examine the subject in greater detail because of the intervention of the full committee's impeachment inquiry, and the subsequent confirmation hearings for the Vice President.

However, neither public nor congressional interest in the question of surveillance has waned since we temporarily laid aside our inquiry. Within the month since the 94th Congress convened, more than 13 bills relating to surveillance with over 70 House sponsors have been introduced and referred to the subcommittee. Without objection, at this point these bills will be inserted in the record.

[The bills referred to follow:]

94TH CONGRESS
1ST SESSION

H. R. 141

IN THE HOUSE OF REPRESENTATIVES

JANUARY 14, 1975

MR. KASTENMEIER introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend title 18, United States Code, with respect to surveillance practices and procedures.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Surveillance Practices and Procedures Act of 1975".

SEC. 2. Section 2510 of title 18 of the United States Code is amended—

(1) by striking out "and" at the end of subsection (10);

(2) by striking out the period at the end of subsection (11) and inserting in lieu thereof a semicolon; and

(3) by inserting immediately after subsection (11) the following new subsections:

"(12) 'foreign agent' means a person who is engaged in activities which, in the opinion of the Attorney General, are intended to serve the interests of a foreign principal and undermine the security or national defense of the United States; and

"(13) 'foreign principal' includes—

"(a) a government of a foreign country and a foreign political party;

"(b) a person outside of the United States, unless it is established that such person is an individual and a citizen of and domiciled within the United States, or that such person is not an individual and is organized under or created by the laws of the United States or of any State or other place subject to the jurisdiction of the United States and has its principal place of busines within the United States; and

"(c) a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country.".

SEC. 3. (a) Section 2511 of title 18 of the United States Code is amended by striking out subsection (3).

(b) Section 2516(1) (a) of such title 18 is amended—

(1) by inserting immediately after "(a)" the following: "the activities of a foreign agent, or of"; and

(2) by inserting immediately after "imprisonment for more than one year" the following: "if there is, in the judgment of the authorizing official, probable cause to believe that the individual whose communications are to be intercepted is a foreign agent, or has committed or is about to commit such offense, and if such offense is punishable".

(c) Section 2518(3) of such title 18 is amended—

(1) in paragraph (a), by striking out "offense enumerated" and inserting in lieu thereof "offense or activity specified"; and

(2) in paragraph (b), by inserting "or activity" immediately after "offense".

(d) Section 2518(4) (c) of such title 18 is amended by inserting "or activity" immediately after "offense".

SEC. 4. Section 2519 of title 18, United States Code, is amended by inserting at the end thereof the following new subsections:

"(4) In January, April, July, and October of each year, the Attorney General shall report to the Committees on the Judiciary and on Foreign Relations of the Senate and the Committees on the Judiciary and on Foreign Affairs of

the House of Representatives the following information with respect to interceptions of wire or oral communications made during the preceding three months pursuant to applications made under section 2516 and orders and extensions granted or denied under section 2518 of this chapter:

"(a) the number of such orders and such extensions applied for during the preceding three months;

"(b) the number of such orders and extensions granted;

"(c) the number of such orders and extensions denied;

"(d) the maximum and minimum numbers of such interceptions in place at any time during the preceding three months:

"(e) the number of such interceptions terminated during the preceding three months;

"(f) the duration of all such interceptions in place on the day of the report;

"(g) the duration of all such interceptions terminated during the preceding three months;

"(h) the status of all interceptions made under the provisions of section 2518 of this chapter within the preceding three months; and

"(i) the costs of all such interceptions made during the preceding three months.

"(5) The President, the Attorney General, and all departments and agencies of the United States shall supply to any committee named in subsection (4) of this section, upon request of such committee, any information regarding any interception of wire or oral communications made or applied for pursuant to section 2516 or section 2518 of this chapter, within thirty days after the receipt of such request.".

94TH CONGRESS
1ST SESSION

H. R. 142

IN THE HOUSE OF REPRESENTATIVES

JANUARY 14, 1975

MR. KASTENMEIER introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To enforce the first amendment and fourth amendment to the Constitution and the constitutional right of privacy by prohibiting any civil officer of the United States or any member of the Armed Forces of the United States from using the Armed Forces of the United States to exercise surveillance of civilians or to execute the civil laws, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. This Act may be cited as the "Freedom From Military Surveillance Act of 1975".

SEC. 2. (a) Chapter 67 of title 18, United States Code, is amended by adding at the end thereof the following new sections:

"§ 1386. Use of the Armed Forces of the United States for surveillance prohibited

"(a) Except as provided in subsection (b) of this section or otherwise required by statute, whoever being a civil officer of the United States or a member of the Armed Forces of the United States willfully causes any part of the Armed Forces of the United States to conduct investigations into, maintain surveillance over, or maintain records regarding the beliefs, associations, political activities, or private affairs of any citizen of the United States who is not a member of the Armed Forces, or regarding the beliefs, membership, or political activities of any group or organization of such citizens, shall be fined not more than $10,000, or imprisoned not more than two years, or both.

"(b) Nothing contained in the provisions of this section shall be deemed either to limit or to enlarge such legal authority of the Armed Forces of the United States as may exist to:

"(1) collect, receive, or maintain information relevant to a criminal investigation, the conduct of which has been lawfully charged to the Armed Forces of the United States;

"(2) collect, receive, or maintain information relevant to lawful investigations of persons who are applicants for employment with the Armed Forces of the

United States, who are employees of the Armed Forces of the United States, or who are contractors, or prospective contractors, with the Armed Forces of the United States;

"(3) collect, receive, or maintain information necessary and proper to the restoration of public order once the Armed Forces of the United States have been deployed under the provisions of title 10, United States Code, sections 331, 332, 333, and 334: *Provided, however,* That such information shall be destroyed no later than sixty days after the withdrawal of such Armed Forces.

"(c) As used in this section the term—

"(1) 'civil officer of the United States' means any civilian employee of the United States;

"(2) 'Armed Forces of the United States' means the Army, Navy, Air Force, Marine Corps, Coast Guard, and the militia of any State when in Federal service;

"(3) 'militia' has the same meaning as that set forth in section 311, title 10, United States Code;

"(4) 'investigations' means any oral or written inquiry directed to any person, organization, or agency of Government;

"(5) 'surveillance' means any monitoring of persons, places, or events by means of electronic intercep-

tion, overt and covert infiltration, overt and covert observation, photography, and the use of informants;

"(6) 'records' means records resulting from any investigation or surveillance conducted by the Armed Forces of the United States, or resulting from any investigation or surveillance conducted by any governmental agency of the United States or any State;

"(7) 'private affairs' means the financial, medical, sexual, marital, or familial affairs of an individual."

(b) The analysis of chapter 67 of such title is further amended by adding at the end thereof the following new item:

"1386. Use of Armed Forces of the United States for surveillance prohibited.".

SEC. 3. (a) Title 28, United States Code, is amended by adding after chapter 171 the following new chapter:

"Chapter 172. ILLEGAL SURVEILLANCE

"Sec.
"2691. Civil actions generally; illegal surveillance.
"2692. Special class actions; illegal surveillance.
"2693. Venue; jurisdictional amount.

"§ 2691. Civil action, generally; illegal surveillance

"(a) Except as provided in subsection (b) of section 1386, title 18, United States Code, or otherwise required by statute, whoever being a civil officer of the United States or a member of the Armed Forces of the United States causes

any part of the Armed Forces of the United States to conduct investigations into, maintain surveillance over, or maintain records regarding the beliefs, associations, political activities, or private affairs of any citizen of the United States who is not a member of the Armed Forces, or regarding the beliefs, membership, or political activities of any group or organization of such citizens shall be liable for damages to any person, group, or organization that has been the subject of a prohibited investigation, surveillance, or recordkeeping in an amount equal to the sum of—

"(1) any actual damages suffered by plaintiff, but not less than liquidated damages at the rate of $100 per day for each day the prohibited activity was conducted;

"(2) such punitive damages as the court may allow, but not in excess of $1,000; and

"(3) the costs of any successful action, including reasonable attorneys' fees.

"(b) Any person, group, or organization that has been the subject of any investigation, surveillance, or recordkeeping in violation of subsection (a) of this section may bring a civil action against the United States for such equitable relief as the court determines appropriate to enjoin and redress such violation.

"§ 2692. Special class actions; illegal surveillance

"Any person, group, or organization that has been the subject of any investigation, surveillance, or recordkeeping in violation of subsection (a) of section 2691 of this chapter, may bring a class action against the United States on behalf of himself and others similarly situated for such equitable relief as the court determines appropriate to enjoin and redress such violations.

"§ 2693. Venue; jurisdictional amount

"(a) A person may bring a civil action under this chapter in any district court of the United States for the district in which the violation occurs, or in any district court of the United States for the district in which such person resides or conducts business, or has his principal place of business, or in the District Court of the United States for the District of Columbia.

"(b) Any Federal court in which a civil action under this chapter is brought pursuant to subsection (a) shall have jurisdiction over such action regardless of the pecuniary amount in controversy."

(b) The analysis of part VI of such title 28 is amended by adding immediately after item 171 the following new item:

"172. Illegal surveillance---------- 2691".

(c) Section 1343 of title 28, United States Code, is amended by redesignating paragraph (4) as paragraph (5) and by inserting immediately after paragraph (3) the following new paragraph:

"(4) To recover damages or to secure equitable or other relief under chapter 172 of this title;"

SEC. 4. The civil actions provided by the amendments to title 28, United States Code, made by this Act shall apply only with respect to violations of subsection 2691(a) of title 28, United States Code, as added by this Act, arising on or after the date of enactment of this Act.

SEC. 5 (a) Section 1385 of title 18, United States Code, is amended by striking out "the Army or the Air Force" and inserting in lieu thereof the following: "the Armed Forces of the United States".

(b) (1) The section heading 1385 of such title is amended to read as follows:

"§ 1385. Use of Armed Forces of the United States as posse comitatus"

(2) Item 1385 of the analysis of chapter 67 is amended to read as follows:

"1385. Use of Armed Forces of the United States as posse comitatus.".

94TH CONGRESS
1ST SESSION

H. R. 266

IN THE HOUSE OF REPRESENTATIVES

JANUARY 14, 1975

Mr. BOLAND introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To enforce the first amendment and fourth amendment to the Constitution and the constitutional right of privacy by prohibiting any civil officer of the United States or any member of the Armed Forces of the United States from using the Armed Forces of the United States to exercise surveillance of civilians or to execute the civil laws, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. This Act may be cited as the "Freedom From Military Surveillance Act of 1974".

SEC. 2. (a) Chapter 67 of title 18, United States Code, is amended by adding at the end thereof the following new sections:

"§ 1386. Use of the Armed Forces of the United States for surveillance prohibited

"(a) Except as provided in subsection (b) of this section or otherwise required by statute, whoever being a civil officer of the United States or a member of the Armed Forces of the United States willfully causes any part of the Armed Forces of the United States to conduct investigations into, maintain surveillance over, or maintain records regarding the beliefs, associations, political activities, or private affairs of any citizen of the United States who is not a member of the Armed Forces, or regarding the beliefs, membership, or political activities of any group or organization of such citizens, shall be fined not more than $10,000, or imprisoned not more than two years, or both.

"(b) Nothing contained in the provisions of this section shall be deemed either to limit or to enlarge such legal authority of the Armed Forces of the United States as may exist to:

"(1) collect, receive, or maintain information relevant to a criminal investigation, the conduct of which has been lawfully charged to the Armed Forces of the United States;

"(2) collect, receive, or maintain information relevant to lawful investigations of persons who are applicants for employment with the Armed Forces of the

United States, who are employees of the Armed Forces of the United States, or who are contractors, or prospective contractors, with the Armed Forces of the United States;

"(3) collect, receive, or maintain information necessary and proper to the restoration of public order once the Armed Forces of the United States have been deployed under the provisions of title 10, United States Code, sections 331, 332, 333, and 334: *Provided, however,* That such information shall be destroyed no later than sixty days after the withdrawal of such Armed Forces.

"(c) As used in this section the term—

"(1) 'civil officer of the United States' means any civilian employee of the United States;

"(2) 'Armed Forces of the United States' means the Army, Navy, Air Force, Marine Corps, Coast Guard, and the militia of any State when in Federal service;

"(3) 'militia' has the same meaning as that set forth in section 311, title 10, United States Code;

"(4) 'investigations' means any oral or written inquiry directed to any person, organization, or agency of Government;

"(5) 'surveillance' means any monitoring of persons, places, or events by means of electronic

interception, overt and covert infiltration, overt and covert observation, photography, and the use of informants;

"(6) 'records' means records resulting from any investigation or surveillance conducted by the Armed Forces of the United States, or resulting from any investigation or surveillance conducted by any governmental agency of the United States or any State;

"(7) 'private affairs' means the financial, medical, sexual, marital, or familial affairs of an individual."

(b) The analysis of chapter 67 of such title is further amended by adding at the end thereof the following new item.

"1386. Use of Armed Forces of the United States for surveillance prohibited.".

SEC. 3. (a) Title 28, United States Code, is amended by adding after chapter 171 the following new chapter:

"Chapter 172.—ILLEGAL SURVEILLANCE

"Sec.
"2691. Civil actions generally; illegal surveillance.
"2692. Special class actions; illegal surveillance.
"2693. Venue; jurisdictional amount.

"§ 2691. Civil action, generally; illegal surveillance

"(a) Whoever violates any provision of section 1386 of title 18, United States Code, shall be liable for damages to any person, group, or organization that, as a result of such violation, has been the subject of a prohibited investiga-

tion, surveillance or recordkeeping in an amount equal to the sum of:

"(1) any actual damages suffered by plaintiff, but not less than liquidated damages at the rate of $100 per day for each day the prohibited activity was conducted;

"(2) such punitive damages as the court may allow, but not in excess of $1,000; and

"(3) the costs of any successful action, including reasonable attorneys' fees.

"(b) Any person, group, or organization that has been the subject of any investigation, surveillance, or recordkeeping in violation of section 1386, title 18, United States Code, may bring a civil action against the United States for such equitable relief as the court determines appropriate to enjoin and redress such violation.

"§ 2692. Special class actions; illegal surveillance

"Any person, group, or organization that has been the subject of any investigation, surveillance, or recordkeeping in violation of section 1386, title 18, United States Code, may bring a class action against the United States on behalf of himself and others similarly situated for such equitable relief as the court determines appropriate to enjoin and redress such violations.

"§ 2693. Venue; jurisdictional amount

"(a) A person may bring a civil action under this chapter in any district court of the United States for the district in which the violation occurs, or in any district court of the United States for the district in which such person resides or conducts business, or has his principal place of business, or in the District Court of the United States for the District of Columbia.

"(b) Any Federal court in which a civil action under this chapter is brought pursuant to subsection (a) shall have jurisdiction over such action regardless of the pecuniary amount in controversy."

(b) The analysis of part VI of such title 28 is amended by adding immediately after item 171 the following new item:

"172. Illegal surveillance---------- 2691".

(c) Section 1343 of title 28, United States Code, is amended by redesignating paragraph (4) as paragraph (5) and by inserting immediately after paragraph (3) the following new paragraph:

"(4) To recover damages or to secure equitable or other relief under chapter 172 of this title;".

SEC. 4. The civil actions provided by the amendments to title 28, United States Code, made by this Act shall apply only with respect to violations of section 1386 of title 18,

United States Code, as added by this Act, arising on or after the date of enactment of this Act.

SEC. 5. (a) Section 1385 of title 18, United States Code, is amended by striking out "the Army or the Air Force" and inserting in lieu thereof the following: "the Armed Forces of the United States".

(b) (1) The section heading 1385 of such title is amended to read as follows:

"§ 1385. Use of Armed Forces of the United States as posse comitatus".

(2) Item 1385 of the analysis of chapter 67 is amended to read as follows:

"1385. Use of Armed Forces of the United States as posse comitatus.".

94TH CONGRESS
1ST SESSION

H. R. 539

IN THE HOUSE OF REPRESENTATIVES

JANUARY 14, 1975

Ms. HOLTZMAN introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To enforce the first amendment and fourth amendment to the Constitution, and the constitutional right of privacy by prohibiting any civil or military officer of the United States or the militia of any State from using the Armed Forces of the United States or the militia of any State to exercise surveillance of civilians or to execute the civil laws, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Freedom From Surveillance Act of 1975".

SEC. 2. (a) Chapter 67 of title 18, United States Code, is amended by adding at the end thereof the following new sections:

"§ 1386. Use of the Armed Forces of the United States for surveillance prohibited

"(a) Except as provided in subsection (b) of this section, whoever being a civil officer of the United States or an officer of the Armed Forces of the United States employs any part of the Armed Forces of the United States or the militia of any State to conduct investigations into, maintain surveillance over, or record or maintain information regarding, the beliefs, associations, or political activities of any person not a member of the Armed Forces of the United States, or of any civilian organization, shall be fined not more than $10,000, or imprisoned not more than two years, or both.

"(b) The prohibition under subsection (a) shall not apply to the use of the Armed Forces of the United States or the militia of any State—

"(1) when they have been actually and publicly assigned by the President to the task of repelling invasion or suppressing rebellion, insurrection, or domestic violence pursuant to the Constitution or section 331, section 332, or section 333 of title 10 of the United States Code; or

"(2) to investigate criminal conduct committed on a military installation or involving the destruction, dam-

age, theft, unlawful seizure, or trespass of the property of the United States; or

"(3) to determine the suitability for employment or for retention in employment of any individual actually seeking employment or employed by the Armed Forces of the United States or by the militia of any State, or by a defense facility; or

"(4) whenever the militia of any State is under the command or control of the chief executive of that State or any other appropriate authorities of that State.

"(c) As used in this section, the term—

"(1) 'Armed Forces of the United States' means the Army, Navy, Air Force, Marine Corps, and Coast Guard;

"(2) 'militia' has the same meaning as that set forth in section 311 of title 10, United States Code;

"(3) 'civil officer of the United States' means any civilian employee of the United States;

"(4) 'surveillance' means any monitoring conducted by means which include but are not limited to wiretapping, electronic eavesdropping, overt and covert infiltration, overt and covert observation, and civilian informants;

"(5) 'defense facility' has the same meaning as that

set forth for the term 'facility' in section 782 (7) of title 50, United States Code.".

(b) The analysis of chapter 67 of such title is amended by adding at the end thereof the following new item:

"1386. Use of Armed Forces of the United States for surveillance prohibited.".

SEC. 3. (a) Title 28, United States Code, is amended by adding after chapter 171 the following new chapter:

"Chapter 172.—ILLEGAL SURVEILLANCE

"Sec.
"2691. Civil actions generally; illegal surveillance.
"2692. Special class actions; illegal surveillance.
"2693. Venue.

"§ 2691. Civil actions, generally; illegal surveillance

"(a) Whenever any person is aggrieved as a result of any act which is prohibited by section 1386 of title 18, United States Code, such a person may bring a civil action for damages irrespective of the actuality or amount of pecuniary injury suffered.

"(b) Whenever any person is threatened with injury as a result of any act which is prohibited by section 1386 of such title, such a person may bring a civil action for such equitable relief as the court determines may be appropriate irrespective of the actuality or amount of pecuniary injury threatened.

"§ 2692. Class action; illegal surveillance.

"Whenever any person has reason to believe that a vio-

lation of section 1386 of title 18, United States Code, has occurred or is about to occur, such person may bring a civil action on behalf of himself and others similarly situated against any civil officer of the United States or any military officer of the Armed Forces of the United States to enjoin the planning or implementation of any activity in violation of that section.

"§ 2693. Venue

"A person may bring a civil action under this chapter in any district court of the United States for the district in which the violation occurs, or in any district court of the United States in which such person resides or conducts business, or has his principal place of business, or in the District Court of the United States for the District of Columbia.".

(b) The analysis of part VI of such title 28 is amended by adding immediately after items 171 the following new item:

"172. Illegal surveillance---------- 2691".

(c) Section 1343 of title 28, United States Code, is amended by redesignating paragraph (4) as paragraph (5) and by inserting immediately after paragraph (3) the following new paragraph:

"(4) To recover damages or to secure equitable or other relief under chapter 172 of this title;".

SEC. 4. (a) Section 1385 of title 18, United States

Code, is amended by striking out "the Army or the Air Force" and inserting in lieu thereof the following: "the Armed Forces of the United States."

(b) (1) The section heading of section 1385 of such title is amended to read as follows:

"§ 1385. Use of Armed Forces of the United States as posse comitatus."

(2) Item 1385 of the analysis of chapter 67 is amended to read as follows:

"1385. Use of Armed Forces of the United States as posse comitatus.".

57-282 O - 76 - pt. 1 - 3

94TH CONGRESS
1ST SESSION

H. R. 171

IN THE HOUSE OF REPRESENTATIVES

JANUARY 14, 1975

Ms. ABZUG introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend title 18 of the United States Code to prohibit the interception of certain communications unless all parties to the intercepted communication consent.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2511 of title 18 of the United States Code is amended by—

(1) striking out, in subsection (2) (c), "or one of the parties to such interception" and inserting in lieu thereof ", but only if all of the parties to the communication have given prior consent to such interception."; and

(2) striking out, in subsection 2 (d), "or where one

2

of the parties to the communication has given prior consent to such interception" and inserting in lieu thereof ", but only if all of the parties to the communication have given prior consent to such interception,".

94TH CONGRESS
1ST SESSION

H. R. 620

IN THE HOUSE OF REPRESENTATIVES

JANUARY 14, 1975

Mr. LONG of Maryland (for himself, Mr. HECHLER of West Virginia, Mr. RIEGLE, Mr. BROWN of California, Mrs. CHISHOLM, Mr. MOSS, Mr. CHARLES WILSON of Texas, Mr. MITCHELL of Maryland, Mr. DIGGS, Mr. RANGEL, Mr. HELSTOSKI, Mrs. COLLINS of Illinois, Mr. HARRINGTON, and Mrs. MINK) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend title 18 of the United States Code to require the consent of all persons whose communications are intercepted under certain provisions relating to certain types of eavesdropping.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2511 (2) of title 18 of the United States Code is amended by striking out paragraphs (c) and (d), and inserting in lieu thereof the following:

"(c) It shall not be unlawful under this chapter for a person to electronically record or otherwise intercept a wire

or oral communication where all parties to the communication have given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act."

94TH CONGRESS
1ST SESSION

H. R. 214

IN THE HOUSE OF REPRESENTATIVES

JANUARY 14, 1975

Mr. MOSHER introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To require in all cases court orders for the interception of communications by electronic and other devices, for the entering of any residence, for the opening of any mail, for the inspection or procurement of certain records, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Bill of Rights Procedures Act of 1975".

FINDINGS AND PURPOSES

SEC. 2. (a) The Congress hereby finds and declares that—

(1) the rights of the people of the United States under the Constitution of the United States are endan-

gered by interception of communications by electronic and other devices, the entry of dwellings, opening of mail, and the inspection of and procuring of the records of telephone, bank, credit, medical, or other business or private transactions of any individual when undertaken by officials, agents, or employees of the United States without a court order issued upon probable cause that a crime has been or is about to be committed, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized;

(2) the constitutional duty of the Congress to make the laws and to provide for the common defense, and the constitutional duty of the President to execute the laws and to command the Armed Forces and other security forces according to rules and regulations made by the Congress, would not be impeded by requiring court orders for any interception of communications by electronic and other devices, the entry of dwellings, opening of mail, or the inspection of and procuring of the records of telephone, bank, credit, medical, or other business or private transactions of any individual;

(3) the constitutional duty of the Congress to make laws to protect the national security of the United States and the constitutional duty of the President to execute

such laws should not limit the rights of individuals under the Constitution of the United States. Any interception of communications by electronic and other devices, the entry of dwellings, opening of mail, or the inspection of and procuring of the records of telephone, bank, credit, medical, or other business or private transactions of any individual which is undertaken on any grounds, including but not limited to, national security or foreign policy, without a court order issued upon probable cause that a crime has been or is about to be committed, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized, constitutes "an unreasonable search and seizure" within the meaning of the fourth amendment to the Constitution of the United States.

(b) It is therefore the purpose of this Act to prohibit any interception of communication by electronic and other devices, surreptitious entry, mail opening, or the inspection of and procuring of the records of telephone, bank, credit, medical, or other business or private transaction of any individual without a court order issued upon probable cause that a crime has been or is about to be committed, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

SEARCHES AND SEIZURES

SEC. 3. Section 2236 of title 18, United States Code, is amended to read as follows:

"§ 2236. Searches without warrant

"(a) Whoever, being an officer, agent, or employee of the United States or any department or agency thereof willfully—

"(1) searches any private dwelling used and occupied as a dwelling without a warrant directing such search or maliciously and without reasonable cause searches any other building or property without a search warrant;

"(2) procures or inspects the records of telephone calls, bank, credit, medical, or other business or private transactions of any individual without a search warrant or the consent of the individual;

"(3) opens any foreign or domestic mail not directed to him without a search warrant directing such opening or without the consent of the sender or addressee of such mail in violation of section 3623(d) of title 39; or

"(4) intercepts, endeavors to intercept, or procures any other person to intercept any wire or oral communication except as authorized under chapter 119;

shall be fined not more than $10,000 or imprisoned not more than one year, or both.

"(b) (1) The provisions of section (a) (1) shall not apply to any person—

"(A) serving a warrant of arrest;

"(B) arresting or attempting to arrest a person committing or attempting to commit an offense in his presence, or who has committed or is suspected on reasonable grounds of having committed a felony; or

"(C) making a search at the request or invitation or with the consent of the occupant of the premises.

"(2) For purposes of subsection (a) the terms 'wire communication,' 'oral communication,' and 'intercept' shall have the same meaning as given to such terms under chapter 119.".

INTERCEPTION OF WIRE OR ORAL COMMUNICATIONS

SEC. 4. (a) Section 2511 (1) of such title 18 is amended by striking out "Except as otherwise specifically provided in this chapter" and inserting in lieu thereof "Except as specifically provided in chapter 109 in the case of any officer, agent, or employee of the United States,".

(b) Sections 2511 (3), 2518 (7), and 2518 (8) (d) of such title 18 are repealed.

REPORTING OF INTERCEPTED COMMUNICATIONS

SEC. 5. (a) Section 2519 of such title 18 is amended to read as follows:

"§ 2519. Reports concerning intercepted wire, oral, and other communications

"(a) Within thirty days after the date of an order authorizing or approving the interception of a wire or oral communication (or each extension thereof) entered under section 2518, or the denial of an order approving an interception, the person seeking such order shall report to the Administrative Office of the United States Courts and to the Committee on the Judiciary of the Senate and House Representatives—

"(1) the fact that an order or extension was applied for;

"(2) the kind of order or extension applied for;

"(3) the fact that the order or extension was granted as applied for, was modified, or was denied;

"(4) the period of interceptions authorized by the order, and the number and duration of any extensions of the order;

"(5) the names of all parties to the intercepted communications;

"(6) the offense specified in the order or application;

"(7) the identity of the investigative or law enforcement officer and agency making the application and the person authorizing the application to be made;

"(8) a copy of the court order authorizing, approving, or denying such interception;

"(9) the nature of the facilities from which or the place where communications were intercepted.

"(b) Within sixty days after the date of an order authorizing or approving the interception of a wire or oral communication (or extension thereof) entered under section 2518, or the denial of an order approving an interception, the judge hearing the application for such order shall transmit to the Committees on the Judiciary of the Senate and House of Representatives a complete transcript of the proceedings.

"(c) Within ninety days after the date of an order authorizing or approving the interception of a wire or oral communication (or each extension thereof) entered under section 2518, and within sixty days after the termination of any such interception, the person authorized to make such interception shall report to the Administrative Office of the United States Courts and to the Committees on the Judiciary of the Senate and House of Representatives the disposition of all records (including any logs or summaries of any such

interception) of any such interception and the identity of and action taken by all individuals who had acces to any such interception."

(b) (1) Any information transmitted or submitted, pursuant to section 2519 (a) (5) of title 18, United States Code (as added by subsection (a) of this section), to the Congress or to any standing, special, or select committee of either House of Congress or to any joint committee of the two Houses of Congress shall be treated as a confidential communication and kept secret.

(2) Paragraph (1) of this subsection is enacted by the Congress—

(A) as an exercise of the rulemaking power of the Senate and House of Representatives, respectively, and as such shall be considered as a part of the rules of each House, respectively, or of that House to which it specifically applies, and such rule shall supersede other rules only to the extent that they are inconsistent therewith, and

(B) with full recognition of the constitutional right of either House to change such rule (so far as it relates to the procedure in such House) at any time, in the same manner, and to the same extent as in the case of any other rule of such House.

REPORTING AUTHORIZATIONS TO OPEN MAIL

SEC. 6. Chapter 205 of such title 18 is amended by adding at the end thereof the following new section:

"§ 3117. Reporting requirements in the case of warrants issued authorizing the opening of mail

"(a) Within thirty days after the date of issuance of a warrant to open any mail or the denial of such a warrant the person seeking such warrant shall report to the Administrative Office of the United States Courts and to the Committee on the Judiciary of the Senate and House of Representatives—

"(1) the fact that a warrant was applied for;

"(2) the fact that the warrant was issued as applied for, was modified, or was denied;

"(3) the offense specified in the warrant;

"(4) the identity of the investigative or law enforcement officer and the agency making the application and the person authorizing the application to be made;

"(5) the names of the sender and addressee of all mail opened pursuant to such warrant;

"(6) a copy of the approved warrant;

"(7) the nature of the facilities from which or the place where any such mail was opened; and

"(8) the disposition of all records (including any

log, copy, or summary) of any such mail or the contents of such mail and the identity of and action taken by all individuals who had access to any such mail.

"(b) Within sixty days after the date of any warrant authorizing the opening of any mail, or the denial of any such warrant, the judge hearing the application for such warrant shall transmit to the Committee on the Judiciary of the Senate and House of Representatives a complete transcript of the proceeding."

TECHNICAL AMENDMENT

SEC. 7. The analysis of chapter 205 of such title 18 is amended by adding at the end thereof the following new item:

"3117. Reporting authorizations to open mail.".

94TH CONGRESS
1ST SESSION

H. R. 414

IN THE HOUSE OF REPRESENTATIVES

JANUARY 14, 1975

Mr. FISH introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To require in all cases court orders for the interception of communications by electronic and other devices, for the entering of any residence, for the opening of any mail, for the inspection or procurement of certain records, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Bill of Rights Procedures Act of 1974".

FINDINGS AND PURPOSES

SEC. 2. (a) The Congress hereby finds and declares that—

(1) the rights of the people of the United States

under the Constitution of the United States are endangered by interception of communications by electronic and other devices, the entry of dwellings, opening of mail, and the inspection of and procuring of the records of telephone, bank, credit, medical, or other business or private transactions of any individual when undertaken by officials, agents, or employees of the United States without a court order issued upon probable cause that a crime has been or is about to be committed, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized;

(2) the constitutional duty of the Congress to make the laws and to provide for the common defense, and the constitutional duty of the President to execute the laws and to command the Armed Forces and other security forces according to rules and regulations made by the Congress, would not be impeded by requiring court orders for any interception of communications by electronic and other devices, the entry of dwellings, opening of mail, or the inspection of and procuring of the records of telephone, bank, credit, medical, or other business or private transactions of any individual;

(3) the constitutional duty of the Congress to make laws to protect the national security of the United States and the constitutional duty of the President to execute

57-282 O - 76 - pt. 1 - 4

such laws should not limit the rights of individuals under the Constitution of the United States. Any interception of communications by electronic and other devices, the entry of dwellings, opening of mail, or the inspection of and procuring of the records of telephone, bank, credit, medical, or other business or private transactions of any individual which is undertaken on any grounds, including, but not limited to, national security or foreign policy, without a court order issued upon probable cause that a crime has been or is about to be committed, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized, constitutes "an unreasonable search and seizure" within the meaning of the fourth amendment to the Constitution of the United States.

(b) It is therefore the purpose of this Act to prohibit any interception of communication by electronic and other devices, surreptitious entry, mail opening, or the inspection of and procuring of the records of telephone, bank, credit, medical, or other business or private transaction of any individual without a court order issued upon probable cause that a crime has been or is about to be committed, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

SEARCHES AND SEIZURES

SEC. 3. Section 2236 of title 18, United States Code, is amended to read as follows:

"§ 2236. Searches without warrant

"(a) Whoever, being an officer, agent, or employee of the United States or any department or agency thereof willfully—

"(1) searches any private dwelling used and occupied as a dwelling without a warrant directing such search or maliciously and without reasonable cause searches any other building or property without a search warrant;

"(2) procures or inspects the records of telephone calls, bank, credit, medical, or other business or private transactions of any individual without a search warrant or the consent of the individual;

"(3) opens any foreign or domestic mail not directed to him without a search warrant directing such opening or without the consent of the sender or addressee of such mail in violation of section 3623 (d) of title 39; or

"(4) intercepts, endeavors to intercept, or procures any other person to intercept any wire or oral communication except as authorized under chapter 119;

shall be fined not more than $10,000 or imprisoned not more than one year, or both.

"(b) (1) The provisions of section (a) (1) shall not apply to any person—

"(A) serving a warrant of arrest;

"(B) arresting or attempting to arrest a person committing or attempting to commit an offense in his presence, or who has committed or is suspected on reasonable grounds of having committed a felony; or

"(C) making a search at the request or invitation or with the consent of the occupant of the premises.

"(2) For purposes of subsection (a) the terms 'wire communication', 'oral communication', and 'intercept' shall have the same meaning as given to such terms under chapter 119.".

INTERCEPTION OF WIRE OR ORAL COMMUNICATIONS

SEC. 4. (a) Section 2511 (1) of such title 18 is amended by striking out "Except as otherwise specifically provided in this chapter" and inserting in lieu thereof "Except as specifically provided in chapter 109 in the case of any officer, agent, or employee of the United States,".

(b) Sections 2511 (3), 2518 (7), and 2518 (8) (d) of such title 18 are repealed.

REPORTING OF INTERCEPTED COMMUNICATIONS

SEC. 5. (a) Section 2519 of such title 18 is amended to read as follows:

"§ 2519. Reports concerning intercepted wire, oral, and other communications

"(a) Within thirty days after the date of an order authorizing or approving the interception of a wire or oral communication (or each extension thereof) entered under section 2518, or the denial of an order approving an interception, the person seeking such order shall report to the Administrative Office of the United States Courts and to the Committees on the Judiciary of the Senate and House of Representatives—

"(1) the fact that an order or extension was applied for;

"(2) the kind of order or extension applied for;

"(3) the fact that the order or extension was granted as applied for, was modified, or was denied;

"(4) the period of interceptions authorized by the order, and the number and duration of any extensions of the order;

"(5) the names of all parties to the intercepted communications;

"(6) offense specified in the order or application;

"(7) the identity of the investigative or law en-

forcement officer and agency making the application and the person authorizing the application to be made;

"(8) a copy of the court order authorizing, approving, or denying such interception;

"(9) the nature of the facilities from which or the place where communications were intercepted.

"(b) Within sixty days after the date of an order authorizing or approving the interception of a wire or oral communication (or extension thereof) entered under section 2518, or the denial of an order approving an interception, the judge hearing the application for such order shall transmit to the Committees on the Judiciary of the Senate and House of Representatives a complete transcript of the proceedings.

"(c) Within ninety days after the date of an order authorizing or approving the interception of a wire or oral communication (or each extension thereof) entered under section 2518, and within sixty days after the termination of any such interception, the person authorized to make such interception shall report to the Administrative Office of the United States Courts and to the Committees on the Judiciary of the Senate and House of Representatives the disposition of all records (including any logs or summaries of any such interception) of any such interception and the identity of and action taken by all individuals who had access to any such interception."

(b) (1) Any information transmitted or submitted, pursuant to section 2519 (a) (5) of title 18, United States Code (as added by subsection (a) of this section), to the Congress or to any standing, special, or select committee of either House of Congress or to any joint committee of the two Houses of Congress shall be treated as a confidential communication and kept secret.

(2) Paragraph (1) of this subsection is enacted by the Congress—

(A) as an exercise of the rulemaking power of the Senate and House of Representatives, respectively, and as such shall be considered as a part of the rules of each House, respectively, or of that House to which it specifically applies, and such rule shall supersede other rules only to the extent that they are inconsistent therewith, and

(B) with full recognition of the constitutional right of either House to change such rule (so far as it relates to the procedure in such House) at any time, in the same manner, and to the same extent as in the case of any other rule of such House.

REPORTING AUTHORIZATIONS TO OPEN MAIL

SEC. 6. Chapter 205 of such title 18, is amended by adding at the end thereof the following new section:

"§ 3117. **Reporting requirements in the case of warrants issued authorizing the opening of mail**

"(a) Within thirty days after the date of issuance of a warrant to open any mail or the denial of such a warrant the person seeking such warrant shall report to the Administrative Office of the United States Courts and to the Committee on the Judiciary of the Senate and House of Representatives—

"(1) the fact that a warrant was applied for;

"(2) the fact that the warrant was issued as applied for, was modified, or was denied;

"(3) the offense specified in the warrant;

"(4) the identity of the investigative or law enforcement officer and the agency making the application and the person authorizing the application to be made;

"(5) the names of the sender and addressee of all mail opened pursuant to such warrant;

"(6) a copy of the approved warrant;

"(7) the nature of the facilities from which or the place where any such mail was opened; and

"(8) the disposition of all records (including any log, copy, or summary) of any such mail or the contents of such mail and the identity of and action taken by all individuals who had access to any such mail.

"(b) Within sixty days after the date of any warrant authorizing the opening of any mail, or the denial of any such warrant, the judge hearing the application for such warrant shall transmit to the Committee on the Judiciary of the Senate and House of Representatives a complete transcript of the proceedings."

TECHNICAL AMENDMENT

SEC. 7. The analysis of chapter 205 of such title 18 is amended by adding at the end thereof the following new item:

"3117. Reporting authorizations to open mail.".

94TH CONGRESS
1ST SESSION

H. R. 1603

IN THE HOUSE OF REPRESENTATIVES

JANUARY 17, 1975

Mr. DRINAN introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend certain sections (authorizing wiretapping and electronic surveillance) of title 18 of the United States Code.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress finds and declares that—

(1) Widespread wiretapping and electronic surveillance, both by private persons and Government agents, both under color of law, and without pretense of legal excuse or justification, has seriously undermined personal security and often violated fundamental constitutional rights, including the rights to free speech, press, and association, the rights to due process and equal protection, and the right to privacy.

(2) Complexities and defects in current Federal law

have aided those who engage in wiretapping and electronic surveillance, and current Federal law has not provided adequate safeguards against corrupt abuses of communications technology.

(3) No person, in any branch of the Federal Government, in however high an office, or in any other governmental or private position should be authorized either explicitly or implicitly to violate the constitutional rights of persons by eavesdropping on private conversations through wiretapping and electronic surveillance.

(4) The end of prosecuting those who violate the law does not justify wrongdoing on the part of the Government.

(5) The peculiar susceptibility of wiretapping and electronic surveillance to misuse in the furtherance of partisan political goals renders wiretapping and electronic surveillance a particularly dangerous temptation to Government officials, and the chance of its misuse outweighs any potential benefits which might otherwise be found in it.

SEC. 2. Title 18 of the United States Code is amended—

(1) by striking out in section 2511 (1) "Except as otherwise specifically provided in this chapter any person who—" and inserting in lieu thereof "Whoever—";

(2) by inserting immediately after subparagraph (d) of section 2511 (1), but before "shall be fined" the following new subparagraph:

"(e) willfully intercepts or records any wire or oral communication without the consent of all the parties to such communication";

(3) by striking out "or" at the end of section 2511 (1) (e) and by inserting "or" at the end of section 2511 (1) (d);

(4) by striking out sections 2511 (2) (a) (ii), (b), (c), and (d);

(5) by striking out section 2511 (3);

(6) by striking out section 2512 (1) "Except as otherwise provided in this chapter, any person who willfully—" and inserting in lieu thereof "Whoever—";

(7) by striking out section 2512 (2); and

(8) by striking out sections 2516, 2517, 2518, 2519, 2510 (9).

94TH CONGRESS
1ST SESSION

H. R. 1864

IN THE HOUSE OF REPRESENTATIVES

JANUARY 23, 1975

MR. KASTENMEIER introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To enforce the first amendment and fourth amendment to the Constitution and the constitutional right of privacy by prohibiting any civil officer of the United States from exercising surveillance of citizens, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. This Act may be cited as the "Freedom ~~for~~ from Surveillance Act of 1975".

DOMESTIC SURVEILLANCE

SEC. 2. (a) Chapter 109 of title 18 of the United States Code is amended by adding at the end thereof the following new section:

"§ 2237. Use of civil officers of the United States for surveillance prohibited

"(a) Except as provided in subsection (b) of this section or otherwise required by statute, whoever being a civil officer of the United States willfully conducts investigations into, maintains surveillance over, or maintains records regarding the beliefs, associations, political activities, or private affairs of any citizen of the United States, or regarding the beliefs, membership, or political activities of any group or organization of such citizens, shall be fined not more than $10,000, or imprisoned not more than one year, or both.

"(b) Nothing contained in the provisions of this section shall be deemed either to limit or to enlarge such legal authority of the United States as may exist to:

"(1) collect, receive, or maintain information relevant to an investigation of an individual who has committed or is suspected on reasonable grounds to have committed a felony;

"(2) collect, receive, and maintain information relevant to lawful investigations of persons who are applicants for employment with the United States, who are employees of the United States, or who are contractors, or prospective contractors of the United States."

CIVIL ACTION

SEC. 3. (a) Title 28, United States Code, is amended by adding after chapter 171 the following new chapter:

"Chapter 172. ILLEGAL SURVEILLANCE

"§ 2691. Civil action, generally; illegal surveillance

"(a) Except as provided in subsection (b) of section 1386, title 18, United States Code, or otherwise required by statute, whoever being a civil officer of the United States conducts investigations into, maintains surveillance over, or maintains records regarding the beliefs, associations, political activities, or private affairs of any citizen of the United States, or regarding the beliefs, membership, or political activities of any group or organization of such citizens shall be liable for damages to any person, group, or organization that has been the subject of a prohibited investigation, surveillance, or recordkeeping in an amount equal to the sum of—

"(1) any actual damages suffered by plaintiff, but not less than liquidated damages at the rate of $100 per day for each day the prohibited activity was conducted;

"(2) such punitive damages as the court may allow, but not in excess of $1,000; and

"(3) the costs of any successful action, including reasonable attorneys' fees.

"(b) Any person, group, or organization that has been the subject of any investigation, surveillance, or recordkeeping in violation of subsection (a) of this section may bring a civil action against the United States for such equitable relief as the court determines appropriate to enjoin and redress such violation.

"§ 2692. Special class actions; illegal surveillance

"Any person, group, or organization that has been the subject of any investigation, surveillance, or recordkeeping in violation of subsection (a) of section 2691 of this chapter, may bring a class action against the United States on behalf of himself and others similarly situated for such equitable relief as the court determines appropriate to enjoin and redress such violations.

"§ 2693. Venue; jurisdictional amount

"(a) A person may bring a civil action under this chapter in any district court of the United States for the district in which the violation occurs, or in any district court of the United States for the district in which such person resides or conducts business, or has his principal place of business, or in the District Court of the United States for the District of Columbia.

"(b) Any Federal court in which a civil action under

this chapter is brought pursuant to subsection (a) shall have jurisdiction over such action regardless of the pecuniary amount in controversy."

(c) The analysis of part VI of such title 28 is amended by adding immediately after item 171 the following new item:

"172. Illegal surveillance ..... 2691".

(d) Section 1343 of title 28, United States Code, is amended by redesignating paragraph (4) as paragraph (5) and by inserting immediately after paragraph (3) the following new paragraph:

"(4) To recover damages or to secure equitable or other relief under chapter 172 of this title;"

SEC. 4. The civil actions provided by the amendments to title 28, United States Code, made by this Act shall apply only with respect to violations of subsection 2691 (a) of title 28, United States Code, as added by this Act, arising on or after the date of enactment of this Act.

DEFINITIONS

SEC. 4. As used in this Act the term:

(a) "civil officer of the United States" means any civilian employee of the United States;

(b) "investigations" means any oral or written inquiry directed to any person, organization, or agency of the Government:

(c) "surveillance" means any monitoring of persons, places, or events by means of electronic interception, overt or covert infiltration, overt or covert observation, photography, and the use of informants;

(d) "records" means records resulting from any investigation or surveillance conducted by any governmental agency of the United States or any State or local government;

(e) "private affairs" means the financial, medical, sexual, marital, or familial affairs of an individual.

Mr. KASTENMEIER. Because of the steep decline of public confidence in Government, reinforced by repeated disclosures of alleged illegitimate Government spying, it is essential that the subcommittee exercise vigorous oversight and actively consider legislation which will limit what Justice Holmes characterized as "this dirty business." Today's hearing is only the first in a series which will consider all aspects of surveillance. In the future we will investigate specific legislative proposals designed to eliminate those abuses.

The various bills presently pending before the subcommittee outline the broad scope of the problem and suggest a number of possible solutions. They range from proposals to ban any investigation of American citizens for other than limited criminal law enforcement or job application purposes to a bill which bans all military surveillance of civilians. Other legislation would require court orders for one-party consensual wiretapping or for national security electronic eavesdropping. The specific proposal which today's witnesses will address would prohibit intelligence gathering and surveillance by wiretapping, mail opening, inspection of bank, telephone, credit, and other personal records without a court order based on probable cause that criminal activity is involved.

This hearing will consist of two parts. First, we will hear testimony from the chief sponsors of one of the bills which is broadest in scope. At later hearings we will hear from sponsors of other proposals. The second part will consist of testimony from two attorneys who have been involved in a wide variety of litigation dealing with almost every aspect of surveillance. These witnesses will provide the subcommittee with specific examples of past abuses of a wide variety of Government surveillance.

The subcommittee is mindful of the activities of other bodies such as the National Wiretapping Commission on which Congressman Railsback and I serve. However, since the Commission has abdicated its responsibilities to investigate national security warrantless wiretapping, this urgent task falls to us. While the Senate has created a Select Committee on Intelligence and the House is considering similar action, legislative responsibility with regard to controlling surveillance and privacy invasion remains within this subcommittee.

At this point I would like to observe that there will be no oath administered to the witnesses this morning. But it has been suggested because of the nature of the testimony at times in the past, which through later revelations appear not to accord with the facts or with truth, some testimony may have been less than wholly accurate or truthful, that oaths be administered to witnesses. This is a matter which the subcommittee will take under advisement and will resolve in the future. But the mere fact that witnesses this morning are not put under oath does not foreclose that possibility at some time in the future.

I am pleased to welcome the committee this morning including a new member, Congressman Wiggins of California. Mr. Cohen was a former member of this committee from Maine and was interested in this question last year and has generously taken of his time to sit with us on this question. And Congressman Badillo of New York is a new member of our subcommittee who is with us this morning.

At this point I would like to welcome our friend and our colleague from Ohio, Mr. Mosher, who has taken the lead in the House and has

aggregated, as I understand, a bipartisan bill with 62 sponsors. I am told 31 Members are of the minority and 31 members are of the majority, which is about as bipartisan as you can get, and whose bill certainly represents a very broad attack on the question which the committee is directly concerned. And accompanying Congressman Mosher is an old friend of this committee—one who served on the Judiciary Committee with very great distinction—and now, of course, is the Senior Senator from the State of Maryland, Senator Charles Mac Mathias. I welcome you both, and will call on Congressman Mosher to make any opening statement he may care to make.

TESTIMONY OF THE HONORABLE CHARLES A. MOSHER, A REPRESENTATIVE IN CONGRESS FROM THE 13TH CONGRESSIONAL DISTRICT OF THE STATE OF OHIO

Mr. MOSHER. Thank you, Mr. Chairman, and gentlemen of the committee.

I confess to being somewhat intimidated by this situation this morning. All of you are distinguished attorneys, all of you on this committee are very much accustomed to TV. I am strictly a layman, a smalltown country-editor type who has no experience of being exposed to TV, so I am intimidated. However, I have attempted to compensate for my lack of legal competence by bringing with me my attorney. At my left is Senator Mathias, an old friend and colleague, and certainly one of the most distinguished members of the House when he was with us here. And as you have just mentioned, he was a very important member of the House Judiciary Committee when he served in the House.

I wanted to make it plain that Senator Mathias is the originator of the legislation to which we jointly will speak this morning. He and his associates in the Senate perfected this legislation. It was called to my attention by an attorney, William Wickens, who is a constituent of mine and who was a staff man on the Senate side at the time this legislation was being prepared. When he called this Mathias bill to my attention I was so impressed by the entire timely and important nature of it that I talked to Senator Mathias and asked permission to introduce it on this side. And I feel very privileged to be here this morning as a lead witness testifying in favor of our legislation.

And, Mr. Chairman, let me say both of us appreciate very much that you are giving this such an early hearing, an indication that your committee will give serious consideration to our bill, and certainly we will welcome your wisdom, your analysis and hopefully your approval of our legislation.

Now, before turning this over to Senator Mathias, let me say this: I mentioned being a smalltown country-editor type, and perhaps it is that background, working with individual citizens at the grass roots, at the curbstone, that background of concern for people in their day-to-day and hour-to-hour living, perhaps it is that background which moves me to feel so intensely the imperative need, in fact, I think the absolute right for the individual American citizen to feel secure in the confident knowledge that his or her privacy is not being invaded

surreptitiously by any cavalier, capricious or even viscious, unwarranted activity of Government officials or agents, not being invaded by any arbitrary, arrogant misuse of governmental authority. All of us are acutely aware, as, Mr. Chairman, you have just indicated, of a variety of recent events which indicate the serious abuse of Government authority in the form of unwarranted acts of surveillance, the arrogant invasion of the individual citizen's privacy, and all of us are now aware of the chilling effect, the anxieties, the resentments, the cynicism, disbelief or confusion of belief concerning Government, the wave of fear and anger in many citizens toward Government. All of us here on the Hill see indications of this almost every day in the mail we receive and the conversations we have with our constituents, and I am completely convinced that each of us as individuals needs and deserves the strongest possible guarantees as stipulated by law, the strongest possible guarantees against any form of arbitrary surveillance by Government.

So in our legislation, H.R. 214, which we call the Bill of Rights Procedures Act, we attempt to implement that very strong conviction. Rather simply and very directly our bill attempts to prohibit absolutely the conduct of any form of surveillance on any American citizen by any agent of the Federal Government for any reason whatsoever. We would provide that broad, sweeping, complete prohibition, that guarantee of privacy unless a court order is first obtained. That is the essence of the legislation we ask you to approve.

Now, as you indicated, Mr. Chairman, when I introduced this legislation in the 93d Congress more than 50 Members, a completely bipartisan group, cosponsored it. Already in this Congress more than 62 have cosponsored it. In fact, as you just suggested by coincidence today there are 62 cosponsors, 31 Republicans and 31 Democrats.

At my urging, the House Republican Task Force on Privacy, chaired by Barry Goldwater, Jr., in the last Congress carefully considered this legislation and approved it, officially approved it as a group. And now most members of that task force are cosponsoring it. However, I again do not want to give the impression that just because Mr. Mathias and I are Republicans, or that the House Republican Task Force on Privacy endorses it, I do not want to give the impression that this is a partisan effort in any way. It is, in fact, a remarkably bipartisan effort with agreement across the full spectrum of political thinking in the House from the more conservative Members to the more liberal Members.

Now, Mr. Chairman, I would like to step aside for my much more erudite legal spokesman, Senator Mathias, and I feel very privileged to be associated with him. I repeat, he is the real originator of this legislation. He and I have prepared jointly a statement which I do not intend to read into the record, and I am not sure whether he does. But unless he does intend to read it fully into the record, Mr. Chairman, I ask that our joint statement as prepared be inserted in the committee record.

Mr. KASTENMEIER. Without objection.

Mr. MOSHER. Thank you, Mr. Chairman.

Mr. KASTENMEIER. The joint statement will be received and made a part of the record.

[The joint statement of Hon. Charles McC. Mathias and Hon. Charles A. Mosher follows:]

JOINT STATEMENT BY

SENATOR CHARLES McC. MATHIAS AND CONGRESSMAN CHARLES A. MOSHER

Mr. Chairman, members of the Subcommittee, we are most grateful to you for the early date you have selected for these hearings. We consider the issue of government surveillance to be of paramount importance to the American people. We hope that the Bill of Rights Procedures Act, which we are cosponsoring, may make an important contribution in this area and we thank you for giving us this opportunity to testify on it.

A little less than a year ago we first began developing the Bill of Rights Procedures Act. We did so in response to our growing alarms over government abuses, both real and potential, of the American citizen's rights to privacy.

The first versions of our bill were introduced in the Senate and the House last spring. Since then several technical changes have been made in the legislation. In this Congress, the Bill of Rights Procedures Act (BRPA) was first introduced on January 14 and is identified as HR 214 in the House of Representatives.

Response to our proposed legislation has been very enthusiastic, especially here in the House. Last year, a total of 53 Representatives joined as cosponsors of the bill. These Members represent a remarkably diverse, bipartisan coalition . . . Republicans, Democrats, liberals, conservatives, members of all relevant committees, from every geographic region of the United States. With the 94th Congress less than a month old, more than 50 Members already have signed up as cosponsors of this legislation in the House.

What has caused this enthusiastic response? Why are so many Members willing to cosponsor such wide-ranging legislation that has not yet undergone hearings?

Mr. Chairman, we submit that there is a growing concensus in support of providing absolute safeguards against invasions of privacy by the Federal Government. Citizens must be assured that they can, in fact, enjoy the rights to privacy that are supposedly guaranteed by the Constitution.

Our bill addresses this problem directly by prohibiting any agent of the federal government from conducting any form of surveillance on an American citizen—for any reason—unless a court order is first obtained. At this point we would like to enter into the record a summary of our proposed legislation:

SUMMARY OF BILL OF RIGHTS PROCEDURES ACT

The key provision of the proposed Bill of Rights Procedures Act is that it would require any federal agent to obtain a court order before he or she may conduct any form of surveillance on a private citizen. Probable cause would have to be demonstrated before the court order could be issued, and the warrant must be specific in its particulars.

The term "surveillance" includes bugging, wiretapping and all other forms of electronic eavesdropping, opening of mail, entering of dwellings, and the inspection or procurement of the records of telephone, bank, credit, medical or other private transactions. Court orders would be required in virtually every instance, thus clarifying the law and closing many loopholes in present statutes. The only exceptions made are in the cases of: the serving of an arrest warrant, the "hot pursuit" of a criminal, or when the consent of the subject individual has been obtained.

A penalty of up to $10,000 and/or a year imprisonment is provided for any government official, employee, or agent who willfully violates or causes the violation of this legislation. The bill requires that within thirty days after application has been made for a court order, the applicant must file a report with: the Administrative Office of the U.S. Courts and with the Committees on the Judiciary of the House and Senate. Followup reports on approved surveillance activities would also be required.

The Bill of Rights Procedures Act is intended primarily to reinforce the protections provided by the Fourth Amendment to the Constitution. That section assures "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures." And I think this legislation is also directly relevant to the First Amendment (freedom of speech, assembly, etc.) and the Fourteenth Amendment (equal protection).

As you can see, this proposal is very comprehensive. We intend to leave no opportunity for misunderstanding.

It is our firm belief that discretionary authority in the area of government surveillance should be removed entirely from the Executive Branch. It should not be the prerogative of the Executive to determine whose rights should be infringed upon and whose should not.

We feel that the Constitution correctly indicates that the Courts are the only proper place for decisions of this sort to be made.

Much confusion exists today in the minds of law enforcement officers as to what exactly are the statutory limitations on surveillance activities. What types of surveillance require prior court orders? What types are solely at the discretion of the Executive? What exceptions are allowed? Again, we reiterate that we propose to end this ambiguity by requiring that a federal agent must have a court order in hand before undertaking any surveillance of any individual citizen.

Mr. Chairman, we wish that this legislation was not needed. But the fact is that it is clearly needed.

In the very recent past we have all seen the newspaper stories documenting a variety of federal excesses in the area of surveillance. These include, but are by no means limited to: military intelligence activities at the 1968 Democratic National Convention, FBI surveillance on various civil rights leaders and on participants at the 1964 Democratic Convention, wiretapping by the ill-fated White House "Plumbers" unit, compilation of thousands of files at the CIA related to domestic security, and the maintenance of FBI files on Members of Congress. Most dramatic of all, of course, is the so-called Huston plan that was revealed in the course of the Senate's Watergate investigations.

We believe that our proposed legislation will prevent similar abuses of citizens' rights from occurring in the future. It would do so by making it unmistakably clear that all such activities, without express approval of the courts, are illegal and that all individuals involved will be personally liable for their actions.

However, our reasons for introducing this legislation go beyond the actual prevention of specific surveillance activities. We also are concerned with the public's perception of the protections offered against improper surveillance.

American citizens today, in many instances, are becoming virtually paranoid about government surveillance. Who is to say what adverse consequences already have resulted from the "chilling effect?" There is the demonstrated tendency of individuals to withdraw from political activity and the exercise of other Bill of Rights-guaranteed rights when they believe they are being monitored by the government. Actual surveillance need not even take place, because the mere threat of it may be all that is necessary to intimidate a citizen.

Despite the fact that we deliberately have kept the Bill of Righs Procedures Act in a low public profile, we have received support and encouragement in our efforts from a number of groups. The American Civil Liberties Union has commented favorably upon the bill, although they have indicated that they may suggest some very specific modifications. The same is true of the Harvard Civil Rights—Civil Liberties Research Committee. Also a number of lawyers active in the legal end of the news media have expressed their interest.

Perhaps of particular interest to this subcommittee might be the report of the House Republican Task Force on Privacy, a group of 13 GOP Members of the House, chaired by Congressman Barry Goldwater, Jr. In a report issued last August, the Task Force stated:

"The Task Force is deeply disturbed by the increasing incidence of unregulated, clandestine government surveillance based solely on administrative or executive authority . . . The various abuses of discretionary authority in the conduct of surveillance provide ample evidence that current safeguards do not work. Procedures allowing the executive branch to determine whether a surveillance activity is proper or not poses certain conflict of interest questions."

The Task Force report went on to outline the need for legislation along the same lines as those followed by the BRPA. Last year, in fact, nine of the 13 Task Force members joined as cosponsors of our proposed legislation and eight already have done so again this year.

But we want to make it clear that this is not in any way a partisan bill nor is it a partisan issue which we address. Our list of cosponsors is a bipartisan list.

And it is certainly clear that right-to-privacy legislation enjoys a very broad base of public support. A Harris Poll released on September 5, 1974,

shows that an overwhelming majority of Americans support strict judicial oversight of government surveillance activities. The poll found, "By 80 to 12 percent (Americans) claim the right not to be spied upon by any kind of electronic surveillance except with a court order." 77 percent claim the right "not to have one's mail opened by the government except by specific court order." And so on.

Again, we wish to thank the chairman and members of this subcommittee for the interest they have shown in the Bill of Rights Procedures Act and for the speed with which you have opened these hearings. On behalf of our cosponsors, we hope that you will provide the opportunity for other supporters of this legislation to submit statements for the record.

It is our understanding that this subcommittee is planning to hold additional hearings and that you will then hear from a number of expert witnesses. Therefore, we have refrained from assailing you with statistics and case studies on this opening day of your investigation.

If you do have any specific questions, however, we will be pleased to try to answer them, and we are also willing to suggest to you or your staff the names of various individuals who might be placed on your witness list.

Mr. KASTENMEIER. Senator Mathias.

TESTIMONY OF HON. CHARLES McC. MATHIAS, A U.S. SENATOR FROM THE STATE OF MARYLAND

Mr. MATHIAS. Thank you very much, Mr. Chairman. I appreciate this opportunity for a homecoming in the Judiciary Committee and the privilege of appearing here with Congressman Mosher who has done such a yeoman's job on advancing this particular bill.

He refers to me as the legal member of this team. I think he has done so well already that as a lawyer I do not want to confuse the committee with any legal jargon when he has stated the proposition very succinctly.

I would say just a personal word. It is a pleasure for me to be back here. I spent many years with this committee, and it induces a considerable sense of humility to reflect on how the record of the committee, the luster of the committee increased rapidly and dramatically very shortly after I left it.

Perhaps since my colleague has touted me as the legal member of the team we ought to review very briefly the provisions of the Bill of Rights Procedures Act.

The key provision is, of course, that it would require any Federal agent on any kind of an errand to obtain a court order before he or she can conduct any form of surveillance on a private citizen. No exceptions. Probable cause would have to be demonstrated before the court order could be issued, and the warrant must be specific in its particulars.

The term "surveillance" includes bugging, wiretapping, and all other forms of electronic eavesdropping, opening of mail, entering of dwellings, and the inspection or procurement of the records of telephone, bank, credit, medical, or other private transactions. Court orders would be required in virtually every instance, thus clarifying the law and closing many loopholes in present statutes. The only exceptions made are in the cases of the serving of an arrest warrant, the "hot pursuit" of a criminal, or when the consent of the subject individual has been obtained.

A penalty of up to $10,000 and/or a year imprisonment is provided for any Government official, employee, or agent who willfully violates or causes the violation of this legislation. The bill requires that, within

30 days after application has been made for a court order, the applicant must file a report with the Administrative Office of the U.S. Courts and the Committees on the Judiciary of the House and Senate. This is a very key provision to which I would like to return.

Followup reports on approved surveillance activities would also be required.

The Bill of Rights Procedures Act is intended primarily to reinforce the protections provided by the fourth amendment to the Constitution. That section assures "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." I think this legislation is also directly relevant to the first amendment—freedom of speech, assembly, et cetera—and the 14th amendment—equal protection.

There will be many people who will object to this legislation and object to this as being impractical in the kind of complex world in which we live. There are those who say the Government has a right to bug embassies here in Washington, and they do not want to go to court in order to bug an embassy. Why not? Why not? I see no reason for any exceptions to the Constitution.

Now, other nations are confronted with similar questions. Mr. Roy Jenkins, the Home Secretary of Great Britain, was in Washington recently, and I had an opportunity to discuss with him the prevailing practice there—industrial nation with complex defense problems, complex domestic security problems, and certainly very difficult problems at this moment. He said, and I do not want to quote him, I am not authorized to quote him directly, but I don't think he would object to my saying that he was very strongly of the view that the same person should not be the prosecutor of the case and the originator of the wiretap. There is just a basic invitation to abuse in that situation which is, of course, the situation that prevails in this country today. There should be two parties, at least two parties, who review each other's activities, and then there should be a clear line of accountability. That is exactly what this bill provides. It provides that the Attorney General, or an official of the Justice Department acting on his behalf, would originate a request, that request would then be reviewed by a court, and then, as I said, I wanted to return to the question of reporting to the Congress.

The committees of the Congress, this committee and the committee in the Senate, would get a report that a tap had been placed. That means that there is a clear line of accountability. We know who has acted, who requested the wiretap, who ratified the request, and when the tap went on. A report is made to the Congress as to the disposition of the case.

Let me say I would not envision that the report would involve giving this committee or the Senate committee a transcript of what was learned via the wiretap or other search. It would be the mere fact that the tap occurred, that it was put into place, that it existed for a period of time and that it was then disconnected. I think that would provide a broad range of information to responsible public officials so the Constitution could be enforced, so that the guarantees of the Constitution could be honored. But I do not think it would unduly interfere with the necessary enforcement of the law, police work.

The other day I had an occasion to be talking with the chief police official of another country, which I suppose has perhaps the most difficult police problems of any country in the world, and I talked to him about this concept. He said it is absolutely the only way to do it. It would be unthinkable to work any other system, that there was a division of responsibility between the person who was going to prosecute the case, the police activity and the person who was going to issue the wiretap. I said would you, as a police officer, find this unduly burdensome. And he said, absolutely not. He said, in fact, it is the only way it ought to be done in order to live with yourself. These are just some examples of the fact that other peoples in other systems can live with this kind of protection, and I think with the tradition of the U.S. Constitution, we must find a way to give at least this protection to the American people.

Mr. KASTENMEIER. Thank you, Senator Mathias. I appreciate both witnesses' testimony and congratulate you both on your really extraordinary efforts in building up support for the concept embodied in H.R. 214.

To gain some fuller perspective of what it covers and what it does not cover, it covers wiretapping, electronic surveillance, it covers opening mail, it covers surreptitious entry of homes. It does not cover physical surveillance; that is, the so-called shadowing or tailing of an American citizen by a Government agent, I take it? Is that correct?

Mr. MATHIAS. It would cover surreptitious entry. We have not spelled out shadowing as an area, but it would cover surreptitious entry.

Mr. KASTENMEIER. The reason I raise this is because the bill appears to be quite comprehensive in bringing certain practices under control, certain practices that presently are not subject to warrants, and I am wondering in that context what it includes and what it does not include in the general area of Government agent versus the individual.

Mr. MATHIAS. We have attempted, Mr. Chairman, to be as comprehensive as we could. It may be that Congressman Mosher and I and others who have worked on the bill may have overlooked some area that we should consider, and I hope this committee will rectify any omissions that we may have made. But we have gone pretty far. In fact, one of the points that is covered is in conflict with a recent act of Congress which has been wrongfully interpreted by the Treasury Department to give the Secretary of the Treasury the right to look at every bank check which is written in the United States by any housewife for her weekly groceries. Well now, I think that the impact of this bill would——

Mr. KASTENMEIER. It would be enormous, yes. I would cover that.

Mr. MATHIAS. I think it would cover that kind of transaction.

Mr. KASTENMEIER. In terms of mail, your bill requires a warrant for opening mail, but does not carry within its purview what is generally known as systematic inspection of an individual's mail short of opening, the practice known as a mail cover. That would not be covered, I take it, by your bill?

Mr. MATHIAS. The bill, its terms, would not cover that practice. Of course, there are going to be some things that people in power, people with official positions can do to people who are not in official positions

that I think are beyond definition. We could sit here all year and never be able to think of all the ways in which officialdom has found to pry into the lives of private citizens. But I think this bill points out the flagrant abuses, it sets up the undoubted protection of the Constitution, and I hope it emanates a spirit which would motivate everyone who is in a position of authority to act more carefully than they have in the past in a lot of the petty practices that have been so annoying to citizens.

Mr. KASTENMEIER. Your bill virtually would eliminate wiretapping without a court order issued upon probable cause. How do you answer critics who feel that the national security requires wiretapping and other forms of surveillance for purely intelligence gathering purposes, and this just about eliminates the use of any of these techniques for intelligence gathering obviously not based on probable cause of investigating a crime?

Mr. MATHIAS. I suspect that a great deal of the activities that take place in this area would either qualify for a warrant under probable cause, or if it is of lesser value could be dispensed with. I suspect that what is beyond the reach of a warrant is not of major significance in the operation of the Government. Regarding the interests of national security, we are meeting this afternoon in the Senate for the first time on the new Select Committee to Investigate Intelligence Problems. Maybe we can overlap, to some extent, in that consideration, some of the issues that arise in connection with this bill.

Mr. KASTENMEIER. And incidentally, we wish you and Senator Church and the select committee well in your new assignment.

At this point, I would like to yield to my friend from Illinois, Congressman Railsback.

Mr. RAILSBACK. Thank you, Mr. Chairman, and I want to welcome my two friends and also to congratulate you for your leadership.

I have this question which I think I will address to either one of you. It is certain to be argued that the President has the constitutional right to gather information in order to protect our national security. Is it your contention that we can enact legislation pursuant to the fourth amendment which would preempt the President's obligation in national security cases?

Mr. MOSHER. Congressman Railsback, as a layman, I recognize this is a profoundly important constitutional question, and I am going to certainly yield to my own attorney here on that subject. But the question you raise typifies, it seems to me, an increasing problem we have in this country where rights, very important, fundamental rights seem to be in conflict and do need adjustment and interpretation. I think it happens all of the time. It is also throughout our national history, this sort of thing has happened, but with the increasing complexity of life today I think we face these all of the time, so I am not going to attempt to answer your question, but I hope Mr. Mathias can.

Mr. MATHIAS. It is a difficult question and one that I do not think we can take lightly. But I think that if you do not answer the question, and I think the Congress has got to provide an answer, if you do not answer that question we are right back with the Huston plan. That is the nuts and bolts of it. If you are going to say that the President has inherent powers in the field of national security which he

can apply at his discretion, no matter how conscientious a President may be, no matter how faithful to his constitutional oath, he is going to be invading the rights of citizens in violation of the fourth amendment.

It seems to me that the fourth amendment here is very clear, is very specific and without exceptions. The President can act within the fourth amendment. We are not saying that there should be no wiretapping. We are not saying there should be no surveillance. We are saying that it should be done in accordance with the protections provided by the Constitution.

Mr. RAILSBACK. There have been some cases that have really upheld the President's right of surveillance as far as foreign intelligence and so forth, and as I understand your answer, you are saying in this case there are two conflicting constitutional rights, and it is proper for Congress to determine statutorily that one must give way to the other, one is of overriding importance; that is, the fourth amendment?

Senator MATHIAS. I am not so sure. Maybe Congressman Mosher would like to comment on that. I am not sure where you find all of this inherent power of the President to deal.

Mr. RAILSBACK. It is in the *Ivanov* case which has been alluded to many times.

Mr. MATHIAS. When I say you, I mean I am not sure where the judges find all of this inherent power of the President. You know, the President has the power to repeal invasion and assert other specific national security responsibilities. But a lot has been read into the powers of the Presidency over the cold war period, and I think that we have got to recognize what has happened in a relatively short span of time to the powers of the Presidency, and we have to look at them. I do not think we should strip the President of the powers he constitutionally should have and that the safety of the country requires he should have, but I do think we have a responsibility to the Constitution not to let the events of a relatively narrow period of history erode what are really timeless principles.

Mr. RAILSBACK. Thank you.

Mr. MOSHER. Mr. Railsback, I suggest, and I guess this is only a footnote to what the Senator has said, I suggest the Presidents, and particularly recent Presidents in this century have assumed powers which have not been adequately challenged, and particularly have not been adequately challenged by the legislative branch, and that I strongly feel, I hope that the legislative branch has implicit authority to curb that assumption of authority.

Mr. RAILSBACK. Thank you.

Mr. KASTENMEIER. If the Chair may interject on the point raised by the gentleman from Illinois, there will be reference in later testimony to a case involving a Detroit attorney in which the Attorney General stated that surveillance of this attorney was deemed necessary to protect the Nation against actual or potential attack or other drastic acts or to obtain intelligence information deemed essential to the security of the United States. It is rather overriding and intimidating language to use. The problem seems to be that it is used very often without the sort of justification which reasonable people concerned with the defense of their country might think this intends. But we will obviously have to look at that question much more carefully.

Mr. MATHIAS. The very existence of this kind of power leads to the abuse of it. I can hardly believe that tapping Joe Kraft's phone fits into the definition which is implied by that language.

Mr. KASTENMEIER. I would like to yield to the gentleman from Massachusetts, Mr. Drinan.

Mr. DRINAN. Thank you, Mr. Chairman, and Senator Mathias and our colleague. I am afraid that I feel that this may open new loopholes, frankly, in the law as it now exists. Taking the example of Mr. Joe Kraft, I am certain that if the Department of Justice had gone to a Federal court and had given reasons, that the Federal judge would have given them a warrant. We have most of the protections that your bill gives us now, Senator. We have in 18 U.S.C. section 2519 all of the information at the Administrative Office of the U.S. Courts, and the juggernaut transferred to the House committee. I find this without any value.

In my experience, 30 days after the issuance the judge has to send this to the administrative office, the fact of the order and so on, and then we get that information on an annual basis, or semiannual basis, but it is worthless because they are not telling us what is there. Furthermore, I am afraid you are unwittingly eroding the right of people to privacy of their letters.

Let me cite the U.S. Supreme Court itself almost a century ago, 1877:

> No law of the Congress can place in the hands of officials connected with the Postal Service any authority to invade the secrecy of letters or such sealed packages in the mails.

And then it says there before that also that:

> Sealed packages of this kind in the mails are as fully guaranteed from examination and inspection as if they were retained by the parties who forward them.

Mr. MATHIAS. Just another sign of how the Postal Service has deteriorated.

Mr. DRINAN. All right. But I really do not feel that you are going to solve this problem, that the fact of the matter is that Federal judges virtually never deny requests, and if they do deny a request, they do not tell us the reason for it. And as a result, I find little in your bill I am able to commend.

Furthermore, what about upping the damages in section 2520. Anybody now who is intercepted can get $100 a day. You incorporate this, and I suppose you have not deleted 18 U.S.C. 2520, as far as I know. Would you like to raise the damages? You raise the penalty.

Mr. MATHIAS. If this committee in its judgment would like to increase it, I would not quarrel with you in the least.

Mr. DRINAN. What would you think the House Judiciary Committee should do when we get all of these documents, and also the Senate Judiciary Committee? They will be pouring into us, and they are available now, to repeat, on a 6-month or monthly basis, whenever you want them, and what are we supposed to do with them? They do not have any content to them. You say we do not get a transcript, but only the mere fact of the placing of a tap.

Mr. MATHIAS. I think what you have to consider is the relationship of Congress to the executive branch and to the judicial branch. What happens today is a ministerial act. Perhaps we could make it more if we were more vigorous about it.

Mr. DRINAN. But Senator, you are not giving us any facts.

Mr. MATHIAS. Well now, just let me answer you. What happens today is ministerial. If under this new procedure you have to divide the responsibility for issuing a warrant, the executive branch has to request it, the judicial branch has to approve it, and the Congress oversees it, and we exercise this responsibility getting the reports in our respective committees of taps that were in place, and, on a selective basis, we spot check some of the cases.

Mr. DRINAN. But Senator, what information does your bill provide that we do not now have?

Mr. MATHIAS. You provide it directly. You put the committee in a direct oversight position.

Mr. DRINAN. Senator, that is not the question. The question is what do you provide under your bill that we do not now get from the administrative office?

Mr. MATHIAS. We provide on a 30-day basis the direct information.

Mr. DRINAN. All of that is provided now to the administrative office of the court, and we get it, and they tell us nothing. So you are not giving us any further information than is now available.

Mr. MATHIAS. Yes; they are reporting to us, and that is a very big difference. That is a very significant difference. A Federal judge who is going to report to this committee, and who knows that this committee and the Senate committee is going to oversee his activities, and the Attorney General who knows that this committee, with the powers of impeachment, is going to be overseeing the warrants which he authorizes is going to think a little harder before he issues them. And even more important, some subordinate down in the Department of Justice who may be acting for the Attorney General in advance of an actual authorization by the Attorney General is going to think two or three times before he sends this committee reports that are in any way misleading, or in which warrants requested cannot be fully justified.

I think the direct oversight relationship established would be a different one, a significant one, and would have greater influence on how this area of Government activity continues.

Mr. DRINAN. Now, in the law of 1968 it says that in April of each year the Director of the Administrative Office of the Courts shall transmit to the Congress a full and complete report concerning the number of applications for orders authorizing or approving the interception of communications, and the number of orders and et cetera. I have gotten that, and I have studied it for the last 7 years, and it does not tell you anything. And in your bill I do not see that we get anything further except in one item here, where the judge after 60 days sends a complete transcript of the proceeding where the Department of Justice asks for a tap. And I have seen such complete transcripts, and who is the judge that when a man says that we need this, and we think this terrible crime is going to be committed, and the judge just gives it, and there is nobody there repressing the individual or anybody. So I am not certain really that that is going to help after 60 days to get that, and then after 90 days we get a little bit more information. But you have pulled the punch on that, and you say we get the disposition of all records, but we do not get the records. So in all candor,

I do not see how I am going to be helped by your laws. And I have followed this intensely since 1968, and annually I have written something on what the reports do not tell us. So in all candor, I just do not see how this is going to clean up the Department of Justice.

Mr. MATHIAS. I would suggest that there be periodic hearings by the committees of the Senate and the House looking at these reports, as I suggested earlier, doing some spot checking on individual cases, developing within the executive branch and judicial branch the concept that the Congress is going to discharge its oversight responsibility. I think we have been negligent in this in the past. Perhaps when the existing law was adopted, if when we had gotten the 6 months reports we had done something with them, perhaps there woud be a different philosophy. But I think we have now got to take a new departure.

Mr. DRINAN. Well Senator, I have spoken with Federal judges about this matter, and I have intimated to them in generous, gracious language that they have been pretty sloppy in the administration of this, and they say we call it as we see it. Some man comes in from the Department of Justice, and I am going to deny him the right to wiretap when he and his superiors say it is necessary? There is no evidence on the other side, so they are just trapped in the whole situation, and we can have oversight on them, but nothing is going to change.

Mr. MOSHER. Mr. Chairman?

Mr. DRINAN. Yes.

Mr. MOSHER. Bob, going back to your original question, and your reference to the penalties, am I not correct that the penalty would provide in here of up to $10,000, which is a considerable increase over the present penalty?

Mr. DRINAN. Yes. I meant, Congressman, the damages. Right now a person damaged can recover $100 a day, and I would like to have that more proportionate to the other.

Mr. MOSHER. OK.

Mr. DRINAN. If that will work, but there is no case yet where anybody has ever received $100 a day.

I yield back. Thank you very much.

Mr. KASTENMEIER. May I also observe that we talk about the Justice Department, but this affects all agencies of Government, presumably the Central Intelligence Agency, the Department of Defense, and the Internal Revenue Service as well as the Justice Department?

Mr. MATHIAS. That is right. And in answer to Father Drinan's question about what more does he get under this bill, you get the protections covering the whole range of Government activities, activities that you and I may not know fully about.

Mr. DRINAN. Which is already illegal.

Mr. MATHIAS. But which may be happening.

Mr. KASTENMEIER. I yield to the gentleman from California, Mr. Wiggins.

Mr. WIGGINS. Thank you, Mr. Chairman. I welcome our former colleague to the committee. Your absence has been felt in recent years, and I certainly as an individual want to acknowledge your enormous contribution to this committee and to the Congress.

I want to talk conceptually first, and then get into the details of the legislation. It seems to me that there are at least two optional

courses of action. One is to rely on the fourth amendment without more, and to permit abuses of that amendment to be circumscribed by case action, and by decisions ultimately of the U.S. Supreme Court.

The other is for the Congress to legislate in the field and attempt to regularize the process, and in the course of doing that to establish what is permissible and what is not. Why did you select this latter option rather than simply to rely on the good judgment of the Court in prohibiting excesses?

Mr. MOSHER. Charles, again I will turn to my legal adviser, but my own answer to that question would be what seems to a layman abuse that is so obvious that the legislative branch needs to consider the possibility, it has an absolute obligation to consider the possibility, of trying to curb and implement the fourth amendment by legislation.

Mr. MATHIAS. If I could amplify that just for a second, it seems to me that:

No. 1: You have the record that we are not doing very well with this problem on a case-by-case basis.

No. 2: I think you have the responsibility of the Congress to define its view of this problem. I do not think we in the Congress can simply leave it to the judges and to the Attorneys General, or Secretaries of Defense, or whoever happens to be the active agents in the case. We cannot simply leave it to them to define the Constitution, and then live with their definition, and perhaps go down on the floor and make some speeches complaining every now and then. We have the responsibility to give our definition of the Constitution in this case.

Mr. WIGGINS. I respect that point of view. It has the virtue of involving this branch of Government in a most important subject. But, it has the vice of interjecting rigidity into the system, the judicial branch. It does have a great deal of flexibility in dealing with precise circumstances of a given case. I am not sure I share your view that the judiciary has been less than aggressive in protecting fourth amendment rights. *Katz*, *Berger*, and the so-called *Keith* and other cases indicate the aggressiveness and sensitivity of the judicial branch to this problem.

So much for that conceptual problem, and I will mull it around myself.

Mr. MATHIAS. Of course, one of the problems is that many of the cases, the ones that worry Congressman Mosher and myself, never get to the attention of the judicial branch. We are trying to involve them, and make sure they do get into the act. So in a sense we are in your corner. We are trying to give the judges a chance to participate in each case and not be excluded from so many as they now are.

Mr. WIGGINS. In the Constitution in various places the word "person" is used, "citizen" is used and in one case, two cases "people" is used. Your prepared statement did not carefully use those terms, I think, because you indicated in places in your prepared statement you are attempting to protect the rights of citizens.

I would like to know if the thrust of this legislation is broader than that, if you intend to reach persons as well as citizens?

Mr. MATHIAS. Yes, the answer is "Yes." You can go back to the Embassy example.

Mr. WIGGINS. Yes. Your legislation does not admit of special circumstances directed toward noncitizens, is that correct?

Mr. MATHIAS. Not within the borders of the United States.

Mr. WIGGINS. Yes. I would like you to turn to the bill itself, starting on page 4, if you have it before you. Do you have a copy of the bill, Senator?

Section 2236, commencing on line 4, page 4, in the first subdivision indicates that warrants issued without probable cause, and I want to know your understanding, "without reasonable cause" are the words, your understanding of "reasonable cause" to believe what?

Senator MATHIAS. That there has been a violation of law or that there is about to be a violation of law. And, of course, a severe threat to national security would be a violation of law, I think, in almost every case.

Mr. WIGGINS. Well, I am sure, and you are focusing now on my concern as to whether or not wiretaps and searches in general must be directed to an offense, and if it is your intent to prohibit investigative searches without reference to a particular offense.

Mr. MATHIAS. I would like to tie it to an offense.

Mr. WIGGINS. All right. Then would you like to prohibit investigative searches that are not tied to a specific offense?

Mr. MATHIAS. That is right. But, again, I think your concern does relate to security problems.

Mr. WIGGINS. Yes; it does.

Mr. MATHIAS. And almost every problem that would relate to national security, espionage, for example, is a violation of law. And it would be readily susceptible to being related to——

Mr. WIGGINS. Well, let us just take a hypothetical case. If the United States felt there was a certain tension between its interest and that of country *X*, under no circumstances, under your bill, would a tap be permitted in the Embassy of country *X* simply to determine whether or not they are attempting to engage in espionage activities, or any activities detrimental to the United States?

Mr. MATHIAS. If there was reason to believe that they were engaged in such activities, and those activities are prohibited by our law, they could be reached by a warrant.

Mr. WIGGINS. What if the search was simply for the purpose of intercepting and ultimately breaking their intelligence codes? It is certainly an offense for them to have such an intelligence system.

Mr. MATHIAS. That would be violating a treaty.

Mr. WIGGINS. Which one? What one?

Mr. MATHIAS. Just an inquiry of that sort is clearly prohibited by treaty.

Mr. WIGGINS. It is impermissible for us to, under the treaty, to attempt to break the code of a foreign power?

Mr. MATHIAS. Yes; it is.

Mr. WIGGINS. I am surprised to hear that, because that has been considered to be one of the great successes of our country in the past. Are they in violation of law?

Mr. MATHIAS. Treaties are the law of the land.

Mr. WIGGINS. They are indeed. So, I will look into that a little bit later.

[Subsequently, Senator Mathias submitted the Vienna Convention on DiplomaticRelations, which follows:]

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UNITED NATIONS CONFERENCE
ON DIPLOMATIC INTERCOURSE AND IMMUNITIES

VIENNA CONVENTION
ON
DIPLOMATIC RELATIONS

UNITED NATIONS
1961

TIAS 7502

VIENNA CONVENTION ON DIPLOMATIC RELATIONS

The States Parties to the present Convention,

Recalling that peoples of all nations from ancient times have recognized the status of diplomatic agents,

Having in mind the purposes and principles of the Charter of the United Nations [1] concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations,

Believing that an international convention on diplomatic intercourse, privileges and immunities would contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems,

Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States,

Affirming that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention,

Have agreed as follows:

Article 1

For the purpose of the present Convention, the following expressions shall have the meanings hereunder assigned to them:

(a) the "head of the mission" is the person charged by the sending State with the duty of acting in that capacity;

(b) the "members of the mission" are the head of the mission and the members of the staff of the mission;

[1] TS 993; 59 Stat. 1031.

(c) the "members of the staff of the mission" are the members of the diplomatic staff, of the administrative and technical staff and of the service staff of the mission;

(d) the "members of the diplomatic staff" are the members of the staff of the mission having diplomatic rank;

(e) a "diplomatic agent" is the head of the mission or a member of the diplomatic staff of the mission;

(f) the "members of the administrative and technical staff" are the members of the staff of the mission employed in the administrative and technical service of the mission;

(g) the "members of the service staff" are the members of the staff of the mission in the domestic service of the mission;

(h) a "private servant" is a person who is in the domestic service of a member of the mission and who is not an employee of the sending State;

(i) the "premises of the mission" are the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission.

Article 2

The establishment of diplomatic relations between States, and of permanent diplomatic missions, takes place by mutual consent.

Article 3

1. The functions of a diplomatic mission consist inter alia in:

(a) representing the sending State in the receiving State;

(b) protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;

(c) negotiating with the Government of the receiving State;

(d) ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;

(e) promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.

2. Nothing in the present Convention shall be construed as preventing the performance of consular functions by a diplomatic mission.

Article 4

1. The sending State must make certain that the agrément of the receiving State has been given for the person it proposes to accredit as head of the mission to that State.

2. The receiving State is not obliged to give reasons to the sending State for a refusal of agrément.

Article 5

1. The sending State may, after it has given due notification to the receiving States concerned, accredit a head of mission or assign any member of the diplomatic staff, as the case may be, to more than one State, unless there is express objection by any of the receiving States.

2. If the sending State accredits a head of mission to one or more other States it may establish a diplomatic mission headed by a chargé d'affaires ad interim in each State where the head of mission has not his permanent seat.

3. A head of mission or any member of the diplomatic staff of the mission may act as representative of the sending State to any international organization.

Article 6

Two or more States may accredit the same person as head of mission to another State, unless objection is offered by the receiving State.

Article 7

Subject to the provisions of Articles 5, 8, 9 and 11, the sending State may freely appoint the members of the staff of the mission. In the case of military, naval or air attachés, the receiving State may require their names to be submitted beforehand, for its approval.

Article 8

1. Members of the diplomatic staff of the mission should in principle be of the nationality of the sending State.

2. Members of the diplomatic staff of the mission may not be appointed from among persons having the nationality of the receiving State, except with the consent of that State which may be withdrawn at any time.

3. The receiving State may reserve the same right with regard to nationals of a third State who are not also nationals of the sending State.

Article 9

1. The receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is persona

non grata or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared non grata or not acceptable before arriving in the territory of the receiving State.

2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this Article, the receiving State may refuse to recognize the person concerned as a member of the mission.

Article 10

1. The Ministry for Foreign Affairs of the receiving State, or such other ministry as may be agreed, shall be notified of:

(a) the appointment of members of the mission, their arrival and their final departure or the termination of their functions with the mission;

(b) the arrival and final departure of a person belonging to the family of a member of the mission and, where appropriate, the fact that a person becomes or ceases to be a member of the family of a member of the mission;

(c) the arrival and final departure of private servants in the employ of persons referred to in sub-paragraph (a) of this paragraph and, where appropriate, the fact that they are leaving the employ of such persons;

(d) the engagement and discharge of persons resident in the receiving State as members of the mission or private servants entitled to privileges and immunities.

2. Where possible, prior notification of arrival and final departure shall also be given.

Article 11

1. In the absence of specific agreement as to the size of the mission, the receiving State may require that the size of a mission be

kept within limits considered by it to be reasonable and normal, having regard to circumstances and conditions in the receiving State and to the needs of the particular mission.

2. The receiving State may equally, within similar bounds and on a non-discriminatory basis, refuse to accept officials of a particular category.

Article 12

The sending State may not, without the prior express consent of the receiving State, establish offices forming part of the mission in localities other than those in which the mission itself is established.

Article 13

1. The head of the mission is considered as having taken up his functions in the receiving State either when he has presented his credentials or when he has notified his arrival and a true copy of his credentials has been presented to the Ministry for Foreign Affairs of the receiving State, or such other ministry as may be agreed, in accordance with the practice prevailing in the receiving State which shall be applied in a uniform manner.

2. The order of presentation of credentials or of a true copy thereof will be determined by the date and time of the arrival of the head of the mission.

Article 14

1. Heads of mission are divided into three classes, namely:

(a) that of ambassadors or nuncios accredited to Heads of State, and other heads of mission of equivalent rank;

(b) that of envoys, ministers and internuncios accredited to Heads of State;

(c) that of chargés d'affaires accredited to Ministers for Foreign Affairs.

2. Except as concerns precedence and etiquette, there shall be no differentiation between heads of mission by reason of their class.

Article 15

The class to which the heads of their missions are to be assigned shall be agreed between States.

Article 16

1. Heads of mission shall take precedence in their respective classes in the order of the date and time of taking up their functions in accordance with Article 13.

2. Alterations in the credentials of a head of mission not involving any change of class shall not affect his precedence.

3. This article is without prejudice to any practice accepted by the receiving State regarding the precedence of the representative of the Holy See.

Article 17

The precedence of the members of the diplomatic staff of the mission shall be notified by the head of the mission to the Ministry for Foreign Affairs or such other ministry as may be agreed.

Article 18

The procedure to be observed in each State for the reception of heads of mission shall be uniform in respect of each class.

Article 19

1. If the post of head of the mission is vacant, or if the head of the mission is unable to perform his functions, a chargé d'affaires ad

interim shall act provisionally as head of the mission. The name of the chargé d'affaires ad interim shall be notified, either by the head of the mission or, in case he is unable to do so, by the Ministry for Foreign Affairs of the sending State to the Ministry for Foreign Affairs of the receiving State or such other ministry as may be agreed.

2. In cases where no member of the diplomatic staff of the mission is present in the receiving State, a member of the administrative and technical staff may, with the consent of the receiving State, be designated by the sending State to be in charge of the current administrative affairs of the mission.

Article 20

The mission and its head shall have the right to use the flag and emblem of the sending State on the premises of the mission, including the residence of the head of the mission, and on his means of transport.

Article 21

1. The receiving State shall either facilitate the acquisition on its territory, in accordance with its laws, by the sending State of premises necessary for its mission or assist the latter in obtaining accommodation in some other way.

2. It shall also, where necessary, assist missions in obtaining suitable accommodation for their members.

Article 22

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.

2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

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.

Article 23

1. The sending State and the head of the mission shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the mission, whether owned or leased, other than such as represent payment for specific services rendered.

2. The exemption from taxation referred to in this Article shall not apply to such dues and taxes payable under the law of the receiving State by persons contracting with the sending State or the head of the mission.

Article 24

The archives and documents of the mission shall be inviolable at any time and wherever they may be.

Article 25

The receiving State shall accord full facilities for the performance of the functions of the mission.

Article 26

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State shall ensure to all members of the mission freedom of movement and travel in its territory.

Article 27

1. The receiving State shall permit and protect free communication on the part of the mission for all official purposes. In communicating with the Government and the other missions and consulates of the sending State, wherever situated, the mission may employ all appropriate means, including diplomatic couriers and messages in code or cipher. However, the mission may install and use a wireless transmitter only with the consent of the receiving State.

2. The official correspondence of the mission shall be inviolable. Official correspondence means all correspondence relating to the mission and its functions.

3. The diplomatic bag shall not be opened or detained.

4. The packages constituting the diplomatic bag must bear visible external marks of their character and may contain only diplomatic documents or articles intended for official use.

5. The diplomatic courier, who shall be provided with an official document indicating his status and the number of packages constituting the diplomatic bag, shall be protected by the receiving State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

6. The sending State or the mission may designate diplomatic couriers ad hoc. In such cases the provisions of paragraph 5 of this Article shall also apply, except that the immunities therein mentioned shall cease to apply when such a courier has delivered to the consignee the diplomatic bag in his charge.

7. A diplomatic bag may be entrusted to the captain of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag but he shall not be considered to be a diplomatic courier. The mission may send one of its members to take possession of the diplomatic bag directly and freely from the captain of the aircraft.

Article 28

The fees and charges levied by the mission in the course of its official duties shall be exempt from all dues and taxes.

Article 29

The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.

Article 30

1. The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.

2. His papers, correspondence and, except as provided in paragraph 3 of Article 31, his property, shall likewise enjoy inviolability.

Article 31

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

(a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;

(b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

2. A diplomatic agent is not obliged to give evidence as a witness.

3. No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under sub-paragraphs (a), (b) and (c) of paragraph 1 of this Article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

4. The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.

Article 32

1. The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 may be waived by the sending State.

2. Waiver must always be express.

3. The initiation of proceedings by a diplomatic agent or by a person enjoying immunity from jurisdiction under Article 37 shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary.

Article 33

1. Subject to the provisions of paragraph 3 of this Article, a diplomatic agent shall with respect to services rendered for the sending State be exempt from social security provisions which may be in force in the receiving State.

2. The exemption provided for in paragraph 1 of this Article shall also apply to private servants who are in the sole employ of a diplomatic agent, on condition:

(a) that they are not nationals of or permanently resident in the receiving State; and

(b) that they are covered by the social security provisions which may be in force in the sending State or a third State.

3. A diplomatic agent who employs persons to whom the exemption provided for in paragraph 2 of this Article does not apply shall observe the obligations which the social security provisions of the receiving State impose upon employers.

4. The exemption provided for in paragraphs 1 and 2 of this Article shall not preclude voluntary participation in the social security system of the receiving State provided that such participation is permitted by that State.

5. The provisions of this Article shall not affect bilateral or multilateral agreements concerning social security concluded previously and shall not prevent the conclusion of such agreements in the future.

Article 34

A diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except:

(a) indirect taxes of a kind which are normally incorporated in the price of goods or services;

(b) dues and taxes on private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;

(c) estate, succession or inheritance duties levied by the receiving State, subject to the provisions of paragraph 4 of Article 39;

(d) dues and taxes on private income having its source in the receiving State and capital taxes on investments made in commercial undertakings in the receiving State;

(e) charges levied for specific services rendered;

(f) registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of Article 23.

Article 35

The receiving State shall exempt diplomatic agents from all personal services, from all public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting.

Article 36

1. The receiving State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes, and related charges other than charges for storage, cartage and similar services, on:

(a) articles for the official use of the mission;

(b) articles for the personal use of a diplomatic agent or members of his family forming part of his household, including articles intended for his establishment.

2. The personal baggage of a diplomatic agent shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1 of this Article, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving

State. Such inspection shall be conducted only in the presence of the diplomatic agent or of his authorized representative.

Article 37

1. The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in Articles 29 to 36.

2. Members of the administrative and technical staff of the mission, together with members of their families forming part of their respective households, shall, if they are not nationals of or permanently resident in the receiving State, enjoy the privileges and immunities specified in Articles 29 to 35, except that the immunity from civil and administrative jurisdiction of the receiving State specified in paragraph 1 of Article 31 shall not extend to acts performed outside the course of their duties. They shall also enjoy the privileges specified in Article 36, paragraph 1, in respect of articles imported at the time of first installation.

3. Members of the service staff of the mission who are not nationals of or permanently resident in the receiving State shall enjoy immunity in respect of acts performed in the course of their duties, exemption from dues and taxes on the emoluments they receive by reason of their employment and the exemption contained in Article 33.

4. Private servants of members of the mission shall, if they are not nationals of or permanently resident in the receiving State, be exempt from dues and taxes on the emoluments they receive by reason of their employment. In other respects, they may enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the mission.

Article 38

1. Except insofar as additional privileges and immunities may be granted by the receiving State, a diplomatic agent who is a national of or permanently resident in that State shall enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of his functions.

2. Other members of the staff of the mission and private servants who are nationals of or permanently resident in the receiving State shall enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the mission.

Article 39

1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed.

2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

3. In case of the death of a member of the mission, the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the expiry of a reasonable period in which to leave the country.

4. In the event of the death of a member of the mission not a national of or permanently resident in the receiving State or a member of

his family forming part of his household, the receiving State shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the country the export of which was prohibited at the time of his death. Estate, succession and inheritance duties shall not be levied on movable property the presence of which in the receiving State was due solely to the presence there of the deceased as a member of the mission or as a member of the family of a member of the mission.

Article 40

1. If a diplomatic agent passes through or is in the territory of a third State, which has granted him a passport visa if such visa was necessary, while proceeding to take up or to return to his post, or when returning to his own country, the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return. The same shall apply in the case of any members of his family enjoying privileges or immunities who are accompanying the diplomatic agent, or travelling separately to join him or to return to their country.

2. In circumstances similar to those specified in paragraph 1 of this Article, third States shall not hinder the passage of members of the administrative and technical or service staff of a mission, and of members of their families, through their territories.

3. Third States shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as is accorded by the receiving State. They shall accord to diplomatic couriers, who have been granted a passport visa if such visa was necessary, and diplomatic bags in transit the same inviolability and protection as the receiving State is bound to accord.

4. The obligations of third States under paragraphs 1, 2 and 3 of this Article shall also apply to the persons mentioned respectively in those paragraphs, and to official communications and diplomatic bags,

whose presence in the territory of the third State is due to force majeure.

Article 41

1. Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State.

2. All official business with the receiving State entrusted to the mission by the sending State shall be conducted with or through the Ministry for Foreign Affairs of the receiving State or such other ministry as may be agreed.

3. The premises of the mission must not be used in any manner incompatible with the functions of the mission as laid down in the present Convention or by other rules of general international law or by any special agreements in force between the sending and the receiving State.

Article 42

A diplomatic agent shall not in the receiving State practise for personal profit any professional or commercial activity.

Article 43

The function of a diplomatic agent comes to an end, inter alia:

(a) on notification by the sending State to the receiving State that the function of the diplomatic agent has come to an end;

(b) on notification by the receiving State to the sending State that, in accordance with paragraph 2 of Article 9, it refuses to recognize the diplomatic agent as a member of the mission.

Article 44

The receiving State must, even in case of armed conflict, grant facilities in order to enable persons enjoying privileges and immunities, other than nationals of the receiving State, and members of the families of such persons irrespective of their nationality, to leave at the earliest possible moment. It must, in particular, in case of need, place at their disposal the necessary means of transport for themselves and their property.

Article 45

If diplomatic relations are broken off between two States, or if a mission is permanently or temporarily recalled:

(a) the receiving State must, even in case of armed conflict, respect and protect the premises of the mission, together with its property and archives;

(b) the sending State may entrust the custody of the premises of the mission, together with its property and archives, to a third State acceptable to the receiving State;

(c) the sending State may entrust the protection of its interests and those of its nationals to a third State acceptable to the receiving State.

Article 46

A sending State may with the prior consent of a receiving State, and at the request of a third State not represented in the receiving State, undertake the temporary protection of the interests of the third State and of its nationals.

Article 47

1. In the application of the provisions of the present Convention, the receiving State shall not discriminate as between States.

2. However, discrimination shall not be regarded as taking place:

(a) where the receiving State applies any of the provisions of the present Convention restrictively because of a restrictive application of that provision to its mission in the sending State;

(b) where by custom or agreement States extend to each other more favourable treatment than is required by the provisions of the present Convention.

Article 48

The present Convention shall be open for signature by all States Members of the United Nations or of any of the specialized agencies or Parties to the Statute of the International Court of Justice, [1] and by any other State invited by the General Assembly of the United Nations to become a Party to the Convention, as follows: until 31 October 1961 at the Federal Ministry for Foreign Affairs of Austria and subsequently, until 31 March 1962, at the United Nations Headquarters in New York.

Article 49

The present Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 50

The present Convention shall remain open for accession by any State belonging to any of the four categories mentioned in Article 48. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 51

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the twenty-second instrument of ratification or accession with the Secretary-General of the United Nations.

[1] TS 993; 59 Stat. 1055.

2. For each State ratifying or acceding to the Convention after the deposit of the twenty-second instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

Article 52

The Secretary-General of the United Nations shall inform all States belonging to any of the four categories mentioned in Article 48:

(a) of signatures to the present Convention and of the deposit of instruments of ratification or accession, in accordance with Articles 48, 49 and 50;

(b) of the date on which the present Convention will enter into force, in accordance with Article 51.

Article 53

The original of the present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States belonging to any of the four categories mentioned in Article 48.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorised thereto by their respective Governments, have signed the present Convention.

DONE AT VIENNA, this eighteenth day of April one thousand nine hundred and sixty-one.

Mr. WIGGINS. On the same page, section II, dealing with records of telephone calls and the like, I want to know if that is intended to circumscribe the subpena power of the Congress of the United States?

Mr. MATHIAS. No, it would not be intended.

Mr. WIGGINS. It does by its literal term, because it indicates that no officer, agency, or employee of the United States, or any department or agency thereof, which is apparently broad enough to include the Congress.

Mr. MATHIAS. Well, I think if there is any question, we would certainly welcome an amendment on that point.

Mr. WIGGINS. At least it is not your intent to do so?

Mr. MATHIAS. Well, I think if there is any question, we would certainly welcome an amendment on that point.

Mr. WIGGINS. At least it is not your intent to do so?

Mr. MATHIAS. Certainly it would not be our intent. I do not think we could do it, if we wanted to. The subpena power is a constitutional power.

Mr. WIGGINS. On the next page, you indicate some exceptions; namely, the issuance or serving of an arrest warrant, searches pursuant to a lawful arrest, searches made pursuant to the invitation of the occupant, and the like.

Is it your intent to incorporate the common law with respect to those areas? As you know, hundreds and hundreds of cases have flushed out the meaning or limits of a proper search pursuant to an arrest or the like.

Is it your intent to incorporate those cases?

Mr. MATHIAS. I would say yes, in a general way. What we are trying to do in this, as you would readily recognize, is to avoid the rigidity that you have expressed concern about and provide that there are cases in which there has to be some flexibility.

Mr. WIGGINS. One final question, and then I will catch you, perhaps, on the second round.

You provide for reports to the Congress, both in the case of wiretap intercept and in the case of mail intercepts. The reports are to be confidential and maintained as secret, but the report must include in each case a full transcript of the proceedings before the judge who issued the warrant.

Now, let us hypothetically assume a national security case in which the judge must issue a warrant. I take it that some person in the executive branch must present to the judge, upon oath or affirmation, information justifying a search.

It is possible for me to assume that the justification might include very sensitive material in order to justify the search. That would be a part of the proceedings in the court.

That information thereafter is to be transmitted to the Congress of the United States. Do you perceive or foresee the possible breaching national security interests by that procedure?

Mr. MATHIAS. I think there is a problem. I think you have to look the problem squarely in the face. There are many court proceedings that are held in some degree of confidentiality. There are many matters before the Congress that are classified.

I think that we are capable of handling such material. I think that it is a very serious responsibility and one that we simply have to shoulder.

I think the day is past when Members of Congress can do as some of our predecessors did and say, do not tell me, I do not want to know. I do not think we have that right. I think we have to know. I believe this is one of the areas where we have to know.

Now, the importance of it goes to Father Drinan's objection to the whole judicial process. If you do not have some provision of this sort, exactly what he has suggested will occur. The judges will say if you think it is all right, I will give you the warrant; do not tell me any more. Here is your warrant.

I think this guarantees a new relationship in which judges are going to have to examine their own consciences and the law.

Mr. WIGGINS. Well, I do not wish to take more time than I am entitled, Mr. Chairman, but I would like to just bounce an idea off of you, Senator. We have approximately 500 district court judges in the United States, any one of whom would presumably be authorized to issue a warrant. I am not sure how many magistrates we have, but the issuance of the warrant has been an authority which we have recognized in magistrates as well.

The point is that there are a large number of persons who are authorized to issue warrants. In national security cases, what do you think of the idea of requiring that those warrants be issued by designated judges, designated by title, in order to minimize the risk, and perhaps develop a uniform system of judging these matters?

Mr. MATHIAS. I would not preclude that at all. It is something that we ought to think about, and it could be a very constructive suggestion that a judge be designated to become expert in these matters.

This is, of course, one of the objections to going to judges in intelligence cases. They do not know anything about foreign policy; they do not know anything about defense policy.

Well, judges can be experts in many fields. They could become expert in this field and could be designated for this particular service.

Mr. WIGGINS. Thank you, Senator.

Mr. KASTENMEIER. The gentleman from New York, Mr. Badillo.

Mr. BADILLO. Thank you, Mr. Chairman.

When I was preparing for this hearing, Mr. Chairman, I read the transcripts of the hearings last year, and it seemed to me that the situation was almost exactly what it is today. At that time, the Senate and the House were considering the appointment of special committees to deal with this problem.

And I appreciate what the chairman has indicated, that the impeachment hearings delayed any action, but I am very much concerned that we take action this time. And it is for this reason that I have joined in cosponsoring the bill that Senator Mathias and Congressman Mosher have introduced.

I do wonder about some of the exact language, Senator. For example, on page 4, section 2236, I will point out that "whoever being an officer, agent, or employee willfully searches a private dwelling or procures or inspects the records or opens the mail will receive a penalty," but in section 4, which has to do with wiretapping, the wording is the same as that of the existing law, that it is not just a person who searches himself, but also procures another person to do it.

In other words, if the President of the United States says to someone to tap the wires of Senator Mathias, he can be held guilty

of a crime. But, if he says we will intercept the mail of Senator Mathias, then only the person who actually opens the mail will be liable.

Why should not the individual who gives the instruction as well as the one who carries out the instruction be held liable in each case?

Mr. MATHIAS. First of all, Congressman, let me say that I do not think either Congressman Mosher or I consider ourselves infallible draftsmen. We hope that the committee will be able to improve the bill.

To be perfectly honest with you, I have not thought very deeply on this particular distinction, except in regard to the physical acts involved in entering a dwelling. For example, if you go and break into the Watergate offices of the Democratic National Committee without a warrant, the most limited intelligence knows that you are doing something seriously wrong.

If you are a telephone lineman applying a device to a telephone, it seems to me that you may or you may not understand the full degree of your culpability. It is the person who directs that to be done that you seriously want to reach.

I think that you might broaden the coverage in both of those sections and cast a wider net, and that might be a useful thing to do. But I believe that was the philosophy.

Mr. BADILLO. Well, I thought that was what you had in mind, but the way it reads, you would not, in subdivisions 1, 2, and 3, you would only get at the one who actually carries out the act, rather than the one who directs the act, and I think this is what we want to do.

Mr. MATHIAS. It might be a useful addition to broaden the coverage, as I say, in each case, and then you would have the comprehensive responsibility.

Mr. BADILLO. Thank you. Now, with respect to the question of receiving reports within 30 days or 60 days or 90 days, we will have the right in the Judiciary Committees to receive reports with respect to wiretapping, with respect to mail, but we will not have the right with respect to subdivision 2, which has to do with requests for telephone calls, bank, credit, medical, or other private transactions, or with respect to subdivision 1.

Do you have any objection if we have the right in all four cases?

Mr. MATHIAS. I would have no objection. The theory that we proceeded on there was that such warrants are more analogous to normal practice today, where a subpena duces tecem is issued and papers are subpenaed. This happens every day and there might be such a volume of it that it would become an impractical way of overseeing the act; whereas, the serious violations, the ones that have caused the most trouble, are the surveillance activities.

Again, there would be no reason not to have it, if, in fact, we could mechanically deal with it.

Mr. BADILLO. Well, if we want to have adequate oversight, we should know to what extent the telephone calls are being monitored or credit cards or bank records are being monitored. We might not have the staff to be able to cover it, but at least we have the right to investigate.

We could, on a spot-check basis, determine whether or not the procedures are being carried out properly.

Mr. MATHIAS. Precisely.

Mr. BADILLO. Now, with respect to the question of what reports we do receive, the itemization on page 6 or 7 does not include the affidavit which stated the grounds for probable cause.

Was it intended to include it and, if not, is there any reason why it should not be included?

Mr. MATHIAS. Well, I think that would be included as a part of the——

Mr. BADILLO. I am talking about the first one, the first 30 days.

Mr. MATHIAS. You are looking on page——

Mr. BADILLO. I am looking on page 6, subsection A, 2519(a), within 30 days, and talking about the first one, within 30 days. We do get the fact that an order was applied for and other information, but I am not clear whether you intended to say we could also get the affidavit.

Mr. MATHIAS. Page 7, line 14, refers to a complete transcript of the proceedings.

Mr. BADILLO. But that is in 60 days. I am talking about 30 days.

Mr. MATHIAS. Well, if you get it in 30—60 days, I see.

Mr. BADILLO. Is there any reason we could not get it in the first 30 days?

Mr. MATHIAS. I see no problem in 30 days, if that would be considered useful.

Mr. BADILLO. No, I understand from Father Drinan and some of the Members who have had a chance to examine these documents, especially the one with 60 days, where it has the complete transcript, that what we actually receive is just a document that says this was done, but there is no information by which it might be possible to judge whether there is any basis for the probable cause. In other words, if my telephone or your telephone was tapped, under a probable cause that we were trying to deal with some foreign country, and 30 or 60 days go by, should there not be some indication of whether or not that allegation of probable cause has been justified in some way?

In other words, how can we have oversight, is what I am getting? That is what I am getting at. How can we have oversight if we do not have a way of finding out whether there is any basis for the suspicion in the first place?

There should be some point at which—there should be some conclusion that the suspicions are absolutely unjustified.

Mr. MATHIAS. The reports, of course, would set up the nature of the suspicion in the application for the warrants.

Mr. BADILLO. How would we evaluate that suspicion?

Mr. MATHIAS. That would be clear. That there be a 90-day report after the order, and within 60 days after the termination of such interception, there should be a report to the committees in the House and Senate, and to the administrative officer of the court of the disposition of the interception, as well as the identity of those who physically participated in it.

From the disposition, it seems to me, the committee could deduce what had occurred. If a prosecution follows, it is perfectly clear what happens.

If, in fact, there are a large number that just trail off into limbo, it seems to me that is where the oversight responsibility of this committee

will be particularly important. At that point, you call the Attorney General, or the Secretary of the Treasury, or whoever is the responsible department head, and say we now want to have some explanation of exactly what has been happening here. That would be the purpose of the whole procedure, to trigger that kind of an inquiry.

Mr. BADILLO. Now, as you visualize this, the order could be extended indefinitely, because you point out within 90 days after the order or any extension thereof, and the order could go on for a year or two years?

Mr. MATHIAS. This is an area where I would agree with Mr. Wiggins that you cannot be so rigid. I don't know how you could set by law any general definition, except to make them go back again and again and again to restate the necessity for the extension, as they did for the original application.

Mr. BADILLO. Thank you very much.

Mr. KASTENMEIER. The Chair has one last question, prompted by the gentleman from Maine, Mr. Cohen, as to the scope of the bill.

I think the term which one of the witnesses used was, "confines of the United States." I wondered whether the bill would cover a case such as that involving Mr. Joseph Kraft, who was subjected to wiretapping or surveillance while in Europe. Is that outside of the scope of this particular bill?

Mr. MATHIAS. My personal philosophy, which I will not inflict on Congressman Mosher, is that the Constitution ought to follow the citizen wherever he is. But I think that raises some controversial areas of discussion which might delay the enactment of this guarantee within the United States, where it is much less controversial.

Mr. KASTENMEIER. Well, I am sure that if the subcommittee goes forward with this legislation, it can resolve that question, should it arise.

Thank you. Are there further questions of the witness?

Mr. DRINAN. Mr. Chairman, I have one question, if I may.

Mr. KASTENMEIER. Yes. We do have other witnesses.

Mr. DRINAN. All right. One simple question, Senator.

Congressman Mosher, would this apply to surveillance by the FBI over demonstrations or assemblies such as the Socialist Party?

Mr. MOSHER. Yes, sir. Sure.

Mr. MATHIAS. Sure.

Mr. DRINAN. How would it? They are just sending their agents there to take pictures or to make observations and how would they be covered?

As I read it, they could say that we would not be required by any provision of H.R. 214 to get a court order.

Mr. MOSHER. This question goes back to an earlier question of the chairman's, where he asked if this included a shadowing, and I think this is essentially what you are talking about, is it not, that type of surveillance.?

Mr. DRINAN. How would they be covered?

Mr. MOSHER. Without intending to pun, I must say that the chairman's question raised a shadow of a doubt as to whether this legislation is as comprehensive as we intended. I have no easy, quick answers, Father Drinan, to your question. I have a personal abhorrence to any type of government surveillance that seems to inhibit freedom of speech, freedom of expression, and that sort of thing, and I think

that is what you are driving at here, a surveillance which would seem to inhibit and threaten the right to belief and speech.

Mr. DRINAN. As I read it, Congressman, there would be nothing that would prevent the FBI or the CIA or anybody else having that surveillance.

One last question. Does it apply to the military? In our hearings last spring we had Mr. Cooke here from the DOD, and he reported on the surveillance that the military does, and he had this particular statement, that the directive of the military requires quarterly reports to the Secretary of Defense concerning the employment of wiretaps and eavesdrops, including those conducted in areas of the world where the substantive provisions of the directive do not apply.

And I asked him for information about that, and he said he would send it, but it never did come. In other words, do you get into the whole question of military surveillance on which, as you know, many bills have been submitted in the Congress.

Mr. MOSHER. It is my personal intention, certainly, to get into that area.

Mr. DRINAN. By this bill?

Mr. MOSHER. Yes.

Mr. DRINAN. Once again, I am not certain it is covered. Thank you.

Mr. KASTENMEIER. Does the gentleman from California have questions?

Mr. WIGGINS. Well, let me quickly ask this, and I hope it will be a quick answer.

Mr. KASTENMEIER. Let me say to the gentleman from California, the next two witnesses will not necessarily be addressing themselves to this bill.

Mr. WIGGINS. All right. I am back again, troubled with the words "without reasonable cause." Now, I know that is in the statute now, and there are, unfortunately, very few cases under the warrant section interpreting "without reasonable cause." The case laws under the arrest provisions of the law.

But, I am still troubled with the question. Without reasonable cause to believe what? And in order to focus your answer, I want to give you at least three options.

One, reasonable cause to believe that an offense has been committed. That is usually easy to establish, it is an objective fact.

Second, reasonable cause to believe that a given person committed that offense. That is very difficult. If you postulate that you must have that reasonable cause to believe, you already have the authority to go out and arrest him without need of further investigation.

And then the third and most difficult situation is that you have reasonable cause to believe that a person is innocent of any offense, but possesses information which may lead to the discovery of who, in fact, did commit the offense.

Now, if you can deal with particularly the latter two situations, and tell me what you intend to cover by this language "without reasonable cause" it would be helpful to me.

Mr. RAILSBACK. Would the gentleman yield?

Mr. WIGGINS. Yes, of course.

Mr. RAILSBACK. I think it is important to note that the word "maliciously" is also part of that same clause. In other words, it is "maliciously" and "without reasonable cause." That may be significant.

Mr. WIGGINS. Perhaps that modifies it, but I still am troubled by the reach of "without reasonable cause," particularly when you are dealing with an individual, and I want to hypothesize, who committed no offense, but may be possessed of information which would be valuable to law enforcement officials in determining who did commit the offense.

Mr. MATHIAS. Again, I can give you my personal view. I will not attempt to impose it on my partner here.

We have intended to require a strict standard of reasonable cause.

Mr. WIGGINS. To believe what?

Mr. MATHIAS. Tied to the concept of the commission of an offense or the prospect of the commission of an offense. I do not believe it is beyond the reach of this committee to broaden the definition of reasonable cause. I think that is feasible and might be done.

I, myself, would say that I believe we should stick to a rather narrow definition of reasonable cause, to the narrow and traditional definitions.

Mr. WIGGINS. OK.

Mr. KASTENMEIER. That concludes the questions this morning, and the Chair, on behalf of the committee, would like to personally thank both Senator Mathias and Congressman Mosher for this appearance this morning as leadoff witnesses in this most urgent area. Thank you both.

Mr. MOSHER. Mr. Chairman, it seems to me the quality of the questions you have asked indicates your very serious intent to deal with this problem, and I am very happy to note that.

Mr. MATHIAS. Mr. Chairman, I join with my partner in saying that we are very much heartened by the lively interest that has been shown by the committee. I might amplify my last answer to Mr. Wiggins by saying that as far as I am concerned, if we cannot do it within the four corners of the Constitution, it oughtn't to be done. And finally, to express the hope that the committee will give the House a better bill than we have given you.

Mr. KASTENMEIER. Next, the Chair would like to call Prof. Leon Friedman, of Hofstra University Law School and Mr. John Shattuck, legal counsel to the American Civil Liberties Union, both of whom have been witnesses before this committee, as well as many others, I assume, and in the past who have been enormously helpful and are extraordinarily well informed and knowledgeable about the elusive question of wiretapping, electronic surveillance, and the invasion of privacy by government.

Mr. Shattuck, would you begin?

TESTIMONY OF JOHN H. F. SHATTUCK, NATIONAL STAFF COUNSEL, AMERICAN CIVIL LIBERTIES UNION; AND LEON FRIEDMAN, PROFESSOR OF LAW, HOFSTRA UNIVERSITY

Mr. SHATTUCK. Thank you, Mr. Chairman.

We wish to express our gratitude for the opportunity to appear before the subcommittee for the second time in 6 months on a subject

of great importance to us, as well as to the subcommittee. We appear as lawyers representing a variety of private individuals who have been targets of various forms of governmental surveillance over approximately the last 5 years.

Mr. Friedman and I are serving as co-counsel in a number of cases which we will be discussing this morning, and we will both address ourselves to the questions before the subcommittee as well as to the issues in our statement.

Mr. KASTENMEIER. I take it you have prior to this made an assessment of what you are free to say and what you are not, either by virtue of the nature of the litigation or any inhibitions imposed upon you by a court in connection with the cases?

Mr. SHATTUCK. We have, Mr. Chairman. And the materials we have provided to the subcommittee are all matters of public record. These documents are now on file in cases in which we are involved as counsel, so not only are they matters of public record, but they are matters of record in our cases.

And I think your statement really poses one of the most difficult and important questions in this entire area, and that is that this subject we are addressing today is really a part of the governmental secrecy issue which has been of so much concern to the Congress and to the courts in recent years. The materials that we have obtained in our litigation are, of course, only a very small tip of the iceberg, and the fact that some of these materials are covered by a protective order, and we cannot even disclose them to the Congress—unless we are, of course, to receive a subpena, and you were to seek to enforce it—I think demonstrates the difficulty which you and the litigants whom we are representing face in attempting to get the kind of information which is necessary to legislate in this area, as well as to litigate. And I think it goes to the question that Congressman Drinan was addressing during the previous testimony, which is precisely what kind of information is made available, and how useful is it.

The successes and failures of our litigation, more failures than successes, I might say, are spelled out in the article that is appended to our prepared statement, so I will not discuss in any detail the litigation itself. I would like to focus on the 17 exhibits that have been submitted to the subcommittee, and I would hope that they could be included within the record of this hearing.

Mr. KASTENMEIR. Without objection, your statement, five-page statement, and appendixes, and the schedule of exhibits just referred to, which are at each member's desk, will be received and made a part of the record.

[The material referred to follows:]

STATEMENT OF JOHN H. F. SHATTUCK, NATIONAL STAFF COUNSEL, AMERICAN CIVIL LIBERTIES UNION AND LEON FRIEDMAN, PROFESSOR OF LAW, HOFSTRA UNIVERSITY

As attorneys currently engaged in litigation challenging various governmental surveillance practices, we are grateful for this opportunity to appear before the Subcommittee. Over the past several years we have represented, on behalf of the American Civil Liberties Union, a wide diversity of citizens who have become the targets of surveillance by the FBI, the Army, the Secret Service, the CIA, the IRS and other government agencies because of their controversial

political views and activities. Our litigation to date has not succeeded in establishing that surveillance without judicial control is illegal, but it has provided a glimpse of the size and conduct of such surveillance by federal agencies. The failures and successes of the litigation are summarized in an article, "Uncovering Surveillance" by John Shattuck (*Trial Magazine*, January 1975), a copy of which is attached to this statement.

The purpose of our testimony is to supply the Subcommittee with examples of the range of surveillance practices which we have discovered through our lawsuits, in an effort to suggest areas of inquiry that might be conducted in considering legislation to regulate surveillance and protect individual rights.

We should reiterate at the outset what has often been said by others: that political intelligence gathering and covert action by the federal government against private citizens is a product of at least the last two Administrations, and is rooted in the fear and paranoia of those in power in the face of rapid political and social change over the last decade. As a recent article in the *Washington Post* pointed out, "[a]lthough the factual evidence isn't settled, at least this much is clear: that these activities grew out of common reflexes of fear, that the regular inhibitions of decent men or traditional legal restraints proved inadequate, not just in the CIA or the Justice Department or the FBI, but in the White House." Greider, "Soldier, Agent, Tax Man, Spy," *The Washington Post*, February 2, 1975, p. C1.

As a result of our litigation we have reached two general conclusions about the kinds of legislative controls which should be imposed on investigative and intelligence gathering agencies in order to dismantle the surveillance apparatus which has been assembled over the last decade. First, the warrant procedure must be strengthened and broadened so that no intrusive surveillance is conducted over American citizens outside of the judicial supervision required by the Fourth Amendment and in the absence of probable cause that a crime has been or is about to be committed. Second, the law must develop a variety of flat statutory prohibitions, including (a) a ban against the conduct of any form of surveillance over persons because of or in order to determine the nature of their political views and activities, in violation of their First Amendment rights; and (b) a bar against use or dissemination of the fruits of any lawful investigation beyond the purpose for which it was conducted. Both legislative approaches should be backed up by strong criminal and civil remedies. While the federal Privacy Act of 1974 is a step in the right direction, it is insufficient to curb political or intrusive surveillance because it broadly exempts the very agencies which make up the heart of the surveillance apparatus.

In our testimony we will attempt to give examples of what we consider are significant areas for this Subcommittee to probe in its hearings. These examples are all drawn from our litigation and are documented in the 17 exhibits appended to this introductory statement. Most of the material we will be discussing has received little, if any, public exposure, although in our view it highlights (1) the range of surveillance techniques utilized by the FBI, the Secret Service, military intelligence, and other federal investigative agencies; (2) the filing, recordkeeping and dissemination practices of these agencies; and (3) the purposes and effects of political surveillance.

Exhibits 1 through 6 demonstrate the length, intrusiveness of and varying asserted justifications for warrantless "national security" wiretapping. These documents provide examples of the issues we identified in our testimony last April before the Subcommittee (copy attached).

Exhibits 7 through 10 demonstrate the wide variety of private documents, records and information routinely obtained by federal investigators without any form of legal process or notice to persons having an expectation of privacy in the materials. These include bank records, telephone toll records, credit information and personal mail. Through such readily accessible private information investigative agencies are often able to construct intimately detailed portraits of private citizens. In many instances this information would not be obtainable pursuant to a subpoena because the agencies would not be able to lay the foundation for its issuance.

Exhibit 11 provides several examples of the routine use of informers and undercover agents in political and religious groups, including several indications of the degree to which agents must become actively involved in the affairs of their targets in order to provide useful information to the investigators.

Exhibits 12 through 16 contain a broad sampling of the recordkeeping and dissemination practices of federal surveillance agencies. Files of different persons are often intermingled if they have associated in any way together; derogatory generalizations are made about groups or organizations in the files of persons who have been members or associates; information is collected from and disseminated to sources known by the investigative agencies to be prejudiced against or hostile to the subject of a non-criminal investigation; information about lawful private or political activities is characterized in a subjective and derogatory manner; and erroneous or misleading information is released about the scope and purpose of intelligence gathering activities.

Finally, exhibit 17 provides several examples of surveillance programs conducted by the FBI and military intelligence to "disrupt" political organizations and discredit their leaders.

SCHEDULE OF EXHIBITS

1. 25-year warrantless wiretap on domestic organization. Saxbe Affidavit, *Dellinger* v. *Mitchell*, C.A., No. 1768–69 (D.D.C.)

2. 21-month warrantless wiretap on former National Security Council aide. Second Amended Complaint, *Halperin* v. *Kissinger*, C.A. No. 1187–73 (D.D.C.)

3. Interception of Detroit attorney 40 times on 13 separate warrantless wiretaps initiated after 1972 Supreme Court decision barring domestic security taps. Saxbe Affidavit, *Jabara* v. *Kelley*, C.A. No. 39065 (E.D. Mich.)

4. Interception of civilian American attorneys in Germany on warrantless Army wiretaps. McDougal and Schreiber Affidavits, *Berlin Democratic Club* v. *Schlesinger*, C.A. No. 310–74 (D.D.C.)

5. District Court opinion declining to hold "foreign security" surveillance legal on basis of *ex parte in camera* submission by FBI. *Jabara* v. *Kelley, supra* (January 17, 1975).

6. Justice Department interpretation in Congressional hearings of 1972 Supreme Court decision invalidating warrantless domestic security wiretaps. Testimony of Kevin T. Maroney, Deputy Assistant Attorney General, Hearings before Subcommittee on Administrative Practice and Procedure, Senate Judiciary Committee, 92nd Cong., 2d Sess., June 29, 1972, at 70.

7. Access to private bank records without legal process by FBI and Secret Service. *Forcade* v. *Knight*, C.A. 1258–73 (D.D.C.); *Kenyatta* v. *Kelley*, C.A. No. 71–2595 (E.D.Pa.); *ACLU* v. *Shultz*, C.A. No. 1330–72 (D.D.C.). See also Exhibit 12.

8. Secret Service access to telephone toll records without legal process. *Forcade* v. *Knight, supra.*

9. FBI access to credit records without legal process. *Forcade* v. *Knight, supra.*

10. Mail covers and mail opening without legal process by FBI, Secret Service and Army Intelligence. *Paton* v. *La Prade*, C.A. No. 1091–73 (D.N.J.); *Forcade* v. *Knight, supra; Berlin Democratic Club* v. *Schlesinger, supra.*

11. Use of undercover agents and informers in political and religious groups by FBI and Army Intelligence. *Kenyatta* v. *Kelley, supra; Berlin Democratic Club* v. *Schlesinger, supra.* See also Exhibit 4.

12. Non-criminal investigation of Arab-American attorney by FBI for seven years, including 50 wiretap interceptions, inspection of his bank records, continuous physical surveillance and data collection, solicitation of derogatory data from domestic zionist groups and constant dissemination of data about subject outside FBI. *Jabara* v. *Kelley, supra.*

13. FBI investigation of former Member of Congress. *Lowenstein* v. *Rooney*, C.A. No. —— (E.D.N.Y.).

14. Release of "erroneous or misleading" information by Army Intelligence concerning the scope of its surveillance of American civilians. *Berlin Democratic Club* v. *Schlesinger, supra; Laird* v. *Tatum*, 408 U.S. 1 (1972). See also Exhibit 4.

15. Cross-referencing of files and construction of political "spiderwebs" by FBI and Army Intelligence. *Forcade* v. *Knight, supra; Berlin Democratic Club* v. *Schlesinger, supra.*

16. Dissemination of derogatory reports by Army Intelligence about civilian, political and legal activities. *Berlin Democratic Club* v. *Schlesinger*, supra.

17. FBI and Army Intelligence "disruption" programs. COINTELPRO Black Panther Party proposal; *Kenyatta* v. *Kelley, supra; Berlin Democratic Club* v. *Schlesinger, supra.*

Uncovering Surveillance

(By John H. F. Shattuck)

John H. F. Shattuck is a national staff counsel of the ACLU, coordinating litigation on privacy, surveillance, and government secrecy.

This article is adapted from "Tilting at the Surveillance Apparatus," which first appeared in Civil Liberties Review, *Summer 1974,*

Political surveillance—the search for enemies of the government through techniques traditionally associated with law enforcement—has a long and troubled history in the United States. Modern methods of controlling political expression were first used during the aftermath of World War I and the Russian Revolution, when a general threat to existing authority began to haunt most Western countries. The periodic "Red Scares" and anti-fascist drives of the twenties and thirties created increasing demands for political surveillance, while the McCarthy era produced the first full flowering of such techniques as bugging, wiretapping, and undercover infiltration, all of which have been refined for more intensive use against political activists in our own era.

The last decade has witnessed dramatic developments in the investigative and data-gathering activities of government at all levels. Massive injections of funds into police and other security agencies were made by political leaders bent both on responding to their constituencies' frustrations with rising crime rates, and on allaying their own fears of growing political dissent. The most tangible product of all this surveillance is a vast increase in the government's maintenance and dissemination of personal intelligence records on the millions of citizens who had participated in or supported activities considered by the surveillance bureaucracy to warrant scrutiny.

THE LITIGATION RESPONSE

Not surprisingly, these developments have provoked a variety of responses from civil liberties groups. One major response has been litigation. During the past four years, a wide variety of lawsuits have been initiated to restrain the growth of political surveillance. These suits offer a panoramic view of controversial political groups and leaders and of the heads of the government's intelligence apparatus. Among them are:

Kenyatta v. *Kelley*, challenging the FBI surveillance of a black nationalist leader; including searches of his bank records, wiretapping, sending informers into his organization and placing his name on a "Security Index" of political dissenters.

Fonda v. *Nixon*, a suit against the President, White House aides, and other officials for having ordered federal agents to inspect Jane Fonda's bank records, burglarize her car and seize her baggage and other property; thereby subjecting her to continuous surveillance and impairing her reputation.

Laird v. *Tatum*, a class action to enjoin the Army from collecting intelligence on domestic political activity.

Kent State Vietnam Veterans Against the War v. *Fyke*, a damage suit against Kent State University for placing on campus an undercover police agent who tried to persuade VVAW members to purchase weapons and to blow up campus buildings.

In all, approximately 75 lawsuits against political surveillance practices have been brought in recent years. Perhaps 100 lawyers have been involved throughout the country. Thousands of pages of testimony have been taken, hundreds of briefs written, and dozens of opinions rendered by courts.

What has all this litigation accomplished so far? If the measure is how often courts have ordered the government to cease illicit political surveillance practices, or awarded damages to those whose political liberty was impaired, the outcome of four years of litigation is at best mixed in terms of its projection of First Amendment rights. Two major decisions are typical:

In *Laird* v. *Tatum*, the Supreme Court in a 5–4 decision in 1972 dismissed as "nonjusticiable" a class action seeking to enjoin the Army's program of gathering

intelligence on civilian dissenters. The majority opinion held that the plaintiffs were attacking the "mere existence and operation of the intelligence operation" and not specific acts. Nevertheless, the Army substantially reduced its challenged program in response to the lawsuit and congressional hearings condemning military surveillance.

In *Anderson* v. *Sills*, the New Jersey Supreme Court in 1970 reversed a lower court decision enjoining local and state police from collecting and maintaining a special statewide intelligence file on political protest groups. The court ordered a trial on whether the data collection had a "chilling effect" on political activity, but the case has since become bogged down in procedural issues.

In terms of constitutional doctrine, many of the political surveillance decisions between 1969 and 1972 were undoubtedly discouraging to civil libertarians. With one major exception, no recent Supreme Court decision has significantly curtailed the power of the government to eavesdrop, employ informers and undercover agents, collect data, or use photographic surveillance against political groups. The major exception was the unanimous 1972 decision in *United States* v. *United States District Court*, rejecting the government's assertion that the Executive Branch has an inherent power to wiretap domestic radicals without a court order to protect the national security. However, the Supreme Court held a few months later in *Laird v. Tatum*, that plaintiffs in civil cases must prove concrete injury to themselves before the courts can review most claims of improper surveillance.

Nevertheless, beginning in 1973, lower federal courts throughout the country, affected in all probability by judicial concern over the Watergate revelations, have shown a more critical attitude toward the government's claims of power to investigate political groups. These decisions have not yet produced definitive rulings which hold physical surveillance and the use of informers or dossier systems unconstitutional, and have not yet expanded the Supreme Court's ringing prohibition in 1972 of warrantless domestic security wiretapping. What the rulings have done, however, is to reject government motions to dismiss anti-surveillance suits and to uphold requests by plaintiffs that local or federal agencies reveal traditionally secret aspects of their surveillance operations in pre-trial discovery proceedings. They have narrowed the scope of *Laird* v. *Tatum* and *Anderson* v. *Sills* in ways that open up opportunities for further litigation.

THEORY SHOPPING

To overcome the judicial attitudes toward surveillance which have thwarted several major lawsuits, recent litigants have shelved, at least temporarily, the broad claim that government surveillance inevitably exerts a chilling effect on political activities. In such cases as *Laird* v. *Tatum*, plaintiffs have discovered that their claims of "chilling effect" have led to a Catch-22 situation in which courts rejected their arguments since anyone "chilled and cowed" would not bring a lawsuit.

To get around this roadblock litigants have recently been framing surveillance suits more narrowly. Fewer plaintiffs are involved, and those who are can demonstrate that they are the specific targets of the surveillance, and that it is being used to deny judicially recognized First Amendment rights. In doing so they have isolated and succeeded in striking down surveillance which results in the punitive treatment and public branding of persons engaged in First Amendment activity.

A federal court of appeals last year, for example, ruled in *United States Servicemen's Fund* v. *Eastland* that the House and Senate Internal Security Committees violated the First Amendment by secretly obtaining bank records of a peace group. The decision did not rest on any chilling effect. The court stated:

"The right of those engaged in activities which may not meet with popular favor to be free from having either state or federal officials expose their affiliation and membership . . . has been made clear a number of times."

This traditional First Amendment analysis has been adopted in several other recent lower court decisions in cases involving the misuse of surveillance. In *Yaffe* v. *Powers*, for example, a broad challenge to police photographic surveillance in Fall River, Massachusetts, was upheld by the First Circuit Court of Appeals in part because one of the plaintiffs was a candidate's wife whose police photograph, picturing her leading an antiwar demonstration, was released to the press on the eve of the election. This is an example of what a federal court in Wisconsin recently found to be "harm from the bad faith operation of

the surveillance system" in a ruling that sustained a complaint alleging that police and FBI files on demonstrators had been widely disseminated so that one of the plaintiffs had difficulty finding a job (*Bach* v. *Mitchell*).

These recent decisions and others like them suggest that litigants should go back to the roots of the First Amendment in order to escape the judicial limits set in earlier cases. Following this approach, there is one area in which dramatic gains have been registered in previously alien territory: the use of informers and undercover agents to conduct searches by deceit and to provoke the groups they have infiltrated to commit illegal acts.

The heart of most effective surveillance operations is the undercover operator. Unlike technological surveillance devices, such as the wiretap or the hidden camera, the human agent can exercise a high degree of control over the surveillance subject. In fact, his credibility is often enhanced when he participates in and helps to shape the activities of those he is watching.

Though the law does not prohibit deceptive police practices, it does protect individuals against entrapment. The defense of entrapment was first recognized by the Supreme Court in 1932 in *Sorrells* v. *United States*, which held that the police could not manufacture crime in order to ensnare suspects. The Court's dissenters in *Sorrells* would have permitted a broader entrapment defense, rejecting prosecutions when the police have engaged in illegal conduct regardless of any unlawful intent ascribed to the defendant.

Over the last forty years, in a controversy similar to that over the exclusion of illegally seized evidence, courts have debated the merits of adopting the *Sorrells* minority position as a means of deterring police misconduct. In a decision last year, however, the "subjective test" of entrapment was reaffirmed in *Russell* v. *United States*, although the Supreme Court left open two important questions: first, whether entrapment is established if the crime itself is entirely created by the government with the assistance of a "willing defendant" and second, whether agents and informers can be permitted to operate freely among persons whom they have no reason to believe are engaged in criminal activity.

Several recent lower court decisions have answered these questions in the negative. The most striking case is *Kent State Vietnam Veterans Against the War* v. *Fyke*. There, a group of campus antiwar veterans had been infiltrated by a campus police agent who they allege had urged them to take up arms and blow up campus buildings. His colleagues called the police, and the agent was arrested by the municipal police for illegal possession of firearms, although he was quickly released when campus police verified that he was an undercover agent.

The veterans filed suit in federal court against the university and its police force on the theory that their First and Fourth Amendment rights had been denied because, even if they were eventually acquitted, the intended entrapment would have thoroughly discredited their political activities. The trial judge sustained the plaintiffs' complaint for damages and injunctive relief against the state's motion to dismiss, and then granted a series of broad discovery orders permitting the veterans to obtain extensive files which the campus police had compiled on their activities as a result of the undercover agent's work. The judge consistently made a distinction between the use of undercover agents for the purpose of investigating a specific crime, and undercover surveillance to investigate "subversive activities," which as he put it, "is a large canopy and a large tent where . . . there might be some constitutional rights involved."

Throughout the proceedings in the Kent State case, the guiding precedent was a 1972 lower federal court decision in *Handschin* v. *Bureau of Special Services* involving the use of undercover agents among political dissenters by a special unit of the New York City Police Department. In that case the district judge ruled that while informers per se do not violate constitutional rights, the plaintiffs' allegations that "an anti-Vietnam organization of veterans disbanded due to the actions of a named informer," as well as the police efforts to create dissension among various anti-war groups placed the suit "beyond the pale of [*Laird* v.] *Tatum*."

OPENING THE FILES

Over the last two years, there have also been new developments in broadening and speeding up the discovery process. The most frequent problem in surveillance litigation isits protracted and inconclusive character. Since the government has a virtual monopoly on the evidence, a private litigant must make herculean efforts to extract information from his adversaries before he can even begin to press his claims on the merits.

For a variety of reasons, discovery often proceeds at a snail's pace no matter how diligent the plaintiffs are. The problem is well illustrated by *Anderson* v. *Sills*, the New Jersey case in which the state supreme court reversed the trial court's ruling that a statewide surveillance program was unconstitutional per se, and ordered the plaintiffs to prove their allegations that the program had a chilling effect on speech. A dozen depositions by the plaintiffs revealed little new information. The barriers thrown up by government lawyers in these depositions would fill a handbook on "how to keep the demonstrators out of court." The classic ploy is to refuse to answer any questions seeking factual information on the ground that it is protected by an "investigatory privilege." At the same time, defendants will often decline to answer questions probing the government's purpose and method of operation because those inquiries are too "broad."

A frustrating example is the deposition of Lieutenant Michael Goch, supervisor of the Central Security Unit of the New Jersey State Police. In the questioning by Frank Askin, attorney for the plaintiffs, the following colloquy was typical:

Q.: What is the personnel, how large is the personnel of the Central Security Unit?

Mr. Zauber (attorney for the state): I direct you not to answer that question, Lieutenant.

Q.: What kinds of equipment are possessed by the Central Security Unit other than ordinary office equipment?

A.: I direct you not to answer that question.

Q.: Does the Central Security Unit possess any kind of special photographic equipment?

Mr. Zauber: I direct you not to answer that question.

And so on for a number of questions . . .

This rather tortured dialogue reads like a section of the record in *Jarndyce* v. *Jarndyce*, the ill-fated and interminable suit imagined by Charles Dickens, which "drags its dreary length before the Court, perennially hopeless."

The only way to overcome such typical stonewalling and evasion is to bring the discovery problems to court and move to compel the production of information or documents. However, because such motions raise thorny issues of governmental privilege, they tend to become intertwined with the merits of the litigation and are often held awaiting decision for months or even years. In *Anderson*, for example, motions to compel discovery have been awaiting decision for more than two years and in *Kenyatta* v. *Kelley* it took 14 months for a ruling to be made on discovery motions.

Over the past year, however, there have been several developments which indicate that the pace of discovery is quickening. The power abuses disclosed in the Watergate and impeachment hearings have, no doubt, given credence to allegations of government misconduct. Furthermore, since recent lawsuits have been framed with greater specificity, it is now more difficult for the government to evade the issues. Several important decisions have rejected governmental claims of investigatory and executive privilege.

The pattern of government evasion in wiretap cases has become so clear that some courts have refused to accept sworn general denials of illegal surveillance activities. Several federal judges have recently ordered FBI officials to set forth in detail how they supposedly searched the Bureau's records to determine whether a particular person was wiretapped, despite a sworn denial of wiretapping.

Finally, trial courts in some cases have grown so impatient with the government's refusal to disclose information at the core of a surveillance case that they have simply ruled the withholding to be an admission against the government's interest. One dramatic decision in this area was federal Judge Charles Richey's conclusion in *Center of Corporate Responsibility* v. *Smultz* that the White House had pressured the IRS to deny tax-exempt status to a Ralph Nader-affiliated public interest organization, the Center on Corporate Responsibility. The ruling was based substantially on the government's refusal to grant discovery of documents.

EXPOSING POLITICAL SURVEILLANCE

In an era in which the White House Plumbers and the Symbionese Liberation Army have shared the front pages, the law of government surveillance must be clarified. Given the difficulties in litigating an anti-surveillance lawsuit, and

the vagueness and flexibility of present laws, legislation may be the only answer.

One frequently proposed legislative approach is to prohibit covert human or mechanical surveillance unless it is authorized for a limited period of time by a judicial warrant or subpoena based on probable cause.

The statement by Egil Krogh, at his time of sentencing for perjury in relation to the Fielding break-in, suggests that clear constitutional procedure might inhibit individuals from using "national security" or other vaguely defined justifications for conducting political surveillance:

"I see now that the key is the effect that the term 'national security' had on my judgment. The very words served to block critical analysis. It seemed at least presumptuous if not unpatriotic to inquire into just what the significance of national security was. . . . The discrediting of Dr. Ellsberg, which today strikes me as a repulsive and inconceivable national security goal, at the time would have appeared a means to diminish any influence he might have had in mobilizing opposition to ending the war. . . Freedom of the President to pursue his planned course was the ultimate national security objective."

This statement reflects the belief by surveillance strategists that their operations are in the national interest, as well as their fear that their operations will be exposed and censured. While their existence may be an inevitable part of the body politic, they must be exposed and treated with great intensity if they are not to eat away the healthy cells of a free society.

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 1768–69

DAVID DELLINGER, ET AL., PLAINTIFFS

v.

JOHN N. MITCHELL, ET AL., DEFENDANTS

AFFIDAVIT AND CLAIM OF PRIVILEGE

City of Washington }
District of Columbia } ss.

William B. Saxbe, being duly sworn, deposes and says:

1. I am the Attorney General of the United States and head of the United States Department of Justice, an Executive Department of the United States. I am also, by reason of the provisions of Rule 25(d)(1) of the Federal Rules of Civil Procedure, an official defendant in the above-captioned civil action. By reason of my office, I have official custody and control of the files and records of the United States Department of Justice. The matters stated herein are based upon my knowledge; upon information available to me in my official capacity; upon advice and recommendations made to me by the Director of the Federal Bureau of Investigation, Clarence M. Kelley; and upon conclusions reached in accordance therewith.

2. The above-captioned civil action was instituted on June 26, 1969 against the then Attorney General of the United States, John N. Mitchell, and the then Director of the Federal Bureau of Investigation, the late J. Edgar Hoover, seeking declaratory and injunctive relief and money damages. In this action the plaintiffs allege a violation of their rights under 18 U.S.C. §§ 2510–2520, 47 U.S.C. § 605 and the First, Fourth and Ninth Amendments to the Constitution, in essence on the grounds that the defendants have subjected each of the plaintiffs to actionably unlawful electronic surveillance and threaten to continue to do so in the future.

3. The plaintiffs in this action served upon former Attorney General Mitchell certain Interrogatories and a Request for Admission of Facts Under Rule 36, which have since been modified by the plaintiffs. As the Attorney General of the United States and a successor in office to former Attorney General Mitchell, I am in receipt of the said modified interrogatories and request, which relate to certain national security electronic surveillance conducted by the Department of Justice, as well as the Court's Order of January 10, 1974 entered with respect thereto. The defendants have moved the Court for partial relief from

its Order of January 10, 1974 requesting that the defendants be relieved of answering Interrogatories 1.c., 2.c.(i), 2.c.(ii), 2.i., 7.k., 11 and 12 and that their answer to Interrogatories 2.d.(ii), 2.d.(iii), 2.e., 2.f. and 4 be stayed pending further order of the Court following determination by the Court of whether the electronic surveillances in issue are legally actionable.

4. I am advised that my subordinates have carefully searched the files of the Department of Justice and the Federal Bureau of Investigation and have removed therefrom and delivered to me all documents relevant to the assertions hereinafter made in this Affidavit and Claim of Privilege in response to the remainder of the modified interrogatories and request for admission of facts.

5. As the Attorney General of the United States I have examined such documents and find that certain of them and/or the information contained therein may be revealed to the plaintiffs without prejudice to the public interest so long as the rights of third parties are fully protected. To this end I have designated Edward S. Christenbury, an Attorney in the Criminal Division of the Department of Justice, to answer the request for admission of facts and certain of the modified interrogatories and make certain of such documents pertaining thereto available to the plaintiffs, but, where appropriate, to seek a Protective Order of the Court with respect thereto to protect the rights of third persons not parties to this civil action. I also find, for the reasons more fully set forth below, that certain other such documents and/or the information contained therein cannot, in the public interest, be disclosed to the plaintiffs.

6. The documents and/or information which cannot in the public interest be disclosed to the plaintiffs relate to three national security electronic surveillances authorized by the then Attorneys General of the United States, acting for the President, to obtain information deemed necessary to protect the United States against the overthrow of the Government by force or other unlawful means. The decisions to authorize these surveillances were based upon information contained in the requests of the then Director of the Federal Bureau of Investigation, which were considered in conjunction with the entire range of intelligence information available to the Attorney General at that time. For the purposes of designating and describing the documents, I here group them into three sets, to correspond to the three electronic surveillances referred to in this paragraph.

a. The first set consists of ten documents:

(1) A two-page Memorandum for the Attorney General (Francis Biddle) dated October 24, 1942 from the Director of the Federal Bureau of Investigation and signed by him (J. Edgar Hoover) classified Personal and Confidential bearing the hand-written notation "authorized FB 10/26/42";

(2) A one-page Memorandum for the Attorney General (Nicholas deB Katzenbach) dated June 17, 1965 from the Director of the Federal Bureau of Investigation and signed by him (J. Edgar Hoover) classified SECRET bearing the handwritten initials "NdeBK";

(3) A one-page Memorandum for the Attorney General (Nicholas deB Katzenbach) dated December 20, 1965 from the Director of the Federal Bureau of Investigation and signed by him (J. Edgar Hoover) classified SECRET bearing the handwritten notation "NdeBK";

(4) A one-page Memorandum for the Attorney General (Nicholes deB Katzenbach) dated June 14, 1966 from the Director of the Federal Bureau of Investigation and signed by him (J. Edgar Hoover) classified SECRET bearing the initials "NdeBK"; and

(5) Six internal Bureau messages from the Director, FBI to the cognizant Bureau field office dated October 27, 1942, February 10, 1949, December 20, 1949, December 21, 1949, October 2, 1950 and February 9, 1967 relative to the installation, continuation and discontinuation of the above electronic surveillance.

The four documents identified in paragraph 6.a.(1)–(4) constitute the authorization and all reauthorizations with respect to this electronic surveillance on this organization, which electronic surveillance was initiated on November 1, 1942 and discontinued on February 10, 1967.

b. The second set consists of eleven documents:

(1) A three-page Memorandum for the Attorney General (John N. Mitchell) dated June 26, 1970 from the Director of the Federal Bureau of Investigation and signed by him (J. Edgar Hoover) classified SECRET bearing the signature of approval of John N. Mitchell with the handwritten date "6/29/70";

(2) A two-page Memorandum for the Attorney General (John N. Mitchell) dated July 29, 1970 from the Director of the Federal Bureau of Investigation and signed by him (J. Edgar Hoover) classified SECRET bearing the signature of approval of John N. Mitchell with the handwritten date "7/29/70":

(3) A two-page Memorandum for the Attorney General (John N. Mitchell) dated August 31, 1970 from the Director of the Federal Bureau of Investigation and signed by him (J. Edgar Hoover) classified SECRET bearing the signature of approval of John N. Mitchell with the handwritten date "9/2/70";

(4) A two-page Memorandum for the Attorney General (John N. Mitchell) dated September 30, 1970 from the Director of the Federal Bureau of Investigation and signed by him (J. Edgar Hoover) classified SECRET bearing the signature of approval of John N. Mitchell with the handwritten date "10/1/70"; and

(5) Seven internal Bureau messages from the Director, FBI to the cognizant Bureau field office dated June 3, 1970, June 30, 1970, July 13, 1970, July 15, 1970, July 24, 1970, August 3, 1970 and November 2, 1970 relative to the installation, continuation and discontinuation of the above electronic surveillance.

The four documents identified in paragraph 6.b.(1)–(4) constitute the authorization and all reauthorizations with respect to this electronic surveillance on this individual, which electronic surveillance was initiated on July 14, 1970 and discontinued on November 2, 1970.

c. The third set consists of six documents:

(1) A five-page Memorandum for the Attorney General (John N. Mitchell) dated March 30, 1971 from the Director of the Federal Bureau of Investigation and signed by him (J. Edgar Hoover) classified SECRET bearing the signature of approval of John N. Mitchell with the handwritten date "3/30/71";

(2) A two-page Memorandum for the Attorney General (John N. Mitchell) dated April 29, 1971 from the Director of the Federal Bureau of Investigation and signed by him (J. Edgar Hoover) classified SECRET bearing the signature of approval of John N. Mitchell with the handwritten date "4/29/71"; and

(3) Four internal Bureau messages from the Director, FBI to the cognizant Bureau field office dated April 1, 1971, April 13, 1971, May 3, 1971 and May 12, 1971 relative to the installation, continuation and discontinuation of the above electronic surveillance.

The two documents identified in paragraph 6.c.(1)–(2) constitute the authorization and all reauthorizations with respect to this electronic surveillance on these locations, which electronic surveillance was initiated on April 1, 1971 and discontinued on May 13, 1971.

7. The first of the aforesaid electronic surveillances was conducted to gather, on a long-range basis, national security information to meet a potential threat to the nation's security resulting from the activities within the United States of an organization composed of citizens of the United States which is dominated by a foreign power and which acts on behalf of that foreign power to advance its objectives within the United States. The subject of this surveillance was an organization whose activities were controlled by the aforesaid organization. To disclose the subject and purpose of this surveillance would, to that extent, reveal the depth, scope and degree of the Government's knowledge of the extent of the foreign-dominated organization's activities in connection therewith and alert that organization as to that phase of the Government's current activity with respect to it. The Director of the FBI has advised and I have concluded that to disclose any such information, other than that set forth in paragraph 6a, of this affidavit and in the answers to the interrogatories to be filed by Mr. Christenbury, would be prejudicial to the public interest and the national security of the United States. Accordingly, pursuant to the authority vested in me as Attorney General of the United States, I assert a formal claim of executive privilege against the disclosure of such information.

8. The second of the aforesaid electronic surveillances was conducted to gather security information to meet a potential threat to the national security resulting from the activities within the United States of an individual who is believed to have a significant connection with a foreign power and to operate on behalf of that foreign power to advance its objectives within the United States. This individual is a former member of the foreign-dominated organization referred to in paragraph 7 above. Although the electronic surveillance of this individual has been discontinued, the FBI is currently conducting an investigation into the activities of one of the organizations in which this individual was a principal influence, and which the foreign-dominated organization referred to in paragraph 7 above is systematically seeking to infiltrate and control. To disclose the subject and purpose of this electronic surveillance would reveal the Government's investigative interest in and knowledge of such organization as an organization which has been influenced by such individual and is sought to be infiltrated and controlled by the domestic foreign-dominated organization aforesaid and alert the foreign-dominated organization as to that phase of the Government's

current activity with respect to it. The Director of the FBI has advised and I have concluded that to disclose any such information, other than that set forth in paragraph 6.a. of this affidavit and in the answers to the interrogatories to be filed by Mr. Christenbury, would be prejudicial to the public interest and the national security of the United States. Accordingly, pursuant to the authority vested in me as Attorney General of the United States, I assert a formal claim of executive privilege against the disclosure of such information.

9. The third of the aforesaid electronic surveillances was conducted, primarily, to gather security information relating to the activities of a group of individuals and an organization who were at that time planning the imminent use of force and violence against the Government of the United States, including bombings, guerrilla tactics, and the disruption of essential government functions. The organization is infiltrated by members of the foreign-dominated organization referred to in paragraph 7 of this affidavit. To disclose the subjects and locations of this surveillance would not only prejudice the Government's current activity with respect to them but would also, to that extent, reveal the depth, scope and degree of the Government's knowledge of the extent of the foreign-dominated organization's activities in connection therewith and alert such organization as to that phase of the Government's current activity with respect to it. The Director of the FBI has advised and I have concluded that to disclose any such information, other than that set forth in paragraph 6.c. of this affidavit and in the answers to the interrogatories to be filed by Mr. Christenbury, would be prejudicial to the public interest and the national security of the United States. Accordingly, pursuant to the authority vested in me as Attorney General of the United States, I assert a formal claim of executive privilege against the disclosure of such information.

WILLIAM B. SAXBE,
Attorney General of the United States.

Subscribed and sworn to before me this 18th day of March, 1974.

_____,
Notary Public.

My Commission expires March 14, 1975.

CERTIFICATE OF SERVICE

I hereby certify that on this date I served a copy of the foregoing NOTICE OF AFFIDAVIT AND CLAIM OF PRIVILEGE with attached Affidavit and Claim of Privilege dated March 11, 1974 upon the plaintiffs by serving a copy thereof by mail, postage prepaid, upon:

WILLIAM J. BENDER, Esq.,
c/o *Constitutional Litigation Clinic, Rutgers Law School.*
BENJAMIN C. FLANNAGAN,
Attorney, Department of Justice.

March 18, 1974.

EXHIBIT 2

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 1187–73; SECOND AMENDED COMPLAINT

MORTON H. HALPERIN and INA HALPERIN, 8215 Stone Trial Drive, Bethesda, Maryland, suing individually and on behalf of their minor children, DAVID HALPERIN, MARK HALPERIN and GRAY HALPERIN, PLAINTIFFS

v.

HENRY A. KISSINGER, 2527 Waterside Drive, NW, Washington, D.C.; RICHARD M. NIXON, Presidential Compound, San Clemente, California; JOHN N. MITCHELL, 1030 Fifth Avenue, New York, New York; H. R. HALDEMAN, 2402 R Street, NW, Washington, D.C.; JOHN EHRLICHMAN, 330 Chesapeake Drive, Great Falls, Virginia; ALEXANDER HAIG, Fort McNair, Washington, D.C.; WILLIAM C. SULLIVAN, 2810 64th Avenue, Cheverly, Maryland; ROBERT C. MARDIAN, 2323 North Central Avenue, Phoenix, Arizona; CLARENCE KELLEY, Director of the FBI, 10th and Pennsylvania Avenue, Washington, D.C.; JEB STUART MAGRUDER, Federal Penitentiary, Allenwood, Pennsylvania; JOHN DOE, RICHARD ROE, and other unknown agents of the FBI; and JAMES POE, RICHARD DOE, and

other unknown employees of the Executive Department and other agencies of government; and CHESAPEAKE & POTOMAC TELPHONE CO., 725 13th Street, NW, Washington, D.C., DEFENDANTS

JURISDICTION

1. This action arises under Title 18, United States Code, § 2520 and under the First, Fourth and Ninth Amendments to the United States Constitution. The jurisdiction of this Court is based upon Title 28, United States Code, § 1331(a) and 1343(4), Title 18, United States Code, § 2520, and the First, Fourth and Ninth Amendments to the Constitution. The matter in controversy, exclusive of interests and costs, exceeds $10,000.

PARTIES

2. Plaintiff Morton H. Halperin is a citizen of the United States and a resident of the State of Maryland. He is a Senior Fellow at the Brookings Institution, Washington, D.C. From January 21, 1969 through September 19, 1969, he was Assistant to the defendant Kissinger; and from August 1967 through January 1969 he was Deputy Assistant Secretary of Defense for Policy Planning and Arms Control.

3. Plaintiff Ina Halperin is a citizen of the United States and a resident of the State of Maryland. She resides with her husband, plaintiff Morton Halperin.

4. Plaintiffs David, Mark and Gary Halperin are minors and citizens of the United States, residing with their parents, plaintiffs Morton and Ina Halperin.

5. Defendant Henry A. Kissinger is Secretary of State and at the time this action was initiated was Assistant to the President of the United States for National Security Affairs, residing at 2527 Waterside Drive, NW, Washington, D.C., and working at the White House, 1600 Pennsylvania Avenue, Washington, D.C. He is sued in his individual and official capacities.

6. Defendant Richard M. Nixon is former President of the United States, presently residing at "Casa Pacifica", San Clemente, California. He is sued in his individual capacity.

7. Defendant John N. Mitchell is former Attorney General of the United States who at the time this action was initiated resided at 1030 Fifth Avenue, New York, New York. He is sued in his individual and former official capacities.

8. Defendant H. R. Haldeman is former Assistant to the President of the United States, residing at the time this action was initiated at 2402 R Street, NW, Washington, D.C. He is sued in his individual and former official capacities.

9. Defendant John Ehrlichman is former Counsel to the President and former Assistant to the President of the United States for Domestic Affairs, residing at the time this action was initiated a 330 Chesapeake Drive, Great Falls, Virginia. He is sued in his individual and former official capacities.

10. Defendant Alexander Haig is Assistant to the President of the United States, formerly Deputy Assistant to the President of the United States for National Security Affairs, and formerly Military Assistant to the defendant KISSINGER, residing at the time this action was initiated at Fort McNair, Washington, D.C. He is sued in his individual and official capacities.

11. William C. Sullivan is former Director of the Office of National Narcotics Intelligence, Justice Department, and formerly assistant to the late Director of the Federal Bureau of Investigation, J. Edgar Hoover. At the time this action was initiated, he resided at 2810-64th Avenue, Cheverly, Maryland. He is sued in his individual and former official capacities.

12. Defendant Robert C. Mardian is a former Assistant Attorney General of the United States and a former official of the Committee to Re-elect the President, residing at 2323 North Central Avenue, Phoenix, Arizona. He is sued in his individual and former official capacities.

13. Clarence M. Kelley is Director of the Federal Bureau of Investigation. He is sued in his official capacity as custodian of certain records hereinafter described.

14. Defendant Jeb Stuart Magruder, is a former Special Assistant to the President and is currently serving a prison term in the Federal Penitentiary at Allenwood, Pennsylvania. He is sued in his individual and former official capacities.

15. Defendants John Doe and Richard Roe are unknown agents of the Federal Bureau of Investigation. They are sued in their individual and official capacities.

16. Defendants James Poe and Richard Doe are unknown agents of the Executive Department or of other governmental agencies. They are sued in their individual and official capacities.

17. Defendant Chesapeake & Potomac Telephone Co. is a District of Columbia corporation with its principal place of business at 725–13th Street, NW, Washington, D.C. It is a public utility providing telephone service for residents in the greater Washington area, including the plaintiffs.

FACTS

18. Upon information and belief, sometime in April, 1969, in Washington, D.C., defendants Kissinger, Nixon, and Haldeman and the late J. Edgar Hoover, former Director of the Federal Bureau of Investigation, decided and agreed to conduct electronic surveillance of certain persons, including employees of the National Security Council, including plaintiff Morton H. Halperin without securing any form of prior judicial approval. Defendant Nixon has subsequently stated that such decision and agreement were made, and subsequent actions taken, at his personal direction.

19. Thereafter, upon information and belief, defendant Kissinger had a conversation with the late FBI Director J. Edgar Hoover in Washington, D.C., and at that time or subsequently directed and procured him to have FBI or other government agents install electronic surveillance devices on plaintiff Morton Halperin's home telephone.

20. Upon information and belief, sometime in the month of May, 1969, in Washington, D.C., defendant Mitchell, acting in concert with defendants Haldeman, Ehrlichman, Nixon, Kissinger and Haig, under color of his authority as Attorney General of the United States, and without application for or issuance of a judicial order or warrant, or other valid authorization, directed and procured Mr. Hoover and other persons employed by the FBI or by other governmental agencies, to install an electronic, mechanical or other device at the private residence telephone of the plaintiffs at 8215 Stone Trail Drive, Bethesda, Maryland, for the purpose of intercepting the wire communications of plaintiff Morton Halperin.

21. Upon information and belief, such a device was or devices were thereafter installed upon the home telephone of the plaintiffs by defendants John Doe, Richard Roe, and other known and unknown agents of the Federal Bureau of Investigation and/or by James Poe, Richard Doe and other unknown agents of the Executive Department or other governmental agencies, acting at the direction and procurement of defendants Kissinger, Nixon, Haig, Mitchell, Haldeman and Ehrlichman.

22. Such a device was installed on the home telephone of plaintiffs on May 9, 1969, three days before any written authorization is claimed to have been secured from defendant Mitchell or any authorized official of the Justice Department or other office of the Federal Government. Such installation, without any written authorization of the Attorney General was in violation of the governing rules and regulations of the Justice Department and the FBI.

23. Upon information and belief, defendant Chesapeake & Potomac Telephone Co. assisted in the installation of such devices and participated in the interception of plaintiffs' telephone conversations.

24. Upon information and belief, the defendants named in paragraphs 21 and 23 above kept the said devices in place for a period of twenty-one months or more after its installation.

25. In September 1969, shortly after defendant Kissinger accepted plaintiff Mortin H. Halperin's resignation from the National Security Council staff, defendant Kissinger ordered that the Halperin tap continue at the same time that he consented to the termination of other taps instituted at his request.

26. During the course of this surveillance the defendants named above intercepted numerous conversations to which each of the plaintiffs were parties. Disclosure of such interceptions was procured by defendants Nixon, Kissinger, Haig, Haldeman and Ehrlichman by means of a request to the late J. Edgar Hoover and defendant Sullivan that summaries of these conversations be prepared and transmitted to them.

27. On a regular basis during the course of this illegal interception of plaintiffs' private telephone conversations, defendant Sullivan disclosed such conversations by preparing or causing to be prepared such summaries and transmitting them to the defendants Nixon, Kissinger, Haig, Haldeman, and Ehrlichman for their examination and use.

28. On or about May 13, 1970, defendants Nixon and Haldeman met with the late FBI Director, J. Edgar Hoover, whereupon defendant Nixon specifically instructed Mr. Hoover to send all future summaries of plaintiffs' private telephone conversations to defendant Haldeman alone, which Mr. Hoover and his subordinates, including defendant Sullivan, thereafter did.

29. Sometime in the month of July, 1971, in San Clemente, California, defendant Nixon, in the presence of defendant Erlichman, personaliy instructed defendant Mardian physically to remove from the Federal Bureau of Investigation all documents, tapes, summaries, and other records pertaining to the defendants' electronic surveillance of the plaintiffs and certain other persons, and to deliver such records to the White House.

30. Following his meeting with defendant Nixon as set forth in the preceding paragraph, defendant Mardian, with the assistance of defendant Sullivan, physically removed from the Federal Bureau of Investigation all records pertaining to the defendants' electronic surveillance of the plaintiffs and certain other persons and delivered such records to the Oval Office of the White House for the purpose of their fraudulent concealment, following which, at the direction of defendant Nixon, the records were secreted in a safe in the White House office of defendant Ehrlichman, where they remained fraudulently concealed from July 1971 until May 1973.

31. On information and belief, the purpose of the concealment of the surveillance records by defendants Mardian, Ehrlichman and Sullivan, acting on personal instructions of defendant Nixon, as alleged in the preceding paragraphs, was to prevent appropriate discovery by the defense in *United States* v. *Ellsberg and Russo,* No. 9373 (WMB)—CD (C.D. Cal.) of the interception of conversations of the defendant in that case, Daniel Ellsberg, and his consultant, plaintiff Morton H. Halperin, on the Halperins' home telephone.

31a. Defendant Nixon, acting directly and through his agents, made continuing efforts from July 1971 to May 1973 to prevent disclosure of the existence of and records pertaining to the wiretap on plaintiffs' home telephone by deceiving attorneys in the Department of Justice and the Acting Director of the Federal Bureau of Investigation, and procuring false testimony from them denying the existence of the wiretaps in response to judicial and congressional inquiries.

32. The existence of an electronic surveillance device on a telephone at their residence first became known to the plaintiffs on May 10, 1973, when the trial judge in *United States* v. *Ellsberg and Russo, supra,* ordered the release of a memorandum filed with the court on May 9, 1973, by William D. Ruckelshaus, Acting Director of the Federal Bureau of Investigation. The memorandum stated in pertinent part:

> A preliminary report which I received last night indicates that an F.B.I. employee recalls that in late 1969 and early 1970 Mr. Ellsberg had been overheard talking from an electronic surveillance of Dr. Morton Halperin's residence. It is this employee's recollection that the surveillance was of Dr. Halperin, and that Mr. Ellsberg was then a guest of Dr. Halperin.
>
> I have no information concerning the substance of the conversation, nor has the investigation to date been able to find any record of such a conversation. The investigation, of course, is not complete, and further facts bearing upon the wiretaps may be uncovered.

33. Subsequently, acting F.B.I. Director Ruckelshaus recovered the missing surveillance records from a safe in the White House office of defendant Ehrlichman and returned them to the Federal Bureau of Investigation.

34. On July 12, 1974, defendant Nixon, in a letter to the Chairman of the Senate Foreign Relations Committee, described his role in the wiretapping of plaintiffs as follows:

> Where supporting evidence was available I personally directed the surveillance, including wiretapping, of certain specific individuals. I am familiar with the testimony of Secretary Kissinger before your Committee to the effect that he performed the function, at my request, of furnishing information about individuals within investigative categories that I established so that an appropriate and effective investigation could be conducted in each case. This testimony is entirely correct, and I wish to affirm categorically that Secretary Kissinger and others involved in various aspects of the investigation were operating under my specific authority and were carrying out my express orders.

35. From May 1969 until September 19, 1969, while plaintiff Morton Halperin was serving as Assistant to defendant Kissinger, he and plaintiff Ina Halperin frequently communicated their political and other views privately and frankly in telephone conversations with their close friends. On information and belief these conversations were recorded and summarized in regular reports to the defendants Kissinger, Nixon, Haig, Haldeman and Ehrlichman, based on the continuous electronic surveillance of plaintiffs' telephone during the period in question.

36. On information and belief, the defendants' illegal interception, disclosure and use of conversations on the private telephone in plaintiffs' residence continued for a period of twenty-one months or more after plaintiff Morton Halperin had left the staff of the National Security Council. During this period plaintiff Morton Halperin, no longer a government employee, frequently communicated by telephone with many persons, including high elected officials, who expressed their views of current government policies. Plaintiff Morton Halperin also wrote many articles for newspapers and journals in this period and communicated by telephone with many individuals in the course of preparing these articles. All these communications were privately expressed but, on information and belief, were intercepted under the direction of defendant Sullivan, and disclosed and used in regular reports to the defendants Kissinger, Nixon, Haig, Haldeman and Ehrlichman.

37. On one specific occasion plaintiff Morton Halperin was in telephone contact with Leslie Gelb who was working on an article with former Secretary of Defense Clark Clifford relating to American policy in Vietnam. Plaintiff Morton Halperin discussed with Mr. Gelb on his telephone an outline of points Clifford might make in such an article, and steps Clifford might take to insure a broad audience for his views. Upon learning of the interception of this conversation, defendant Sullivan transmitted information about the conversation to defendants Kissinger, Mitchell and Nixon, through J. Edgar Hoover. This information was subsequently received by defendants Ehrlichman and Haldeman who transmitted it to defendant Magruder, who in turn transmitted it to Alexander Butterfield, then a deputy assistant to the President, early in January, 1970. Haldeman instructed defendant Magruder, then a special assistant to the President, to work on planning answers to the criticisms of the Administration's Vietnam policy which the intercepted conversations revealed would be made in the Clifford article. In various communications in January, 1970, defendants Butterfield, Magruder, Haldeman and Ehrlichman suggested various ways in which to answer the article once it appeared and to attempt to discredit its author. The activities described in this paragraph were in no way related to the defense of national security. They constituted illegal political intelligence gathering designed to counter constitutionally protected political criticism of administration policies.

38. On information and belief, the defendants' electronic surveillance of the plaintiff Morton Halperin and his family was initiated, continued, and concealed by the defendants Kissinger, Nixon, Haig, Ehrlichman, Haldeman and Mitchell in bad faith for the purpose and effect of monitoring the political ideas and associations of plaintiff Morton Halperin during the period in question.

39. At no time did the plaintiffs, citizens of the United States, have any involvement with a foreign power, its agents or agencies.

40. After the fact of the wiretaps on plaintiff Morton Halperin's home telephone was made a matter of public record, FBI agents questioned defendant Haig concerning the basis of the wiretaps and the reasons, justifications and value of the taps. Defendant Haig told said FBI agents that plaintiff Morton Halperin was relieved of his responsibilities in the National Security Council as a result of his overheard telephone conversations. These statements were made by defendant Haig in bad faith and for the purpose of injuring plaintiff Morton Halperin and were false and were known to defendant Haig to be false when he made them.

CLAIMS

41. The defendants' procurement of interception, disclosure and use, and their interception, disclosure and use of plaintiffs' telephone conversations during the period in question were unreasonable and illegal, and were not made in good faith, reliance on any judicial, legislative or other valid authorization; and their disclosure and use of such communications were made with knowledge that the communications had been obtained by electronic surveillance of plaintiffs' telephone.

42. Defendants' procurement of interception, disclosure and use, and their interception, disclosure and use of the plaintiffs' wire communications through electronic surveillance for a period of 8 to 25 months or more, was in violation of Title 18, United States Code, Sections 2511 and 2520.

43. Defendants' procurement of interception, disclosure and use, and their interception, disclosure and use of plaintiffs' telephone communications during the period in question, deprived plaintiffs of their rights of free speech and association under the First Amendment, and their right to privacy and security against unreasonable searches and seizures guaranteed by the First, Fourth and Ninth Amendments.

Wherefore, plaintiffs pray that:

1. Each plaintiff have judgment against each defendant (except defendant Kelley) in the sum of:

(a) $100.00 per day of procurement of interception, disclosure and use, and interception, disclosure and use, or $1,000.00, whichever is higher, as liquidated damages pursuant to Title 18, United States Code, § 2520.

(b) Such punitive damages as the court deems just under the circumstances.

2. Plaintiffs individually have judgment against each defendant (except defendant Kelley) in a sum deemed just by the court for violation of their rights under the First, Fourth and Ninth Amendments.

3. Plaintiffs jointly have judgment against the defendants jointly for reasonable attorneys' fees and other costs reasonably incurred in connection with this action, pursuant to Title 18, United States Code, § 2520(c).

4. This court enjoin the defendants from any further procurement of interception, use and disclosure and any further interception, use and disclosure of plaintiffs' wire communications.

5. That defendant Kelley be ordered to hand up to plaintiffs all records and logs relating to the electronic surveillance of plaintiffs.

6. This court declare the action of defendants as herein described in violation of Title 18, United States Code, § 2511 and § 2520 and of the First, Fourth and Ninth Amendments to the Constitution.

7. This court require the FBI to correct the false statement contained in the interview report with defendant Haig by noting that said statements were inconsistent with other documentation in its files relating to the wiretaps in question.

8. This court grant such other and further relief as to it may seem just and proper.

Respectfully submitted.

MELVIN L. WULF,
JOHN H. F. SHATTUCK,
WALTER SLOCOMBE,
LEON FRIEDMAN,
CHARLES R. NESSON,
HERMAN SCHWARTZ,
Attorneys for Plaintiffs.

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

CIVIL ACTION NO. 39065

ABDEEN M. JABARA, PLAINTIFF

v.

CLARENCE M. KELLEY, ET AL., DEFENDANTS

AFFIDAVIT AND CLAIM OF PRIVILEGE

City of Washington }
District of Columbia } ss.

William B. Saxbe, being duly sworn, deposes and says:

1. I am the Attorney General of the United States and head of the United States Department of Justice, an Executive Department of the United States. By reason of my office, I have official custody and control of the files and records of the United States Department of Justice. The matters stated herein are based upon my knowledge; upon information available to me in my official capacity; and upon conclusions reached in accordance therewith.

2. The above-captioned civil action was instituted on October 19, 1972 against former Attorney General Kleindienst, Acting FBI Director Gray and others seeking declaratory and injunctive relief, alleging that the defendants have been investigating plaintiff and gathering information about him in violation of his constitutional rights. Plaintiff alleged on information and belief that information concerning him had been gathered by overt and covert surveillance, by the moni-

toring of his telephone through the use of electronic surveillance devices, by the monitoring of his speaking engagements by informants and agents of the FBI, and by investigation of his bank accounts without legal process and without his prior knowledge and approval.

3. On the initial discovery by plaintiff in this action the defendants acceded to certain requests and objected to others. On a consolidated motion to compel answers to interrogatories and to determine the sufficiency of defendants' objections to plaintiff's request for admissions, the Court held that the Government properly invoked privilege as a justification for its refusal to answer certain interrogatories and requests to admit and, as delineated in its opinion, that the privilege was applicable to certain specific requests for information but not to others. *Jabara* v. *Kelley, et al.*, 62 F.R.D. 424 (E.D. Mich. 1974). Thereupon the Government furnished the information as to those interrogatories or requests, or portions thereof, which the Court directed the Government shall answer.

4. Thereafter, on August 2, 1974 the plaintiff served upon the defendants a request for production of documents and second supplemental interrogatories. Defendants objected to the request for production of documents and to certain of the second supplemental interrogatories. Plaintiff has moved to compel discovery and defendants have opposed his motion. I submit this Affidavit and Claim of Privilege on behalf of the United States of America in conjunction with the aforesaid Opposition to plaintiff's motion to compel discovery in opposition to any disclosure to the plaintiff by the defendants of documents and information concerning the interception through certain national security electronic surveillance of any conversations or communications to which plaintiff was a party or in which any acts or activities of plaintiff were discussed; and I reserve the opportunity to submit a further Affidavit and Claim of Privilege in opposition to any disclosure to the plaintiff of the other information requested should it be necessary to do so following the Court's rulings on the objections which have been interposed by the defendants with respect thereto.

5. Defendant Kelley has delivered to me for submission to the Court an *in camera* affidavit of Special Agent Robert F. Peterson of the FBI's Legal Counsel Division setting forth in detail the factual basis for the FBI's investigation of plaintiff, together with the circumstances through which any conversations or communications to which plaintiff was a party, or in which any acts or activities of plaintiff were discussed, were intercepted by means of national security electronic surveillance. That affidavit also contains other information germane to plaintiff's motion to compel. With respect to national security electronic surveillance Mr. Peterson's affidavit, in orderly form, relates the identity of the subject of each surveillance and the dates on which the interceptions occurred. Where applicable, Mr. Peterson attaches as exhibits to his affidavit the authorizations (or reauthorizations) of the Attorney General for such surveillances; and in those instances where plaintiff's conversations were overheard through such surveillances, the logs of such overhearings. The authorizations for these national security electronic surveillances were approved by former Attorney General Kleindienst on September 14, 1972; September 15, 1972; September 18, 1972 (two separate surveillances); September 21, 1972; October 6, 1972; November 29, 1972; March 16, 1973; May 10, 1973 and May 21, 1973; by former Attorney General Richardson on June 15, 1973; and by me as Attorney General on March 21, 1974 and May 29, 1974, on behalf of the President of the United States in the exercise of the President's authority relating to the Nation's foreign affairs, as described in 18 U.S.C. § 2511(3), and were deemed necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power or to obtain foreign intelligence information deemed essential to the security of the United States. The decisions to authorize these surveillances were based upon intelligence data available to the President, classified "SECRET" and "TOP SECRET". The affidavit of Mr. Peterson, together with the authorizations (or reauthorizations) and logs aforesaid, is contained in a sealed exhibit (Exhibit A) submitted to the Court herewith for its *ex parte, in camera* review.

6. I certify that it would be a practical impossibility to submit to the Court all of the facts, circumstances or other occurrences upon which each aforesaid authorization was based. I further certify that it would prejudice the public interest and the national security to disclose the particular facts in the attached sealed Exhibit A concerning these national security electronic surveillances (except the dates of interception, previously furnished to the plaintiff) other than to the Court, *in camera*. Accordingly, pursuant to the authority vested in me as Attorney General of the United States, I assert a formal claim of executive privilege in opposition to the disclosure of such information and any documents relating thereto.

7. I further submit herewith for the Court's *ex parte, in camera* review a second sealed exhibit (Exhibit B) which contains an affidavit of the Secretary of Defense, James R. Schlesinger, asserting a formal claim of executive privilege in opposition to the disclosure, other than to the Court, *in camera*, of documents and information relating to certain foreign, national security electronic surveillance. That affidavit is submitted in connection with certain matters related in Part II.C. of the affidavit of Mr. Peterson (Exhibit A).

8. I respectfully request that the Court treat the contents of the attached sealed exhibits (Exhibits A and B) for security purposes as they were treated in submission to the Court and to return those exhibits to the Department of Justice at the conclusion of any hearing on this matter. The Department of Justice will retain those exhibits under the Court's seal subject to any Orders of this Court or other court of competent jurisdiction.

WILLIAM B. SAXBE,
Attorney General of the United States.

Subscribed and sworn to before me this 13th day of December, 1974.

_____,
Notary Public.

My Commission expires March 14, 1975.

EXHIBIT 4

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 310–74

BERLIN DEMOCRATIC CLUB, ET AL., PLAINTIFFS

v.

JAMES R. SCHLESINGER, ET AL., DEFENDANTS

AFFIDAVIT OF JOHN M. MCDOUGAL

John M. McDougal, being first duly sworn, deposes and says:

1. I am an American citizen and a member of the United States Army, specialist fourth class, stationed at Mannheim, West Germany, with Company B, 2nd Battalion, 13 Infantry, APO 09028.

2. I enlisted in the Army in January 1972. Following my basic training I was assigned to the Army's Arabic Linguist School at Monterrey, California, completing my training in March 1973, when I graduated from the United States Army Intelligence Center and School at Fort Huachuca, Arizona. On March 28, 1973 I was assigned to the 527th Military Intelligence Battalion of the 66th Military Intelligence Group, stationed at Kaiserslautern, West Germany, APO 09227. My primary Military Occupational Specialty was Interrogator, but I was assigned to Personnel Security Investigations for the bulk of my duty. In May 1973 I was given a Temporary Duty Assignment at Zirndorf, West Germany, during which time I was performing my primary Military Occupational Specialty. I am unable to elaborate on the details of this mission because of its classified nature, but my orders were twice extended and I was employed in place of other personnel because, I was told, my performance was highly satisfactory.

3. During the course of my duties in conducting Personnel Security Investigations with the 527th Military Intelligence Battalion I routinely received, read and used confidential reports on the political and social activities and personal lives of American civilians and servicemen residing in West Germany. I also typed and reviewed "External Factors Reports", which were reports compiled by the various sections of the 527th Military Intelligence Battalion, including Countersubversion Section ("CS"). These were general intelligence reports compiled on an area-wide basis.

4. My general duties with the 527th Military Intelligence Battalion brought to my attention various documents concerning the actual operations of military intelligence CS units in and around Kaiserslautern, Mainz and Heidelberg, West Germany. These CS operations were directed by David C. Wales (GS–13), the Operations Officer of the 527th Military Intelligence Battalion, and included, to the best of my knowledge, extensive coverage of the political and journalistic activities of American civilians and civilians groups, through the use of coded

confidential "penetration agents", wiretapping, interception of civilian mail and surreptitious photography.

5. Among the documents that came to my attention during my general military intelligence duties were CS reports on American civilians and servicemen in Mainz who edited, published and distributed an English language newspaper, *FTA With Pride*, including Carol and Terry Bott, Ernest Iovinni, John Castro and others. These CS reports contained biographical details concerning the persons under surveillance and emphasized their regular contact with the Lawyers Military Defense Committee in Heidelberg, from which they were apparently receiving legal advice. The reports also repeatedly referred to Thomas Schwaetzer, always including a "(C)" after his name, which indicated that there was additional confidential biographical data on him in other CS reports.

6. I also became aware, during the course of my general military intelligence duties, of a planned penetration attempt of the Gossner Mission in Mainz by coded confidential sources of the 527th Military Intelligence Battalion. Military intelligence personnel had determined that Horst Stuckmann, a priest thought to be associated with the Mission, was permitting the persons involved in putting out *FTA With Pride* to use his printing press. The CS unit in question evidently believed the press was located in the Mission. The penetration plan was given the code name, "Operation Penguin Monk", and was apparently undertaken by the Army because it was assumed that the German police would render no assistance in penetrating a religious mission. The plan, which was subsequently carried out, included surveillance by MI agents with cameras in 3 cars owned by the Army but bearing German license plates; ground surveillance by agents with cameras hidden on the premises of the Mission; and penetration of the Mission by a coded confidential informer, an Indian, who would claim to be disaffected by racism in the Army and would ask for assistance in deserting, and would attempt to induce the residents of the Mission to harbor him. A 24-hour "spotter system" was to be put into effect to record the license plates of all vehicles parking on mission property and to photograph all persons entering or leaving the Mission. A floor plan of the interior was to be obtained. An FBI check of Avery C. Manchester, an American citizen associated with the Mission as an official of the United Methodist Church, was to be requested, and MI files were to be searched for information obtained from any previous surveillance of the Mission. Contacts between Mission residents and Carol and Terry Bott, the Lawyers Military Defense Committee, Mary Jo Van Ingen Leibowitz and Thomas Schwaetzer, as well as other persons, were to be ascertained and recorded. The written plan for the operation specifically stated that at no time were the German authorities to be informed of the Operation's existence.

7. I am also aware from information that came to my attention during my duties that "Operation Penguin Monk" was approved by Major General Harold Aaron, former Deputy Chief of Staff for Intelligence, USAREUR, on June 12, 1973, during a visit by him to the Mainz Field Office of the 527th Military Intelligence Battalion. Col. Gaspar V. Abene, Commander of the 527th Military Intelligence Battalion had overall responsibility for the Operation, which was supervised directly by Captain Frank Stiglich, Commander of the Battalion's Mainz Field Office.

8. "Operation Penguin Monk" was part of a larger military intelligence countersubversion program in effect throughout West Germany. This program is known as the "1663 Program", and was put into operation in approximately August 1972 pursuant to Regulation 381–17 of the 66th Military Intelligence Group. Project 1663 involves the recruitment of non-Military intelligence servicemen, who are told to establish contact with political groups and organizations and to act as undercover agents and informers within those groups. These 1663 "sources" are given code numbers and are assigned to military intelligence agents who program their activities, help them develop and establish their "cover" identities, and receive from them regular reports on the activities, contacts, communications, mail, internal disagreements, and identities of persons within the targetted group or organization. The source is instructed to gather as much information as possible about the political beliefs of each member of the targetted group and to find out the nature and extent of their involvement in political activities in the United States before coming to Germany. It was my understanding that Project 1663 was developed and implemented upon the direct order of Major General Harold R. Aaron, USAREUR Deputy Chief of Staff for Intelligence.

9. On or about July 19, 1973 during the course of my duties in charge of quarters at the 527th Military Intelligence Battalion headquarters, I observed the summaries of conversations intercepted on a wiretap installed on a civilian telephone, number 06223–3316 [see Exhibit A, *infra*]. These summaries are written on U.S. Army Agent Reports (DA Form 341), and are signed by Special Agent Frank Dent. The body of the reports is preceded by the notation, "NOFORN", which means that the information in the documents is not to be disseminated to any foreign government. The text is also preceded by the words, "Extended Coverage", which indicates that either a wiretap or a covert mail cover, or both, has been established. The purported subject of the surveillance is Thomas Schwaetzer. All the conversations on telephone number 06223–3316 which were of interest to military intelligence appear to relate to the journalistic activities of Mr. Schwaetzer and others, as well as to Mr. Schwaetzer's work as a consultant and translator for the Lawyers Military Defense Committee. The wiretap summaries which I have appended to this affidavit contain the substance of conversations held on June 21–22 and 26–28, 1973 involving civilian attorneys, journalists and others, including: Thomas Schwaetzer; Howard DeNike, identified as an attorney with the Lawyers Military Defense Committee; Dennis McClintock who, although not further identified, I know to be a radio broadcaster for Armed Forces Network, out of Kaiserslautern; Mr. Guha, identified as a reporter for the *Frankfurter Rundschau*, a German newspaper; and Joanna Prym, identified as a reporter for the *Overseas Weekly*. Other persons referred to in the "agent's notes" (appended to the documents), whose conversations were apparently overhead on other occasions, include John Sheahan, identified as a reporter for CBS News; Craig Whitney, identified as a reporter for the *New York Times;* and Annette Broecker, identified as a reporter for Reuters.

10. When these wiretap reports came to my attention during my charge of quarters duty on or about July 19, 1973, the name Larry Johnson caught my attention because I had recently read of his trial in the *Overseas Weekly*, a newspaper which covers news of U.S. servicemen. My attention was drawn to the fact that these documents disclosed the existence of tapped telephone conversations concerning the strategy for Johnson's defense, to which Johnson's attorney, Howard DeNike, was a party. Because I believed these telephone taps violated the rights of Larry Johnson in securing a fair trial, I took steps to contact the Lawyers Military Defense Committee to inform Johnson's lawyer. On July 21, 1973 I signed a statement concerning the wiretaps in question, which I submitted to Howard J. DeNike for use on behalf of Mr. Johnson's defense. [Exhibit B, *infra*]. I signed this statement, which was subsequently made public, in the sincere belief that I should do so pursuant to the Code of Conduct of the 66th Military Intelligence Group, which requires all members to "[m]aintain both . . . private and professional lives in such a way as to meet the highest standards of moral strength and character; [and to] achieve the intellectual honesty to perceive the truth and to have moral courage to accept and defend the truth regardless of personal cost." [Exhibit C, *infra*].

11. On or about July 21, 1973, I was visited by a personal friend also assigned to 66th Military Intelligence Group. We had been assigned to Germany at the same time. During the course of his social visit, he mentioned to me that he had been ordered to destroy approximately 15 volumes of CS surveillance documents, including wiretap and mail interceptions, on or about the second week in July. The order had been given by Mr. Malone, the head of CS, in Headquarters, 66th Military Intelligence Group, in Munich, and Captain Swift, his deputy.

12. During the course of my duties in the latter part of July 1973 at the Kaiserslautern Field Office of the 527th Military Intelligence Battalion, I was informed by Captain Joe Holmes, Commander of the Battalion's Kaiserslautern Field Office, that several Project 1663 coded confidential sources had penetrated the meetings and editorial staff of the English language newspaper, *Fight Back*, published monthly in Heidelberg by a group of American civilians and servicemen. One such source, a black serviceman with the Army rank, E–5, was code-numbered, to the best of my recollection, "2212–1400". Since February 1973 he had been reporting the identities and background information of all individuals connected with *Fight Back*, projected programs of the group, and advance copies of articles to be published and the names of the authors (which would not appear in the newspaper). He had written poems for the news-

paper with the guidance of his military intelligence agent, which were published. One report of a contact between 2212–1400 and his agent which came to my attention concerned a conference of *Fight Back* and several other groups which he had attended and surreptitiously recorded in April 1973. This conference, which apparently had centered on servicemen's rights under the Uniform Code of Military Justice, was addressed by Howard DeNike and Robert Rivkin of the Lawyers Military Defense Committee. Upon information and belief, agent 2212–1400 was known to the people at *Fight Back* as "Scott" or "Scotty".

13. Also during my charge of quarters duties at the Kaiserslautern Field Office of the 527th Military Intelligence Battalion I became aware of the intensive CS surveillance of Thomas Schwaetzer and Mary Jo Ingen Leibowitz, and other civilians, over a period of at least three years. On or about July 31, 1973, four days after the *New York Times* had published an article about the Army's surveillance activities in Germany, substantial quantities of CS surveillance documents were destroyed and additional such documents were forwarded to the Headquarters of the 66th Military Intelligence Group in Munich. During this period (on or about July 31, 1973) I personally witnessed the destruction of approximately 25 bags of CS documents by, among others, Special Agent Hollis Plumley, Specialist 4 James Mains, and Sergeant First Class Stephen Alexander, acting under orders given by GS–11 Gary Jochem, director of CS of the 527th Military Intelligence Battalion.

14. On or about August 4, 1973 I was given written notification that I was to be the respondent in a formal proceeding to investigate "the facts and circumstances surrounding the release of information to unauthorized sources." The names of nine military intelligence personnel were listed as prospective witnesses. I was informed that I was to give notice of any witness I wished to call by August 5, 1973 [Exhibit D, *infra*]. At that time, my attorney telephoned the Investigating Officer, Major James P. Drago, and gave him the names of fifteen witnesses I wished to call, including the Undersecretary of the Army, the military judge who had presided at the trial of Larry Johnson, and Senator Lowell Weicker. My attorney further informed Major Drago that I would challenge as illegal and unconstitutional, and unauthorized by applicable Department of Defense regulations, the Army's wiretapping of civilians and infiltration of political organizations. On August 6, 1973 my attorney was informed by Major Drago that the hearing had been cancelled, that his orders as Investigating Officer had been rescinded, and that the Army would instead conduct an informal investigation to "determine relief of accountability." I have never been informed of the results of such an investigation, nor whether in fact such an investigation has been conducted, nor have I been charged in any way for my actions. I have repeatedly stated that I would be willing to testify before any competent authority, including the United States Senate or a military court martial, concerning my actions.

15. On August 21, 1973 I submitted to the Army General Counsel an Affidavit and Request for Court of Inquiry Under Article 135, Uniform Code of Military Justice, charging Major General Harold Aaron, Colonel Richard Evers and Lt. Col. Gaspar Abene with violating Articles 92 and 134 of the Uniform Code of Military Justice by putting into operation a plan to penetrate and conduct surveillance of a religious, civilian organization, the Gossner Mission; by conducting surveillance of a civilian political campaign organization in West Berlin; and by ordering the destruction of wiretapped telephone conversations of a civilian defense attorney during the pendency of a court martial (Exhibit E, *infra*). On September 11, 1973 Army General Counsel Robert Berry rejected my request in a letter to my attorney, stating in pertinent part that "the evidence that he has (submitted) does not justify convening such a Court of Inquiry" (Exhibit F, *infra*).

16. However, on December 3, 1973, I was told that my security clearance would be revoked. Although I was allowed a brief period to submit a rebuttal, my clearance was revoked on December 28, 1973, on the grounds of "poor judgment." In February of 1974, over my objections, my military occupational specialty ("MOS") was changed from 96C2LAE (interrogator, translator, interpreter, Arabic) to 71T (equipment maintenance clerk), and I was transferred on March 1, 1974 from Military Intelligence to my present Infantry unit.

17. I believe certain military intelligence activities in Germany, notably those activities described in my affidavit, violate the First Amendment rights

of American citizens living abroad. Such operations in the continental United States have been strongly condemned by legislative and judicial authorities and they should be similarly condemned overseas.

JOHN M. MCDOUGAL.

Mannheim,
West Germany.

Sworn to before me this 11th day of July, 1974.

RICHARD H. MCCALL, JR.
Captain, JAGC, Notary Public.

A commissioned officer on active duty with the United States Army, presently serving as a member of The Judge Advocate General's Corps with powers of a notary public pursuant to 10 USC 936.

AGENCY REPORT

For use of this form, see FM 30–17(C); the procurement agency is the Office of the Assistant Chief of Staff for Intelligence.

1. Name of subject or title of agent: Thomas SCHWAETZER (C) DPOB: 13 June 1923, Vienna, Austria.
2. Date submitted: 12 July 1973.
3. Control symbol or number:
4. Report of findings:

WARNING NOTICE-SENSITIVE SOURCES AND METHODS INVOLVED

(C–ROFORN) From 1100 hours 20 June until 1100 hours 22 June 1973, extended coverage (USI case number A–0038; tape recording number 29) concerning SUBJECT revealed the following information:

(C) Four (4) telephonic communications of interest to USI occurred between SUBJECT at HIS apartment telephone number 06223–3316 and various individuals from different telephone numbers and locations. These communications were as follows:

a. On 21 June 1973, at approximately 1710 hours, a telephonic communication occurred between an individual identified as Max from telephone number 06223–3316 and an individual identified as DeNike at telephone number 06221–4 65 82 in DeNike's legal office, located at 7 Maerngasse, Heidelberg. This communication, conducted in the English language, was in substance as follows:

"DeNike just got back from Wuersburg. The JAG there who is working with DeNike has appendicitis so they have postponed the trial for one month. DeNike is going to the stockade in Mannheim tomorrow. Larry Johnson is supposed to go to jail today. Max has a letter from Daniel Benson. Max says that about 300 Germans and about 20 GIs attended the meeting and heard Father Bertulli speak. None of the GIs from Kaiserslautern made it to the meeting. Max is very mad about that. Some of the GIs in Heidelberg printed up some leaflets on the meeting and passed them out at Campbell Barracks. Larry Darnes also spoke at the meeting. (Transcriber's Note: SLO files show that Darnes is the leader of VOL in Frankfurt.) A collection was taken up at the meeting for Larry Johnson. Max thinks that maybe Johnson will donate it to PPC. Max thinks that Stars & Stripes reporter John Hart gave the Johnson story to AFW. It was on the news last night. DeNike reveals that the last letter he had from Fent indicated that Fent was to arrive in Brussels on 23 June and it would take him several days to get to Heidelberg. DeNike will call Peter More. Max is going to try to get another set of negatives from the slides he got from Dertulli."

b. On 21 June 1973, at approximately 1755 hours, a telephonic communication occurred between an individual identified as Max from telephone number 06223–3316 and an individual identified as Dennis Hallintock at an undisclosed telephone number at the AFW, Kaiserslautern. This communication, conducted in the English language, was in substance as follows:

"McClintock says that the story on Johnson was on the 0730 hours news yesterday in Kaiserslautern. McClintock thinks that Kelly (AFW) got it from S&S reporter John Hart. Max is surprised that AFW did the story but is very happy about it. McClintock will try to get Max a transcript of the story. Max will send AFW his version of the Johnson story in return."

c. On 21 June 1973, at approximately 1951 hours a telephonic communication occurred between an individual identified as Max from telephone number 06223–3316 and an individual identified as Mr. Guba from an undisclosed telephone number at the Frankfurter * * * . This communication, conducted in the German language, was in substance as follows:

"Max explains that the American Nazi Party has been active in Frankfurt passing out leaflets. The leaflets deal with white power. Some of the themes are 'special rights for black savages; white power; and have you had enough white? Max gives * * * the address of the party as 2507 North Franklin Road, Arlington, VA. Their telephone number is 524–2175. By calling 523–4361 you hear a recorded message dealing with white power."

d. On 22 June 1973 at approximately 0955 hours, a telephone communication occurred between an individual identified as Max from telephone number 06223–3316 and an individual identified as Rudy * * * at telephone number 821–6189 in Berlin. This communication, conducted in the * * * language, was translated as follows:

"Max relays the above story on the American Nazi Party. Max is angry because whenever the blacks or the GIs attempt to distribute papers the police are there to give them trouble. Max says that the police have done nothing to the members of this group. Max says that the leaflets are printed on very expensive paper and are very well done. Max relays that the Johnson story was on * * * Max also reveals that the leaflets had swastikas on them. Max is sure that this is illegal in Germany. Schwinn agrees. Max says that the article in the leaflets advocate sending all of the blacks back to Africa."

(C) Agent's Notes: Max is a known alias of * * * . DeNike is further identified as LMDC attorney Howard DeNike from Heidelberg (MV 7873), Federal Republic of Germany (FRG). Peter Horn is a geologist from Heidelberg who is a close associate of Subject.

5. Type name and organization of special agent: Frank E. * * * 66th MI Group.

6. Signature of special agent:

DA Form 341 * * *

AGENCY REPORT

For use of this form, see FM 30–17(C); AR 381–130; the procurement agency is the Office of the Assistant Chief of Staff for Intelligence.

1. Name of subject or title of agent: Thomas SCHWAETZER (C) DPOB: 13 June 1923, Vienna, Austria.

2. Date submitted: 12 July 1973.

3. Control symbol or the number:

4. Report of findings:

WARNING NOTICE—SENSITIVE SOURCES AND METHODS INVOLVED

(C–NOFORM) From 1100 hours on 25 June until 1100 hours on 27 June 1973 extended coverage (USI case number A–0033; tape recording number 31), concerning SUBJECT revealed the following information:

(C) Four (4) telephone communications of interest to USI occurred between SUBJECT at USI apartment telephone number 06223–3316 and various individuals from different telephone numbers and locations. These communications were as follows:

a. On 26 June 1973, at approximately 1245 hours, a telephonic communication occurred between an individual identified as Max from telephone number 06223–3316 and an individual identified as DeNike at telephone number 06221–4 65 82 in DeNike's legal office, located at 7 Maeragesse, Heidelberg. This communication, conducted in the English language, was in substance as follows:

"Max asks DeNike to look at Monday's issue of Stars & Stripes, page 27, the story on the Schweinfurt 6. Max says that it is a typical S & S story. DeNike wants to know how to get in touch with 'Steve', a black, in Worms. DeNike says that Steve's story is going to Stern. Max has received the transcript from CDS on Hamilton. After reading it Max feels sorry for the Army. DeNike reveals that Font should be here today. June gave a lot of material on Father Bertulli to Fightback."

b. On 26 June 1973 at approximately 1307 hours, a telephone communication occurred between an individual identified as Joanna * * * from an undisclosed

telephone number at the Overseas Weekly and an individual identified as Max at telephone number 06223–3316. This communication, conducted in the English language, was in substance as follows:

"Max received his pictures back from the Johnson trial. He will send her two of them. Max gives Joanna the story on the Schweinfurt 6. Max hasn't received his money yet. Max—'stopping my mail is one thing, but keeping my money is too much.' Joanna—'a letter from Munich occasionally takes a week.' Max—'it doesn't take that long unless they are interested in your mail. I think they are interested in yours as well.' Joanna—'No, I don't think they have so much time.' Max—'One day when we meet I can tell you what people have told me what happens to our mail. One of the comments was, our telephone conversations are mimeographed and passed out like handbills in a circus.' Joanna—'Isn't that interesting?' Max—'Particularly when the guy reads it and finds it so interesting that he gets in touch with us.' Joanna answered two letters this week from GIs who wanted Max's address."

c. On 26 June 1973, at approximately 2251 hours, a telephonic communication occurred between an individual identified as Max from telephone number 06223–3316 and an individual identified as Rudolph at telephone number 06221–46813. This communication, conducted in the German language, was translated as follows:

"Max explains that June has translated Bertulli's speech into English. It is 13 pages long and Max wants to run off about 300 copies. Rudolph thinks that maybe the Theological Department has the facilities to do it. Rudolph would also like a few copies. Max reveals that he needs at least 300 for GIs, especially black GIs. Rudolph will come out to Max's and pick up the stencils. Max reveals that he is in the process of getting out about 2000 leaflets on the Johnson trial."

d. On 27 June 1973, at approximately 0819 hours, a telephonic communication occurred between an individual identified as John Cat from an undisclosed telephone number and an individual identified as Max at telephone number 06223–3316. This communication, conducted in the English language, was in substance as follows:

"Cat just came in from Paris. He has no car and no place to stay. He plans to stay a few days in Heidelberg and then go on to Berlin. He saw Alex in Paris. Max says that Cat can either stay at the guest house in Dilsberg or at the C–A. June will come in and pick him up."

5. Type name and organization or association: FRANK E. DEIT, 66th MI Group.

6. * * *

AGENCY REPORT

For use of this form, see FM 30–17(C); AR 301–130; the proponent agency is the Office of the Assistant Chief of Staff for Intelligence.

1. Name of subject or place of incident: Thomas SCHWAETZER (C) DPOB: 13 June 1928, Vienna, Austria.

2. Date certified: 12 July 1973.

3. Control symbol or the number:

4. Report of findings:

WARNING NOTICE—SENSITIVE SOURCES AND METHODS INVOLVED

(C–NOFORN) From 1100 hours on 27 June until 1100 on 29 June 1973 extended coverage (USI case number A–0088; tape recording 32) concerning SUBJECT revealed the following information:

(C) Five (5) telephonic communications of interest to USI occurred between SUBJECT at HIS apartment telephone number 06223–3316 and various individuals from different telephone numbers and locations: These communications were as follows:

a. On 27 June 1973, at approximately 1134 hours a telephonic communication occurred between an individual identified as Julie from telephone number 06201–6 34 98 and an individual identified as Max at telephone number 06223–3316. This communication, conducted in the English language, was in substance as follows:

"Rudolph just called her. Max explains that he needs 14 pages run off—at least 300 copies. She can do it this evening. She lives at Hauptstr. 36 in Weinheim on the first floor. Max will be there at 1700 hours."

b. On 27 June 1973, at approximately 1928 hours a telephonic communication occurred between an individual identified as John 'Cat' from telephone number 06223–3316 and an individual identified as Julie at telephone number 06201–6 34 98. This communication, conducted in the German language, was in substance as follows:

"Cat asks for Julie who is not at home. Cat would like to visit her on Saturday."

c. On 28 June 1973, at approximately 0906 hours, a telephonic communication occurred between an individual identified as DeNike from telephone number 06221–4 65 82 and an individual identified as Max at telephone number 06223–3316. This communication, conducted in the English language, was in substance as follows:

"DeNike says that there is a letter at LMDC for Max from Father Bertulli. The letter is short but it is in French. Max wants to leave this afternoon on his eight-day trip. DeNike says that Font is in Heidelberg. DeNike saw Johnson again yesterday. Max reveals that there was a large story on Johnson in the Berliner Extradienst. John 'Cat' is at Max's. Max says that even the servicemen's union has no idea of everything that is happening in Europe.

d. On 28 June 1973, at approximately 1050 hours, a telephonic communication occurred between an individual identified as Rudy Schwinn from telephone number 8 21 61 89 in Berlin and an individual identified as Max at telephone number 06223–3316. This communication, conducted in the German language, was in substance as follows:

"John 'Cat' is coming to Berlin. He will arrive on Sunday. Schwinn would like to interview him. Max says that there is a full page article on RITA in the last issue of Democratic German Report. This publication is from the DDR. Max also relays that Font is in Heidelberg."

e. On 28 June 1973, at approximately 1416 hours, a telephonic communication occurred between an individual identified as John 'Cat' from telephone number 06223–3316 and an individual identified as Julie at telephone number 06201–6 34 98. This communication, conducted in the English and German language, is in substance as follows:

"Cat reveals that he is leaving for Berlin Saturday night but would like to see her before he goes. He will come to visit tomorrow night."

(C) AGENT'S NOTES: Max is a known alias of anti-US Army activist Thomas SCHWAETZER. John "Cat" is further identified as John Catalinotto, one of the founders of the American Servicemen's Union, has corresponded with SUBJECT in the past. DeNike is further identified as Howard DeNike, an attorney for Lawyers Military Defense Committee (LMDC) Heidelberg (MV 7773), FRG. LMDC offers legal aid to servicemen who do not trust the military judicial system. UTM Coordinates for Weinheim are MV 7689, and Berlin UU 9220. Further identifying data on other personalities is not known at present.

5. Type name and organization of special agent: FRANK E. DENT, 66 MI Group.

6. Signature of special agent: Frank E. Dent.

DA * * * 341 * * *

(c) Agent's Notes: Max is a known alias of T * * *, is a known Communist and radical extremist who has been associated with dissident, black U.S. Soldiers. He is closely affiliated with other extremist groups and is suspected of contacts with hostile intelligence agencies in East Berlin. Bertulli is further identified as Father Bertulli, Superior Father of the White Fathers, and has spent 18 years in Mozambique. His appearance was requested by SCHWAETZER at the trial of Larry Vance Johnson, a black US Soldier, who is currently * * * detained at the US Army Detention Facility, Mannheim (MV 6282), FWG. DeNike is further identified as Howard DeNike, an attorney working at LMDC office in Heidelberg (MV 7873), FRG. Lucy is further identified as * * * Jonelle DeNike, nee Soon, wife of Howard DeNike. * * * Identifying data on individual referred to as June is available in * * * 527th MI Bn Ltr data. John Sheahan is a reporter for CBS news in Bonn (LB 6522), FRG. Joanna Prym is a reporter for *Overseas Weekly* who has contacted SUBJECT often in the past with regard to newsworthy items of interest. Craig Whitney is a reporter for the *New York Times* in Bonn. Annette Broecker is a reporter for *Reuters* in Bonn, identifying data on other personalities is unknown.

EXHIBIT A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 310–74

BERLIN DEMOCRATIC CLUB, ET AL., PLAINTIFFS

v.

JAMES R. SCHLESINGER, ET AL., DEFENDANTS

AFFIDAVIT OF MARK E. SCHREIBER

Mark E. Schreiber, being duly sworn, hereby deposes and says:

1. The attached set of documents labelled "Exhibit A", are the original documents received by me on December 4, 1974 at the LMDC office, Marzgasse 7, Heidelberg, BRD. (West Germany)

2. The attached envelope labelled "Exhibit B" is the envelope in which "Exhibit A" was enclosed.

3. The attached documents labelled "Exhibits C and D" are carbon original Affidavits submitted by the Government in August, 1974 in the Army Special Court-Martial of U.S. v. Specialist 4 Louis M. Stokes, 550–92–2294, according to the LMDC office file on this case, and to the best of my knowledge and belief.

City of Heidelberg,
Federal Republic of Germany,
December 5, 1974.

MARK E. SCHREIBER.

Signed and sworn to before me this 5th day of December 1974 at Heidelberg, Germany.

JAMES C. SAVAGE III,
Captain, JAGC, Assistant SJA.

A commissioned officer on active duty with the United States Army, presently serving as a member of the Judge Advocate General's Corps, with powers of a notary public pursuant to 10 USC 936.

EXHIBIT B

WILLIAM H. SCHAPP, CIVILIAN DEFENSE COUNSEL, LAWYERS MILITARY DEFENSE COMMITTEE, 6900 HEIDELBERG 1, MAERZGASSE 7

Attention: Mr. Schreiber.

DEPARTMENT OF THE ARMY,
HEADQUARTERS, 1ST SUPPORT BRIGADE,
OFFICE OF THE STAFF JUDGE ADVOCATE,
APO 09325, December 4, 1974.

WILLIAM H. SCHAPP,
Civilian Defense Counsel,
Lawyers Military Defense Committee.

DEAR MR. SCHAPP: Inclosed for your information is a copy of the Staff Judge Advocate Memorandum provided to the Convening Authority, upon which the Convening Authority relied in taking his action in the Special Court-Martial of Specialist Four Louis M. Stokes, 550–82–2294. I am also inclosing copies of Special Court-Martial Order No. 41, pertaining to the case.

The accused's copy of the record of trial, with a copy of the inclosed memorandum and orders inserted therein, has been mailed to Specialist Stokes at his last known address, with a request that these be forwarded should this be necessary.

I trust that you will communicate this information to your client.

Sincerely,

CHARLES H. TAYLOR.
Colonel, JAGC, Staff Judge Advocate.

Memorandum for: Colonel Carl G. Davaz.
Subject: Special Court-Martial of SP4 Louis M. Stokes.

On August 7, 1974, the trial counsel in the special court-martial case of Specialist Four Louis M. Stokes submitted to the court an affidavit in response to a motion made by the accused for discovery. That affidavit stated in part:

". . . I have determined that no such telephone or electronic monitoring has been conducted against Louis M. Stokes, William H. Schapp, Robert S. Rivkin, Ellen Ray, Tomi Schwaetzer on telephones (06221) : 29582, 14149 at 6900 Heidelberg 1, Margasse 7 or (06221) 28249 which I am informed is Mr. Schapp's home phone or (06223) 3316 which I am informed is the phone of one Mary Jo Van Ingen Liebowitz but is used by Tomi Schwaetzer or (030) 781–5668 which I am informed is the telephone number of Forward in Berlin, FRG, or on the premises of those persons or concerning in any manner whatever, Louis M. Stokes or the case of United States v. Louis M. Stokes from 19 April 1974 to the date of this certificate."

It has subsequently come to the attention of Headquarters, USAREUR, that on one occasion within the time frame addressed in the affidavit a conversation to which William H. Schapp was a party was legally intercepted in which Mr. Schapp in a discussion with a third person referred to the Stokes Court-Martial in the following terms :

". . . We just found out, we just had one of Lu Stoke's (?) charges dismissed against him today—in the haircut . . ."

A review of the transcript of the intercepted conversation discloses no other mention of Louis M. Stokes or his court-martial. At the time the affidavit was submitted to the court, Headquarters, USAREUR had no record of this intercepter conversation. Since the intercept in which this conversation occurred was not directed at Mr. Schapp and since the intercept was not disseminated in any way within Army Intelligence channels, there was no record of which Headquarters, USAREUR was aware regarding this particular intercepted conversation. This intercepted conversation was discovered subsequent to the submission of the aforementioned affidavit.

Headquarters, USAREUR, has no information indicating, and no reason to believe, that this intercepted conversation was ever revealed to any person involved in any way with the court-martial of Specialist Stokes.

Headquarters, USAREUR, has no record of any other intercepted conversation pertaining in any way to this court-martial to which Mr. Schaap or any other person listed in the accused's discovery motion was a party.

The intercepted comment quoted above referred to a charge preferred against Stokes which had been dismissed and was not before the court-martial at the time of the conversation.

It is my opinion that it is clear from the foregoing that the intercepted conversation was not illegally intercepted, was not privileged in nature and could not in any way have tainted or influenced the outcome of the court-martial. The conversation which was intercepted (with the exception of the single sentence referred to above) did not pertain to Stokes or the Stokes case. However, the affidavit filed with the court-martial which I have noted above was erroneous in that it denied any interception. In this respect it was too broad and possibly misleading. In the interest of fairness and justice this conviction should be set aside. A rehearing could be ordered after the conviction is set aside. However, since Stokes has served a substantial portion of his sentence and since he is now in the United States, I believe that a rehearing is impractical and that the charges should be set aside. Stokes released from confinement and restored to duty and that all rights, privileges and property of which he has been deprived by reason of this conviction should be immediately restored.

JACK A. MULLINS,
Lieutenant Colonel, JAGC,
Acting Staff Judge Advocate.

DEPARTMENT OF THE ARMY,
HEADQUARTERS, USA COMBAT EQUIPMENT GROUP, EUROPE,
APO New York 09100, November 23, 1974.

Re : Special Court-Martial Order No. 41.

Before a Special Court-Martial which assembled at Funari Barracks, Mannheim, Germany, pursuant to Court-Martial Convening Order Number 3, this headquarters, dated 12 March 1974 as amended by Court-Martial Convening Order Number 12, this headquarters, dated 3 May 1974 as amended by Court-Martial Convening Order Number 15, this headquarters, dated 5 June 1974 as amended by Court-Martial Convening Order Number 24, this headquarters, dated 27 June 1974 as amended by Court-Martial Convening Order Number 25, this headquarters, dated 1 July 1974 as amended by Court-Martial Convening Order

Number 27, this headquarters, dated 10 July 1974 as amended by Court-Martial Convening Order Number 49, this headquarters, dated 20 August 1974 as amended by Court-Martial Convening Order Number 50, this headquarters, dated 20 August 1974 was arraigned and tried :

Specialist Four Louis M. Stokes, 550–82–2294, U.S. Army, HHD, Area Maintenance and Supply Facility, APO 09086.

Charge I: Violation of the Uniform Code of Military Justice, Article 91.

Specification.—In that Specialist Four Louis M. Stokes, United States Army, Headquarters and Headquarters Detachment, United States Army Communications Command—Europe, Area Maintenance and Supply Facility, having received a lawful order from Master Sergeant James R. Lamar, his superior noncommissioned officer, to get a haircut, did, at Mannheim, Germany, on or about 0800 hours, 17 April 1974, willfully disobey the same.

Charge II. Violation of the Uniform Code of Military Justice, Article 90.

Specification.—In that Specialist Four Louis M. Stokes, United States Army, Headquarters and Headquarters Detachment, United States Army Communications Command—Europe, Area Maintenance and Supply Facility, having received a lawful command from Captain William J. Schuck, his superior commissioned officer, to report to his office at 0800 hours, Monday 22 April 1974, with a haircut did, at Mannheim, Germany, on or about 0800 hours, 22 April 1974, willfully disobey the same.

PLEAS

To the *Specifications* and Charges : Not Guilty.

FINDINGS

Of the *Specification* of Charge I and Charge I : Guilty.
Of the *Specification* of Charge II and Charge II : Guilty.

SENTENCE

To be reduced to the grade of E–1; to forfeit $217.00 per month for four (4) months; to be confined at hard labor for four (4) months. (No previous convictions considered.)

The sentence was adjudged on 18 September 1974.

ACTION

DEPARTMENT OF THE ARMY,
HEADQUARTERS, USA COMBAT EQUIPMENT GROUP, EUROPE,
APO New York 09166, November 23, 1974.

In the foregoing case of Specialist Four (E–4) Louis M. Stokes, 550–82–2294, U.S. Army, Headquarters and Headquarters Detachment, Area Maintenance and Supply Facility, APO New York 09086, the sentence is disapproved and the charges are dismissed. As the accused has served a portion of the sentence to confinement at hard labor and is presently in the United States, a rehearing will not be ordered.

CARL G. DAVAZ,
Colonel, Ord C, Commanding.

By order of Colonel Davaz.

B. L. CHANDLER,
Captain, AGC, Adjutant.

Official.

EXHIBIT C

CERTIFICATE

I certify that I, Thomas W. Bowen, Brigadier General, US Army, am the Deputy Chief of Staff for Intelligence, USAREUR and 7th Army. That in such capacity, I have direct major staff cognizance of all Army telephone and electronic monitoring in USAREUR which might be conducted by or on behalf of US Army, Europe, for intelligence purposes. The only division of my element responsible in any way for telephone or electronic monitoring in USAREUR is the Counterintelligence Division. That after an exhaustive search and inquiry of Counterintelligence records, I have determined that no such telephone or electronic moni-

toring has been conducted against Louis M. Stokes, William H. Schaap, Robert S. Rivkin, Ellen Ray, Tomi Schwaetzer on telephones (06221) : 29582, 14149 at 6900 Heidelberg 1, Marzgasse 7 or (06221) 28249 which I am informed is Mr. Schaap's home phone or (06223) 3316 which I am informed is the phone of one Mary Jo Van Ingen Liebowitz but is used by Tomi Schwaetzer or (030) 781–5668 which I am informed is the telephone number of Forward in Berlin, FRG, or on the premises of those persons or concerning in any manner whatever, Louis M. Stokes or the case of *United States* v. *Louis M. Stokes* from 19 April 1974 to the date this certificate.

I further certify that any electronic or telephone monitoring inside of the continental United States is outside of US Army, Europe, authority. Therefore, neither I nor my element have knowledge of any information resulting from, or any acts of, electronic or telephone monitoring of telephone numbers (202) 659–1138 and 1139 which I am informed are at the Washington, DC, office of the Lawyers Military Defense Committee at 1346 Connecticut Avenue, NW, concerning in any manner whatever, Louis M. Stokes or the case of *United States* v. *Louis M. Stokes* from 19 April 1974 to the date of this certificate.

THOMAS W. BOWEN,
Brigadier General, USA.

Sworn to and subscribed before me this 5th day of August 1974.

WILLARD E. NYMAN III,
Captain, JAGC.

A commissioned officer on active duty with the United States Army, presently serving as a member of the Judge Advocate General's Corps with powers of a notary public pursuant to 10 USC 936.

EXHIBIT D

CERTIFICATE

I certify that I, Thomas W. Bowen, Brigadier General, US Army, am the Deputy Chief of Staff for Intelligence, USAREUR and 7th Army.

In reference to my certificate in the case of *United States* v. *Louis M. Stokes*, dated 5 August 1974, I used the wording "telephone or electronic monitoring." This wording means to me, all telephonic and electronic surveillance to include the acts of intercepting or listening to or recording or transcribing any telephonic or other conversation by use of any electronic, mechanical, or other device.

THOMAS W. BOWEN,
Brigadier General, USA.

Sworn to and subscribed before me this 7th day of August 1974.

WILLARD E. NYMAN III,
Captain, JAGC.

A commissioned officer on active duty with the United States Army, presently serving as a member of the Judge Advocate General's Corps with powers of a notary public pursuant to 10 USC 936.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 310–74

BERLIN DEMOCRATIC CLUB, ET AL., PLAINTIFFS

v.

JAMES R. SCHLESINGER, ET AL., DEFENDANTS

AFFIDAVIT OF MARK E. SCHREIBER

Mark E. Schreiber, being duly sworn, hereby deposes and says :

1. I am a graduate of the Harvard Law School, member of the Bar of the Commonwealth of Massachusetts, and the Federal District Court of Massachusetts.

Since Mid-July, 1974 I have been employed as a staff attorney for Lawyers Military Defense Committee (hereafter LMDC), Heidelberg, West Germany.

2. In this capacity I have represented members of the American Armed Forces located in West Germany in courts-martial, administrative boards, and non-judicial punishment (Article 15) proceedings, as well as advising soldiers as to methods of filing complaints and other administrative remedies provided by regulation.

3. In the course of this employment, and by studying the various documents, appendices and affidavits in the above captioned case, I have been made aware of some of the means whereby the Army Military Intelligence, the * * * Group, and its subordinates have undertaken overt and covert surveillance of the LMDC.

4. The existence of wiretap surveillance by or on behalf of the Army in West Germany has caused me to file wiretap discovery motions pursuant to 18 U.S.C. Sec. 3504 in recent courts-martial cases. The drafting, filing, and arguing such motions have occupied numerous hours, and inordinate amounts of time.

5. Mail routinely arrives at the office with the impression that it has been opened. Letters from soldiers located in West Germany within a few hours drive, who, for instance, inquire as to conscientious objector hearings or Chapter 13 boards, have often taken exceedingly long periods from the date of postmark to arrive. On the other hand, mail from non-clients, i.e. lawyers, etc., from the east coast of the United States usually arrives much sooner, with certain exceptions.

6. There are frequently strange hums, whistles, buzzes on the office telephone line. On numeorus occasions telephone conversations with soldier clients have been inexplicably cut off.

7. The possiblity that client confidences may not be assured by using mail or telephones drastically limits the means of attorney client communications. Numerous soldiers have voiced to me severe reservations in speaking about their cases over the phone. Soldier clients must often take trains of several hours duration to reach this office so that I may meet with them personally on matters which might otherwise be handled on the phone or through the mail. For some clients whose station is not within a short train ride, such as recent cases in Nuremberg and Schweinfurt, useful communication in preparing a defense is minimized.

8. It has recently been brought to my attention that while one of the lawyers of LMDC was in Italy conducting a defense, that ". . . the Heidelberg office was left in charge of a paid U.S. Army source. . . ."

9. The spectre presents itself of military intelligence having had access to innumberable case files and client confidences. Lawyers for LMDC have been in Naples, Italy on several occasions and for extended periods within the last year representing U.S. sailors in a complicated set of courts-martial. One of the attorneys, Willam H. Schaap, has been in Naples since the third week in September, 1974, involved in these cases, and has just returned to Heidelberg.

10. It is now necessary for me to attempt to determine 1) which lawyers for LMDC were in Naples, Italy, at any time within the last year since those cases began, 2) which other lawyers were then present in Heidelberg, 3) at what point and for what periods was that lawyer(s) not present in Heidelberg, including myself, 4) at what point and for what period did anyone other than staff lawyers have access to the LMDC office, 5) what appellate action, requests for remand, reversal or vacation, or other judicial remedies on which LMDC cases should now be undertaken. This inquiry has now commenced and will necessarily involve a great deal of time and expense.

City of Heidelberg,
Federal Republic of Germany,
December 5, 1974.

MARK E. SCHREIBER.

Signed and sworn to before me this 5th day of December 1974 at Heidelberg, Germany.

JAMES C. SAVAGE III,
Captain, JAGC, Assistant SJA.

A commissioned officer on active duty with the United States Army, presently serving as a member of the Judge Advocate General's Corps, with powers of a notary public pursuant to 10 USC 936.

EXHIBIT 5

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

CIVIL ACTION NO. 39065

ABDEEN M. JABARA, PLAINTIFF

v.

CLARENCE KELLEY, ET AL, DEFENDANTS

MEMORANDUM OPINION

This matter is before the court on the plaintiff's motion for leave to file a first amended complaint. Attached to the motion is a copy of the proposed amended complaint. The facts of this case can be found in this court's opinion in *Jabara v. Kelley*, 62 F.R.D. 424 (E.D. Mich. 1974).

Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to file an amended pleading "shall be freely given when justice so requires." The major differences between the original complaint and the proposed complaint are (1) a new claim for wiretap damages under 18 USC § 2520; and (2) factual allegations which "flesh out" the contentions contained in the original complaint. The defendants oppose this motion, principally contending that the proposed amendment fails to state a legally sufficient claim and that the amendment is not timely.

The court is of the opinion that the proposed amendment is timely. This case has been proceeding slowly, due to the complexities of the issues, and the case is still in a stage wherein the filing of an amended complaint will not prejudice the defendant. The basis for much of the material contained in the amendment were only recently revealed to the plaintiff by the defendants. Moreover, as the plaintiff points out, the basic nature of the complaint will not be charged by the amendment.

Nor is the court convinced by the defendants' argument that the proposed complaint is simply a basis for more discovery and that they will thereby be prejudiced by the granting of this motion. As the court has noted, the proposed amendment does not materially change the nature of the plaintiff's complaints. The court does not ascribe "discovery" as a motive for the plaintiff's amendment, but, rather, believes that the amendment is offered in order to conform the complaint to facts now in the plaintiff's possession. Moreover, the court has been compelled to oversee the plaintiff's discovery in this case to a greater extent than in most cases. The court believes that it can adequately protect the defendants from impermissible discovery. If anything, the proposed amendment would aid the court in understanding the nature and extent of the plaintiff's claims and would thereby facilitate this court's discovery determinations.

The defendants also contend that the actions alleged in the amendment were lawful and thus, the plaintiff has failed to state a legally sufficient claim. The defendants argue that the wiretaps were lawful "national security electronic surveillances," and thus not subject to the damages provision of § 2520 or for damages under the First, Fourth, Fifth and Ninth amendments to the Constitution. In oral argument on this motion, the defendants contended that the surveillance involved in this case was "foreign", and thus lawful. They clarified their position on this motion by stating that they wanted the court, in ruling on this motion, to decide whether foreign intelligence surveillance is lawful.

Even were the court disposed to make a ruling on this issue at this time, the court would first have to determine whether the surveillance was, in fact, authorized "national security electronic surveillance." The court does not believe that the record before it is adequate to make either the factual or legal determination necessary to support the defendants' position. (In deciding this motion the court did not examine or utllize the *in camera* exhibits submitted by the Government on December 16, 1974.) Moreover, such determinations would go to the very core of this case and the court does not believe that such important issues should be resolved at this stage of the proceedings.

The defendants believe that an early resolution of these issues would simplify the case. Be that as it may, the court is not inclined to make an early determination in order to simplify the case, at the possible expense of the plaintiff's rights. In a case of this nature, it is especially essential for the court to have all of the facts before ruling on such important issues.

While the defendants claim that there is no need to "flesh out" the allegations in the original complaint, the court sees no harm in allowing the plaintiff to do so.

The plaintiff's motion for leave to file a first amended complaint is granted. An appropriate order shall be submitted.

RALPH M. FREEMAN,
U.S. District Judge.

January 17, 1975.

JOHN H. F. SHATTUCK,
MELVIN L. WULF,
RONALD J. REOSTI,
For plaintiff.

HENRY E. PETERSEN,
Assistant Attorney General.
EDWARD S. CHRISTENBURY,
BENJAMIN C. FLANNAGAN,
Attorneys, Dept. of Justice.

RALPH B. GUY, Jr.,
United States Attorney.
MICHAEL D. GLADSTONE,
Assistant U.S. Attorney.
For defendants.

EXHIBIT 6

[Excerpts From Hearings Before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, U.S. Senate, 92d Congress, 2d session on Warrantless Wiretapping, June 29, 1972]

Mr. MARONEY. No, I do not think it has little standing. I think it is axiomatic that the more distribution you give to secrets, the less secrecy you have. It is certainly more desirable if you have sensitive information if you are able to restrict it in the closest possible way.

The Court recognizes that it may be difficult to distinguish between domestic and foreign unlawful activities directed against the Government of the United States where there is collaboration in varying degrees between domestic groups and organizations and agents or agencies of a foreign power. The committee has asked that we address ourselves to the question of what level of foreign dominance and control of a domestic group would be considered sufficient to bring the group into the area of foreign activities which the Court has not yet ruled upon.

The *Keith* decision has suggested a standard of significant connection with a foreign power, its agents or agencies. We do not interpret this as meaning casual, unrelated contacts and communications with foreign governments or agencies thereof. We would not try to apply this standard without the presence of such factors as substantial financing, control by or active collaboration with a foreign government and agencies thereof in unlawful activities directed against the Government of the United States. Obviously, such factors will be present in a very minimum number of situations.

I wish to assure the committee on behalf of the Attorney General, that the Department of Justice accepts both the letter and the spirit of the Court's ruling in the *Keith* case.

Senator KENNEDY. What do you think the spirit of the Court's ruling in the *Keith* case is?

Mr. MARONEY. Well, I think the spirit of the case is that where you are dealing with wholly domestic organizations that may bring into play first amendment considerations, the first amendment considerations outweigh the governmental necessity in securing warrantless electronic surveillance and require that the Government follow the provisions of title III in the Court-authorized warrant.

Senator KENNEDY. The decision contained, I thought, a strong and eloquent plea about the importance of the convergence of first and fourth amendment values:

> National security cases, moreover, 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 their greater jeopardy to constitutionally protected speech. . . . 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. . . . The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power. Nor must the fear of unauthorized official eavesdropping deter vigorous citizen dissent and discussion of government action in private conversation. For private dissent, no less than open public discourse, is essential to our free society.

There seems to be a strong commitment here to the convergence of first and fourth amendment rights. I was just wondering if you shared that view and——

Mr. MARONEY. Yes, sir.

Senator KENNEDY. You were impressed by its discussion in the opinion.

Mr. MARONEY. Yes, sir; very definitely.

It is the intention of the executive branch to utilize electronic surveillance in present and future national security matters in full and ungrudging application of the rationale of the decision.

In connection with the latter point, I think it appropriate to note that it was the Department of Justice which sought a definitive resolution of the difficult constitutional questions presented by the *Keith* decision at the earliest possible time. When the district court ruled against the Government's position in this case, we had no right of appeal under the law as it then stood. We therefore resorted to the unusual remedy of petitioning the court of appeals for the extraordinary writ of mandamus on the basis that the question was of substantial public importance which should be decided by the courts. It was a result of that effort, that the matter has now been decided, which is better for everyone concerned.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Maroney follows:]

STATEMENT BY KEVIN T. MARONEY, DEPUTY ASSISTANT ATTORNEY GENERAL, INTERNAL SECURITY DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. Chairman and Members of the Subcommittee, I am happy to appear here today on behalf of the Department of Justice in response to your request for our views on the subject of electronic surveillance and in particular, concerning the impact of the Supreme Court's decision last week in the case of *United States* v. *United States District Court for the Eastern District of Michigan* No. 70–153 decided June 19, 1972 and more popularly known as the *Keith* case.

The immediate impact of the *Keith* case was set forth clearly by Attorney General Richard G. Kleindienst in his statement of June 19, 1972. Let me quote:

"In accordance with the decision of the Supreme Court, I have today directed the termination of all electronic surveillance in cases involving domestic security that conflict with the Court's opinion. Hereafter, surveillance will be undertaken in domestic security cases only under procedures that comply with the Court's opinion."

Whatever problems, Mr. Chairman, some may have had with respect to the difficult issue of electronic surveillance involving wholly domestic organizations have, in great part, been laid to rest by the Supreme Court decision. In such cases, under the law as it stands, the Government must seek prior judicial approval before intercepting wire or oral communications.

The Court's opinion in the *Keith* case would, however, suggest the possibility that Congress might desire to legislate standards and procedures for court approved electronic surveillance in domestic security cases under standards

somewhat different from the standards now applicable in ordinary criminal cases. However, as was stated last week by the President, the Executive Branch has no present intention of seeking such amendatory legislation with respect to the area governed by the *Keith* decision. In the event that future experience demonstrates a legal void, it will then be an appropriate time to consider the necessity or desirability of requesting appropriate legislation.

It is important to recall, however, that Justice Powell, speaking for the majority, made clear that "the instant case requires no judgment on the scope of the President's surveillance power with respect to the activities of foreign powers, within or without this country." Slip opinion, page 10. Subsequently at page 23, the Court pointed out:

"As stated at the outset, this case involves only the domestic aspects of national security. We have not addressed, and express no opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents."

The *Keith* decision made it clear that the court was limiting the scope of the decision to "domestic organization[s] . . . composed of citizens of the United States and which ha[ve] no significant connection with a foreign power, its agents or agencies." The Court recognized that it may "be difficult to distinguish between domestic and foreign" unlawful activities directed against the Government of the United States where there is collaboration in varying degrees beween domestic groups and organizations and agents or agencies of a foreign power." The Committee has asked that we address ourselves to the question of what level of foreign dominance and control of a domestic group would be considered sufficient to bring the group into the area of foreign activities which the Court has not yet ruled upon.

The *Keith* decision has suggested a standard of "significant connection with a foreign power, its agents or agencies." We do not interpret this as meaning casual, unrelated contacts and communications with foreign governments or agencies thereof. We would not try to apply this standard without the presence of such factors as substantial financing, control by or active collaboration with a foreign government and agencies thereof in unlawful activities directed against the Government of the United States. Obviously, such factors will be present in a very minimum number of situations.

I wish to assure the Committee on behalf of the Attorney General, that the Department of Justice accepts both the letter and the spirit of the Court's ruling in the *Keith* case. It is the intention of the Executive Branch to utilize electronic surveillance in present and future national security matters in full and ungrudging application of the rationale of the decision.

In connection with the latter point, I think it appropriate to note that it was the Department of Justice which sought a definitive resolution of the difficult constitutional questions presented by the *Keith* decision at the earliest possible time. When the District Court ruled against the Government's position in this case, we had no right of appeal under the law as it then stood. We therefore resorted to the unusual remedy of petitioning the Court of Appeals for the extraordinary writ of mandamus on the basis that the question was of substantial public importance which should be decided by the courts. It was as a result of that effort, that the matter has now been decided, which is better for every one concerned.

Senator KENNEDY. You talk about this unusual remedy of petitioning the court of appeals. What other choice did you really have?

Mr. MARONEY. Well, the choice that we had was disclosure of the information to the defendant.

Senator KENNEDY. Or dismissal?

Mr. MARONEY. Or suffering the dismissal of the case.

Senator KENNEDY. So it was really to carry through your own interest in maintaining a successful prosecution, rather than, should we say, the goodness of your heart?

Mr. MARONEY. I did not say out of the goodness of our heart. I indicated that we were as aware as anyone else that this was a constitutional problem hanging over all of us. We were aware of the difficulties of the legal problems involved and we were as anxious as anyone else to have the matter settled.

Senator KENNEDY. After hearing your statement here this morning, and after seeing Mr. Kleindienst's statement on June 19 and the President's comments at his news conference on June 22, I found it somewhat troubling that nothing

has been said by the Justice Department or the President about what you are going to do to cleanse all the Government files of the information that came from conversations which were tapped or bugged unconstitutionally. Could you tell us what your plans are about that?

EXHIBIT 7

CHEMICAL BANK—MASTER CHARGE DEPARTMENT, LAKE SUCCESS, NEW YORK

We are Debiting your account for as per details below:
Date: October 4, 1971, total amount: $55.00.
Person: To be applied to Master Charge Account No. 170 097 061 015.
Account number: Spec. Checking No. 097 518 654, Thomas King Forcade, 11 East 17 St., New York, N.Y. 10003.

APPENDIX D

June 18, 1970.

Re: SAC, (157–3852) (P).
To: SA Thomas F. Lewis.
From: National Black Economic Development Conference.

On 5/20/70, Mr. Daniel McGronigle, Cashier, Southeast National Bank (formerly Delaware County National Bank), 4th and Market Streets, Chester, Pa., advised that as of 1/1/70 the Delaware County National Bank merged with several Chester County banks to form the Southeast National Bank.

Subsequent to this merger, this bank instituted a new computer system for checking accounts. Under this system all checks drawn on active checking accounts are recorded on microfilm and available for review at the Computer Center of this bank at 24th and Edgmont Avenue, Chester, Pa.

Mr. McGronigle stated there is a current, regular checking account at that bank in the name National Black Economic Development Conference, Pennsylvania Office, 217 Concord Avenue, Chester, Pa. There are two persons authorized to sign checks on this account and they are Muhammad Kenyatta and Mary Kenyatta. As of 5/20/70, the balance in this account was $44.32.

On 5/20/70, Mr. Allan Ferguson, Executive Officer, Computer Center, Southeast National Bank, 24th and Edgmont Avenue, Chester, made available for review copies of the statement for checking account # 550–723–1, which is in the name National Black Economic Development Conference, Pennsylvania Office. Those statements dated 3/16, 4/15, and 5/15/70 reflect activity on this account during the 30-day period prior to the date of this statement. A review of the statements reveals the balance in this account has ranged from a high of $1,948.56 on 4/9/70 to a low of $38.19 on 5/14/70.

Mr. Ferguson stated it is not possible under their computer system to identify the nature and source of deposits and credits to this account. He would however, make available for review the microfilms containing checks drawn on this account during the periods covered by the above statements.

A review of these checks reflects almost all are signed by Muhammad Kenyatta and made payable to cash. All of these checks have a space on the face of the check after the word "for" in which is written the purpose of the check. On the vast majority of these checks the notation in this space contains such language as "operating expenses," "clothing allowance," "maintenance expenses."

An average of 15 to 20 checks were drawn on this account for each of the three months reviewed. Among these checks the following are noted:

Check dated 3/9/70 in the amount of $300, payable to Thomas Jefferson Hospital for hospitalization of ———;

Check dated 1/5/70 in the amount of $100, payable to ——— care of Young Afro American Willow Games for supplies;

Check dated 3/5/70 in the amount of $100, payable to ——— for grant to Nat Turner Community Center;

Check dated 5/8/70 in the amount of $144.95, payable to Bell Telephone Company for phone #s TR 2–7083 and TR 6–8867;

Check dated 5/13/70 in the amount of $50.00 made payable to ——— for emergency grant;

Check dated 5/14/70 in the amount of $10,000 made payable to cash for clothing allowance.

STATEMENT OF CHECKING ACCOUNT—MAR. 16, 1970

Checks	Debit charges	Deposits and credits	Date	Balance
			02/17/70	1,684.65
100.00	100.00			
500.00			02/18/70	984.65
467.00			02/19/70	517.65
		250.00		
5.00	50.00	1,200.00	02/20/70	1,912.65
30.00	250.00		02/24/70	1,632.65
3.00			02/25/70	1,629.65
25.00			02/26/70	1,604.65
5.25	15.00			
250.00			02/27/70	1,334.40
		140.00	03/02/70	1,474.40
		15.00		
180.00		175.00	03/03/70	1,484.40
20.00			03/04/70	1,464.40
11.13			03/05/70	1,453.27
66.78	100.00			
100.00			03/06/70	1,186.49
75.00		110.00	03/09/70	1,221.49
15.00	28.92			
34.20			03/10/70	1,143.37
10.00	48.00		03/11/70	1,085,37
25.00		175.00	03/12/70	1,235.37
50.00	100.00			
300.00			03/13/70	785.37

STATEMENT OF CHECKING ACCOUNT—MAY 15, 1970

Checks	Debit charges	Deposits and credits	Date	Balance
			04/15/70	1,539.53
		117.00		
		160.00		
		300.00	04/16/70	1,516.53
49.20			04/17/70	1,467.33
25.00	50.00	50.00		
69.00	100.00			
100.00	125.00		04/20/70	1,048.33
40.00			04/21/70	1,002.33
22.00	48.30	36.00		
57.50			04/23/70	916.53
30.41	75.00	314.66	04/24/70	1,128.78
50.00			04/27/70	1,075.78
50.00			04/28/70	1,025.78
39.50		50.00	04/29/70	1,036.28
10.00			05/04/70	1,026.28
60.64			05/06/70	965.64
7.50	50.00		08/08/70	902.14
		175.00		
100.00		300.00	05/11/70	1,283.14
30.00	144.95			
1,000.00			08/13/70	108.19
20.00	50.00		05/14/70	38.19

LEADS—PHILADELPHIA:

At Philadelphia, Pa.

Will ascertain through Bell Telephone Company identity of subscribers to phone No. TR 2–7083 and TR 6–8867.

At Chester, Pa.

Will continue to monitor bank account of National Black Economic Development Conference at Southeast National Bank.

EXHIBIT 8

U.S. SECRET SERVICE, TREASURY DEPARTMENT

Origin: Field.
Office: Milwaukee, Wisconsin.

File No. CO–2–35,800; Doc. No. 17, 406.
Type of case: Intelligence—601.
Status: Investigation, continued.
Title or caption: Name of subject: Gary Kenneth Goodson, AKA Thomas King Forcade.
Investigation made at: Madison, Wisconsin.
Period covered: February 10, 1972.
Present whereabouts: Unknown.
Investigation made by: SA James D. Plichta.
Quarterly investigations: No.
Details: Synopsis—Toll calls from 1–5–72 to 1–21–72 from the phone at YIP and the underground newspaper headquarters in Madison, Wis., have been obtained and the respective offices are requested to identify the name and address of the holders of the numbers called in their district.
(A) Introduction: Case originated in the field in Madison, Wisconsin, on 2–8–72 when the Madison PD Intelligence Section requested I interview one of their informants in that city.
(B) Identification and background of subject: Name, Gary Kenneth Goodson, alias, Thomas King Forcade, current address, unknown, home address, unknown.
(D) Other investigations: This interview was conducted by Officer George Croal and me on 2–8–72, at which time it was learned phone number 251–6401 was installed on 1–4–72 at YIP and Take Over headquarters at 7 Frances Court, Madison, Wisconsin. This is also the communal residence of, among others, Mark Knops, Michael Felner (Fellner) and Tim Slater.
Report made by: Special Agent James D. Plichta, February 11, 1972.
Approved: Special Agent in Charge Robert R. Bimke, February 14, 1972.
This phone was installed in the name of Michael Fellner. The local police informants advised that the group residing at this address is in daily contact with Thomas Forcade and, as previously reported in TWX 17 from this office on 2–8–72, regularly reach him at a New York City number 212–242–3888.
Local intelligence sources advise that during the YIP conference in Madison on January 7–9, 1972, Thomas Forcade was frequently seen in Madison driving a 4-door black Cadillac Fleetwood, bearing Pennsylvania registration 8D8414, which they advise is registered to Thomas Forcade, C/O Goldstein, 327 S. 17th Street, Philadelphia, Pa.
On 2–11–72 all toll calls from this number between 1–5–72 and 1–21–72 were received and they are as follows:

Date and City called	*Phone number called*
Jan. 7, 1972, New York	212–989–6389
Jan. 12, 1972, New York	212–242–3888
Jan. 8, 1972, St. Louis	314–862–1384
Jan. 7, 1972, Chicago	312–929–0133
Jan. 8, 1972, Chciago	312–262–8746
Jan. 10, 1972, Chicago	312–263–0800
Jan. 10, 1972, Harvard, Ill.	815–943–5118
Jan. 8, 1972, San Francisco	415–922–6042
Jan. 13, 1972, Hartford, Conn.	203–243–2629

(F) Disposition: Investigation continued. The respective offices are requested to obtain names and addresses of the holders of the phone numbers called in their district. The holders of the numbers called in the Milwaukee district will also be ascertained.

EXHIBIT 9

U.S. DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION,
Miami, Fla., September 9, 1972.

In Reply, Please Refer to File No. MM 100–16625.

Re: Thomas King Forcade, Security Matters, Revolutionary Activities.

YOUTH INTERNATIONAL PARTY

The Youth International Party (YIP), also known as Yippies, is a loosely knit anti-establishment revolutionary youth organization formed in New York City

in January, 1968. Following a factional dispute in May, 1972, the YIP divided into two factions; the Yippies, headed by a YIP collective; and the Zippies, headed by THOMAS KING FORCADE, a member of the underground press syndicate.

As of June 28, 1972, Thomas Forcade was living at 3113 Mary Street, Coconut Grove, Miami, Florida, the residence and headquarters of the Zippie faction of the YIP. As of this date, Patrick Small was considered a leader in the Zippie movement, lived at the same address and was considered the primary leader in the absence of Thomas Forcade.

(MM T–1 on 6/28/72)

As of June 29, 1972, Thomas Forcade was in effect "kicked out" of the Zippies because of his wanting to support Che Guevara. The reason behind this was because the Zippies were afraid that there could be a possible confrontation with the Cubans in Miami over the fact Forcade wanted to support Che. Due to the confusion over this matter, Patrick Small was actually leading the Zippies and they continue to live at 3113 Mary Street, Coconut Grove, Miami, Florida.

(MM T–1 on 6/29/72)

Thomas Forcade of the ZIP faction of the YIP is publishing an underground-type newspaper referred to as the "Beach Blanket Struggle," formerly known as the "Beach Blanket News." It appears this paper is being prepared for distribution throughout the United States. It reportedly is being printed by the Golden Rule Press of South Florida, 190 S.W. 5th Court, Pompano Beach, Florida.

(MM T–1 on 6/22/72)

Re: YIP.

The current city directory for Pompano Beach, Florida, reflects an individual by the name of Ken Middleton, connected with the Goldren Rule Press, 190 S.W. 5th Court, Pompano Beach, Florida. Kenneth L. Middleton lives at 7521 Alhambra Boulevard, Miramar, Florida, telephone 989–1565, as indicated in the Pompano Beach City Directory.

The Credit Bureau of South Florida was unable to locate any record identifiable with the Golden Rule Press; however, there was a file in the names of Ken and Shirley Middleton, 7521 Alhambra Boulevard, Miramar, Florida. The Middleton's have been in the files of the Credit Bureau since August, 1967, and Ken Middleton was recorded as being 43 years of age and having three dependents. His employment was listed as that of a foreman at the Universal Printing Company, Hialeah, Florida, verified in December, 1968. The credit records also indicated that the owner of the Universal Printing Company is Roger Bechtel.

EXHIBIT 10

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 1091–73

LORI PATON, ET AL., PLAINTIFFS

v.

J. WALLACE LA PRADE, ET AL., DEFENDANTS

OPINION

Appearances: Mr. Frank Askin, Attorney for plaintiffs. Mr. Henry E. Petersen, Assistant Attorney General, Mr. Jonathan L. Goldstein, United States Attorney, and by: Mr. David H. White, Attorneys for defendants.

Coolahan, District Judge.

On January 11, 1973 the Director of the Federal Bureau of Investigation (FBI) requested the United States Postal Inspection Service to institute a 120-day mail cover on the national headquarters of the Socialist Workers Party (SWP) in New York City.[1] The mail cover was executed by a foreman in the

[1] At the time of the mail cover the SWP was on the Attorney General's list of subversive organizations. The list has since gone out of existence.

New York City Post Office, who copied the information found on the envelopes of letters sent to the SWP. All information was forwarded to the New York City division of the FBI. In the course of this mail cover, the name and address of plaintiff Lori Paton were found. Plaintiff Paton's name and address were sent to defendant Special Agent-in-Charge La Prade of the Newark, New Jersey, FBI office. After it was ascertained that the Newark FBI files contained no information about her, Special Agent John Devlin of the Paterson, New Jersey, Resident Agent Office was assigned to investigate plaintiff Paton.

Devlin confirmed, through use of a local area directory, that plaintiff Arthur H. Paton (Lori Paton's father) lived at the address found on the letter surveyed in the mail cover. Through inquiries at a local credit bureau, Devlin learned the past and present addresses of Lori Paton's parents and the past and present places of employment of her father. Devlin interviewed Chester Township Chief of Police Edward Strait, who informed Devlin that no member of the Paton family had a criminal record. West Morris-Mendham Park High School Principal Richard Matthews and Vice Principal Gerald Werle were interviewed by Devlin. The agent learned that Lori Paton was a student at the High School and was enrolled in a course entitled "Left to Right" which involved the writing of letters to political organizations of various persuasions.

Devlin concluded his investigation with his visit to the High School and reported on his findings to La Prade on April 2, 1973. A memorandum dated May 7, 1973, written by Special Agent John H. Bryan at Newark to La Prade, stated:

> In view of the fact that the subject is a high school student who apparently contacted the national office of the SWP in New York for information for one of her courses and, due to the fact that she is not believed to be involved in subversive matters, it is recommended that this case be closed administratively.

The FBI has produced, and plaintiffs have filed with this Court as part of the public record in this action, the foregoing memorandum of Special Agent Bryan and the remaining FBI files in the Paton investigation. (See Government brief at 4.) The FBI has revealed further that "Plaintiff Paton's file carries the filing symbol 'SM–SWP', standing for 'Subversive Matter-Socialist Workers Party', which identifies the larger investigation of which the inquiry respecting her was a part."

Lori Paton, suing by her father, and William Gabrielson, her teacher in the course "Left to Right," are plaintiffs of record here. Plaintiffs have brought suit on the grounds that defendants have violated plaintiffs' rights under 18 U.S.C. § 1702[2] and the following provisions of the United States Constitution: First Amendment (chilling and impeding the exercise of free political expression and inquiry); Fourth Amendment (illegally investigating plaintiffs); Fifth Amendment (depriving plaintiffs of due process of law); and Sixth Amendment (prosecuting plaintiffs without affording plaintiffs the right to trial by jury or other procedural safeguards).

Plaintiff Lori Paton has demanded $15,000 compensation from individual FBI agents and $50,000 in punitive damages. Plaintiffs together seek a declaratory judgment holding the SWE mail cover and investigations stemming from it to be illegal. They request injunctive relief barring future such mail covers and investigations. Lastly, plaintiffs seek "a mandatory injunction ordering the defendants to produce before the Court for destruction all records and notations made and maintained by them describing the correspondence and constitutionally protected educational, political and other activities of plaintiffs."

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[2] 18 U.S.C. § 1702 provides:

> Whoever takes any letter, postal card, or package out of any post office or any authorized depository for mail matter, or from any letter or mail carrier, or which has been in any post office or authorized depository, or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with design to obstruct the correspondence, or to pry into the business or secrets of another, or opens, secretes, embezzles, or destroys the same, shall be fined not more than $2,000 or imprisoned not more than five years, or both.

It is not disputed that this is a criminal statute. Plaintiff can have no civil right of action arising from the provision.

Before the Court are several motions of each party: motion by plaintiffs to add specific FBI agents as parties defendant and to amend the complaint by including various details learned through discovery; motion by plaintiffs to compel the Government to give further answers and explanations in discovery; motions by plaintiffs for a preliminary injunction requiring the FBI to cease any investigation of plaintiffs and to expunge its records containing information on Lori Paton; motion by the Government on behalf of defendants for an order of dismissal or in the alternative for summary judgment denying the relief plaintiffs seek.

On January 14, 1974 this Court rendered a bench ruling and order denying, under Rule 23(c)(1) of the Federal Rules of Civil Procedure, plaintiffs' motion to certify a class joining as plaintiffs with the named plaintiffs:

> . . . all persons who have been or will become engaged in correspondence with dissident political groups or organizations in pursuance of their rights under the United States Constitution; and whose correspondence is surveilled by defendants, their agents, employees or informants without authority pursuant to a valid search warrant; and who thereby become subjects of files, dossiers, index cards, memoranda or other records maintained by the defendants, their agents, servants, employees or informants. [Notice of motion filed by plaintiffs on November 20, 1973.]

The Court denied plaintiffs' motion on the ground that the position of plaintiffs failed to satisfy the requirements of Rule 23(a)(3) of the Federal Rules of Civil Procedure which states:

> . . . the claims or defenses of . . . representative parties [must be] typical of the claims or defenses of the class.

It is admitted by the Government in the official record of this action that Lori Paton's interest in the SWP was momentary and academic and that the Paton investigation was quickly terminated. It has not been shown that other persons investigated pursuant to the SWP mail cover had such mild contact with the SWP or were cleared of suspicion as completely as was Lori Paton. She cannot be an adequate representative for persons who may have had close affiliation with the SWP and persons who may have had illegal or suspicious activities uncovered as a result of the mail cover investigations.

In *Hall v. Beals*, 396 U.S. 45 (1969), the Supreme Court determined that Colorado residents who had been barred from voting due to a six-month residency requirement could not represent a class of all persons barred from voting when the residency period was changed, after the election, from six to two months. The Court stated, 396 U.S. at 48–49:

> . . . so far as [plaintiffs] are concerned nothing in the . . . legislative scheme as now written adversely affects either their present interests, or their interests at the time this litigation was commenced . . . The [plaintiffs] 'cannot represent a class of which they are not a part,' Bailey v. Patterson, 369 U.S. 31, 32–33. . . .

Hall v. Beals is analogous to the situation here. Like the *Hall v. Beals* plaintiffs, the interests of the instant plaintiffs are not being "adversely" affected as the litigation moves forward, whereas at least some members of the purported class are continuing to see themselves harmed. Thus, the instant plaintiffs cannot be deemed to be part of the class they seek to represent. See also *Carter v. Butz*, 479 F. 2d 1064 (3d Cir.), *cert. den.*, 414 U.S. 1094 (1973) (in suit seeking relief for deprivation of food stamps, the Court affirmed the ruling of the District Judge denying the class where there were "disparate factual circumstances of class members," 479 F. 2d at 1089); *Rothblum v. Board of Trustees of College of M. & D. of N.J.*, 474 F. 2d 891 (3d Cir. 1973) (foreign students suing for entrance to State medical school on basis that they were discriminated against because of national origin could not sue on behalf of class where the particular plaintiffs were actually rejected because of their grades); *Committee to Free the Fort Dix 38 v. Collins*, 429 F. 2d 807 (3d Cir. 1970 (statement that suit was brought on behalf of all persons seeking to keep open the right to demonstrate at a military base was insufficient to state a class action).

The Court finds, for much the same reason it found plaintiffs not to qualify as representatives of the class plaintiffs wished the Court to certify, that plaintiffs have not been harmed in such a way as to support their demand for much of the relief they seek.[3] The only personal harm that Lori Paton has argued at all convincingly that she has suffered is possible harm to her reputation as a result of the fact that she was investigated.[4] Yet, unlike many persons who see their reputations clouded by investigation or prosecution, Lori Paton had seen her name totally cleared of any wrongdoing. No one doubts that there has not been even the smallest degree of impropriety, legal or otherwise, in her communication with the SWP. The FBI has placed into the public record its file showing that there was not one shred of negative information obtained through the Paton investigation. The opinion of this Court, reiterating the innocence of Lori Paton, now becomes part of the public record. Plaintiff Paton may argue that despite these pronouncements, the fact of having once been investigated leaves an indelible blemish on her reputation. This Court cannot, however, accept as legally significant, the argument that members of the public have insufficient intelligence to place the fact that there has been an investigation into the proper perspective when faced with the clear public record outlined in this opinion. such a view would defy common sense.

As she has failed to show injury to her reputation. plaintiff has failed to show other injury. Her privacy has not been invaded. None of her own time was taken up in the investigation. She was not harassed in any way. Her rights of political inquiry has not been abridged; information requested from the SWP was received. The Supreme Court noted the

> "established principle that to entitle a private individual to involve the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action. . . ." *Ex parte Levitt*, 302 U.S. 633, 634 (1937).

Laird v. Tatum, 408 U.S. 1, 13 (1972). Because plaintiffs have failed to show a "direct injury," there is no judicial power to invoke the relief they seek. See also *Linda R. S. v. Richard D.*, 410 U.S. 614, 618 (1973).

Plaintiff Paton has argued, however, and this Court holds, that irrespective of the question of the legality of the FBI investigation,[5] there is no legal justification for the continued possession by the FBI of the Paton file, marked "SM–SWP." Courts have recognized that the "Federal Court's broad and flexible equitable powers" allow limits to be placed on the maintenance and dissemination of police records.[6] *Sullivan v. Murphy*, 478 F.2d 938, 971 (D.C. Cir), *cert. den.*, 94 S. Ct. 1726 (1973). Also see *United States* v. *Kalish*, 271 F.Supp. 968, 970 (D.P.R. 1967) Insofar as plaintiff Paton's files contain no information which could be useful to the FBI in the exercise of its law enforcement functions and the existence of those records may at a later time become a detriment to her, this Court holds that the Paton FBI file should be removed from the custody of the Government and destroyed.

Because the Court is granting defendants' motion for summary judgment in part and plaintiffs' motion for injunctive relief in part, it is unnecessary to address the instant procedural and discovery motions or the substantive question of the legality of the SWP mail cover.

Counsel will submit an order in conformity with this opinion.

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[3] Plaintiff Gabrielson has complained that attendance in his course declined after word of the Paton investigation was circulated. This fact, if true, does not constitute sufficient direct personal harm to Gabrielson to provide a legal basis for the relief he seeks.

[4] No party contests the fact that word of the FBI investigation spread within the High School and later throughout the local and general communities. The Government has stressed that plaintiff Paton, through interviews with the press and other media, has done more than anyone else to cause her investigation to become public knowledge. The Court feels it is unnecessary to discuss the legal implications of the Government's assertion.

[5] No assertion has been made that plaintiff Gabrielson has been the subject of an investigation related to the SWP mail cover.

[6] The cited *Sullivan* and *Kalish* cases involved arrest records which this Court views as being generally of greater importance to the police than records compiled in investigations that do not produce arrests or arrest warrants.

[U.S. Secret Service Memorandum]

JULY 13, 1972.

To: DAD Rundle, convention coordinator.
From: ASAIC Jones, Intelligence Division.
Subject: Bill Rowe.

At approximately 5:30 p.m. this date the statement as written by SA Joe Uebelher, FDLE, was brought to my attention.

The name Bill Rowe with a Detroit address was familiar to me and I requested a name check from Intelligence Division. The information as contained in TWS No. 973 dated 7–13–72 was brought to my attention. Due to the similarities between Thomas Forcade who had placed the package in the Post Office box, his connection with the underground press syndicate, and the package Forcade mailed addressed to a Bill Rowe in Michigan, it was determined possibly the package mailed by Forcade could contain an explosive device.

TSD was immediately notified and the small Post Office in the lobby of the Convention Hall entrance was opened and a package addressed to Bill Rowe was not observed. The two drop boxes located by the small Post Office were removed to a grassy area in front of Convention Hall.

SA Baber attempted to contact Postal Inspectors to determine the possible location of the package and to obtain keys to open the boxes. After this was not immediately successful, the two boxes were forcibly entered by EOD personnel and the questioned package was not observed.

SA Symanski, Detroit, was requested to determine the owner of Box 28703. It should be noted that Forcade mailed his envelope to William T. Rowe, Box 28703, Detroit. SA Symanski later advised that Box 28703 was registered to a William T. Rowe, title of Community Tax Service, Ann Harbor, Michigan. Other addresses on the Post Office rental slip are Argus Accounting and Writing (underground newspaper), 8730 West Chicago, Detroit, Michigan; 4403 Second Avenue, Detroit, Michigan; 13662 Mark Twain, Detroit, Michigan, telephone number 831–6801, and 19133 Ferguson, Detroit, Michigan (This is possibly the subject's wife's address since there is a notation on a card that mail for William T. Rowe should not be sent to that address). William T. Rowe had Michigan driver's license R–00–887–742–055. The box was rented on 2–10–71.

At approximately 7:00 p.m. SA Miskinis, TSD, advised that the envelope had been located and it did not contain an explosive device. It contained numerous writings, checks and other envelopes from Forcade

RADFORD W. JONES,
Assistant Special Agent in Charge.

THE COLLEGE OF CHARLESTON,
Charleston, S.C., May 31, 1973.

WHERE IT'S AT,
Postfach 65,
Iberlin 12,
F. R. Germany.

DEAR PEOPLE: Our library collects materials concerning current social and political affairs of interest to students and faculty. We have received several questions lately regarding WHERE IT'S AT and would like to learn more about your publication. Any literature on WHERE IT'S AT and its views which you might be able to pass along will certainly be greatly appreciated and well used.

Thank you very much.

Sincerely,

ROBIN YARROW,
Reference Services, Library.

EXHIBIT 12

[Excerpt From Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 93d Congress, 2d session, on Military Surveillance, April 9 and 10, 1974]

Exhibit 10—Operations Plans

Subject: Operation Plan Penguin Monk (U).
Ref: a. 66th MI Gp Reg 381–17

b. FM 30–17
c. FM 30–17A
d. DCSI visit to Mainz Field Office on 12 JUNE 73
1. SITUATION: Again mentions Stuckmann, Describes Mission
d. Assumptions:
(1) the Mission induces AWOL
(2) the Mission supports anti-US activities (subversive)
(3) the German Police and Sec. will honor the immunity of the mission because it is religious
2. MISSION:
a. To determine (1) d above
b. To determine (2) d above
c. To determine the extent of US Forces involved with either the mission or the personalities
3. (c) Execution:
a. A spotter system will be established to observe vehicle parking within the confines of the mission. The spotter will be stationary/walking/vehicular. He will record on tape or paper license nos. the spotter system will be on a 24 hr. basis.
b. check for owners (Plate nos) RACs on owners.
c. US personnel MASs/LACs
d. Coordination: LWR MzFO, LLO Bh./Pz.
"At no time will the Goessner mission be mentioned to the German authorities"
4. Logistics and Admin:
a. Personnel: three US S/A and one LWR from MzFO will be utilized to man fixed and mobile surveillance positions during this operation.
b. EQUIP: 3 VW bugs with quick change plates LLO R/P & MzFO
g. attempt to gain admission into private residence in proximity to mission to FOTO
h. attempt to penetrate by a 1663.
j. solicit info through 165
k. coordinate with OFD to obtain coverages telephone and mail
l. coordinate with _____ in effort to hvg specific collection requ. on the assets they have available to them.
Large dossier mostly on (name deleted)

(Signature block deleted).

OPLAN 2–73
References: Letter, 66th MIG, subject: Concept of Operations re: BR–262

OPLAN NO: OP (CS) HFO–527–1–73

3. (C) *Execution:*
a. Phase I: Karlsruhe Field Office provides economy accommodation address.
b. Phase II: (1) Initial letters will be posted thru German mail from GI from Karlsruhe area to BR–262 claiming interest in organizing dissident GIs in area but claiming no experience. GI will express fear of discovery by authorities and use this as an excuse for being discreet about his identity or meeting known dissidents. Letter will request reply from BR–262 with suggestions and aid.
c. Phase III: If BR–262 repl to the letters, attempts will be made thru addit corres to
(1) entice BR–262 to make trip(s) to meet GI taking time and costing money
(2) BR–262 can be enticed into making long distance phone calls—numbers prov in corresp will be obtained from local phone books
(3) BR–262 can be enticed into sending literature which might be exploited by USI and costing him money.
(4) BR–262 can be given misleading or false information concerning events and situations in Karlsruhe which if he disseminates, will result in his embarrassment.

HEADQUARTERS, 8TH INFANTRY DIVISION.

EXHIBIT 13

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

CIVIL ACTION NO. ——

ALLARD K. LOWENSTEIN, 20 South Oxford Street, Brooklyn, New York 11217, PLAINTIFF

v.

JOHN J. ROONEY, 217 Congress Street, Brooklyn, New York;
CLARENCE M. KELLEY, Director of the F.B.I., Pennsylvania Avenue and 9th Street, Washington, D.C.;
CHARLES W. COLSON, 4840 Loughborough Road, N.W., Washington, D.C. 20016;
JOHN W. DEAN III, 100 Quay Street, Alexandria, Virginia 22314;
JOHN D. EHRLICHMAN, 3820 Hunts Point Road, Bellevue, Washington, 98004;
H. R. HALDEMAN, 24 Harbor Island, Newport Beach, California;
LAWRENCE M. HIGBY, 5002 Brookeway Drive, Washington, D.C. 20016;
JOHN J. CAULFIELD, 5205 Concordia Road, Fairfax, Virginia 22030;
ROGER V. BARTH, 7824 Fulbright Court, Bethesda, Maryland 20034;
DONALD C. ALEXANDER, Internal Revenue Service, Pennsylvania Avenue and Fifteenth Street, NW., Washington, D.C. 20220;
JOHN DOE and RICHARD ROE, and other unknown employees of the F.B.I. or other agencies of the federal government, DEFENDANTS

Plaintiff, by his attorneys, alleges as follows:

JURISDICTION

1. This is a Civil Action for declaratory and injunctive relief and money damages arising from the First, Fourth, Fifth and Ninth Amendments to the United States Constitution. The jurisdiction of this Court is based on Title 28 United States Code, sections 1331(a), 1343, 1361, 2201 and 2202, Title 18, United States Code, Section 2520 and Title 42, United States Code, Section 1985. The matter in controversy, exclusive of interests and costs, exceeds $10,000.

2. Plaintiff seeks damages for deprivation by the defendants of his Constitutional rights, a declaratory judgment and a permanent injunction enjoining and restraining the defendants from engaging in the acts complained of in this complaint.

PARTIES

3. Plaintiff, Allard K. Lowenstein is a citizen of the United States and a resident of the State of New York. In 1968 he was elected to Congress as a member of the House of Representatives from the 5th Congressional District of New York. He was defeated for re-election from that district in 1970. In 1972 he was a candidate for the Democratic nomination for the House of Representatives in the 14th Congressional District in Brooklyn, New York.

4. Defendant, John J. Rooney is a citizen of the United States and a resident of the State of New York, residing at 217 Congress Street, Brooklyn, New York with an office at 225 Cadman Place, Brooklyn, New York. He is currently the representative in Congress from the 14th Congressional District in Brooklyn, New York. In 1973 plaintiff Lowenstein opposed him for the Democratic nomination for Representative in primary elections held in June and September, 1973 in the 14th District. He is being sued in his individual and official capacities.

5. Defendant, Clarence M. Kelley is the Director of the Federal Bureau of Investigation. He is sued in his official capacity as custodian of certain records mentioned below.

6. Defendant, Charles W. Colson is former Special Counsel to the President, presently residing at 4840 Loughborough Road, N.W., Washington, D.C. He is sued in his individual and former official capacities.

7. Defendant, John W. Dean III is a former Counsel to the President, presently residing at 100 Quay Street, Alexandria, Virgania. He is sued in his individual and former official capacities.

8. Defendant, John D. Ehrlichman is former Counsel to the President and former Assistant to the President for Domestic Affairs, presently residing at 3820 Hunts Point Road, Bellevue, Washington. He is sued in his individual and former official capacities.

9. Defendant, H. R. Haldeman is former Assistant to the President of the United States, presently residing at 24 Harbor Island, Newport Beach, California. He is sued in his individual and former official capacities.

10. Defendant, Lawrence W. Higby is former Deputy Assistant to the President, presently residing at 5002 Brookeway Drive, Washington, D.C. He is sued in his individual and former official capacities.

11. Defendant, John J. Caulfield is a former employee of the Executive Office of the President of the United States, presently residing at 5205 Concordia Road, Fairfax, Virginia. He is sued in his individual and former official capacities.

12. Defendant, Roger V. Barth is the former Deputy Chief Counsel to the Internal Revenue Service, presently residing at 7824 Fulbright Court, Bethesda, Maryland. He is sued in his individual and former official capacities.

13. Defendant, Donald C. Alexander is the current Commissioner of the Internal Revenue Service. He is sued in his official capacity as the custodian of certain records described below.

14. Defendant, John Doe and Richard Roe are unknown employees of the F.B.I., and other agencies of the federal government. They are sued in their individual and official capacities.

FIRST CAUSE OF ACTION AGAINST DEFENDANTS ROONEY, KELLEY, DOE AND ROE

15. In 1972, defendant Rooney was the representative in Congress from the 14th Congressional District in Brooklyn, New York. His nomination as the Democratic candidate for that position was contested by plaintiff Lowenstein. A primary election for the Democratic nomination was held on June 20, 1972 and September 19, 1972.

16. Defendant Rooney was at all times relevant hereto Chairman of the House Subcommittee on Appropriations for State, Justice, Commerce, and the Judiciary and related agencies [hereinafter "the Subcommittee"]. His Subcommittee had oversight and supervisory jurisdiction over the budget of the F.B.I. Since 1959 the F.B.I. has regularly assigned its agents or employees to the Subcommittee to act as full-time directors of surveys and investigations run by the Subcommittee. Other F.B.I. agents have performed special tasks for both defendant Rooney and other members of the Subcommittee.

17. At all times relevant hereto, the Subcommittee regularly approved the F.B.I. budget as submitted by its Director. In some cases it recommended appropriations beyond that requested by the F.B.I.

18. Because of defendant Rooney's special position regarding the appropriation of funds for the F.B.I. budget and because of the activities described above, a close relationship existed at all times relevant hereto between defendant Rooney and high officials of the F.B.I.

19. On information and belief, defendant Rooney conspired with unknown agents and officials of the F.B.I. to utilize resources of the Bureau during the 1972 Democratic Primary Campaign described above. On information and belief, as part of this conspiracy defendants John Doe and Richard Roe and other unknown employees of the F.B.I. searched F.B.I. records for any and all information concerning plaintiff Lowenstein. On information and belief this information was unlawfully passed on to defendant Rooney or his agents by said employees.

20. On information and belief, as part of this conspiracy, unknown employees of the F.B.I. unlawfully conducted an investigation of plaintiff Lowenstein sending employees into the field to discover facts about plaintiff Lowenstein's private life and to report on his schedule, activities and political operations. Such investigation was made neither in the course of a criminal investigation nor as a background investigation for possible Executive Department employment of plaintiff Lowenstein or for any other lawful purpose. Such investigation was conducted in bad faith with knowledge that it was beyond the jurisdiction of the F.B.I. as determined by applicable statute and rules and regulations. Substantial information was collected by the F.B.I. on the basis of the investigation described above. On information and belief, this information was delivered to defendant Rooney or his agents.

21. On information and belief, such information was in fact used unlawfully in bad faith and with malicious intent by defendant Rooney in the 1972 primary to the injury and detriment of plaintiff Lowenstein.

22. On information and belief, the information collected by the F.B.I. agents is still contained in the F.B.I. files under the control of defendant Kelley and may serve as the basis for future action against plaintiff Lowenstein in his political activities.

23. As a direct result of the acts alleged herein, plaintiff Lowenstein was injured and burdened in the exercise of his First Amendment right to engage in political activities without being the subject of illegal surveillance, information gathering and dissemination by the defendants under color of law. Such acts also invaded his Fourth, Fifth and Ninth Amendment rights to be free from government intervention into his private life.

24. The collecting of information and investigation of plaintiff Lowenstein by the F.B.I., its submission to defendant Rooney and its use by defendant Rooney constituted a conspiracy in violation of Title 42 United States Code, Section 1985, and violated the rights of the voters within the 14th Congressional District to exercise their electoral rights without being the target of deceptive or illegal practices by the defendants or their agents acting under color of law.

SECOND CAUSE OF ACTION AGAINST DEFENDANTS COLSON, DEAN, EHRLICHMAN, HALDEMAN, HIGBY, CAULIFIELD, BARTH, ALEXANDER, DOE AND ROE

25. In the years 1969 to 1971 plaintiff Lowenstein was a member of the House of Representatives from the 5th Congressional District in New York. He was an active opponent of the Nixon Administration's policies in many areas, including its policies in Vietnam, its defense spending, its crime legislation and other matters. In 1970, plaintiff Lowenstein was opposed for re-election to Congress by Norman Lent in the 5th Congressional District. He was defeated in the election in November, 1970.

26. In 1971, plaintiff Lowenstein continued his political activities. He organized "Registration Summer," a bi-partisan effort to register 18 to 21 year-old persons in contemplation of the ratification of the 26th Amendment to the Constitution which occurred on July 5, 1971. Numerous rallies were held throughout the country in the Spring, Summer and Fall to encourage such registration which plaintiff Lowenstein organized and at which he spoke. Rallies took place in Providence, Rhode Island; Indianapolis, Indiana; Austin, Texas; Milwaukee, Wisconsin; Chapel Hill, N.C.; Boston, Massachusetts, and other places. This registration effort continued through 1971 under the name of "Countdown '72." The campaign was frequently referred to as a "Dump Nixon" movement.

27. In the Winter of 1971–72 and the early Spring of 1972, plaintiff Lowenstein engaged in other political activities. He continued to urge registration of 18 to 21 year-olds. He also organized efforts to support opponents of President Nixon in Republican presidential primaries in New Hampshire and other states. In the Spring of 1972 he began preparation for his own primary campaign described in paragraph 15 above.

28. On information and belief, some time in 1970 or 1971 leading officials of the federal government entered into a conspiracy to deprive plaintiff Lowenstein of the rights guaranteed him under the First, Fourth, Fifth and Ninth Amendments. Defendants Colson, Dean, Higby, Ehrlichman and Haldeman organized an effort to misuse agencies of the federal government to harass, invade the privacy of and otherwise injure persons they considered to be political enemies of the Nixon Administration, including plaintiff Lowenstein.

29. On information and belief, as part of this conspiracy defendants Colson, Dean and Higby prepared an "enemies list", or "political opponents list" of persons who would be subject to surveillance and harassment by various arms of the federal government. An effort was to be made to "use the available federal machinery to screw our political enemies," and "[give them] a hard time." Reflecting this conspiracy was a list prepared in June, 1971 on which plaintiff Lowenstein was number 7 of 20 persons on such a list, with the following comment made about him: "Guiding force behind the 18 year-old 'Dump Nixon' vote drive."

30. On information and belief, as part of the conspiracy described above, defendants Colson, Higby, Haldeman and Ehrlichman with the assistance of defendant Caulfield, urged and/or ordered the Internal Revenue Service to audit the tax returns of plaintiff Lowenstein. In fact, and as a result of these efforts, and with the aid and assistance of defendant Barth plaintiff Lowenstein's tax

return for 1969 was audited by the I.R.S., and his tax return for 1970 was audited by the New York State Income Tax Bureau at the request and urging of the I.R.S.

31. On information and belief, as part of this conspiracy, information about plaintiff Lowenstein's lawful and peaceful political activities was gathered unlawfully by unknown employees and informants of the F.B.I. and other federal government agencies. Such information was unlawfully gathered by overt and covert surveillance including illegal wiretapping, infiltration by secret agents, reports from known and unknown informants, seizure of private documents and by other means. Such efforts were made in bad faith and with malicious intent to the injury and detriment of plaintiff Lowenstein.

32. On information and belief, such information was passed on to other government officials and private parties who used it to harass and disrupt the political activities of plaintiff Lowenstein described above.

33. During the Winter of 1971–72 and the Spring of 1972, defendants Colson, Ehrlichman and Haldeman directed defendant Caulfield and other unknown employees of the federal government to gather information about plaintiff Lowenstein which related exclusively to his lawful and peaceful activities protected by the First Amendment in organizing opposition to President Nixon in the coming primaries and election. This information was gathered by overt surveillance, including illegal wiretapping, infiltration by secret agents, reports from known and unknown informants, seizure of private documents and by other means.

34. As a direct result of the acts alleged herein, plaintiff Lowenstein was injured and burdened in the exercise of his First Amendment right to engage in political activities without being the subject of illegal surveillance, information gathering and dissemination by the defendants under color of law. Such acts also invaded his Fourth, Fifth and Ninth Amendment rights to be free from government intervention into his private life.

35. The misuse of governmental agencies described above and the collecting of information and investigation of plaintiff Lowenstein constituted a conspiracy in violation of title 42, United States Code, Section 1985, and violated the rights of voters supporting plaintiff Lowenstein's efforts to defeat President Nixon in the 1972 primaries and election to exercise their electoral rights without being the target of deceptive or illegal practices by the defendants or their agents acting under color of law.

Wherefore, plaintiff demands judgment as follows:

A. A declaratory judgment that the course of conduct and activities of the defendants set forth above violate the First, Fourth, Fifth and Ninth Amendment rights of the plaintiff and are beyond any statutory authority of the F.B.I.

B. A. permanent injunction enjoining the defendants and their agents from engaging in the activities declared to be unconstitutional and illegal.

C. A mandatory injunction and writ of mandamus ordering defendants Kelley and Alexander to produce before this Court for destruction, all files, records, and reports relating to the activities described herein.

D. That plaintiff have judgment against the defendants (except defendants Kelley and Alexander), in the amount deemed appropriate by the Court for violation of his rights under the First, Fourth, Fifth and Ninth Amendments of the United States Constitution and under Title 42, United States Code, Section 1985.

E. That plaintiff have judgment against each defendant (except for defendants Kelley and Alexander), for such punitive damages as the Court deems just under the circumstances.

F. That plaintiff has judgment for the reasonable costs and attorneys fees of plaintiff.

G. Such other relief as the Court shall deem just and proper.

Respectfully submitted.

LEON FRIEDMAN,
MELVIN L. WULF,
JOHN H. S. SHATTUCK,
DAVID ELLENHORN,
GARY BELLOW,
Attorneys for Plaintiff.

EXHIBIT 13

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK
CIVIL ACTION NO.

ALLARD K. LOWENSTEIN, 20 SOUTH OXFORD STREET, BROOKLYN, NEW YORK 11217, PLAINTIFF.

v.

JOHN C. ROONEY, 217 CONGRESS STREET, BROOKLYN, NEW YORK.

CLARENCE M. KELLEY, DIRECTOR OF THE F.B.I., PENNSYLVANIA AVENUE AND 9TH STREET, WASHINGTON, D.C.

CHARLES W. COLSON, 4840 LOUGHBOROUGH ROAD, N.W., WASHINGTON, D.C. 20016.

JOHN W. DEAN III, 100 QUAY STREET, ALEXANDRIA, VIRGINIA 22314.

JOHN D. EHRLICHMAN, 3820 HUNTS POINT ROAD, BELLEVUE, WASHINGTON, D.C. 98004.

H. R. HALDEMAN, 24 HARBOR ISLAND, NEWPORT BEACH, CALIFORNIA.

LAWRENCE M. HIGBY, 5002 BROOKEWAY DRIVE, WASHINGTON, D.C. 20016.

JOHN J. CAULFIELD, 5205 CONCORDIA ROAD, FAIRFAX, VIRGINIA 22030.

ROGER V. BARTH, 7824 FULLBRIGHT COURT, BETHESDA, MARYLAND 20034.

DONALD C. ALEXANDER, INTERNAL REVENUE SERVICE, PENNSYLVANIA AVENUE AND FIFTEENTH STREET, NW., WASHINGTON, D.C. 20220.

JOHN DOE AND RICHARD ROE AND OTHER UNKNOWN EMPLOYEES OF THE F.B.I. OR OTHER AGENCIES OF THE FEDERAL GOVERNMENT, DEFENDANTS.

Plaintiff, by his attorneys, alleges as follows:

JURISDICTION

1. This is a Civil Action for declaratory and injunctive relief and money damages arising under the First, Fourth, Fifth and Ninth Amendments to the United States Constitution. The jurisdiction of this Court is based on Title 28 United States Code, sections 1331(a), 1343, 1361, 2201 and 2202, Title 18, United States Code, Section 2520 and Title 42, United States Code, Section 1985. The matter in controversy, exclusive of interests and costs, exceeds $10,000.

2. Plaintiff seeks damages for deprivation by the defendants of his Constitutional rights, a declaratory judgment and a permanent injunction enjoining and restraining the defendants from engaging in the acts complained of in this complaint.

PARTIES

3. Plaintiff, Allard K. Lowenstein is a citizen of the United States and a resident of the State of New York. In 1968 he was elected to Congress as a member of the House of Representatives from the 5th Congressional District of New York. He was defeated for re-election from that district in 1970. In 1972 he was a candidate for the Democratic nomination for the House of Representatives in the 14th Congressional District in Brooklyn, New York.

4. Defendant, John J. Rooney is a citizen of the United States and a resident of the State of New York, residing at 217 Congress Street, Brooklyn, New York with an office at 225 Cadman Place, Brooklyn, New York. He is currently the representative in Congress from the 14th Congressional District in Brooklyn, New York. In 1972 plaintiff Lowenstein opposed him for the Democratic nomination for Representative in primary elections held in June and September, 1972 in the 14th District. He is being sued in his individual and official capacities.

5. Defendant, Clarence M. Kelley is the Director of the Federal Bureau of Investigation. He is sued in his official capacity as custodian of certain records mentioned below.

6. Defendant, Charles W. Colson is former Special Counsel to the President, presently residing at 4840 Loughborough Road, N.W., Washington, D.C. He is sued in his individual and former official capacities.

7. Defendant, John W. Dean III is a former Counsel to the President, presently residing at 100 Quay Street, Alexandria, Virginia. He is sued in his individual and former official capacities.

8. Defendant, John D. Ehrlichman is former Counsel to the President and former Assistant to the President for Domestic Affairs, presently residing at 3820 Hunts Point Road, Bellevue, Washington. He is sued in his individual and former official capacities.

9. Defendant, H. R. Haldeman is former Assistant to the President of the United States, presently residing at 24 Harbor Island, Newport Beach, California. He is sued in his individual and former official capacities.

10. Defendant, Lawrence W. Higby is former Deputy Assistant to the President, presently residing at 5002 Brookeway Drive, Washington, D.C. He is sued in his individual and former official capacities.

11. Defendant, John J. Caulfield is a former employee of the Executive Office of the President of the United States, presently residing at 5205 Concordia Road, Fairfax, Virginia. He is sued in his individual and former official capacities.

12. Defendant, Roger V. Barth is the former Deputy Chief Counsel to the Internal Revenue Service, presently residing at 7824 Fulbright Court, Bethesda, Maryland. He is sued in his individual and former official capacities.

13. Defendant, Donald C. Alexander is the current Commissioner of the Internal Revenue Service. He is sued in his official capacity as the custodian of certain records described below.

14. Defendants, John Doe and Richard Roe are unknown employees of the F.B.I., and other agencies of the federal government. They are sued in their individual and official capacities.

FIRST CAUSE ACTION AGAINST DEFENDANTS ROONEY, KELLEY, DOE AND ROE

15. In 1972, defendant Rooney was the representative in Congress from the 14th Congressional District in Brooklyn, New York. His nomination as the Democratic candidate for that position was contested by plaintiff Lowenstein. A primary election for the Democratic nomination was held on June 20, 1972 and September 19, 1972.

16. Defendant Rooney was at all times relevant hereto Chairman of the House Subcommittee on Appropriations for State, Justice, Commerce, and the Judiciary and related [hereinafter "the Subcommittee"]. His Subcommittee had oversight and supervisory jurisdiction over the budget of the F.B.I. Since 1959 the F.B.I. has regularly assigned its agents or employees to the Subcommittee to act as full-time directors of surveys and investigations run by the Subcommittee. Other F.B.I. agents have performed special tasks for both defendant Rooney and other members of the Subcommittee.

17. At all times relevant hereto, the Subcommittee regularly approved the F.B.I. budget as submitted by its Director. In some cases it recommended appropriations beyond that requested by the F.B.I.

18. Because of defendant Rooney's special position regarding the appropriation of funds for the F.B.I. budget and because of the activities described above, a close relationship existed at all times relevant hereto between defendant Rooney and high officials of the F.B.I.

19. On information and belief, defendant Rooney conspired with unknown agents and officials of the F.B.I. to utilize resources of the Bureau during the 1972 Democratic Primary Campaign described above. On information and belief, as part of this conspiracy defendants John Doe and Richard Roe and other unknown employees of the F.B.I. searched F.B.I. records for any and all information concerning plaintiff Lowenstein. On information and belief, this information was unlawfully passed on to defendant Rooney or his agents by said employees.

20. On information and belief, as part of this conspiracy, unknown employees of the F.B.I. unlawfully conducted an investigation of plaintiff Lowenstein sending employees into the field to discover facts about plaintiff Lowenstein's private

life and to report on his schedule, activities and political operations. Such investigation was made neither in the course of a criminal investigation nor as a background investigation for possible Executive Department employment of plaintiff Lowenstein or for any other lawful purpose. Such investigation was conducted in bad faith with knowledge that it was beyond the jurisdiction of the F.B.I. as determined by applicable status and rules and regulations. Substantial information was collected by the F.B.I. on the basis of the investigation described above. On information and belief, this information was delivered to defendant Rooney or his agents.

21. On information and belief, such information was in fact used unlawfully in bad faith and with malicious intent by defendant Rooney in the 1972 primary to the injury and detriment of plaintiff Lowenstein.

22. On information and belief, the information collected by the F.B.I. agents is still contained in the F.B.I. files under the control of defendant Kelley and may serve as the basis for future action against plaintiff Lowenstein in his political activities.

23. As a direct result of the acts alleged herein, plaintiff Lowenstein was injured and burdened in the exercise of his First Amendment right to engage in political activities without being the subject of illegal surveillance, information gathering and dissemination by the defendants under color of law. Such acts also invaded his Fourth, Fifth and Ninth Amendment rights to be free from government intervention into his private life.

24. The collecting of information and investigation of plaintiff Lowenstein by the F.B.I., its submission to defendant Rooney and its use by defendant Rooney constituted a conspiracy in violation of Title 42 United States Code, Section 1985, and violated the rights of the voters within the 14th Congressional District to exercise their electoral rights without being the target of deceptive or illegal practices by the defendants or their agents acting under color of law.

SECOND CAUSE OF ACTION AGAINST DEFENDANTS COLSON, DEAN, EHRLICHMAN, HALDEMAN, HIGBY, CAULFIELD, BARTH, ALEXANDER, DOE, AND ROE

25. In the years 1969 to 1971 plaintiff Lowenstein was a member of the House of Representatives from the 5th Congressional District in New York. He was an active opponent of the Nixon Administration's policies in many areas, including its policies in Vietnam its defense spending, its crime legislation and other matters. In 1970, plantiff Lowenstein was opposed for re-election to Congress by Norman Lent in the 5th Congressional District. He was defeated in the election in November, 1970.

26. In 1971, plaintiff Lowenstein continued his political activities. He organized "Registration Summer," a bi-partisan effort to register 18 to 21 year-old persons in contemplation of the ratification of the 26th Amendment to the Constitution which occurred on July 5, 1971. Numerous rallies were held throughout the country in the Spring, Summer and Fall to encourage such registration which plaintiff Lowenstein organized and at which he spoke. Rallies took place in Providence, Rhode Island; Indianapolis, Indiana; Austin, Texas; Milwaukee, Wisconsin; Chapel Hill, N.C.; Boston, Massachusetts, and other places. This registration effort continued through 1971 under the name of "Countdown '72." The campaign was frequently referred to as a "Dump Nixon" movement.

27. In the Winter of 1971–72 and the early Spring of 1972, plaintiff Lowenstein engaged in other political activities. He continued to urge registration of 18 to 21 year-olds. He also organized efforts to support opponents of President Nixon in Republican presidential primaries in New Hampshire and other states. In the Spring of 1972 he began preparation for his own primary campaign described in paragraph 15 above.

28. On information and belief, some time in 1970 or 1971 leading officials of the federal government entered into a conspiracy to deprive plaintiff Lowenstein of the rights guaranteed him under the First, Fourth, Fifth and Ninth Amendments. Defendants Colson, Dean, Higby, Ehrlichman and Haldeman organized an effort to misuse agencies of the federal government to harass, invade the privacy of and otherwise injure persons they considered to be political enemies of the Nixon Administration, including plaintiff Lowenstein.

29. On information and belief, as part of this conspiracy defendants Colson, Dean and Higby prepared an "enemies list," or "political opponents list" of persons who would be subject to surveillance and harassment by various arms

of the federal government. An effort was to be made to "use the available federal machinery to screw our political enemies," and "[give them] a hard time." Reflecting this conspiracy was a list prepared in June, 1971 on which plain Lowenstein was number 7 to 20 persons on such a list, with the following comment made about him: "Guiding force behind the 18-year-old 'Dump Nixon' vote drive."

30. On information and belief, as part of the conspiracy described above, defendants Colson, Higby, Haldeman and Ehrlichman with the assistance of defendant Caulfield, urged and/or ordered the Internal Revenue Service to audit the tax returns of plaintiff Lowenstein. In fact, and as a result of these efforts, and with the aid and assistance of defendant Barth plaintiff Lowenstein's tax return for 1969 was audited by the I.R.S., and his tax return for 1970 was audited by the New York State Income Tax Bureau at the request and urging of the I.R.S.

31. On information and belief, as part of this conspiracy, information about plaintiff Lowenstein's lawful and peaceful political activities was gathered unlawfully by unknown employees and informants of the F.B.I. and other federal government agencies. Such information was unlawfully gathered by overt and covert surveillance including illegal wiretapping, infiltration by secret agents, report from known and unknown informants, seizure of private documents and by other means. Such efforts were made in bad faith and with malicious intent to the injury and detriment of plaintiff Lowenstein.

32. On information and belief, such information was passed on to other government officials and private parties who used it to harass and disrupt the political activities of plaintiff Lowenstein described above.

33. During the Winter of 1971–72 and the Spring of 1972, defendants Colson, Ehrlichman and Haldeman directed defendant Caulfield and other unknown employees of the federal government to gather information about plaintiff Lowenstein which related exclusively to his lawful and peaceful activities protected by the First Amendment in organizing opposition to President Nixon in the coming primaries and election. This information was gathered by overt and covert surveillance, including illegal wiretapping, infiltration by secret agents, reports from known and unknown informants, seizure of private documents and by other means.

34. As a direct result of the acts alleged herein, plaintiff Lowenstein was injured and burdened in the exercise of his First Amendment right to engage in political activities without being the subject of illegal surveillance, information gathering and dissemination by the defendants under color of law. Such acts also invaded his Fourth, Fifth and Ninth Amendment rights to be free from government intervention into his private life.

35. The misuse of governmental agencies described above and the collecting of information and investigation of plaintiff Lowenstein constituted a conspiracy in violation of Title 42 United States Code, Section 1985, and violated the rights of voters supporting plaintiff Lowenstein's efforts to defeat President Nixon in the 1972 primaries and election to exercise their electoral rights without being the target of deceptive or illegal practices by the defendants or their agents acting under color of law.

Wherefore, plaintiff demands judgment as follows:

A. A declaratory judgment that the course of conduct and activities of the defendants set forth above violate the First, Fourth, Fifth and Ninth Amendment rights of the plaintiff and are beyond any statutory authority of the F.B.I.

B. A permanent injunction enjoining the defendants and their agents from engaging in the activities declared to be unconstitutional and illegal.

C. A mandatory injunction and writ of mandamus ordering defendants Kelley and Alexander to produce before this Court for destruction, all files, records, and reports relating to the activities described herein.

D. That plaintiff have judgment against the defendants, (except defendants Kelley and Alexander), in the amount deemed appropriate by the Court for violation of his rights under the First, Fourth, Fifth and Ninth Amendments of the United States Constitution and under Title 42 United States Code, Section 1985.

E. That plaintiff have judgment against each defeandant, (except for defendants Kelley and Alexander), for such punitive damages as the Court deems just under the circumstances.

F. That plaintiff has judgment for the reasonable costs and attorneys fees of plaintiff.

G. Such other relief as the Court shall deem just and proper.

Respectfully submitted,

LEON FRIEDMAN,
MELVIN L. WULF,
JOHN H. S. SHATTUCK,
American Civil Liberties Union Foundation.
22 E. 40th Street, New York City, 10016, (212) 725–1222.

DAVID ELLENHORN,
1345 Avenue of the Americas, New York City, 10019.
GARY BELLOW,
Harvard Law School, Cambridge, Massachusetts 02138.
Attorneys for the plaintiff.

EXHIBIT 14

WITH THE UNITED STATES ARMY,
At Heidelberg, Federal Republic of Germany ss:

AFFIDAVIT

Personally appeared before me, the undersigned, Thomas W. Bowen, who, having been properly sworn, deposed and said:

"On June 7, 1974, an affidavit which I executed was submitted to the court. It has subsequently come to my attention that certain statements in that affidavit may be susceptible to misinterpretation. Additionally, through extensive investigative efforts undertaken in connection with this lawsuit, certain facts previously unknown to me have come to my attention which I feel render inaccurate some of the statements I have made. I therefore feel the need to clarify those portions of my affidavit. It is in this vein that the following matters are discussed:

1. In paragraph A.5. of my affidavit I stated that:

"Thus, for example, an investigation initiated because it was thought that a particular person or persons are engaging in subversion often unearths sabotage and espionage as well."

In the context of the investigative efforts previously mentioned as well as a continuing review of the statements in my affidavit, it now appears that the use of the word "often" in the above paragraph may be an overstatement. I now believe it would be more accurate to describe the incidence of sabotage and espionage uncovered by subversion investigations as "sometimes".

2. In paragraph C.9. of my affidavit I stated that:

"These incidents have been attributed to a nationwide criminal terrorist gang which German police for some time have been attempting to neutralize. The search by German Police in February 1974, of one suspected gang member's apartment uncovered five hand grenades, two automatic pistols, two rifles with sawed-off barrels, three explosive charges, eight pistols, two land mines, and eight hundred kilograms of dynamite. Among the items also found were a typewritten list of senior United States personnel, including the names and addresses of eight generals, six colonels, and one consul general."

The statements in this paragraph were based on early accounts of the incident. Later followup German police reports indicate that the paraphernalia confiscated were actually "five hand grenades, two sawed-off shotguns, eight small arms, two contact mines, four submachine guns, and eight hundred grams of explosives." In addition to the list of senior United States officials mentioned in my previous affidavit, the search also uncovered documents concerning floor plans of U.S. Army buildings in West Berlin and maps showing the locations of allied billets and training areas and the location of West Berlin police weapons storage.

3. In paragraph E.2. of my affidavit I stated that:

"Since the initiation of the litigation pending before the Federal District Court, I have instructed all intelligence units under my supervision not to destroy classified material relative to this case which otherwise would have been destroyed."

Defendants' Exhibit 37.
Civil Action No. 310–74.

My oral instruction to that effect was disseminated in a 66th Military Intelligence Group message dated February 22, 1974. That message stated, in pertinent part: "Reference is made to the recently announced class suit filed by the ACLU in Washington against the Department of the Army, et al, seeking a cease and desist order of all MI overseas investigations of US citizens,

both military and non-DOD affiliated concerning activities which are considered to be within the purview of constitutional rights. You are to take immediate steps to assure that no documents or material related to any investigation or operation pertaining to US citizens, regardless of category are destroyed. Normal destruction programs, etc., as relates to this category of documents are suspended indefinitely, until further notice. It is imperative that any possible accusations against MI in USAREUR regarding destruction of such documents cannot be substantiated." This message was modified by an April 5, 1974 Military Intelligence Group message which permitted units to resume their normal destruction of materials other than countersubversion and counterespionage files. It has subsequently come to my attention that some units under my supervision interpreted these directives to permit destruction of extra copies of documents so long as no sole copies of documents within their possession were destroyed. In this regard, some units or elements of the 66th Military Intelligence Group have, in some instances, destroyed extra copies of documents, some of which were messages and documents generated by their lawsuit. I have been assured by the commanders of these units that each has insured that no sole copies of documents have been destroyed.

It has come to my attention that a literal reading of the language of the February 22, 66th MI Group message would not prohibit the destruction of any documents relating to the non-US citizen plaintiff, Tomi Schwaetzer. It is true that the language of the Febraury message does not incorporate all the intended aspects of my directive. It is apparent, however, that subordinate units understand that my order forbade the destruction of any files or documents related to the lawsuit including any related to non-US citizens, because I have ascertained personally from all subordinate unit commanders that no sole copies of any such documents have been destroyed.

4. In paragraph F.2. of my affidavit I stated :

"With regard to the initial decision to initiate any investigation at all, under procedures presently in effect, if the investigation is of a non-Department of Defense affiliated United States citizen, its initiation requires approval by DCSI, USAREUR. Thus, even if the investigation is limited to overt inquiry and to agency checks of such persons, specific DCSI approval is required."

This requirement is embodied in a USAREUR regulation which went into effect in February 1974. The pertinent part of this regulation states: "Under no circumstances will USAREUR CI agencies make any non-DOD US citizens objects of overt or covert CI activities without the approval of DCSI, USAREUR." My affidavit accurately stated the requirements of the regulation for specific DCSI, USAERUR approval in order to investigate a non-DOD affiliated US citizen. In my mind, having so stated the regulation's requirements implied that those requirements were being universally followed in units under my authority (as I believed they were). I have recently discovered that this regulation was misinterpreted and that subordinate elements were not complying with this specific requirement in that they were initiating agency checks on non-DOD affiliated US citizens under other published authorities. Upon discovering the above, I directed that all units under my authority strictly comply with these requirements.

In addition, there were two exceptions to my affidavit statement as quoted above. One type of investigation excepted from this requirement of specific DCSI, USAREUR approval was the initiation and conduct of a limited investigation on leads developed relating to possible espionage. The other type of excepted investigation was a background check on an applicant for employment or an employee with any U.S. government agency. Army Regulation 380–13, promulgated on September 30, 1974, now prohibits acquiring, reporting, processing or storage of information on persons or organizations not affiliated with the Department of Defense without Secretary or Under Secretary of the Army approval. The previous exception for initial or limited investigations related to possible espionage was abrogated by Army Regulation 380–13. That portion of the previous exception for background checks on employees of other U.S. government agencies was also abrogated by AR 380–13. Background checks on applicants for employment with other U.S. government agencies has been excepted from the provisions of AR 380–13, based on a Department of the Army message dated October 28, 1974, which clarified (pending revision) Army Regulation 380–13. DCSI, USAREUR approval for such background checks is required.

5. Also in paragraph F.2. I stated that :

" . . . photographic surveillance of a public demonstration sponsored by individuals or organizations suspected of being engaged in illegal activity could not be undertaken without specific DCSI approval. This requirements (sic) has been in effect at least since 1969."

This statement by me overlooked other criteria which alternatively permit such

photographic surveillance. The limitations on photographic surveillance are embodied in a DCSI, USAREUR Letter of Instruction (LOI). The current version of this LOI is dated August 21, 1972 and the version it superceded is dated June 23, 1969. Both the 1972 and 1969 letters of Instruction identically provide: "The 66th MI Group will: . . . Conduct visual and photographic surveillance of public demonstrations when directed by DCSI, USAREUR, or when there is reason to believe a demonstration will directly endanger a USAREUR installation/activity or when it will enhance or support the collection mission of the 66th MI Group." Thus a public demonstration can be photographed without my specific approval. In practice, the office of the DCSI, USAREUR is often informed in advance of planned photographic coverage of an anticipated demonstration. However, in the case of demonstrations which are, for example, spontaneous or unanticipated, the use of photography is often based only on local determination that it would enhance the collection mission of the 66th MI Group.

6. In paragraph F.3. of my affidavit, I stated:

"The use of informants at private meetings is often referred to as penetration of an organization. Throughout the period dating back at least to 1967, specific approval by the DCSI, USAREUR, has been required before such penetration may be initiated."

This statement may be misleading to someone outside the intelligence field because of the rigid and specialized definitions used in military intelligence operations. In defining penetration of an organization as "the use of informants at private meetings", my concern was to fashion a definition which could be understood by persons not familiar with military intelligence terminology. I now realize that my definition may have been too limited. While attending a private meeting of an organization could be considered one indication that a penetration had been accomplished, such attendance, in and of itself, does not necessarily establish penetration of that organization. For an informant to penetrate in the technical sense as it is normally understood in counterintelligence activities, he must become a member of that organization or an accepted associate. Additionally, his activities in relation to the targeted organization must be subject to the direction and control of military intelligence. Once specific DCSI, USAREUR approval for penetration of an organization was obtained, there was no requirement for specific DCSI approval for each informant used to penetrate the organization.

Penetration of civilian organizations whose membership includes non-DOD affiliated U.S. citizens is now regulated by Army Regulation 380–13, dated September 30, 1974, which states: "There will be no covert or otherwise deceptive surveillance or penetration of civilian organizations unless specifically authorized by the Secretary or the Under Secretary of the Army. . . . No Army personnel, military or civilian, will be assigned to attend public or private meetings, demonstrations, or other similar activities held off-post . . . without specific approval by the Secretary or Under Secretary of the Army." This regulation and the above specific provisions apply overseas.

7. In paragraph F.4. of my affidavit I stated:

"No such informant is a Military Intelligence agent. Each volunteers to be an informant and may withdraw if he chooses."

I have recently learned that this statement is inaccurate. An extensive search of countersubversion informant records indicates that three military intelligence personnel were used to penetrate organizations. One of these was school trained as a special agent. The others were not special agents. Most of the informants used to penetrate organizations were military personnel of enlisted rank. While some approached military intelligence in order to provide information, many were themselves approached by military intelligence and asked to become informants. They volunteered in the sense that they were neither required as part of their military duties nor ordered to become informants. In addition, although not the usual practice, civilians were occasionally utilized as informants.

8. In paragraph F.8 of my affidavit I stated that:

"A thorough search has been made of all files maintained by Military Intelligence units in Germany and has produced no indication that any wire or mail intercept has been conducted by the United States Army in the Federal Republic off United States military installations since the implementation of the G–10 Law in 1968. Moreover, this search has disclosed no record that the Lawyers Military Defense Committee, Robert Rivkin, or Howard DeMike, are now or ever have been the subject of any telephone or mail intercept order issued by or at the suggestion of the United States Army in Europe."

The above statement remains true. It has, however, always been recognized that in both the Federal Republic of Germany and West Berlin, if anyone, including an attorney, called to or from a telephone number or wrote to or received a letter through a postal address which was itself the targeted subject of an approved intercept order, such a conversation or letter may have been inter-

cepted. There have been approved intelligence intercept orders in effect before and after January 29, 1974, and it is not possible to affirmatively state that conversations and letters involving attorneys have not been intercepted.

Since the filing of my affidavit, the Department of Army has promulgated a message, Subject: "Army Regulation 381–17, Wiretap, Investigative Monitoring and Eavesdrop Activities." This message dated August 2, 1974, requires that all approvals of wire intercepts must state that: "Privileged conversations (e.g. between an attorney and client) shall not be intercepted or, if indavertently intercepted shall not be transcribed or otherwise reported in any way." Although this message did not address postal intercepts, a letter, Subject: Delegation of Authority, dated August 16, 1974, an dsigned by the Commander in Chief, USAREUR, applied the requirements of this message to postal intercepts.

9. In paragraph F.11. of my affidavit I stated that:

"As result of the July 26, 1973, message on Wiretap, Investigative Monitoring and Eavesdrop Activities, promulgated by the Department of the Army, wiretaps of (sic) an installation outside the United States must be based upon reasonable grounds to believe a criminal offense concerning national security is involved or a felony has been or is about to be committed. Inasmuch as these grounds are very similar to those USAREUR already followed and had adopted under the G–10 Law, the substantive basis upon which suggestions have been processed and approved by the DCSI in the Federal Republic of Germany has not changed in light of the message."

The above statement must be qualified by one exception. Foreign intelligence wiretaps are not based upon nor directed toward the acquisition of information regarding national security criminal offenses or felonies, although such information is infrequently uncovered. Rather, it is directed at acquiring indications of the capability and propensity of foreign governments to wage war or otherwise effectuate their policies. The August 2, 1974 message, mentioned in paragraph 8, above, as amended, continues to exclude foreign intelligence collection from the requirement to demonstrate reasonable grounds to believe a criminal offense concerning national security or a felony is involved. DCSI, USAREUR approval of such intercepts is required.

10. In paragraph F.13 of my affidavit I stated that:

"USAREUR instructions governing intercepts, both wire and postal, conducted by or for the United States Army in West Berlin have since the implementation of the G–10 Law incorporated the same requirements as the USAREUR instructions concerning suggestions for intercepts in the Federal Republic of Germany."

In stating the above, I meant that the basic standards for approval of wire and mail intercepts were delineated in USAREUR regulations and instructions which applied equally in West Berlin and the Federal Republic of Germany.While the DCSI did utilize the same standards in approving or disapproving requests for wire and mail intercept orders, in practice, the written requests emanating out of West Berlin were not as detailed in their justifications for the requested intercept orders. Institutional knowledge and internal file holdings were often used to supplement the written language of those justifications. Likewise, non-United States agencies which requested wire or mail intercept orders in the U.S. sector of Berlin were not required to provide in-depth justification in their requests.

11. In paragraph F.14 of my affidavit I stated that:

"Approvals of wiretaps and postal intercepts in West Berlin are, at present, valid for no longer than thirty days, subject to renewal, and must be terminated before that time if the desired information is obtained."

It appears that a subordinate unit in West Berlin was lax on at least one occasion in submitting, before the end of the 30 day period, a written request for extension. Monitoring was continued beyond the 30th day based on an oral representation that the extension was desired and a written request would be forthcoming. In this instance a written request was thereafter submitted, albeit belatedly. This practice is no longer condoned and wire and mail intercepts are now terminated in the absence of a timely and proper request for extension.

In stating that wire and postal intercepts in West Berlin were valid for no longer than 30 days, I failed to mention a category of intercepts excepted from that requirement. On and after the date of my affidavit, special long term telephone and mail intercepts of organizations as well as some individuals not U.S. citizens have been permitted when specifically approved by the DCSI, USAREUR. Such long term intercepts were based on the decision that the information derived would fulfill continuing and unchanging intelligence requirements. These intercepts could be approved for up to one year. The special long term category of intercepts has been terminated. At present, all wire and postal intercepts in West Berlin are valid for no longer than 30 days, without exception.

12. In submitting this affidavit I have attempted to correct misstatements in and possible misinterpretations generated by my previous affidavit before the court. I feel compelled to explain the circumstances which I believe caused or contributed to the inaccuracies in my first affidavit. The foremost problem has been compartmentalization, that is the strict limitations placed on the distribution of and access to intelligence information. Compartmentalization is necessary in intelligence operations to insure that information compromised in one intelligence activity will not compromise other activities as well. Army intelligence units, possessing varying quantities of files, are located throughout the Federal Republic of Germany and West Berlin. There is no central repository for all MI Files. In order to overcome compartmentalization and insure the accuracy and completeness of our information it is not only necessary to visit and review the files at each separate location, but also to talk to the key personnel remaining at each unit and personnel who have been transferred out of Europe. The monumental nature of this task initially hindered our efforts to ascertain the complete information needed by the government attorneys in this case.

THOMAS W. BOWEN.

Sworn to and subscribed before me this 20th day of October, 1974, at Heidelberg, Federal Republic of Germany.

ROBERT B. KIRBY,
Captain, Judge Advocate General's Corps,
Power of a Notary, 10 U.C.S. 936.

DEPARTMENT OF THE ARMY,
HEADQUARTERS, U.S. COMMANDER, BERLIN AND U.S. ARMY, BERLIN,
APO 09742, December 19, 1974.

Maj. Gen. WILLIAM R. KRAFT, Jr.,
Chief of Staff, HQ, U.S. Army Europe and Seventh Army,
APO 09403.

DEAR BILL: Attached is the latest copy of *Forward* magazine for December 1974. Although AR 390–13 does not specifically address the collection and dissemination of such publications, Tom Bowen and my Deputy Chief of Staff Intelligence inform me that they were advised by Mr. Carney (the Acting Department of the Army General Counsel) that the evacuation of *Forward* to higher headquarters should be avoided since it might be interpreted as an investigation of a non-DOD affiliated U.S. civilian organization and its activities. I do not share this interpretation since I believe the CINC and the USAREUR staff should be kept informed. Accordingly, I have directed my DCSI to provide any publications of this nature that he considers would be of interest to HQ, USAREUR without comment.

Faithfully yours,

SAM S. WALKER,
Major General, USA, Commanding.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 310–74

BERLIN DEMOCRATIC CLUB, *et al*, PLAINTIFF, v. JAMES R. SCHLESINGER, *et al.*,

DEFENDANTS

COUNTY OF NEW YORK, STATE OF NEW YORK, *ss:*

AFFIDAVIT OF CHRISTOPHER H. PYLE

Christopher H. Pyle, being first duly sworn, deposes and says:

1. I am a former captain in Army Intelligence (1966–1968) and have been investigating the military's surveillance of civilian politics since the summer of 1969 as a private citizen, as a writer for the *Washington Monthly*, as a paid consultant to the U.S. Senate Subcommittee on Constitutional Rights (before which I also testified as a principal witness on Army surveillance in February 1971), as a doctoral candidate writing his dissertation on the subject (degree completed, October 1974), and as professor at the John Jay College of Criminal Justice, City University of New York, writing a book on the subject (nearly completed).

2. In the course of my investigation of the Army's surveillance, which has involved interviews with over 125 former intelligence personnel and examination

of thousands of military intelligence reports and documents, I have arrived at certain conclusions relevant to the above captioned case. They are:

(*a*) that the surveillance activities in Germany complained of in this case were part of, and a continuation of, surveillance activities conducted within the United States by Army Intelligence during the late 1960s and early 1970s;

(*b*) that this surveillance was initiated by Army intelligence officers without authority from, or notice to, their civilian superiors in the Department of the Army, the Department of Defense, the White House, or the Congress;

(*c*) that the surveillance of civilian political activity, both within the United States and overseas, was substantially beyond the Army's legitimate counter-intelligence, security, and civil disturbance missions; and

(*d*) that despite substantial efforts on the part of officials within the Office of the Secretary of the Army, attempts to curb the unauthorized surveillance, record-keeping, and data-exchanges have failed and civilian control of military intelligence has not been achieved.

3. In support of these conclusions, I wish to draw the Court's attention to the following facts, which I believe establish a clear pattern of non-compliance by Army intelligence with orders forbidding its surveillance of civilian political activity. Documentation in support of these facts will be found in the accompanying citations and exhibits. Further documentation, including witnesses, can be provided at the Court's request.

4. *January 1970.* Existence of the Army's surveillance of civilian political activity throughout the United States was disclosed by the affiant ("CONUS Intelligence: The Army Watches Civilian Politics," *Washington Monthly*, January 1970, pp. 4-16). A meeting was held in the Office of the Army General Counsel. Brig. Gen. William H. Blakefield, commanding general of the U.S. Army Intelligence Command, denied the existence of a blacklist and computerized data banks on civilian political activities described in the *Washington Monthly article.* [Copies of memoranda of that meeting and interviews with participants are in affiant's files.]

5. *February 1970.* The Army General Counsel discovered that a blacklist and data bank existed, and concluded that he was lied to [Interview by affiant with Robert E. Jordan III.] The blacklist was ordered recalled for supervised destruction, and the data base was ordered destroyed [copies of orders in affiant's files]. The Intelligence Command purportedly failed to collect blacklists, and requested certificates of destruction instead. An August 1970 inventory indicates that the copies were still not accounted for [Copy in affiant's files].

6. *Spring 1970.* Col Arthur Halligan, Director of Investigations, U.S. Army Intelligence Command, disobeyed an order to destroy the computer data base, and hid the tapes of information [Interviews by affiant with Pentagon investigators]. Information from the Fort Holabird computer was also secretly transferred to the Central Intelligence Agency and the National Security Agency [NBC News Transcript, Jan. 10, 1975, Exhibit A, *infra*].

7. *August-September 1970.* Army General Counsel Jordan learned that his cut-back orders had been obeyed, and summoned commanders of all military intelligence groups to his office to be "reinstructed", also ordering an Inspector General's investigation of the entire Army Intelligence Command. This investigation established non-compliance [Interview by affiant with Robert E. Jordan III].

8. *December 1970.* Former Army Intelligence Agent John M. O'Brien disclosed that the 113th MI Group in Chicago kept files on Senator Adlai Stevenson III and Representative Abner J. Mikva. Secretary of the Army Stanley R. Resor denied this charge, based on information supplied by O'Brien's unit. The Secretary's denial was later retracted at hearings before Senator Sam J. Ervin's Subcommittee on Constitutional Rights [*Federal Data Banks, Computers and the Bill of Rights*, Hearings before the Subcommittee on Constitutional Rights, Committee on the Judiciary, U.S. Senate, February 24, March 2, 1971, Part I, pp. 102, 389; *Congressional Record*, Dec. 29, 1970, p. S21423].

9. *February 1971.* Hearings were conducted before the Subcommittee on Constitutional Rights. Testimony was received detailing the continued surveillance [*Id.*, pp. 156–160]. Edward Sohier, a member of the 30-man military intelligence Task Force charged with preparing the military for the hearings, testified: "In view of what I would call the 'blatant' lying and unceasing string of misstatements made by Army spokesmen to Congressmen, members of the press, and citizens during 1970, I find it difficult to believe that we can take the official Army assurances at face value" [*Id.*, p. 281].

10. *Spring 1971.* Assurances were received by the Subcommittee on Constitutional Rights that all forbidden domestic intelligence records had been excised

from the microfilm archive at the Counterintelligence Analysis Detachment, Hoffman Building, Alexandria, Virginia. Four years later these assurances proved to be false because forbidden records were retained [DA Press Release, Jan. 10, 1975, Exhibit B, *infra*].

11. *1970–1973.* Army intelligence participated in meetings of the Intelligence Evaluation Committee, a secret domestic intelligence unit set up pursuant to plans initiated by Tom Charles Huston of the White House staff. The original decision memorandum, signed by President Richard M. Nixon on July 15, 1970, and never formally revoked, directed the carrying out of burglaries and illegal wiretapping. The use of military undercover agents (except on authority of the Under Secretary of the Army) was supposedly barred by the decision memorandum, but other forms of participation by military intelligence services, including the interception of international telephone communications and surveillance of American civilians overseas, were not prohibited [Text republished, *New York Times*, June 7, 1973, p. 36; exception; TAG Letter, June 9, 1970, subject: Collection, Reporting, Processing, and Storage of Civil Disturbance Information, p. 4].

12. *Summer 1973.* Disclosures occurred of widespread surveillance by the Army of the political activities of American civilians in West Germany, including wiretapping, mail opening, undercover agent penetration of civilian groups, and compiling and dissemination of reports on individual civilians and their activities. The Army at first denied these reports, but later admitted the truth of many of them and claimed that most forms of the surveillance were being discontinued.

13. *February-December 1974.* The complaint on *Berlin Democratic Club, et al., v. James R. Schlesinger, et al.* was filed, including substantial documentary evidence of the Army's surveillance of American civilians in West Germany. During the course of the year the Army revised its evidentiary submissions to the Court, claiming that it had discovered "new facts" which indicated that the scope of the surveillance at issue was broader than first disclosed.

14. *April 1974.* Robert Jordan, former Army General Counsel who investigated the unauthorized domestic intelligence operations, testifies before Subcommittee on Constitutional Rights: "... my experience has been that it is extremely difficult for appointed civilian officials to deal with middle-level career military intelligence officials and get a straight story" [*Military Surveillance.* Hearings before the Subcommittee on Constitutional Rights, Committee on the Judiciary, U.S. Senate, April 9, 1974, p. 15].

15. *January 1975.* The Department of the Army disclosed that its microfilm archive had not been properly purged [Exhibit B, *infra*]. NBC News disclosed that a forbidden data bank on civilian political activity was transferred by the Army Intelligence Command to the National Security Agency (a military intelligence agency) and the CIA in 1970 in violation of the order directing its destruction [Transcript, Exhibit A, *infra*].

16. On the basis of the foregoing facts, I submit that unilateral assurances by the Army that its surveillance of the constitutionally protected political activities of American civilian citizens has ceased are not credible.

CHRISTOPHER H. PYLE.

Sworn to before me this 18 day of January 1975.

SIDNEY JANOFF, *Notary Public.*

EXHIBIT A

NBC NIGHTLY NEWS, FRIDAY, JANUARY 10, 1975—ROWAN/CIA

NBC News has learned that the Federal Government's vast computer network permits the CIA and the White House to retrieve raw intelligence data on thousands of American citizens.

Much of the data was gathered by Army intelligence in the period from the Korean War until 1971, when the Army said it discontinued its domestic surveillance program. But the Defense Department said today that it still has intelligence information on American citizens in the Army computer file which should have been purged in 1971. However, a Defense Department spokesman conceded that "purged" material would not be destroyed if it still is useful.

A source who has worked at high levels in both the CIA and the Defense Department said valuable intelligence records are never destroyed; that discussions were held in 1971 to turn them over to the CIA.

Today the Defense Department denied that the Army domestic surveillance files were transferred and the CIA declined comment.

But the files would not have to be physically transferred. Sources familiar with the computer network said that the CIA could receive information directly because its computer is interconnected with others, including the National Security Agency's "Harvester" computer at Fort Meade, Maryland.

The White House is also connected to the system and can retrieve raw data from at least 6 computers.

FORD ROWAN, *NBC News, Washington.*

EXHIBIT B

JANUARY 10, 1975.

PRESS RELEASE

The Secretary of the Army has today notified the Congress that the Army, in the course of its continuing review of its investigative activities, has ascertained that the files of one of its Washington, D.C. offices contains some information relating to activities of American civilians, which should have been purged before now under the applicable Defense Department and Army directives. The file containing this information is a microfilm library in a counterintelligence analysis and research office, the index to which is computerized. While Congress was advised in 1971 of the existence of this file, and that the purging of unauthorized information might not be complete, the Army further indicated that the index would be modified so as to prevent retrieval. This may not have been completely accomplished and this is the reason for the Secretary of the Army's statement today.

Through the 1960's, the Army, under the direction of competent civilian authority, collected information on individuals and organizations not affiliated with the Army or the Department of Defense primarily relating to the civil disturbances of that period. This led, as the record shows, to inquiries by the public and to Congressional hearings.

Beginning in 1969, the Secretary of the Army began tightening up on this surveillance and information gathering on U.S. civilians and organizations not affiliated with the Department of Defense. The Secretary imposed further restrictions in 1970, as did the Secretary of Defense. In March 1971, a Defense Department directive was published which prohibited surveillance and information gathering on nonaffiliated U.S. civilians and organizations except in very limited circumstances. That directive has recently been extended by the Army to cover investigative activities overseas. In implementing these prohibitions, it has been necessary to screen all investigative files for the purpose of eliminating from those files information collected prior to 1971 which could not be retained under the new guidance.

The file in question was screened in 1971 and this fact was reported to the Congress. Review of the file has now disclosed, however, that that screening did not result in the elimination of all information acquired before the effective date of the new regulations in 1971 on nonaffiliated civilians which should not have been retained under the new regulations. In addition, there is material in the file which was acquired subsequent to promulgation of the new regulations in 1971, but which is now outdated and should have been destroyed. On the basis of a limited search to date, nothing has been found in the file to indicate that the Army has engaged in any surveillance of U.S. civilians within the United States in violation of DoD regulations subsequent to the promulgation of these regulations in 1971.

The improperly retained information is contained with material on foreign intelligence services, foreign terrorist groups and the like. The computerized index to this microfilm library, which indexes the material by the names of the persons or organizations to which the information relates and by topical event, and which led to this discovery, has been operational only since June, 1974. Indications at this time are that access has been limited and tightly controlled.

The Secretary of the Army today directed that a number of steps be taken with regard to this matter. First, he has directed that the entire file be rescreened on a priority basis for the purpose of eliminating all material on United States civilians not affiliated with the Department of Defense which is not retainable under current regulations. A task force is now at work on this screening. Second, since this screening will take some time, he has directed in the interim that no one be permitted access to this file except for the purpose of screening it, or with his personal approval. Third, he has directed that an investigation be conducted to determine responsibility for the failure to keep this file in compliance with the DoD and Army regulations. Finally, the Secretary of the Army

has requested the Chief of Staff of the Army to communicate today to all Army commanders worldwide the importance which he places on total compliance with the regulations governing collection and retention of information on American civilians.

The Secretary reemphasized in his letter to Congress that the existence of this file was called to his attention as a result of the Army's implementation of Defense Department standards and procedures regarding investigative activity and files. He also emphasized that the information in this file is outdated and does not indicate any prohibited surveillance by the Army of United States civilians subsequent to the 1971 policy announcement. He indicated that he believed the disclosure of this file and the steps being taken with regard to it illustrate the Army commitment to assuring full compliance with the Defense Department policy prohibiting military surveillance of US civilians.

[From the Washington Post, November 1975]

FAILURE TO DESTROY FILES PROBED

SPYING DATA RETAINED BY ARMY

The Army announced yesterday that it has discovered counterintelligence files on political dissenters that were supposed to have been destroyed under a 1971 Defense Department directive.

The announcement by Army Secretary Howard H. Callaway indicates that the files on dissenters, contained in some 400 microfilms, are now being destroyed and that an investigation of the episode is in progress.

Callaway said the files, which contain the results of military surveillances of American civilians conducted prior to 1971, relate mainly to civil disturbances. A Defense Department spokesman said the civilian spying by the military was also targeted against draft resistance movements, GI coffeehouses and other anti-Vietnam war activities.

The announcement said that the Army "has ascertained that the files of one of its Washington, D.C., offices contains some information relating to activities of American civilians which should have been purged before now . . ."

Callaway advised Congress of the existence of the surveillance files in 1971 and promised that the material would be expunged from its records.

Late last month, however, the Army discovered that some 400 microfilms of files were still in its active files. Material had, in fact, been added to the file subsequent to the pledge that the files would be purged, the Army learned.

Callaway stressed, however, that the Army has not carried out any surveillance of civilians since the 1971 decision to prohibit it. The change in policy was prompted by congressional hearings and press accounts of the military spying program.

Army officials said the lapse in management to counter intelligence record-keeping policies came to light within the Defense Department. An inspector-general investigation was immediately ordered.

A number of civil damage suits have been filed against the Defense Department as an outgrowth of the surveillances which were conducted throughout the 1960s. The suits call upon the Army for production of any records in its files that might relate to individual cases.

"We're checking to see whether this came about through inadvertance or whether it was done deliberately," said one Army official. "There is nothing at this time to suggest that there was any illegal surveillance or file-gathering."

In a related development a senior government intelligence official acknowledged yesterday that the CIA had accumulated at least two sets of files on American citizens who figured in civilian disturbances and war protests in the late 1960s and early in the Nixon administration.

One of those files was compiled in response to requests by the Justice Department for overseas checks on U.S. citizens who were targets of internal security investigations. This was a list variously estimated at 9,000 to 12,000 names.

Another list of some 10,000 names was also assembled by the CIA as a result of requests by domestic intelligence agencies for information from abroad on U.S. citizens. The New York Times said yesterday that well-placed sources told it a low-echelon employee of the CIA sought but did not receive permission to destroy the files which the newspaper described as "illegal."

In another development, AFL–CIO President George Meany commented yesterday on a report in The Washington Post that the CIA read his correspondence with two international labor aides, Jay Lovestone and Irving Brown.

"Obviously I have no way of knowing if my mail was surreptitiously intercepted or read by the CIA or anyone else. If this did happen (and I have no reason to believe that it did) I would resent it very much.

"I am opposed," Meany said, "to the illegal interception of the mail of any American citizen by anyone at any time for any purpose."

[From the Washington Star-News, October 1975]

ARMY FILES YIELD DATA ON CIVILIANS

The Army has announced it has found some intelligence information on political activities of American civilians in a microfilm library nearly four years after records were supposed to have been purged.

Secretary of the Army Howard Callaway ordered the file, located in a Washington counterintelligence analysis and research office, to be "rescreened on a priority basis for the purpose of eliminating all material on United States civilians not affiliated with the Department of Defense which is not retainable under current regulations."

Callaway also ordered that, while the screening is under way, "no one be permitted access to this file except for the purpose of screening it, or with his (Callaway's) personal approval."

Callaway said the information on activities of U.S. civilians in the microfilm library was discovered in the course of what he called a "continuing review of investigative activities by the Army."

"The improperly retained information is contained with material on foreign intelligence services, foreign terrorist groups and the like," Callaway added.

Congress was informed of the existence of the file in 1971, and was told at that time that if all the information were not purged at least the index would be altered to prevent use of the information. The existence of the computer index was contrary to that pledge, and prompted yesterday's announcement, the Army explained.

Meanwhile, the Army secretary said, he has ordered an investigation "to determine responsibility for the failure to keep this file in compliance with Defense Department and Army regulations."

Those regulations, issued in March 1971, barred Army intelligence surveillance and gathering of information on U.S. civilians and organizations not affiliated with the Defense Department.

"On the basis of a limited search to date," Callaway notified Congress, "nothing has been found in the file to indicate that the Army has engaged in any surveillance of U.S. civilians within the United States in violation of Defense Department regulations subsequent to the promulgation of these regulations in 1971."

EXHIBIT 15

DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION,
Miami, Fla., June 21, 1972.

Bufile: 100–469538
MM File: 100–16625
Title: Thomas King Forcade
Reference: Memorandum dated and captioned as above, at Miami, Florida.

All sources (except any listed below) whose identities are concealed in referenced communication have furnished reliable information in the past.

THOMAS KING FORCADE

On February 25, 1972, it was determined that one Richard Dowling is the owner of Mediagraphics, 125 108th Avenue, Treasure Island, Florida, a firm specializing in art work for advertising agencies. Dowling was overheard to say that Tom Forcade from New York City had visited St. Petersburg, Florida, for two days on February 11–12, 1972. Dowling at the time described Forcade as a representative of the Youth International Party (YIP) or "Yippie" and also remarked that he understood "Yippie" had recently changed its name to "Zippie". Forcade remained at the Edgewater Beach Motel in St. Petersburg. The purpose of his visit to

St. Petersburg was to observe a youth registration rally in St. Petersburg on February 11, 1972. It was at this rally that Dowling met Forcade.

Forcade learned from Dowling that the latter did art work, and this perpetrated a prolonged conversation between Dowling and Forcade about the possibility of Mediagraphics doing some artwork for the Zippies in connection with their participation in the forthcoming Democratc National Convention in Miami, Florida.

The real purpose of Forcade's visit to St. Petersburg was to evaluate the drive and enthusiasm of Florida youth politically and to assess how much the Zippies can count on them in their Miami plans. Forcade indicated to Dowling that he, Forcade, intended to leave St. Petersburg for a visit in Miami, in order to make arrangements in connection with Jerry Rubin.

Forcade told Dowling that Zippie had little organizational structure in Florida and that it was going to be necessary for them to utilize most of the other New Left groups in the State in connection with the Democratic National Convention Zippie activities.

MM T–1, 2/25/72.

The Youth International Party (YIP), also known as "Yippies", is a loosely-knit, anti-establishment, revolutionary youth organization formed in New York City in January, 1968.

Abbe Hoffman and Jerry Rubin, on February 18, 1970, were found guilty of Antiriot Law violations that arose from activities during the Democratic National Convention at Chicago, Illinois, in August, 1968. Pending an appeal they were released on bond by the United States Court of Appeals, Chicago, Illinois.

The YIP National Congress, scheduled for May 26–28, 1972, at Miami, Florida, was cancelled. Tom Forcade (YIP factional leader) in its place scheduled a three-day conclave at his residence, 3113 Mary Street, Coconut Grove, Miami, Florida. The conclave was to begin with a "banquet" at that address. A planning and strategy session would be held the following day.

MM T–4, 5/26/72.

The YIP conclave commenced on the evening of May 26, 1972, at the residence of Tom Forcade, 3113 Mary Street, Coconut Grove, Florida. Approximately 25, the majority from Madison, Wisconsin, were in attendance. Admission was restricted to individuals known to Forcade. The conclave was totally disorganized. Nothing was accomplished. Discussions centered around previous YIP activities and previous arrests of those present. A number present indicated a displeasure at the cancellation of the YIP–NC. They stated they may leave Florida the following day.

MM T–4, 5/27/72.

The planning and strategy session of the YIP conclave was held at the home of Tom Forcade in Coconut Grove, Florida. It commenced at 2:00 P.M. with approximately 40 in attendance. Rubin and Hoffman were expected to attend. Attempts were to be made to work out the differences between these two factions. Hoffman and his supporters arrived at the meeting and commenced to stage an obvious, well-planned attack against Forcade.

They blamed him for all the difficulties and factional divisions within the YIP. Considerable time was devoted to a discussion of Forcade's public claim that he was not paid sufficiently for corroborating with Hoffman on the book entitled "Steal This Book". A decision was made to submit this controversy to a panel of "Movement" people rather than to a court of law. Virtually the entire meeting was devoted to the vicious attack on Forcade. The arguments against him were well timed and effective. A motion was passed censuring Forcade for not privately resolving the issue concerning the book. He was expelled from the YIP and was specifically named a "police provacteur and/or a maniac". This motion passed by a vote of 32 to 3 with four abstentions.

The "people's court" ruled against Forcade but told Hoffman to pay him $1,500.00. Hoffman did but marked the check "paid in full". Forcade, believing he would not have a claim any more against Hoffman under New York law if he accepted the check, turned it back to Hoffman's lawyer. Reportedly he is now suing Hoffman for $30,000.00 in a court of law.

Forcade at times acted like a "wild man". At one point he picked up a pair of scissors and severely carved up the paneling of a wall in the house where the conclave was being held.

MM T–4, 5/27/72.

Tom Forcade, following his expulsion from the YIP, departed for Gainesville, Florida, to attend a meeting of the Vietnam Veterans Against the War in that city.

MM T–3, 5/28/72.

The Vietnam Veterans Against the War (VVAW) is a national veterans organization with a national clearinghouse located at 25 West 26th Street, New York City. Its first published objective is "to demand an immediate cessation of fighting and a withdrawal of all American troops from Indochina".

The YIP collective, on the evening of May 28, 1972, met with YIP followers of Forcade at YIP headquarters, Miami Beach, Florida. Approximately 35 were in attendance. A decision concerning the establishment of a printing collective took place.

MM T–3, 5/29/72.

A fight occurred at the YIP headquarters, Miami Beach, on May 30, 1972. Tom Forcade (YIP factional leader) and his people attempted to crash the office. Yippie rebel calls were sounded and those present, including Abbe Hoffman, formed a barricade and a fighting wedge and ejected Forcade and his followers from the office. Forcade was screaming and called for Hoffman to come out and fight. Forcade's followers pulled him into the elevator but before the door had closed Hoffman spit in his face. Later the area was scouted by YIP members and it was reported Forcade was walking around the building with a gasoline can.

MM T–3, 6/2/72.

Tom Forcade was the member of the YIP who was attempting to head the offshoot of the YIP referred to as "ZIPPIES". There is disagreement and bickering between the individuals who control the YIP and the offshoot group referred to as "ZIPPIES", which means "Zeipgiest International Party" meaning "World View".

Jerry Rubin continues to be in New York and may remain there until after the primary elections. Tom Forcade is also in New York City.

MM T–3, 6/15/72.

Source described Tom Forcade as being very active in the "Zippies" along with Patrick Small and the headquarters could be considered 3113 Mary Street, Coconut Grove, Miami, Florida, for the Zippie faction.

Tom Forcade, after the disagreement in the YIP, had spent the night on drugs with Jerry Rubin and although there was still dessention at the present time they were attempting to iron out their differences.

MM T–3, 6/21/72.

As of June 21, 1972, Tom Forcade, Abbe Hoffman and Jerry Rubin were all expected to return to Miami following a press conference which they were to hold in New York City on June 21, 1972.

MM T–3, 6/21/72.

A publication called the "Beach Blanket News" is published by the Tom Forcade faction of the Youth International Party and printed by the Golden Rule Press of South Florida, 190 S.W. 5th Court, Pompano Beach, Florida. On the front page of this item there is a notation "Zippie in 72" and "Published by Youth International Party".

Tom Forcade continues to be involved in publishing the "Beach Blanket News". One copy of this paper contained an article captioned "Gay Power" and another article "On To Miami". The "On To Miami" article was as follows:

"As summertime approaches, various radical groups are looking forward to enjoying surf, sand and sun in a 1972 political vacation in Miami Beach. We'll all be enjoying the warm tropical climate while trying to change the political climate.

"Y.I.P. is going to be trying to bring thousands of people down to Miami for the conventions. We're also going to be working to integrate these people into the spirit and mood of the local community, and needs. . .

"Y.I.P. and everyone wants a non-violent summer. The public is tired of violence. Chicago proved the government can be fascist. In Miami we want to show how we're different. We all want an immediate end to the war and much more.

"But already the government appears to be trying to use the convention demonstrations to project an image of 'law 'n order'.

"Some of our key people have been jailed, others have been hit with bogus charges and are on the lam. Hassles of freeks have begun locally.

"Further, we have made it clear to the Miami Beach police that to prevent trouble during the conventions we would have to have Bayshore Golf Course as an assembly and accomodation area for the huge numbers of people coming down. Chief Pomerance and other officials expressed their desire to fully cooperate, and the future will tell how sincere they are. We know the people will not allow unnecessary stalling like Chicago did, in '68.

"So, we hereby cordially invite you to the Y.I.P. million dollar beach ball in Miami Beach, July 9–14, Aug. 21–24.

"The purpose is to get high, stop the war, dump Nixon, and exercise our rights. If we're going to build Utopia, somebody's got to get the ball rolling!"

MM T–2, 5/31/72.

Tom Forcade is the individual who had attempted to form the group known as the "Zappies" and who, when in Miami headquarters at 3113 Mary Street. In the absence of Forcade, Patrick Small takes over the operation of the "Zappies" and handles any activities, planning or press releases.

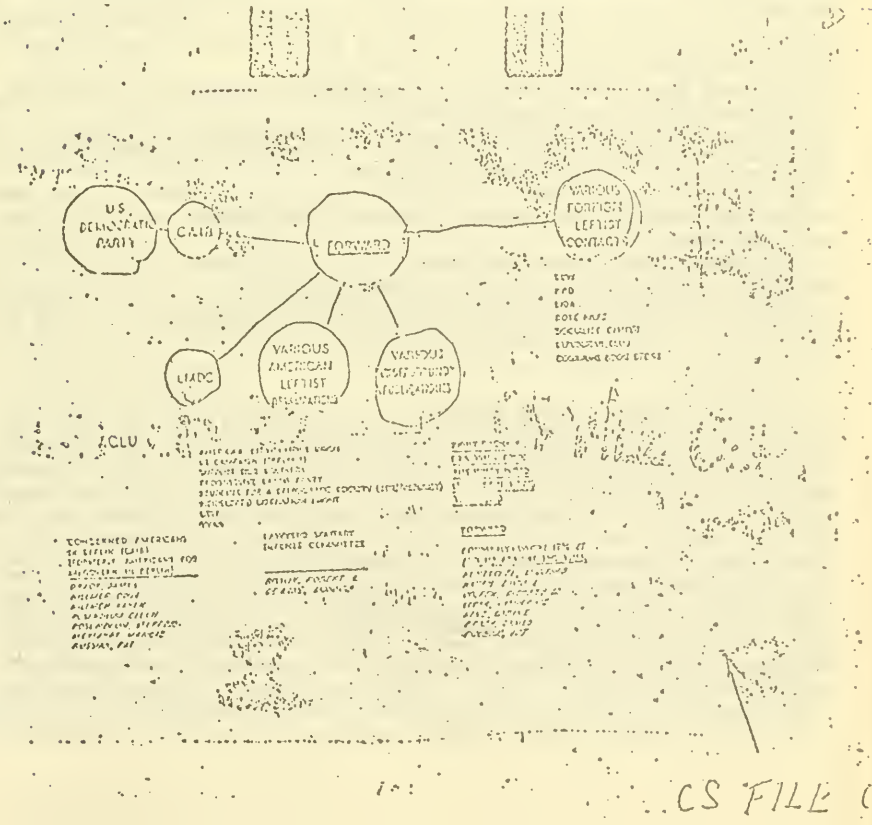
MM T–2, 6/21/72.

The records of the following agencies were negative regarding Thomas King Forcade, as checked on May 26, 1972:

Miami, Florida Police Department; Miami Beach, Florida Police Department; Dade County Public Safety Department; Miami Municipal Court; Credit Bureau of Greater Miami.

Following is a description and background of the subject:

Name: Thomas King Forcade.
Aliases: Tom Forcade, Gary Kenneth Goodson.
Sex: Male.
Race. White.
Date of Birth: 9/11/45.



DEPARTMENT OF THE ARMY,
DETACHMENT B, COFN MILITARY INTELLIGENCE GROUP,
APO 09742, May 25, 1973.

Subject: Concerned Americans in Berlin.
Memorandum for: DOSI/USCOB, per your request the following is submitted:

1. (C) *Personalities:* Present and former.

(*a*) Hillmer, Douglas: Student at FU. DPOB: 30 May 46, Portland, Oregon; MN, William. US citizen, Passport No. B975390. Occupation unknown. Married Karen Sandra Hillmer, nee Rhodes. Approved to be organizer/leader of CAB at initial meeting, 24 Mar 73.

(*b*) Hillmer, Karen: Wife of Douglas Hillmer. DPOB: 6 Nov 45, Missouri. Residence with husband: 8 Misahels Str., Bln-Schoonerberg. Speaks fluent German.

(*c*) Brady, James Jay: DPOB, 7 Oct 46, Staten Island, N.Y. SGAH. Old–36–1668. Married, Katherine Maria Cartrad Ingrid Brady, nee Hillners, Occupation unknown. Identified as member of CAB. Exact status unknown. Former of stationed in Berlin w/AFN, discharged May 70, honorable.

(*d*) Meyfaren, Margie: US citizen, Passport No. K1025369. Identified as member of CAB. DPOB, 14 Jul 43, Voltage, Texas. Married Kenrad Mayfarth. Nee Holloway. Attended conference in Heldelberg, 7–0 April 73, sponsored by BMDC.

(*e*) Rosenblum, Ellen. US citizen, Passport No. Z1306732. She was identified at the initial meeting of CAB, 2d Mar 75. She attended BMDC conferenced, 7–0 Apr 73, Heidelberg-Believed married to Staffen Saul Rousenblum, data unknown. Residence: 10 Bamberger Str., Bln-Wilmerndorf. Believed student at FU.

(*f*) Rosenblum, Steffen: DPOB: 26 Sep 42, New York; MR, Saul. Physicist at FU. Believed member of CAB, exact status of activity unknown.

(*g*) Wolter, David: Former SP4, Hq Co., Special Troops, BB. Reassigned 21st Replacment Bn, Frankfurt, then ETS, Apr 73. Spoke at initial meeting of CAB concerning his pending court-martial, 26 Mar 73. Also worked with *FORWARD* group. Believed to be returning to Berlin, date unknown. Brother, Mark, believed still in Berlin.

(*h*) Denike, Howard: Lawyer with LMDC, Heidelberg. Attended initial CAB meeting in conjunction with defense of Wolter. Has had contact with CAB members since in initial meeting, also with *FORWARD*.

(*i*) Rivkin, Robert: Known to be in contact with members of CAB and *FORWARD* for "aid" to GI's. Lawyer with LMDC.

(*j*) Zagarell, Allen: US citizen, Passport #Z1630962. DPOB: 3 Jun 41, New York. Married, Sandra Zagarell, nee Abelson. Occupation, Student. Believed to be affiliated with CAB. No other information known.

(*k*) Zagarell, Sandra: US citizen, Passport #B1888924. DPOB: 10 Aug 43. Washington. Married, Allen Zagarell. Believed to be affiliated with CAB. Exact connection unknown.

(*l*) Walther, Giesla: German national. Residence: Waldenner Str. 7A, Bln 21. Believed to be affiliated with CAB. Exact connection unknown.

(*m*) Japp, Al: Identifying data not found. Name has been mentioned in connection with CAB since initial meeting. LAC's and other investigation revealed no information on identity.

2. (C) *History:*

CAB emerged from a group of persons, Americans in Berlin for McGovern, which distributed information in support of McGovern, August 1972. The first notification of CAB was published in Issue #11, of *FORWARD*, December 1972. This notification contained the CAB Platform, which appears below. The notice also listed a contact telephone number, 213–7795, which is listed as Steffen Rosenblum. On 24 March 1973, CAB held an initial meeting at the ESG Heim, near the FU. This meeting was publicized throughout the American Community via a leaflet which was posted at various locations and distributed at others. CAB members are also known to have participated in the GI Rights Conference, sponsored by the LMDC, 7–8 April 1973. They have reportedly been in contact with a few leftist groups, the RPD, etc., but at present they are not known to have any affiliation with radical leftists. Some contact with *FORWARD* has been exhibited, but recent information indicated that *FORWARD* members do not want to promote further contact.

3. (C) *Platform:*

The following is quoted from the above referenced copy of *FORWARD:*

"The Concerned Americans in Berlin support the platform of the Democratic Party as adopted July 11, 1972, in Miami, including:

Immediate and complete withdrawal from Indochina with return of all prisoners. An end to the use of military power as a substitute for economic and diplomatic initiatives.

Thorough tax reform with closing of loopholes for special interest groups. De-emphasis of the property tax.

First priority for the citizens rather than for big business per se. Reform and simplification of the welfare system coupled with the right of every American to a job at a fair wage.

Greater federal aid to schools, to assure every child an equal educational opportunity.

Work toward ending all forms of racial and sexual discrimination, and upholding of the right to privacy.

A system of national health insurance for all Americans.

In addition we support:

Abortion as a right rather than a privilege.

In the tradition of Abraham Lincoln, amnesty for those whose conscience prohibited them from participating in the Vietnam war.

Abolition of the electoral college, substituting a direct presidential election, and reform of campaign practices.

We are working on the following specific problems in Berlin:

1. Finding job opportunities for military dependents and civilians.
2. Ending housing discrimination by race and nationality.
3. Assisting all Americans in Berlin, both military and non-military, with the transition from American to European living. This includes services such as arranging German tutors, a food cooperative, and general orientation."

4. (C) *Constitution:*

CAB is reported to have adopted the Bill of Rights from the US Constitution as its own constitution. No further information concerning this action has been reported.

5. (C) *Activities:*

(*a*) *Past:* Distribution of literature and petitions in support of Sen. George McGovern, August 1972, in and around the American Community, Berlin. Attendance at LMDC Conference, 7–8 April 1975, Heidelberg, and attempting to establish a GI Rights counselling service to inform GI's of their rights and counsel them in the use of the UCMJ when they face court-martial or Article 15 punishment.

(*b*) *Present:* Distribution of leaflets and petitions calling for the impeachment of President Nixon. Association with and involvement with US dependents/civilians thereby gaining greater access to the American Community for the perpetration of their aims. No dependents/civilians or US servicemen have been positively identified by name or photograph. Unidentified individuals allegedly associated with CAB, have been observed and reported as collecting signatures and distributing literature in and around the main PX, Berlin Brigade.

It was also reported that CAB has petitioned the Democratic Party in the US for membership, NFI.

(*c*) *Future:* Observation of past and present activities of CAB does not give a great deal of indication as to what they may do in the future. It is expected that they will follow their present trend, a somewhat conservative approach, i.e., controlled protest. It is also possible that they may seek greater support from the American Community, either CI's, civilians, and/or dependents. No definite future plans of CAB are known at this time.

6. (C) *Associations:*

CAB is known to have tried to establish associations with the EPD and LICA, but it was reported that these attempts failed to produce an alliance. It was also reported that they have contacted various groups, NFI, of non-Germans, but no further results have been reported about these attempted contacts.

7. (C) *Summary:*

CAB presents a considerably smaller picture but much the same as, the more outspoken, Democratic oriented politicians in the US. They offer no present indication of subversive activities either among or around the US military. The actions of CAB, to date, have been strictly within the legal rights of US

citizens. They appear to be aware of the monitoring attempts by US authorities, but reactions to the monitoring present an air of mild discomfort or anger, and little more. The lack of enthusiasm by *FORWARD* to promote a continuing association with CAB, indicates that perhaps the attitude of CAB does not approach the slightly more radical degree of *FORWARD*.

For the commander:

HYRUM H. HUSKEY, Jr.,
CFT, MI, Operations Officer.

EXHIBIT R

"CONCERNED AMERICANS IN BERLIN (CAIB)"

(Notes for a briefing for LC Aaron, 2 Mar. 73)

Background: The "concerned Americans in Berlin (CAIB)" group was formed in August 1972, as the "Americans for McGovern in Berlin", to support the candidacy of Senator McGovern. Their activities appear to have been limited to organizational meetings, leaflet distribution, and announcements in local publications. It is not known if the group had the official backing of the Democratic party's overseas branch, but it is believed that there was some contact with the official party. It is known that Douglas Hillmer, one of the leaders in the group, received an autographed picture of Senator McGovern. Their attempts to organize the American community in West Berlin are not believed to be notably successful. Mrs. Hilllmer, for example, was puzzled over the lack of response from the military community. She generally attributed it to apathy among the Americans. The group came to our attention again with the December issue of *FORWARD*, the "GI underground newspaper" based in West Berlin. This issue, Military Defense Committee" in Heidelberg, described the organization as "a relevant political initiative in Berlin outside the realm of normal army dependent activities".

CAIB published in this issue a statement concerning its platform. Concerning this, *FORWARD* commented ". . . . we do agree on a lot of political demands that CAIB, a group which evolved out of the Americans for McGovern in Berlin, supports. Others appear to us to be quite two-sided and deserving our comment." In February 1973, CAIB, once again came to our attention when leaflets were distributed near US military installations inviting the reader to a conference on "G.I. rights and American civil liberties" to be held on 24 February 1973 at the Evangelische Studenten Gemeinde (ESG) heim near the Free University (FU) in the vicinity of Berlin Brigade HQS compound. The leaflet stated that "guest speakers from the American civil liberties union, lawyers military defense committee, and the Berlin military" would be present. During the same period, the group attempted to contact American students at the Free University (FU) by mail, using official FU franked envelopes. Enclosed within the envelope was a copy of the same leaflet mentioned before plus a short type written note inviting the reader to contact the group at the Kennedy Institute (FU), Lansstr. 5–9 Rm. 227. Interested parties could also contact the writer, Doug Hillmer, at 1 BLN 30, Elssholzstr. 8. In the note, Hillmer commented that the Akademisches Auslandsamt has the only mailing list of American students at the FU, but were not allowed to show it to any individual or group. So they had one of their (FU) workers address the group's letters to each student. According to Hillmer, it cost the group "30 dm a shot". On 13 February 1973, a letter was sent to the public information office, BLN BDE, requesting publicity for the conference on "GI rights and American civil liberties". This letter, containing essentially the same information as the leaflets, was signed by one Jay Brady for "concerned Americans in Berlin". The meeting was held on 24 Feb as scheduled and lasted from 1430 hrs to 1755 hrs. It was followed by an informal party at the same location from 2000 hrs to approximately 2400 hrs. Acting as "co-chairman" of the meeting was "Doug Hillmers" and "Chris Spitzel" (Phonetic).

Approximately 50 people were in attendance of which, approximately 15 may have been U.S. military personnel. Of the latter, two identified themselves as members of the U.S. Army. The meeting began with some brief background remarks by Hillmer concerning the background of their organization. Then, he introduced Howard J. De Hike Jr., a lawyer of the Lawyers Military Defense Committee (LMDC), located in Heidelberg. De Hike is an associate of Robert Rivkin also of the Heidelberg office and author of two books concerning military

justice. De Hike provided a background of the LMDC and a description of the military justice system. Following his presentation, a few brief remarks were made by a representative of the "Union of American Exiles in Britain" who described the activities of his group. Following this, two American soldiers, identified as SP4 David Wolter and Sgt. William L. Beall, both of Special Troops, HHC, BLN BDE, Andrews Barracks, presented a description of their misadventures with the Army. Wolter, who had two previous "Art. 15s" stated that he was to go to trial the following Monday for assault. Further, that he was to be to go to trial the following Monday for assault. Further, that he was to be defended by De Hike. During a question-answer period following, in response to a question as to what the civilians could do, the audience was urged to attend the court martial, presumably to influence the court. (The turn out for the trial however, was very poor.) During the question-answer period, an unidentified black male, believed to be John Henry Clemons, a former SP5 assigned to the same company as Wolter and Beall, but recently discharged, took the floor and delivered an emotional monologue concerning his problems in the Army.

It is believed that there are contacts with *Forward*, but to what extent cannot now be ascertained. Those ties are assumed because there was the description in *Forward*'s December issue and there were members of the *Forward* staff present during the 24 February meeting.

Further, an intercept in January implied some contact between Hanfred Hehtschel, the individual usually listed as responsible for *Forward*, and members of the McGovern group or CAIB.

Goals: In the December 1972 issue of the Berlin based "GI Underground Newspaper", the CAIB issued a statement of its goals:

1. CAIB supports the platform of the Democratic Party as adopted 11 July 1972 in Miami, including:

A. Immediate and complete withdrawal from Indochina with return of all prisoners. An end to the use of military power as a substitute for economic and diplomatic initiatives.

B. First priority for the citizen rather than for big business per se through tax reforms with closing of loopholes for special interest groups. De-emphasis of the property tax.

C. Reform and simplification of the welfare system coupled with the right of every American to a job at a fair wage.

D. Greater Federal aid to schools, to assure every child an equal educational opportunity.

E. Work toward ending all forms of racial and sexual discrimination and upholding the right to privacy.

F. A system of national health insurance for all Americans.

2. In addition, CAIB supports:

A. Abortion as a right rather than a privilege.

B. In the tradition of Abraham Lincoln, amnesty for those whose consciences prohibited them from participating in the Vietnam war.

C. Abolition of the Electoral College, substituting a direct Presidential election, and reform of campaign practices.

3. CAIB is working on the following specific problems in Berlin:

A. Finding job opportunities for military dependents and civilians.

B. Endng housing discrimination by race and nationalty.

C. Assisting all Americans in Berlin, both military and nonmilitary, with the transition from American to European living. This includes services such as arranging German tutors, a food cooperative, and general orientation.

During the meeting of 24 February, the goals as stated by Hillmer appeared to be somewhat vague. He did state that they were interested in working on a program to eliminate housing discrimination in West Berlin and there were some brief remarks concerning seeking official status under the overseas branch of the democratic party. Based on conversation with Mrs. Hillmer, it is possible that the continuation of the group after the election was largely based on "social" rather than "political" reasons. The active members are nearly all non-military or non--U.S. Government sponsored and therefore, cut off from the predominantly military/government community. The CAIB membership, made up of individuals largely on their own in a foreign environment appear to be seeking friends of a common background, interests, and problems.

Known names associated with CAIB: According to Mrs. Hillmer, there are only about eight active members. She did not know most of those who attended the 24 February meeting. Personalities identified with CAIB are as follows:

1. Hillmer, Douglas—apparent leader.

2. Brady, James Jay.
3. Spitzel, Chris—(phonetic)—Co-chairman with Hillmer during the 24 February meeting.
4. Hillmer, Fnu—wife of Douglas Hillmer.
5. Rosenblum, Ellen—participant during 24 February meeting. Also attended trial of Wolter.
6. Klakow, Joan—attended trial of Wolter.
7. Zagarell, Allen—attended trial of Wolter.
8. Zagarell, Sandra—attended trial of Wolter.
9. Meyfarth, Margie—attended trial of Wolter.
10. Wolter, David, Sp4, 568–80–3525, Sp Trops, HHC, Bln Bds, Andrews Barracks.
11. Wolter, Mark, brother of David Wolter, civilian residing in W. Berlin.
12. Beall, William L., Sgt., 285–46–4218, HHC, Bln Bdo, Andrews Barracks.
13. Clemons, John Henry, formerly SP5, 141–36–3813, HHC, Bln Bdo.
14. De Nike, Howard J.—Lawyers Military Defense Committee representative at 24 February meeting and lawyer for Wolter.
15. Wheeler, Roger—a member of the airforce, who according to Mrs. Hillmer is due for discharge after which he plans to remain in Berlin.

It was noted that during the meeting of 24 February, there was no particular attempt to meet the GI's or solicit their support. At one point, a sheet was passed around so that a mailing list could be started. Most of the GI's, however, refrained from signing.

EXHIBIT 16

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 310–74

BERLIN DEMOCRATIC CLUB, *et al.*, PLAINTIFFS,

v.

JAMES R. SCHLESINGER, *et al.*, DEFENDANTS

PLAINTIFFS' EXHIBIT AA

DEPARTMENT OF THE ARMY,
527TH MILITARY INTELLIGENCE BATTALION,
66TH MILITARY INTELLIGENCE GROUP,
APO 09227, June 15, 1974.

AEUMI-K-S

Subject: Semi-annual update, external factors report (U) Heidelberg (MV 7873), Baden-Wuerttemberg.

1. (U) *Unit identification*: All US Army units in the vicinity of Heidelberg.
2. (U) *General*: No change
3. (U) *Area of interest*:

(*a*) General: No change

(*b*) Specific: Changed to read as follows: This External Factors Report (EFR) specifically pertains to Heidelberg the following cities and towns within a 15 km radius of Heidelberg:

(1) Schwetzingen (MV 6870)
(2) Oftersheim (MV 6968)
(3) Sandhausen (MV 7565)
(4) Nussloch (MV 7763)
(5) Neckargemuend (MV 8471)
(6) Ziegelhausen (MV 8274)

Heidelberg is attached as Inclosure 7.

(*b*) Organizations: Changed as follows:

(9) Fight Back (FTA): So much as reads "The organizers of Fight Back and those responsible. . . ." through ". . . using *FighT bAck* to convey the communist line to the soldier." is superseded by the following: "Organizers of *FighT bAck* are leftist oriented, and most do not hesitate to admit to being Marxist/Leninists." The last sentence which reads "Should any of the persons mentioned above. . . ." is deleted.

(15) Lawyers Military Defense Committee (LMDC): This subparagraph is deleted.

(*c*) Intelligence: Changed as follows:

DEPARTMENT OF THE ARMY,
527TH MILITARY INTELLIGENCE BATTALION,
66TH MILITARY INTELLIGENCE GROUP,
APO 09227, December 10, 1973.

AEUMI–R–S

Subject: External Factors Report (U) Heidelberg (MV 7873), Baden-Wuerttemberg.

1. (U) *Unit Identification:*

2. (U) *General:* This External Factors Report (EFR) lists all known current security threats or possible security threats for use by the commander of the above unit in estimating the threat of the security of his unit and personnel. The fact that security hazards exist within the area in no way indicates a lack of proper security measures by the local commander, but rather, insures that the local commander has a current assessment of the security situation in proximity to his installation. This report is forwarded to various higher headquarters so that those headquarters may insure that adequate counterintelligence coverage of security threats is furnished the local commander. These reports should not be confused with counterintelligence survey and inspection reports which are the management tools provided to insure that the local commander complies with established security policies and procedures.

(*a*) Because of the propensity of individuals and groups to take up causes related to their national or political beliefs which adversely

* * * * * * *

(9) Fight Back (FTA): The Fight Back organization, with its base in Heidelberg, first surfaced in August 1972. It is the successor to the now defunct Heidelberg Liberation Front. The stated aim of Fight Back is to keep "GI's" informed of their rights and to assist soldiers in obtaining their civil rights. The news organ of Fight Back is *FighT bAck* (FTA), a publication that is allegedly by and for "GI's." However, soldiers do not author all of the articles that appear in the paper, nor do soldiers become involved in the printing or the financial matters of the paper. *FighT bAck* is professionally printed and not the normal mimeographed underground newspaper, that is put together by a group of soldiers. *FighT bAck* is published monthly in approximately 5,000 copies per printing. Copies are mailed to soldiers for distribution. Members of Fight Back have been instructed to leave papers in snack bars, orderly rooms and other common-use troop areas. This is done to avoid penalties for distributing unauthorized publications on post. The newspaper is also distributed outside casernes. This type of distribution is handled by personnel other than soldiers such as the organizers of Fight Back or German students, who belong to left-wing organizations at the University of Heidelberg such as the AStA and Spartakus (see subparagraph (22), below). While the publishers of *FighT bAck* cannot legally charge for their paper, they do solicit contributions. They appear to be sufficiently successful to keep the publication going. There are further indications that not all the contributions find their way to the publisher. It appears that some of the organizers may be keeping the contributions for their own use. No soldier who is involved with Fight Back is permitted by the organization to handle the contributions. The organizers of Fight Back and those responsible for the publication of *FighT bAck* are:

(*a*) Karen S. Bixler, U.S. citizen, allegedly a student at the University of Heidelberg. Bixler has no official status with U.S. Forces in Europe.

(*b*) Carolyn Stevens, U.S. citizen. Stevens has taught University of Maryland courses in the Heidelberg area.

(*c*) Anna Heath aka Leszczynka, British citizen of Polish extraction. She obtained her British citizenship through marriage. Heath is a student at the University of Heidelberg.

(*d*) Linda Lucas aka Huley, U.S. citizen. Lucas states she is on vacation in Europe. She also has stated that she is a member of the Progressive Labor Party in the U.S.

(*e*) Helga Kramer, U.S. citizen, a close friend of Lucas and also a member of the Progressive Labor Party.

All of the above individuals are extremely left-wing oriented and generally espouse the Marxist/Leninist line. They have even gone so far as to discuss the

possibility of using *FighT bAck* to convey the communist line to the soldier. Fight Back has been holding monthly meetings since its inception.

Until September 1973 these meetings always were held in Heidelberg. In September, meetings were held in Mannheim and Nuernberg. The October and November meetings were held in Kaiserslautern. Previously, meetings were held to produce articles for the paper, but since September, meetings have been held for organizational purposes. There does not appear to be any further effort to maintain an appearance of soldier participation in the preparation of the newspaper. Current goals of the leadership of Fight Back are to organize soldiers on a local level. Subjects of discussion center around allegations of racism and sexism in the U.S. Army and failure of the Modern Volunteer Army. Using these themes, Fight Back hopes to form local chapters and develop a united front among soldiers to fight against real or imagined infringements on their civil rights. To date, these efforts of establishing local chapters have not been particularly successful, but it can be anticipated that these efforts will continue. Every area where troops are assigned is a potential target for Fight Back. Fight Back presents itself as being against the use of drugs; however, there are indications that the leadership has at least experimented in drugs and has turned a blind eye on drug users who attend their meetings. On the surface, Fight Back is little more than a nuisance organization controlled by a small nucleus of misguided individuals, who are carrying out personal vendettas against the U.S. Army at the expense of soldiers who naively become involved. However, the leadership of Fight Back periodically publishes a questionnaire or asks questions, which on the surface appear to support their claims of fighting against racism and sexism. The following are some examples of their questioning: "What is the installation mission?" "What are the armaments?" "What are the names of the commanders?" This type of information is allegedly gathered to support their claims; and the soldier is told that his answers will be used to prepare articles for their paper. To date, if this information has been provided, it has never appeared in the *FighT bAck* publication. Should any of the persons mentioned above or any person who is believed to be a representative of Fight Back appear in a unit area, their presence should be reported immediately to the nearest U.S. Military Intelligence (MI) office.

(15) Lawyers Military Defense Committee (LMDC): The LMDC is an organization located at 7 Maerzgasse, Heidelberg. LMDC first arrived in the FRG in the summer of 1972. While it is not a subversive organization in itself, being nominally recognized by the American Civil Liberties Union (ACLU), the current LMDC attorneys have aligned themselves with the leadership of Fight Back and other known anti-US Army/Government individuals. LMDC's stated purpose is to defend all members of the military whose civil rights are being usurped. LMDC will not defend anyone charged with purely criminal acts. While LMDC does not charge for its services, it does put pressure on the soldiers it defends to contribute money. It has further been noted that LMDC defends soldiers when it believes that charges resulted from racial prejudice or when it believes that the charges can be construed to be in violation of an individual's civil rights. There are instance noted where LMDC has withdrawn from cases when it became evident that they had no case or there would be no press coverage. LMDC counsels soldiers not to accept punishment under Article 15 of the Uniform Code of Military Justice under any circumstances and not to accept trial by Summary Court. As a result, there have been instances where young soldiers who followed this advice found themselves without an attorney when it became evident that their case would be lost, or that it would not draw publicity. LMDC has further become involved with the organization CARE. LMDC provided counsel and advise when CARE was organized. LMDC initially was composed of two attorneys, Howard DeNike and Robert Rivkin. In August 1973, DeNike returned to the US, leaving only Rivkin. LMDC uses the leadership of Fight Back as advisors and consultants. It can be certain that when a soldier is defended by LMDC, there will be news media coverage of any trial that results.

Appendix K

NEW LEFT NOTES—PHILADELPHIA, SEPTEMBER 16, 1970, EDITION NO. 1

This newsletter will be produced at irregular intervals as needed to keep those persons dealing with New Left problems up to date in an informal way. It is not a serial and is considered an informal routing slip. It should be given the security afforded a Bureau serial, classified confidential, but may be destroyed when original purpose is served.

The New Left conference at SOG 9/10–11/70 produced some comments:

In disseminating reports recommending for the SI it is preferable to designate and disseminate to Secret Service immediately and put the FD–376 (the buck slip to Secret Service) on the second Bureau copy.

There was a pretty general concensus that more interviews with these subjects and hangers-on are in order for plenty of reasons, chief of which are it will enhance the paranoia endemic in these circles and will further serve to get the point across there is an FBI Agent behind every mailbox. In addition, some will be overcome by the overwhelming personalities of the contacting agent and volunteer to tell all—perhaps on a continuing basis. The Director has okayed PSI's and SI's age 18 to 21. We have been blocked off from this critical age group in the past. Let us take advantage of this opportunity.

In payments to information, if the *total* of services and expenses to an informant is less than $300 in a lump sum payment or per month, our request for such payment is handled within division 5. If the lump sum payment or monthly authorization is $300 or more, it must be approached on a much higher level. *Note:* If an informant is to travel outside our division and we initially go in and request expense payment of less than $300, it can be handled simply while the services payment and be requested later based on what he has produced.

J. O'Connor.

Exhibit 17

SAC, San Francisco 5/11/70

Director, FBI

COUNTERINTELLIGENCE AND SPECIAL OPERATIONS
(RESEARCH SECTION)

The Bureau would like to offer for your considera
a proposal for a disruptive-disinformation operation target
against the national office of the Black Panther Party (BPP
This proposal is not intended to be all inclusive or bindin
in any of its various phases, but only is a guide for the
suggested action. You are encouraged to submit recommendat
relating to revisions or innovations of the proposal.

1. The operation would be effected through close
coordination on a high level with the Oakland or San Franci
Police Department.

2. Xerox copies of true documents, documents sub
incorporating false information, and entirely fabricated doc
would be periodically anonymously mailed to the residence o
key Panther leader. These documents would be on the stati
and in the form used by the police department or by the FBI
disseminating information to the police. FBI documents, wh
used, would contain police routing or data received notati
clearly indicating they had been pilfered from police file

3. An attempt would be made to give the Panther
recipient the impression the documents were stolen from pol
files by a disgruntled police employee sympathetic to the
Panthers. After initial mailings, brief notes by the alle
disgruntled employee would be included with the mailed doc
These notes would indicate the motive and sympathy of the
employee, his bitterness against his department, and possi
a request for money.

4. Depending on developments, at a propitious ti
consideration would be given to establishing a [redacted] office
or other suitable "drop" address for the use of the alleg
disgruntled employee to receive responses, funds, and/or
specifications relating to the documents from the Panthers.

Letter to SAC, San Francisco
RE: COUNTERINTELLIGENCE AND SPECIAL OPERATIONS

5. Although the operation may not require inclus
of a live source to represent the disgruntled employee, cir
stances might warrant the use of such a source for face-to-
meetings with the Panthers. During early stages of the ope
an effort should be made to locate and brief a suitable pol
employee to play the role of the alleged disgruntled employ

6. A wide variety of alleged authentic police or
FBI material could be carefully selected or prepared for
furnishing to the Panthers. Reports, blind memoranda, LHMs
and other alleged police or FBI documents could be prepare
pinpointing Panthers as police or FBI informants; ridiculi
or discrediting Panther leaders through their ineptness or
personal escapades; espousing personal philosophies and pr
factionalism among BPP members; indicating electronic cove
where none exists; outlining fictitious plans for police ra
or other counteractions; revealing misuse or misappropriat
of Panther funds; pointing out instances of political disc
tation; etc. The nature of the disruptive material and di
formation "leaked" would only be limited by the collection
ability of your sources and the need to insure the protect
of their security.

Effective implementation of this proposal logica
could not help but disrupt and confuse Panther activities.
Even if they were to suspect FBI or police involvement, th
would be unable to ignore factual material brought to thei
attention through this channel. The operation would affor
us a continuing means to furnish the Panther leadership th
information which is to our interest that they know and
disinformation which, in their interest, they may not ignore.

Although this proposal is a relatively simple
technique, it has been applied with exceptional results in
another area of intelligence interest where the target was
far greater sophistication. The Bureau believes with care
planning this technique has excellent long-range potential
to disrupt and curtail Panther activity.

Letter to SAC, San Francisco
RE: COUNTERINTELLIGENCE AND SPECIAL OPERATIONS

[redacted]

San Francisco is requested to submit comments and recommendations relating to the implementation of this prog

Copies of this letter have been designated for Los Angeles for background and information purposes. Any suggestion Los Angeles may have for strengthening or furthe implementing the technique will be appreciated.

SAC, San Francisco 12/24/70

Director, FBI

Re San airtel 12/7/70 captioned "Counterintelligence and Special Operations," and previous correspondence under the counterintelligence caption, outlining a proposed disruptive technique to be applied against [redacted] leader/ [redacted] with the objective of neutralizing the [redacted]

Recent information indicates [redacted] has broken with the [redacted] organization and is in the process of forming a new group. For this reason, and because of the expanding complexities of the proposed technique, no further action should be taken on this suggested disruptive technique.

REFERENCE OR OFFICE SYMBOL: AEUTMI-K-DCS

SUBJECT: Operational Lead Sheet (U)

TO: INTELLIGENCE FO

FROM: Commanding Officer
52nd MI Battalion
ATTN: AEUTMI-K-DCS
APO 09227

DATE: 27 JUN 73

CMTI

SUBJECT: Thomas SCHNEIDER (C)

SUSPENSE DATE: 6 Jul 73

13 June 1926; Vienna, Austria

NR. COPIES REQUIRED:

a. Final 3w and 1g XXXXX

b. Draft _____

Office of Origin: AEUTMI-K-LCS

(C) Thru Police checks and LFV Liaison, obtain sample(s) of SUBJECT'S handwriting and British signature. Conduct check of MVA/AMA for MIS application for temporary resident Permit or other official papers which would bear MIS written signature.

(U) ARs and Exhibits will be forwarded this battalion NLT 6 Jul 73. Final typed format with three (3) white copies and one (1) green copy is required.

CLASSIFIED BY: 66th MI Cdg 381-1
EXEMPT FR GDS OF EXO 11652
EXEMPTION CATEGORY 2
DECLASSIFY ON: N/A

DAVID C. VALES, MAJ, (AC-I), Operations Officer

Page 1 of 1

DA FORM 2496-1 PREVIOUS EDITIONS IN STOCK WILL CONTINUE TO BE USED UNTIL EXHAUSTED. SUPERSEDES DA FORM 2496-1, 1 JAN 72, WHICH WILL BE ISSUED AND USED UNTIL EXHAUSTED OR USED SOONER EXHAUSTED.

CONFIDENTIAL

OPLAN 2-73
References: Letter, 66th MIG, subject: Concept of Operations. re: BR-262. OPLAN No: OP(CS)HFO-527-1-73.

3. (C) *Execution:*

(*a*) Phase I: Kalsruhe Field Office provides economy accommodation address.
(*b*) Phase II: (1) Initial letter will be posted thru German mail from GI from Karlsruhe area to BR-262 claiming interest in organizing dissident GIs in area but claiming no experience. GI will express fear of discovery by authorities and use this as an excuse for being discreet about his identity or meeting known dissidents. Letter will request reply from BR-262 with suggestions and aid.

Phase III: If BR-262 reply to the letter, attempts will be made thru audit corresp. to:

(1) enticed BR-262 to make trip(s) to meet GI taking time and costing money.

(2) BR-262 can be enticed into making long distance phone call, numbers prov in corresp will be obtained from local phone books.

(3) BR-262 can be enticed into sending literature which might be exploited by USI and costing him money.

(4) BR-262 can be given misleading or false information concerning events and situations in Karlsruhe which if he disseminates, will result in his embarrassment.

Mr. SHATTUCK. Thank you, Mr. Chairman.

There are three major areas that we would like to cover in the relatively short time that we have. Those areas are first, the surveillance techniques that we have discovered in the litigation in which we are representing people who have been the subject of these techniques, surveillance techniques used specifically by the FBI, the Secret Service, Military Intelligence, and to the best of our knowledge, by other Government agencies not specifically referred to in these exhibits.

Second, we will discuss the recordkeeping and record dissemination practices which we have come to discover—recordkeeping based on the fruits of the surveillance in question.

And third, to the extent that time permits, we will discuss what we have learned are the purposes of some of the surveillance and the effect that it has had on the people whom we have been representing.

The limits of the subject that we will be discussing through these exhibits is surveillance conducted in noncriminal investigations where no judicial control or any other form of warrant procedure has been utilized. Now, by defining the subject in this way, we do not mean to suggest that the warrant procedure, which appears to be at the core of H.R. 214, is necessarily the answer to many of the abuses that we have come to know.

However, the most abusive forms of surveillance that we have seen in our litigation are those that occur without any form of control, judicial or, I might add, legislative, and are really discretionary areas of surveillance.

The first area that I would like to turn to, unless there are questions on the introductory statement that we have submitted, is wiretapping—the most intrusive among the various surveillance techniques that we have seen. As we pointed out in our testimony in April of last year, wiretapping constitutes the most intensive form of investigation. It sweeps everyone who calls into a particular telephone or from it into its search, and it is, in that manner, very seriously questionable in constitutional terms, because it does not involve the seizure of particularized evidence, but rather the collection of everything within a particular time span.

Warrantless national security wiretapping, however, which is one subject of today's hearing, is even more intrusive, and we submit, based upon the evidence that we have seen in our litigation, is almost beyond control, because it has no judicial or warrant procedure. Two of the most striking examples of what we are talking about in the warrantless national security wiretap area are contained in exhibits 1 and 2.

Exhibit 1 is an affidavit executed by the former Attorney General, Mr. Saxbe, in March of this year, pertaining to a wiretap on which

several civil litigants in a case styled *Dellinger* v. *Mitchell* had been overheard. The plaintiffs had sought to obtain evidence of what kinds of conversations were seized in this wiretap, and they made a motion for discovery. A formal claim of executive privilege was asserted. I might say that there were three wiretaps at issue here, but the one I am particularly pointing the committee s attention to is one that went on for a period of 25 years, uninterruptedly, from November 1, 1942, to February 10, 1967. During that entire period of time, the tap was reauthorized only once, by former Attorney General Katzenbach in 1966, and the documents which pertain to the authorization and supposed continuing need for the wiretap number in total four, four documents over this period of 25 years, during which this wiretap was installed.

Now, the materials, of course, have not been obtained by the plaintiffs in this civil action, but what has been disclosed is the rather extraordinary fact that this wiretap was in place for 25 years. The justification that was asserted by the Attorney General in claiming executive privilege over the wiretap, which at the time that it was sought in discovery had been turned off for 7 years, was and I am reading now from paragraph 7 on page 6 of the Attorney General's affidavit, "The first of the aforesaid electronic surveillances was conducted to gather, on a long-range basis, national security information to meet a potential threat to the Nation's security resulting from the activities within the United States from an organization composed of citizens of the United States which was dominated by a foreign power, and which acts on behalf of that foreign power to advance its objectives."

Now, having read that far, one would have thought that that was the organization on which the wiretap was placed. However, it was not.

The following sentence reads "The subject of the surveillance," which is the 25-year tap, "was an organization whose activities were controlled by the aforesaid organization." So, the organization that was tapped was doubly removed, if you will, from the foreign power that was claimed to have been controlling another organization.

It is impossible for us to say anything more about this, but I think it raises a whole host of questions about the authorization, the continuation and the fruits of the surveillance that was conducted for 25 years. We would, for example, have no way of knowing whether there were prosecutive leads developed from information that was collected by the Justice Department as a result of this asserted intelligence gathering tap, a tap in place for 25 years. However, the fact that persons were, in fact, subsequently prosecuted would suggest that prosecutive information was gathered in that manner.

Now, in exhibit 2, a much more familiar case to the subcommittee, we have set forth in our second amended complaint in *Halperin* v. *Kissinger*, all of the information that is now known and in the public record with respect to the wiretap of Morton Halperin for 21 months by officials who were acting at the request of the White House. I do not think I will add anything to what we have previously testified about this wiretap. I think it highlights, to an obviously dramatic extent, but much more currently, what we were discussing with respect to the 25-year tap—a tap conducted for 21 months, only one

authorization, and a very vague assertion of the reason for the conduct of the tap, which was the claim that information of a security nature was leaking from the White House.

This wiretap was installed on Dr. Halperin's home telephone 3 days before there was an formal written authorization on the subject, and it was a very instrusive wiretap which continued for nearly 2 years and involved the secretion of documents in the White House so that the wiretap's existence would not be discovered in civil proceedings when requests were made to the FBI.

Now, the obvious question raised by these causes is, under what existing law is a national security tap "lawful", not the question of what the Congress might do in this area by way of legislation, but what is now "lawful."

In 1972, in the Supreme Court's decision in *United States* v. *United States District Court*, the Court held that a domestic security warrantless wiretap would violate the fourth amendment, and it left only one issue open expressly, and that issue is "whether a person with a significant connection with a foreign power" may be tapped without a warrant.

Following this decision, the Justice Department publicly stated before Congress, in testimony before Senator Kennedy's Administrative Practice Subcommitte, that it would very narrowly construe the open question in the Supreme Court decision. And in exhibit 6, we set forth the testimony of Deputy Assistant Attorney General Maroney who said:

> The Keith decision has suggested a standard of significant connection with a foreign power, its agents or agencies. We do not interpret this as meaning casual, unrelated contacts and communications with foreign governments or agencies thereof. We would not try to apply this standard without the presence of such factors as substantial financing, control by or active collaboration with a foreign government and agencies thereof in lawful activities directed against the government of the United States.

That assertion by the Justice Department, however, has repeatedly been overlooked in the litigation in which we have been involved, and in which the Government takes a much broader view of the open question, so-called, in the *Keith* case. We have submitted an affidavit of Attorney General Saxbe, exhibit 3, filed in the case that the chairman was describing earlier, *Jabara* v. *Kelley*. I must apologize for the marginal notes that appear throughout this affidavit. I received it in court on the day on which I was to argue whether this affidavit was sufficient to support a claim of executive privilege, and I had to make all of these notes. I am sorry that they were not taken out.

In any case, this affidavit was filed in connection with 13 wiretaps that were installed after the Supreme Court's decision in *Keith* in 1972, installed over a very short period of time in rapid succession, and on which my client, Mr. Jabara, was overheard on 40 times. There is a correction to be made in the schedule of exhibits where it says 50 times. Jabara has been overheard at least 40 times during the period from the initiation of these wiretaps to the present.

Now, these 13 wiretaps are described by the Attorney General as being:

> Deemed necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, or to obtain foreign intelligence information deemed essential to the security of the United States.

There is nothing in this affidavit which refers to any significant connection to a foreign power of the subject of the wiretap within the meaning of the *Keith* decision and the Justice Department's earlier explanation of that decision. And so whether or not the fourth amendment would invalidate these wiretaps, the Justice Department has taken two very different positions with respect to the power that it claims it continues to have following the Supreme Court's decision.

One of the reasons why—and this was raised in the earlier session this morning—one of the reasons why it seems to me that the Government is so unwilling to disclose the factual basis for its asserted foreign security or domestic security wiretapping is that in the few cases in which we have obtained information that we were seeking with respect to what was intercepted and what the purpose of a tap was, the facts simply do not support a claim that foreign security or domestic security, or basically any other kind of security justifying a violation of the fourth amendment was at issue. In this connection I would like to direct your attention to exhibit 4, in which information pertaining to wiretaps conducted without warrant by the U.S. Army in Germany is displayed.

In the appendices to the affidavit of a former special agent of military intelligence, we are able to get a picture of the fruits of 6 days of wiretapping by the Army. And what we find is an extraordinary range of interceptions involving American attorneys defending GI's in court-martial proceedings, and reporters, both foreign and American, but principally American, including reporters for the New York Times and CBS News.

And in that respect I would direct your attention to the agent's notes at a page which appears approximately in the middle of the exhibit, where it says identifying data on individuals is spelled out.

John Sheahan is a reporter for CBS News in Bonn; Joanna Prym is a reporter for Overseas Weekly; Craig Whitney is a reporter for the New York Times in Bonn and Annette Broecker is a reporter for Reuters in Bonn.

These are all persons who apparently were overheard on this wiretap.

Now, at the back of exhibit 4, where there is an affidavit of Mark Schreiber, who is an American attorney in Germany, it also shows that the Army has denied intercepting the conversations of American lawyers in Germany and it has denied this, and subsequently been forced to admit that such interceptions took place. As a result of these admissions, the Army has been forced to dismiss the prosecution of a GI who spent 2 months in prison as a result of the withholding of the information about the overhearing of his attorney. And this was after the highest Army intelligence officer in Germany twice executed affidavits that denied that there were such wiretaps in existence. These are the affidavits of Thomas W. Bowen, which appear toward the back of exhibit number 4.

Mr. DRINAN. Mr. Chairman, would the witness yield at that point? Did he use the familiar contention that this is not really a wiretap because one party has consented to it?

Mr. SHATTUCK. No, there is no indication of that at all. The only justification for not disclosing the tap initially is that the Army claims that there were "no records" on the wiretap at the time that the affidavits of General Bowen were executed, and in that respect, I

would address your attention, just to corroborate what I am saying, to page 1 of the memorandum for Colonel Carl G. Davaz, dated November 22, 1974, which states at the bottom of the page, the bottom paragraph, "at the time the affidavit was submitted to the court, Headquarters, United States Army, Europe, had no record of this intercepted conversation."

Now, why they had no record they do not tell us, but that apparently is an attempt to appear to be in good faith. On the other hand, I think it demonstrates once again the obtrusiveness and the lack of control over this entire process.

Now, I would like to yield to my colleague, Professor Friedman, to make some comments about the materials that we have submitted on the wiretap question, and then I would like to move on to our second area.

Mr. FRIEDMAN. Thank you, Mr. Chairman.

Mr. KASTENMEIER. Mr. Friedman.

Mr. FRIEDMAN. I think there are a number of conclusions that we have drawn from some of these exhibits, from some of the materials which you have in front of you. I know last year, when the Justice Department witnesses were here, they defended the continuation of the present system essentially on three grounds. They said: (1) You should depend on our sense of self-restraint; (2) they said there is Justice Department oversight over the FBI, so that they have their own internal way of dealing with these issues; and (3) they say it is necessary for national security and foreign intelligence.

And I think some of these exhibits really demolish those kinds of arguments. I mean, the sense of self-restraint that the FBI had is certainly not shown by a wiretap which went on for 25 years.

Now, whatever the original cause for it—and the fourth amendment talks about the issuance of a warrant upon probable cause, specifically screening the things to be tested—whatever the reason was in 1942, it is inconceivable that it would continue until 1967, when people grew up, and died, and had babies and this wiretap continued all of this time.

Second: There was certainly no Justice Department oversight if the original authorization by Francis Biddle in 1942 was thought to justify the continuation of the tap for 25 years until the Justice Department again got into the picture in 1965, and it was only in 1967, when Ramsey Clark came in and ordered a complete review of the existing national security wiretaps in operation that these taps went off. So, the FBI really was running its own show for this entire period.

Third: This question about national security and foreign intelligence, which Representative Wiggins discussed before, the courts have said that if Congress does not act at all, then the executive power will be given its broadest interpretation. So, if Congress does nothing, and you rely on the courts, the courts are going to say because Congress has done nothing, we will assume that they want the Executive power to extend as far as possible. So, it really is incumbent upon Congress to say something about the exercise of this power.

Mr. DRINAN. Mr. Chairman? Professor Friedman, would you go back on the conclusion that you made here before this very committee

on April 26 of 1974? At that time, you were asked: Does the *Keith* decision mean anything as far as the FBI or Department of Justice is concerned, the *Keith* decision in 1972?

At that time, you felt it was almost inoperative. I wonder how you feel now? Is there more evidence of that, or is there some indication that the Department of Justice says that the *Keith* decision must mean something?

Mr. FRIEDMAN. Well, as Mr. Shattuck just said, the interpretation which the Justice Department has put on foreign intelligence is now as expansive as anything they ever said about national security. For example, in the *Halperin* case, they say well, we are really gathering foreign intelligence if we wiretap a leaker of information, or a newsman who gets this information, because if a foreign power reads the newspaper, he is gathering information, he is gathering intelligence about the United States, about the U.S. operation. Therefore, under the foreign intelligence exception, it is permissible for us to wiretap people inside of the Government, the newsmen that they speak to, and presumably, whoever the newsman speaks to, because that way we are cutting off a leak of information to a foreign power.

Second, in the *Jewish Defense League* case, the *JDL* case, the Government has said it is OK to wiretap this particular group which, as you know, was harassing foreign diplomats in New York, because what they do has an impact on a foreign power, so what they say is that in both those cases we now have a new magic term, "foreign intelligence" and that justifies about everything that they could do before under the general rubic of national security.

Mr. DRINAN. Under the administration of Mr. Saxbe, do you see any erosion of that, or would you say in his administration, the *Keith* decision has not restrained them in any way?

Mr. FRIEDMAN. I agree 100 percent. You see, it was not restrained. After the *Keith* decision was handed down, they wiretapped a Detroit lawyer, as Mr. Shattuck has described, 13 separate wiretaps, and the way it happened is interesting.

What happens is that one tap is put on, and then it immediately—A talks to B, they find something interesting, they immediately put a tap on B, and he talks to C. He says something interesting, and these wiretaps mushroom, so that in a period of just a few days, in the *Jabara* case, there were a dozen wiretaps which were put on just because one person, they found someone that was interesting, and then someone just led to the other. And there was certainly no sense of self-restraint.

There appears to be no sense in the Justice Department that the *Keith* case has restrained it from doing exactly what it was doing in the past.

Mr. DRINAN. Would either of you say that the bill proposed by Senator Mathias offers any hope for this situation?

Mr. FRIEDMAN. Well, to the extent that the Government must then prove that a crime is about to be committed, that is of some help. I know we had a dialog about this last year, Father Drinan. We, of course, in our starting position are with you, there should be no wiretaps at all, even under title III. But, every time the Government must justify something that it does by saying there is a crime that has been committed, it must go before a judge in order to prove this, and per-

haps that is some restraint. I do not think that is the whole answer, but, you know, almost anything is better than the anarchy that rules now in terms of the kinds of wiretaps that they have been able to secure.

Mr. DRINAN. Thank you very much.

Mr. FRIEDMAN. And the other point I want to make about this is that the FBI is making all kinds of political judgments here. We always think of the police or the FBI as politically neutral, but unfortunately they are not. They are making their own judgments about what is politics and what is crime, and those judgments are often very bad, very bad judgments.

For example, we had a meeting last year with Clarence Kelly, and all of his top officials, and we asked them directly, what about the Socialist Workers, Party, how do you continue wiretaps and follow these people around, and a top official in the domestic intelligence division told us, well, we consider the Socialist Workers Party part of the worldwide Communist conspiracy. Now, that was within the last year, last spring.

And if the FBI is making that kind of a judgment about politics and crime, I do not think we can depend on them to make the careful distinctions which the Supreme Court has said are necessary in this area.

The FBI has a great deal of trouble distinguishing legitimate political activity from crime. And as I said, we cannot rely on their labels of national security, we cannot rely on the foreign intelligence exception because the final result is this massive invasion of the first, fourth, and sixth amendment rights.

Mr. KASTENMEIER. I would like to interrupt to yield to the gentleman from California, although I would request my colleagues, to the extent possible, to permit the witnesses to conclude their statement. You will have time for interrogatories later on.

Mr. DANIELSON. I have only been here a short while, for which I apologize. But, I have several conflicts this morning.

But you have brought out, even while I have been here, some very valid criticisms on the wiretapping, surveillance procedures, which have been in effect.

I would like to know if you can give us some affirmative suggestions as to how can the agencies of our Government meet their responsibilities of being informed in foreign intelligence fields and the like. What affirmative recommendations can you give us as to how they could acquire essential information without involving our constitutional or statutory restraints?

Mr. SHATTUCK. Congressman, I think as a quick answer to that question, I would refer back to the comment by Senator Mathias that was made, I think, prior to your arrival in the room. Senator Mathias said, and I think we would agree, that to the extent that a warrant procedure is to be used in wiretapping, it is likely that it would be possible to make the kind of showing of probable cause with respect to the necessity for a national security wiretap which must be made to conduct a wiretap in a criminal investigation.

In other words, you could probably make a demonstration of probable cause in what is now known as the foreign security or foreign intelligence field that would be similar to the kind of demonstration

that you would make with respect to probable cause in the domestic field.

And in that regard, I would point out that in title III, the crimes that are specified now are virtually all encompassing. The national security crimes almost outnumber the ordinary crimes, and why it is not possible for the Justice Department to proceed under title III is something that they have never adequately answered.

Mr. DANIELSON. Thank you. I am just concerned about balancing of responsibilities here, and I thank you for your comments. I am sure we have a long way to go on this.

Mr. KASTENMEIER. I think you were still discussing wiretapping, and you had not really gotten beyond that point.

Mr. FRIEDMAN. I have just one last comment, and this relates to the role of the telephone company. The fact of the matter is that the FBI could not engage in this kind of surveillance it does without the active assistance and cooperation of the telephone company, which in the past was secured even without a written request.

An FBI agent would come down and ask the telephone company to cooperate, and they would show them the terminal points, and the FBI would run a line from the telephone company into its own headquarters and then tap away as much as it wanted. Now, lately, the telephone company, on its own initiative, has required a written authorization, and it has required the FBI to pay for a leased line from the terminal point to terminal lines to its headquarters, so at least it has some record.

But, as you deal with legislation in this area, I think the role of the telephone company is absolutely crucial and if there are penalties directed against the telephone company for not following specified procedures, I think you are going to find that their lawyers are going to insist that the letter of the law be followed so that there is a very practical way of cutting in and getting some control on it.

I think the legislation should very pointedly address itself to the role of the telephone company.

Mr. SHATTUCK. Mr. Chairman, we will move on to the second set of exhibits and area of our testimony. Before we do that, I would just like to make one observation about Professor Friedman's answer to Congressman Drinan's question about whether *Keith* is, in fact, effective.

Without suggesting that it is, or disagreeing with Professor Friedman, I would like to direct the subcommittee's attention to the Saxbe affidavit in the *Jabara* case, which indicates that over a period of 8 months, from I believe it was September of 1972 until his resignation, Attorney General Kleindienst 10 times ordered the installation of wiretaps at issue there, 10 separate wiretaps; and in a period of 6 months that he was in office, former Attorney General Richardson authorized only one such tap; and in the period of 6 months to the time the affidavit was executed, former Attorney General Saxbe authorized only two.

Now, I think this demonstrates the subjectivity of the whole authorization process. It may reflect on the kinds of judgments that these three Attorneys General were making, but in any case, I think it demonstrates that certainly *Keith* is not effective in curtailing what ap-

pear to be at least on their face, domestic wiretaps, and it also shows that different Attorneys General apply very different standards.

The second major area in our testimony is private document and private information seizures, which are another technique of surveillance that we have come across in our litigation. All of these techniques, with the exception of one, are addressed in H.R. 214: bank records, telephone toll records, mail interceptions, credit information. And the one area that we would like to briefly touch on that is not addressed in H.R. 214 is the acquisition of information by informants and undercover agents.

With respect to the seizure of private documents or government access to private documents, I think the principal reason why subpenas are now not generally issued by the investigative agencies and specifically the FBI, the Secret Service and the Army Intelligence, in our experience, is first that access is very easy. It is extremely easy, apparently, for someone clothed with Federal authority, to walk into a bank or establish a relationship with a bank and obtain information about accounts in that bank.

It is similarly easy for agents to establish close relationships with credit reporting companies and with telephone companies, and obviously with the post office, with respect to mail covers, so it is not necessary to execute, to issue a subpena.

And second, even if it were necessary, subpenas probably would not be issued in most of the cases that we are going to discuss, because no foundation could be laid for their issuance, since the information that is collected is the kind of information collected on a classic fishing expedition by a private attorney who does not know quite what he is looking for.

In the case of bank records, exhibits 7 and 12 give some of the facts. These bank records are apparently a favorite target of particularly the FBI, because they show so much about the way a person lives, and who his associates are, what he likes, what his dislikes are, what he is a member of, et cetera. And we find in the second and third pages of exhibit 7 a graphic illustration of the way bank records are obtained.

Here we have a special agent of the FBI going to the cashier of the Southeast National Bank in Chester, Pa., and asking to see records of the National Black Economic Development Conference, Muhammad Kenyatta, its Director, and Mary Kenyatta. These individuals and this organization are represented by us in a civil action against the FBI for collecting this kind of information. They have never been charged with any crime. They are active politically in the city of Philadelphia. There is no evidence that the FBI has offered that indicates that its investigation was anything other than a "security matter."

So, what we have here is a special agent going to the bank, he makes a notation that a new computer system for checking accounts has been instituted, and under this system all checks drawn on active checking accounts are recorded on microfilm, and available for review in the computer section. This, of course, is now required by the Bank Secrecy Act, and so the practice in 1970 of keeping the microfilm materials is now a Federal requirement.

The cashier of the bank, whose authority is unclear, except that apparently he has established a close relationship with the special

agent, is willing to make available for review the microfilms containing checks drawn on this account during the period covered by the statement, which in this case is a period of 3 months. And we find the kinds of checks that are of interest here, 15 to 20 checks drawn on this account for more than 3 months review. They involve payments for hospitalization—and by the way, we have crossed out the names of the persons to whom the checks were paid in order to protect their privacy; this was done by the plaintiffs in the case—membership in organizations, the Nat Turner Community Center and the list really just goes on.

And then we find photocopies of statements, and finally two checks which are almost illegible, but nevertheless demonstrate the actual photocopying of the checks. Then an affidavit attached to this exhibit of Robert N. Wall, a former special agent of the FBI, indicates that the system of access which is demonstrated in this exhibit was really institutionalized with respect to security investigations for the periods 1967 to 1970. Whether it continues to be, we have no information. But it was institutionalized in the Washington, D.C., field office of the FBI, which had developed relations with various officers and employees of banks in the area.

Special agent Wall indicates he had obtained the banking records of a variety of organizations whom he was investigating on security questions, all without legal process.

In Attorney's Jabara's case, there are a variety of forms of surveillances at issue. One of the facts that has been disclosed is that the FBI obtained access to at least one check that was paid to Mr. Jabara by one of his clients, and has all of the information recorded that relates to that transaction.

No subpena was issued in that case, and the FBI has admitted in interrogatories that it was not conducting a criminal investigation.

Mr. COHEN. Mr. Chairman, could I just interrupt to ask just one question in connection with this testimony?

Mr. KASTENMEIER. The gentleman from Maine.

Mr. COHEN. I was just wondering if the witness was aware of the fact that last year before this committee, the Deputy Director testified that in terms of dealing with attorneys, that a person who was the subject of surveillance, if he were to engage in a conversation with his attorney, that the wiretap would be, or the monitor would be turned off. This was an established policy on the part of the FBI, and I believe that case is totally contradictory to that.

Mr. KASTENMEIER. I gather the question is, have you, through experience, found that not to be the case?

Mr. SHATTUCK. It appears not to be the case in at least Mr. Jabara's litigation, where all or at least some of the interceptions we have reason to believe involve his communications with his clients.

The second area of private record access is telephone toll records, and we have offered exhibit 8, which has been obtained in discovery in a civil action where two journalists are seeking access to the White House to get passes to the White House and they have been denied press passes, and the FBI and the Secret Service files on them have been ordered by the court to be turned over to the plaintiffs. Telephone toll records appear to be very innocuous. They are really just a listing of the calls that were made over long-distance lines over a particular period, and

on first thinking about the subject, it would not appear that there would be much objection to access being obtained without legal process.

However, the amount of investigative activity that can be initiated as a result of obtaining these toll records is only limited by the willingness of the agent to go and follow up the sources and find out who all of these people who were called are and why the calls were made. It is almost tantamount to the wiretap procedure itself, and yet considerably easier to do.

I would analogize it to the mail cover as opposed to the opening of mail: it is a toll record as opposed to an actual wiretap. In exhibit 8, we see toll calls made during a 2-week period, where records were obtained without legal process by the Secret Service, of an underground newspaper, and the Yippie headquarters in Madison, Wis. Apparently, Mr. Forcade's activities as a Yippie and later as a Zippie have great interest to the FBI and the Secret Service, but I might add that he has never been convicted of any crime.

In this connection, this particular investigation here appears to be an attempt on the part of the Secret Service to find out Mr. Forcade's whereabouts through the toll record process.

Mr. DRINAN. Mr. Shattuck, would you discuss some of the collaboration between the Secret Service and the FBI? How did the Secret Service get to these alleged radicals in Madison. Why are they in this act?

Mr. SHATTUCK. Well, there is, to our knowledge, in any case—and again these judgments are always based on the litigation and we want to make sure that we are not making statements that we have no factual foundation for—there is very close collaboration between the Secret Service and the FBI on persons who are of interest to the Secret Service. Now, this particular investigation which involved access to toll records appears to have been entirely a Secret Service operation. There is no indication here, at least from the documents, that the FBI was involved.

However, the other materials that we have received in this litigation against the Secret Service involve many more FBI than Secret Service documents. And one of them we will get to shortly, which indicates FBI continuing surveillance of Mr. Forcade.

I would like to move on, in the interests of time, to the credit record area, exhibit 9. Again, this demonstrates the ease with which credit reports can be obtained by the FBI.

In this case, the credit records seem to be sort of a last resort for the investigator. If he does not have any other leads, and he is having trouble nailing down his subject, the local, friendly credit bureau will probably help him out, and that is exactly what happened in this case, where Mr. Forcade had begun publishing a paper called the Beach Blanket News in Pompano Beach, Fla., and it was being printed by an outfit called the Golden Rule Press.

The agent had been unable to obtain any information about the Golden Rule Press, but he did find out the name of someone, Ken Middleton, who was connected with the Press, and he initiated an inquiry with the credit bureau about Mr. Middleton. And Mr. Middleton was not then the subject of an investigation here, but all of this information in the bottom paragraph on page 2 of the exhibit about Mr. Middleton was obtained. The name of his wife, his address, that he

had been in the files of the credit bureau since 1967, and he was reported as being 43 years old, he had three dependents, his employment was listed as that of a foreman in the Universal Printing Co., verified in December 1968.

It also indicated that the owner of Universal Printing Co., was Roger Bechtel. Well, there are a whole variety of individuals drawn into this investigative report through credit records, and the report itself does not even relate to those individuals. No legal process or any other form of subpena had been issued to obtain the material.

The fourth area of private records is mail covers, and we have a variety of materials to offer on that subject in exhibit 10, the principal one of which is the case that you, Mr. Chairman, were mentioning earlier of the 16-year-old high school girl in New Jersey who had the misfortune of trying to write a school paper on the Socialist Workers Party and sent away for information about the Party. And a mail cover on the Party resulted in a full-field investigation of her and her family.

Now, this included, I might add, a check at the local credit bureau, because they were unable to find out very much about the family and the girl, except, again, by going to the last resort, the credit bureau, getting the names of her parents there and her father's employment and the like.

Mr. WIGGINS. Mr. Chairman, could I ask for a clarification?

Mr. KASTENMEIER. The gentleman from California.

Mr. WIGGINS. I am possibly confused, and you could help me if you could tell me what is meant by a mail cover.

Mr. SHATTUCK. I am sorry. A mail cover, as distinguished from the opening of mail, is the reading of the information on the outside of a letter that is addressed to a particular person who is the subject of the mail cover, and that would include the inside address of anyone who is writing to the person, and then in most instances, where the cover is being used as a way of investigating people associating with the person getting the mail, the investigation will then be initiated on that person.

And the fact that an investigation was initiated on just a random letter-writer to the Socialist Workers Party here would indicate, at least to me, that probably many such persons who wrote to the Socialist Workers Party were investigated as a result of the mail cover.

The mail opening, of course, is the inspection of the mail itself.

The mail cover issue in the *Patton* case was really not addressed on the merits by the district court, who decided that this particular girl was not an adequate representative of the class of persons writing to the Socialist Workers Party because she had received a full clearance by the FBI as a result of the investigation, and they had no further interest in her. This decision is on appeal right now. And we are pressing the issue that, in fact, such mail covers resulting in investigations of this kind are highly intrusive and have really blemished the reputation of the girl and caused considerable consternation when the investigation got underway.

I might add, though, that the district judge did order that all of the files that the FBI had collected on her as a result of the mail cover be expunged.

The actual opening of mail is something which we have offered some information and an exhibit, which I would particularly like to address your attention to. At the back of exhibit 10, a letter addressed to a so-called underground newspaper in Berlin, which came from the reference library of the College of South Carolina requesting information about and a subscription to this underground newspaper. This letter was intercepted, as apparently were many going to this newspaper, and opened by Army Intelligence, and photocopied, and it has been made available to us through Senator Weicker whose investigator obtained it.

The last subject in the area of information collection is undercover agents, and we have offered an exhibit with respect to this subject. And I do not know whether time permits going into it, but I would like to say at least that undercover agents, when they operate freely in political or religious or social organizations, involve the most intrusive and unpredictable kinds of information gathering, because what they obtain is almost always directly related to how involved they are in the organization and whether or not they can move the organization in a direction that it may not want to go, which is a question that certainly will not be addressed by the investigative agency in deciding to use the undercover agent.

We find in many cases that undercover agents are recruited when there is sort of a Sword of Damocles over their head and they are in trouble with the investigative agency.

For example, one investigative agency in Germany, we see on page 3 of the confidential document, that is in this exhibit, exhibit 11, "the source is interested in performing well for the U.S. Intelligence as this would show favorably on his record and somewhat overshadow his article 15." This was a serviceman who had been the subject of disciplinary proceedings and wanted to make good, so to speak, and was therefore willing to perform as an undercover man in a religious group that was the subject of investigation by military intelligence. All of this was without any form of warrant procedure or other kind of control from the outside.

And I think that I would like to give Professor Friedman an opportunity again to comment briefly on this subject before quickly moving to the last subject, which is the recordkeeping and dissemination.

Mr. Friedman. I think again I just would like to make a few brief comments about this kind of activity, the keeping of bank records, credit information, toll records, and informers. One problem is existing legislation does not prohibit the Government from engaging in this kind of activity and from retaining these kinds of records.

Now, the new Privacy Act of 1974 has an encouraging provision, section 552(a)(e)(7), which says that each agency that maintains a system of records shall maintain no record describing how any individual exercises rights guaranteed by the first amendment unless expressly authorized by statute or by the individual about whom the record is maintained, or unless pertinent to and within the scope of an authorized law enforcement activity.

So, presumably, Lori Patton, who was exercising her first amendment right to find out about the Socialist Workers Party, there should

be no records maintained about her, except the FBI has insisted what it is doing is a part of an authorized law enforcement activity: namely, maintaining cover on what they consider to be a criminal organization; namely, the Socialist Workers Party. It comes back to that kind of judgment all over again.

And second: The real danger is that these records stay in the Government. It is not like there is a piece of information which goes in and goes out. They are a permanent part of a man's file.

This material on Mr. Kenyatta, on who he wrote checks to, 5, 6 years ago, is part of his dossier, or whatever the FBI wants to call it—his file, his references. It stays there.

The toll records that Mr. Forcade makes, the comments they pick up in other areas, it is part of the Government record, since the FBI is exempt from the provisions of the Privacy Act that require an individual to have access to his records and can make comments on it. The FBI keeps this material here, and we now know Clarence Kelley says he cannot destroy it, because of the requirements of the National Archives Act, which says that Government records cannot be destroyed unless an archivist takes a look at them.

So, the danger is both in the scope of the materials collected, and the fact that it stays in the man's file and since existing legislation neither forbids the collecting of this information nor does it permit, we are told, the destruction of the information, when it does not serve a legitimate law enforcement activity, the kind of danger that exists, I think, can be illustrated not only by some of these cases, but what happened in the *Ellsberg* case. What happened there is how did they ever get to his psychiatrist to begin with? They went to his bank records, and a friendly bank teller there let the FBI look at his list of checks, and they found periodic checks made to a Dr. Fielding. And then they knew that Dr. Fielding was someone he frequented very often, and they went to Dr. Fielding, asked him questions which he refused to answer.

The material went back to Washington, and it was sent up to the White House, to the Plumbers. Then the Plumbers used the information gathered by the FBI through the bank examination, examination of the bank records, and that is why they were able to focus on Dr. Fielding as a good target for what they engaged in.

So again, we see this kind of mushrooming effect, where one piece of information leads to other information, and it is available there in FBI records. And there is not adequate control on its maintenance, and on its availability to other organs of Government who might misuse it.

Mr. DRINAN. Mr. Chairman, I have a point that I think is very relevant. It may not be new to you, but Mr. Silberman, the Deputy Attorney General, wrote to me January 27, 1975:

> Please be assured that it is the policy of this Department, including the FBI, that all requests for information relating to the counterintelligence program which are submitted under the Freedom of Information Act are being afforded prompt response.

Now, would you feel that this is something that could be further implemented or exploited if they admit that the counterintelligence program, and that is the subject of exhibit 17 here, that all of that

information is, in fact, available under the Freedom of Information Act, and maybe that could be analogized or could be stretched?

Mr. SHATTUCK. I would like to answer that, Congressman, if I may, because I think I have information that reflects on whether or not that is a fact. In one case, *Kenyatta* v. *Kelley*, we have had pending now, for approximately 6 months, discovery requests pertaining to whether or not these individuals were targets of Cointelpro. Repeatedly, we have been told that our requests are being given expedited consideration, et cetera, but nothing has been forthcoming.

And, of course, this is civil litigation where we have considerably more leverage than one would have if one were just a member of the public seeking access to information under the Freedom of Information Act.

I am not at all sanguine about whether or not we are going to find very much out about Cointelpro unless Congress really takes hold of this subject and tries to get this material out of the FBI. I get the distinct impression that the disclosures on Cointelpro are being very well managed, and that the real facts that relate to people like Kenyatta are just not going to come out.

Mr. DRINAN. As you may know, another subcommittee of this Judiciary Committee, Mr. Edward's Committee, on February 20 will have Mr. Clarence Kelly and the Attorney General, and I am sure this issue may come up. Thank you.

Mr. KASTENMEIER. Yes. I might also say that our sister Subcommittee on Constitutional Rights has general oversight jurisdiction over the Federal Bureau of Investigation in terms of recordkeeping, data banks, arrest records, and has been looking into the Cointel program. Both this subcommittee and our sister subcommittee have more or less coexisting interests in the same subject matter.

You may proceed, sir.

Mr. FRIEDMAN. I am going to discuss exhibit 13, which is the complaint that we filed on behalf of Allard K. Lowenstein, a former Congressman. There were two actions filed in the Eastern District of New York, one on behalf of Peter Eikenberry, who was a candidate for the Democratic nomination in the 14th Congressional District against John Rooney in 1970, and then Mr. Lowenstein, when he ran against Mr. Rooney in 1972.

And we had secured—there was a published account to the effect that Mr. Rooney, who at that time was the head of the Appropriations Committee that had responsibility over the FBI, had asked the FBI for assistance during the primary campaign, and in checking with Mr. Eikenberry, it turns out, whose case is a little clearer, while he was in college he had once been arrested for drunkenness, some 20 years before he ran for office, and he also had dropped out of an ROTC program in college. And 20 years later, he is running in a primary election in New York against Mr. Rooney, and Mr. Rooney refers to him in public as a fugitive from justice from Ohio. And Mr. Eikenberry could not understand how it was that Mr. Rooney had found that out. He speculated maybe some old enemy of his from college had sent along this information.

And then a newsman, talking to a source within the FBI, later discovered that, in fact, because Mr. Rooney had been very helpful to

the FBI, that some agents looked into their records, dug out this old arrest record and supplied it to Mr. Rooney. And he referred to these two episodes.

Mr. Lowenstein also had a history of numerous political involvements, and Mr. Rooney was very well aware of them. Now, the only information we have been able to secure on those two cases was an affidavit submitted last week in the court action up in Brooklyn in which John A. Mintz, the Assistant Director of the FBI, and head of the Office of Legal Counsel, admitted that there are references in FBI files to both Mr. Eikenberry and to Mr. Lowenstein, but he claims that there is no indication in the records that they came as a result of an inquiry by Mr. Rooney, which we would hardly expect anyhow. But, they did admit that there are references to these two individuals.

Now, Mr. Lowenstein was a Congressman. We know from Mr. Gray's testimony before the Senate Judiciary Committee that the FBI did make a practice of gathering information on nonincumbent candidates so that if the person, the nonincumbent person won, the FBI would be aware of something about his background. And he admitted that this came from public sources, and in addition, from investigative files, which were undefined. But, Mr. Eikenberry is one step removed. He was never a candidate in the general election. He was a candidate only in the primary.

Now, what business does the FBI have gathering information about him, which is still in the files of the FBI?

Again, we are trying to continue to run this information down. We have received some information to the effect that Mr. Lowenstein traveled through Southeast Asia three times between when he was a Congressman, once before he was a Congressman, and information about his visits to, we are not quite sure which one, but information about his visits was collected by the CIA and sent back to Washington, and some of this information eventually found its way into Army files.

Now, I am not sure whether this was when he was a Congressman or before that time, but this is another area where information is transmitted from one organization to another and ends up in some kind of a permanent file with respect to that individual. And when we are talking about candidates for Congress, or the Congressmen themselves, it is a particularly dangerous enterprise and we hope in the litigation to try and find out more about this.

Mr. Shattuck. We will conclude by briefly, because I know the hour is late, summarizing some of the information in the latter exhibits here, 12, and 14 through 17, which relate to the recordkeeping and dissemination practices of these investigative agencies.

First, let me highlight some of the facts that we have discovered about the FBI's recordkeeping in the *Jabara* case, which I have discussed before. We now know, as a result of a court order, ordering discovery in the case over an assertion of privilege by the Government over all of this information—the opinion of the court is at the front of the exhibit—we now know that Jabara's speeches were regularly monitored over a period of 7 years, apparently because he was an outspoken advocate of pro-Arab positions on Middle Eastern policy, and the actual information about his speeches is now contained in sum-

mary form within the FBI files, and is set forth in considerable detail in the answers to these interrogatories.

Just a typical report to show you the kind of information it is, Jabara said, and I am reading from the FBI's report on the November 1972, 5th Annual Convention of the Association of Arab-American University Graduates of which Jabara was then president, and he said he is essentially an Arab, but they are a group with common interests, such as black Americans, young people, civil-libertarians, and he stated that during the past year the group had successfully established a dialog with some of the leaders and members of the black community, evincing support for their demands and participation, et cetera.

And he talks about "affirming that we will not be thwarted in our struggle against racism, and we have the right to speak against Americans and to dissent from the U.S. policy which is disastrous for the Middle East," and that is all in Jabara's file. And to date we have no reason, we have no way of knowing precisely why.

The most that the FBI will say is that he is of interest to them because of organizations at which he has spoken, or meetings at which he has appeared, or what have you. All of which are, I might add, public meetings in which certainly no clandestine activity of any kind is being conducted.

Now, we also know that there is a great deal of intermingling of material in Jabara's file about persons with whom he associated, and that is again in circumstances not involving a criminal investigation. But we know that the FBI has collected information about Jabara from, of all sources, Zionist organizations in the United States, whom they had every reason to know were, of course, very hostile to Jabara's view about a whole variety of things.

They had previously denied they had collected information from such organizations, but they now admit that they have.

We know of 145 separate communications with people outside of the FBI by FBI agents about Jabara, and we know that since this suit was filed in November of 1972, the investigation of Jabara has not only continued, but it seems to have stepped up. There are 38 interceptions of his conversations which have taken place over wire taps since then, and they have collected information about 17 of his speeches.

Now, I would like to conclude by giving you several examples from exhibit 15 about what Mr. Friedman was talking about earlier, judgments that are consistently made by these investigative agencies about what is to be investigated and what is not, what kind of information should be recorded about people in the interests of national security and what should not, and judgments we see made are repeatedly absurd in some instances, embarrassing in others, but in so many cases, we see the kind of information collected that is just downright frivolous and should never have been put into any file, and is very damaging once it is.

For example, in the FBI file on Thomas King Forcade, which is the first document in exhibit 15, we have a full page which was classified confidential by the FBI containing a retyped copy of an article written by Forcade in his infamous underground newspaper, the Beach Blanket News. And the article, you can read it for yourself,

contains language about coming to Miami and demonstrating, and having fun in the sun, basically. Nevertheless, it is retyped into the FBI file and then stamped confidential as if something in there was not otherwise available.

Then we see, skipping over two pages from that, an Army intelligence spiderweb on an organization in Germany involving American citizens who are all supposedly relating to each other in a conspiratorial fashion, and being in contact with various "foreign leftist" organizations. These include the U.S. Democratic Party, which I am not sure how appropriately is way over on the far left of the exhibit, which in turn is connected with something called the Concerned Americans in Berlin, which is an organization that campaigned for Senator McGovern in 1972, and was at that time known as the Americans in Berlin for McGovern.

And then a newspaper, Forward, which apparently the McGovern group had contact with, and then in the lower left-hand corner, the Lawyer's Military Defense Committee, which is a group of American lawyers sponsored by the ACLU, which is listed but not circled. It is sort of off the grass on the left side.

Various underground publications and various American leftist organizations are also listed here.

Now, to put this spiderweb together, obviously a lot of judgment had to be exercised by quite a few people, because this is an attempt to pull together diverse elements of Army surveillance of Americans in Germany. And the judgments that are made, I submit, are almost downright embarrassing. I mean, the names of people who are involved here are either attorneys, or in some instances, they are private citizens living in Germany, and in no case are they people who have ever been charged with any crime of any kind, but their investigation appears to have been initiated because they were first campaigning for Senator McGovern and because they had friendship and contact with GI's living in Germany.

Now, the organization, the Concerned Americans in Berlin, which appears in this graph, is the subject of a great deal of file information which is set forth at the end of this exhibit, and I would just like to highlight to you two quotations from these files on the Concerned Americans in Berlin, which I think, better than anything I could have said, demonstrates the absurdity of the judgments that are being made about whether to conduct surveillance. At the end, toward the end of a long report, which apparently was prepared by undercover agents who had had contact with the group, on page 4 we find a subcategory C, "Constitution."

"CAB is reported to have adopted the Bill of Rights from the U.S. Constitution as its own constitution. No further information concerning this action has been reported."

And then we find in the summary at the end of page 5, No. 7 "CAB presents a considerably smaller picture, but much the same as the more outspoken Democratic oriented politicians in the United States."

Well, I would think that that might be a source of some concern to members of your subcommittee, at least.

That concludes our testimony. Thank you.

Mr. KASTENMEIER. Thank you very much. I have some questions of my own, but before I ask any questions, I would like to yield to some of the other members who have not had a chance to ask questions and may have other schedule problems.

The gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. Thank you for your testimony, and I thought it was very well prepared.

Let me ask you this. There are going to be arguments, I think, that the President has a constitutional right to, under the *Ivanov* and other cases of surveillance for national security causes without having to show probable cause. What is your answer to that?

Mr. FRIEDMAN. Well, Judge Gesell, in an opinion here in the District of Columbia, was met with that same kind of argument when John Ehrlichman said the President has the right to crash into Dr. Felding's office to gather intelligence information; and as a matter of fact, the chief reliance of Mr. Ehrlichman was on the *Ivanov* and *Butenko* cases in the third circuit, which talked about wiretapping, and Judge Gesell made very clear that the general power to protect the Nation, to execute the laws of the United States does not carry with it the power to violate a specific provision of the Constitution.

You are dealing with very general power, Executive power, and you have specific prohibitions.

Mr. RAILSBACK. We are talking now about foreign cases, not domestic?

Mr. FRIEDMAN. I am talking about wiretapping within the domestic United States of even a foreign intelligence agent. That is to say, if we are talking about the President's power within the United States, I mean I suppose CIA agents in the Soviet Union have some powers, which are much broader powers than a CIA agent in the United States has. I think that is clear.

Mr. RAILSBACK. I think that when you read that case, that the court is also trying to resolve, what they call a clash between the President and the Congress, and it seems to me that that has not been—really been resolved, so I am kind of inclined to agree with what you are saying.

Mr. FRIEDMAN. We know Congress passed the War Powers Act, and now the power of the President to act as the Commander in Chief is very broad. But, Congress can certainly specify the way in which that power is triggered.

That is to say, when does a war begin, when can he send the troops out into the field to begin with, and it is certainly equally clear that to the extent that the President has inherent power to protect the Nation, that a prohibition in the Constitution and an exercise of congressional oversight as to when that power should be triggered, under what circumstances that power should be triggered, would pass muster. Again, we are dealing in an area where Congress has said nothing, and the courts are very free to say, well, the power is as broad as is necessary when Congress has not acted.

Mr. RAILSBACK. Thank you.

Mr. SHATTUCK. Congressman, if I could just add two sentences to that; I think the Supreme Court has spoken, although indirectly, to

this issue in the *Youngstown Sheet and Tube* case, the steel seizure case, in which it said that where an inherent power is asserted and yet there is no specific constitutional provision to support it, asserted by the President, that that power does not override any exercise of congressional power which might remove it. If there is an express power in the Constitution given to the President to do certain things, then Congress is powerless, but to the extent that there is no express power, it is up to the Congress to act if it deems necessary to do so.

Mr. RAILSBACK. Or where it is ambiguous?

Mr. SHATTUCK. Or where it is ambiguous, yes.

Mr. KASTENMEIER. The gentleman from California, Mr. Danielson.

Mr. DANIELSON. I think we have a long way to go here. Alluding back to your recent comments about Mr. Ehrlichman's argument before Judge Gesell, the conduct complained of there was in itself a violation of criminal law, as I recall it, burglary. Some of the surveillance-type activity that you have referred to here this morning falls short of violating a criminal law, the conduct proscribed by law.

I am thinking of the surveillance of a person. At what level do you contend that a law enforcement agency has the duty or power to commence an investigation? Obviously at a low threshold there is going to be a time when some conduct, some association, some activity, some circumstance would cause a reasonable minded investigator, if there is such a thing, to feel that there may be a violation of the law here.

Now, that would then invoke the commencement of an investigation, and surveillance and inquiry. At what level would you say that that comes in?

Mr. FRIEDMAN. Well, the Supreme Court in the *Terry* case, which is the stop-and-frisk case, said that when you are asking about an intrusion into a man's fourth amendment rights, or his right to be free from Government activity, you have to measure the level of intrusion against the right of the individual to be free from Government surveillance.

Now, in the *Terry* case, they said you do not need probable cause to put down a person who is engaged in suspicious activity to find out if he has a gun. A founded suspicion is enough.

Mr. DANIELSON. Well, and even there the conduct of the investigating officers are somewhat greater than that which I just described, because you have physically stopped someone. In effect, you have arrested them, whether you want to call it that or not.

Mr. FRIEDMAN. Exactly.

Mr. DANIELSON. And you have got a search, a surveillance, an inquiry concerning somebody which falls short even of stopping and patting down.

Mr. FRIEDMAN. I agree. In other words, if someone just quietly shadows somebody else, I suppose the level of suspicion is even less than the *Terry* suspicion, but something else is necessary.

Mr. DANIELSON. I would think so.

Mr. FRIEDMAN. Something has to trigger it, and as you go up the ladder, as you look at the man's bank record, as you look into his conversations, the threshold before the Government can—Government can act increases.

Mr. DANIELSON. As the level of the Government's inquiry intensifies by invasion of privacy, such as stopping and patting down. Now, I

am old-fashioned enough to call that an arrest. It is usually cured by releasing a person, but it is an arrest.

Examining a bank record is a search of sorts. But, I am just talking about doing what I would say any reasonable investigator would do; that is, a law enforcement official, to follow someone, to see where he goes, where he came from, to ascertain his license number or et cetera, the same thing that newspaper reporters do frequently when they are trying to find out what is going on.

At what level is that justified in a Government agency that is charged with the responsibility of enforcing the laws of the Nation or of the State?

Mr. FRIEDMAN. I would say, suppose again—to go back to the Congressman Rooney situation he just said, look, I have helped—at least the allegation has been that he helped the FBI, and he wants the FBI to follow Mr. Lowenstein around during the campaign.

Mr. DANIELSON. I would not think that you could justify that under any circumstances.

Mr. FRIEDMAN. I do not think so either.

Mr. DANIELSON. And I am certain that is below the level of whoever the Congressman was that was using the FBI, and the FBI was permitting itself to be used, neither of which is proper conduct.

Mr. FRIEDMAN. I agree. It depends on what the individual is, is his first amendment right at issue, which it was in the election situation, and is there any suspicion that a crime has been committed, and those are the kinds of questions I think you have to ask.

Mr. DANIELSON. Well, suppose you are assigned to the U.S. Capitol Building, and you are a member of a law enforcement agency, there are circumstances in existence which indicate that there might conceivably be some violence and you see a person come into the rotunda and the person has a bulge on his right hip right where you would carry a gun if you carried a gun. And do you think that would be enough reason to at least follow the person at least to see where he was going perhaps?

Mr. FRIEDMAN. Yes.

Mr. DANIELSON. To see if brushing against somebody, it might push the coat back far enough so that you could take a look, that that would be legitimate suspicion you feel?

Mr. FRIEDMAN. I think so.

Mr. DANIELSON. I do not want to go into this real long, because we are short on time, but my first statement was I think we have a long way to go here. I think we are trying to draw a line or establish a threshold at which properly the Government agent can commence his inquiry, his investigation, call it whatever you like, surveillance. It is all the same.

And thereafter, assuming that more facts are developed, or ascertained, you can either go farther with it or close the case out, as the case may be. And that really is what we are going to be groping for along here. I see nothing inherently wrong with surveillance if the surveillance relates to a proscribed activity or potentially a violation of the law.

I do not want to have a bunch of busybodies to follow me around when I am not violating any law or intending to, but there comes a

level when you are entitled to commence, and I do not think we have resolved that very much.

Thank you very much.

Mr. KASTENMEIER. The gentleman from California, Mr. Wiggins.

Mr. WIGGINS. Thank you, Mr. Chairman.

I want to compliment my colleague from California for putting his finger directly on the problem. That is, the difficult cure which Congress has to decide is under what circumstances is it appropriate for the Government to intrude on the privacy of an individual.

Now, the question as to legislative standard, the standard is couched in deliberately vague terms of probable cause, or, in another context, reasonable cause. Now, I am troubled about the use of two different words to begin with, and I want to ask you if probable cause, as is used in title III, means any more or less than reasonable cause for the issuance of a warrant, which is contained in section 2236 of title 18.

Do those two concepts, "reasonable cause" or "probable cause," mean different things to you?

Mr. FRIEDMAN. Well, I heard Senator Mathias indicate that he thought he was searching for a probable cause level. I mean, probable cause is well defined in the arrest cases, in the search and seizure cases, as that level of activity which makes it probable that a crime has been committed, and that person committed the crime.

We have some new standards, I mean founded suspicion, which is a test found in the *Terry* case and the Supreme Court in *Terry* and in *Camara*, which is the administrative search case, has indicated that it will engage in a kind of balancing test where the level that may trigger a Government intrusion or inquiry has to be measured against the invasion of the personal right involved. And that was what we were just talking about, that that level may be different.

The FBI may follow a Congressman around, they may be able to follow someone around with a bulge in his pocket, but to follow a Congressman is something where there is no founded suspicion or any suspicion that would justify that kind of conclusion, so we are stuck with the balancing test no matter what we do. And again, I think we have to measure the level of the intrusion, the level of the invasion against the loss of personal right under those circumstances.

I do not know how to draft an appropriate test in every case.

Mr. WIGGINS. Yes; I do not know either, but it is going to have a vague standard, that is for certain. But, I suspect, without having researched the question, that reasonable cause for the issuance of a warrant is probably something less than probable cause; that is, a search warrant, than probable cause to issue an arrest warrant and to make an arrest, because the warrant may be directed to a person who is admittedly not involved in any criminal activity.

For example, a bank presumably may be free from criminal activity, but may possess information from which probable cause could be deduced for a subsequent arrest, if they ever get that information. Obviously, if you must have probable cause to begin with, you do not need the information to proceed directly against the individual involved.

Let me give you a hypothetical case here. Let us suppose in the course of an organized crime investigation the investigators come upon an individual who has a rather expansive lifestyle, suggesting

from all objective factors that he is a man of some substance and wealth.

Now, I am going to assume that it is not illegal or improper for there to be an interchange of information between the FBI and the IRS, but let us suppose that interchange results in a finding that that man has not paid any income taxes. I do not think you could certainly say that he has committed a crime, the willful failure to pay his taxes simply on the fact of his wealth and failure to pay income taxes, but you at least have a suspicious circumstance, I think, which would justify further inquiry.

Maybe as a result of a mail cover or at least some sort of an inquiry with the Post Office Department, which I will presume to be lawful, it was discovered that the man receives envelopes monthly, which appear to be bank statements on their exterior surface, and I can understand the FBI now wanting to take a look at that man's bank records, given the fact of his lifestyle and given the fact he has not paid any income taxes.

Well, now, if the FBI must establish probable cause that a crime has been committed, it may find itself short of being able to establish that. If it must establish alternatively probable cause that a crime may be committed, I think that it is something short of that.

What it has is a reasonable suspicion, and I would hate to circumscribe the authority of the FBI in those circumstances to make a showing for a warrant. Now, I want judicial intervention for a warrant based on reasonable circumstances to have access to that man's bank records, in order to either clear him or condemn him, as the case may be.

I do not know if you disagree with that position or not. If you do, then I can understand that the rigid standards of probable cause that a crime has been committed may well interfere with the investigation which I would take to be wholly appropriate.

Mr. DANIELSON. Would the gentleman yield?

Mr. WIGGINS. Yes, sir.

Mr. DANIELSON. I think we are getting into the area of where this committee is going to have to work out something. I respectfully submit that there is a difference between a probable cause for an arrest and a probable cause which justifies an arrest. You have to have pretty overwhelming evidence before you reach that point, and even lesser sum of evidence should be necessary, as my colleague has pointed out, to be probable cause for a search.

And again, you may search premises that do not even belong to and are not under the control of the suspect. You might have a fence situation, or somebody who innocently picked up some stolen property, but here at least you can locate it and then probably unravel the ball of string and get back up to the thief.

But, even before you go to the magistrate and file an affidavit seeking a search warrant, let alone an arrest warrant, you have to have conducted enough investigation to give you the facts to put into that affidavit so that the egg is coming before the hen here again. And I think our real problem, and I think we should do this reasonably, is to find out what is the minimum, what is the absolute threshold at which an investigating agency has a right to commence this inquiry.

Then following its nose, you are going to come to a point where you either cancel out, or you go another step forward. And you may

go several steps until you get around to do some searching, for example, and you are going to have to go beyond that before you get around to the arrest stage.

But I am convinced you gentlemen are not telling us here, although your presentation has been pretty much an attack on our system, which is probably a richly deserved one, but I do not think you are telling us that you are opposed to Government enforcement agencies investigating crime. I do not think you are arguing that people who violate our laws should be above the law.

If you have, you have lost that battle right in this room. But, I think you can give us a lot of help in helping us to ascertain, and then to define that level which justifies the agency in commencing an inquiry, in doing some physical surveillance. I am not talking about wiretapping now. I use physical to distinguish the methods by which you conduct inquiries. There has got to be a level under which you can begin using physical surveillance, and it is not nearly as high as the probable cause that we usually talk about in criminal law.

It is the gentleman's time, and I yield back.

Mr. Wiggins. Well, I appreciate that because I believe the gentleman to be correct, and I do not obviously have a standard in mind at this moment. But it is a problem to which we should address ourselves, and I think in doing so we should not discard the possibility that we should spin off so-called political cases from other cases, because of separate first amendment values and attempts to deal largely with everything in your file as a separate category of cases, apart from normal criminal investigating cases, once we have one standard, it is going to be obviously inappropriate in some cases, whereas it may seem singularly appropriate in another.

Whether that classification of a political versus nonpolitical is one that makes sense is something that I cannot tell you or represent to my colleagues, but I do know I have a different reaction to political cases than I do to tax fraud cases that I might have described on the other hand. And I suppose you do, too.

Mr. Shattuck. Congressman, I think we would almost agree with everything that has been said on this subject. The point that we are trying to make here—and I hope that we have not overly dramatized the political cases, although I think it is necessary to do that in order to demonstrate the entire range of the problem—Congress has got to decide, we think, that the discretion of the investigative authority must be curtailed.

The question is, whose discretion should be exercised at each step of the way, and we submit that the threshold at which the investigator must go to a neutral magistrate, be he a judge or someone else, perhaps even his superior if the investigation is a very low level one, and get a second judgment, and have the discretionary standard applied by an outside force is the area that we are most concerned about.

At the moment, however, the discretionary judgment in almost all of the investigative techniques that we have been addressing is left entirely to that of the investigator. And I think if an agreement can be reached with respect to the curtailment of that discretion, then the inquiry can commence into what standards the outsider should apply

in determining what constitutes probable cause for, say, the search of bank records.

Mr. FRIEDMAN. To just answer your question, it is a lot easier than even you described, because that tax investigation, the IRS has administrative summons and can come in below each of the threshold points we have been talking about. That is to say, they can gather information relating to the preparation or need to prepare taxes.

Mr. WIGGINS. Well, let me tell you, and I am not telling you anything, Professor, but the fourth amendment does not distinguish IRS and the Attorney General's office. If we are dealing in constitutional values, then that distinction evaporates.

Mr. FRIEDMAN. I agree, but there is existing a forum that would cover the kind of bank records you have, and the tax laws have the lowest threshold of all, with respect to the need to produce documents, so that judgment has been made by Congress before. That will require very little before we will allow the IRS to come in.

Mr. WIGGINS. Apparently that meets constitutional standards.

Mr. FRIEDMAN. Yes; it does.

Mr. KASTENMEIER. The gentleman from Massachusetts, Mr. Drinan.

Mr. DRINAN. I simply want to thank Mr. Shattuck and Professor Friedman, and I hope they will be in touch with us regularly, and I want to thank them not merely for informing this committee last April and today, but also for all of the extraordinary work they are doing on behalf of plaintiffs, some of whose documents are here.

Thank you very much.

Mr. KASTENMEIER. The gentleman from New York, Mr. Badillo.

Mr. BADILLO. I also want to thank you. I appreciate the way in which you have broken up your exhibits, and I agree with most of what you have said. But, I am going to ask just one question which creates a problem, especially in view of some of the things that have been happening in New York City.

Your recommendation on page 2, or your suggestion that there be a ban against the conduct of any form of surveillance over persons because, or in order to determine, the nature of their political views and activities, what do you do in the case of the Puerto Rican or the alleged Puerto Rican terrorist groups where there have been some notes which indicate that the reason for that is because of the failure of Puerto Rico to achieve independence?

If it is concluded that, in fact, we may have involved a political movement for independence, there are any number of splinter groups, some of which believe in independence through normal political activity and others which do not, and what would the impact of the ability of the FBI to conduct an investigation if there was a total ban against determining the nature of the political activities of an organization be?

Mr. SHATTUCK. We should probably both answer that separately, because we may have different positions. But it seems to me, insofar as a crime is concerned, under the determinations that have been made by Congress and by State legislatures in the criminal laws, any political justification that might be used to defend against criminal charges should not act as an inhibition against bringing those charges, or investigating whether they should be brought.

But you are concerned about the threshold question, at which you start.

Mr. Badillo. When do you investigate the political views to find out how they propose to carry out their objectives, if there are any number of organizations who want to carry out their objectives in different ways.

Mr. Shattuck. Well, criminal conspiracies can be conducted with political overtones, but I think that the demonstration that would have to be made by the investigative agency, in order to get the information it was seeking, would have to be similar to the demonstration it would have to make to a magistrate if it were an organized crime case. There would have to be some showing that there was criminal activity flowing from the other, lawful activity of a particular group, and I think that any lesser standard than that invites the kind of abuse of discretion that we see in many of these cases.

Mr. Badillo. Yes; but the point is in that case it would not be against a total ban, as you indicated here, but where there is a probable cause, it would be permitted, is that not so?

Mr. Shattuck. That is right.

Mr. Kastenmeier. If there are no further questions, on behalf of the committee I would like to express our gratitude to you both for the very lengthy but extraordinary helpful presentation. This is the beginning of a series of hearings today, which I anticipate will lead to legislation within the subcommittee, and we may have reason to again ask for your assistance at some point.

And so I conclude today by expressing our thanks to you both.

Having concluded with today's witnesses, the subcommittee is adjourned.

[Whereupon, at 1:25 p.m., the hearing was recessed, subject to the call of the Chair.]

SURVEILLANCE

TUESDAY, FEBRUARY 18, 1975

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:10 a.m., in room 2141, Rayburn House Office Building, Hon. Robert W. Kastenmeier [chairman of the subcommittee] presiding.

Present: Representatives Kastenmeier, Drinan, and Pattison.

Also present: Bruce A. Lehman, counsel; Timothy A. Boggs, professional staff member; and Thomas E. Mooney, associate counsel.

Mr. KASTENMEIER. The subcommittee will come to order.

This morning the subcommittee will continue its hearing on the issue of surveillance techniques, concentrating today on the practices of the Nation's major telephone company, American Telephone & Telegraph. We are very pleased to have three witnesses before the subcommittee: Mr. H. W. William Caming, attorney for security matters for A.T. & T., Mr. Earl Connor, staff supervisor for security of the Cheasapeake & Potomac Telephone Co., an operating company of A.T. & T., and Mr. John E. Mack of Bell Laboratories.

Mr. Caming, of course, testified before this subcommittee last spring regarding company policy on wiretapping and electronic surveillance. At that time, Mr. Caming stated, "I wish to stress the singular importance the Bell System has always placed upon preserving the privacy of telephone communications."

Since that time, however, there have been a number of serious allegations raised regarding the Bell System's commitment to the preservation of privacy and its practices in the area of surveillance.

First: It has been revealed that the Bell System randomly recorded over 30 million phone calls between 1965 and 1970 in order to develop a procedure to apprehend fraudulent callers.

Second: A former executive of the Southwestern Bell Telephone Co. has charged that employees of that company commonly exchanged wiretap information with Federal and State law enforcement personnel without a court order as required by title III of the Omnibus Crime Control and Safe Streets Act of 1968.

Third: There was evidence presented during this committee's recent impeachment proceedings indicating that Bell System staff directly assisted in effecting 17 wiretaps against newsmen and White House staff.

Also: Testimony before this subcommittee at our last hearing indicated that Bell System personnel have in the past delivered on request very revealing telephone toll records to investigators without any legal process whatsoever.

Further: It has been established that the Bell System electronically monitored a room used for meetings of Communication Workers Union members. The subcommittee is releasing today documents supporting this particular allegation.

Last: There are serious questions raised regarding pointed discrepancies between past testimony before Congress of Bell System officials and a number of these revealed practices.

Hopefully many of these serious questions of veracity can be answered for the record in today's proceeding. Today's testimony, as I indicated the last time, will be taken under oath in order to establish the seriousness and credibility of these hearings. I would like to now call the three witnesses forward.

I understand Mr. Caming has a short statement but I would like to call Mr. Connor and Mr. Mack to come forward to join Mr. Caming, if you would, at the table, as the three witnesses this morning.

And, gentlemen, if you will stand and please raise your right hand.

Do you, Mr. Caming, Mr. Connor, and Mr. Mack, and each of you solemnly swear that the testimony you are about to give this subcommittee will be the whole truth and nothing but the truth, so help you God?

Mr. CAMING. I do.

Mr. CONNOR. I do.

Mr. MACK. I do.

Mr. KASTENMEIER. You may be seated, and Mr. Caming, you may proceed, sir, with your statement.

TESTIMONY OF H. W. WILLIAM CAMING, ATTORNEY, GENERAL DEPARTMENTS, AMERICAN TELEPHONE & TELEGRAPH CO.; ACCOMPANIED BY JOHN E. MACK, DIRECTOR, SWITCHING ADMINISTRATION AND MAINTENANCE SYSTEMS CENTER, BELL TELEPHONE LABORATORIES, NEW JERSEY; AND EARL CONNOR, STAFF SUPERVISOR, SECURITY, OF CHESAPEAKE & POTOMAC TELEPHONE CO. OF WASHINGTON, D.C.

Mr. CAMING. Thank you.

With your indulgence, I will keep Mr. Mack for the moment back here because I have a briefcase there.

I might say before initiating my statement, Mr. Kastenmeier, that should any members of the subcommittee have any difficulty hearing me in the absence of microphones, I would greatly appreciate being apprised of that.

Mr. KASTENMEIER. Yes. It is unfortunate that the judiciary committee is itself short handed electronically, paradoxical as that may be.

Mr. CAMING. I would also like to make one more comment that with respect to the questions which the chairman addressed himself to, I will be very pleased to discuss each of those in depth subsequent to my statement.

As the chairman knows, the statement is just an opening frame of reference for the inquiry of the subcommittee and to assist it.

Mr. KASTENMEIER. Mr. Caming, that will of course, be acceptable. I would hope we can develop it through a colloquy, through questions and through answers, and I should point out that we appreciate your being here, and Mr. Connor and Mr. Mack and other officials on very short notice. You would have preferred, I believe, a longer period of time in which to prepare your testimony, but you graciously agreed to come today and the committee does appreciate that.

Mr. CAMING. Thank you very kindly. I might say that we did prepare a statement that we feel will be complete, irrespective of the short time which we had at our disposal.

I am William Caming, attorney in the general departments of American Telephone & Telegraph Co. My areas of primary responsibility have since 1965 and to date included from a legal standpoint, oversight of matters pertaining to industrial security and privacy as they affect the Bell System. I might just say it is a pleasure to have with us today Mr. John E. Mack, who is the director of switching administration and maintenance systems center at Bell Telephone Laboratories, and with expertise in the fields particularly of electronic toll fraud; and Mr. Earl Connor, the staff supervisor in charge of security for the Chesapeake & Potomac Telephone Co., Washington.

It is a pleasure to appear before your subcommittee once again. I wish to thank you for the opportunity to reaffirm the Bell System's dedication and commitment to privacy of communications; to delineate again briefly our experiences with electronic surveillance, primarily in the area of wiretapping; and to discuss those measures we employ to combat the theft of telephone service by those clandestinely using electronic toll fraud devices.

You may recall that during my prior appearance before this subcommittee on April 26, 1974, I reviewed in depth the manner in which we safeguard privacy, and those statements are of equal efficacy and validity today. I adverted to our longstanding public espousal of legislation that would make wiretapping as such illegal. We have consistently said we strongly oppose any invasion of privacy of communications by illegal wiretapping and accordingly welcome Federal and State legislation designed to strengthen such privacy. This is still, of course, our position.

I described, too, how all Bell System companies conduct a vigorous program to ensure every reasonable precaution is taken to preserve privacy of communications through physical protection of plant and records and thorough instruction of employees.

I also mentioned how yellow pages directory advertising relating to wiretapping, eavesdropping, and debugging has long been banned.

I explained, too, our concern for privacy and how it is reflected in the manner in which we thoroughly investigate every incident of alleged wiretapping, whether found by our employees in the course of their work or through a customer's request for a wiretap check.

I have also reviewed the limited assistance we provide to law enforcement authorities engaged in the execution of court-ordered wiretaps, and to the Federal Bureau of Investigation in national security cases involving hostile acts of a foreign power and the like, upon

letter request personally signed by the Director of the Federal Bureau of Investigation, or the Attorney General of the United States.

Because of its continued timeliness, with the subcommittee's permission I would like to incorporate my statement of April 26, 1974, into my statement of today and for the convenience of the subcommittee, a copy of this statement is attached.

Turning now to another area of the subcommittee's initial inquiries, the Bell System has traditionally and consistently and unequivocally been concerned with the preservation of its customers' privacy. We firmly believe that whenever a communication is lawfully placed, its existence and contents must be afforded the full protection of the law.

But when wrongdoers break into the telephone network and by use of an electronic device seize its circuits so that calls can be illegally initiated—and the key word is initiated—we are faced with the formidable problem of gathering evidence of such fraud for purposes of prosecution and billing.

The Communications Act of 1934 imposes upon us the statutory obligation and duty to prevent such thefts of service. In essence, the act imposes upon each telephone company the duty to require all users of its services to pay the lawful charges authorized by tariffs on file with the appropriate regulatory bodies. No carrier may discriminate under the law between its customers by granting preferential treatment to any. Knowingly to allow those committing electronic toll fraud to receive "free service" would constitute such discrimination, in our opinion.

Furthermore, each telephone company is enjoined, under pain of criminal penalty, from neglecting or failing to maintain correct and complete records and accounts of the movements of all traffic over its facilities. Each carrier is also obliged to bill the Federal excise tax on each long-distance call.

To put for a moment the matter of electronic toll fraud into historical perspective, in the early 1960's a most ominous threat burst upon the scene, the advent of the so-called black and blue boxes, the first generation of a number. It was immediately recognized that if such fraud could be committed with impunity, losses of staggering proportions would ensue. This threat continues at flood level today, despite our constant vigilance and a large number of successful prosecutions over the past decade.

These devices are relatively inexpensive to make, and their use has grown at an alarming rate. We estimate blue boxes can be mass-produced at a cost of $25 to $50 per unit, and black boxes at a cost of a dollar or less. Our experience has shown that, among others, these devices have a unique appeal to the criminal element, whether it be a member of organized crime or an unethical, unscrupulous businessman. Not only may payment of the lawful telephone charges be evaded, but often more importantly, any record of the communication made concealed.

Perhaps at this point some brief definitions would be helpful. A black box is operated by the called party, so that anyone calling that particular number is not charged for the call. Contrariwise, a blue box is operated by the calling party and, because of its small size and portability, can be hidden on the person and at any time used to place an illegal call from any telephone to anywhere in the world.

Thus, from the outset, these and similar electronic toll fraud devices have been matters of serious concern. Telephone service is our only product, and its wholesale theft results in losses ultimately borne by the honest telephone user.

Such crimes have never enjoyed the protection of the law, neither before nor after the passage of title III of the Federal Omnibus Crime Control and Safe Streets Act in June 1968. A substantial number of distinguished courts, including several U.S. Circuit Courts of Appeals, have unequivocally held that persons stealing telephone service by trespassing upon the telephone network place themselves outside the protection of section 605 of the Communications Act, and of title III. In these criminal cases, our entire process of gathering evidence has been subjected to close and thorough and repeated judicial scrutiny: This jurisdictional oversight has continued to date, with some 270 convictions and a number of pending cases indicating the extent to which the courts at Federal and State levels have reviewed telephone company procedures for gathering such evidence. With virtual unanimity, the courts have held that the methods used have been lawful, independent of cooperation with law enforcement authorities, and wholly in the public interest.

It should be stressed, too, that prosecution has been and continues to be the only effective deterrent. As to the specific methods employed by the telephone companies to gather evidence of electronic toll fraud, we have found that a minimum amount of recording of a limited number of calls is indispensable, if a prosecution is to succeed.

Since the goods being stolen are the communication itself, for example, by a blue box user, there is no alternative at this state of the art, and I must emphasize that, but to make a limited recording of each illegal call, at least of the fraudulent dialing, ringing, and opening salutations for the following purposes: To identify the calling party, who the criminal is, the user of the blue box, and others with whom he may be acting in concert. Identification of the telephone line from which the fraudulent calls are originating must be followed by the more difficult identification of the specific individual making the calls. This is of paramount importance if prosecution and proper billing are to occur.

Establish the location from which the calls are originating. Most blue boxes are portable devices, some as small as a package of cigarettes, which are used by holding the device against the telephone mouthpiece, without the necessity of a direct electrical connection, that is, connecting by wiring into the telephone system, the telephone line.

Third, it is necessary to record the multifrequency tones being dialed, key pulsed, by the blue box after the line is illegally seized. And lastly, to determine whether the fraudulent call or a series of calls all being made through one seizure, were completed by the called party answering.

Distance as well as time is a factor in determining the proper billing charge for a long distance call. It is, therefore, necessary to ascertain each specific location called after the wrongdoer seizes the circuit. Let us assume, for example, that a blue-box user places a call from Washington, D.C. to the directory assistance operator at Chicago, which is 312–555–1212. I mention, Mr. Kastenmeier, that this is a small device. It is—well, I think it is—if I can find the box, it is

about the size of a Marlboro cigarette pack, and they are even getting smaller. And to show the graphic comparison, I have taken the liberty of bringing one down, to show that we are talking about something that is virtually able to fit into it.

Now, going on, by then emitting a specific tone from his blue box device, which tone you can understandably recognize, we prefer not to mention in public, the user seizes the line, disconnecting the operator at Chicago, and he has the long distance circuit. He can then, by pressing a single button, and then dial a number such as my home number in Summit, N.J.—I don't know if you can hear that from here, but it is duplicative of the tones that the operators themselves have. He can dial from that point to any part of the country. He can also dial to London, Moscow, Sydney, and other parts of the world. And this is done regularly.

The ultimate destination of each blue-box call can, therefore, be determined only by recording the multifrequency tones key pulsed. Also, as I have previously explained, after seizing the circuit the blue-box user can make not only one but a series of calls, terminating one, say, to Sydney after 15 minutes, and then he can immediately send a call to Hawaii and follow that with a call to Durban, South Africa.

Should such fraudulent calls be key pulsed, the location of each party called and the determination of whether each such call was completed and answered can only be made through recording the telltale tones. Unless the tones are recorded at the very moment they are emitted, they are, of course, lost forever.

None of the foregoing information can be obtained by use of our regular plant testing equipment, such as a peg count register, which is a simple electromechanical counting device that will count blue-box tones, as they appear. Such equipment cannot identify the fraudulent caller, nor record the multifrequency tones key pulsed after the blue-box tone is emitted, nor determine whether one or a series of fraudulent calls were dialed in succession, nor whether each such call was completed, nor produce other necessary evidence. These essential evidentiary elements can only be adduced through recording.

Nor will inspection of the suspect location usually uncover the small, readily concealed devices. Moreover, seizure of the device would not in and of itself, establish that fraud by wire had been committed, nor by whom, nor the extent of the fraud. Nor can the automatic message accounting equipment that normally obtains the information essential for billing purposes produce the necessary evidence of electronic toll fraud.

Most importantly, the limited recording done is solely to gather evidence of calls illegally placed. This is not a wiretapping case, where the contents of the conversations themselves are sought as evidence of some crime other than the theft of telephone service itself.

Limited recording by the local telephone company is done from secure locations, admission to which is tightly controlled on a need-to-know basis. This is done to maximize the protection of customers' privacy by preventing intrusion by unauthorized personnel. These quarters are kept under lock and key when not in use.

To assure the privacy of lawful communications, the telephone companies first employ a series of investigatory measures other than voice

recording to carefully evaluate the accuracy of any preliminary indications of electronic toll fraud. Only when a reasonable suspicion of such fraud has been firmly established, the possibility of plant trouble ruled out, and all other investigative measures exhausted, do the telephone companies engage in limited recording.

Nor does the recording begin until the caller's blue box emits a tone to seize the line, the one you first heard. The recording is brief and usually includes the ensuing dialing of the multifrequency tones of the number being illicitly called after the line was seized, the ensuing ringing cycle of the call, and the opening salutations of the parties after the call is answered. Usually only 60 seconds or less of conversation is necessarily recorded. The equipment generally is adjusted to cut off automatically at the end of this recording cycle.

In conclusion, we have shown that at best, detection of electronic toll fraud is difficult. We can only conjecture at the full scale of the substantial revenue losses sustained by the telephone industry and its customers. As in many criminal areas where detection is difficult, the instances of electronic toll fraud unearthed by the telephone companies represent merely that portion of the iceberg visible to the eye. The actual losses currently being sustained may be 10 or 20 times as great as our provable losses.

In none of the cases prosecuted, State or Federal, has any judge ever subscribed to the thesis that the telephone companies do not have the statutory obligation to collect, through limited recording, the evidence necessary to identify those placing calls in an illegal manner. To hold otherwise would in effect herald to the racketeer, the corrupt businessman, and all others that they have carte blanche to operate with relative impunity.

The virtually unchecked use of electronic toll fraud devices which would ensue if the threat of detection and prosecution is removed would impose an overwhelming financial burden on the telephone industry and its honest customers, who would be required to underwrite the entire cost of these depredations, including the total loss of revenue and the substantial expense of the circuits, facilities, and equipment tied up by such illegal use. These losses would rapidly reach staggering proportions, soaring into the tens and hundreds of millions of dollars and jeopardizing our very ability to provide telephone service to this Nation.

I shall be most pleased to answer any of the subcommittee's questions.

[The prepared statement of Mr. Caming follows:]

STATEMENT OF H. W. WILLIAM CAMING, ATTORNEY, AMERICAN TELEPHONE & TELEGRAPH CO.

I am H. W. William Caming, Attorney in the General Departments of American Telephone and Telegraph Company. My areas of primary responsibility have since 1965 included, from a legal standpoint, oversight over matters pertaining to industrial security and privacy as they affect the Bell System.

I wish to thank the Subcommittee for the opportunity to present the views of the Bell System on privacy of communications and delineate our experiences with electronic surveillance, principally in the area of wiretapping.

At the outset, I wish to stress the singular importance the Bell System has always placed upon preserving the privacy of telephone communications. Such privacy is a basic concept in our business. We believe that our customers have an inherent right to feel that they can use the telephone with the same degree

of privacy they enjoy when talking face to face. Any undermining of this confidence would seriously impair the usefulness and value of telephone communications.

Over the years, the Bell System has repeatedly urged that full protection be accorded to its customers' privacy, and we have consistently endorsed legislation that would make wiretapping as such illegal. In 1966 and again in 1967, we testified to this effect before the Senate Subcommittee on Administrative Practice and Procedure during its consideration of the Federal Omnibus Crime Control and Safe Streets Bill. We said we strongly opposed any invasion of the privacy of communications by wiretapping and accordingly welcomed Federal and State legislation which would strengthen such privacy. This is still, of course, our position.

We believe that the Federal Omnibus Crime Control Act has contributed significantly to protecting privacy by, among others, clarifying existing law and proscribing under pain of heavy criminal penalty any unauthorized interception "or" disclosure or use of a wire communication.

During our Congressional testimony, we said too that we recognized that national security and organized racketeering are matters of grave concern to the government and to all of us as good citizens. The extent to which privacy of communications should yield and where the line between privacy and police powers should be drawn in the public interest are matters of national public policy, to be determined by the Congress upon a proper balancing of the individual and societal considerations.

For more than three decades, it has been Bell System policy to refuse to accept in the Yellow Pages of its telephone directories advertisements by private detective agencies and others, stating or implying that the services being offered include the use of wiretapping. In December 1966, during Congressional consideration of the Federal Omnibus Crime Control Act's Title III proscriptions against unauthorized interceptions, this longstanding policy was expanded to prohibit too the acceptance of eavesdropping copy. This standard, adopted by all Bell System Companies, and interpreted from the outset to make equally unacceptable so-called debugging advertising (*i.e.*, advertising stating or implying electronic devices or services will be provided for the detection and removal of wiretaps and eavesdropping "bugs"), on the theory that those who can debug also possess the capability to bug and wiretap.

Our Companies continually review their Yellow Pages in an endeavor to ensure all unacceptable copy is removed, either by satisfactory rewording or deletion of the offending copy. New advertising is subject to similar scrutiny. The scope of this undertaking becomes apparent from the fact that there are approximately 2,400 Yellow Pages telephone directories, containing some 18,000,000 advertisements and listings.

The removal of unacceptable copy is a never-ending task of large proportions, since many such advertisements are revised, and new ones appear, in each issue. We believe, however, that we have done a creditable job in this area, and we intend to continue such rigid policing as contributive to maximizing privacy of communications.

It may help place matters in perspective if we provide a brief insight into the magnitude of telephone calling that occurs in this country in a single year. During the calendar year 1973, for example, there were approximately 138 million telephones (including extensions) in use in the United States, from which some 188 billion calls were completed.

From the time our business began some 90 years ago, the American public has understood that the telephone service they were receiving was being personally furnished by switchboard operators, telephone installers and central office repairmen who, in the performance of their duties of completing calls, installing phones and maintaining equipment, must of necessity have access to customers' lines to carry out their normal job functions. We have always recognized this and have worked hard and effectively to ensure that unwarranted intrusions on customers' telephone conversations do not occur. We are confident that we have done and are doing an excellent job in preserving privacy in telephone communication.

The advance of telephone technology has in itself produced an increasing measure of protection for telephone users. Today, the vast majority of calls are dialed by the customer, without the presence of an operator on the connection. This has greatly minimized the opportunities for intrusions on privacy. In

addition, more than 88 percent of our customers now have one-party telephone service, and the proportion of such individual lines is growing steadily. Direct inward dialing to PBX extensions, automatic testing equipment, and the extension of direct distance dialing to person-to-person, collect and credit card calls and to long distance calls from coin box telephones further contributes to telephone privacy.

Beyond this, all Bell System Companies conduct a vigorous program to ensure every reasonable precaution is taken to preserve privacy of communications through physical protection of telephone plant and thorough instruction of employees.

Our employees are selected, trained, and supervised with care. They are regularly reminded that, as a basic condition of employment, they must strictly adhere to Company rules and applicable laws against unauthorized interception or disclosure of customers' conversations. All employees are required to read a booklet describing what is expected of them in the area of secrecy of communications. Violations can lead, and indeed have led, to discharge.

In regard to our operating plant, all of our premises housing central offices, equipment and wiring and the plant records of our facilities, including those serving each customer, are at all times kept locked or supervised by responsible management personnel, to deny unauthorized persons access thereto or specific knowledge thereof. We have some 90,000 people whose daily work assignments are in the outside plant. They are constantly alert for unauthorized connections or indications that telephone terminals or equipment have been tampered with. Telephone cables are protected against intrusion. They are fully sealed and generally filled with gas; any break in the cable sheath reduces the gas pressure and activates an alarm.

With these measures and many others, we maintain security at a high level. We are, of course, concerned that as a result of technological developments, clandestine electronic monitoring of telephone lines by outsiders can be done today in a much more sophisticated manner than has been heretofore possible. Devices, for example, now can pick up conversations without being physically connected to telephone lines. These devices must, however, generally be in close proximity to a telephone line, and our personnel in their day-to-day work assignments are alert for signs of this type of wiretapping too. Every indication of irregularity is promptly and thoroughly investigated.

Our concern for the privacy of our customers is reflected too in the care with which we investigate any suspicious circumstances and all customer complaints that their lines are being wiretapped. Our Companies follow generally similar operating procedures when an employee discovers a wiretap or eavesdropping device on a telephone line. Each Company has established ground rules for the small number of these situations that occur, which take into consideration any local statutory requirements. Most frequently, when our people find improper wiring at a terminal, it is the result either of a record error or failure on the part of our personnel to remove the wires associated with a disconnected telephone. Each of these cases is, however, carefully checked. In those few instances where there is evidence of wiretapping, the employee discovering it is required to inform his supervisor immediately, and a thorough investigation is undertaken in every such case by competent security and plant forces.

In a small number of cases, a customer suspects a wiretap and asks for our assistance. Usually, these requests arise because the customer hears what are to him suspicious noises on his line. Hearing fragments of another conversation due to a defective cable, or tapping noises due to loose connections, or other plant troubles are on occasion mistaken for wiretapping. Each Company has established procedures for handling such requests. Generally, the first step is to have our craftsmen test the customer's line from the central office. In most instances, these tests will disclose a plant trouble condition. In each such case, the trouble is promptly corrected and the customer informed there was no wiretap.

In cases where no trouble is detected through testing the customer's line, a thorough physical inspection for evidence of a wiretap is made by trained personnel at the customer's premises and at all other locations where his circuitry might be exposed to a wiretap. If no evidence of a wiretap is found, the customer is so informed. Where evidence of a wiretap is found, the practice generally is to report to law enforcement authorities any device found in the course of the Company inspection, for the purposes of determining whether the

device was lawful and of affording law enforcement an opportunity to investigate if the tap was unlawful. The existence of the device is also reported to the customer requesting the check, generally irrespective of whether it was lawful or unlawful. The customer is told that "a device" has been found on his line, without our characterizing it as lawful or unlawful; should the customer have any questions, he is referred without further comment to law enforcement.

New Jersey Bell however, as a matter of policy, informs a customer requesting a wiretap check that only the presence of an unauthorized device will be disclosed. Minnesota by statute similarly limits disclosure to unlawful devices. Should the customer inquire about the presence of a lawful device, he will usually be assured that applicable Federal and State laws require any judge authorizing or approving a court-ordered interception to notify the affected customer within 90 days after interception ceases (or at a later date, if disclosure is postponed upon a good cause showing by law enforcement).

All Bell System Companies report the existence of an unlawful device to the customer requesting the check, as well as to law enforcement, and the latter is provided an opportunity to investigate for a reasonable period (generally 24–48 hours) prior to removal of the wiretap.

We might point out that unless the wiretap effort is amateurish, a person whose line is being tapped will not hear anything unusual, because of the sophisticated devices employed. As we previously said, most of the complaints originate because the customer hears an odd noise, static, clicking, or other unusual manifestations. As far as our experience discloses, these usually turn out to be difficulties in transmission or other plant irregularities. From 1967 onward, for example, the total number of wiretap and eavesdrop devices of all types (including both lawful and unlawful) found by telephone employees on Bell System lines has averaged less than 21 per month—an average of less than one a month for each of the twenty-four operating companies of the Bell System. In our opinion, the criminal sanctions imposed by Title III (for the unauthorized interception or disclosure or use of wire or oral communications, or the manufacture, distribution, possession, or advertising of intercepting devices), coupled with vigorous law enforcement and attendant publicity, appear to have contributed significantly to safeguarding telephone privacy.

In the area of court-ordered wiretapping, it is the policy of the Bell System to cooperate with duly authorized law enforcement authorities in their execution of lawful interceptions by providing limited assistance as necessary for law enforcement to effectuate the particular wiretap. We wish to stress that the Bell System does not do the wiretapping. The assistance furnished generally takes the form of providing line access information, upon the presentation of a court order valid on its face, as to the cable and pair designations and multiple appearances of the terminals of the specific telephone lines approved for interception in the court order.

The term "cable and pair" denotes the pair of wires serving the telephone line in question, and the cable (carried on poles, or in conduit, or buried in the earth) in which the pair reposes. A "terminal" is the distribution point to which a number of individual pairs of wires from the cable are connected, to provide service in that immediate area. A terminal may in a residential area be on aerial cable suspended from telephone poles or on a low, above-ground pedestal, or be found in terminal boxes or connecting strips in the basement, hall, or room of an office building or apartment house. The pair of wires of each telephone serviced from a particular terminal are interconnected at that terminal with a specific pair of wires from the cable, so that a continuous path of communication is established between the customer's premises and the telephone company's central office. The terminals vary in size, depending upon the needs of the particular location. To provide optimum flexibility in usage of telephone equipment, the same pair of wires may appear in parallel in a number of terminals, so that the pair can be used to service a nearby location if its use is not required at a particular point. Thus, the term "multiple appearance" denotes the locations where the same pair of wires appears in more than one terminal on the electrical path between the central office and the customer's premises.

In the instance of law enforcement authorities of the Federal government (and of those States enacting specific enabling legislation in conformity with the amendments to § 2518(4) of Title III of the Federal Omnibus Crime Control Act effective February 1, 1971), the court order may "direct" the telephone company to provide limited assistance in the form of the "information, facilities,

and technical assistance" necessary to accomplish the wiretap unobtrusively and with a minimum disruption of service. Upon the receipt of such a directive in a court order valid on its face, our cooperation will usually take the form of furnishing a private line channel from terminal to terminal (*i.e.*, a channel from a terminal which also services the telephone line under investigation to a terminal servicing the listening post location designated by law enforcement). Additionally, the above described line access information will be furnished for the specific telephone lines judicially approved for interception.

On occasion, assistance in the form of private line channels is furnished to Federal authorities in national security cases. This assistance is only rendered upon specific written request of the Attorney General of the United States or of the Director of the Federal Bureau of Investigation (upon the specific written authorization of the Attorney General to make such request) to the local telephone company for such facilities, as a necessary investigative technique under the Presidential power to protect the national security against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. For reasons of security, we are not informed in such cases of the specific nature of the national security matter under investigation.

In cooperating in court-ordered and national security cases, we endeavor to provide the very minimum assistance necessary to effectuate the particular wiretap. Under no circumstances, do we do the wiretapping itself; that is the exclusive province of the appropriate law enforcement officers. Nor do we furnish end equipment to be used in connection with a wiretap, such as tape recorders or pen registers. Nor do we design or build wiretap or eavesdrop devices for law enforcement authorities. Furthermore, our telephone companies do not train law enforcement personnel in the general methods of wiretapping and eavesdropping, nor do we provide telephone company employee identification cards, uniforms or tools, or telephone company trucks.

In conclusion, I wish to assure you that the Bell System continues to be wholly dedicated to the proposition that the public is entitled to telephone communications free from unlawful interception or divulgence. We are vitally interested in the protection of the privacy of communications and always welcome measures and techniques that will strengthen and preserve it.

The foregoing reflects our experience in the areas of wiretapping and electronic surveillance since the passage of Title III of the Federal Omnibus Crime Control Act in 1968 and our continuing concern for maximizing the privacy of communications.

I shall be pleased to endeavor to answer any questions that the Subcommittee may have.

Mr. KASTENMEIER. Thank you, Mr. Caming.

In connection with the practices of the phone company in connection with fraudulent toll calls, blue box calls, on February 2 the St. Louis Post-Dispatch reported that between 1965 and 1970, over 30 million telephone calls in six cities were randomly recorded, and over 1.5 million of these were retained for analysis, or perhaps that is a point you substantively made.

Was this basically an accurate statement of telephone company practices during this period?

Mr. CAMING. Yes, but I would like to clarify it for the subcommittee if I may.

First, I would like to say that the number of calls recorded for analysis were on the order of 1.5 to 1.8 million and not 30-plus million. The 30-plus million, as I will indicate, were merely scan tested without any human ear being possibly able to hear it, and erased automatically by equipment. This is purely a scanning process.

Now, why was this introduced? Was it necessary, and did it in any sense imperil our commitment to privacy of communications, or was it in furtherance of the public interest, I think, are fair questions. I

would like to address myself to them, with the permission of the Chair.

Mr. KASTENMEIER. You may proceed, sir.

Mr. CAMING. First, I think as I mentioned in my statement, we have to look at this in historical perspective so that you can appreciate the problems that the telephone industry as a whole, including the Bell System, of course, faced.

First, the advent of the black and blue boxes in the early sixties, and I think the first one was found in the State of Washington at the latter part of 1961, created a problem that we had never faced before, one that jeopardized the very integrity of our billing system and our ability to serve this Nation, and it was the fact that it could, by seizing the line in various ways, circumvent the billing equipment so that the calls would not be chargeable, seize and control indefinitely lines and clog our facilities accordingly.

At that time we recognized—and we can say this more confidently in public in retrospect—that we had no immediate defense. This was a breakthrough almost equivalent to the advent of gunpowder, where the hordes of Genghis Khan faced problems of a new sort, or the advent of the cannon.

To us the problem required an immediate course of action if the public interest was to be protected, because it was feared that if these devices, which I had shown, and I might just, so Mr. Drinan could be aboard with the others, sir, with the indulgence of the Chair, since I may allude to it again, just show you.

This is a Marlboro cigarette pack which I had mentioned earlier, and this is one of the devices, and they are even smaller than this. It has on the back—and I did not mention to the committee earlier, an ability to transmit by placing it against the mouthpiece so that you can carry this in your—in the pocket. It is completely concealable, and there are smaller ones. Then you take it out anywhere, any phone in the world. You can be in Hong Kong, London, it will work just as well, or in the United States, and usually, of course, our references are wholly to the United States. The others were an unlearned statement which my learned colleague, Mr. Mack, may correct.

Can you use these outside the United States?

Mr. MACK. No, technically you cannot. But the technique can be worked outside of the United States, but you need different sequences and frequencies.

Mr. CAMING. But it is similar in principle?

Mr. MACK. In principle, yes.

Mr. CAMING. Thank you.

The point is you can just press this and that is all it needs to seize the line because that specific tone is the tone on our equipment which indicates to it the line is under the dominion of the operator, say, at the toll center, and she is going to send a long-distance call through by key pulsing, and then all you do is pulse these through and it proceeds.

Mr. KASTENMEIER. Mr. Caming, I would like to go into the question of losses.

Mr. CAMING. Surely.

Mr. KASTENMEIER. I say this because at least one person has asserted, that in the Southwestern Bell Telephone Co. case, the cost of security personnel exceeded any losses attributable to the blue box or

anything else in the region. And so the question is, what provable losses do you have.

I notice you have 270 cases, apparently, you have won, or that have been pursued, prosecuted, according to your testimony. What in fact is the loss over all of these years due to these mechanisms?

Mr. Caming. Sure, I will go into that, and then we will revert back to what we started on before I diverted myself, to produce the box for Mr. Drinan.

We estimate our provable annual losses, Bell System wide—and it is difficult to segment them by a particular location—in the order of $1 million. But let me emphasize to you very graphically how understated that figure is. First, we, because of our concern for privacy of communications, only record a limited number of calls. For example, there was a gentleman who bore the sobriquet of Captain Crunch, who for years had been making a great many calls from all over. He was finally tracked down through various methods and necessary evidence gathered. Now we only gathered a few calls in his case, and in those instances, the calls were perhaps six in number for which he was indicted, yet we know definitely, and I think this is the norm, that probably thousands of calls were placed.

To give you another order of magnitude, we understand the market price today because we have been offered these devices in the underworld, is close to between $2,500 and $3,500 for a device you can make for $25 to $50, and if you mass-produced it you could probably make it for less.

This indicates the importance attached to it and the use placed of it. We have found businessmen have been constantly using this to have their salesmen call in or considering using it for that purpose, yet when we prosecute, in order to minimize any intrusion on privacy of communications, we only take a few calls. And that is why I say that even despite the constant threat—and we do prosecute every case that we can, because we have found unless we do that there is no deterrent of effective measures—despite that, it is still at a flood level.

But our annual losses, to respond again, are in the order of, we estimate, $1 million, and it would be 10 or 20 times that at the least.

Mr. Kastenmeier. You say you prosecute every case you can. To date it is your testimony you have some 270 convictions, is that correct?

Mr. Caming. Yes.

Now, it must be borne in mind, just to clarify that, that the policy of prosecution was not initiated for a period of time. We tried through the preliminary equipment, scanning equipment I was adverting to earlier, to gain a measure of the magnitude of the fraud, and so we have not really—we did not initiate during the 1960's any but several landmark cases such as the *Hanna* case, the *Nolan* case, the *Beckley* case, *D'Amato*, and the like, and it was in the early 1970's.

Now, detection second, is a very difficult process because of the portability, because it may be used from a number of sources, although we have a large number of methods that we employ and we are getting increasingly effective. It is still a problem, and as I say, 270. There have been over 1,000 boxes picked up. That might be another statistic.

And then there are other devices. There is the cheese box, which is often used with a black box to interconnect two telephones. There is the so-called purple box or the red box which reflects the action of a

blue box by having the tones rather than the buttons, so that you just can on a tape bring out the tone.

Mr. KASTENMEIER. Mr. Caming, let me return to the Post-Dispatch report. I would like to deal with the 30 million telephone calls. These were randomly recorded by electronic device, and of those, apparently you had selected out 1.5 million of the 30 million which were randomly recorded or screened in some sense, is that correct?

Mr. CAMING. Yes. If I may, perhaps if I gave it to you in sequence now it would be helpful. The answer to that is "yes." As I said, we had the problem burst upon the scene, but we did use some of the finest minds that Bell Laboratories could muster on a task force to attempt to obtain a first generation detector, something that could scan and give us some idea of the magnitude of the problem because one of the questions was do we have to redesign the entire nationwide telephone network to put in a new signaling system, the costs of which would vary in estimates from a quarter of a billion to a billion dollars, and many, many years.

The second question was, in order to make an intelligent determination and to be able to justify it in the public interest, we had to have statistics, and therefore we devised six experimental units which were placed at representative cities. Two were placed in Los Angeles because of not only activity in that area, but also different signaling arrangements, and one was placed in Miami, two were originally placed in New York, one shortly thereafter moving to Newark, N.J., and one was placed in Detroit, and then about January 1967 moved to St. Louis.

Now, these were put in place not until about the end of 1964, and that was still extremely speedy. It was not a novel breakthrough. We used a great deal of standard equipment.

Now, the purposes were first to gather statistics of toll fraud, and it was decided that the prosecution should not be undertaken except in a few salient cases because it could alert the users and distort the statistics that were the basis of the decision whether or not to modify the network at a cost that would have to be borne ultimately by the ratepayers, and with no assurance at all that if we did modify it, that that in turn would not be overcome, too, by a different signaling system.

Second, we felt that we could obtain some ideas of the number who were committing it in these particular representative systems, only outgoing direct distance dialed calls going through the switching machines were scanned. Now, the way they were scanned is very simple to understand because—I have a fair grasp of it. There were in each of these locations a hundred trunks selected out of a large number, and the equipment which was logic equipment, would select a call. There were five temporary scanners which would pick up a call and look at it with this logic equipment and determine whether or not it had the proper direct current supervisory signals, whether, for example, there was return answer supervision.

When we have a call, we have a supervisory signal that goes to and activates the billing equipment which usually we call return answer supervision. That starts the billing process and legitimatizes the call, and if you find voice conversation without any return answer signal, and that is what it was looking for, it is an indication, a strong indica-

tion of a possible black box that the caller called in; and if, for example, you heard the tell-tone, blue box tone—and remember, this is a first generation development—this was a very strong indication of illegality because that tone has no normal presence upon our network at that point.

Now, all this equipment did was look at these calls. This equipment at these locations was not within the dominion, control, or ability to penetrate, of the local company. It was in locked cabinets. It was all automatically done. I know at least in one or two locations that I visited at the time, it was actually behind fences within the plant central office. So you would have to really penetrate that, too.

And the equipment then would determine whether there was a preliminary indication of illegality, either the lack of voice or the like.

Then we had another problem, particularly on black box calls, which were most prevalent at first, and were very easily concealable at the called end—and as I say, these can be made for less than a dollar apiece without really any great mass-production development. We would then be able to discern the extent of the problem in this regard.

Now, what happened when there was a preliminary indication, and remember, we had to make a decision, how long do we observe, in order to determine preliminary indications, and we tried to do the minimum possible. For example, with a black box call it was, I think, 90 seconds and then reduced to 60 seconds by the end of 1966, early 1967. In a blue box call it was first complete because of other reasons I will advert to, and then reduced to 5 minutes.

Now, these calls—and I must indicate to you, were calls the signals of which indicated abnormalities that would only be present normally if there was a plant irregularity or a preliminary indication of illegality. We were not looking at the contents of the calls to try to establish anything else at that stage.

These calls were then selected by the equipment randomly, the scanning was random, but it was specific selection on designated logic principles of the particular call, and only then would they be transferred over to a four-track recorder.

Now, this recorder was called a master recorder. It had a four-hour capacity. All it did on the first track was dub in the 90 seconds or so of recording of the call. That was taken and scanned and then later it would be fitted together in the analysis bureau. A second track would take the rest of the call if there was any, on a live basis, both the voice and also the tones of the conversation, and any signals.

The third took care of the so-called supervisory signals, such as direct current, the billing signals, and the like, and the fourth was a time announcement machine that gave you the time in which the call took place.

Now, what was done with this information? Whenever the reel was completed at these five locations, remembering there are six units, no more than five locations at any one time, and that is all, it was then accessed after an audible signal, and the reel removed by one of two local plant supervisors, who were very carefully selected, and they were the only two that had access from the local company, merely for the purpose of putting it in a container and sending it by registered mail to an analysis bureau we established in New York City under the supervi-

sion of A.T. & T. to insure that the maximum privacy would be given to this, so that no one in the local companies even had access to these random calls which were outgoing DDD calls.

At the bureau there was first a very small group working on it. They were in a single room closely supervised, working together, using equipment such as some of our traffic service position and other computer equipment, to analyze these calls. There was a preliminary analysis made first before there was even a further analysis, to weed out any except those that gave very strong indications [that] of illegality; if there was any doubt about illegality, the calls were immediately destroyed. Our tests were so vigorous that we winnowed out almost the great bulk of it.

Remember, no one has seen these at all.

Mr. KASTENMEIER. You had 1.5 million of these transferred to New York?

Mr. CAMING. Exactly, 1.5 to 1.8 million, somewhere in that order. I am not sure of the exact figures now, but in that order.

They were then the ones that were examined. They came from these five locations, only. They had not been seen or not been heard by any human ear until they reached the analysis bureau.

Now, at the analysis bureau they were subject to rigorous tests to attempt to determine whether they were illegal in fact.

Mr. KASTENMEIER. How many of these were illegal in fact?

Mr. CAMING. Well, let us put it this way. It is hard to determine under our regular standards whether or not there may have been more calls with indications of illegality, but we had at least 25,000 cases of known illegality, and we projected for example in 1966, which was the early stage when toll fraud was just getting underway, that we had on the order of 350,000 calls nationwide.

Mr. KASTENMEIER. The 25,000 calls you referred to, were they directly attributable to the analysis of the 1.5 to 1.8 million?

Mr. CAMING. Yes, they were, but these were only preliminary indications of illegality. Now, more than 60 percent of those were almost completely winnowed out at once because we had only recorded very limitedly on the black box, that is, voice without any return answer supervisory signal.

Now, there are many other types of telephone calls where there is no real privacy problem as far as overhearing the customer-to-customer conversation. That fell within that group, and let me name some of them because I think it is a very valuable insight to assure you that this type of equipment in no sense constituted a threat to privacy.

The calls were intercept calls, calls to intercept, calls to a vacant number where they would be routed, and calls where you had what we would call free line service. If you called a plant repair office to report your telephone needed some adjustment, or calls to a business office bureau to order an extension telephone.

I have a list of them, and just to be complete, I will just advert to that if I may. And then the other would be in the area of service irregularities or plant trouble. Now we estimate of that group, for example, only something like the minute fraction of 0.006 percent were really in the service irregularity group. Would that be generally correct?

Mr. MACK. Certainly less than a half percent.

Mr. Caming. Certainly less than a half percent.

Mr. Kastenmeier. Is this random monitoring program still in effect?

Mr. Caming. No.

Mr. Kastenmeier. When was it terminated?

Mr. Caming. It was terminated, Mr. Kastenmeier, just as soon as we had the capability of developing the second generation, so to speak, in computer technique and knowledge. In May 1, 1970, we had closed down fully although we were tapering off before that, and the reason we did that is, we developed a second generation, which was on the boards from the very first, of an effort to develop that which is more sophisticated equipment. It did not require voice recording, and the moment we had something that would permit scanning of this nature, we terminated the other. It has given us broader coverage, and therefore, we did terminate as of May 1, 1970.

Mr. Kastenmeier. Is it your view that the program, if conducted today, would be legal pursuant to law?

Mr. Caming. I think there is no question that the program then and now—when I say then, from the beginning, prior to the passage of the Crime Control Act, clearly was not violative of section 605, and subsequent thereto in no way violated section 25(11)(2)(a) proviso which speaks about service observing or random monitoring.

Mr. Kastenmeier. Right.

Mr. Caming. That proviso states, as you are well aware, that service observing or random monitoring, using those terms synonymously, and I can point that out, is not to be used except for service quality control or mechanical check purposes.

Mr. Kastenmeier. Title 18, United States Code, section 2511, subsection 2(a) reads in part as follows, "provided that said communication common carriers shall not utilize service observing or random monitoring, except for mechanical or service quality control checks."

I would submit to you that the practice that you followed between 1965 and 1970 is outside of that, and as a result is not legal.

Mr. Caming. With due respect to the chairman's request for consideration, may I address myself to that?

Mr. Kastenmeier. Well, yes, of course.

Mr. Caming. I take it yours was a question.

Mr. Kastenmeier. Yes.

Mr. Caming. First, of course, as I pointed out to you, one of the basic purposes of this entire scanning program is its close confinement to a handful of people, its use only for information, and not—the contents were not used. It was purely to give us preliminary indications of the specific character of specific calls, which had appeared to be illegally placed.

We are not talking about lawful calls with unlawful content.

Mr. Kastenmeier. With what you said, I agree. I understand the purpose.

Mr. Caming. Fine.

Now, second, if I may address myself to the question of the Chair after that preparatory language. I personally am very familiar, coincidentally, with the proviso because I was involved in the legislative history preparation of it, and in following that, as you can well understand at that time, the legislative history's landmark decision appears

in Senate Report No. 1097 of the Committee of the Judiciary of the U.S. Senate, which was dated April 29, 1968, during the consideration in the later stages by the Senate of the bill that became the Crime Control Act.

Now, in looking at the proviso—and I might say that it is our interpretation, which I think I can establish to the satisfaction of the committee—and permit me to assure you that if there had been any doubt whatever, we would never have continued this practice at that time. I think that goes without question.

I might also say that up until the passage of the Crime Control Act, a large number of circuit court cases and the U.S. Supreme Court having affirmed in the *Sugden* case and denied cert in the *Hanna* case, had upheld our practices as lawful and not violative of section 605. This is prior to the passage of the Crime Control Act.

The courts have since then repeatedly scrutinized. Now, it is my position, based upon what I would like to say, that service observing and random monitoring are interchangeable synonymous terms. That service observing is random monitoring, as we use that term in the industry, and I refer to page 93 which also appears at 2 U.S. Congressional and Administrative News, 1968, at page 2182.

It states, "paragraph 2(a) provides that it shall not be unlawful for an operator of a switchboard or employee of the telephone company to intercept, disclose, or use wire communications in the normal course of their employment, while engaged in any activity which is a necessary incident to the rendition of service or the protection of the rights or property of the carrier." It is intended to reflect existing law. The *United States* v. *Beckley*, a case that I handled in the district courts of Georgia, as far as the telephone company's aspect, which clearly held that our course of conduct in recording was proper and that those who were illegally placing calls were not entitled to the protection of section 605 of the Communications Act.

Mr. DRINAN. Mr. Chairman, may I intervene here and go back?

Did you say that service observing and random monitoring are synonymous in the statute?

Mr. CAMING. I did, sir.

Mr. DRINAN. Then why were both terms included? And you indicated you had something to do with drawing up this particular statute in 1968? Is it just absolutely superfluous? Could we just say you cannot utilize service observing, and just eliminate random monitoring?

Mr. CAMING. Yes.

Mr. DRINAN. Well, you included it. You insisted, I imagine, that that language be there. Why did you want it to be redundant?

Mr. CAMING. The reason we did at the time—and in hindsight, it may not have been clarifying—it's hopeful it was clarifying—that frequently in service observing—and I'm talking about official service observing of a statistical, anonymous nature—is used the term "random monitoring". It is so frequently used, in our use of it—and it had been over the years by our officials in describing it.

For example, in 1966 Herbert Kertz in September 1966, appeared before the Congress, the Long committee, and again in 1967. In both cases the stress was on the random monitoring character of service observing.

Now, if I may go on, there are a few words that may help. The proviso came into being, by the way, as an afterthought. It was put in, I understand, at the request of several of the telephone unions to assure that service observing was not used for what we would call "supervisory observing" purposes, that is, on a position of an employee.

Sir, the Senate report did say that further provides section—I'm sorry paragraph 2(a), that is after saying existing law shall prevail on toll fraud—if I may read just a little further. Further provides about the service observing or random monitoring. "Service observing is the principal quality control procedure used by these carriers for maintaining and improving the quality of telephone service. Such observing is done by employees known as 'Service Observers' and this provision, the proviso, was inserted to insure that service observing will not be used for any purpose other than mechanical and service quality control."

I would also say, Mr. Drinan, in retrospect, despite what we thought was crystal-clear language—and that is we said is known as "service observers" and it is only to apply to that—it seems to have caused more confusion that clarification.

Mr. DRINAN. It demonstrates we should not allow telephone lobbyists to put in things as an afterthought.

Mr. CAMING. It was not a lobbyist, but merely a respectful consideration of the Congress, and it does demonstrate that too, but certainly it was our position in view of this—and let me, may I go one step further, as to this process, because there is another aspect of this problem in addition to the legislative history.

Mr. KASTENMEIER. Incidentally, Mr. Caming, let me only interrupt to say that I would like to move on from this point, but at best there is a great deal of ambiguity in section 2511(2)(a). Notwithstanding the Senate legislative history—and that is not clear in and of itself—one has to look at the context in which the entire section was written. At the very best there is ambiguity. I would say a precise reading of the cases you have cited indicates that they were not based on random recordings. For example, the *Beckley* case did not involve random recording. Frankly, I did assume that in 1970 you discontinued the practice because you did not think it conformed with the 1968 statute.

Mr. CAMING. That is categorically, sir——

Mr. KASTENMEIER. That was just an assumption.

Mr. CAMING. That is categorically not the case. We did it as soon as we had voice recording. If we had any doubt at all—I'm sorry, as soon as we had voice recording capability eliminated, if we had any doubt at all, we could have done it in June of 1968. We were not at that time prosecuting, and we were advanced in our second generation. There was no question. This never became a problem.

As I mentioned in this legislative history, which I adverted to, it states specifically that it refers solely to service observing, as done by service observers. And that is the term of art known in the industry. And there is another point there, if I may just very briefly touch on it.

This is not random monitoring. The recording, the scanning and testing initially done of the 30-odd million calls was random monitoring. It was done at random, picking calls, each of five units having 20 trunks under its dominion of outgoing DDD calls, but when there was

recording, it was done only in specific cases where there was a preliminary indication to the mechanical equipment that this was an illegally placed call, and recording was limited to that, and the courts have since, as well as before, upheld this as nonrandom monitoring, where it is on a specific indication of fraud.

And, for example, in Milwaukee recently the *United States* v. *DeLeuw* case, the Federal district court itself stated that the only recording was in those instances where a blue box frequency was applied thereto, and it was nonrandom monitoring sanctioned under section 25(11)(2)(a) because it was only in cases of specific indications of illegality, and the only calls that were recorded for analysis were those where there were those specific indications.

There were many other cases of a similar nature which took this position.

Third, and perhaps——

Mr. KASTENMEIER. I think I would be less likely to argue with you on this point except for your concession that the original 30 million calls were, in fact, cases of random monitoring. Even though you describe them as essentially electronic, they were not ordinarily accessible to phone company personnel.

I think, technically, this was random monitoring, and at least according to the face of the statute is forbidden. This art of random monitoring, I would say, may be a different character than service observing.

Mr. CAMING. May I address myself to that?

Mr. KASTENMEIER. Yes.

Mr. CAMING. I think I could say something that is very opposite. Section 2510(4) of the Crime Control Act provides that the term "intercept" is defined as the aural acquisition—A–u–r–a–l—acquisition of the contents by use of a device.

This requires, according to the interpretation, for example, by the Supreme Court recently in a Pen Register case, the human ear to listen, and that is exactly our point. I could not have said it better that you did say it, Mr. Kastenmeier, that the random monitoring was of the 30 million, and those calls, as I have stressed, were not listened to by the human ear.

Accordingly, they were not within the aural acquisition, and therefore are not within title III of the Crime Control Act. There is no question whatever about that. The U.S. Supreme Court has held that, that aural acquisition must be by the ear, and there are also a host of other cases.

Now, in addition, there is one other last point. This is a very—and I must respectfully state that I do not wish to seem to be throwing things around, but it is a very complicated statute, and I am not sure I, after many years of studying it, really understand all of the nuances, and the best point was one Mr. Drinan pointed out, that we did more to confuse than to clarify.

But section 2510(5) defines the term "device," and it must be borne in mind that as I mentioned 2510(4) defines intercept as aural acquisition and also not only by the ear but with the use of a device, and excluded from the term device is equipment used by the telephone company in the ordinary course of its business, and certainly any

plant-testing equipment we use for purposes of detecting fraud has over the years been uniformly accepted by the courts, and I think by the Congress, as being in the ordinary course of business, therefore it is excluded from the term device, so for those three reasons——

Mr. KASTENMEIER. Well, Mr. Caming, you have a case, or cases, which give judicial approval to this particular monitoring program from beginning to end. We would be very happy to receive them. I do not know if there may be such things. I am not aware of them.

Mr. CAMING. Certainly. There are a host of cases that have approved of the type of recording we do, and I think I have discussed a number of them with Mr. Lehman in the past, and I know the Congressional Library called me Friday, and I gave them some 15 cases or more, but for those reasons we were firmly of the opinion—and I think it is helpful to the committee to know what our opinion was—that this, for those three reasons: One, it was not aural acquisition; two, the proviso does not apply except to service observing; and three, it was use of equipment which is used by the telephone company in the ordinary course of its business and therefore excluded from the term device.

[The material referred to follows:]

AMERICAN TELEPHONE & TELEGRAPH CO.,
New York, N.Y., March 18, 1975.

BRUCE LEHMAN, Esq.,
Majority Counsel, Subcommittee on Courts, Civil Liberties and the Administration of Justice, Committee on the Judiciary, Rayburn House Office Building, Washington, D.C.

DEAR MR. LEHMAN: In accordance with Mr. Kastenmeier's suggestion, I am enclosing for your information a list of citations of representative judicial decisions upholding the lawfulness of the methods employed by Bell System Companies (including limited recording) in gathering evidence, for billing and prosecutory purposes, of the commission of electronic toll fraud, accomplished through the use of devices such as the so-called black and blue boxes. These cases span a period from the mid-Sixties to the present. They uniformly hold that the illegal "placing" of calls through the use of these devices was not protected, either under § 605 of the Communications Act of 1934 or under the Federal Omnibus Crime Control and Safe Streets Act of June 1968.

The Courts have stated that the Communications Act imposes upon common carriers the statutory obligation to prevent such thefts of service. In essence, all users of telephone service must be required to pay the lawful, tariff-prescribed charges. No carrier may discriminate between its customers by granting preferential treatment to any. Knowingly to allow those committing electronic toll fraud to receive "free service" would constitute such discrimination and be violative of the carrier's statutory duties. [See §§ 202, 203(c) of 47 U.S.C.] Further, each telephone company is enjoined, under pain of criminal penalty, from neglecting or failing to maintain correct and complete records and accounts of the movements of all traffic over its facilities. [§ 228 of 47 U.S.C.]

These cases are illustrative of the judicial holdings at federal and state level to the effect that such crimes have never enjoyed the protection of the law, neither before nor after the passage of Title III of the Federal Omnibus Crime Control Act. A substantial number of distinguished courts, including several United States Circuit Courts of Appeals, have uniformly held that persons stealing telephone service by trespassing upon the telephone network place themselves outside the protection of § 605 of the Communications Act and of Title III.

In these criminal cases, the telephone companies' methods of gathering evidence has been subjected to close and thorough judicial scrutiny and oversight. With virtually unanimity, the courts have held that the methods used have been lawful, independent of cooperation with law enforcement authorities in the evidence-gathering stage, and wholly in the public interest. Further, such evidence gathering was not violative of the Fourth Amendment or other constitutional strictures.

These cases are to be associated with and are supportive of the Statement that I presented in behalf of the Bell System to the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House of Representatives Committee on the Judiciary on February 18, 1975.

Should you have any questions with respect to the foregoing, I shall be pleased to discuss them with you.

Sincerely,

H. W. William Caming,
Attorney.

Enclosure.

Citations of Representative Judicial Decisions Upholding the Legality of the Methods Employed by Associated Operating Companies of the Bell System To Gatheer Evidence (Including Limited Recording), for Prosecutory and Billing Purposes, of the Commission of Electronic Toll Fraud Through the Use of So-Called Blue and Black Boxes or Other Electronic Devices

United States v. Sugden, 226 F. 2d 281 (9th Cir. 1955), aff'd per curiam, 351 U.S. 916 (1956)
United States v. *Beckley*, 259 F. Supp. 567 (N.D. Ga. 1965)
United States v. *Hanna*, 260 F. Supp. 430 (S.D. Fla. 1966), aff'd upon reh., 404 F. 2d 405 (5th Cir. 1968), cert. denied 394 U.S. 1015 (1969)
Brandon v. *United States*, 382 F. 2d 607 (10th Cir. 1967)
United States v. *Kane*, 450 F. 2d 77 (5th Cir. 1971), cert. denied, 405 U.S. 934 (1972)
Nolan v. *United States*, 423 F. 2d 1031 (10th Cir. 1970), cert. denied, 400 U.S. 848 (1970)
Bubis v. *United States*, 384 F. 2d 643 (9th Cir. 1967)
United States v. *McDaniel*, unreported Memorandum Decision (9th Cir. 1974), copy of which is attached, distinguishing *Bubis* supra.
United States v. *Baxter*, 492 F. 2d 150, 166–67 (9th Cir. 1973)
Katz v. *United States*, 389 U.S. 347, 352 (1967)
Burdeau v. *McDowell*, 256 U.S. 465 (1921)
United States v. *Shah*, 371 F. Supp. 1170 (W.D. Pa. 1974)
United States v. *Freeman*, 373 F. Supp. 50 (S. D.Ind. 1974)
United States v. *DeLeeuw*, 368 F. Supp. 426 (E.D. Wisc. 1974)
United States v. *Jaworski*, 343 F. Supp. 406 (D. Minn. 1972)
People v. *Garber*, 275 Cal. App. 2d 119, 80 Cal. Rptr. 214 (Ct. App. 1st Dist. 1969), cert. denied, 402 U.S. 981 (1971)

The Library of Congress,
Congressional Research Service,
Washington, D.C., March 3, 1975.

To: House Judiciary Committee, Attention: Bruce Lehman.
From: American Law Division.
Subject: The Legality of Telephone Company Monitoring for Anti-Fraud Purposes Under 18 U.S.C. § 2511(2)(a)(i).

This memorandum is in response to your request and our subsequent telephone conversation wherein you requested a legal memorandum discussing the legality of telephone company monitoring for anti-fraud purposes as disclosed by a St. Louis Post-Dispatch article of February 2, 1975.

A. THE TELEPHONE COMPANY'S MONITORING

According to the newspaper article and testimony of Mr. H. W. William Caming, attorney for American Telephone and Telegraph Company, before the Subcommittee on Courts, Civil Liberties and the Administration of Justice on February 18, 1975, the telephone company monitored nearly thirty million long-distance phone calls during the six year period from 1964 to 1970. During this period of time the phone company monitored only outgoing, direct distance dialed calls in five cities. In each of these locations several trunk lines were selected out of a large number. Scanners would then pick up a call and look at it with logic equipment in order to determine if the call had the proper direct current supervisory signals.

This supervisory signal goes to and activates the company's billing equipment, and if there is a voice conversation without this signal there is a strong indication of a possible fraudulent long-distance call. The phone company attorney stated that these calls were selected by the equipment randomly. The scanning was done at random, "but it was specific selection on designated logic principles of the particular call." When there was a preliminary indication to the mechanical equipment that there was an illegally placed call, the call would be transferred to a tape-recorder.

As reported in the newspaper, the recorder would record a segment or the entire content of the call. Approximately 1.5 million of these calls were recorded and sent to a central location to be analyzed by listening to the conversation. However, fewer than 25,000 of these calls were considered to be indicative of fraud, and during the first four years of this activity about 500 calls were confirmed as fraudulent. Thus it seems that a large number of nonfraudulent calls were monitored and recorded over a long period of time by the phone company.

B. THE LAW

During the period that the phone company was conducting its monitoring operation, two federal statutes governed wiretapping and electronic surveillance. Section 605 of title 47 was passed by Congress in 1934 and read as follows prior to June, 1968:

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

In June, 1968, Congress passed the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197 (1968). Title III of that Act, 18 U.S.C. §§ 2510–2520, generally made it a federal crime to intercept or attempt to intercept any wire or oral communication or to disclose or attempt to disclose or use information obtained by an unlawful interception. Several exceptions to this prohibition were given in the statute including one that allows law enforcement officials to secure a court order approving interceptions. Another exception is found in 18 U.S.C. § 2511(2)(a) which states:

"It shall not be unlawful under this chapter for an operator or a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: *Provided*, That said communication common carriers shall not utilize service observing a random monitoring except for mechanical or service quality control checks."

Title III also amended Section 605 so that the prohibition of that section became subject to 18 U.S.C. §§ 2510–2520.

The statutory language in section 605 does not grant an exception for communication carriers or their employees. However, such an exception has been created by judicial interpretation. One of the most significant cases on this point is *United States* v. *Sugden*, 226 2d 281 (9th Cir. 1955), aff'd per curiam, 351 U.S. 916 (1956). In *Sugden*, the defendant was indicted for conspiracy to violate the immigration laws. Part of the evidence was obtained by a Federal Communications Commission employee, who intercepted radio communications broadcast over a licensed radio station by unlicensed operators. The defendant moved to suppress the evidence, and the trial court was of the opinion that the evidence was obtained in violation of Section 605 and granted the motion to suppress.

On appeal the United States Court of Appeals reversed. The appellate opinion starts by making an interesting distinction :

"The government must concede that if the facts were the same save that [the government agent] had tapped the Sugden's telephone line and obtained the same information without the Sugden's consent as he did by monitoring the air waves, then the trial court's rulings were correct. 226 F. 2d at 284."

The court went on to say that the purpose of Section 605 was to protect the means of communication, and the court held that this purpose would not support an application of that section to an unlicensed operator. It seemed implicit in the Act, the court said, that agents of the F.C.C. could make interceptions in order to enforce the Federal Communication Act.

"Therefore, we hold that as to private radio communications, . . . the voice must be legally on the air; otherwise one who hears, . . . may make full disclosure. Giving the one who broadcasts without authority any protection under Section 605 could not tend to protect the means of communications. 226 F. 2d at 285."

The *Sugden* case was affirmed per curiam by the United States Supreme Court with 3 Justices dissenting. However, the distinction made by the Ninth Circuit between the protection given to a licensed operator and the protection given to an unlicensed operator by Section 605 has been criticized. Note, 44 California L. Rev. 603, 606 (1956) ; Note, 42 Virginia L. Rev. 400, 401 (1956). Also, the *Sugden* court seemed to ignore the language in *Nardone* v. *United States*, 302 U.S. 379, 382 (1937), that

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

The Supreme Court in *Nardone* interpreted the phrase "no person" to include federal officers, and the Court went on to say that "Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should resort to methods . . . destructive of personal liberty." 379 U.S. at 383. If Section 605 applies to federal law enforcement officers it would also seem to apply to communications carriers, although the *Nardone* court did not discuss this point. Since the Supreme Court did not issue an opinion when it affirmed *Sugden* the law is not clear.

Three federal courts of appeal have given the telephone company an exception to Section 605, however. *Nolan* v. *United States*, 423 F. 2d 1031 (7th Cir. 1969), cert, denied, 400 U.S. 848 (1970) ; *Hanna* v. *United States*, 404 F. 2d 405 (5th Cir. 1968), *cert. denied*, 394 U.S. 1015 (1969) ; *Brandon* v. *United States*, 382 F. 2d 607 (10th Cir. 1967) ; *Bubis* v. *United States*, 384 F. 2d 643 (9th Cir. 1967).

In *Bubis*, the telephone company was investigating a situation in which a device was being used to enable the caller to circumvent the company's record-keeping equipment so as to avoid long distance charges. As a result of information obtained by keeping a record of the member and duration of telephone calls made, the phone company connected automatic monitoring equipment to Bubis' telephone line. This equipment monitored all of his incoming and outgoing telephone calls over a three month period and tape-recorded the conversations of all such calls. The company notified the government that some of the recorded conversations revealed gambling information and the tapes were subpoenaed. Bubis was convicted and appealed on the grounds that the district court erred in denying his motion to suppress the evidence obtained through the recordings.

The Ninth Circuit Court of Appeals said that :

"To apply the literal language [of § 605] to the foregoing circumstances, would, in our view, reach an absurd result, contrary to common sense and reasonable business practices. . . . It would mean that communications systems are powerless to take reasonable measures to protect themselves and their properties

against the improper and illegal use of their facilities. We do not believe that in the enacement of Section 605, or in any of the provisions of Title 47, Congress intended to deprive communications systems of their fundamental right to take reasonable measures to protect themselves and their properties against the illegal acts of a trespasser.

"When a subscriber of a telephone system uses the system's facilities in a manner which reasonably justifies the telephone company's belief that he is violating his subscription rights, then he must be deemed to have consented to the company's monitoring of his calls to an extent reasonably necessary for the company's investigation. 384 F. 2d at 647."

A similar interpretation of Section 605 is found in *Brandon* v. *United States*, supra, and *United States* v. *Beckley*, 259 F. Supp. 567 (N.D. Ga. 1965). The *Bubis* court went on to hold that the monitoring and tape-recording in the instant case had continued for such a length of time, after ample evidence of illegal use had been secured, that it was unreasonable and unnecessary. "To sanction such practices on the part of the telephone company would tend to emasculate the protection of privacy Section 605 was intended to protect." 384 F. 2d at 648.

The *Hanna* decision is a curious one. Hanna was charged with violation of the federal wire fraud statute and the interstate gambling laws. Most of the evidence consisted of tape recordings which resulted from the monitoring of Hanna's telephone lines by the telephone company. The company had detected an unusual condition on a certain telephone line in Miami, and this condition was such as to indicate that a device was used to circumvent the company's toll equipment. The suspected telephone number was subscribed to by Hanna. A phone company engineer confirmed the use of a "blue box" on Hanna's line, and a company employee attached a tape recorder to the line in order to record the electronic signals emanating from the "blue box." The recorder operated only during the first 35–45 seconds of all telephone calls placed with the "blue box" during a 3 week period.

The defendant asked the trial court to suppress the evidence. This court refused, reading into Section 605 "an implied right to monitor under certain conditions." 260 F. Supp. 430, 433 (S.D. Fla. 1966). On appeal, the United States Court of Appeals for the Fifth Circuit reversed the lower court in its first opinion published at 393 F. 2d 700. The majority relied primarily on *Nardone*, supra, and *Bubis*, supra, for the proposition that Section 605 did not imply a right to monitor by the phone company. The court also rejected the suggestion that, by his illegal use of the telephone company facilities, Hanna impliedly authorized the interception of any communication.

After rehearing the case, the Fifth Circuit issud its second opinion reported at 404 F. 2d 405. This later opinion affirmed the lower court and was necessary, the court explained, because the original opinion was in error as to the facts and the law. In its second opinion, the court found that recording limited parts of telephone conversations was necessary for the telephone company to comply with the duties imposed by 47 U.S.C. § 220 and 26 U.S.C. § 4251. The Fifth Circuit also felt bound by the *Sugden* case.

"It must, therefore, be conceded that when the use of the communication facility itself is illegal, section 605 has no application, at least insofar as concerns the person guilty of such illegal users [sic, uses]. Whatever we might otherwise think, this Court is bound by the *Sugden* decision. 404 F. 2d at 408" (emphasis added).

However, the court failed to distinguish *Nardone*, the case relied on by the court in the first *Hanna* opinion.

The *Hanna* decision was appealed to the United States Supreme Court, but certiorari was denied. 394 U.S. 1015 (1969). Justices Fortas and Douglas dissented. They would have granted certiorari to resolve the area of conflict between *Bubis* and *Hanna*. By this time Congress had passed Section 2511(2)(a) of Title 18, and Justice Fortas wrote that it ". . . is by no means clear that the new statute would authorize this kind of conduct if a similar case occurred today."

In *Nolan*, supra, the defendant attempted to suppress tape recordings obtained by the telephone company as part of an investigation of illegal use of its long distance lines. The Tenth Circuit held that the evidence was obtained legally under Section 605. As to the senders of illegal calls, the *Nolan* court said that Section 605 ". . . was not intended as a refuge for the wrongdoer who uses the telephone in a scheme to violate the wire fraud statute." 423 F. 2d at 1031 (citing *Brandon* and *Sugden*). With regard to the recipients of illegal calls, the court relied on

Hanna for the argument that the telephone company has the right to monitor its lines in order to fulfill its statutory duty to detect toll fraud. The court also pointed out an alternative theory that there was an implied exception to the second clause of Section 605. Of course, the fact that the Supreme Court denied the petition of certiorari in *Nolan* does not mean that the Court approved this decision.

It should be noted that in *Hanna*, *Brandon*, *Beckley*, and *Nolan* the defendants were using the telephone illegally, and the telephone company made tape recordings only of the illegal calls. None of these courts had to consider whether the taping of an innocent phone call would be legal under Section 605, although the *Bubis* opinion seems to say that it would not. In each of these cases the phone company had evidence that a specific phone line was the source of fraudulent calls prior to any tape-recordings. Also, none of these cases had to discuss the legality of random monitoring by the phone company. Thus it does not seem clear that under Section 605 the phone company had the legal right to randomly monitor all outgoing calls, tape-record all those calls that appeared to be fraudulent, including the entire conversation, and then listen to the conversations to determine if they were indeed fraudulent.

In 1968 Congress passed Section 2511(2)(a). This section declared that it would not be unlawful for a communication common carrier employee to intercept a communication in the normal course of his employment while engaged in an activity necessary for the protection of the rights or property of the carrier. However, the statute also provides that the carriers shall not utilize "service observing or random monitoring" except for mechanical or service control checks. The legislative history of this section does little to explain what is meant by random monitoring. There is no House Report and the Senate Report says:

"Paragraph (2)(a) provides that it shall not be unlawful for any operator of a switchboard or employees of a common carrier to intercept, disclose, or use wire communications in the normal course of their employment while engaged in any activity which is a necessary incident to the rendition of his service or the protection of the rights or property of the carrier. It is intended to reflect existing law (*United States* v. *Beckley*, 259 F. Supp. 567 (D.C. Ga. 1965)). Paragraph (2)(a) further provides that communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks. Service observing is the principal quality control procedure used by these carriers for maintaining and improving the quality of telephone service. Such observing is done by employees known as service observers, and this provision was inserted to insure that service observing will not be used for any purpose other than mechanical and service quality control. S. Rept. No. 1097 at 93, 90th Cong. 2d Sess. (1968)."

Beckley was not a "blue box" or "black box" case. It involved a conspiracy to defraud the telephone company by an employee of the company and others. The court simply said, without citing any authority, that, "Section 605 does not prohibit the telephone company from monitoring its own lines." 259 F. Supp. at 571.

One author has interpreted Section 2511(2)(a) to mean that the monitoring must be random and it must be done to determine mechanical or service quality in the case of a communication common carrier. "No monitoring for criminal misuse as such would be acceptable under this provision." J. George, Constitutional Limitations on Evidence in Criminal Cases 158 (1973 ed.).

After diligent research no reported federal appellate court cases that interpret Section 2511(2)(a) could be found. Three federal district court cases involving this section have been reported. In *United States* v. *Deleeuw*, 368 F. Supp. 426 (E.D. Wisc. 1974), the telephone company connected a dialed number recorder to the defendant's telephone line. In addition, the company recorded a one minute conversation of the defendant whenever the mechanism was activated by a "blue box" frequency. The defendant was indicted for fraud, and on his motion to suppress the evidence the court held that ". . . the action taken by the . . . company in attaching a . . . detector to the defandant subscriber's line, which device recorded . . . the conversations had on such line in only those instances where a blue box' frequency was actually applied thereto, constituted the type of nonrandom monitoring for the protection of property which is sanctioned by 18 U.S.C. § 2511(a)(i)." 368 F. Supp. at 428.

On the basis of an analysis of a computer printout it was suspected the defendant Shah may have been using a "blue box." The phone company monitored Shah's line and recorded the beginning portion of any conversation when the "blue box" was used. Shah was charged with violating the wire fraud statute, and

on his motion to dismiss the court held that the phone company had done nothing that was not within the exception of 2511(2)(a). *United States* v. *Shah*, 371 F. Supp. 1170 (W.D. Pa. 1974).

In *United States* v. *Freeman*, 373 F. Supp. 50 (S.D. Ind. 1974), the phone company, after receiving information from another phone company, installed a tape-recorder on defendant's ex-wife's telephone line. The monitor recorded the use of a "blue box" on several occasions. The defendant made a motion to dismiss, but the court denied the motion. The trial judge said that the action taken by the phone company was "the type of non-random and non-service control monitoring for the protection of the utility's property which is contemplated by 18 U.S.C. § 2511(2)(a)(i), ..." 373 F. Supp. at 52.

Obviously, none of these cases have sanctioned the widespread use of random monitoring by the phone company. Like the cases decided under Section 605, each of these recent cases involved the monitoring of a specific telephone line. The question as to whether the random monitoring as reported in the newspaper was in violation of Section 2511 remains unanswered.

Section 2511(2)(a)(i) specifically states that the telephone company "shall not utilize . . . random monitoring except for mechanical or service quality control checks." It would seem that the random monitoring conducted by the company after the Omnibus Crime Control and Safe Streets Act took effect was within the proviso of Section 2511(2)(a)(i). The term random monitoring is not defined by the Act. Although the phone company has argued that "random monitoring" has a technical meaning, it is a general rule that a statute must be interpreted by its plain and common meaning. See, *Rathburn* v. *United States*, 355 U.S. 107, 109 (1957). As the Supreme Court has said, in speaking of Section 605, "distinctions designed to defeat the plain meaning of the statute will not be countenanced." *Benanti* v. *United States*, 355, U.S. 96, 100 (1957).

Even if the random monitoring is within the proviso of Section 2511(2)(a)(i) it would appear that no violation of that section has occurred. Section 2511 prohibits the willful interception of any wire or oral communication or the use of any device to intercept any oral communication. Section 2510(4) of Title 18 defines intercept to mean "the aural acquisition of the contents of any wire or oral communication through the use of any . . . device." The term device is defined so as to exclude any apparatus being used by a communications carrier in the ordinary course of its business. 18 U.S.C. § 2510(5). Only equipment being used by the carrier in the ordinary course of its business would be excluded. S. Rept. No. 1097, supra, at 90.

Arguably the random monitoring by the electronic scanner was not the aural acquisition of the contents of the communication and therefore not an interception of the conversation. The words "aural acquisition" as used in 18 U.S.C. § 2510(4) mean to come into possession through the sense of hearing. *Smith* v. *Wunker*, 356 F. Supp. 44 (S.D. Ohio 1972). The mechanical monitoring of telephone conversations to detect the use of a "blue box" a "black box" would not be an "aural acquisition" of the conversation.

The tape recording of the conversations would be an interception, but such an interception would seem to be legal by the exception given the phone company in Section 2511(2)(a)(i). However, if the company recorded the entire conversation or if the company recorded more calls than were necessary to prove illegality, then the company may have exceeded the authority given to it by Section 2511. See, *Bubis* v. *United States*, supra. If the scanning and the recording is viewed as a one-stage process, then what the phone company did was the aural acquisition of the contents of a communication. This one-stage process would only be illegal if the device was not being used in the ordinary course of the company's business.

One other possible argument that the phone company's monitoring was illegal is that it violated the Fourth Amendment rights of the company's subscribers. Generally there is no invasion of the security afforded by the Fourth Amendment against unreasonable search and seizure when evidence is acquired illegally by private parties. *Burdeau* v. *McDowell*, 256 U.S. 465 (1921). The argument has been made, however, that when the searcher has a strong interest in obtaining convictions and has committed searches and seizures regularly then the Fourth Amendment should apply even though the search was not done by a government official. Note, 19 Stanford L. Rev. 608, 615 (1967). Thus, there is the basis for any argument, albeit a weak one, that the phone company violated the Fourth Amendment by recording telephone conversations in order to prosecute illegal users.

C. CONCLUSION

It is not certain that the telephone company violated any federal laws by the random monitoring of telephone conversations during the period from 1964 to 1970. This uncertainty exists because the Congressional intent in passing Section 2511(2)(a)(i) is not clear, and case law has not clearly explained the permissible scope of monitoring by the company. Under the existing law it seems that the only way that the telephone company can violate Section 2511 is if it randomly monitors telephone conversation with a device not used in the ordinary course of its business so as to aurally acquire the conversation. One obvious remedy wou'd be for Congress to amend Section 2511 so as to make clear the extent of the monitoring to be allowed.

IRWIN MANDELKERN, *Legislative Attorney.*

Mr. CAMING. The reason we terminated the program was because the second generation, which we were attempting to develop as fast as we could, did come along and permit us to get as broad or broader coverage without the necessity of having any voice recording whatsoever, and the whole program and the concept of being closely guarded, seen by only a few very trusted employees under constant supervision, and promptly erased thereafter, was designed for this purpose.

That's a long way around Mr. Kastenmeier.

Mr. KASTENMEIER. Leaving that particular question, Mr. Caming, are you aware of company practices that have involved surveillance of individual employees or union activities or conversations conducted on company property, other than on business phones, in the recent past?

Mr. CAMING. There have been a number of situations where there have been allegations over the years. Each one of those is carefully and fully investigated. How, if we are talking in terms of the normal supervisory observing, whether it is visual, whether it is from a desk across the room, or at an adjacent location, there is a possibility that this may have occurred, but that would certainly in no wise be designed to overhear union conversation.

For example, let us take a plant repair test room, or let us say a business office, which is very simple. A business office service representative may also be a union vice president, let us say. She is at the front desk, and she may receive a call on one of several telephones, which she handles for telephone contacts with the public, and usually they handle large volumes.

One of that large volume of business calls may be a call on union business. If so, it is possible that it would be subject to observation.

However, it is to be borne in mind that those particular telephones are to be used only for official business, and—and I think this is most important—there are other phones immediately available, such as in the employees' lounge next door, where any and all calls can be taken in complete privacy.

Now, that is a possibility. I can only conjecture when that might occur. Any specific allegation would be carefully investigated. Normally, if such a call was overheard, the supervision would drop off the call, the purposes of the observation being purely for determining the quality of service rendered by the individual, and also by the—I'm sorry—and also whether the individual employee might require further training and assistance.

I might say that I appeared before the Government Operations Subcommittee of this respected House and discussed this subject at considerable length on June 11, 1974, with respect to——

Mr. KASTENMEIER. Did you discuss with them the complaint of Local 2108 of the Communications Workers of America in a local case out here?

Mr. CAMING. I do not know, without knowing the date. It does not ring a bell, but Mr. Glen Watts, president of CWA, was next to me at a very pleasant hearing which we had, and we did discuss this subject matter, and whether it is one case or another, I think the same would apply.

There was an allegation, which we have been unable to run down, that somewhere in the distant past, about 15 years ago or more—no, about 12 years ago—that there was a specific instance of that at one location. I might say it is wholly against company policy to engage in any such conduct. It is also to be borne in mind that these employees using official business lines for official business are aware of the fact that their calls are subject to periodic supervisory observing.

Mr. KASTENMEIER. Let me recite to you the incident I have in mind.

Mr. CAMING. Sure.

Mr. KASTENMEIER. It is alleged by officers of Local 2108 in the Silver Spring area, that on or about April 4, 1974, they discovered electronic devices in a company garage wherein they had held, I gather, union meetings from time to time, and after investigating, they discovered that a craftsman had in fact put the equipment in under the direct supervision of the foreman.

Accordingly, they concluded that management was responsible. At that time they were apparently involved in grievances with the company, and they then reasonably concluded that there was a direct relationship.

Mr. CAMING. May I respond? I am familiar with that, highly familiar.

As you can appreciate, I was trying to give you an overview of the problem, and not recognizing the name of the particular local union—but this was a case not at all what it appeared to be on its face at first blush. This is a case, perhaps best described as consideration at a low level of supervision, of the use of audiovisual alarms.

Now, we do provide, under tariff, in a number of our places, audiovisual alarms to subscribers and others. The question was, a particular Maryland garage, the one at Silver Spring, as I understand it, was subject to a series of thefts, and various methods to protect the property of the company against losses, which ultimately our ratepayers bear, were used without success.

And the question arose then, see what else is on the market in the way of burglary alarms that might assist in apprehending the perpetrators. One of the subordinates installed an instrusion alarm, which was a perimeter alarm that when anyone broke into the garage during certain hours when employees were normally not there, it would sound a nonaudible-to-the-intruder alarm, and then this would permit activation of an audiosurveillance burglar alarm to overhear unusual noises and the like to see if a burglar was breaking in or perhaps an animal or the like triggered the alarm.

This was installed by a craftsman, as you mentioned. There was nothing covert about it, and at the time no notices had yet been posted, but it had been the intention to post notices because we use, for example, such audio alarms in Pacific Northwest Bell at remote loca-

tions high in the Rockies, at which there are unattended locations, and there are notices posted to that effect, that an audiovisual alarm is there, because it is some miles from the nearest human habitation.

Now, this was in for only 4 to 5 days on an experimental basis. It had not been approved by management yet, and it was only at this one location on an experimental basis. The question was raised by the union. That brought the matter to the attention, you might say, of middle management there, and on learning of it, they pulled it out immediately, and it was never used, except for this very brief period.

It was not permanently installed. It was determined first, that it did not appear to be a sound method for a burglary alarm system, and thus certainly would have not been approved under any circumstances. It was to operate after hours, and I believe that was all there was to it, and that was not for the purposes of overhearing, and if there were within that very short period, union officials there, that—as I understood the grievance, however, although those allegations were made, in fact it was known to the craftsman who put it in. He put it in himself. It was not put in covertly at night for some cynical purpose.

Mr. KASTENMEIER. Do you know who the company official was who was responsible for the installation of this particular device?

Mr. CAMING. I don't. I know he was rather low level. I know the commercial manager, I believe, Mr. Landon, was the one who removed it.

Mr. KASTENMEIER. Mr. Connor, would you know?

Mr. CONNOR. No, sir; I would not know.

Mr. CAMING. But I believe—I had talked, and I know personally of this incident, and it did occur over a year ago because I have these notes in connection with——

Mr. KASTENMEIER. Almost a year ago, according to the record I have. I will read you the first line of the letter, which I will offer for the record, from the president of the union, James E. Mazzi, April 24, 1974, and one line is: "Members of Local 2108 became aware of surveillance equipment in the Tech Road Garage on or about April 9, 1974."

[The letter referred to follows:]

COMMUNICATIONS WORKERS OF AMERICA,
Silver Spring, Md., April 11, 1974.

To: Chief Stewards.
Subject: Grievance Meetings—Surveillance.

This is to advise that as of today, April 11, 1974, grievance meetings should not be conducted in telephone company garages. I am aware of eavesdropping equipment in at least one Company location, the Tech Road garage. All anyone need do is dial the appropriate access code, and they are immediately connected to amplification equipment strategically mounted in the garage. Conversations in the garage are easily overheard by the calling party. The conversations could then be documented or recorded. For obvious reasons, we cannot run the risk of subjecting the problems of our members to this Big Brother surveillance system.

Ed Lewinski, our CWA Representative, is aware of the situation and has taken immediate action at his end. We will be discussing the problem in greater detail in the near future. In the meantime, protect your conversations. Don't meet in telephone company garages. You should advise all employees who work in garage locations of the possibility of any conversation being monitored.

Sincerely and fraternally,

JAMES E. MAZZI, *President.*

Mr. CAMING. I referred, Mr. Kastenmeier, when I said a year, I meant since I testified with respect to this on June 11. Mr. Watts was right next to me, you see. This is the second time around on this.

Mr. KASTENMEIER. This particular question was not raised at Government Operations.

Mr. CAMING. I said I knew about it fully at the time. That's why I had these notes. It had happened before June 11, is what I meant.

Mr. KASTENMEIER. Thank you, Mr. Caming.

Mr. Connor, are you supervisor for security with Chesapeake and Potomac Telephone Company?

Mr. CONNOR. Yes, sir, that's right.

Mr. KASTENMEIER. How long have you been employed in that capacity?

Mr. CONNOR. About 10 years, Mr. Kastenmeier.

Mr. KASTENMEIER. Last April, when Mr. Caming then appeared before the committee, he stated:

> In cooperating in court-ordered national security cases, we endeavor to provide the very minimum assistance necessary as required by law to effectuate a particular wiretap. Under no circumstances do we do the wiretapping itself. That is the exclusive province of the appropriate law enforcement officers.

Is that correct? Do you agree with Mr. Caming's statement?

Mr. CONNOR. That's right.

Mr. KASTENMEIER. So that, in fact, is the practice followed here in this area in C. & P.?

Mr. CONNOR. That is—yes, sir, that is correct.

Mr. KASTENMEIER. Evidence obtained by the Judiciary Committee during its recent impeachment inquiry includes a May 12, 1973, memorandum written by Inspector O. T. Jacobsen of the FBI. This memorandum states that during the summer of 1969, FBI Supervisor James Gaffney received instructions to place wiretaps on certain telephones in an attempt to locate the source of unknown press leaks at the White House. The memo further states:

> Gaffney, when he received the oral instructions to institute these wiretaps, would in turn orally request the telephone companies to effect the requested wiretap.

Now, we interpret this to mean that the phone company takes over in that case. What sort of assistance was Inspector Jacobsen referring to in terms of the company at that time?

Mr. CAMING. May I interrupt, Mr. Kastenmeier, respectfully?

Mr. KASTENMEIER. Yes.

Mr. CAMING. Mr. Connor did not—or were you involved at that time, Mr. Connor?

Mr. CONNOR. No, not in 1971.

Mr. CAMING. Are you referring to the *Halperin* case? I happen to be very familiar with it because I am one of the counsels in the *Halperin* case, and the 17 leaks in the House Judiciary Subcommittee——

Mr. KASTENMEIER. I am not necessarily referring to the *Halperin* case.

Mr. CAMING. But what I mean is, it's the incident where 17, according to the House Judiciary Subcommittee's evidence—17 individuals,

I think, 13 who were members of the Government, and 4 who were newspapermen, is that correct, Mr. Lehman, were in May 1969, subjected to so-called national security wiretaps, as designated by the Government in that terminology.

Now, Mr. Connor was not in that area, but I am very familiar with this incident, if I may. He did not take over.

Mr. KASTENMEIER. Who was, then, the——

Mr. CAMING. I believe then the Director of Government Communications at that time, Mr. Horace Hampton, handled those questions.

Mr. KASTENMEIER. Mr. Hampton, I see. Mr. Hampton has been retired.

Mr. CAMING. Yes; he has been retired for some years.

Mr. KASTENMEIER. But he was still active at that time?

Mr. CAMING. Yes; but I am personally familiar with the facts, if I may address myself to them.

Mr. KASTENMEIER. Yes; please do.

Mr. CAMING. You may recall—or you may not recall because it has been some time ago—that in my last appearance, I discussed at length the history of our involvement in national security wiretapping and mentioned that until July of 1969, there was no adoption of the so-called reduction to writing of the national security requests that we had theretofore received on infrequent occasions between 1941, when President Roosevelt, and every President since then followed it up until then.

It was at three regional conferences in July 1969, that we introduced the Hoover letter, as it was then described. That is one personally executed by the Director, or by the Attorney General.

Now before that, in May—and I might say the C. & P. Co., as I adverted to in my earlier testimony, did not adopt that letter until sometime later, in August of 1971. Up until then it had been our practice to provide assistance in connection with this, by receipt of an oral request from the properly authorized member of the Federal bureau.

Now, in that case, we did provide—we did receive a national security request orally, which was the practice, from the Federal Bureau of Investigation, and we provided equipment that went to the locations designated by the Federal bureau. The assistance was in providing the interconnecting channel terminal to terminal.

You may recall I testified—in my statement, you will find description of it on the April 26 date, and that we have appended hereto.

Now, in that case, one of those involved—and why we know it, one of the 17 happened to be Dr. Halperin, and I have just given a deposition of some 3 hours on this subject, and I am very familiar with the area. Now, we did not, as I stressed before the committee last, do more than provide the channel as required, and any cable and pair access information that would have been necessary in conjunction with it.

The actual wiretapping, the actual placing of the terminal equipment on the end, whatever it was, was done by the Government, and in that sense, as I have previously explained, we do not do the actual wiretapping. We have categorically refused to. We will not train them. We will not design wiretap equipment. We will not send our employees along, generally, to the site where it is being done.

And we've had repeated requests in this area for further assistance, not only at the Federal level, but at the local level, and we have said, as I have previously testified, that we do provide limited assistance, and we are to date in connection with national security investigations.

Mr. KASTENMEIER. In other words, the language, "to effect the requested wiretap," that Mr. Jacobsen refers to, in your view meant to provide access, and if you make some sort of connection for them. Is that——

Mr. CAMING. Well, generally, just to——

Mr. KASTENMEIER. To what extent is it installation as apart from conducting the actual auditing? I assume you do not conduct the wiretapping, but to what extent do you install the equipment?

Mr. CAMING. All right, if I may, both in court-ordered and in national security situations, court-ordered, when we receive a directive from the court to provide information facilities and technical assistance as required by section 2518(4)(e) of title III of the Crime Control Act, we do provide the assistance necessary, the minimum assistance necessary to effectuate the particular wiretap. That would normally consist of line access information in the form of cable and pair, and would also consist of a private line so that there is a connection running from the terminal of the suspect to the terminal designated by the Government, which presumably serves as their listening post. But we provide the channel of communication and the actual equipment, whether it is a tape recorder, whether a pen register or not, would be put on in that connection, made by the Government, and when a private line is provided terminal to terminal, the actual connection at the other end also is done by the Government.

Mr. KASTENMEIER. Thank you, Mr. Caming.

I am going to yield for my colleagues who have waited very patiently here, and I realize that they want the opportunity to ask some questions, too. So I am going to recognize the gentleman from Massachusetts, Mr. Drinan.

Mr. DRINAN. Thank you, Mr. Caming, for your testimony. I went back over what you told us about 1 year ago here, and you gave us the same information. I must say that it is a rather thin distinction between what assistance you provide and with what the Government actually does in the final act of wiretapping. But I think that you said last time, and you have said now, initially that the A.T. & T. collaborates and cooperates.

However, to come back to the question of the 1.5 million or the 1.8 million, just to make simple analogy that the supermarket has problems with monitoring people who like to shoplift, but at a moment in time they turn this whole thing over to the law enforcement agencies. I guess what we are arguing about is at what moment should A.T. & T. say now this is beyond our purview and turn a hard case over to the Department of Justice.

How would you feel about a decision that would say that you would have to do that? Why should you yourself, why should A.T. & T. make a decision to tap at a moment in time? Why not go and get a warrant? Why not turn over law enforcement to an outside agency? Why is A.T. & T. the police officer?

The supermarket proprietor at a moment in time has to call the law enforcement people and say we think that this particular person did

something. I am sure that you have thought about this, but I did not get a satisfactory answer. You people say that we are in charge, that this is our property and we can place our property under surveillance. How would you feel about a Federal statute saying that at a certain moment in time you too have to get a warant like the FBI and like other agencies.

Mr. CAMING. I am very pleased to address myself to this question if I may because I have thought of it very carefully and fully and we have conferred about it.

Mr. DRINAN. With the Department of Justice? Have you checked with the Department of Justice?

Mr. CAMING. Not as such, although we have, for the reasons I say, independently gathered our evidence. But if I can just start out by saying unlike a supermarket, we are a regulated public utility, subject to regulation not only by the Congress in general, but also by specific regulatory bodies, both at the Federal and State and at times local level.

Mr. DRINAN. And we have specifically withheld from you the right to do what you are alleging you can do. That you are regulated makes it more apposite. You do not have the right to tap a telephone wire just simply because you think this man is stealing, or keeping money. I mean, the statute does not really support your position, but go on.

Mr. CAMING. Well, for the reasons I have previously stated, I respectfully retain our belief, and the courts have sustained it uniformly, that we can protect our rights and property, and the *Beckley* case, which I personally handled, did just what we have recited here, and we did go up to the U.S. Supreme Court in *Hanna* and *Modell*, and the very strong opinion of the fifth circuit court of appeals was affirmed. The *Brandon* case was affirmed, the *Nolan* case went to the Supreme Court and cert. was denied.

We are not talking first—the reason I mentioned it was a public utility, Father Drinan, is——

Mr. DRINAN. Excuse me; *Hanna* was before the change in the law, was it not?

Mr. CAMING. That's right.

Mr. DRINAN. Well, that weakens your case.

Go ahead.

Mr. CAMING. Well, not necessarily, because *Hanna* has served as the landmark for a long number of cases that have followed, and the *Hanna* case is one of the cases that followed the *Beckley* theory and that was recognized in title III, which says we have the right to protect——

Mr. DRINAN. OK, sir, but tell me your policy reasons for why you do not want to get a warrant. Why do you not turn these matters over to law enforcement? You would save a lot of money, and the public would be assured that an outside agency, a Federal agency is in fact pursuing these obvious thieves who use the blue box and the black box.

Mr. CAMING. I wish it were that simple because it would certainly be saving us a great deal of trouble and difficulty.

First: We are not talking, as I adverted to earlier, about wiretapping. As I said in my statement, we are not seeking to obtain the contents of conversations of lawful calls, of lawful calls to obtain evidence of some other crimes than the theft of the call itself.

Now, if the call is legally placed, and let us say it is a call between two narcotics pushers, the telephone company does not have the right nor access to its contents. That is the law and we adhere to it.

Second: That is to access its contents for purposes of proving narcotics trafficking.

We are talking about monitoring selected, particular lines in specific cases to detect the fraudulent use of the service through electronic toll fraud devices in placing the call, where it circumvents the automatic billing equipment. We are not interested, I submit, interested in the contents of the conversation as such. Rather, we are discharging a statutory duty which is imposed upon us by the Communications Act and by our regulatory bodies to not permit people to knowingly make in volume calls which are illegal. To identify the person—and it may be a little long-winded——

Mr. DRINAN. We all read that. We have read your testimony. We read your testimony a year ago, and other Government Operations Committee material that is furnished us, but you keep saying the same thing, that you have a statutory authority to protect the company property, but that is begging the question.

Mr. CAMING. I agree with you. I am just merely reciting.

Mr. DRINAN. I know, I have heard this before. I want you to answer the question. Why doesn't A.T. & T. say it would be a beautiful thing if we could have Federal officials do all of this work for us and train them so that they are the law enforcement people, just like any other business. Granted, your business is unique, but in a moment in time, it seems to me that when you have clear evidence of wrongful acts, illegal conduct, you have to turn it over to somebody else.

Mr. CAMING. I agree with you 100 percent, and that is just the whole point. Now, that is what I have been trying to say and I know I am slow in getting to my points at times, and I hope you will indulge me, but I work in that way. That is why I was stressing the contents of the calls illegally placed, requires certain evidentiary minimal gathering of evidence before you have anything, because if you do not identify the criminal, you cannot have a crime.

Now, the monitoring and recording we do is done solely by us and I think this is important, and we do not make wholesale incursions. We do it in a limited number of calls.

Secondly, to have court orders would virtually eliminate prosecutions.

Mr. DRINAN. Why? Why? This is the key point now.

Go ahead.

Mr. CAMING. What I wanted to point out is that we must have a certain minimal probable cause in order to get search warrants, to have grand juries return indictments and the like. Now, when we selectively gather the very minimum evidence, very limited recording—and remember, this is not to get the contents of the conversation as such, but rather to establish that the call is being illegally placed—we must record, and as I say, it is usually 60 seconds or less, and we then can identify, A, who is calling, because through these portable devices, for example, you could use——

Mr. DRINAN. OK, Mr. Caming. I want to yield to Mr. Pattison. I have only 5 minutes, but would you explain this.

You said, "getting court orders would virtually eliminate prosecution," and that is why you are against them. Why?

Mr. CAMING. Because we would not be able to have the probable cause until we were in the stage, as we are now; when we do this minimal recording we get not only enough to establish probable cause, but we immediately are ready for prosecution, and every case we have is prosecuted to the extent we can get it accepted.

Mr. DRINAN. Well, now, you do not go to the courts because it is to your convenience.

Mr. CAMING. It is because it's in the public interest.

Mr. DRINAN. Well, in the interest of A.T. & T. to save a little money, but the public interest says, and the fourth amendment says, that the FBI, if they want to do an electronic eavesdrop, must get a written court order, and then within 90 days they have to inform the subject of the wiretap. You know all the things that are in the law.

Well, I see your point. I see the property point, but what would be so calamitous if we said that the telephone company must also go through this procedure or something comparable?

You have given one reason—that it would virtually eliminate prosecution. Now, the fourth amendment makes things very complicated because it does cut down maybe on prosecution because you have got to prove to a judge first that yes, there is probable cause, and we think we have got to tap this guy. He is using the blue box.

Well, what is so terrible about that? Why do you not prove it to a court before A.T. & T. itself goes in.

Mr. CAMING. OK, for two reasons, if I may. First, we are saying why don't we show the court there is probable cause that this guy is using a blue box and therefore get it—because we cannot show that unless we have enough evidence to show that minimal amount, and once we have that minimal amount, we prosecute. We do not need any more evidence than that minimal amount. We do not go in on a series of calls over 6 months. We take 1 or 2 or 6 days of calls, perhaps 10 calls. We go in, we prosecute, and remember, every one of those cases are subject to exhaustive judicial scrutiny, and not once has there been any abuse shown. Unless we have that minimal evidence necessary to turn it over to law enforcement, what I am saying is——

Mr. DRINAN. Well, Mr. Caming, it still comes out to me that it is very convenient for you and very convenient for everybody to finesse the fourth amendment and the regulations that apply to implement it.

And then let me ask one question and then I will yield to Mr. Pattison.

A year ago, before the Government Operations Committee, you said, "Customer to customer conversations have never been recorded in the Bell System." I am not suggesting an open inconsistency, but why has A.T. & T. been so secretive about all of this going on?

If you want to make any explanation of that, it would be helpful, I think.

Mr. CAMING. Very well.

May I just make one remark with your indulgence? You mentioned the fourth amendment, and you see, I think you and I are on the same side, Mr. Drinan. It is just that apparently I am not articulate enough to get across to you what I'm trying to say.

We gather, and I say this in tactful terms, but I think the nuance is, we gather our evidence independent of law enforcement, first. Second, we gather only enough to establish the minimal probable cause. When we have that we have enough to convict. Third, we are subject to judicial scrutiny, full judicial scrutiny on each case, because unless we can prosecute each case there is no deterrent. Fourth, with respect to the fourth amendment, sir, I respectfully refer you to a number of cases, including *Katz* v. *United States*, where I am sure you are familiar with the case which states in part that one who encloses himself in a telephone booth, and I quote, "and pays the toll that permits him to place a call" is within the protection of the fourth amendment. This is apart from the consideration of *Burdeau* v. *McDowell*.

Now, to address myself to your other question, if I may, on customer-to-customer conversations not being observed, I believe your references may have been to statements such as the following, and I read from page 179 of the hearings before the Subcommittee of the Committee on Government Operations of June 11 and 13. We were then addressing ourselves to questions, what do you do in service observing. That is all we were talking about, and I give you the question. To what——

Mr. DRINAN. All right, so that is an adequate explanation, but it was very broad, and frankly I was surprised doing my homework to find that broad statement, and it just goes to demonstrate the point that you have not told anybody, including the law enforcement officials, of the 1½ million bugs or intercepts. I just raise the question of why did you not go to the law enforcement officials and say to the Department of Justice, we need you. It is a very complicated case.

In any event, thank you, and I yield to Mr. Pattison.

Mr. CAMING. May I, with the indulgence of Mr. Pattison and the Chair, may I respectfully address that question just to give you background. You said we did not go to the Department of Justice. That is not true.

Mr. DRINAN. Well, you just a little while ago said you had not consulted with Justice.

Mr. CAMING. I though you were asking me about the wisdom of having them work with us to gather evidence of toll fraud. If you are addressing yourself to the question of whether we informed the Department of Justice, we did. I did personally. I informed Mr.—I don't know whether you want to go into it, but in 1966——

Mr. DRINAN. Well, this contradicts what you just told me.

Mr. CAMING. It was just that I misunderstood your question.

Mr. DRINAN. The question was crystal clear: Did you consult with the Department of Justice? And you said "No."

I have it right down here, but go ahead.

Mr. CAMING. It was my understanding that your question was addressed to whether I consulted with respect to your suggestion about court-ordered wiretapping, but as far as the monitoring—and I respectfully want to just call it to your attention, we did in 1966 and again in 1967, in the discussions of the Hanna case, I informed the Department of Justice attorneys involved in the Criminal Division, of the scanning equipment, and on one or two occasions and again in 1967 when I met with them on a general survey, some of the leads from

that equipment could possibly, we thought, have come from—I'm sorry, some of the leads in that case which involved some gamblers in Miami, could have come from either some of our computer printouts, some of our informant sources, some of our plant testing gear, or possibly this equipment at the time. There were a number of leads, and I accordingly did inform the Department of Justice.

Now, that does not say they cleared it or gave me their imprimatur. We did not feel we needed it. And the law has clearly held, at that time, that there was no violation of 605, but we did inform them, and if I misstated my understanding of your question, I respectfuly apologize.

Mr. DRINAN. All right. Thank you, sir.

Mr. KASTENMEIER. The gentleman from New York, Mr. Pattison.

Mr. PATTISON. I just have a couple of questions.

Suppose that the law was that it was illegal for you to engage in this kind of monitoring, and that it was very clear that it was the Federal Government's responsibility only to detect this kind of theft of telephone services. What would be the result of that in terms of the amount of recorded conversations that might be turned over to other people?

In other words, in your judgment, would it be more likely that the actual conversations that are recorded, that deal perhaps incidentally with illegal activities or private matters, to get out if the Federal Government were doing it as opposed to the telephone company doing it?

Mr. CAMING. I honestly think it is a question of judgment, of course, and I can only give you my opinion. Unquestionably, first, we only take the minimum amount, so that normally we cut off at the start of conversation. Second, if we find evidence of other crimes than toll fraud during our toll fraud investigations, we do not—and I repeat, we do not disclose that to the Government. The only way it could be disclosed is as part of that minimal number of calls.

Mr. PATTISON. Whereas, presumably, if the Government had that information, it would be more likely to use that information in the prosecution of those crimes.

Mr. CAMING. I think that is a conclusion that I respectfully would have to bow to the wisdom of this subcommittee on. I think it speaks for itself, that no one could do less recording than we could. When we get this minimal amount of recording, if we don't have this much you could not even get a search warrant. When we have this very limited amount—and most of ours is not recording—we have computer tests, plant testing. We are working on further developments to attempt to eliminate more and more of the recording. We immediately go, make proper disclosure, and go before a grand jury and get a search warrant. We do not have any further recording. As I say, this one incident that I gave you where there has been lots of illegal calling known and admittedly for several years, we went in on six calls. That is all we stood on.

Second, each of these cases is thoroughly examined by the court to see whether there is an abuse.

And third, it is not A.T. & T., I respectfully say, but our honest ratepayers that would ultimately have to bear the losses, you and me.

Mr. PATTISON. Just one other question.

I take it that it is your position that the words in the proviso to section 2511 random monitoring, are unfortunate words in the sense that

the random monitoring which is referred to there, is not what a layman would think of as random monitoring, but is a term of art which means service observing.

Mr. CAMING. That is quite correct. I could cite you in the cases in my testimony and testimony of our prior witnesses; for example, Mr. Kertz, who appeared before the Congress prior to this Act being enacted, who constantly used the term random monitoring. We have given information to the Jackson committee, for example, and others the Government Operations Committee that uses this term continuously. You look at the answers to our questions that I adverted to, full of random monitoring.

Now, it states, and I just would like to repeat, this provision was inserted to assure that service observing will not be used for any purpose other than mechanical and quality control. That is one point. The legislative history, too, that it would in effect—this is specific monitoring, not random monitoring, as Mr. Kastenmeier pointed out. Third, you must have a human ear to violate title III, aural acquisition, and so those are our positions.

Mr. PATTISON. But the normal meaning of the term random monitoring, and as applied to the activity of the 30 million calls, it would seem to be the same to the——

Mr. CAMING. I would agree, and we would say that was random monitoring, but without human ear, and without it meaning the type of random monitoring——

Mr. PATTISON. But not random monitoring without the meaning of the proviso.

Mr. CAMING. Exactly.

Mr. PATTISON. All right. I just wanted to make it clear.

I have no further questions.

Mr. KASTENMEIER. I have several concluding questions.

Just to return to a point so we can put it to rest, do I understand your testimony to say categorically that the listening device of which local 2108 was complaining, was not installed in the Tech Road garage for the purpose of overhearing union personnel?

Mr. CAMING. Categorically, sir.

It was done for only a period of 4 or 5 days until it came to light. It was done to serve as an audiovisual alarm, or an audio alarm for burglary purposes in a garage that had been subjected to a great many thefts. It was done, too, by a craftsman, which is self-evident that we are publicizing it, since he as a member of the bargaining unit, may well have been a member of the union.

Mr. KASTENMEIER. Another area which we have not really discussed, which I would only refer to briefly, and that is to the extent that toll billing records are made available either to law enforcement or private parties. I refer to this because a week ago Thursday some records were introduced into the testimony before this subcommittee which indicated that toll records in Madison, Wis., and presumably elsewhere throughout the country, were made available to the Secret Service, on mere oral request. That is in 1972.

Now, since February of last year, at this time, Bell System has a policy, as I understand it, that the toll billing records of a subscriber will be released only upon receipt of a valid civil or criminal subpena,

or administrative summons. Is that correct? This is part of the Bell System policy, and this is about a year old; it did not exist prior to February of last year?

Mr. CAMING. That is correct in this sense.

Mr. KASTENMEIER. I have given a very superficial statement of what your policy is.

Mr. CAMING. In March 1, 1974, we initiated a change of policy in which lawful demands of authorities in form other than administrative subpena, summons, or court order, were no longer acceptable, and that thereafter we would only disclose—and this is part of the warp and woof of our policy of not unduly cooperating and our refusal to cooperate except at arm's length with law enforcement, and of which there are many other illustrations. We now only disclose under a subpena or a summons.

However, prior thereto, it was our practice in a number of our companies to disclose under subpena or summons or other demand of lawful authority. Now, in this respect the courts had held and the Federal Communications staff had so agreed that toll billing records were subject to demand by proper law enforcement authorities. That was and I believe is still the law, and there is a host of cases, and I would be glad to even furnish the committee with a memorandum I wrote on October 29 before our change in policy which addressed itself to that.

So what we did before, such as with the Secret Service, was wholly lawful, was wholly consonant with our understanding. We on our own, however, felt it was advisable in the change of climate, further strengthening of privacy and expressing our concern for it, to on our own introduce a policy not only of subpena, but of automatic notification to the customer when the subpena or service is provided, absent the certification by law enforcement that it will impede a criminal investigation or by a legislative committee.

Mr. KASTENMEIER. Following up on that, then, normally you state to the law enforcement authority requesting the information and armed with a valid subpena that you will notify the subscriber within 24 hours unless that law enforcement authority indicates that such disclosure would impede the investigation being conducted, in which case the existence of this disclosure of this information would be deferred for 90 days.

Mr. CAMING. Mr. Kastenmeier, as you know, I always make as full a disclosure as possible. May I give it to you?

First of all, we will only accept a request for nondisclosure because it would interfere with an investigation, if it is an official investigation of a suspected felony. We do not do it in cases of misdemeanors. Then we will do it for a period of 90 days, withhold notification, and such notification is subject to renewal, just so that you are not in any sense——

Mr. KASTENMEIER. Subject to what?

Mr. CAMING. Subject to renewal, just so you are not misled.

Mr. KASTENMEIER. Well, that is one of the points.

Mr. CAMING. This would require a new certification in each instance by law enforcement. It would be equivalent to the extension of a court order in the title III proceedings. Bearing in mind, too, that the whole

question of notification is one that we strongly have endorsed, but we do recognize that there are the countervailing considerations when a certification is present.

Mr. KASTENMEIER. The reason I ask this is, while this has been Bell System policy since last year, we must decide whether something of this sort should be imbedded in the statutes. We are considering a bill which covers disclosure of private records such as bank records and phone company records

Mr. CAMING. Well, I would say first that over the long history of the Bell System, when we take a course like that we have never regressed. Anything that has furthered privacy has remained. I would submit respectfully that it is a question of national policy for the subcommittee to determine on really balancing on the one hand the individual considerations and the individual right to privacy which we think is so important, and the very important countervailing considerations from a social standpoint of law enforcement authorities acting under the strictest terms.

We personally have found within the last, almost a year now, that this has been uniformly adopted and enforced throughout the Bell System. It is working very well. I see no reason that we would ever consider changing this policy, and whether it should be imbedded in a statute is something that I would respectfully defer to the committee on.

Mr. KASTENMEIER. OK, fine.

The last question I have is the size and cost of the security force maintained by the Bell System, and to what extent it is, regional or local. That is to say, does the Chesapeake and Potomac or Southwestern Bell have its own security force. Is it independent of the national Bell System?

Mr. CAMING. Very well.

To address myself to the first question, I would say that since each of our 23 operating companies and the long lines department, which would be 24, plus Bell Laboratories and Western Electric, we have 26 independent operating entities. They are truly operating independent companies with presidents, boards of directors, responsible to local, State regulatory bodies, as New York Telephone Co. and the like. They are employees of and under the direction and control of their respective companies, so these are separate forces. We consider them that we treat them—it is just like with our various presidents. When we introduced this policy on toll billing record, we sent it to the security men. We also have security counsel in each company, legal counsel, especially trained and able. Mr. Kelleher, for example, who is with me today, is the general attorney and security counsel of C. & P. Co., and in the toll billing problem, when we forged the policy at A.T. & T., and I played a principal role with others in the operating end of the business, we then submitted it to the presidents, to the security managers, and security counsel through them, and the vice presidents and general counsel for consideration. We then got their comments. We adopted the policy. When there is a policy evolved, it is a system policy, and it is enforced by the system in the sense that if it is a policy that is violated, the system is concerned as well as the individual company.

Now, with respect to the numbers in the companies, in the 28 operating entities, if you take the A.T. & T. and include that in it, there are only in the 28, 644 employees out of over a million total employees by these companies. We have assets in the order of probably close to $70 billion plus revenues, which I have the statistics on, revenues for 1973 were $23.5 billion, in addition to $70 billion worth of property, or close to it.

The securities department's function, I might say, in areas like wiretapping and electronic toll fraud is a very minimal part of their overall responsibility. These 644 employees cover all of the companies. Now, of that, the number, because I have seen it bruited about in the press of our having a great many members of the Federal Bureau, we only have 42, 6½ percent of our total force, are former members of the Bureau who are in security positions, and most of them are people of relatively short Bureau experience and such long telephone experience that although we don't think—and I don't mean to say it washes out their sins, because I am sure they are without sin, to be facetious for a moment—still, they are of long telephone experience.

And let me give you a figure that may interest you. We have the heads of our 28 groups, only two of the operating heads—the New England Co. and the Northwestern Bell Co. at the present time—have had any FBI background. The head in security and one in Western Electric, which is a non-Bell—I'm sorry, in A.T. & T. security, and the one in Western Electric, which is a nonoperating company, also are members of the FBI.

Now, let us look at their experience just to give you an illustration. New England Tel, 6 with the FBI, 20 with the telephone company; Northwestern Bell, it was 12 and 5. In the case of A.T. & T. it was 21 and 5. We have in addition—and of that, less than 1 percent of the force are retired FBI personnel of that 6½ percent. The others are very short term.

We also have some 50 others, which would be 7.8 percent of the force, who have some law enforcement background, non-CIA. We only have one or two others who were in the Federal group, not that there is anything wrong, with reference to members of the CIA. I am sure they make very attractive security people. They don't seem to seek telephone company work.

Mr. KASTENMEIER. There is nothing wrong with that, or being a former member of the FBI. As a matter of fact, several members of the Judiciary Committee are former members of the Federal Bureau of Investigation.

One of the reasons, to interrupt, however——

Mr. CAMING. I'm sorry.

Mr. KASTENMEIER. And there is a numerical inconsistency here. There was a column in a news release, an AP release covered in the Washington Post last month on January 1, which indicates that the Bell System, the legal eavesdropping in the Bell System is done by the small, tightly organized group of not 644 employees, but 665 security agents. They control when, according to this article, when, where, and how it is done.

At least 76 members of that force are former FBI agents. You indicated 42. And then it refers to a spokesman for A.T. & T., and

then the next paragraph, the spokesman, Attorney H. W. William Caming, and so forth. So, I am wondering, how do you explain the difference?

Mr. Caming. Well, understandably with the vast press of problems that the newspapers have in meeting the deadlines, and the various sources they gather from, some of whom are not necessarily thinking of the best interest of the public or the Bell System, these figures may have arisen. I know not the source. These are figures which I have had taken and prepared in great depth, effective January 1975, of the Bell System. These were responded to by each of the companies. This is fact, not allegation.

Mr. Kastenmeier. I take it that the reporter obtained his information from what he thought was reliable sources, but not from you. I would only note that there is not a great deal of discrepancy.

Mr. Caming. I will respectfully defer when you say from reliable sources. I cannot comment on that whether they were, but I do know that there is no question about this, Mr. Kastenmeier, this is fact. I can produce every name, and there are no others except this group that I know of that handle any function.

Now, if it appeared in the newspaper, I am sure that the reporter did think he had a reliable source, and it is a very highly regarded newspaper, but in fact, this is the statistical situation and I am powerless to say anything else, except express the facts.

Mr. Kastenmeier. Actually the deviation is minor, although 665, or 644, one referring to agents, and the other to employees, whether the 644 could not be referring to all as agents, I take it.

Mr. Caming. May I say, as there are members of the Judiciary Subcommittee with an FBI background, there are members of the telephone industry with an FBI background who are not in any way connected with security. There are 20 to 25 of those.

Mr. Kastenmeier. Well, no, the story says at least 76 members of that force are FBI agents.

Mr. Caming. Well, all I'm saying is the facts are, so that you can rest assured what they, and we will be glad to, if you wish, produce every one of the 665 names, or whatever, 644.

Mr. Kastenmeier. That will be fine. Yes, we would request that for the purpose in following this matter up. That would be useful.

In the nature of what annual expense is incurred by the Bell System, by A.T. & T. in maintaining this security force and in its operations?

Mr. Caming. I would have to have those figures assembled. I am not prepared. I think we would have to poll the individual companies. As you can recognize, we operate nationwide. The amount that we expend for this security force, in view of the major responsibilities in the area of prevention, in areas of indoctrination of employees, as well as detection of crime, make this a very small proportion of our total revenues of $23 billion a year.

Mr. Kastenmeier. I appreciate that. One of the reasons I asked this, to give you fair warning, but I am sure you are able to assess it anyway, is because of the allegation made that while the company suggests that the blue-box problem is the major reason to maintain a security force of this size, that as a matter of fact, the cost of the force, even as imputed to the little blue-box problem, exceeds the losses that are attributed to it.

Now, without arguing that point——

Mr. CAMING. May I respectfully address myself to that because I think that that statement is understandable, quite, Mr. Kastenmeier, but it has nothing to do with the facts, which I am sure you are most interested in. First, there was no imputation that the speaker is not at fault, nor that the major use of our security force is in electronic toll fraud. What I said was that if electronic toll fraud is not scotched like a snake wherever it appears, the losses could be of staggering proportions and you could see if one-half of the population had a blue box it would clog the facilities and destroy our ability to serve effectively.

But our security forces' functions overall are in the area of prevention, protection of property, protection of assets, there are many other types, coinbox larceny, credit card fraud, third billing fraud, the actual physical safeguarding, instruction of personnel, deciding how the property is to be supervised and protected. These are the functions of the security. The 644 do not devote themselves to electronic toll fraud. I repeat, they do not. It is a very small, select group in each company, and we are only talking of 644 in 28 companies which, due to my very poor mathematics, I hesitate to speculate on proportionately, but I think it's only about 25 to a company. We cover 48 States, and we are engaged in innumerable activities, court ordered wiretapping, for example, takes some personnel. Treatment of personnel. So that 644 in nowise reflects within each company those who engage in electronic toll fraud. It is a very small segment of that group. Most of this is done mechanically by computers, by testing gear. It is done by accounting departments, and it is done by receiving aid from informants.

We just did with reference to a gentleman who is well known for a bevy of beauties, and one of his beauties was using a blue box which got a great deal of publicity in the Los Angeles area. But the number of personnel of the 644 devoted to electronic toll fraud is a very small proportion, and the amount of savings in proportion to that is very substantial. The potential savings are beyond compare.

Mr. KASTENMEIER. Therefore, the company official of Southwestern Bell Telephone who was quoted in the press as saying that the security force of Southwestern Bell Telephone was essentially devoted to matters such as the little blue-box problem is probably incorrect and inaccurate.

Mr. CAMING. Yes; I think you have reference, without mentioning his name, to the ex-Southwestern Bell employee who is suing for some $29 million, and who has made many newspaper allegations.

We will respectfully respond to them. We are very carefully——

Mr. KASTENMEIER. I was not referring to him. I was referring to the defensive explanation on the part of a company official. His allegation was not that. The defensive response on the part of a company official in Southwestern Bell Telephone was that, well, we need all these security personnel for the little bue-box problem. But you are indicating basically your personnel are not used for that problem.

Mr. CAMING. I would say that certainly they are used for that problem, but from a Bell System-wide standpoint, and I think, for example, in the C. & P. company, we have Mr. Connor with us, it would be a good illustration that a very small fraction of their time, an im-

portant fraction; just as it is with credit card fraud, coinbox larceny, a very small fraction of that time is devoted to blue-box fraud, and that is the system practice.

Now, in a particular area, or in a particular set of circumstances, the problem could be more acute than others, as in some cases we have areas where we have a great deal of coinbox larceny, and in other areas, like Madison, Wis., we have very little, is our experience, but this does not mean coinbox larceny is not a real problem in New York City.

Mr. KASTENMEIER. In conclusion, Mr. Caming, I would request, and, of course, it would require some time, I suppose, to accumulate the figure on the costs of the Bell System, and its subsidiaries in maintaining a security force, and the names, and at least superficially the background. I guess we are really interested in the Federal agency prior connection of certain of the security force people.

I gather Mr. Drinan still has some questions.

Mr. DRINAN. Yes; I do.

Mr. CAMING. May I, Mr. Drinan, just to clarify Mr. Kastenmeier's question, I would like to give the committee a full view. You have mentioned the Federal forces. If I may respectfully, I would like to also include any local or State officials. We have nothing to hide from this committee, and I would like to give the background on all of them.

Mr. KASTENMEIER. That would be very helpful. I do not wish to impose something terribly difficult.

Mr. CAMING. It will take awhile. I have the figures right now, by the way, but I do not have the names of the individuals. If you want just the figures and the breakdown completely without the names. I can give you those.

Mr. KASTENMEIER. We will wait for whatever you have as a composite.

Mr. CAMING. In other words, you would like the names of each individual.

Mr. KASTENMEIER. We would.

Mr. CAMING. It will be a pleasure.

Mr. KASTENMEIER. I would also like, and here I think generalities would be all right, more or less the breakdown of overall devotion to certain tasks. For example, if 15 percent of the time is devoted to toll fraud cases, and 15 percent of the time is devoted to cooperating with Federal authorities and installing wiretapping devices, or whatever.

Mr. CAMING. Zero in installing wiretapping devices.

Mr. KASTENMEIER. Well, whatever.

Mr. CAMING. I know, title III, court ordered, or the like, toll fraud or indoctrination of employees, and protection of plant.

Mr. KASTENMEIER. Yes.

Mr. CAMING. Certainly we'll give you the complete story of the entire overall.

Mr. KASTENMEIER. The mystique or the mystery of at least some of these so that we can determine to what extent some of the stories that have already appeared are correct or incorrect.

Mr. CAMING. It will be a pleasure, and if I may, I will work with Mr. Mooney and Mr. Lehman in providing the figures.

Mr. KASTENMEIER. Mr. Drinan?

Mr. DRINAN. Mr. Caming, I would think you would want a clear Federal statute to warn all people that the use of a blue box is a crime and that they can be prosecuted.

Have you people thought of seeking a Federal statute that would make it clear beyond a doubt that the use of a blue or black box is not merely a fraud on the phone company but it is a serious crime?

Mr. CAMING. Yes; we have. We have in a number of States statutes that say use, manufacture and possession, sale, advertising of blue boxes, et cetera, is a serious crime.

Mr. DRINAN. Would not a Federal crime——

Mr. CAMING. That would be very helpful. We do use fraud by wire, section 1343 of 18 United States Code.

Mr. DRINAN. Why do you not propose a law. Maybe it will be less murky than the one that turned up in 1968. We are here to help you and to prevent all of the misunderstandings that may arise.

Now, reading the two or three cases here since 1968 that support your position, I would feel, and I think that you would, that you are going to have a different result some day, that if you continue to litigate this in the court, some lawyer is going to turn up with some angle on this thing that it seems to me that will say that you may not monitor because monitor is a euphemism for intercept. There is just no doubt about it, that the random monitoring means random intercepting, that you listen. And in the case, for example of the gentleman from abroad—what is his name, Mr. Shaw, that you, the telephone company, listened until you found the name of Mr. Shaw, and then you called in the authorities. Well, this must have occurred to you that when you think that this is happening, why do you not ask the Federal or State authorities to get a search warrant and go and try to get the blue box. That is the way of circumventing all of this.

Mr. CAMING. We have, and I think this is well taken. I would like to thank you for the opportunity to present some legislation.

Second, we have employed that and we do wherever possible. However, because of its small size, portability, the fact that it is often used on a variety of telephones, it is very difficult to seize this in use, and unless you do that, possession is not illegal under Federal law.

Mr. DRINAN. Well, that is the whole point, you see, why do you not make possession—I take it that the blue and black boxes can be used for nothing else except to defraud A.T. & T.

Mr. CAMING. Exactly.

Mr. DRINAN. It seems to me that mere possession should be a crime, and then you can get a search warrant, and then the appropriate officials can go, and then this is destroyed.

Mr. CAMING. We still might require—and this would be very helpful—I am delighted, and I agree with you completely, it still may be necessary to have a very limited amount of recording in order to identify the criminal, in order to get the search warrant. In other words, we have to have a minimal probable cause, and that is our present philosophy. We do not stay on the conversation, and we do not record a large number of calls.

Mr. DRINAN. Well, one very technical point that perhaps you would want to submit something on this, but there is a device I understand, M220, by which you can preclude the necessity of actually intercepting or monitoring a call.

Would you explain the technical aspects of that or if you want——

Mr. KASTENMEIER. Well, actually, if the gentleman from Massachusetts would yield, we had asked Mr. Mack of Western Electric to come and explain something about the M220 observing system.

Mr. DRINAN. All right. I yield back to the chairman, and we welcome this gentleman.

Mr. KASTENMEIER. If very briefly you could explain that, Mr. Mack, it would justify your being here this morning.

Mr. MACK. Now the question——

Mr. CAMING. He has been very helpful, I might say, in preparing me for today's presentation.

Mr. MACK. The question is the need to record voice, essentially. Could you, Mr. Drinan, state the question again so I can make certain I——

Mr. DRINAN. Would you just tell us that the usefulness of the M220 and that if this is used would it preclude the necessity of actually monitoring the conversation until A.T. & T. finds out the name of the caller?

Mr. MACK. Right.

Mr. CAMING. There certainly, in the modes of operation of the MTTU—oh, is that the one you are referring to?

Mr. MACK. You said M220.

Mr. DRINAN. This was described in part on June 11, 1974, to the Government Operations Committee, and I have here a memo, which, frankly, is very specialized.

What I want to find out is whether or not there is some way of circumventing the problem of the possible violation of Federal law by using ultrasophisticated devices which in no way cut into the conversation of human beings.

Mr. KASTENMEIER. I believe Mr. Drinan is referring to the remote observing system which was explained during that hearing in part. That is an M220? Is that not what it is called?

Mr. CAMING. I know what the difficulty is because I was there. if I may interrupt, and I am afraid the designation is understandably confusing. That is probably the technical designation for Tel-Tone equipment. The minute you mentioned the committee hearing, I knew it.

Tel-Tone is equipment which permits us to remotely access for service observing purposes, plant repair bureaus, and service business offices to which calls are made, and instead of hard wiring, as we have in the past, the interconnection between the place being observed where the calls come in at random and the service observing bureau, is done remotely by dialing up first a security access telephone number of, say, 7 or 10 digits, and if you were in Washington, you could access a Baltimore plant repair bureau. Then a special tone comes back. Another security code must then be emitted within, say, 5 seconds. That then permits you to randomly monitor the plant repair calls to the telephone company or the business office calls at Baltimore.

That is the equipment to which reference was made at that hearing. And then they do actually overhear the contents of those business calls.

Mr. KASTENMEIER. May I just interrupt to ask one question in terms of the language? The term "observing" is employed both officially and

as a matter of testimony. I am wondering whether "observing" has a special meaning.

What does "observing" mean in terms of electronics?

Mr. Caming. "Observing" is really used in the telephone industry as a word of art in two senses. One is the so-called service observing. That is, the official service observing whereby we statistically, for quality control purposes, monitor at random up to the start of conversation by a select group of people in service observing bureaus. That is what the statute referred to in the proviso when they say "known as service observers." These are at special locations. Mr. Lehman was to one with Mr. Mooney, I believe, and there they merely observed the quality of the calls, outgoing DDD calls, incoming calls, and the like.

Now there is the term "supervisory observing," which is done either by the telephone company or by certain business subscribers who sign prescribed agreements to comply with certain tariff preconditions for observing on the quality of service of individual employees who are apprised of that observing. And that is done for quality control of the individual employee.

The service observing is purely done by the telephone company to get the tone of the office. There is no identity of individuals or any specific unit of operation.

Mr. Kastenmeier. There is no visual connotation whatsoever?

Mr. Caming. There is observing done and we do use that term. Observing, for example, within a traffic room by our service assistant in the old days, or walking behind the operator, or by a group chief operator walking behind and watching girls today at TSPS boards and how they operate. We could usually call that observing or visual observing.

Mr. Kastenmeier. Well, thank you. Going back to the question posed by Mr. Drinan, Mr. Mack, is not the remote service observing of the Tel-Tone system's M220 essentially for overhearing rather than for—well, let me ask you, for what purpose is such an instrument used for?

Mr. Mack. I think that—I believe that Mr. Caming really stated it. That purpose is to centralize the operation of the observing, and in this case we are talking about oral observation.

Mr. Kastenmeier. It appears, if I understand your explanation, which, perhaps, you have not had an opportunity to give, this is a system which can be employed for wiretapping if you know the code, for wiretapping in a rather indiscriminate manner by unauthorized people, people other than phone company people or people authorized by law.

Built into the system is the susceptibility for such equipment being used for overhearing or substituted for wiretapping in a much more sophisticated sense.

Is that not true?

Mr. Caming. May I respectfully answer that because that was the question I discussed at length and I refer you to the hearings of June 11 and our written answers thereto on Tel-Tone which appear, Mr. Lehman, on page 177 and before that—which describes this equipment. It cannot be used for wiretapping in any sense of the word, and also, it would be the most cumbersome way of doing it.

What this does—see, we do have bureaus—service bureaus, for official service observing for statistics which are presented to the FCC, the State regulatory body, and for us to determine the quality of our service. It is purely anonymous, random monitoring, as I adverted to in our earlier testimony before the Long committee.

Now, all you can do if you—first of all, you cannot access this from an ordinary Touch-Tone telephone. When we first used it on a trial basis in a couple of companies—and the equipment is made in the State of Washington by the Tel-Tone Corp.—it was accessible by—if you had stolen the codes which were closely guarded, it would then be accessible by the ordinary Touch-Tone telephone.

We immediately took measures of the following nature to insure against it. There are two security access codes which are changed with regularity. The first in 2-week periods; I think the second now at once a quarter.

In addition, these are very carefully held in a service observing location.

Third: You have to use special equipment now which is not the ordinary Touch-Tone telephone.

Fourth: Even if you access the line, what would you get? You would get random calls to the plant repair bureau or the business office. This equipment cannot be diverted to any other use. It is not. It has to be set up for this. And it is spelled out in detail in the answers both at 177 and the prior testimony which Mr. Lehman and Mr. Mooney might like to glance at.

Mr. KASTENMEIER. Yes, we can do that. Mr. Drinan, do you have any further questions?

Mr. DRINAN. Just one last question. I assume that the FBI is going after the people who make these blue boxes and the black boxes. They have a little organization somewhere to make this sophisticated equipment. Now, there must be one or more organizations. I assume that the men in blue are looking for the men with the blue boxes.

Mr. CAMING. I think that is very well stated. I don't really think that they are to any degree primarily with respect to blue boxes as such.

Mr. DRINAN. Maybe black boxes.

Mr. CAMING. Or any other type of such equipment, primarily because the telephone company wanting to insure the integrity of our evidentiary gathering proceedings and to confine the overhearing only to evidence of toll fraud and not other crime has always independently gathered this minimal amount of evidence, and we present the whole package to them—so at that time the fraud section would in the Department of Justice or U.S. attorney's office be prepared to prosecute, or in a State level, say, county prosecutor, and will, like the U.S. attorney in Milwaukee, who is a good friend of mine.

Mr. DRINAN. Well, what I meant is, how many of these things are out there, and there must be one or more persons manufacturing them, and what is the Department of Justice doing about just killing the production?

Mr. CAMING. Well, as I say, we ourselves are about the only body that can really—except if you get it through an informant—get the initial indications of use.

Now, we have had several big cases, and we have enjoyed the cooperation of the Department of Justice. We've had several big cases recently, and they are all being prosecuted for fraud by wire, where we have had manufacturing—we had one up in Minnesota which covered about six States with manufacturing and distributing. We had one recently in Montana, which involved as variegated a group as manufacturers, distributors, a druggist, a housewife, two members of the military.

We have recently had one in Oregon and Arizona. In each case, these have been prosecuted with the full cooperation of the U.S. attorney, and the FBI, and in the Bremson case, for example, in Minnesota, there were multistate raids coordinated to make the arrests, but we did gather the evidence, and we are extremely concerned about the proliferation of people who seem to find this a very lucrative way to make money.

For example, you can make one of these for $50, and in the right circles, whether it's organized crime or unscrupulous businessmen, get, as I mentioned, $3,500, and they are getting it.

Mr. Drinan. Well, one last point. It would seem to me that it is so sophisticated, it would be very easy to catch and apprehend and deter the manufacture thereof, though maybe that is another case where the Department of Justice is not doing too well these days.

Thank you very much.

Mr. Kastenmeier. Thank you, Mr. Caming, for your appearance here today, and your colleagues, Mr. Connor and Mr. Mack, both of whom we did not have to much access to, but perhaps at a later date, there will be additional reasons to ask for your help; also to others who may be here this morning from A.T. & T., I want to express the subcommittee's appreciation. It has been very helpful indeed.

Mr. Caming. It has been a pleasure.

Mr. Kastenmeier. The Chair would like to announce that Mr. Wiggins was to have been here this morning, but because of the death of our colleague, and very close friend from California, Congressman Pettis, Mr. Wiggins is attending the funeral in California and could not be here, so until we reconvene at a later date on this subject, the subcommittee stands adjourned.

[Whereupon, at 12:50 p.m., the subcommittee was adjourned, subject to the call of the Chair.]

SURVEILLANCE

TUESDAY, MARCH 4, 1975

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:10 a.m., in room 2141, Rayburn House Office Building, Hon. Robert W. Kastenmeier [chairman of the subcommittee] presiding.

Present: Representatives Kastenmeier, Danielson, Drinan, Pattison, Railsback, and Wiggins.

Also present: Bruce A. Lehman, counsel; Timothy A. Boggs, professional staff member; and Thomas E. Mooney, associate counsel.

Mr. Kastenmeier. This morning the subcommittee will conduct another in its series of hearings on surveillance legislation.

We will be hearing this morning from three distinguished Members of Congress who are cosponsors of various antisurveillance bills pending in the subcommittee. They are Hon. Edward Biester of Pennsylvania, Hon. Barry Goldwater, Jr., of California, and Hon. Parren Mitchell of Maryland.

All three are among the 71 House cosponsors of the Bill of Rights Procedures Act. The subcommittee heard testimony from the chief House and Senate sponsors of this bill, Congressman Charles Mosher and Senator Charles Mathias, at its first hearing on February 6.

The Bill of Rights Procedures Act prohibits interception of any communication by electronic or other device, surreptitious entry, mail opening, or the inspection and procuring of bank, telephone, credit, medical, business, or other private records without a court order based on probable cause that a crime has been or is about to be committed.

In addition, two of our witnesses today have cosponsored legislation to limit military surveillance of civilians, and Congressman Mitchell has also cosponsored a bill to prohibit wiretapping performed with the consent of one party to a conversation unless accompanied by a court order.

At this time it is a great personal pleasure for me to welcome as our first witness not only a former colleague on the Judiciary Committee, but a colleague who served on this very subcommittee, and whose service was very deeply appreciated by this chairman for I guess about 4 years.

The Chair greets Congressman Ed Biester of Pennsylvania. Congressman Biester.

TESTIMONY OF HON. EDWARD G. BIESTER, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

Mr. BIESTER. Thank you, Mr. Chairman, and thank you for your generous remarks.

And I am reminded while we are dwelling in the world of yesterday that when you and I were on the full committee, and we were considering wiretapping legislation, an issue arose as to the extent to which the strictures then being proscribed for wiretapping should also be proscribed for limitation upon the President's power in national security cases. And it was Senator Mathias, then Congressman Mathias, who fought as vigorously as anyone to try to see to it we did not make a distinction in those instances. It would seem to me that the events which have transpired since then have borne out the presager of his concern. We have permitted the whole concept of national security to require an aura of impregnability in terms of the use of that rationale against the security of individual Americans.

Mr. Chairman and members of the committee, I appreciate this opportunity to appear before you today to speak on behalf of H.R. 214, the Bill of Rights Procedures Act, introduced in the House by the distinguished gentleman from Ohio, Mr. Mosher, and in the Senate by its author, the distinguished Senator from Maryland, Mr. Mathias, I just referred to.

As you indicated, Mr. Chairman, the Bill of Rights Procedures Act would require any Federal agent to obtain a court order before he or she could conduct any form of surveillance on a private citizen. The Government would be required to demonstrate probable cause that a crime had been or was about to be committed before a warrant for surveillance could be issued.

The term "surveillance" is defined in the bill to include bugging, wiretapping, and all other forms of electronic surveillance, opening of mail, entering of dwellings, and the inspection or procurement of the records of telephone, bank, credit, medical or other private transactions.

The questions at stake in consideration of this legislation go to the very core, it seems to me, of the democratic process. This issue forces us to contend with perhaps the most basic question faced by a free society: Where do we draw the line between the rights of the individual and the legitimate and necessary functions of society as embodied in the Government?

The specific rights addressed by this bill are contained in the fourth amendment to the Constitution of the United States which proclaims the right of the people to be "secure in their persons, houses, papers, and effects against unreasonable searches and seizures." It seems to me, Mr. Chairman, security is not only an abstract legal proposition. If it is to have meaning it must be a sure perception of one's condition. I think that goes to the heart of the reason why this legislation is necessary. It is necessary not only to make quite clear the prohibition upon functionaries of the Federal Government with respect to what they may or may not do, but it goes to the heart of the question in terms of the way in which individual American citizens perceive the extent of their rights. And when they know that we have made it

unlawful for Federal officials or Federal agents to engage in activities which would derogate from their personal security, we revitalize their internal perception of being secure in their persons, in their homes, in their mails, in their telephone, and in their communications. That is the important part of this act, not only to guarantee those rights, but to enable a discouraged public to revitalize their appreciation and their sense of protection of those rights, the safety of those rights, the security of those rights.

Now, a basic question such as this, a question of rights and balance is seldom easy to answer in any age, and particularly in our own complex age. It is particularly difficult to answer in the context of national security considerations, or it has been made to seem so. It is precisely those considerations I would like to address this morning. I do so as one deeply interested in the matter, reflected through my services over three terms on this very distinguished Judiciary Committee, my present service on the Committee on Foreign Affairs, and my service during the 93d Congress on the Subcommittee on National Security of that committee.

Clearly all those in positions of public responsibility must approach this question with a weighty concern for the dangers inherent in the prevailing international political system, and the peculiar obligations which our position within that system imposes on the Government of the United States. Few would dispute the need for the Government to deal with many sensitive matters in secrecy. Few would dispute the need for the Government to preserve international trust in the confidentiality of diplomatic discussions.

But equally clear must be the need to deal with such legitimate national security concerns within our constitutional framework—to subject governmental surveillance to proper and reasonable standards of procedure, and to minimize the scope for individual caprice or abuse of power.

With regard to national security, what balance do we properly strike? Where, indeed, do we draw the kind of line which protects both the individual and society at large?

I would contend that under existing procedure, the rights of the individual under the Fourth Amendment are currently inadequately protected.

The law presently allows surveillance to be undertaken on the authority of the President—with such authority usually executed by the Attorney General—when national security is considered to be at stake.

It seems clear to me that such a procedure—involving individual interpretation of such a broad and ambiguous term as "national security" does indeed allow for abuse of power. And I need not remind members of this committee of the extent to which that can mature.

H.R. 214 would rectify that situation by linking all surveillance—including that undertaken on grounds of national security—to a court order based on probable cause that a crime had been or was about to be committed.

In the case of national security, such an order would have to be linked to suspected sabotage, espionage, treason or similar crimes. In other words, wiretapping or other forms of surveillance undertaken strictly for intelligence gathering purposes unrelated to suspected criminality would be effectively eliminated.

Is this an unreasonable restraint on executive power? Would such a requirement hamper the proper stewardship of our national safety? Would it indeed swing the judicial pendulum dangerously in the direction of individual rights at the expense of societal security?

I think absolutely not. Such a requirement is inherently reasonable and proper, and would not have to subject our society to risk.

I am supported in this belief by the Honorable William D. Ruckelshaus, former Deputy Attorney General and former Acting Director of the Federal Bureau of Investigation. Hardly a man oblivious to legitimate national security considerations, Mr. Ruckelshaus last year stated before joint hearings of the Senate Committees on the Judiciary and Foreign Relations that he sees "No reason why all wiretaps, should not be subject to court warrant."

To restrict wiretaps and other forms of surveillance to instances approved by a Federal court, simply means the Government must establish to the satisfaction of an independent arbiter that a reasonable suspicion exists as to the commission of a crime affecting the national security of the United States. And it seems to me, members of the committee, and Mr. Chairman, that in the intellectual process that one might go through to satisfy an independent arbiter of those circumstances inheres the process of testing in one's own mind, one's own objectivity with respect to the need for the surveillance one requests. It seems to me that if the only guide is oneself, if the only setter of standards is oneself, the opportunity for gradual erosion of high standards and high criteria for surveillance, the erosion process, it seems to me, is inevitable because it simply becomes easy always to draw the line further down the standard and further down the criteria rather than in strengthening those standards or in strengthening those criteria.

Some would contend that Federal magistrates lack the necessary expertise in international or security affairs to make such judgments. I would not make that kind of statement. I do not believe that to be the case. I am inclined to believe, however, that officials of the Federal judiciary are indeed capable of assessing the quality of evidence presented to establish probable cause, and are indeed capable of judging the relative importance of the Government's arguments versus the constitutional rights of any individual in question. And it seems to me again that if we permit ourselves to be deluded by the notion that Federal magistrates lack the necessary expertise to make judgments in the national security field we are again ascribing to the phrase national security a certain mystical power, a certain arcane quality which jeopardizes a free society and which is authoritarian in nature.

As Mr. Ruckelshaus pointed out in his previously cited testimony, "Courts almost never turn down legitimate requests for wiretaps in criminal cases and would be even less likely to do so in the area of national security."

H.R. 214 would thus not bar necessary national security surveillance; it would simply subject the need for that surveillance to prior assessment by the judicial branch. Such a prior assessment simply, but significantly, removes national security surveillance from the realm of possibly arbitrary, capricious action.

I would suggest that the committee might profitably consider various ways to reduce the number of Federal judges authorized to hear re-

quests for national security surveillance as a means of insuring stricter consistency of rulings, if that is a question which vexes the subcommittee in the course of markup.

We hardly need remind ourselves that for a number of years and under administrations of both political parties, national security has all too often been a facade for partisan or selfish individual motives. It does little good to recite specific abuses by individuals. We must concern ourselves with correcting institutional flaws. Congress must very properly seek to place a reasonable restraint on the use of power to insure that all valid factors are given due consideration. The requirement of a court order is, in my opinion, an altogether reasonable restraint. It subjects surveillance to an orderly and objective procedure capable of weighing relative values involved.

Prior judicial assessment of surveillance, combined with continuing congressional oversight—which is strengthened by H.R. 214—involves all three branches of Government in meeting the shared constitutional well-being and preserve the national security. I would contend that only through such continued involvement of all three branches can we reasonably expect to strike the necessary balance between individual and societal concerns.

Let me briefly address one other important aspect of this question. Does elimination of wiretapping and other surveillance for intelligence gathering unrelated to suspected criminal activity preclude a needed and valuable source of national security information?

Again, on balance, I think not. Recent experience with wiretapping and surveillance for information gathering purposes seems to indicate that such procedures have been used mainly to stop internal organizational leaks, or to gain information usable only in a domestic context, rather than for legitimate national security or defense needs.

The use of such surveillance—divorced from suspected criminality and unrestrained by any check—imperils our constitutional system, and thus undermines the very national security it is ostensibly designed to protect.

I would like to interpolate at that point in my prepared testimony, Mr. Chairman, to underscore again the observation I made earlier which is that in striking of the balance we must strike here it would be a sad tragedy for our system to become so concerned over the matter of national security as to permit the individual security, which is the hallmark of our particular contribution to civilization, to be debased in the process.

I should point out that H.R. 214 does allow for information gathering surveillance with the consent of the individual in question. It is conceivable that a situation could arise, in which a high-ranking official involved in sensitive negotiations, could be reasonably suspect of being a security risk, simply because of present or prior family, business, or political associations. Such an official might then want to undergo surveillance simply as a means of establishing his or her reliability. In that sense I would suspect that such a process is all right. I have concern, however, about the difficulty of permitting one party in a circumstance who might very well be an informant to permit by his license surveillance of a host of other persons if such were done without some very regular court supervision. It seems to me that is a potential loophole through which a number of abuses might flow.

Mr. Chairman, as a lawyer and a former member of this committee, I fully appreciate the very difficult task which you and the other very distinguished members of the committee face. I am fully confident, however, that from the collective wisdom of this committee will emerge the kind of legislation which does indeed rise to this difficult challenge, and which does indeed strike an appropriate balance between individual rights and societal needs. H.R. 214, backed by distinguished members of both parties, goes a long way toward striking that kind of balance. I know it will be given very careful consideration.

Thank you, Mr. Chairman, and other members of the committee, for allowing me to appear before you this morning. I appreciate particularly the attendance of Mr. Railsback, even though he was 15 minutes late to the session. That is better than usual, Tom.

Mr. Railsback. Thank you.

Mr. Kastenmeier. I thank my colleague for his testimony. I am interested in the part of your testimony placing heavy emphasis on the impact of the bill that you have cosponsored on "national security". I suspect we would want to have the testimony of others with regard to the question that you pose and answer which is, does the elimination of wiretapping and other surveillance for intelligence gathering unrelated to suspected criminal activity preclude a needed and valuable source of national security information. You answer that, "On balance, I think not."

What other sources, or devices or techniques for intelligence gathering might the security apparatus of this country rely upon if not those proscribed by this legislation? Presumably intelligence gathering will go on, but in a different form, is that not so?

Mr. Biester. Yes. I think that the testimony that various committees will hear in the course of the next several months concerning the activities of the Central Intelligence Agency, and which other committees will hear in terms of oversight of the FBI and other such institutions, I think will discover that at least in the instance of the CIA that 95 percent, or 98 percent of its work in intelligence gathering is done by simply the passive act of reviewing journals, reviewing professional journals, engineering journals, political journals, newspapers in various countries, reports that are quite open and come from open sources. The intelligence gathering that is done by the most surreptitious and covert means is really a very tiny fragment of that.

Now, that does not mean that that tiny fragment is not important and significant, because undoubtedly in many instances it is. I would not want to permit the impression that because its volume is low that the significance is equally low.

Now, as to intelligence gathering in the United States where that intelligence gathering is done to protect the national security of the United States, it is my assumption it is done with respect to protecting the Government of the United States from the commission of a crime by an external agent or persons working for external powers. The solicitation on the part of an external agent of an American citizen is in my understanding a crime. The offer on the part of an American citizen to an external power is, in my understanding of the law, a crime. So that process is regarded by most societies as so sensitive and deleterious on the well being of the society that most countries

have made the very initial stages of those kinds of contacts criminal activity, so that it seems to me criminal activity covers the range of national security concerns and is in intelligence gathering already, and that we really would be talking about, I think, an area that is de minimus and ought not to permit us to jeopardize the right of American citizens to try to chase.

Now, I know that other persons hold different points of view with respect to that, but that is my view.

Mr. KASTENMEIER. Well, it would certainly cover counter-intelligence gathering in the sense of intelligence gathering by foreign powers within this country because the Government could seek a warrant in such cases. Whether otherwise unconditional intelligence gathering could take place through use of these techniques I would question, but apparently if they could establish a nexus between the need to do so and criminal activity, violations of law, that might be the case.

I do not know to what extent you participated in the formulation of H.R. 214, or having seen it in its general form happen to be in general agreement with it and subscribed to it as a cosponsor. But as I understand it, it is intended to be a comprehensive document in terms of forbidding general activities which are complained about in a number of areas. It does not, however, I note, ban so-called mail covers. It bans the opening of mail.

Mr. BIESTER. No, Mr. Chairman, it does not ban mail covers, and in my judgment it should. And if there were an amendment I would hope that the committee might include in markup it would be to touch on that subject, because mail covers can be just as obnoxious as the mail opening it seems to me.

Mr. KASTENMEIER. Well, the reason I asked the question is not necessarily to go through a litany of what it covers and what it does not cover, but whether it is your understanding the intention was to cover comprehensively all similar acts which are complained of in terms of breech of privacy of American citizens for which there is no legal restraint other than capriciousness of the executive officer, and most of this being hidden or unknown activity, and would bring it to account. Is that basically what it does?

Mr. BIESTER. I cannot speak for other cosponsors, but in my view, from my discussions with some of them that was the purpose, is the purpose, and you have touched on one gap. And I think that gap should be closed. But our purpose is a comprehensive protection of the American people's individual rights in this field.

Mr. KASTENMEIER. Others complain about the use of agents for the purpose of infiltrating groups, and I believe that this too constitutes invasion of privacy. But, their characterization of that perhaps might be more difficult or, indeed, surveillance by means of physical surveillance, by means of shadows of individuals might also be considered objectionable.

Mr. BIESTER. Would fall within the same concern.

Mr. KASTENMEIER. I have several other questions, but to enable my colleagues to participate in the questioning at an early point, I am now going to yield to the gentleman from California, Mr. Danielson.

Mr. DANIELSON. Thank you, Mr. Chairman.

You have made your point very clearly. I think I understand it.

What you are truly talking about is the abuse of peoples, of the American citizens or the American nationals right to be free from unreasonable searches and seizures. I share that concern. I want to voice probably a few comments here because I have another committee that I am going to have to go to, and it will be quicker than questions and answers, though I do not mean to cut you off if you have a comment.

I share the concern very fully, but I also have another concern. We have lived in recent years in a context in which there has been an abuse of many of our constitutional rights, an abuse of power, and I am not being partisan when I say this. It went back before Mr. Nixon's administration. But it is a fact, it is an illness that has affected our national political structure. Yet I feel that we are in danger here of indulging in what I call reactive legislation, and perhaps swinging the pendulum too far. For example, there have been comments that we should not allow infiltration of groups. Let me ask only a rhetorical question. How on earth do you expect a law enforcement agency to become acquainted with the proposed activities of a burglary ring, how they propose to dispose of their products and the like if they are forbidden from infiltrating that group? We would be tying the hands of society to the point where they could not investigate. If you have a used car theft ring, and there are many of them, you cannot examine a public or private business transaction without a court order. How can you go into a garage and find out where they have alterations made to a motor vehicle, and how are you ever going to find out how these stolen vehicles passed in interstate commerce if you cannot look at business records, and they are private records?

Have we asked the courts, do they want to become such activists in our investigative process on the very cases they are going to have to try impartially? Do you have to go to a judge every time you are going to follow a thief down the street to find out where he disposes of his ill-gotten property? I submit you do not have to.

While I think we must be careful to protect everybody's constitutional rights, we must do this all the way. The people have a constitutional right to see to it that the laws are enforced also, and it is a legitimate police function to try to investigate those who are committing crimes. I am not talking about national security you may have noticed, if the bill covers both sides of this. I am as much interested in the bank robbers, in the narcotics industry, and it is very nearly that, and in other forms of vice, in the use of usurious money lending operations, I am as much interested in them as almost anything else, and we cannot in my opinion tie the hands of law enforcement to the point where society cannot protect itself.

Now, I have not asked the courts, but I think I will. I have a habit of doing that, do they want to become so deeply involved in our executive and administrative procedures. Do the courts want to pass upon whether or not an FBI agent can follow a car thief, and then they are going to have to later sit down and judge that car thief's case. I submit that they will not.

My last little comment, and then I will have to beg forgiveness, I have got to go to another meeting, I feel that a large share of the blame here is our own. The Congress has failed miserably in exercising its oversight function. If the normal law enforcement procedures had

been followed, as they should have been followed during the last 10 or 15 years, we would not have come to this situation we now find ourselves in. And one reason why they have come to this pretty pass is because of the fact that that the Congress has not exercised oversight. I feel that we should exercise a strong, vigorous, penetrating oversight on every one of the agencies. The FBI should come into this committee once a year and justify its budget, and justify its activities rather than having an open-ended authorization, and simply running over to the Subcommittee of the Appropriations Committee to where they become apparently some kind of a sacred cow and get any kind of an appropriation they want. Well, that is not much of a question, Mr. Chairman, but I think I have told you what I have got on my mind. We may agree in substantial part or we may disagree to some extent, but that is my attitude on it, and now with your permission, I am going to run off to another meeting.

Mr. KASTENMEIER. Good luck.

Mr. DANIELSON. Thank you.

Mr. KASTENMEIER. Do you want to comment?

Mr. BIESTER. If I could. And I understand——

Mr. DANIELSON. I will wait a little here and listen to you.

Mr. BIESTER. First of all, I agree with much of what you said, particularly in the area of oversight. If there is one area where we have failed miserably, it is in the area of oversight.

With respect to whether the courts wish to become involved in questions of this kind, they are increasingly involved in questions of this kind, the purity of evidence, the purity of searches and the appropriateness of arrest, so that in at least my neck of the woods we have almost two trials now. First of all, the trial on the questions of evidence and then the trial in the question of the merits.

Mr. DANIELSON. If I may interrupt though, that trial on the question of the evidence comes after the arrest and after the charge and when the case is pending before the court, not when it is in an administrative posture, before there has been an arrest, a warrant, an indictment or information, or any other sort of judicial proceeding.

Mr. BIESTER. That is correct. But in terms of the time of the court, in terms of the time involved, it might have been salutary in some instances for a better judgment to have been made at the outset than during the course of a lengthy hearing there.

Mr. DANIELSON. I must respond to that that it is my own concept that the judicial department should not step in until you have a judicial proceeding. When you have got a strictly administrative, executive department proceeding, the judicial department does not yet step in. On national security as opposed to what I am going to call common crime you have got a different situation. I do not believe you are allowed to wiretap under any circumstances, but they seem to allow it if there is a court order, and if they want to be party to that unconstitutional act I cannot stop them.

Thank you.

Mr. BIESTER. I guess the last point that I would make is if a peace officer, or if an agent of the Federal Government does not have probable cause, then he should not be fishing in any businessman's records. You have got to have some cause for going into that garage which the

gentleman referred to, and it ought to be of sufficient quality to satisfy at least a magistrate with respect to it.

Mr. KASTENMEIER. Now I would like to yield to the gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. We are glad to have you back, and we knew you could not stay away very long.

Mr. BIESTER. You see what happens.

Mr. RAILSBACK. Right. Do you think that there is merit in having a judge in a circuit or a district court specially trained to handle these applications in national security cases?

Mr. BIESTER. Well, I am of two points of view with respect to that, Mr. Railsback. The first is that there is an obvious efficiency if one such judge were assigned to that particular class of cases and decisions, and he could develop an expertise, or she could develop an expertise that would be very useful in that respect. If we did that, however, I would like to see such a judge rotated periodically because I would not wish the judge in the course of developing expertise to also develop a state of mind——

Mr. RAILSBACK. Biases, yes.

Mr. BIESTER. Which might reflect itself in an unfortunate bias.

Mr. RAILSBACK. How about the need for emergency provisions that would permit surveillance without obtaining a court order, but would require, for example, the obtaining of an order within 48 hours?

Mr. BIESTER. As long as the time limit were very short, I would have personally no objection to that. But I think the time limit would have to be very short, and I am not sure that 48 hours is a short enough period of time.

Mr. RAILSBACK. What about proscriptions for overseas surveillance or interception of wire or oral communications?

Mr. BIESTER. That is a very difficult question.

Mr. RAILSBACK. Like the Joe Kraft case.

Mr. BIESTER. Right. That is a very difficult question. It is my personal view, and this is a purely personal view and does not reflect necessarily the opinion of any other cosponsors, it is my personal view that there is a quality of association and relationship among the American citizens abroad who might be tapped, and American agents abroad who might do the tapping. With respect to let us say that enclave of persons, it is my belief that the prohibition should apply.

Now, the question then arises how in heaven's name is a court order feasible or possible under such circumstances. I do not have a practical answer to that. It seems to me that the will and talent of this subcommittee is not beneath arriving at some method for achieving that. But I can see a different set of circumstances there and different practical problems, and I honestly do not have a clear-cut answer to you. But it is something that I have recognized, and now as to that enclave finding some way in which the Federal agents involved can get some kind of independent judgment with respect to that, that is something I think you should pursue.

Mr. RAILSBACK. Do you believe there should perhaps be a different standard of proof in national security cases other than probable cause?

Mr. BIESTER. I personally do not because I think every time we invent a new standard we escape the usefulness of usually a well-recog-

nized loss, a particular legal term which lawyers and the courts and other persons can be more readily guided by.

Mr. RAILSBACK. Thank you for your continuing interest, and I think you have been most helpful just as we knew you would be. Thank you.

Mr. BIESTER. Thank you.

Mr. KASTENMEIER. The gentleman from New York, Mr. Pattison.

Mr. PATTISON. I am just concerned about the area of personal surveillance as opposed to electronic bugging and the problems, the practical police problems that follow in that kind of problem, and I am interested in your comments on that.

Mr. BIESTER. Well, I think the gentleman from Illinois in a sense raised the same kind of question. There is a practical problem there. There may be an emergency situation in which it is simply impossible for a peace officer to get a court order immediately when he is engaged in surveillance or initiates personal surveillance. It is my own view that a very limited period of time in such emergency situation, clearly defined in the legislation, ought to be a practical answer to that. The gentleman from Illinois suggested 48 hours. I think that is a fairly long period of time. I think for my purposes it is too long a period of time. Perhaps 24 hours would be better. But the important thing is that we ought not to let the emergency become a standard and a mechanism by which the strictures of the legislation are avoided.

Mr. PATTISON. I am also a little bit concerned about preventive surveillance. In other words, when you are standing there in a shopping center, for instance, with no particular person in mind, but watching for somebody who picks up a package of balogna or something, certainly you do not need a court order in order to do that.

Mr. BIESTER. Certainly you would not, and in fact, in the bill on page 5 an attempt is made, beginning with line 3, to reaffirm the standard rules with respect to arrests and searches pursuant to arrests and the like. But they do not necessarily cover the point that you have raised, and it is my view, and I come to page 5 simply just to demonstrate that it is the concern of the cosponsors not to distort the norms of current police procedure with respect to arrests and general surveillance of a shopping area or some such thing.

Now, many police officers would tell you that there is a kind of a sixth sense which is acquired by those who work in the field over a span of time that can almost sense out the moment just before a crime is about to take place. Again, we are not getting into that area with this legislation.

Mr. PATTISON. I just have one other question. Would you not think that in the area of consent to wiretapping, where we permit that when the person himself who is going to be wiretapped does consent, aside from the problems of the other caller, would you not think that if that is in this bill that that kind of consent would routinely be extracted from almost every employee?

Mr. BIESTER. That is a very good question, and it is a heavy concern of mine with respect to this section of the bill. I fully understand the need for some mechanism by which a man can protect himself. By the same token, again it offers, just the emergency situation does, an opportunity for abuse. There comes a point I guess at which you cannot write a perfect piece of legislation, and you cannot perfectly predict all of

the possible permutations of human activity afterwards, but again speaking only as an individual cosponsor, I am open to any suggestion or to working with this subcommittee with respect to that.

Mr. PATTISON. My problem is if I were an executive I would want to routinely extract that just so that I did not pinpoint anybody in particular. I mean, if I all of a sudden asked a particular person for his consent, and I had not asked everybody else, I would think that that would be rather destructive to my relationship with that particular person. He might think that I was being overly suspicious of him, whereas if I extracted it uniformly from all of my employees, even though I only had one or two of them in mind——

Mr. BIESTER. If you did that, I think you would be violating certainly the spirit of this legislation.

Mr. PATTISON. Yes; I agree. But it would not be prohibited by this.

Mr. BIESTER. I think it should be. I think in some fashion we should clarify that it is a specific consent not a general consent, and for a specific circumstance.

Mr. PATTISON. That would solve the problem.

I have no other questions.

Mr. KASTENMEIER. Before I yield to the gentleman from California, it might be well just briefly to hear the scope of this bill, because we are talking about some activities not covered in the bill, such as mail covers, or following double agents and the use of informers, infiltration tactics used by police departments, as anyone who watches television knows, very effectively, from all of the dramas that appear every week.

In addition, this bill does not affect State or local law enforcement authorities. It is essentially a Federal bill.

Whether or not one desires to reserve certain powers for any police authority within the United States that is local in character. I think it should be made clear what the scope of this bill is, in terms of what it will or will not prevent.

Mr. BIESTER. I think that section 4 on page 5 of the bill also points in the same direction, but perhaps could be more clearly stated.

Mr. KASTENMEIER. I yield to the gentleman from California, Mr. Wiggins.

Mr. WIGGINS. Thank you, Mr. Chairman.

You have used in the bill the phrase "probable cause," and you have also used in the bill "reasonable cause." Is there a difference in meaning intended between the two usages?

Mr. BIESTER. We have also used the phrase reasonable grounds, which I think reflects a fairly standard phrase with respect to arrests or pursuit of a person who committed a felony, but not in one's presence, not a peace officer's presence, and the probable cause we mean to use as a standard for the magistorial authority in terms of the justification of either surveillance or the wiretap.

Mr. WIGGINS. All right. Then are you intentionally incorporating all the case law which has flushed out the meaning of that word in recent years?

Mr. BIESTER. Yes. We cannot bind the courts to their ad hoc future interpretations of an application of the phrase. We are certainly taking that into account, though.

Mr. Wiggins. In section 2236, subsection (A)(2), commencing on line 13——

Mr. Biester. Right.

Mr. Wiggins [continuing]. You deal with the problem of the search and inspection of records, and you tolerate consensual searches. Normally, records are two-party records. They are records of a buyer and a seller, the record of a doctor and a patient and so forth.

Is it your intent, that the consent be obtained from all parties before a search would be permitted or from only one?

Mr. Biester. Well, it would be my personal view that the consent should embrace all of the persons whose individual rights would be affected by disclosure. Now, different persons have different responsibilities and rights with respect to many of those matters listed.

For example, the medical records, the doctor is not privileged to disclose medical records without permission of the patient. In this instance, it would seem to me we are calling for permission or consent of both, let us say, the patient and doctor with respect to those records.

Mr. Wiggins. What about credit records?

Mr. Biester. With respect to credit records, it is again my own belief that it is a matter of both parties, the party who is the creditor and the party who is the debtor.

Mr. Wiggins. Telephone records.

Mr. Biester. Telephone records would include not only the company itself and the person who may have called, but the person who was, in fact, called, because it seems to me there is an impact, potential impact upon the individual rights of at least the caller and the callee.

Mr. Wiggins. Normal business records that I will not include as credit records? Congressman Danielson made mention of, let us say, the work records with respect to repairs on an automobile. Would that require the consent of both the owner of the automobile and the person who conducted the repairs?

Mr. Biester. To be consistent, I think I would probably have to say yes, although I can perceive some instances in that particular case in which it might be difficult to obtain the consent of one of the parties.

Mr. Wiggins. Does your bill intend to preclude physical surveillance which does not involve an entry, and I include within entry electronic entries as well as physical?

Mr. Biester. You mean the instance such as the shadowing of a person, yes, it would in my opinion. It should, in my opinion.

Mr. Wiggins. Well, if it does, where does it?

Mr. Biester. That is why it should, in my opinion, if it does not.

Mr. Wiggins. I see. Your statement, as distinguished from the legislation, was pretty sweeping in its intent, and I have been trying to find in the bill itself whether or not the bill supported your statement so as to inhibit simply shadowing, physical surveillance of a suspect?

Mr. Biester. Right. I would say that the precise matter set forth in the bill relates to particular events, such as interception of telephone communications, the records, the mail, and the searching of private dwellings. And I do not find here just under the pages a point at which general surveillance of the kind of shadowing that you referred to

is covered, which is why I said in my initial answer that it should, it should cover that.

Mr. Wiggins. The legislation which is now on the books, a portion of which you seek to repeal, speaks in rather sweeping language about the constitutional authority of the President of the United States in certain national security matters. Do you recognize any such constitutional authority on the part of the President of the United States?

Mr. Biester. I recognize——

Mr. Wiggins. Inherent, I think is the way the legislation phrases it.

Mr. Biester. I think there is an inherent constitutional authority both in the Congress and in the President of the United States. It seems to me article I, section 8 confers upon the Congress a very significant responsibility with respect to national security and it seems to me that the President's oath of office to protect and defend the Constitution implies also a certain responsibility with respect to national security.

Mr. Wiggins. I gather from your answer you do recognize some authority in the President of the United States. To the extent that that authority exists, can the Congress modify it by legislation?

Mr. Biester. So long as the legislation that modifies is in the area of, let us take in this instance, the fourth amendment in an effort to apply and define the fourth amendment strictures on the constitutional authority of the President or his agents.

Mr. Wiggins. All right. I am concerned maybe academically more than as a legislator here about two different constitutional values which are implicit in your legislation. One is the fourth amendment interest against unreasonable searches and seizures and the other is the judicially declared value of privacy, which is not expressly found in the Constitution, but which is derived from several sections of the Constitution and is not limited in its origin to the fourth amendment.

It seems to me that some of the activities that you find offensive really tend to offend a privacy consideration as distinguished from searches and seizure considerations. Do you agree?

Mr. Biester. I absolutely agree, Mr. Wiggins. It seems to me the first amendment protection on freedom of association, for example, creates a certain private of privacy of association which might be impinged by informants planted in a small group. That comes to mind almost immediately.

Mr. Wiggins. Yes. I am aware of that.

Now, the thing that troubles me is that, in the fourth amendment area, our ability to legislate is pretty much confined by the words of that amendment that we tolerate only reasonable searches and seizures, and the courts have done a lot to tell us what is and what is not reasonable. But, in some of these other areas we do not have the guidance of precise language of the Constitution.

In the area of the first amendment, for example, we have a *clear and present danger rule*, for example, as a basis to interfere with what otherwise might be protected speech, and in the privacy area we have tended to balance competing governmental interests without adhering to a rigid probable cause standard, or a reasonable cause to believe standard.

Now, maybe my question tends to describe my concern, because I believe your bill focuses only upon the protection of the fourth amend-

ment interests, but does so in a way which also is designed to protect privacy interests, using fourth amendment techniques.

Can you just comment about my concern?

Mr. Biester. Sure; I think it is a valid concern and it is not simply just from an academic standpoint, either. I think it is a legislative standpoint and a constitutional standpoint. I have never subscribed to the notion of hierarchal values in the Bill of Rights, but there are some who do. I would not put the fourth amendment at any lower level, let us say, than the fifth amendment.

It seems to me that so long as the constitutional protection, the constitutional interest is of the same hierarchal value, and I find the first amendment protection to be the same as the fourth in that respect, then I do not see any obnoxious result if we use maybe perhaps only the fourth to protect rights which are at least advanced in other amendments to the Constitution or in other language of the Constitution.

Now, perhaps from a technician's standpoint, it would be more appropriate to spell out some of the first amendment bases and perhaps spell out a whole constitutional derivation of this right of privacy so that it might be more coherently balanced against the societal concerns, but that is a matter that we have not really addressed.

Mr. Wiggins. It is a lurking concern of mine, and I do not have my own thoughts clearly in order.

Mr. Biester. You can tell from my answer that I do not either.

Mr. Wiggins. One final question, then, Mr. Biester. In some portion of the bill, reports with respect to information summaries, I believe, of wiretaps are to be furnished to the House Judiciary Committee and to the Senate Judiciary Committee.

What public interest do you see served by requiring the information obtained to be given to these public bodies, recognizing the reality that there is no real security in the Congress of the United States?

Mr. Biester. Well, the summaries, as I recall from the bill, are also to be provided to the administrative officers of the courts and I assume that it would be safe and secure in that repository.

Mr. Wiggins. I do not.

Mr. Biester. You do not? Well, there comes a point at which it seems to me we have to try. If you set the same standard for responsible elements to all three branches of Government, in terms of protection of the individual rights of American citizens, and policy questions with respect to those rights, and then pretend that only or claim only or find only that the executive branch or a limited number of people in the executive branch are the only persons who can be trusted with the information pursuant to which those policy judgments are made, I think one comes to a conclusion which might appeal to certain groups.

But, I find it frankly obnoxious to the whole notion of a balanced, tripartite interest on the part of each branch.

Mr. Wiggins. It is not entirely an either/or situation here where the options are to leave it entirely with the executive branch or to publish it in the newspaper. But we grant under the bill authority to a magistrate, a judge, to issue the warrant in the first place. And we are all concerned that that judge has not been hoodwinked by false, or at least misleading affidavits, and thereafter the law enforcement agency embarks upon an unconscionable fishing expedition.

But why not let the issuing judge supervise his own warrant by a review of the product of that warrant? The degree of security under those circumstances, I think, is significantly higher than if you make that information available to Congress.

Mr. BIESTER. I would say that there is another consideration here as well, and perhaps it can be met by a different mechanism than is prescribed in the bill.

One of the reasons I think there should be congressional involvement in this question, or congressional involvement in terms of oversight of what is going on is with a view to determining the extent to which new legislation may be necessary. Now, that could be a function performed, it seems to me, by this committee or the other relevant committee, so long as the material were stored somewhere which was available on some regular basis to certain members of the committee.

The objective, it seems to me, is some kind of continuing review with the object of modification of legislation rather than just simply to nose about the details of individual cases.

Mr. WIGGINS. Thank you, Mr. Chairman. Mr. Chairman, I have got a group of constituents waiting for me who want to talk to me about a different subject, so if you will excuse me, I just apologize.

Mr. KASTENMEIER. We will reluctantly excuse the second gentleman from California who has left the proceedings this morning.

Mr. BIESTER. Something must be going on in California today.

Mr. KASTENMEIER. I take it that in answer to the question from the gentleman from California, Mr. Wiggins, you feel that notwithstanding whatever risks might be entailed, that some of this secure information might be leaked, that it is necessary to involve the Congress, involve all three branches of Government in safeguarding what you regard as our constitutional freedoms?

Mr. BIESTER. I am convinced it is a constitutional responsibility on the part of each of the branches, and perhaps some cleaner and more secure way can be discovered to involve the Congress in the prescription of the bill. But, I would think that it would be a derogation of our responsibility if we did not attempt to provide some means for ourselves to make value judgments over a span of time upon the nature of the kinds of wiretaps or surveillances or other kinds of activities that may go on pursuant to the legislation we pass.

Mr. KASTENMEIER. On behalf of the committee. I want to thank the gentleman from Pennsylvania for his very useful contribution this morning.

Mr. BIESTER. Thank you, Mr. Chairman. It is a pleasure to be back.

[The prepared statement of Hon. Edward G. Biester, Jr., follows:]

STATEMENT OF HON. EDWARD G. BIESTER, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

Mr. Chairman, and Members of the Committee, I appreciate this opportunity to appear before you today to speak on behalf of H.R. 214, the Bill of Rights Procedures Act, introduced in the House by the distinguished gentleman from Ohio, Mr. Mosher, and in the Senate by its author, the distinguished Senator from Maryland, Mr. Mathias.

The Bill of Rights Procedures Act would require any federal agent to obtain a court order before he or she could conduct any form of surveillance on a private citizen. The Government would be required to demonstrate probable cause that a crime had been or was about to be committed before a warrant for surveillance could be issued.

The term "surveillance" includes bugging, wiretapping, and all other forms of electronic surveillance, opening of mail, entering of dwellings, and the inspection or procurement of the records of telephone, bank, credit, medical or other private transactions.

Mr. Chairman, the questions at stake in consideration of this legislation go to the very core of the democratic process. This issue forces us to contend with perhaps the most basic question faced by a free society: Where do we draw the line between the rights of the individual and the legitimate and necessary functions of society as embodied in the Government?

The specific rights addressed by this bill are contained in the fourth amendment to the Constitution of the United States which proclaims the right of the people to be "secure in their persons, houses, papers, and effects against unreasonable searches and seizures. . . ." Security is not only an abstract legal proposition. If it is to have meaning it must be a sure perception of one's condition.

Such a basic question of rights and balance is seldom easy to answer in this complex age. It is particularly difficult to answer in the context of national security considerations. It is precisely those considerations I would like to address this morning. I do so as one deeply interested in the matter, reflected through my service over three terms on the Judiciary Committee, my present service on the Committee on Foreign Affairs, and my service during the 93rd Congress on the Subcommittee on National Security of that committee.

Clearly all those in positions of public responsibility must approach this question with a weighty concern for the dangers inherent in the prevailing international political system, and the peculiar obligations which our position within that system imposes on the Government of the United States. Few would dispute the need for the Government to deal with many sensitive matters in secrecy. Few would dispute the need for the Government to preserve international trust in the confidentiality of diplomatic discussions.

But equally clear must be the need to deal with such legitimate national security concerns within our constitutional framework—to subject governmental surveillance to proper and reasonable standards of procedure, and to minimize the scope for individual caprice or abuse of power.

With regard to national security, what balance do we properly strike? Where, indeed, do we draw the kind of line which protects both the individual and society at large?

I would contend that under existing procedure, the rights of the individual under the fourth amendment are inadequately protected.

The law presently allows surveillance to be undertaken on the authority of the President—with such authority usually executed by the Attorney General—when national security is considered to be at stake.

It seems clear to me that such a procedure—involving individual interpretation of such a broad and ambiguous term as "national security" does indeed allow for abuse of power.

H.R. 214 would rectify that situation by linking all surveillance—including that undertaken on grounds of national security—to a court order based on probable cause that a crime had been or was about to be committed.

In the case of national security, such an order would have to be linked to suspected sabotage, espionage, treason, or similar crimes.

In other words, wiretapping or other forms of surveillance undertaken strictly for intelligence gathering purposes unrelated to suspected criminality would be effectively eliminated.

Is this an unreasonable restraint on executive power? Would such a requirement hamper the proper stewardship of our national safety? Would it indeed swing the judicial pendulum dangerously in the direction of individual rights at the expense of societal security?

I think not. Such a requirement is inherently reasonable and proper, and would not have to subject our society to risk.

I am supported in this belief by the Honorable William D. Ruckelshaus, former Deputy Attorney General and former Acting Director of the Federal Bureau of Investigation. Hardly a man oblivious to legitimate national security considerations, Mr. Ruckelshaus last year stated before joint hearings of the Senate Committees on the Judiciary and Foreign Relations that he sees "no reason why all wiretaps should not be subject to court warrant."

To restrict wiretaps and other forms of surveillance to instances approved by a Federal court, simply means the Government must establish to the satisfaction

of an independent arbiter that a reasonable suspicion exists as to the commission of a crime affecting the national security of the United States.

Some would contend that Federal magistrates lack the necessary expertise in international or security affairs to make such judgments. I'm inclined to believe, however, that officials of the Federal judiciary are indeed capable of assessing the quality of evidence presented to establish probable cause, and are indeed capable of judging the relative importance of the Government's arguments versus the constitutional rights of any individual in question.

As Mr. Ruckelshaus pointed out in his previously cited testimony, "Courts almost never turn down legitimate requests for wiretaps in criminal cases and would be even less likely to do so in the area of national security."

H.R. 214 would thus not bar necessary national security surveillance; it would simply subject the need for that surveillance to prior assessment by the judicial branch.

Such a prior assessment simply, but significantly, removes national security surveillance from the realm of possibly arbitrary, capricious action.

I would suggest that the committee might profitably consider various ways to reduce the number of Federal judges authorized to hear requests for national security surveillance as a means of ensuring stricter consistency of rulings.

We hardly need remind ourselves that for a number of years and under administrations of both political parties, national security has all too often been a facade for partisan or selfish individual motives. It does little good to recite specific abuses by individuals. We must concern ourselves with correcting institutional flaws. Congress must very properly seek to place a reasonable restraint on the use of power to ensure that all valid factors are given due consideration. The requirement of a court order is—in my opinion—an altogether reasonable restraint. It subjects surveillance to an orderly and objective procedure capable of weighing relative values involved.

Prior judicial assessment of surveillance, combined with continuing congressional oversight—which is strengthened by H.R. 214—involves all three branches of Government in meeting the shared constitutional obligations to protect individual rights as well as to guard the national well-being. I would contend that only through such continued involvement of all three branches can we reasonably expect to strike the necessary balance between individual and societal concerns.

Let me briefly address one other important aspect of this question. Does elimination of wiretapping and other surveillance for intelligence gathering unrelated to suspected criminal activity preclude a needed and valuable source of national security information?

Again, on balance, I think not. Recent experience with wiretapping and surveillance for information gathering purposes seems to indicate that such procedures have been used mainly to stop internal organizational leaks, or to gain information useable only in a domestic political context, rather than for legitimate national security or defense needs.

The use of such surveillance—divorced from suspected criminality and unrestrained by any check—imperils our constitutional system, and thus undermines the very national security it is ostensibly designed to protect.

I should point out that H.R. 214 does allow for information gathering surveillance with the consent of the individual in question. It is conceivable that a situation could arise, in which a high-ranking official involved in sensitive negotiations, could be reasonably suspect of being a security risk, simply because of present or prior family, business, or political associations. Such an official might then want to undergo surveillance simply as a means of establishing his or her reliability.

Mr. Chairman, as a lawyer and a former member of this committee, I fully appreciate the very difficult task which you and the other very distinguished members of the committee face. I am fully confident, however, that from the collective wisdom of this committee will emerge the kind of legislation which does indeed rise to this difficult challenge, and which does indeed strike an appropriate balance between individual rights and societal needs. H.R. 214, backed by distinguished members of both parties, goes a long way toward striking that kind of balance. I know it will be given very careful consideration.

Thank you, Mr. Chairman, and other members of the committee, for allowing me to appear before you this morning.

Mr. KASTENMEIER. Next, the Chair would like to call the Honorable Barry Goldwater, Jr., Congressman from California. We welcome you to the committee.

TESTIMONY OF HON. BARRY M. GOLDWATER, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. GOLDWATER. Thank you, Mr. Chairman.

Mr. Chairman, and members of the committee, I am pleased to have the opportunity to appear before you in support of H.R. 2604, the Bill of Rights Procedures Act of 1975. I am a cosponsor of this legislation, as I was in the previous Congress.

I would like to state that I feel this is an important piece of legislation and my colleague in the House, Representative Charles Mosher, is to be congratulated for being its author and chief proponent. My support for the bill stems from my deep and sincere belief that the inalienable rights and liberties enumerated in the Bill of Rights, particularly those of the 1st, 4th, and 14th amendments relating to freedom of speech and association, security in one's property and possessions, and the right to due process, have been eroded by the trend toward the use of surveillance as a primary law enforcement tool and investigative aid.

Further, these rights have been dealt serious injury by the arbitrary way in which administrative authority in the executive branch has been extended to include authority to surveil.

Mr. Chairman, I wish to address myself to four points concerning this legislation, and I would ask unanimous consent to submit my entire statement and only paraphrase those four points.

Mr. KASTENMEIER. Without objection, your statement will be made a part of the record.

[The prepared statement of Hon. Barry M. Goldwater, Jr., follows:]

STATEMENT OF HON. BARRY M. GOLDWATER, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Chairman, and Members of the Committee, I am pleased to have the opportunity to appear before you in support of H.R. 2604, the "Bill of Rights Procedures Act of 1975." I am a co-sponsor of this legislation, as I was in the preceding Congress. This is an important piece of legislation and my colleague in the House, Representative Charles Mosher, is to be congratulated for being its author and chief proponent. My support for the bill stems from my deep and sincere belief that the inalienable rights and liberties enumerated in the Bill of Rights, particularly those of the First, Fourth and Fourteenth Amendments relating to freedom of speech and association, security in one's property and possessions, and the right to due process, have been eroded by the trend toward the use of surveillance as a primary law enforcement tool and investigative aid. Further, these rights have been dealt serious injury by the arbitrary way in which adminstrative authority in the Executive branch has been extended to include authority to surveil.

This trend has received its confirmation recently in the Watergate break-in and in the illegal surveillance conducted by the so-called "plumbers" unit. The urgency of the situation arises from the knowledge that these recent events do not stand alone. They are not an aberration. To varying, and often lesser degrees, we know of events like them going back thirty years. However, I know the Chairman is well aware of the history of the problem for he has demonstrated his interest by the opening of hearings on this subject so early in the new Congressional session. Consequently, I wish to address four points relevant to the bill now before the committee.

First, Watergate and related problems have clearly demonstrated that there is too much vaguely defined administrative authority within the Executive branch of government in the area of surveillance. An ever-vigilant Congress could never hope to check and balance the exercising of the discretionary authority that currently exists. Further, the operational authority is so widely dispersed as to work against the voluntary curtailment or standardization of criterion for undertaking administratively authorized surveillance. The current situation encourages abuse, although well intentioned, by constitutionally questionable application. H.R. 2604 addresses and remedies this problem by eliminating the administrative authority which can currently authorize surveillance by requiring an application for a court order and the demonstration of probable cause prior to undertaking any lawful surveillance. This is the most important element of the legislation and by itself goes a long way to redressing the imbalance that exists.

Second, by defining the term "surveillance" the legislation takes a giant step toward eliminating the confusion that has been brought on by recent court decisions and administrative interpretations. The law enforcement community would be happy to get the situation clarified, for no dedicated law enforcement officer wants to "blow" a legitimate case through technical error. And, the current situation is ripe for such mistakes. There is no doubt in my mind that much of the abuse and injury testified to before this and other Congressional inquiries has been encouraged by the "gray area" between legitimate surveillance and unconstitutional intrusion into a person's privacy. I recognize that for the purists the definitions are incomplete. But, I would remind them that the authors and most of the co-sponsors, myself included, regard this legislation as initial and, in that spirit, experimental. The legislation is aiming at closing loopholes and clarifying the law. We are dealing with a most difficult area. We are attempting to correctly balance the basic Constitutional rights of our citizens with the necessary investigative requirements of legitimate law enforcement and investigative activity. Each of us recognizes that it is a fine line between liberty and license. We have had a recent example of what license can mean to our nation. I doubt anyone wants to return to it or to experience another variety. Thus, while there may be some technical problems regarding exact wording, I believe the provisions relating to court orders and definitions set a proper and balanced direction that should be preserved.

Next, Mr. Chairman, this legislation carefully and deliberately avoids requiring that a court order be obtained for each individual act of surveillance. I strongly believe that that element be retained. I can conceive of no worse situation for our citizenry or the law enforcement community than one which would require such a strict procedure. By relating, as I believe this legislation does, the surveillance authority to the showing of probable cause there is a built-in, natural limitation applied to the extent of the authority. To do more would be to adopt a legalistic and unrealistic approach.

Finally, I wish to speak to the "reports" sections found on pages 6–10 of H.R. 2604. These provisions will go a long way toward insuring knowledgeable Congressional oversight. These provisions should provide the Judiciary Committee and the Congress with a much clearer picture of the relationship between surveillance activity and crime prevention and successful prosecution. The accountability placed on the federal agent in the probable cause and court order sections is balanced by the check and balance quality of these provisions. I believe these are essential provisions. Without them the courts are under no higher compulsion to judge the law enforcement petitions on their merits. These provisions will help eliminate "shopping" for a friendly court. They should prevent overuse and unreasonable refusal of surveillance. However, Mr. Chairman, there are certain risks in these provisions as well. These sections require the providing of the names, addresses, etc. of all the principals involved in the surveillance. If I read them correctly, even the name and address of the recipient of opened mail would be part of the notice report filed with the Congress. Without strong penalties and requirements for confidentiality, these provisions could cause a case to be blown, an informant to be revealed, and the morale of the law enforcement community to be broken. I fully appreciate the intent of the notice requirements. But, I believe these provisions will run a great risk of being harmful and counterproductive unless a strong set of confidentiality provisions are added. I know this is a difficult area and that it is a difficult task to strike a healthy balance. However, I also know that this Committee is up to the task.

This is important landmark legislation, Mr. Chairman. It is constructive and needed. I urge this Committee to make it a reality and I thank you for the opportunity to express my support for it.

REPUBLICAN RESEARCH COMMITTEE,
REPUBLICAN CONFERENCE,
U.S. HOUSE OF REPRESENTATIVES,
Washington, D.C., August 2, 1974.

DEAR TASK FORCE MEMBER: We are submitting for your approval the recommendations of the Task Force on Privacy. Please make any changes you find feasible. If we do not hear from you by 12:00 Noon, Monday, August 5th, then we will assume you are in concurrence with our recommendations.

The Task Force is extremely grateful for the assistance rendered by all Task Force offices in this endeavor.

Once the recommendations have been approved by our Task Force, then they will be forwarded to the Research Committee for approval and then to the Policy Committee. Hopefully, toward the end of next week, we will have a press conference in this connection.

Most sincerely,

BARRY GOLDWATER, JR.,
Chairman.
ALAN STEELMAN,
Vice Chairman.
TENNYSON GUYER,
Vice Chairman.

Should you have questions, please contact Joe Overton, X54461.

RIGHT TO PRIVACY—RECOMMENDATIONS OF THE HOUSE REPUBLICAN TASK FORCE ON PRIVACY

The House Republican Task Force on Privacy believes that the right to privacy is an issue of paramount concern to the nation, the public and the Congress. Recently publicized incidents of abuses and misuses of personal information have only begun to focus attention on this long-neglected area. Public awareness must be heightened and the legislative process geared up to address the full range of problems posed by the issue.

Modern technology has greatly increased the quantity and detail of personal information collection, maintenance, storage, utilization and dissemination. The individual has been physically by-passed in the modern information process. An atmosphere exists in which the individual, in exchange for the benefit or service he obtains, is assumed to waive any and all interest and control over the information collected about him. On the technical and managerial levels, the basic criteria in many decisions relating to personal information practices are considerations of technological feasibility, cost-benefit and convenience. The right of privacy has been made subservient to concerns for expediency, utility and pragmatism.

The trend in personal information practices shows no signs of abating. Twice as many computer systems and seven times as many terminals—particularly remote terminals—will be in use by 1984 as are in use today. And, with each federal service program that is initiated or expanded, there is a geometrically proportionate increase in the quantity and detail of personal information sought by the Bureaucracy. The theory is that the broader the information base, the more efficient and successful the administration of the program.

Such a situation demands the attention of Congress and of the American public. The computer does not by definition mean injury to individuals. Its presence has greatly contributed to the validity and dynamism of both the American economy and the ability of government to serve the people. Under present procedures, however, the American citizen does not have a clearly defined right to find out what information is being collected about him, to see such information, to correct errors contained in it, or to seek legal redress for its misuse. Simply put, the citizen must continue to give out large quantities of information about himself, but

cannot protect himself from its misappropriation, misapplication or misuse. Both government and private enterprise need direction, because many of their practices and policies have developed on an isolated, ad hoc basis.

The House Republican Task Force on Privacy has investigated the following general areas involving the investigation and recording of personal activities and information: government surveillance, federal information collection, social security numbers and universal identifiers, census information, bank secrecy, consumer reporting, school records, juvenile records, arrest records, medical records, and computer data banks. These inquiries have resulted in the development of general suggestions for legislative remedies. Each statement is accompanied by a set of findings.

All findings and recommendations are presented with the intent of being consistent with these general principles:

1. there should be no personal information system whose existence is secret;
2. information should not be collected unless the need for it has been clearly established in advance;
3. information should be appropriate and relevant to the purpose for which it has been collected;
4. information should not be obtained by fraudulent or unfair means;
5. information should not be used unless it is accurate and current;
6. there should be a prescribed procedure for an individual to know the existence of information stored about him, the purpose for which it has been recorded, particulars about its use and dissemination, and to examine that information;
7. there should be a clearly prescribed procedures for an individual to correct, erase, or amend inaccurate, obsolete, or irrelevent information;
8. any organization collecting, maintaining, using, or disseminating personal information should assure its reliability and take precautions to prevent its misuse;
9. there should be a clearly prescribed procedure for an individual to prevent personal information collected for one purpose from being used for another purpose without his consent; and
10. the Federal Government should not collect personal information except as expressly authorized by law.

Each recommendation of the Task Force seeks to contribute to a broader, more intelligent, viable understanding of the need for a renewed concern for personal privacy. An awarenes of personal privacy must be merged with the traditional activities of the free marketplace and the role of the government as a public servant. The Task Force respectfully commends this report to your attention.

SURVEILLANCE

The Task Force is deeply disturbed by the increasing incidence of unregulated, clandestine government surveillance based solely on administrative or executive authority. Examples of such abuses include wiretapping, bugging, photographing, opening mail, examining confidential records and otherwise intercepting private communications and monitoring private activities. Federal government surveillance is widely known and feared, but state and local government, military intelligence and police activities also must be regulated.

The Fourth Amendment of the Constitution clearly specifies "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." The First Amendment guards against abridgement of the rights of free speech, free press, and assembly for political purposes. The Fourteenth Amendment states that none of a citizen's rights may be taken from him by governmental action without the due process of law.

The direct threat to individual civil liberties is obvious in those cases in which a person is actually being monitored, but even more alarming is the "chilling effect" such activities have on all citizens. A person who fears that he will be monitored may, either subconsciously or consciously, fail to fully exercise his constitutionally guaranteed liberties. The mere existence of such fear erodes basic freedoms and cannot be accepted in a democratic society.

The various abuses of discretionary authority in the conduct of surveillance provide ample evidence that current safeguard mechanisms do not work. Procedures allowing the executive branch to determine whether a surveillance activity is proper or not pose certain conflict of interest questions.

Considerable confusion currently surrounds the question of who is authorized to approve and permit the usurpation or abrogation of a citizen's constitutional

rights to privacy. To eliminate the present ambiguity, the Task Force recommends that new legislation be enacted immediately to prohibit any employee or agent of the government (federal, state or local) from intercepting or monitoring the private communications of any American citizen except in cases where express approval of such activity has been granted in advance by a court of jurisdiction. As is the case presently with court-ordered wiretaps, "probable cause" will have to be shown before approval can be obtained. *No* agent of the government should have the authority to conduct any surveillance without first obtaining a court order.

The Task Force believes that this proposal would not lessen the capabilities of the government to protect and defend the American people, but would go a long way toward assuring the individual citizen that his constitutional rights will not be abridged by government without due process of law.

FEDERAL INFORMATION COLLECTION

Recently, there has been a pronounced increase in federal data and information collection. Over 11.5 million cubic feet of records were stored in Federal Records Centers at the beginning of FY 1973. Accompanying this increase has been a rise in the potential for abuse of federal information collection systems.

The Federal Reports Act of 1942 was enacted to protect individuals from overly burdensome and repetitive reporting requirements. The agency entrusted with the responsibility for implementing the Act has ignored the legislative mandate and failed to hold a single hearing or conduct any investigations. With the exception of the Bureau of the Census and the Internal Revenue Service, there are few restrictions on the collection or dissemination of confidential information compiled by federal agencies.

The Task Force recommends that the Office of Management and Budget immediately begin a thorough review and examination of all approved government forms and eliminate all repetitive and unnecessary information requirements.

Legislation setting down clear guidelines and spelling out restrictions is needed to protect the individual from unrestricted and uncontrolled information collection. Individuals asked to provide information must be apprised of its intended uses. Individuals supplying information which will be made public must be notified of that fact at the time the information is collected or requested. Public disclosure (including dissemination on an intra- or inter-agency basis) of financial or other personal information must be prohibited to protect the privacy of respondents.

Returning the use of the Social Security Number (SSN) to its intended purpose (i.e. operation of old-age, survivors, and disability insurance programs) is a necessary corollary to safeguarding the right of privacy and curtailing illegal or excessive information collection.

The use of the Social Security Number has proliferated to many general items including state driver licenses, Congressional, school and employment identification cards, credit cards and credit investigation reports, taxpayer identification, military service numbers, welfare and social services program recipients, state voter registration, insurance policies and records and group health records.

There are serious problems associated with the use of the SSN as a standard universal number to identify individuals. A standard universal identifier will relegate people to a number status, thereby increasing feelings of alienation and anomie. The SSN's growing use as an identifier and filing number is already having a negative, dehumanizing effect upon many citizens. In addition, the use of a standard universal identifier by all types of organizations enables the linking of records and the tracking of individuals from cradle to grave. This possibility would negate the right to make a "fresh start", the right of anonymity, and the right to be left alone.

A well-developed Standard Universal Identifier system would require a huge, complex bureaucratic apparatus to control it and demand a strict system of professional ethics for information technicians. The technology needed to protect against unauthorized use has not yet been adequately researched and developed. A loss or theft would seriously compromise a system and official misappropriation could become a political threat.

The reasons against allowing the continued or expanded use of the SSN as an identification or general filing number are too great to allow its unrestricted use. Translated into congressional action, the following steps should be taken:

1. legislation should be enacted that sets guidelines for use of the SSN by limiting it to the operation of old-age, survivors, and disability insurance programs, or as required by federal law;

2. any Executive Orders authorizing federal agencies to use SSNs should be repealed, or alternatively, reevaluated and modified;

3. legislation should be enacted restricting the use of the SSN to well-defined uses, and prohibiting the development, and use of any type of Standard Universal Identifier until the technical state of the computer can ensure the security of such a system. At that time, a SUI system should have limited applicability and should be developed only after a full congressional investigation and mandate; and

4. new government programs should be prohibited from incorporating the use of the SSN or other possible SUI. Existing programs using the SSN without specific authorization by law must be required to phase out their use of the SSN. State and local governmental agencies, as well as the private sector, should follow this same course of action.

CENSUS BUREAU

The greatest personal data collection agency is the Bureau of Census. Created to count the people in order to determine congressional districts, this agency has mushroomed into a vast information center which generates about 500,000 pages of numbers and charts each year.

Under penalty of law, the citizen is forced to divulge intimate, personal facts surrounding his public and private life and that of his entire family. These answers provide a substantial personal dossier on each American citizen. The strictest care must be taken to protect the confidentiality of these records and ensure that the information is used for proper purposes.

The Census Bureau sells parts of its collected data to anyone who wishes to purchase such information. Included are all types of statistical data that are available on population and housing characteristics. As the questions become more detailed and extensive, broad-scale dissemination becomes more threatening and frightening. When used in combination with phone directories, drivers' license and street directories, census data may enable a person to identify individuals. Therefore, it is vitally important that rules and regulations governing the access and dissemination of this collected data be reviewed, clarified and strengthened.

Legislation is needed to guarantee the confidentiality of individual information by amplifying the scope of existing law and by increasing the severity of punishment for divulging confidential information. These provisions should be specifically directed at the officers and employees of the Bureau of Census, all officers and employees of the Federal government and private citizens who wrongfully acquire such information. In addition, the Bureau of the Census must use all available technological sophistication to assure that individuals cannot be inductively identified.

FINANCIAL INFORMATION

On October 26, 1970, sweeping legislation known as the Bank Secrecy Act became law. The Act's intention was to reduce white collar crime by making records more accessible to law enforcement officials. However, in accomplishing its purpose, it allowed federal agencies to seize and secure certain financial papers and effects of bank customers without serving a warrant or showing probable cause. The Act's compulsory recordkeeping requirements, by allowing the recording of almost all significant transactions, convert private financial dealings into the personal property of the banks. The banks become the compilers and custodians of financial records which, when improperly used, enable an individual's entire lifestyle to be tracked down.

The general language of the Act allowed bureaucrats to ignore the intent of the law and neglect to institute adequate privacy safeguards. The Supreme Court then affirmed this distortion by upholding the constitutionality of both the law itself and the bureaucratic misinterpretation of it.

Congress must now take action to rectify its original mistake. Specifically, banks should be prohibited from recording and making a permanent record of all but major personal transactions. In addition, the disclosure of a customer's records should occur only:

1. if the customer specifically authorizes such disclosure; or

2. if the financial institution is served with a court order directing it to comply, which is issued after the customer is notified and has had an opportunity to challenge the subpoena or summons.

Passage of such legislation would be an important step forward in reaffirming the individual's right to privacy.

CONSUMER REPORTING

The consumer reporting industry, through its network of credit bureaus, investigative agencies, and other reporting entities is in growing conflict with individual privacy. Most Americans eventually will be the subject of a consumer report as a result of applyng for credit, insurance, or employment. The problem is one of balancing the legitimate needs of business with the basic rights of the individual.

Consumer reports fall into two categories. First, there are the familiar *consumer reports* which contain "factual" information on an individual's credit record—where accounts are held, how promptly bills are paid. 100 million consumer reports are produced each year by some 2600 credit bureaus.

Secondly, *investigative consumer reports* go beyond factual information to include subjective opinions of the individual's character, general reputation, personal characteristics, or mode of living. These are often obtained through interviews with neighbors, friends, ex-spouses and former employers. An estimated 30 to 40 million such reports are produced annually.

The Fair Credit Reporting Act. The first Federal attempt at regulating the collection and reporting of information on consumers by third-party agencies came in 1970 with the enactment of the Fair Credit Reporting Act (FCRA). In theory, the Act had three main objectives: to enable consumers to correct inaccurate and misleading reports; to preserve the confidentiality of the information; and to protect the individual's right to privacy.

The specific safeguards provided by the FCRA are: A consumer adversely affected because of information contained in a consumer report must be so notified and given the identity of the reporting agency. The consumer is entitled to an oral disclosure of the information contained in his file and the identity of its recipients. Items disputed by the consumer must be deleted if the information cannot be reconfirmed. The consumer may have his version of any disputed item entered in his file and included in subsequent reports.

The FCRA needs to be strengthened in two major areas: disclosure requirements and investigative reports. The individual should be entitled to actually see and inspect his file, rather than rely on an oral presentation. Further, he should be allowed to obtain a copy of it by mail (the consumer is often geographically distant from the source of the file). Users of consumer reports should be required to specifically identify the information which triggered any adverse action.

The FCRA protects the sources used in investigative reports. The Task Force believes that this is contrary to the basic tenets of our system of justice and that the information source must be revealed upon the subject's request. Furthermore, the Task Force recommends that advance written authorization be required from any individual who is the subject of an investigative report for any purpose.

SCHOOL RECORDS

The recent increase in popular awareness of the seriousness of the privacy issue has been accompanied by an increase in the general concern over loose, unstructured and unsupervised school recordkeeping systems and associated administrative practices. There has also been general discussion about what information should be kept on a child and considered part of his or her "record". Parents are frequently denied access to their own child's record, or are prohibited from challenging incorrect or misleading information contained in his file. At the same time, incidents of highly personal data being indiscriminately disseminated to inquirers unconnected with the school system are not uncommon.

Remedial measures are available to the Congress in the form of legislative actions. The sanctions under which such provisions would operate, however, are the key to their effectiveness. The Task Force proposes that federal funds be withheld from any state or local educational agency or institution which has the policy of preventing parents from inspecting, reviewing, and challenging

the content of his or her child's school record. Outside access to these school records must be limited so that protection of the student's right to privacy is ensured. It is recommended that the release of such identifiable personal data outside the school system be contingent upon the written consent of the parents or court order.

All persons, agencies, or organizations desiring access to the records of a student must complete a written form indicating the specific educational need for the information. This information shall be kept permanently with the file of the student for inspection by parents of students only and transferred to a third party only with written consent of the parents. Personal data should be made available for basic or applied research only when adequate safeguards have been established to protect the students' and families' rights of privacy.

Whenever a student has attained eighteen years of age, the permission or consent required of and the rights accorded to the parents should be conferred on the student.

Finally, the Secretary of HEW should establish or designate an office and review board within HEW for the purpose of investigating, processing, reviewing, and adjudicating violations of the provisions set forth by the Congress.

JUVENILE RECORDS

The Task Force supports the basic philosophy underlying the existence of a separate court system for juvenile offenders, which is to avoid the stigmatizing effect of a criminal procedure. The lack of confidentiality of such proceedings and accompanying records subverts this intent and violates the individual's basic right of privacy.

Most states have enacted laws to provide confidentiality. Yet the Task Force finds that due to a lack of specific legislation, and contrary to the intent of the juvenile justice system, the individual's right of privacy is often routinely violated. Juvenile records are routinely released to the military, civil service, and often to private employers as well. This occurs in cases in which the hearing involves non-criminal charges, in cases of arrest but no court action, in cases in which the individual is no longer under the jurisdiction of the juvenile court, and in cases where his file has been administratively closed.

Legislation governing the confidentiality of juvenile court and police records varies widely from state to state. Only 24 states control and limit access to police records, therefore enabling a potential employer who is refused access to court records to obtain the information from the police. Only 16 states have expungement laws providing for the destruction of such records after a specified period of good behavior. Only 6 states make it a crime to improperly disclose juvenile record information. And, one state, Iowa, in fact provides that juvenile records must be open to the public for inspection. The Task Force finds that even in those states whose laws provide adequate protection, actual practices are often inconsistent with legislation.

Many new questions about confidentiality, privacy and juvenile rights are being raised, and the Task Force finds that the establishment of safeguards has lagged significantly behind technological developments. For example, presently no state has enacted legislation regulating the use of computers in juvenile court; as a rule, each system establishes its own guidelines for data collection, retention, and distribution.

The Task Force finds that with the use of computers, the juvenile's right to privacy is additionally threatened by the increased accessibility to his record and therefore increased possibility of misuse. Staff carelessness, less than strict adherence to rules of limited access, and electronic sabotage must now be added to the existing threats to the juvenile's right to privacy.

The Task Force recommends the establishment of minimum federal standards for state laws to include the following provisions:

1. All records of the juvenile court and all police records concerning a juvenile shall be considered confidential and shall not be made public. Access to these records shall be limited to those officials directly connected with the child's treatment, welfare, and rehabilitation.

2. Dissemination of juvenile records, or divulgence of that information for employment, licensing, or any other purpose in violation of statutory provisions shall be subject to a criminal penalty.

3. To protect the reformed delinquent from stigma continuing into his adult life, provisions should provide a procedure for either the total destruction or

the sealing of all juvenile court and police investigative and offender records at the time the youth reaches his majority, or when two years have elapsed since he has been discharged from the custody of the court. Subsequent to this expungement, all proceedings and records should be treated as though they had never occurred and the youth should reply as such to any inquiry concerning his juvenile record.

4. All police records on juveniles arrested but where no court action was taken should be systematically destroyed when the incident is no longer under active legislation.

The Task Force recommends the enactment of legislation specifically prohibiting federal agencies from requesting information relating to juvenile record expungement from employment applicants or from requesting such information from the courts or the police.

The Task Force further recommends the cessation of all federal funding for computerized systems which contain juvenile records unless it can be demonstrated that these systems provide adequate safeguards for the protection of the juvenile's right of privacy. These standards must fulfill all the requirements of the minimum standards for state legislation previously enumerated, including special provisions to strictly limit data accessibility.

ARREST RECORDS

A large percentage of arrests never result in conviction. Yet, in over half the states, arrest records of persons are open to public inspection, subjecting innocent parties to undue stigma, harrassment, and discrimination.

Persons with arrest records often find it difficult, if not impossible to secure employment or licenses. A study of employment agencies in the New York City area found that seventy-five percent would not make a referral for any applicant with an arrest record. This was true even in cases in which the arrest was not followed by a trial and conviction. This is just one example of the widespread practice of "presumption of guilt" based on the existence of an arrest record.

The Task Force holds that release of information about arrests not followed by conviction is a direct violation of the individual's right of privacy. It therefore recommends that legislative efforts be directed toward:

1. establishing minimum standards for state laws calling for the automatic sealing of all individual arrest records which were not followed by conviction and which are no longer under active investigation;

2. requiring the FBI to seal arrest records not followed by conviction; and

3. prohibiting inclusion of arrest records not followed by conviction on computerized systems involving more than one state or using federal funds.

MEDICAL RECORDS

Medical records, which contain sensitive and personal information, are especially in need of privacy safeguards to maintain basic trust in the doctor-patient relationship. Yet, development of automated data processing systems has enhanced the ability of government and private organizations to store, analyze and transfer medical records. Increasingly, this occurs without the individual's knowledge or consent. Abuse of such information systems can have a deleterious effect on doctor-patient relations.

To guarantee the privacy of medical records, the Task Force recommends that:

1. the federal government provide dollar grants and incentives to States for the voluntary adoption and execution of State plans to insure the right to privacy for computerized medical information systems. Such a plan would place principle responsibility on the States, giving the federal government the right to set minimum standards;

2. Congress review the recently enacted Professional Standards Reviews Organizations (USRO) legislation. There are increasing numbers of reports and complaints regarding Review Board uses of medical files and the threat this poses to privileged, confidential doctor-patient relationships; and

3. provisions be included in national health insurance legislation which specifically insure the individual's privacy. The institution of a national health insurance plan will create a vast medical information network which will require stringent safeguards to prevent abuses of the patient's right to privacy.

COMPUTER DATA BANKS

The use of the computer has brought great commercial and social benefits to modern America. Greater reliance on the computer, however, increases its integration into all aspects of daily life. The result is increased vulnerability to abuse or misuse of computerized information.

The Task Force finds that the individual possesses inadequate remedies for the correction of such abuses. In fact, the Task Force considers it probable that many abuses have gone unreported simply because the individual involved did not know of the data being collected about him.

Even if the individual is aware that data is being collected about him, he faces several obstacles if he wishes to expunge purely private information or to correct erroneous information. Among his obstacles are the following: the lack of statutory support for legal action (except in the credit reporting area), the cost of litigation, and even fear of retaliation by the company or agency being challenged.

Despite their potential for abuse, data banks remain an inescapable fact of life in a society growing more complex and more technological. The Task Force does not oppose data banks as such, but favors strong safeguards against their misuse, and recommends that:

1. rights under the Fair Credit Reporting Act of 1970 be extended to all data collection. The individual must have and be informed of his right to review information contained in any collection of data about himself (excluding national security and criminal justice files);

2. Congress establish categories (biographical, financial, medical) of information which may not be included in reports on an individual unless the individual knowingly gives his uncoerced consent:

3. limited exceptions be granted for national security and criminal justice investigations;

4. criminal and civil penalties be established for any use of statistical data (collected for collective analysis) to wrongfully acquire information on individuals;

5. transfer of personal information between governmental agencies be strictly limited;

6. the creation of a centralized Federal data bank (except for national security and criminal justice purposes) be prohibited; and

7. a federal "privacy protection agency" be established to enforce the proposed legislation.

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Mr. GOLDWATER. Mr. Chairman, I would also like to ask unanimous consent that the Republican Task Force on Privacy Report also be submitted for the record, for in that report, put together in the previous Congress, it addressed very carefully these very points that are made by this piece of legislation.

Mr. KASTENMEIER. Without objection, we will be pleased to receive that report. [See p. 277.]

Mr. GOLDWATER. First: Watergate and related problems have clearly demonstrated that there is too much vaguely defined administrative authority within the executive branch of government in the area of surveillance.

H.R. 2604 addresses and remedies this problem by eliminating the administrative authority which can currently authorize surveillance by requiring an application for a court order and the demonstration of probable cause prior to undertaking any lawful surveillance. This is the most important element of the legislation and by itself goes a long way to redressing the imbalance that exists.

Second: By defining the term "surveillance" the legislation takes a giant step toward eliminating the confusion that has been brought on by recent court decisions and administrative interpretations. There is no doubt in my mind that much of the abuse and injury testified to before this and other congressional inquiries has been encouraged by the "gray area" between legitimate surveillance and unconstitutional intrusion into a person's privacy.

The legislation is aiming at closing loopholes and clarifying the law. We are, of course, dealing with a most difficult area. We are attempting to correctly balance the basic Constitutional rights of our citizens with the necessary investigative requirements of legitimate law enforcement and investigative activity.

Third: Mr. Chairman, this legislation carefully and deliberately avoids requiring that a court order be obtained for each individual act of surveillance. I strongly believe that the element should be retained.

I think to do more would be to adopt a legalistic and unrealistic approach.

Finally, I wish to speak to the "reports" sections found on pages 6 to 10 of H.R. 2604. These provisions should provide a knowledgeable congressional oversight. And in responding to the question put forth by Mr. Wiggins on whether it is necessary for the Congress to review, I would respond by saying that I feel, and too often this has happened, the Congress has been divorcing itself from responsibility of oversight and review of legislation it created and, therefore, I think the report section is important.

Perhaps the strictness of the reporting procedure may not be necessary. Perhaps an annual review or an annual report would suffice instead of a strict 30- or 60-day provision, that the courts and the law enforcement agencies would have to report by; but I do believe that the Congress cannot divorce itself of the review of the laws that it creates in order to see whether, in fact, those laws are effective and helpful.

I think the provisions in this report section should provide the Judiciary Committee and the Congress with a much clearer picture of the relationship between surveillance activities and crime prevention and successful prosecution. There are certain risks in this provision of reports, for these sections require the providing of names, addresses, et cetera, to all of the principals involved in surveillance.

If I read them correctly, even the name and address of the recipient of opened mail would be part of the notice report filed with the Congress. Without strong penalties and requirements for confidentiality, these provisions could cause a case to be blown, an informant to be revealed, and the morale of the law enforcement community to be broken. I fully appreciate the intent of the notice requirements. But, I believe these provisions will run a great risk of being harmful and counterproductive unless a strong set of confidentiality provisions are added. I know this is a difficult area and that it is a difficult task to strike a healthy balance. However, I also know that this committee is up to the task.

This is important landmark legislation, Mr. Chairman. It is constructive and needed. I urge this committee to make it a reality and I thank you for the opportunity to express my support for it.

Mr. KASTENMEIER. I thank the witness for his statement and commend Congressman Goldwater for his work in the field as chairman of the House Republican Task Force on Privacy. I am aware of the notable work done.

You mention the law enforcement community in your statement, but to what extent does this affect casual law enforcement at the local level? Is this not essentially a proscription of Federal and Federal agency activities in these various fields?

Mr. GOLDWATER. Yes, Mr. Chairman. I feel that this legislation is somewhat experimental in that it is a new area of effort. I do not know whether this is correct or not, but recently at a seminar at Harvard, it was pointed out by local law enforcement officials from a number of communities that there is, at the local level, a greater concern and protection of the rights of the individual than may be found at the Federal level of law enforcement. I do not know if that is true or not, but I think we have a duty to start, to begin down this road, and the best place to begin is at the Federal level.

Mr. KASTENMEIER. I think that is where the abuses that we see complained of have arisen most frequently—at the Federal level.

I take it the bill of Mr. Mosher and others, while not a product of the task force on privacy which you chaired, is, nonetheless, wholly consistent with its findings and its work. Is that correct?

Mr. GOLDWATER. Mr. Chairman, that is true. The privacy task force addressed itself to many areas of invasion of privacy, one being in the area of surveillance, bugging of one kind or another, and the same principles, I think, apply, that a man does have the right to be left alone, to be secure in his house and his home. And whether it be in the mere invasion of privacy involving the collection of information on a routine administrative basis, or whether it be in the area of law enforcement and upholding the laws, I think the basic tenet of the Constitution and the principles involved are the same.

Mr. KASTENMEIER. Was your task force aware of the complaints that culminated in testimony before this committee that the telephone com-

pany had conducted millions of monitorings of its customers on a random basis in order to determine whether there might be any misuse of telephone facilities, presumably by devices which would obviate the necessity of paying a long distance toll charge, and if so, have you made any conclusion with respect to it?

Mr. GOLDWATER. Mr. Chairman, that revelation came out subsequent to our report on the activities of the telephone company. Now, I can appreciate their concern, and perhaps legitimate right to know if their equipment or if their facilities are being misused. But certainly, I do not think it is in their right to surreptitiously conduct such activities.

But, what I think we are all aiming to do in all of this legislation pertaining to privacy is at least to get a sense of responsibility toward the individual, that the individual has the right to know what is going on. If that is the standard practice of the telephone company, then certainly that individual who is the subscriber should know that and it should be spelled out clearly that the telephone company will use certain methods to determine whether their equipment is being misused. It would be up to the courts to determine whether that is a legal practice or not, but certainly to do it in secrecy is against the principles of law and the intent of this particular kind of legislation.

Mr. KASTENMEIER. Yes, I think in fairness to them. I should say that they conducted that sort of surveillance at one time but now desist from employing random recording of conversations. But there remains the question of whether existing law is too broad in terms of what it permits the telephone company to do.

In any event, I want to thank you for your testimony and yield to the gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. I want to thank my friend and ask him if you might just tell us how you went about preparing the report, the Republican task force report?

Mr. GOLDWATER. Mr. Railsback, this was a voluntary effort by some 15 to 20 Republicans that had an interest in one or two particular areas of privacy. Each member of the committee selected an area of their concern and put together a draft paper. This particular draft paper then was reviewed by the entire task force, approved, and submitted to the Republican House Conference for its approval, and then submitted to the Congress.

From what I understand, it was the most comprehensive paper on the entire subject of privacy.

Mr. RAILSBACK. In reading your report, I think it is significant to note that you do not just deal with surveillance, but actually the Census Bureau, financial reports, consumer reporting, school records, juvenile records, arrest records, medical records, computer data banks and you cover, really, the whole realm. I just want to say that I think it is a significant contribution not just to us, but to the Congress. And I want to commend you for it.

Mr. GOLDWATER. I thank the gentleman.

Mr. KASTENMEIER. The gentleman from New York, Mr. Pattison.

Mr. PATTISON. In your testimony you say that by defining the term surveillance this legislation takes a giant step toward eliminating confusion. But, I am a little bit concerned about this definition of the term

surveillance. I do not really see how the definition deals with one of the issues that we discussed with the previous witness—the area of physical surveillance as opposed to interception of oral communications.

Do you conceive of that as being covered by your bill, the problem of shadowing or of physical surveillance as opposed to interception of oral communications or written communications?

Mr. GOLDWATER. I think it is more implied than it is specifically addressed in this particular legislation. But, yes, I would include that in the broad category of surveillance.

Mr. PATTISON. If it is going to be included, it probably should be more specifically defined to remove some of the confusion?

Mr. GOLDWATER. I think that question has arisen here today during the discussion, and I would agree that the bill does not specifically refer to it, and perhaps that should be covered.

Mr. PATTISON. I have nothing further.

Mr. KASTENMEIER. I thank the gentleman from New York.

We were talking, of course, about physical surveillance. If it were to be covered by this bill, the term, surveillance, would have to be defined precisely to include that. We are talking about agencies of the Federal Government and not about private detectives, or agencies of local or State law enforcement authority. So we would have to conceive of what interests agencies of the Federal Government have in conducting physical surveillances without some sort of immediate judicial accountability. That seems to be an area we will have to examine more closely.

I want to express the thanks of the committee for the appearance here this morning of Congressman Goldwater.

Mr. GOLDWATER. Thank you, Mr. Chairman.

Mr. RAILSBACK. Thank you.

Mr. KASTENMEIER. The Chair would like to now call upon Congressman Parren Mitchell of Maryland. Congressman Mitchell has been most active, both nationally and in his community on the question.

And we are most pleased to have you appear, Congressman Mitchell; you may proceed.

TESTIMONY OF HON. PARREN J. MITCHELL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MARYLAND

Mr. MITCHELL. Thank you very much, Mr. Chairman, and members of the committee. I recognize the severe time constraints that are on all Members of Congress. I would suggest that since each of you has a copy of my testimony, with your permission I would merely like to extract certain portions of that testimony, rather than going through the entire presentation. I ask unanimous consent that the entire statement be considered as a part of the record.

Mr. KASTENMEIER. Without objection, your statement will be received and made a part of the record.

[The prepared statement of Hon. Parren J. Mitchell follows:]

STATEMENT OF HON. PARREN J. MITCHELL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MARYLAND

Mr. Chairman and Members of the Subcommittee, I am very pleased to appear before you today, to express my strong support for H.R. 3113, a Bill which I have co-sponsored and a Bill, which in my opinion, is desperately needed.

Other witnesses who will appear before this Subcommittee will probably focus their attention on the Federal Agencies and their possible violations of the Bill of Rights procedures. However, I want to approach the importance of this Bill in terms of a local Police Departments activities.

I ask you to bear with me as I provide a necessary background to make my approach clear.

On February 14, 1975, a hundred and thirty one persons sent the following statement to the Governor of the State of Maryland.

"As we approach the bicentennial of the founding of our nation, we are troubled by mounting evidence of police encroachment on rights guaranteed to citizens in the Amendments to the Constitution. The published list of names of 125 organizations on which the Baltimore Police Department gathered information suggests the frightening and indiscriminate scope of their activity. When there are real crime problems, why has the Police Department wasted half a million dollars a year of taxpayers money in surveillance of such groups as the National Association for the Advancement of Colored People, the American Friends Service Committee, the Baltimore Tutorial Project and the Interdenominational Ministerial Alliance?

"While we recognize the necessary role of the police to maintain order and to prevent crime, for the Police Commissioner to justify blanket surveillance of these groups listed to 'prevent disorder, revolution and strife' is absurd and tragic. The majority of people involved were not remotely connected with any activities that could be considered criminal. They were persons who care about America and were exercising their Constitutional rights to assemble, to enjoy free speech, a free press, to seek redress of grievances, hoping to make the nation more free and more just.

"With Justice Oliver Wendell Holmes, we believe our Constitution was made for people of fundamentally differing views. The strength of the United States has been in diversity, in capacity to accept difference and to profit from dissent. Civil Rights victories were won in the 1960s because citizens used their right to protest against inequality and injustice. The Vietnam war was halted in large measure because citizens used their right to dissent.

"Although some were aware of the presence of police photographers and infiltrators in the 1960s and early 1970s struggle for human rights and peace, only now is the magnitude and threat of police spying in Baltimore becoming apparent. We are shocked by reports from the newspapers, the American Civil Liberties Union and others, and by the Police Commissioner's own admissions concerning:

Infiltration of Peace and Civil Rights groups. Routine photography of demonstrators for several years.

Collection of information on reporters writing stories unfavorable to the Police Commissioner, or on controversial issues.

Surveillance of persons who write letters to editors of Newspapers.

Surveillance of Congressman Parren Mitchell; infiltration of a meeting of the Congressman's campaign staff.

Surveillance of numerous other public officials, including the Baltimore State's Attorney and the head of the Community Relations Commission.

Surveillance of Black Clergymen.

ISD collection of reports on recent striking hospital workers.

ISD collection of reports on individuals and license numbers of persons entering the Friends Meeting House and other places in Charles Village.

Routine forwarding of surveillance records from the Police Commissioner to Army Intelligence and to the FBI.

"The whole network of American Constitutional Rights—especially those of free speech, press, assembly and religion; securing persons, houses, papers and effects from unreasonable search and seizure—was established to curtail government interference with peaceful dissent. These Constitutional Rights have been routinely violated by the Baltimore Police Department.

"Persons who express themselves on controversial public issues have a right to be free of government surveillance of their private lives. On the other hand, public officials and agencies do not have a right to be free of public review of their policies; since the Police Department exercises a great deal of power over citizens lives, what the Police Department does should be known by the public.

"We believe that the expression of Watergate mentality and morality must come to an end in Baltimore. The infection of illegal and immoral police action has undoubtedly spread from the top down, from national intelligence agencies

and from the Army (e.g., ISD agents were trained by Army Intelligence). But the local violation of rights recognized in the First, Fourth, Fifth, Ninth and other Amendments can and must be faced and stopped in Baltimore by citizens and political leaders. If not, the contagion of political surveillance will result in ever more dossiers on ever more innocent people.

"As citizens concerned for the well being and enhancement of Baltimore, Maryland and the nation, we ask you as head of State and as the authority to whom the Commissioner of Police is responsible, to bring to an end the illegal and immoral activity of the Police Department and to help restore an atmosphere of respect and trust in this branch of the government. We urge that you:

(1) End all surveillance of peaceful activity by the Police.

(2) Inform the public of the nature and scope of the activity (methods, not disclosure of individual files), of the 'Red Squad.'

(3) Inform persons if they have been under political surveillance and no criminal chages have been filed against them. Grant them the right to examine their files, to destroy them if they wish, and authorize the destruction of duplicate files.

(4) Develop written standards controlling Police Department surveillance and infiltration; restrict Police investigation to areas where there is evidence of criminal activity.

(5) Develop a system of accountability, giving an idependent civilian body the power to review Police methods, files, etc.

(6) Place the Office of Police Commissioner under the Mayor, and encourage leadership sensitive to individual liberty and sympathetic to the rights of privacy."

Included among the 131 signers of this statement were the names of over forty religious leaders including Bishop Joseph Gossman, The Reverend Hugh Dickinson, and The Reverend Vernon Dobson; from the NAACP, Enolia P. McMillan, President, and Leonard L. Saunders, Vice-President; also representatives from Johns Hokpins University and Medical Institutions; representatives from Goucher, Towson State, Loyola and C.C.B.; from the American Civil Liberties Union, the Director, John Roemer, along with ten Lawyers; included also are representatives of the American Friends Committee.

Based upon information made available to me to date, I am firmly convinced that a national domestic espionage apparatus existed in America. I further firmly believe that this apparatus involved the Federal Bureau of Investigation; The Army Intelligence; and local Police Departments. In this domestic espionage apparatus, information gathered, without benefit of court orders, was exchanged between local Police Departments and Federal Agencies. The information was gathered and exchanged on persons and organizations that were not involved in criminal activity.

Obviously had the provisions of H.R. 3113 been in effect, this dreadful Kafkaesque situation could not have developed in my City and in other Cities across the Nation.

H.R. 3113 is a good, needed Bill. I have one or two areas of concern that hopefully can be cleared up today.

The first is with the language referring to "private dwelling used and occupied as a dwelling." I think this language needs to be broadened and I shall explain why. During my Primary Campaign in 1974, infiltration of my campaign headquarters took place. Here is the story as reported by the local press.

"Leonard Jenoff, the secret police operative who worked for dope trafficker John (Liddie) Jones' lawyer, also infiltrated the offices of Rep. Parren Mitchell, is has been learned.

"Jenoff volunteered to work 'morning, night, plus weekends' in Rep. Mitchell's last election campaign. He also took photographs of Mitchell's campaign workers.

"Jenoff is an admitted supplier of information to the police department's Inspectional Services Division (ISD), a clandestine intelligence gathering unit that reports directly—and only—to Commissioner Pomerleau.

"One of Mitchell's aides said Jenoff asked if he could take pictures of campaign workers 'for a photography course he said he was taking.' He turned over 10 to 15 pictures to us. I don't know if any were given to the police."

There is strong evidence to suggest that in my previous Congressional Campaigns similar infiltrations by paid or unpaid police agents took place. These persons could have, and I believe did, inspect records of telephone calls, credit records and the like. Therefore, I would like to see the language broadened to cover that kind of situation.

My second area of concern deals with Section 2519. "Reports concerning intercepted wire, oral and other communications." I am aware of the complexity of legal, bona fide information gathering by Agencies and I am keenly aware of the need for confidentiality to govern such operations. However, I do feel that the person on whom information was gathered ought be advised some where down the line that he was the object of such activities. Obviously, if the intercepts result in a specific criminal charge, then the person would know.

However, if intercepts do not result in such a charge (or charges) or if indeed intercepts prove that the individuals conduct and behavior has not been inimical to the best interests of the country, I think the person has the right to know that he was under surveillance and why the surveillance took place.

Hopefully, you can clarify these two problems for me. I have and will continue to support H.R. 3113 because it is legislation needed to protect basic civil liberties which are guaranteed by the Constitution.

Mr. KASTENMEIER. And you may continue as you wish.

Mr. MITCHELL. I am very pleased to appear before you today to express my strong support for H.R. 3113—and the other numbered pieces of legislation—a bill which I have cosponsored and a bill, which, in my opinion, is desperately needed.

As I understand it, the other witnesses who have appeared before this subcommittee have focused on the Federal agencies primarily and their possible violations of the Bill of Rights. It is my understanding that subsequent witnesses will focus on the Federal agencies also.

However, I want to approach the importance of this bill in terms of a local police department's activities, because I think there is an essential relation between the local police department and the Federal agencies.

I will ask you to bear with me as I provide the necessary background to make my approach clear.

On February 14 of this year, 131 persons sent a statement to the Governor of the State of Maryland. You have a copy of the statement and, therefore, I will not read it. But I will read what the concerns of the 131 signers of this statement were, and those concerns appear on page 3 of my testimony.

Their concerns were: Infiltration of peace and civil rights groups; routine photography of demonstrators for several years.

Collection of information on reporters writing stories unfavorable to the Police Commissioner of Baltimore, or on controversial issues.

Surveillance of persons who write letters to editors of newspapers.

Surveillance of Congressman Parren Mitchell; infiltration of a meeting of the Congressman's campaign staff.

Surveillance of numerous other public officials, including the Baltimore State's Attorney, who at that time was Milton B. Allen, and the head of the Community Relations Commission; surveillance of black clergymen.

ISD, and that is Inspectional Services Division of the police department, collection of reports on recent striking hospital workers; ISD collection of reports on individuals and license numbers of persons entering the Friends Meeting House—that is a Quaker organization—and other places in Charles Village.

Finally, routine forwarding of surveillance records from the Police Commissioner of Baltimore to Army Intelligence and to the FBI.

May I digress from my testimony just a moment to point out that I have in my possession two documents which were reports from police agents to the police commissioner, and these two documents clearly

show that the reports were forwarded to Army Intelligence and to the Federal Bureau of Investigation.

A portion of the statement that was submitted read:

The whole network of American Constitutional Rights—especially those of free speech, press, assembly and religion; securing persons, houses, papers and effects from unreasonable search and seizure—was established to curtail government interference with peaceful dissent. These Constitutional Rights have been routinely violated by the Baltimore Police Department.

I would make the point here before this committee that in the violation of those rights, there was a linkage, a correlation, a tie-in with the Federal Bureau of Investigation and with Army Intelligence. This much we can demonstrate.

I will skip over to page 6. Let me indicate that among the signers of this document submitted to the Governor were: a bishop of the church, several ministers, the National Association for the Advancement of Colored People, representatives from Johns Hopkins University and the Johns Hopkins Hospital, representatives from Goucher State College, Towson State College, Loyola College, and the Community College of Baltimore, and the American Civil Liberties Union.

Based upon information made available to me to date, I am firmly convinced that a national domestic espionage apparatus existed in America. I further firmly believe that this apparatus involved the Federal Bureau of Investigation, the Army Intelligence, and local police departments.

In this domestic espionage apparatus, information gathered, without benefit of court orders, was exchanged between local police departments and Federal agencies. The information was gathered and exchanged on persons and organizations that were not involved in criminal activity.

Obviously, had the provisions of the bill been in effect, this dreadful Kafkaesque situation could not have developed in my city or in other cities across the Nation.

I would like to indicate to you that a similar kind of an operation took place in Houston, Tex., where a dossier was kept on Congresswoman Barbara Jordan. It is my further understanding that the contents of her dossier were transmitted to the Federal Bureau of Investigation and to Army Intelligence.

I have one or two areas of concern that hopefully can be cleared up today.

The first is with the language referring to "private dwelling used and occupied as a dwelling." I think this language needs to be broadened and I shall explain why.

During my primary campaign in 1974, infiltration of my campaign headquarters took place. Here is the story as reported by the local press. We have further verified it by our own investigation.

Leonard Jenoff, the secret police operative who worked for dope trafficker John (Liddie) Jones' lawyer, also infiltrated the offices of Rep. Parren Mitchell, it has been learned.

Jenoff volunteered to work "morning, night, plus weekends" in Rep. Mitchell's last election campaign. He also took photographs of Mitchell's campaign workers.

Jenoff is an admitted supplier of information to the police department's Inspectional Services Division (ISD), a clandestine intelligence gathering unit that reports directly—and only—to Commissioner Pomerleau, who is the Police Commissioner in Baltimore City.

One of Mitchell's aides said Jenoff asked if he could take pictures of campaign workers for "a photography course he said he was taking." He turned over 10 to 15 pictures to us. I don't know if any were given to the police.

There is strong evidence to suggest that in my previous congressional campaigns similar infiltrations by paid or unpaid police agents took place. These persons could have, and I believe did, inspect records of telephone calls. I know that Mr. Jenoff inspected the roster of telephone calls received on a daily basis. They could have inspected credit records and the like, credit records relating to campaign expenses which were pretty available.

Therefore, I would like to see the language broadened to cover that kind of situation.

My campaign headquarters was not my residence, it was not my principal place of dwelling. The same kind of thing could have happened with an agent of the Federal Government. Under the language relating to residence and principal place of dwelling, there would have been nothing to prevent him from so doing.

My second area of concern deals with section 2519 of H.R. 3113, "Reports concerning intercepted wire, oral and other communications." Mr. Chairman and Members of the Committee, I am aware of the complexity of legal, bona fide information gathering by agencies, and I am keenly aware of the need for confidentiality to govern such operations.

However, I do feel that the person on whom information was gathered ought to be advised somewhere down the line that he was the object of such activities. Now, maybe I have not read the bill carefully enough. I have read it two or three times, but I did not see that protection for the individual in there.

Obviously, if the intercepts result in a specific criminal charge, then the person, when he is confronted with that criminal charge, would know that he had been the object of surveillance.

However, if intercepts do not result in such a charge—or charges—or if indeed intercepts prove that the individual's conduct and behavior has not been inimical to the best interests of the country, I think the person has the right to know that he was under surveillance and why the surveillance took place.

Hopefully, you can clarify these two problems for me. I have and will continue to support H.R. 3113 because it is legislation needed to protect basic civil liberties which are guaranteed by the Constitution.

Thank you very much, Mr. Chairman and members of the committee.

Mr. KASTENMEIER. Well, I thank you, Congressman Mitchell. I think your testimony is possibly the most valuable that we have had. Certainly, it is a testiment to the really outrageous, scandalous police state mentality, and techniques that are used in what presumes to be a free country. I think many of us were superficially aware by news stories of what has happened in Baltimore, but never could we have been brought so forcefully to the facts as you have so succinctly done for us in the last 5 or 10 minutes.

What was the purported purpose of such widespread surveillance over essentially political activities, whether these are the Vietnam war or your campaign activities? What possible justifications could a so-called police agency give for that sort of behavior?

Mr. Mitchell. Mr. Chairman, I think in this whole sordid experience the answer that I will give you is what hurt me the most. The investigation was conducted by two white investigative newspapermen. One of the informants indicated to the newspapermen and the story appeared in the press, that my campaign had been under surveillance. The newspapermen asked why, and the informant said there were many people who did not want Mitchell to win—this was the campaign of 1970, when I was elected—and that "he" was a black man reaching for too much power.

If that is true, and I believe it is, that hurt me and hurt me very badly. That is just so foreign to the direction in which we are attempting to move. There was a racial consideration involved in the surveillance of my campaign. There was a racial consideration involved in the whole domestic espionage conducted by the Baltimore City Police Department through its Inspectional Services Division.

One of the newspapers quotes the investigative reporters as asking the police commissioner whether or not the dossiers were kept on individuals in groups and whether or not they could see those dossiers. The newspaper report has the commissioner replying with words—and I am trying to quote exactly—"Don't worry, they were only kept on the blacks, just on the blacks." That was a pretty horrendous experience.

Mr. Kastenmeier. Well, that is very dismaying indeed, and I take special note of the fact that you say you are convinced that a national domestic espionage apparatus existed in America. Whether it does today or not, you do not know. Presumably it does not, if we are to believe certain people. We are making discoveries in this connection. Obviously, the whole picture is not yet available to us, although the legislative branch, the Congress, and certainly the press are making every effort to learn the truth of this.

But, for anyone who has any notion of what a police state is supposed to be like, this is as close a copy of such a police state that I can possibly imagine in this country and, indeed, is a very great danger not only to you and to citizens in Baltimore, but to everyone in this country.

I yield to the gentleman from New York, Mr. Pattison.

Mr. Pattison. I just have really one concern. The thrust of this bill is to make it illegal to do certain things and to impose a fine or imprisonment for doing these things. I am not sure what the effect of this is in terms of the admissability of evidence before a court. Is there something in this bill that relates to that particular?

Suppose they are conducting an illegal surveillance and do, in fact, discover some crime or evidence of crime. Is there a prohibition against the use of that?

Mr. Mitchell. No, not in terms of my reading of the bill. I did not find any such prohibition in terms of my reading of the bill.

Mr. Pattison. I was just concerned about the enforcement of this, whether anybody is ever going to get arrested or indicted or convicted if any police officer, let us say, is ever going to get arrested in those cases where he actually does find some evidence of criminality, and I would have an idea that that would be the only time that you are ever going to discover that this has ever happened.

Mr. MITCHELL. I would, of course, defer to the author of the legislation. But I understand your concern.

Mr. PATTISON. I am also a little bit concerned about the fact that one of these days down the road we are going to have a case where a person has been accused of, and is being tried, did get indicted for doing something and we are not going to be able to introduce the evidence that he did it because in obtaining that evidence we will have violated the rule ourselves.

Mr. MITCHELL. Yes, that is a very strong possibilty.

Mr. PATTISON. I have no further questions.

Mr. KASTENMEIER. Thank you. The gentleman from Illinois.

Mr. RAILSBACK. Whatever happened to Leonard Jenoff? Did anybody pin him down and ask him what he was doing?

Mr. MITCHELL. There are two investigations now being conducted. The Baltimore city grand jury is going into the matter. I do not know whether or not Mr. Jenoff has appeared before the grand jury.

However, the problem in these situations will be whether or not the statute of limitations will apply. Some of the surveillance took place in 1970, 1971, and 1972. I think there is a 1-year limitation in Maryland, and I just do not know beyond that.

May I just add also——

Mr. RAILSBACK. Has he ever made any public statement or not?

Mr. MITCHELL. No. He sort of disappeared after this broke in the press, and no one I know has heard from him since that time. The investigative reporters have attempted repeatedly to contact him at his home without success. A committee of the Senate of the Maryland General Assembly is also in the process of looking into this whole matter of domestic espionage and surveillance. I do not know whether Mr. Jenoff has been called to appear before that committee.

Mr. RAILSBACK. Is there evidence that the police department itself was involved directly in his activities? Or was he doing it in kind of an informal, unofficial capacity?

Mr. MITCHELL. There were two versions that appeared. The first being an official statement by Mr. Dennis Hill, who represents the police department, who indicated that Jenoff was a regular supplier of information, but was not a part of the police department; he was not on the payroll.

Then a subsequent statement appeared, and I cannot attribute it to any particular person, which indicated that he was one of the regular informants and on occasion did receive money for the information supplied to the Baltimore City Police Department.

We have testimony adduced from at least one former police officer who testified that he was told that it was his responsibility to gather all information possible on the Parren J. Mitchell campaign and to submit it to the city police department. This was an officer who was on payroll at that time.

Mr. RAILSBACK. There is a provision under section 2518 of title 18 that deals with an entry of an order, or the application for the wire tap, the date of entry, the period authorized, approved or disapproved interceptions, or the denial of the application: and the fact that during the period wire or oral communications were or were not accepted.

In other words, the person is eventually put on notice and then he has the right, I believe, to move for discovery or to suppress. I do not know if that is enough protection, in your opinion.

Do you follow me?

Mr. MITCHELL. Yes, I follow you.

Mr. RAILSBACK. Eventually, he is given notice, and then there is a trial.

Mr. MITCHELL. But you see, that really does not help me too much.

Mr. RAILSBACK. Yes.

Mr. MITCHELL. Because that will deal only with a situation where the intercept or the tap leads to the placing of criminal charges against the person. It does not cover that situation where the intercepts, wiretaps and so forth disclose nothing at all wrong, no behavior that was not in the best interests of the country, and this man does not know that he has been the object of a secret surveillance. That is my concern.

Mr. RAILSBACK. This is required within 90 days, or not later than 90 days after the application for the order.

Mr. MITCHELL. I see.

Mr. RAILSBACK. Regardless of what happened.

Mr. MITCHELL. Whether it results in a criminal charge or not?

Mr. RAILSBACK. Yes. He must be advised in any event.

Mr. MITCHELL. Fine. Well, that helps, then.

Mr. RAILSBACK. Yes, that should help.

That is all I have. Thank you very much for your very constructive and personal testimony.

Mr. MITCHELL. Thank you for letting me be here.

Mr. KASTENMEIER. We appreciate your appearance this morning, Congressman Mitchell.

Mr. MITCHELL. Thank you, Mr. Chairman.

Mr. KASTENMEIER. This concludes this morning's hearing on various bills relating to wiretapping and surveillance and other invasion of privacy.

The subcommittee hearings on the subject will continue and will be scheduled in the near future. The subcommittee will meet on Friday morning next for the markup of the Federal parole bill, and until that time the subcommittee stands adjourned.

[Whereupon, at 11:55 a.m., the hearing was recessed, to reconvene subject to the call of the Chair.]

SURVEILLANCE

TUESDAY, MARCH 18, 1975

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:15 a.m., in room 2237, Rayburn House Office Building, Hon. Robert W. Kastenmeier [chairman of the subcommittee] presiding.

Present: Representatives Kastenmeier, Danielson, Drinan, Badillo, Pattison, Railsback, and Wiggins.

Also present: Bruce A. Lehman, counsel; Timothy A. Boggs, professional staff member; and Thomas E. Mooney, associate counsel.

Mr. KASTENMEIER. The subcommittee will come to order.

Over a half century ago Justice Oliver Wendell Holmes wrote: "The United States may give up the Post Office when it sees fit, but while it carries it on, the use of the mails is almost as much a part of free speech as the right to use our tongues."

The purpose of today's hearing is to examine and present postal surveillance practices to determine whether today's postal patron may freely exercise his right to use the mails without the chilling fear of an unseen inquisitor intruding into the privacy of his communications.

The official policy of the U.S. Postal Service as set forth in its published regulations is that first class mail is given absolute secrecy while in the custody of the Service. However, a number of disturbing facts have come to light recently which bring into question the U.S. Postal Service's dedication to the confidentiality of the mail.

Mr. William Colby, Director of the Central Intelligence Agency told a Senate subcommittee on January 15 that the CIA had been reading the mail of selected American citizens for a period of 20 years. One of the subjects of this mail surveillance, it has now been revealed, was a Member of Congress.

In response to a request from me dated January 20, the Chief Postal Inspector has provided the subcommittee with an analysis of the use of mail covers—that is inspection of an individual's mail short of actually reading it—for 1973 and 1974.

This analysis reveals that over 35 separate agencies, State and local, requested over 4,000 mail covers for each of those years. These agencies included organizations not usually associated with law enforcement, such as the Departments of Agriculture and Labor, the

57-282—76—pt. 1——20

Fish and Wildlife Service, as well as State welfare agencies and real estate commissions. In addition, over 250 mail covers for national security purposes were ordered.

The Postal Inspection Service itself accounted for over three-fourths of the 431 court ordered mail openings during 1973 and 1974, and one-third of the 8,687 mail covers during this period.

That this massive intrusion into personal privacy must be examined carefully is apparent from the fact that over 70 Members of the House have sponsored legislation, now pending in this subcommitee, which would require judicial approval and congressional scrutiny of all mail openings.

Our witness this morning is uniquely qualified to supply the subcommittee with the facts about surveillance of mail in the United States. He is Mr. William J. Cotter, Chief Postal Inspector of the U.S. Postal Service. As chief inspector, Mr. Cotter is personally responsible for all investigative activities of the Postal Service, as well as liaison with other investigative and intelligence agencies. He has held his present position since 1969. Prior to that time he served for 18 years with the Central Intelligence Agency and 4 years as an FBI special agent.

On behalf of the subcommittee, I am most pleased to welcome you this morning, Mr. Cotter. Before proceeding however, I shall administer the oath.

Do you solemnly swear that the testimony you are about to give the subcommittee will be the whole truth and nothing but the truth, so help you God?

Mr. COTTER. I do.

Mr. KASTENMEIER. Mr. Cotter, you have a statement which appears to be well prepared. Please identify your associate and proceed.

TESTIMONY OF WILLIAM J. COTTER, CHIEF POSTAL INSPECTOR, U.S. POSTAL SERVICE

Mr. COTTER. Mr. Chairman, accompanying me today is Mr. Louis J. Ansaldi, legal assistant to the Chief Inspector.

I do welcome the opportunity to appear before this subcommittee today to discuss the policy and practices of the U.S. Postal Service regarding the opening of mail and use of mail covers.

As requested in your letter of March 11, 1975, we have prepared and forwarded to you a formal statement, including a detailed analysis of the mail cover procedure, its history, and legality. Our statement also discusses the limited authority of the Postal Service to open first-class mail pursuant to a search warrant or in a dead letter office.

I believe that the statement is of such length that you might desire it to be inserted in the record rather than read into the record at this time. With your permission, I would like to highlight some important parts of the statement and then proceed directly to answer your questions.

Mr. KASTENMEIER. Without objection your statement in its entirety will be accepted and made part of the record. You may proceed to highlight.

Mr. COTTER. Thank you, sir.

A mail cover is a relatively simple investigative or law enforcement technique. It involves recording the name and address of the sender, the place and date of post-marking, the class of mail, and any other data appearing on the outside cover of any class of mail matter in order to obtain information in the interest of protecting the national security; locating a fugitive, or obtaining evidence of the commission, or attempted commission of a crime. Mail is not delayed in connection with a mail cover, and the contents of first-class mail are not examined.

It is uncertain exactly when the mail cover technique originated, although it would seem rather natural to utilize postmarks and return addresses in the investigation of crimes related to the use of the mails. The 1879 postal regulations were the first to contain an official statement concerning the use of postmarks and addresses for law enforcement purposes.

Subsequent revisions of the postal regulations continued to authorize postmasters to furnish information concerning mail matter to postal inspectors and to furnish postmarks, addresses, and return cards—that meaning return addresses—to officers of the law to assist them in locating fugitives.

The 1948 regulations considerably broadened the access to mail cover information. These regulations, allowing mail cover to be requested by both law enforcement officers and representatives of any Federal agency, were in effect in the early 1950's when mail covers first became a matter of congressional concern.

In 1952, members of the staff of the Senate subcommittee on privileges and elections, which was investigating the conduct of Senator Joseph R. McCarthy, obtained covers on the mail addressed to the Senator and his aides. The Senate authorized an investigation into the use of mail covers on his mail. The special investigating committee recommended that the matter be referred to the Attorney General for possible action under the criminal statutes. However, the investigators found no evidence that mail covers had been maintained on any other Members of the Senate.

As part of the general revision of postal regulations which was accomplished in the years 1954 and 1955, the Post Office Department discarded the provisions allowing postmasters to furnish information concerning postmarks, addresses, and return cards to representatives of Federal agencies. The new regulations once again limited the availability of such information to postal inspectors and officers of the law seeking fugitives from justice.

Thus, after approximately 76 years, the postal regulations applicable to the mail cover procedure still exhibited much of their original form. Nevertheless, 10 years later mail covers were again a topic of Congressional concern in the Senate hearings on invasion of privacy by Government agencies. A Senate subcommittee headed by Senator Edward V. Long of Missouri conducted extensive hearings on the use of mail covers.

There was also sentiment for increased regulation or abolition of mail covers in the House of Representatives. On June 17, 1965, the Post Office Department issued new regulations controlling the use of mail covers. The new regulations only allowed mail covers to be used in the

interest of protecting the national security, locating a fugitive, or obtaining evidence of the commission or attempted commission of a felony. The regulations also required all mail covers to be authorized by the Chief Postal Inspector, a postal inspector in charge, or a limited number of their designees. Moreover, mail covers were to be instituted only upon written request stipulating and specifying a reasonable need for the mail cover and a proper reason for its use. Other new provisions, apparently designed to counter specific changes in the Senate hearings, prohibited mail covers on matter mailed between a subject and his known attorney, placed time limits on all mail covers, and barred the continuation of mail covers on indicted persons.

When the Postal Manual was replaced as the basic publication of postal regulations and instructions by the new Postal Service Manual, the regulations governing mail covers were not printed in their entirety. Although omitted from the formal published regulations of the Postal Service, the extensive provisions of the Postal Manual—that's the old Postal Manual—were retained as official instructions to all Postal Service employees and constituted the sole authority and procedure for initiating, processing, placing, and using mail covers.

Most recently, the Postal Service has taken steps to republish the mail cover regulations in the Postal Service Manual and the Federal Register in order to make these regulations more accessible to the public and discourage confusion concerning the nature and uses of this important investigative technique. (Federal Register, March 12, 1975).

The Postal Service has long contended that it would be improper to extend to the mail cover, an investigative technique, the same type of judicial supervision reserved for law enforcement actions which may be properly described as "searches" or "seizures."

The Postal Service position on this matter is bolstered by the decisions of a number of respected courts which have uniformly refused to treat the mail cover technique as a search or seizure, or to extend the protections of the fourth amendment to matter inscribed on the outside of a piece of mail by the sender or by the Postal Service.

First-class mail is protected by the fourth amendment of the U.S. Constitution. First-class mail is matter closed against postal inspection. Title 39, United States Code, section 3623(d) provides in part:

> The Postal Service shall maintain one or more classes of mail for the transmission of letters sealed against inspection.

Part 115 of the Postal Service Manual provides:

> First-class mail is given absolute secrecy while in our custody. No persons in the Postal Service, except employees of dead-mail offices, may open first-class mail without a legal warrant, even though it may contain criminal or otherwise unmailable matter or may furnish evidence of the commission of a crime.

Although section 3623(d) of title 39 speaks only of letters, packages closed against inspection are afforded the same protection under postal regulations.

A legally authorized search warrant is required to open and search first-class mail. Furthermore, under its current mail classification system and regulations, the Postal Service does not subject to a warrantless search any item which the sender has mailed air mail, air parcel post, or priority mail, except in those cases where such mail bears a notation by the sender authorizing postal examination.

Even in those cases where probable cause exists to believe there is contraband in first-class mail, for example, damaged mail exposing contraband or other reliable information, a search warrant must be obtained without causing an unreasonable delay to the suspect mail.

Section 159.7 of title 39, Code of Federal Regulations, defines dead mail as matter deposited in the mail which is or becomes undeliverable, or is unmailable, and which cannot be returned to the sender. At dead letter branches, dead first-class letters are opened in an attempt to determine the name and address of the sender so that his property may be returned. Only those employees especially designated to open dead letters are allowed to open such matter and then only under proper supervision. Letters which contain correspondence only and which are without sufficient information to enable a return to the sender or delivery to the addressee are destroyed; and the numbers of these letters run into the millions per annum.

Second-, third-, and fourth-class mail are subject to postal inspection by authorized postal employees. Payment of postage at the rates established for these classes of mail is considered consent by the sender to examination of the mail contents since the sender is free to choose the greater privacy of first-class mail. The courts have perceived no constitutional impediment to warrantless searches of these classes of mail.

Although second-, third-, and fourth-class mail may be opened for inspection, if such inspection discloses contraband, a search warrant must be obtained prior to the seizure of the item or withdrawal from the mails for use as evidence against the sender in a criminal proceeding.

Pursuant to customs laws, mail of foreign origin is subject to customs inspections. Postal regulations recognize such foreign mail is subject to customs inspections without regard to class.

That concludes my preliminary comments, Mr. Chairman, and I'm available to respond to your questions.

Mr. KASTENMEIER. Thank you, Mr. Cotter, for your very informative presentation.

Before beginning questioning I will state that pursuant to a recommendation from Congressman Drinan, each member will question for 5 minutes, and if there are additional questions there will be an opportunity for additional questioning later on.

Inspector Cotter, the Postal Service grants mail covers to law enforcement agencies. Would you explain how some of the agencies that your report indicates are granted mail covers, fall into this category, such as the Departments of Agriculture and Labor, the Department of Commerce, or local real estate commissions?

Mr. COTTER. In the regulations pertaining to mail covers there is a provision describing law enforcement agencies, and it reads as follows:

> Law enforcement agency is any authority of the Federal Government or any authority of a State or local government one of whose functions is to investigate the commission or attempted commission of acts constituting a crime.

Now, if I might, Mr. Chairman, give you a few examples of these peculiar sounding organizations, and how they come into the picture. For example—that is no reflection on the organization when I say "peculiar sounding", I mean in the context of fitting into this discussion. For example, here is one, Employment Development Department

of California. This investigation pertains to alleged registering of fictitious employers and fictitious earnings in violation of the California Penal Code, section 182, conspiracy, section 470, forgery, and so forth; a penalty of up to 10 years in the state prison.

Real Estate Commission of Colorado. An investigation by the enforcement staff of that particular commission into charges of fraudulently selling the same land twice, a violation of the Colorado Revised Statute, 1963, imprisonment up to 10 years and fines up to $30,000.

Mr. KASTENMEIER. Do you determine in advance whether these various governmental organizations are qualified as having law enforcement functions?

Mr. COTTER. The approval of this type of mail cover would be made out in the field; that is a responsibility delegated to the inspector in charge, for example, or to his designee.

Certainly our inspector in charge in Denver, Colo., in this real estate commission mail cover, or something like that, it's incumbent upon him to determine that it is indeed an organization which fits the criteria as described in our regulations.

Mr. KASTENMEIER. Do your people in the field ever require agencies requesting mail cover to provide any sample evidence of the possible commission of a crime?

Mr. COTTER. Yes.

Mr. KASTENMEIER. And you take that at face value.

Mr. COTTER. Indeed, they do. And they go back, I'm quite sure, regularly, and turn down requests if they don't satisfy the requirements.

Mr. KASTENMEIER. Basically, what are the requirements?

Mr. COTTER. Well, it would be for the three basic reasons. One purpose of the mail cover is to assist in the location of a fugitive. A fugitive would be a person who committed a felony and had fled.

In national security, that is a broad and sweeping category.

And the third category would be to develop evidence pertaining to the commission of a crime or attempted commission of a crime; and there again, it would be a felony offense, a serious offense.

Mr. KASTENMEIER. Now, I take it in granting a national security mail cover, that is something handled through your office, rather than the field. What criteria do you use in granting national security coverage?

Mr. COTTER. Well, here again it is, you would agree, a broad area, without specific definition. I would make a judgment, and my staff would make a judgment, based upon the information provided by the agency requesting the national security mail cover. For example, an agency comes in and says we have a suspect and very strong belief, there is evidence to suggest the fact that he is committing treason, is in contact with representatives of X-Y-Z country; we have reason to believe that he is passing information to that country, and so on. They suggest that a mail cover would be most desirable to see the extent of his contacts, and we would undoubtedly agree to that request.

They might come in and say that this individual is a very active member in a particular organization, and here we come to a problem. I have to make a judgment as to what kind of an organization it is. We have no listing any more; we have no Attorney General's list; if there ever was a profound, solid list, we have nothing like that.

We do indeed go back to the requesting organization. Regarding the ABC Army, we have never heard of it before; and they come back to us and attest to us that they are engaged in such and such a thing, they are planning on blowing up this, or that, or the other thing. So, on the basis of the information that comes back from the organization, I make a judgment.

Now, if it came from the FBI as the primary internal security organization of the United States, or if I receive a request from another Federal agency on national security, I might well check with the FBI to get the view of the FBI as to whether the organization is potentially dangerous to this Nation and its security.

Mr. KASTENMEIER. In other words, your criteria would be more or less consistent with that of the Federal Bureau of Investigation.

Mr. COTTER. That is correct.

Mr. KASTENMEIER. Are subjects of mail cover ever informed of the fact that their mail is monitored?

Mr. COTTER. Not unless they initiate action under a discovery proceeding in a court case and get the results. Generally, we don't volunteer the information that for a particular period of time their mail has been subject to a mail cover.

Mr. KASTENMEIER. I will yield to the gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. Mr. Cotter, have the mail covers during your term borne fruit?

Mr. COTTER. Yes; they have.

Mr. RAILSBACK. Can you just generally explain, give us some examples?

Mr. COTTER. One that very quickly comes to my mind, Mr. Railsback, happened in December 1969. I had been Chief Postal Inspector for only a few months, when we had a truck held up here in Washington, D.C.—around Christmastime—and $382,000 were stolen from this truck; it was the largest holdup in the history of Washington.

We started an investigation and came up with some suspects, and so on. And we did apprehend a fellow in California and a fellow here; it was a local group. We had one outstanding suspect, and he also had in addition to his true name some alias he went by. We did place a mail cover on his family's residence, and 2 days later we had a letter to that address from Ottawa, Canada, addressed to his other name; and in conjunction with the Canadian police, we arrested him a few days later. That was a fugitive case.

About 2 years ago, there was an advertisement placed in the TV Guide. Participate in a contest, and if you win, you will get a free holiday in Acapulco, something like that, send in this card. So, a lot of people sent in the card, and as a consequence—oh, there were many winners, everybody won, in fact. You have won, and you will be going on this trip to Acapulco; however, you have to send in $25, which will be reimbursed to you at the time you depart.

Very early, maybe the first day this mailing went out by two fellows—two fellows, by the way, who had immigrated from Germany and started this business in a hurry.

But anyway, fortunately two of the winners were neighbors, both won. They invited it to the attention of a postal inspector because they thought there was something wrong. We moved in on that case,

and it was obvious to us there was something going on. We put a mail cover on the fellows to see the extent of their mail. And then we contacted some additional people and found everybody was a winner.

We went to our administrative law judge and had a hearing under section 3005, of title 39, USC, and the administrative law judge agreed to halt delivery of the mail. Prior to that proceeding, we had gone into court and had obtained a temporary restraining order under section 3007. As a consequence of that mail cover and the prompt action taken, we saved the customers, the American people, perhaps $150,000 very, very quickly by use of that mail cover.

As you notice from the statistics, the greatest user of the mail cover is the Postal Inspection Service itself. How in the world, do we have more fugitives than anybody else? No indeed, we don't; the greatest utilization in the Postal Service is in mail fraud cases.

Mr. RAILSBACK. Are you personally aware of any illegal opening of first-class mail—not illegal, but are you aware of any opening of first-class mail?

Mr. COTTER. Yes; with court order.

Mr. RAILSBACK. Unauthorized?

Mr. COTTER. Other than Mr. Colby's observation, no.

Mr. RAILSBACK. I am advised I am in a sensitive area, so I will just thank you.

Mr. KASTENMEIER. The gentleman from California, Mr. Danielson.

Mr. DANIELSON. Thank you, Mr. Chairman.

While listening, I have been going through your schedules attached to the letters on mail covers in 1973 and 1974. There are a few in that breakdown that I would like to review just very quickly. I don't want to consume a whole lot of time. The Interstate Commerce Commission is listed; what sort of case would they be involved in to require a mail cover?

Mr. COTTER. This might be it, the Department of Commerce; it involved illegal procurement and export in violation of the Export Administration Act of 1969, as amended, 5 years or a $20,000 fine.

Mr. DANIELSON. Some type of export control. The Agriculture Department, just briefly, what would that be?

Mr. COTTER. Anything, it could have to do with food stamps, that's one area. However, this one, some Treasury checks were deposited in the accounts of employees of the Federal City College. Offense, conspiracy to defraud the U.S. Government; 5 years, up to a $10,000 fine.

Mr. DANIELSON. I see. Now, U.S. marshal, you had a few from the U.S. marshal, when did they start investigating, what kind of case would that be?

Mr. COTTER. That might well be a fugitive case.

Mr. DANIELSON. Well, normally they don't investigate, they are simply jailers.

Mr. COTTER. That is true, but I wonder, if the prisoner was in their custody and fled.

Mr. DANIELSON. Well, then the FBI would investigate. Who is NIS? I don't know NIS.

Mr. COTTER. That is Naval Intelligence Service.

Mr. DANIELSON. Is that something different from ONI?

Mr. COTTER. Yes, sir. These are investigative elements of the Navy, for example, on contract people.

Mr. DANIELSON. In other words, it is some sort of a Venell Corp., in the Scotland Yard field.

Mr. COTTER. Probably so.

Mr. DANIELSON. I have never heard of that. I think you'd better expand on that. You mean the Navy employs a private——

Mr. COTTER. No, sir. It is the Naval Intelligence Service, as I understand it. The Air Force has OSI, which conducts background investigations, and so forth; and DIA——

Mr. DANIELSON. Let's get back to this one.

Mr. COTTER. NIS, as I understand—and I may be way off on this, Congressman—is an investigative element of the Navy which conducts investigations, background investigations, and also—here is a request from that organization:

> Mr. Doe, an employee of the U.S. Navy is currently under investigation by this service, predicated upon his contact with foreign nationals whose intentions are suspect. His duties involve access to classified information regarding the national defense.

Mr. DANIELSON. I get the picture, they decided to become their own FBI. I get the point, thank you.

Now, lastly, or next to lastly, I don't think the public yet fully understands, or that you stated clearly, the difference between a mail cover and mail opening. Mail cover—correct me if I'm wrong—mail cover consists of making a record of the return address, the sender of the mail, his address, the postmark including date, the addressee, and any other information that appears on the outer surface of a piece of mail. Is that correct?

Mr. COTTER. That is correct.

Mr. DANIELSON. And mail opening means just what it says. You open the mail and look on the inside.

Are there any circumstances under which the Postal Service uses opening of mail, other than pursuant to a warrant issued by the court?

Mr. COTTER. Yes; the dead letter branch.

Mr. DANIELSON. Except for the dead letter office, is there any other circumstance?

Mr. COTTER. First-class mail, no, sir.

Mr. DANIELSON. So, any opening of first-class mail within the Postal Service, not pursuant to a court warrant, would be an unauthorized opening as far as you are concerned.

Mr. COTTER. Yes, sir.

Mr. DANIELSON. Do you find mail covers to be a valuable investigative tool? I have done a good deal of investigating in my life, and I found it an invaluable source in locating fugitives; I don't recall ever having used it for any other purpose. But in locating fugitives it is highly valuable, and I can see how it would be in mail fraud. Do you concur in these feelings?

Mr. COTTER. I wholeheartedly concur, Mr. Danielson. That brings me way back when I first started in the investigative business with the FBI in 1947, and the first apprehension I made was a result of a mail cover. I was out in Oregon, they sent me the results of a mail cover

which was on this fellow's family in Mississippi. They sent me the information that a card was received by his family in Mississippi. There was no return address on it; however, the card came from this city, Sweet Home, Oreg. I checked the subject's name, the fellow was in the phone book. I went and said hello, and he said, "How in the world did you find me?"

Mr. DANIELSON. To make a long story short, it worked. I will yield back the balance of my time.

Mr. KASTENMEIER. The gentleman from Massachusetts, Mr. Drinan.

Mr. DRINAN. Thank you, Mr. Chairman.

Mr. Cotter, your organization has made regulations as of March 12, this year which closed many of the loopholes, and now for the first time a written request is necessary from the FBI; and you also said that can be in existence for only 30 days. Were these stricter regulations adopted for the first time because you anticipated coming before this committee?

Mr. COTTER. No, sir, Congressman Drinan. These regulations have been in effect since 1965; we just republished them recently.

Mr. DRINAN. But wasn't an oral request permissible from the FBI for a national security cover prior to March 12 of this year?

Mr. COTTER. No, sir, except in an emergency situation. But to my knowledge, since I have been there, I have never had any verbal request for any mail cover at all.

Mr. Ansaldi tells me they have to follow up within 2 working days with a written request. But I don't recall having had a verbal request.

Mr. DRINAN. Who keeps all the written requests from the FBI? In the year 1973 you had 284 mail covers in the name of national security; and in 1974 you had 260, and I assume in 1975 you have the same number going. The average number of days in 1973 was 116; in 1974 it was 119, and I assume that all of these are going forward. Have you seen the actual written requests?

Mr. COTTER. Yes, sir, I have seen these; each one.

Mr. DRINAN. Are they all the same?

Mr. COTTER. No, sir, they vary.

Dr. DRINAN. What organizations and name?

Mr. COTTER. An organization, Al Fatah.

Mr. DRINAN. And you just take it on faith from the FBI that this is a subversive organization. Have you ever turned down any request by the FBI?

Mr. COTTER. Yes.

Mr. DRINAN. How many?

Mr. COTTER. One reason, perhaps——

Mr. DRINAN. How many?

Mr. COTTER. I'm getting that now, sir; but I might comment?

Mr. DRINAN. Go ahead.

Mr. COTTER. I'm sensitive, perhaps, to Al Fatah because in November of 1972 we had a deluge, as you know, of Black September letter bombs coming into this country. Perhaps I became hypersensitive to the fact that if anybody started mailing these types of things within the United States I would have a dreadful time trying to deal with it. Therefore, I was in sympathy with the FBI's requesting of me suspects they had——

Mr. Drinan. Mr. Cotter, answer the question. You had 284 mail covers one year, 260 the next year. Did you refuse any, and how many, of the FBI?

Mr. Cotter. In the second quarter of fiscal year 1975 we turned down on national security of the FBI, two.

Mr. Drinan. Out of how many requests? Out of the total number of requests you turned down two?

Mr. Cotter. Yes.

Mr. Drinan. Could you give us the reason?

Mr. Cotter. No, sir, offhand I can't.

Mr. Drinan. But in general, if the FBI requests it, you go ahead and do it. Who in the FBI is in charge of this, how high does that get? Is there a name of an individual who sends these things over?

Mr. Cotter. Well, they are signed by Clarence Kelley. The actual fellow who does all the work, I don't know.

Mr. Drinan. All right. And you do actually see every single one?

Mr. Cotter. I sign each one myself.

Mr. Drinan. And now you have this 30-day regulation, except in cases of national security, and they go on, I guess, forever. Is there any limit on the national security cover?

Mr. Cotter. No. However, in 120 days it has to be approved again by the Chief Postal Inspector.

Mr. Drinan. All right. Have you ever turned down a continuation of a national security cover?

Mr. Cotter. I don't recall having turned down a continuation.

Mr. Drinan. So, in other words, if the FBI says, "We want a mail cover on Mr. X because he corresponds with Al Fatah," you put that on, and there really is no record that you ever discontinued that; it goes on, unbeknownst to the person whose mail is being covered.

Mr. Cotter. That is conceivable.

Mr. Drinan. That is correct. I mean, that's what goes on, you have no knowledge that any mail cover initiated has ever been terminated on the national security grounds. Is that right?

Mr. Cotter. I really have no recollection of having done so, Congressman Drinan. It well may have happened. I can review the records to see whether I did, in fact.

Mr. Drinan. You see my point, there is really no protection to the individual, it goes on and on, and the organization may have been out of existence, and he may not be receiving any mail from the organization, yet the mail cover goes on and on and on.

And I can assume that the 260 that had mail covers for national security reasons alone in 1974, are probably included, are on the same persons as the 284 mail covers in the previous year.

Mr. Cotter. I would doubt that. But I would have to check——

Mr. Drinan. Did the FBI ever write and say, let's discontinue this mail cover?

Mr. Cotter. Yes.

Mr. Drinan. How often did that happen?

Mr. Cotter. I don't know.

Mr. Drinan. If you could supply that information, that would be helpful. Thank you, Mr. Chairman.

Mr. Kastenmeier. The gentleman from New York, Mr. Pattison.

Mr. PATTISON. I just have one question. Other than the publication of the regulations in the Federal Register, how do you advise the public that their mail might be subject to a mail cover: do you do that at all? Are there signs in the Post Office, or warnings, like on a cigarette pack?

Mr. COTTER. No, sir; we don't. It is published, as you mentioned, in the Federal Register and picked up in the newspapers, articles in the newspapers. Within the last couple of years the Wall Street Journal had a very comprehensive article on the subject. And, of course, recently there are articles that appear in the newspapers with regularity, although I must say that in many cases they are confusing because they equate the opening to the exterior review type of thing.

Mr. PATTISON. Would it bother you if there were requirements that each postal facility would have a sign posted to notify people that under certain circumstances their mail may be subject to cover?

Mr. COTTER. Not at all. Not at all.

Mr. PATTISON. I yield back.

Mr. KASTENMEIER. Mr. Cotter, to continue, in terms of your procedure, are you required to inform anyone else, the Postmaster General, or the Attorney General, with respect to post covers?

Mr. COTTER. No, sir.

Mr. KASTENMEIER. Let me ask you, in connection with pending legislation, how you feel. Would you oppose the establishment of a warrant requirement, or some other statutory limitations on mail covers? I ask you that in the context of the question by the gentleman from California, Mr. Danielson.

Mr. COTTER. Are you suggesting, Mr. Chairman, that a warrant would be required before a mail cover could be placed?

Mr. KASTENMEIER. Yes.

Mr. COTTER. In certain types of cases I could see that would not necessarily be a problem. In a fugitive case, for example, there is enough time to go in and get one, and there is good probable cause to get that warrant.

On the other hand, I understand from my fellows who have been involved in the consumer fraud protection area, the mail cover really is an investigative technique; and when it is employed in the early stage of an investigation, you probably wouldn't have sufficient grounds, probable cause grounds, to support the judge's issuing a warrant to give you the opportunity to use the mail cover. Actually, you use the mail cover to help develop the probable cause. That would be a problem, I understand.

Again, for example, our people carry out reviews of publications and ads, "Cure for cancer in 2 weeks," price $2. We well might, after some preliminary inquiry, write a letter and buy the publication and see if it is a big fraud; take it to the appropriate Government agency, and they agree it is a fraudulent publication. We well might put a mail cover on that fellow to see the extent of the business and develop more witnesses for this type of thing.

Mr. KASTENMEIER. And you would want to do so without obtaining a warrant.

Mr. COTTER. I wonder whether or not we would have sufficient grounds to get the warrant without the mail cover, to get the witnesses to testify to the fact they have purchased this thing, and so forth.

Mr. KASTENMEIER. So, your answer is, in some areas it could be required, and in other areas it would interfere with the investigation.

Mr. COTTER. Yes. I might add, Mr. Chairman, in the national security area it is something else again. Since I have nothing to do with the substantive aspects of those, I would have to defer to the FBI for their reaction.

Mr. KASTENMEIER. In 1965 there was a New Republic article in which it was alleged that postal inspectors contacted employers of individuals who had been discovered as receiving obscene materials without such evidence ever having been used for criminal prosecution.

Can you state whether or not you are aware of information obtained by your service has ever been used in such a manner during your term of office?

Mr. COTTER. I'm not precisely clear on that point, Mr. Chairman.

Mr. KASTENMEIER. The allegation was that 10 years ago postal inspectors contacted the employers of individuals who had been receiving obscene materials in the mail, presumably for the purpose of having the employer talk to the individual. Have you ever heard of such a thing during the period of your time in office?

Mr. COTTER. Beg your pardon?

Mr. KASTENMEIER. You are not aware of anything like that during your period of service?

Mr. COTTER. No, sir. As a matter of fact, as Mr. Ansaldi brings to my attention, we don't focus attention on individuals receiving obscene material in the mail. The parties with whom we are concerned—who brought us into action several years ago, with a big thrust in emphasis from the Congress—are the big dealers, flooding the market with obscene advertising, and so forth. Those are the people upon whom we are focusing our attention, not upon the individual.

Mr. KASTENMEIER. Could you give the committee a general breakdown of the subject matter covered in the 332 mail openings, accomplished directly at the request of the Postal Inspection Service during the 2 years involved, 1973 and 1974; what was the general subject matter?

Mr. COTTER. One that quickly comes to mind, where many thousands of pieces of mail were involved, was in lotteries. These are lotteries coming in from abroad, from the Islands, the Bahamas, and so forth. We get an indication somehow or other, perhaps we have somebody who is on the mailing list, and they get a batch of lottery tickets. Then we get an indication when this large mailing of lottery tickets is coming into the United States, and we go into court and get a court order for permission to open this mail because there is probable cause to believe there is a violation of the law; hold it, and proceed with court action.

Mr. KASTENMEIER. What percentage of the 323 mail openings were lottery related?

Mr. COTTER. Lottery, 72 out of 323. The largest number, 240 out of 323, involved the illegal mailing of narcotics. Those are the two big ones. Fraud, firearms, and burglaries are included in the total figure. The 2 big ones, narcotics cases, 240; lotteries, 72.

Mr. KASTENMEIER. Thank you.

To what extent are they used for obscenity cases?

Mr. COTTER. Very rarely. I chatted just before coming up here today with my manager who works in this area, and he said the last one that comes to his mind, in the last couple of years, was in Pennsylvania where, I think, 17,000 obscene mailings were in a warehouse. We received information, obtained a court order, seized them, took them into court, held them as evidence, and the court agreed and ordered the destruction of the materials.

Mr. KASTENMEIER. I would like to yield to the gentleman from California.

Mr. DANIELSON. Is mail fraud still a problem, your probably most frequently encountered offense in the Postal Service?

Mr. COTTER. No, sir. I think the most troublesome and worrisome is house letterbox theft; they are after welfare checks.

Mr. DANIELSON. Mail fraud is still a big one.

Mr. COTTER. It is a "biggie."

Mr. DANIELSON. I notice in the frequency of mail covers, as well as mail openings, the Postal Service leads the field in the 2-year statistics you have supplied to us. As a matter of fact, on mail openings, the Postal Service conducted 323, Drug Enforcement Agency 62; you've got the bulk of the openings; the local police, and sheriffs, had only 16.

I don't think a lot of people realize the impact of mail fraud—shortly after President Truman died, there was a case in which an ad was in the paper that people could obtain a steel engraving of President Truman for $5. And when they sent in their $5, they received back a memorial postage stamp that cost four cents. That sort of fraud is prevailed on the public all the time——

Mr. COTTER. Indeed, it is.

Mr. DANIELSON [continuing]. By artful dodgers around our country.

Mr. COTTER. It certainly is.

Mr. DANIELSON. One more comment, and that's all. I notice in your 1973 mail cover tabulation you have a total of 284, which would be 23.66 per month. In the year 1974 you have a total of 260, which is a total of 23.33 per month, which looks like you are holding a pretty even average.

Let's go back to the FBI. They had 268 mail covers in 1973. The average was 116 days, which would mean, obviously, that some had to be terminated, or you couldn't get that kind of figure from the total 284 mail covers. And a similar figure holds true for 1974, where out of 245 mail covers the average was 119.4 days. Is that not correct, from your charts?

Mr. COTTER. Yes, sir.

Mr. DANIELSON. From that, would you say it is a safe assumption that some of them had to be terminated?

Mr. COTTER. There is no question about it.

Mr. DANIELSON. I have no further questions.

Mr. KASTENMEIER. The gentleman from Illinois, Mr. Railsback?

Mr. RAILSBACK. No questions.

Mr. KASTENMEIER. The gentleman from Massachusetts, Mr. Drinan.

Mr. DRINAN. I know, Mr. Cotter, that of your mail cover requests 180 were from police and sheriffs in calendar year 1974.

Is there any list of individuals who are authorized to request mail covers, or can any policeman, or police department, or any sheriff request this and obtain this?

Mr. Cotter. It would normally be the head of the department, the individual, his request, in his name; also in writing.

Mr. Drinan. There is no list of certified people. In other words, any law enforcement agency can write in and request it.

Mr. Cotter. That's correct.

Mr. Drinan. Including a Royal Canadian Mounted Policeman.

Mr. Cotter. That's correct, with whom we work very closely on across-the-border cases.

Mr. Drinan. Is it reciprocal, I mean——

Mr. Cotter. Yes.

Mr. Drinan. In other words, the Canadian police officials would cover our mail.

Mr. Cotter. I don't know about that, Congressman Drinan.

Mr. Drinan. Well, then it is not reciprocal; yes, or no?

Mr. Cotter. I was thinking about reciprocity in a broad sense.

Mr. Drinan. Well, I want to know whether my mail, going to Canada——

Mr. Cotter. I don't know, sir.

Mr. Drinan. I think that is a pretty simple question, you said it was reciprocal.

Mr. Cotter. Yes, sir; and I will certainly find out for you, Congressman Drinan. It is reciprocal in the broad sense, how close we work with the Canadian Mounted Police in the overall criminal mission.

Mr. Drinan. Mr. Cotter, on page 19 you state this, and this was news to me, that "the payment of the lower rate is considered consent by the sender to examination of the mail contents since the sender is free to choose the greater privacy of first-class mail." And you cite some recommendations here.

Do you think that any great disaster could happen to the Commonwealth, the Republic, if H.R. 214 actually went through. Mr. Kastenmeier referred to that and related matters, related bills, that require in all cases court orders for the opening of any mail. I'm not sure that this bill stretches to the cover.

But what great disaster would happen if we had to go to court and get a court decree that even for a mail cover a court order would be necessary?

Mr. Cotter. As far as I'm concerned, Congressman Drinan, I do not think it would be the end of the world. I think perhaps it would slow down our operation and effectiveness in the area of consumer fraud protection, perhaps getting into mail fraud cases. I believe we would be able to work pretty quickly in getting a mail cover in a fugitive type of case. In national security, that is something else again, I would defer to the other agencies who are sensitive as to what they could be discussing in the court with regard to national security. I'm talking, perhaps, more in the foreign world, and I would defer to the Federal Bureau of Investigation and other agencies in that area.

Mr. Drinan. Well, are you going to testify on behalf of the bill, or would you oppose the bill if it moves forward in this subcommittee?

Mr. Cotter. I would oppose it. However, I made my point, it is not the end of the world as far as I'm concerned. I do believe that the American people would lose out by it in the vital area of consumer fraud protection with which we are so concerned today—the "little

old woman" work-at-home type of scheme. We can so much more quickly stop that kind of thing. It's only costing the woman $2, but still, we try to stop that type of case.

In the interest of the American people, I think it would be more difficult to operate if we had to get court orders every time we wanted to get a mail cover. But it's not the end of the world by any means.

Mr. DRINAN. And the American people have, in essence, greater security if the courts are, in fact, protecting this privacy that they have.

Mr. COTTER. Perhaps.

Mr. DRINAN. Would you have any suggestions as to what the Congress can do to help you in all these matters which you are involved with; do you want any legislation that would assist you in this area?

Mr. COTTER. Well, a lot of people suggest there certainly should be some legislation passed which would preclude the illegal opening of mail; and I would suggest that is not necessary since it is already on the statute books.

I would welcome guidance of some sort as to what standards I should use in making my judgment with regard to a national security mail cover, for example.

Mr. DRINAN. Apparently you have no standards.

Mr. COTTER. There are no standards.

Mr. DRINAN. No standards whatsoever?

Mr. COTTER. No, sir.

Mr. DRINAN. You really want to say you have no standards, whatever the FBI says——

Mr. COTTER. No, no——

Mr. DRINAN. That is what you said.

Mr. COTTER. If they met the standards and it was in the national interest, and so on.

Mr. DRINAN. But there is really nothing, I mean, you have nothing that you can put down.

Mr. COTTER. Well, again back to this point, you might well say to me, you have some audacity suggesting that because an individual is a member of such and such an organization, you put a mail cover on him.

Mr. DRINAN. I would say that.

Mr. COTTER. And there is a big difference of opinion between you and the FBI. So, I make a judgment, I go in the direction of the FBI's judgment and go along with the mail cover. Now, if there were some technique whereby there could some consensus approach, whereby these organizations would be recognized by both parties, I would be delighted.

Mr. DRINAN. As you know, the Supreme Court said we can't characterize and blacklist organizations, so you can't have another Attorney's General list of subversive organizations.

Mr. COTTER. Yes.

Mr. DRINAN. In the absence of that, why don't you recommend that we, at least in those cases of national security, that you would be protected, getting a court decree?

My 5 minutes are up, sir. Thank you very much.

Mr. KASTENMEIER. The gentleman from Illinois, Mr. Railsback.

Mr. Railsback. Mr. Cotter, how many people in your service monitor mail for possible fraud, or misuse?

Mr. Cotter. Monitor mail for possible misuse? Perhaps not paying enough postage, something in that area?

Mr. Railsback. No; for fraud. In other words, the Postal Service has initiated many mail covers.

Mr. Cotter. Right.

Mr. Railsback. Who are the people, and how many are there that initiate that?

Mr. Danielson. Would the gentlemen yield? What does the gentleman mean by "monitor mail"?

Mr. Railsback. In other words, the Postal Service becomes, on occasion, suspicious that somebody is misusing the mail, and then they seek a mail cover.

Mr. Danielson. You mean by "monitor," you mean the mail cover?

Mr. Railsback. No. I mean how many people are monitoring to determine if a mail cover would be useful.

Mr. Danielson. I don't know if the witness knows what you mean by "monitor."

Mr. Cotter. I think, Mr. Danielson, what Mr. Railsback means, how many inspectors do I have working in the fraud area.

Mr. Railsback. Yes.

Mr. Cotter. I would estimate, 225. I'm just estimating, I can get you a firm figure, I know it's around 200. We have 21 division headquarters around the country, covering Alaska, Puerto Rico, and so forth; and I would say at least 200 fraud specialists. And then, again, any inspector, if an inspector is out in the territory, he will investigate a fraud case, handle a small case, reacting to a customer's complaint, or something. We have a couple hundred specialists.

Mr. Railsback. What do they do, review newspapers?

Mr. Cotter. We have some in the medical fraud area. For example, we have two inspectors in Washington, D.C., who look for these crackpot medical fraud schemes, who work closely with the FDA, and so forth here in Washington, D.C.; they actually send in "quickie" weight reducers, bust developer aids, and all that kind of quackery. Now, we have had criminal prosecutions, but, furthermore, the administrative action will stop this type of thing. Again, that is defensive action. And again, if you ask why are we doing it, we are doing it in the interest of the people.

Mr. Railsback. Thank you.

Mr. Kastenmeier. The gentleman from California, Mr. Wiggins.

Mr. Wiggins. Mr. Chairman, I am not fully prepared to ask in-depth questions at this time, but I am confused with respect to your presentation—and perhaps my confusion comes from misunderstanding—of mail covers and mail openings.

Am I correct that when you refer to the general term "mail cover," you refer only to the inspection of the exterior content of it?

Mr. Cotter. That is correct, sir.

Mr. Wiggins. Why would you fail to inspect the exterior of an envelope when the addressee is the known attorney of a sender?

Mr. Cotter. We don't want to have anything to do with interference in a client-attorney relationship. And we have had some criticism on

that, back, again, in 1965; just the fact that we were recording the frequency of communication between the individual and lawyer. And we give direction to the postal clerk in the post office if we know the name of the lawyer, not to even record that piece of correspondence.

Mr. WIGGINS. You would not record the address of the sender?

Mr. COTTER. That's correct, we would just forget that letter.

Mr. WIGGINS. I don't understand the policy. I take it that on the exterior of the envelope, there is the name of the sender in some cases, it contains a postmark, and it contains the name and address of the addressee; and you are also monitoring in terms of frequency. That's about all I can understand you get. Is there some other investigative information that is generated?

Mr. COTTER. No, sir; you hit it completely. And that brings to my attention the question—and I wasn't there at the time—back during the Senator Long hearings on mail covers in 1965 this question came up, and we had an agreement, the post office and Senator Long's committee, that certain things would be done, and certain things wouldn't be done. And this particular item was one that the Senate felt rather strongly about.

Mr. WIGGINS. Do you mean to say that if a letter was called to your attention addressed to John Jones, Attorney at Law, at a specific address, and the return address indicated Patty Hearst's address, you would feel that you could not utilize that information for the purpose of apprehending, or aiding in the apprehension of Patty Hearst?

Mr. COTTER. Under our regulations, if he were her attorney of record that we knew about, that would be prohibited.

Mr. WIGGINS. I see. Perhaps I have given you a hard case, but if that is the answer in that case, I, as one member of the public, find that a ludicrous regulation.

Mr. COTTER. I agree, Mr. Wiggins. But its genesis was back in 1965. That was a strong point in the mind of Congress, that we should not record any data with regard to correspondence between attorney and client.

Mr. WIGGINS. Can you use this information in any way? That is, can it be communicated in any way to a law enforcement official for the purpose of pursuing that address?

Mr. COTTER. Under our present rules, no, because the postal clerk is furnished the name of the lawyer and doesn't even record that information.

Mr. WIGGINS. Well, I would suspect that such a rule, if it were honored by the police, would produce ludicrous and absurd results. Is it, in fact, honored by its breach?

Mr. COTTER. Not to my knowledge, Mr. Wiggins.

Mr. WIGGINS. That's all.

Mr. KASTENMEIER. The gentleman from New York.

Mr. PATTISON. I have no questions.

Mr. KASTENMEIER. Mr. Cotter, the recent audit of electronic equipment by the National Wiretapping Commission revealed that the Postal Inspection Service purchased in 1972 a number of room-bugging devices disguised as electrical wall sockets. Did you happen to bring one with you?

Mr. COTTER. Unfortunately, I neglected to bring one. They look just like regular wall outlets.

Mr. KASTENMEIER. Could you explain why the Service purchased the devices, and how they are being used?

Mr. COTTER. Mr. Chairman, if I may, your staff mentioned to me you might be going into this particular area, and I brought with me my officer in headquarters who monitors this type of activity. I wonder if I might ask him to join us at this time?

Mr. KASTENMEIER. Of course.

Mr. COTTER. Mr. Don Diseroad, Manager, External Crimes Branch, Chief Inspector's Department.

Mr. Diseroad, I wonder if you might respond to the chairman's question.

Mr. DISEROAD. The equipment was purchased for use by the Inspection Service in criminal investigations——

Mr. DANIELSON. Mr. Chairman, would the gentleman speak into the microphone?

Mr. DISEROAD. The equipment was procured for use by the Inspection Service in criminal investigative work. It would be used, of course, under the guidelines of the Attorney General in the case where prior consent from the party was communicated, or if not, court order——

Mr. WIGGINS. I can't hear.

Mr. KASTENMEIER. Would you speak up, sir, we did not hear you completely.

Mr. DISEROAD. The equipment was procured for use in criminal investigations. It would be used under the legal standards, in one case with prior consent by one of the parties, or under title III, court order.

Mr. KASTENMEIER. Have you employed it pursuant to court order?

Mr. DISEROAD. We have not used those particular items of equipment at all. They have never been used.

Mr. KASTENMEIER. They have never been used?

Mr. DISEROAD. Operationally?

Mr. KASTENMEIER. They have never been used. Would you explain then why, if they were purchased in 1972—they were in fact purchased for what contemplated use?

Mr. DISEROAD. They were purchased as potential for use in the Inspection Service, if we would have occasion to use such equipment.

Mr. KASTENMEIER. I still don't understand why the Postal Service would pursue the use of such equipment, need such equipment to pursue criminal investigations, rather than the Department of Justice, or the Federal Bureau of Investigation, who are agencies which would pursue violations of the law.

Mr. DISEROAD. Well, we have responsibility for investigations of a number of criminal statutes; under some we have exclusive jurisdiction. We use electronic surveillance on offenses, violations involving the theft of checks from the mails, money orders from post offices.

Mr. KASTENMEIER. Have the devices been used in connection with third-party consent?

Mr. DISEROAD. Those particular devices have not been used operationally at all.

Mr. KASTENMEIER. Do you have other electronic surveillance devices?

Mr. DISEROAD. We do have other electronic surveillance devices.

Mr. KASTENMEIER. Would you provide the committee with a detailed list of such devices? We would appreciate that. Do you maintain a log as to the use of the other devices?

Mr. DISEROAD. We do.

Mr. COTTER. Mr. Chairman, might I just interrupt for a moment?

Mr. KASTENMEIER. Of course.

Mr. COTTER. You know, the Postal Inspection Service is not too well-known to the American people, but it is a very, very significant criminal investigative agency; in fact, it is the oldest criminal investigative agency in the Federal Government, going back to Benjamin Franklin.

Last year, for example, we made some 16,000 arrests. In the area of convictions, cases going to trial, we have a conviction rate of over 98 percent.

Now, the types of cases, for example, that Mr. Diseroad touched upon, burglaries of post offices; holdups of post offices; holdups of letter carriers on the street, which is getting to be a very worrisome problem; house letter box thefts of welfare checks of the needy, that is a very, very troublesome area; bombs in the mails. This past year we have had more pipe bombs going through the mails in the United States, and we have solved 16 out of 18 of these cases; we have the highest solution rate of any Federal agency.

One truck of our mail, for example, going from the GPO in New York City to the Kennedy Airport contained $40 million. I'm astounded that there haven't been more major crimes against the Postal Service and assaults against the Postal Service.

So, we have a very,very big task in the criminal world, and we have to use the most advanced technical devices to confront and to fight crime.

Mr. KASTENMEIER. Wouldn't you employ the Federal Bureau of Investigation to pursue crimes against the Postal Service?

Mr. COTTER. No, sir. We work very closely with the FBI and meet regularly with the heads of the major Federal law enforcement agencies. For example, with the Internal Revenue, Secret Service, Customs, and Clarence Kelley. U.S. attorneys know well the involvement of postal inspectors and utilize the mail fraud statute that goes back to 1872; that is a highly effective tool, loved by the U.S. attorneys. They don't look to the FBI, they look to the postal inspectors who have intimate knowledge of how these crimes can be perpetrated, utilizing the mail, and so forth.

It is a big criminal operation, and these technical devices are essential tools that we employ to solve these crimes. For example, we had a case a year ago in New York City, down on Wall Street, where two fellows came up on both sides of a mail truck which had $14 million in collections from the Wall Street area. They came up and got nervous shot the guard to death; the driver stepped down and ran away.

Who solved that case, the local police, FBI? Indeed, everybody did. The local police were great; the FBI was great; the postal inspectors were great, too; and based upon intelligence from the FBI, technical devices were used, and within 40 days about six people were appre-

hended in that conspiracy; there were three life sentences, very, very serious sentences. It was a joint effort, local police, FBI, and the postal inspectors.

Mr. KASTENMEIER. To go a little bit further, it is my understanding that there have been since 1968 two court orders for wire taps approved for the Postal Service. Is that correct?

Mr. DISEROAD. Yes, sir.

Mr. KASTENMEIER. Therefore the Service's use of wire taps would be a bit tentative, they are neither used very much, or have you used them not at all. Presently, do you contemplate to use them, or currently have any plans to use them? Currently, I am talking about last year.

Mr. DISEROAD. I can't discuss the investigations which we might have, on which we might eventually use an interception order, a wiretap.

Mr. KASTENMEIER. Let me ask you one final thing. You will submit to the committee, the subcommittee a copy of your log for the period 1968 to the present time?

Mr. COTTER. A copy of the log——

Mr. KASTENMEIER. Yes.

Mr. COTTER [continuing]. Indicating?

Mr. KASTENMEIER. Indicating the use of surveillance devices as are carried out by the postal inspectors.

Mr. WIGGINS. Will the gentleman yield? Is it the purpose of the Chairman's request to include active investigations, as well as those——

Mr. KASTENMEIER. If there is any sensitivity with respect to ongoing investigations. I would exclude them. What I have in mind is more or less the frequency and purpose, and the points of such devices.

Mr. COTTER. The whole Nation, Mr. Chairman?

Mr. DANIELSON. Mr. Chairman?

Mr. KASTENMEIER. Yes?

Mr. DANIELSON. If I might make a suggestion. I am certainly in favor of this committee in public knowing the general scope of this activity; but before we conduct ourselves like a bull in the china closet in something that might be highly sensitive, I would respectfully suggest that we would receive any such information in executive session. And then, after having had an opportunity to determine the sensitivity, then we could release whatever portion, which will not prejudice the investigations. But, you can't unring a bell. I think we ought to receive this testimony in executive session, and then determine what portion should be released, as we did in the hearings on the then proposed Vice President Ford.

As I recall, we had witnesses whom we heard confidentially, and most of the testimony was subsequently released. But we avoided at least——

Mr. KASTENMEIER. I certainly think that is a good suggestion, and we will proceed that way. The gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. I have no questions.

Mr. KASTENMEIER. The gentleman from California?

Mr. WIGGINS. I have no questions.

Mr. KASTENMEIER. Mr. Pattison?

Mr. PATTISON. I have one other question. It occurred to me under a key decision of the Supreme Court relating to wire taps by the Attorney General in national security cases, it is required that significant foreign involvement be established in order to get the authority for a wiretap. Is that still the kind of standard that applies in national security cases when you issue a cover for them?

Mr. COTTER. No, sir. As Mr. Ansaldi brought to my attention, we are not talking about the opening of the mail itself, we are just talking about the exterior.

Mr. KASTENMEIER. Would you place the mike in front of yourself?

Mr. PATTISON. Obviously you would in an opening case, but in a cover case you are saying you would not.

Mr. COTTER. That would be up to the court, I guess, Mr. Pattison, to require that type of base for opening.

Mr. PATTISON. But in the case of a cover it is not required, the showing of significant foreign involvement?

Mr. COTTER. No, sir, that is correct.

Mr. PATTISON. Thank you.

Mr. KASTENMEIER. The gentleman from Massachusetts.

Mr. DRINAN. Mr. Cotter, could the case of Lori Paton happen once again? This was a 16-year-old girl who wrote to the Socialist Workers Party in New York City, asking for information. The FBI investigated her, her teachers and her family; and as you know, there is a law suit pending in the whole matter. Have you altered the regulations so that we can never have another case like Lori Paton?

Mr. COTTER. No, sir, but I hope we won't have another case like Lori Paton, that was human error. The mail cover was on the Socialist Workers Party. This young lady wrote a letter to the Socialist Labor Party, who are incidentally in the same building. The clerk got the mail mixed up and recorded her name on the list of mail going to the Socialist Workers Party, as I recall, and that's how the whole confused mixup started.

Mr. DRINAN. What do you mean it was human error? I mean, you had a mail cover on every bit of mail coming in to the Socialist Workers Party, that was at the request of the FBI in the name of national security, so what's the human error?

Mr. COTTER. The human error was in recording Lori Paton's mail, which wasn't even addressed to the Socialist Workers Party, on the list of the Socialist Workers Party.

Mr. DRINAN. I know that, that was a human error. But if she had written, correctly, you say now that cases like that can still happen; you made no alteration of the regulations. People writing to a political party, such as the Socialist Workers Party can get their mail inspected on the cover, and the FBI can get this information and begin investigating them.

Mr. COTTER. That is correct.

Mr. DRINAN. Isn't the Socialist Workers Party still the subject of a mail cover, all letters going in there are recorded?

Mr. COTTER. I don't recall offhand.

Mr. DRINAN. Can we get under the Freedom of Information Act, or any other way, a list of all of the organizations now that are deemed to be subversive by the FBI?

Mr. COTTER. If you address that, Congressman Drinan, to the FBI, I suggest it would be up to them to provide that information.

Mr. DRINAN. Would you want to disclose that information?

Mr. COTTER. No, sir. I would not disclose information with regard to the identity of subjects of mail covers; I would refer the request to the agency which requested the mail cover.

Mr. DRINAN. Can this committee get a list of all the written requests of the FBI in the last 2 or 3 years for mail covers, in the name of national security?

Mr. COTTER. I would suggest, sir, that you direct your inquiry to the FBI.

Mr. DRINAN. Well, Mr. Chairman, I think this would be very valuable, then we would know what these 260 mail covers in the name of national security are. That information, it seems to me, should be available to this committee, if we are going to make any sensible judgment on that.

Mr. COTTER. I think, Congressman Drinan, for me to give that informtaion, I could very well be jeopardizing some very, very significant national security investigation. And I shouldn't be the one to make the judgment to release that information.

Mr. DRINAN. One last question about this reciprocity with the Canadians. Is there any written agreement that they can look at the cover of our mail, or we can do likewise?

Mr. COTTER. No, sir.

Mr. DRINAN. What do you mean by reciprocity, what actually transpires?

Mr. COTTER. In the mail cover area?

Mr. DRINAN. Yes.

Mr. COTTER. They have an individual in Canada—I'm hypothecating, I don't know the individual case—they have an individual in Canada, or an American citizen who walked across from the United States who is "filching" the people in Canada, a fraud scheme, perhaps, and is getting all the money through the mail and getting back to the United States. The Royal Canadian Mounted Police contact us and explain their problem, and ask whether or not they can get a mail cover on this individual so they can get some idea, so they can get some idea as to the scope and magnitude of this scheme; and we agree. And we provide that data to the Royal Canadian Mounted Police.

Mr. DRINAN. But as to reciprocity, does the FBI request from the Canadian officials that they do a mail cover on mail coming from various American citizens?

Mr. COTTER. I do not know.

Mr. DRINAN. Thank you very much. I yield back the balance of my time.

Mr. KASTENMEIER. Mr. Pattison?

Mr. PATTISON. I'm just wondering whether the increasing automation of the mail—will that make it easier or more difficult to operate a mail cover?

Mr COTTER. Well, a mail cover, Mr. Pattison, of course the information is recorded at the point of delivery.

Mr. PATTISON. Oh, I see.

Mr. COTTER. So. it still stops at one point.

Mr. PATTISON. So, it wouldn't make any difference, one way or the other.

Mr. COTTER. I think not, except, you never know what comes next; we may have it shoot down the street——

Mr. PATTISON. OK.

Mr. KASTENMEIER. The gentleman from California, Mr. Danielson.

Mr. DANIELSON. I wish to correct a statement I made on the steel engraving I mentioned of Harry S. Truman, I meant the steel engraving of Franklin D. Roosevelt, shortly after he died in the late 1940's.

One question. When you place a mail cover at the request of another agency, such as the FBI, for example, do you go behind the FBI's request; or if the FBI makes a request, within the parameters of what you are allowed to do, do you simply accept that and put it on?

Mr. COTTER. Generally speaking, Mr. Danielson, if they meet the standards we set forth, furnish the necessary information, and it makes sense to us, I do not go behind it.

However, there are occasions—and I don't recall any offhand, but from other agencies, where I say, "This doesn't make sense to me," and I send it back. Offhand I don't recall having to do that with the FBI because the FBI is a pretty effective organization.

Mr. DANIELSON. Fundamentally, though, if the request comes to you from one of the approved agencies, in the approved form, and prima facie states the case, you do not go behind their representation, you accept it at face value.

Mr. COTTER. That is correct.

Mr. DANIELSON. So, if we were to question the judgment of placing a mail order, our proper inquiry should be directed to the agency requesting it, rather than to your agency; is that correct?

Mr. COTTER. I think certainly, with certain agencies like the FBI, that is very, very true.

Mr. DANIELSON. Thank you, that is all.

Mr. KASTENMEIER. Are there any further questions, Mr. Badillo?

Mr. BADILLO. What has been the procedure that has been followed with respect to opening the mail, who does it, and how is the information referred to the appropriate agency?

Mr. COTTER. Mr. Badillo, we were talking here today with respect to mail covers, which, of course, involves the exterior of the envelope only, and not mail openings.

The only authorized mail opening within the Postal Service would be in the dead letter branch, where it is opened to see who the sender was, or opening a letter under a court order, those are the only three areas—two areas, the dead letter opening, or the court order opening. Now, there is one more, the U.S. Customs Service is authorized to open mail coming into the United States from abroad to see whether or not it contains contraband, to check for the appropriate duty, and so forth; but they are not authorized to read it.

Now, with regard to opening, those are the only categories. Now, other openings would not be in consonance with the rules and regulations.

Perhaps, Mr. Badillo, you are referring again to the Colby observation, and that is another story entirely. Mr. Kastenmeier touched upon that earlier.

Mr. BADILLO. Those openings were not authorized, is that right?

Mr. COTTER. That's correct.

Mr. BADILLO. Now, where the openings are authorized, who actually does the opening, Post Office employees?

Mr. COTTER. If it is authorized, in the dead letter branch by Postal Service employees, trusted employees.

Mr. BADILLO. And with court order?

Mr. COTTER. Court order, it would be. My assistant tells me it would depend on to whom the warrant was issued. If a postal inspector goes into court and requests a court order to open this letter, suspecting it contains heroin, or something, then it would be that postal inspector who would open that letter, and, of course, there would be an appropriate witness.

Mr. BADILLO. Thank you, Mr. Chairman.

Mr. KASTENMEIER. If there are no other questions, this concludes this portion of the hearing.

[The prepared statement and attachments of William J. Cotter follow:]

BIOGRAPHICAL SKETCH, WILLIAM J. COTTER, CHIEF POSTAL INSPECTOR

Chief Inspector William J. Cotter, born in 1921, was appointed to his present position by Postmaster General Blount on April 7, 1969.

A native of New Jersey and raised in the metropolitan New York City area, he received his B.B.A. Degree from the City College of New York and an L.L.B. Degree at the New York University. He also attended the Georgetown University Law School.

During WW II, he served four years in the Army Air Corps both in the United States and as a captain in the India-Burma Theater of Operations.

Upon his release from the military service, he served a brief stint with the public accounting firm of Price Waterhouse and Company until he was appointed a Special Agent of the Federal Bureau of Investigation. He subsequently transferred to the Central Intelligence Agency and was with that agency until his appointment as the Chief Postal Inspector.

STATEMENT OF WILLIAM J. COTTER, CHIEF POSTAL INSPECTOR, U.S. POSTAL SERVICE

Mr. Chairman, I am William J. Cotter, Chief Postal Inspector, Inspection Service, United States Postal Service. Accompanying me is Mr. Louis J. Ansaldi, Legal Assistant to the Chief Inspector.

Mr. Chairman, I welcome the opportunity to appear before this Subcommittee today to discuss the policy and practices of the United States Postal Service regarding the opening of mail and use of mail covers.

As requested in your letter of March 11, 1975, we have prepared and forwarded to you a formal statement, including a detailed analysis of the mail cover procedure, its history and legality. Our statement also discusses the limited authority of the Postal Service to open first-class mail pursuant to a search warrant or in a dead letter office.

I believe that the statement is of such length that you might desire it to be inserted in the record rather than read into the record at this time. With your permission, I would like to highlight some important parts of the statement and then proceed directly to answer your questions. The complete statement follows:

MAIL COVER

Any small cover is a relatively simple investigative or law enforcement technique. It involves recording the name and address of the sender, the place and date of postmarking, the class of mail, and any other data appearing on the *outside* cover of any class of mail matter in order to obtain information in the interest of (1) protecting the national security; (2) locating a fugitive; or (3) obtaining

evidence of the commission or attempted commission of a crime. Mail is not delayed in connection with a mail cover, and the contents of first-class mail are not examined. As sanctioned by law, the contents of second-, third-, and fourth-class mail matter may be examined in connection with a mail cover.

Development of Mail Cover Regulations

It is uncertain exactly when the mail cover technique originated, although it would seem rather natural to utilize postmarks and return addresses in the investigation of crimes related to the use of the mails. The 1879 postal regulations were the first to contain an official statement concerning the use of postmarks and addresses for law enforcement purposes. These regulations authorized postmasters and other postal employees to furnish information "concerning the postmarks and addresses of letters" to "officers of the law, to aid them in discovering a fugitive from criminal justice." However, postal employees were strictly forbidden to delay or refuse the delivery of mail to the person addressed. *Postal Laws and Regulations*, sec. 531 (1879 ed.) (*1*) See also sec. 507 (1887 ed.) (*2*) (see appendix for this and subsequently cited sections)

The 1893 edition of the regulations contained a discussion of the postal patron's expectation of confidentiality in his use of the mail system. The regulation declared that postal employees were "funished with the names and addresses upon letters and other articles of mail matter for the sole purpose of enabling them to make delivery thereof to the persons intended. Such names and addresses are to be regarded as confidential, and this confidence must be respected." *Postal Laws and Regulations*, sec. 462 (1893 ed.). (*3*)

The prohibition against disseminating information concerning mail matter thus seems to be rooted equally in the individual's expectation of confidentality in his use of mails and the desire of the Post Office Department to protect the public against fraud and other abuses of the postal system. It also appears to have been made clear from the beginning that information on matter entrusted to the mails could be released to serve an important public purpose, such as the apprehension of a fugitive from justice.

Subsequent revisions of the postal regulations continued to authorize postmasters to furnish "information concerning mail matter" to Postal Inspectors and to furnish postmarks, addresses, and return cards (return addresses) to officers of the law to assist them in locating fugitives. In addition, to serve important public needs or to insure the effective functioning of the postal system, the developing regulations made several carefully circumscribed expections to the confidentality of address information. By stages, postmasters were authorized to release information to State agricultural inspection personnel, to correct mailing lists sent to them for revision, to testify in court regarding mail matter, and to furnish change of address information.

However, access to the type of information obtainable from what are now known as mail covers was still limited to Postal Inspectors and officers of the law. *Postal Laws and Regulations*, sec. 549 (1902 ed.), (*4*) sec. 523 (1913 ed.), (*5*) sec. 508 (1924 ed.), (*6*) sec. 702 (1932 ed.), (7) and sec. 702 (1940 ed.). (*8*) These personnel, however, were encouraged not to make unnecessary use of the procedure. *Manual of Instructions for Post Office Inspectors*, sec. 13.2 (July 1, 1941 ed.). (*9*)

The 1948 regulations considerably broadened the access to mail cover information by allowing postmasters to furnish for official use, "upon official request of a representative of another executive department, agency, or independent establishment of the Federal Government and the presentation of proper credentials * * * information regarding the addresses, return cards, or postmarks on mail matter * * *." *Postal Laws and Regulations*, sec. 41.4(b) (1948 ed.). (*10*) Similar provisions were contained in the *Manual of Instructions for Postal Personnel*, Chapter XIV, sec. 1 and 3 (1948 ed.). (*11*) These regulations, allowing mail covers to be requested by both law enforcement officers and representatives of any federal agency, were in effect in the early 1950s when mail covers first became a matter of Congressional concern. *Post Office Manual*, Chapter XIII, sec. 1 and 3 (1952 (*12*) and 1954 (*13*) eds.), and as revised by Old Manual Circular 5, January 10, 1955. (*14*)

In 1952, members of the staff of the Senate Subcommittee on Privileges and Elections, which was investigating the conduct of Senator Joseph R. McCarthy,

obtained covers on the mail addressed to the Senator and his aides. During the consideration of a resolution of censure against Senator McCarthy, the Senate authorized an investigation into the use of mail covers on his mail. S. Res. No. 332, 83d Cong., 2d Sess. (1954) : 100 Cong. Rec. 16274–16377, 16331–16333, 16342–16344, 16350–16352, 16400, 16404 (1954). The special investigating committee recommended that the matter be referred to the Attorney General for possible action under the criminal statutes dealing with delay and obstruction of the mails, 18 USC secs. 1701–1703. However, the investigators found no evidence that mail covers had been maintained against any other members of the Senate. S. Rep. No. 2510, 83d Cong., 2d Sess. (1954) ; and 101 Cong. Rec. 2564 (1955).

As a part of the general revision of postal regulations which was accomplished in the years 1954 and 1955, the Post Office Department discarded the provisions allowing postmasters to furnish information concerning postmarks, addresses, and return cards to representatives of federal agencies. The new regulations once again limited the availability of such information to Postal Inspectors and officers of the law seeking fugitives from justice. *Postal Manual*, secs. 311.6 and 311.7 (1954 ed. Postal Procedures Transmittal Letter 6, August 10, 1955). (*15*) An additional section charged postmasters to treat mail cover requests "in strict confidence," and warned that delivery of the mail should not be delayed in obtaining the information. *Postal Manual*, sec. 831.44 (1954 ed., Organization and Administration Transmittal Letter 7, July 31, 1956). (*16*)

Thus, after approximately 76 years, the postal regulations applicable to the mail cover procedure still exhibited much of their original form, and access to mail cover information was once again limited to Postal Inspectors and law enforcement officers seeking to apprehend fugitives from justice.

Nevertheless, ten years later mail covers were again a topic of Congressional concern in the Senate hearings on invasion of privacy by government agencies. A Senate Subcommittee headed by Senator Edward V. Long of Missouri conducted extensive hearings on the use of mail covers. *See* Hearings on Invasions of Privacy (Government Agencies) Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 89th Cong., 1st Sess. (1965).

There was also sentiment for increased regulation or abolition of mail covers in the House of Representatives, where Mr. Cunningham introduced legislation similar in part to measures introduced by Senator Long (S. 2627, 88th Cong., 2nd Sess. (1964) ; S. 973, 89th Cong., 1st Sess. (1965)). H.R. 7709, 89th Cong., 1st Sess. (1965).

On June 17, 1965, the Post Office Department issued new regulations controlling the use of mail covers in Postal Bulletin No. 20478 (see Appendix). The new regulations only allowed mail covers to be used in the interest of protecting the national security, locating a fugitive, or obtaining evidence of the commission or attempted commission of a felony. The regulations also required all mail covers to be authorized by the Chief Postal Inspector, a Postal Inspector in Charge, or a limited number of their designees. Moreover, mail covers were to be instituted only upon written request stipulating and specifying a reasonable need for the mail cover and a proper reason for its use. Other new provisions, apparently designed to counter specific changes in the Senate hearings, prohibited mail covers on matter mailed between a subject and his known attorney, placed time limits on all mail covers, and barred the continuation of mail covers on indicted persons. *Postal Manual* §§ 861.1 through 861.9 (1954 ed., Organization and Administration Transmittal Letter 112, August 11, 1965).(*17*) In keeping with the tighter control over mail covers under the new regulations, § 311.7 was also amended to inform postmasters of the requirement that all mail covers must be authorized by the Chief Postal Inspector or a Postal Inspector in Charge. *Post Manual* § 311.7 (1954 ed., Postal Procedures Transmittal Letter 173, July 27, 1965).(*18*)

Revised mail cover regulations appeared to deal in a satisfactory manner with the potential for abuse present under the old provisions. Postmaster General John A. Gronouski declared :

> The new procedures are designed to protect a beneficial investigative and law enforcement technique from any possible abuse. I believe the new regu-

lations will fully protect the rights of the innocent, while providing assistance in bringing to justice those who would prey upon the innocent.

Post Office Department General Release No. 73, June 15, 1965. (See Appendix).

In a law review article discussing the hearings, Senator Long testified to the Subcommittee's effectiveness in obtaining improved regulations and procedures concerning mail covers:

> New and more rigid controls have been issued in regard to the use of mail covers. Basically these regulations limit their use to investigations of crimes normally constituting a felony. Only the Chief Postal Inspector and District Postal Inspectors can order mail covers to be placed and only in defined situations, and only upon compliance with specific procedures. Indiscriminate use of mail covers that invade normally confidential relationships has been curbed. Records will be kept for a period long enough to make them available when needed in court or administrative proceedings. Definite time limits have been set on the duration which a mail cover can be in effect.
>
> Additionally, a public understanding exists between the Subcommittee and the Postmaster General that if these new regulations are ignored, violated, or abolished, the Subcommittee will renew its push to outlaw mail covers completely.
>
> Long, *The Right to Privacy: The Case Against the Government*, 10 St. Louis Univ. L. J. 1, 25 (1965).

A subsequent law review writer, although opposed to retaining the mail cover procedure, admitted with regard to the new provisions, "The 32-paragraph order covered virtually all objections that had theretofore been raised." *Invasion of Privacy: Use and Abuse of Mail Covers*, 4 Columbia Journal of Law and Social Problems 165, 1973 (1968).

Although Senator Long again introduced legislation to ban mail covers in the 90th Congress, S. 1061, 90th Cong., 1st Sess. (1967), the new postal regulations apparently shelved mail covers as an item of controversy. However, when the *Postal Manual* was replaced as the basic publication of postal regulations and instructions by the new *Postal Service Manual*, the regulations governing mail covers were not reprinted in their entirety. New § 233.2 contained a definition of the mail cover process, a statement of the permissible uses of mail covers, and a specification that only the Chief Postal Inspector or his designee could order mail covers. *Postal Service Manual*, § 233.2 (1970 ed., Organization and Administration Transmittal letter 1, October 1, 1970.) *(19)* Although omitted from the formal published regulations of the Postal Service, the extensive provisions of §§ 861.1 through 861.9 of the *Postal Manual* were retained as official instructions to all Postal Service employees and constituted the sole authority and procedure for initiating, processing, placing and using mail covers.

Most recently, the Postal Service has taken steps to republish the mail cover regulations in the *Postal Service Manual* and the *Federal Register* in order to make these regulations more accessible to the public and to discourage confusion concerning the nature and uses of this important investigative technique. In this republication, the Postal Service has updated the provisions dealing with the delegation of mail cover authority to reflect the present organizational structure of the Postal Inspection Service. However, no substantive changes have been made in mail cover procedures. 40 Fed. Reg. 11579–11580 (March 12, 1975). (See Appendix).

Present Mail Cover Regulations

The use of mail covers is now governed by regulations conveniently located under one heading in the *Postal Service Manual*. These regulations provide procedural and substantive safeguards designed to ensure the confidentiality of the mail cover process and prevent the unjustified use of mail covers. Among the most important of these safeguards are the following:

> Mail covers are to be used only in order to obtain information in the interest of (1) protecting the national security, (2) locating a fugitive, or (3) obtaining evidence of commission or attempted commission of a crime. (*Postal Service Manual* § 232.221).

No officers or employees of the Postal Service other than the Chief Postal Inspector and a limited number of his designees, are authorized to order mail covers. (*Postal Service Manual* § 233.241).

Mail covers are ordered pursuant to a written request from a law enforcement agency only if the requesting authority stipulates and specifies the reasonable grounds that exist which demonstrate the mail cover is necessary to protect the national security, locate a fugitive, or obtain information regarding the commission or attempted commission of a crime. Only the Chief Postal Inspector, or his designee, may order a national security mail cover. (*Postal Service Manual* § 232.242b).

Mail covers are not to include matters mailed between the mail cover subject and his known attorney-at-law. (*Postal Service Manual* § 232.262).

Except in fugitive cases, no mail cover is to remain in force when the subject has been indicted for any cause. (*Postal Service Manual* § 232.266).

Any data concerning mail covers is to be made available to any mail cover subject in any legal proceeding through appropriate discovery procedures. (*Postal Service Manual* § 232.274).

These present administrative safeguards over the use of mail covers furnish ample protection for the privacy of users of the mail.

Mail Covers and the Courts

A mail cover, like the "shadowing" of a suspect or an interview with the victim of a crime, is an investigative tool in the evidence gathering process—a means by which a law enforcement agency may develop significant facts to establish the probable cause necessary to obtain a search warrant or wiretap order or to make an arrest.[1]

The Posttal Service has long contended that it would be improper to extend to the mail cover, an investigative technique, the same type of judicial supervision reserved for law enforcement actions which may be properly described as "searches" or "seizures."

The Postal Service position on this matter is bolstered by the decisions of a number of respected courts which have uniformly refused to treat the mail cover technique as a search or seizure, or to extend the protections of the Fourth Amendment to matter inscribed on the outside of a piece of mail by the sender or by the Postal Service. The fundamental difference between the protected matter inside a piece of first-class mail[2] and the unprotected matter on the cover of the mail was first stated by Mr. Justice Field:

> * * * [A] distinction is to be made between different kinds of mail,—between what is intended to be kept free from inspection, such as letters, and sealed packages subject to letter postage; and what is open to inspection, such as newspapers, magazines, pamphlets, and other printed matter, purposely left in a condition to be examined. Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, *except as to their outward form and weight*, as if they were retained by the parties forwarding them in their own domiciles.
>
> Whilst regulations excluding matter from the mail cannot be enforced in a way which would require or permit an examination into letters, or sealed packages subject to letter postage, without warrant, issued upon oath of affirmation, in the search for prohibited matter, they may be enforced upon competent evidence of their violation obtained in other ways; *as from the parties receiving the letters or packages*, or from agents depositing them in the post-office, or others cognizant of the facts. *Ex-parte Jackson*, 96 U.S. 727, 733, 735 (1877). (Emphasis added).

Modern recognition of Justice Field's distinction between protected and unprotected mail matter was furnished in *Oliver* v. *United States*, 239 F. 2d 818 (8th

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[1] The usefulness of the mail cover as an investigative tool has been discussed in a number of prominent texts dealing with criminal investigation. *See* attached excerpts from J. S. Creamer, *The Law of Arrest, Search and Seizure* 44 (1968); R. D. Davis, *Federal Searches and Seizures* § 9.15 (1964); W. Ringel, *Searches and Seizures, Arrests and Confessions* § 249 (1972).

[2] Mailers are encouraged to include their name and address on all mail. However, the name and return address of the sender is not required on first-class mail.

Cir. 1957), *petition for cert. dismissed per stipulation*, 353 U.S. 952 (1957). The court stated:

> * * * [I]t seems to us the discussion in [Jackson] * * * was primarily purposed to make it doctrinally clear that, in the Government's monopolistic right to provide the public with mail facilities, it could not escape the guaranties of the Bill of Rights, and that as to the search-and-seizure guaranty of the Fourth Amendment it would be required to recognize a distinction between "what is intended to be kept free from inspection" and "what is open to inspection." 239 F. 2d at 821.

The principle of *Jackson* was explicitly applied to mail covers in *United States* v. *Costello*, 255 F. 2d 876 (2d Cir. 1958), *aff'g* 157 F. Supp. 461 (S.D.N.Y. 1957), *cert. denied*, 357 U.S. 937 (1958). Discussing the government's use of a mail cover, the court stated:

> In *Ex parte Jackson* * * *, the Supreme Court's discussion shows that a distinction is to be drawn between material which is sealed and material which is open for inspection. *We think the Jackson case necessarily implies that without offense to Constitution or statute writing appearing on the outside of envelopes may be read and used.* There seems to be a similar implication in *Oliver* v. *United States*, * * *: certainly that case does not suggest that the law is otherwise. 255 F. 2d 876 at 881. (Citations omitted, emphasis added.)

The Court of Appeals thus refused to disturb the following portion of the lower court's decision:

> *It was not prying into their business or secrets to note what the senders had made public on the face of the letters.*
>
> Any delay here was merely incidental to a lawful watch authorized by the postal regulations.
>
> *The evidence shows no violation of Costello's rights under the Fourth Amendment.*

157 F. Supp. 461 at 471 (Footnote omitted, emphasis added.)

Further explicit recognition of the constitutionality of mail covers has been afforded in *United States* v. *Schwartz*, 283 F. 2d 107, 111 (3d Cir. 1960), *aff'g* 176 F. Supp. 613 (E.D. Pa. 19593, *cert. denied*, 364 U.S. 942 (1961); *Canaday* v. *United States*, 354 F. 2d 849, 856 (8th Cir. 1966); *Cohen* v. *United States*, 378 F. 2d 751, 760 (9th Cir. 1967), *aff'g* 251 F. Supp. 269 (N.D. Cal. 1965), *cert. denied*, 387 U.S. 917 (1967); *Lustiger* v. *United States*, 386 F. 2d 132 (9th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968); and *United States* v. *Isaacs*, 347 F. Supp. 743, 750 (N.D. Ill. 1972), *aff'd, rehearing denied*, 493 F. 2d 1127 (7th Cir. 1974), *cert. denied*, 417 U.S. 976 (1974).

Opening of Mail

First-class mail is protected by the Fourth Amendment of the U.S. Constitution. First-class mail is matter closed against postal inspection. Title 39, Code of Federal Regulations, 131.2(a)(1)(iv).(*20*)

Title 39, United States Code, § 3623(d) provides in part, "The Postal Service shall maintain one or more classes of mail for the transmission of letters sealed against inspection. * * * No letter of such a class of domestic origin shall be opened except under authority of a search warrant authorized by law, or by an officer or employee of the Postal Service for the sole purpose of determining an address at which the letter can be delivered, or pursuant to the authorization of the addressee." Moreover, improper opening of first-class mail or mail tampering can subject an individual to serve criminal penalties. 18 U.S.C. §§ 1701–1703, 1709. Part 115 of the *Postal Service Manual* (codified as § 115.1 of title 39, Code of Federal Regulations) (*21*) provides: "First-class mail is given absolute secrecy while in our custody. No persons in the Postal Service, except employees of dead-mail offices, may open first-class mail without a legal warrant, even though it may contain criminal or otherwise unmailable matter or may furnish evidence of the commission of a crime." Although § 3623(d) of title 39 speaks only of letters, packages closed against inspection are afforded the same protection under postal regulations.

Title 39, Code of Federal Regulations § 131.2(a)(3)(iii)(*22*) provides: "Matter closed against inspection includes mail of any class so wrapped as not to be

easily examined, except second-, third-, or fourth-class matter sealed subject to postal inspection."

The leading case in this area is *Ex parte Jackson*, 96 U.S. 727 (1877). In this case, a unanimous court held that although Congress had broad power over the nation's postal system, including the right to determine what shall be excluded from the mails, government policies exercising that power must be enforced "consistently with rights reserved to the people, of far greater importance than the transportation of the mail. * * * Letters and sealed packages [intended to be kept free from inspection] in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guarantee of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household." 96 U.S. 733.

The Court's distinction between what is "intended to be kept free from inspection" and what is "open to inspection" has been consistently followed ever since. The Court recently referred to this distinction with approval in *U.S. v. Van Leeuwen*, 397 U.S. (1970). The Court in this case held that postal officials may detain suspicious first-class mail for a reasonable time while an investigation and an application for a search warrant are made.

A legally authorized search warrant is required to open and search first-class mail. Furthermore, under its current mail classification system and regulations, the Postal Service does not subject to a warrantless search any item which the sender has mailed air mail, air parcel post, or priority mail, except in those cases where such mail bears a notation by the sender authorizing postal examination.

Even in those cases where probable cause exists to believe there is contraband in first-class mail, *e.g.*, damaged mail exposing contraband or other reliable information, a search warrant must be obtained without causing an unreasonable delay to the suspect mail. Although exposure of contraband through accidental damage to mail may be used as probable cause for a search and seizure warrant, the mail may not be withdrawn for use as evidence in a criminal proceeding without following the search warrant procedure.

A search warrant authorized by Rule 41 of the Federal Rules of Criminal Procedure may be issued upon receipt of a request from a federal law enforcement officer or an attorney for the government. Under Rule 41(h), the Attorney General has designated the Postal Inspection Service as one of the agencies authorized to request search warrants. However, only in the rare emergent case is a Postal Inspector permitted to seek a search warrant without the concurrence of the U.S. Attorney's office.

Dead Letters

Section 159.7 of title 39, Code of Federal Regulations (*23*) defines dead mail as matter deposited in the mail which is or becomes undeliverable, or is unmailable, and which cannot be returned to the sender. At dead letter branches, dead first-class letters are opened in an attempt to determine the name and address of the sender so that his property may be returned. Only those employees especially designated to open dead letters are allowed to open such matter and then only under proper supervision. Letters which contain correspondence only and which are without sufficient information to enable a return to the sender or delivery to the addressee are destroyed.

Second-, Third-, and Fourth-Class Mail

Matter which is "intended to be kept open to inspection" within the meaning of *Ex parte Jackson* clearly includes second-, third-, and fourth-class mail under present postal regulations. Second-, third-, and fourth-class mail are subject to postal inspection by authorized postal employees. Title 39, Code of Federal Regulations, §125.2(e) : §§ 134.8 and 135.7. (*24*)

Payment of postage at the rates established for these classes of mail is considered consent by the sender to examination of the mail contents since the

sender is free to choose the greater privacy of first-class mail. The courts have perceived no constitutional impediment to warrantless searches of these classes of mail. *Santana* v. *U.S.*, 329 F. 2d 854 (1st Cir. 1964) ; *Webster* v. *U.S.*, 92 F. 2d 462 (6th Cir. 1937).

Subsequent decisions by federal courts of appeal have been consistent with *Jackson* and have merely adjudicated whether particular mail items were intended to be kept free from postal inspection. *Oliver* v. *U.S.*, 239 F. 2d 818 (8th Cir. 1957) ; *Santana* v. *U.S.*, *supra*. Although second-, third-, and fourth-class mail may be opened for inspection, if such inspection discloses contraband, a search warrant must be obtained prior to the seizure of the item or withdrawal from the mails for use as evidence against the sender in a criminal proceeding.

Perhaps it should also be pointed out that pursuant to Customs laws (19 USC 1582, as implemented by § 162.2 of title 19, Code of Federal Regulations), mail of foreign origin is subject to customs inspections. Postal regulations recognize such foreign mail is subject to customs inspections without regard to class. Section 61.1 of title 39, Code of Federal Regulations. (25) The most recent case of which we are aware upholding the right to subject foreign originating mail to a customs search is *United States* v. *Odland*, 502 F. 2d 148 (7th Cir. 1974).

JANUARY 30, 1975.

MR. WILLIAM COTTER,
Chief Postal Inspector,
U.S. Postal Service,
Washington, D.C.

DEAR MR. COTTER: As Chairman of the Subcommittee on Courts, Civil Liberties, and the Administration of the House Committee on the Judiciary, I have legislative and oversight responsibilities in the area of surveillance and intelligence gathering.

Pursuant to these responsibilities, I would like to request at your earliest convenience a written response to each of the following questions.

For the period of calendar years 1973 and 1974 :

1. How many mail covers were initiated each month? Please list by requesting agency and indicate the average duration of the covers by agency.

2. How many mail openings were authorized by court order? Please list these by requesting agencies and indicate duration of activity.

3. How many mail openings were initiated pursuant to the National Security powers of the President? Please list by requesting agency and indicate duration of activity.

4. Please list personnel who are authorized to institute either or both mail covers and mail openings. Who is nationally responsible for the management of these programs?

5. Please forward all Postal Service internal regulations, directives, and memoranda governing opening of the mails, and the use of mail covers.

Thank you in advance for your assistance and cooperation in this matter.

Sincerely yours,

ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice.

CHIEF POSTAL INSPECTOR,
Washington, D.C., March 14, 1975.

HON. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN : This is in further response to your letter of January 30, 1975, and supplementing my interim reply of February 5, 1975.

In your letter you requested written response to five specific questions. Those questions are addressed in this letter and its attachments.

For the period of calendar years 1973 and 1974.

1. Question: How many mail covers were initiated each month? Please list by requesting agency and indicate the average duration of the covers by agency.

Response: Attached as Exhibit "A" are listings of mail covers initiated during calendar years 1973 and 1974.

2. Question: How many mail openings were authorized by court order? Please list by requesting agencies and indicate duration of activity.

Response: The requested list is attached as Exhibit "B." Recorded are the court authorized search warrants directed to Postal Inspectors and those directed to other authorized agents when actual service of the warrant included cooperation by a Postal Inspector.

The Postal Inspection Service has no means of identifying those search warrants issued to another agency and served by that agency directly upon the head of a postal installation without any participation by a Postal Inspector.

Of the 431 warrants listed, almost all involved single pieces of suspect mail. However, certain investigations conducted by the Postal Inspection Service necessitate the seizure of more than one piece of mail deposited by an alleged violator. Most frequently these multiple seizures occur incident to the investigation of violations of 18 USC 1302, "Mailing lottery tickets or related matter," and 18 USC 1461, "Mailing obscene or crime-inciting matter." Individual court ordered warrants for the seizure of lottery tickets, obscene advertisements, and the like have specified as many as 11,000 pieces of mail. Title 39 USC 3001, Nonmailable matter, declares as nonmailable, matter the deposit of which in the mail is punishable under certain enumerated sections of Title 18 USC. The sections enumerated are within the investigative responsibility of the Postal Inspection Service since use of the mails is involved.

3. Question: How many mail openings were pursuant to the National Security powers of the President? Please list by requesting agency and indicate duration of activity.

Response: The Postal Inspection Service did not initiate any mail openings pursuant to the National Security powers of the President. Nor did any other agency request that such openings be initiated.

4. Question: Please list personnel who are authorized to institute either or both mail covers and mail openings. Who is nationally responsible for these programs?

Response: The Chief Postal Inspector is the principal officer of the United States Postal Service in the administration of all matters governing mail covers. With the exception of the Dead Letter Branches (39 CFR 159.7) there is no Postal Service program for the opening of mail closed against inspection.

Mail matter closed against inspection may be opened through the establishment of probable cause and the successful application for a lawful search warrant. This judicial procedure is available to all Postal Inspectors as it is to any agent empowered to request a warrant.

In specific response to the question there follows a list of those Postal Inspection Service management positions authorized to approve requests for mail covers. The positions are listed by their level of organizational operation. The figure in parenthesis indicates the number of approval officers in each position.

National—Chief Postal Inspector (1); Assistant Chief Inspector, Office of Criminal Investigations (1); and Assistant Chief Inspector, Office of Security (1).

Regional—Regional Chief Inspectors (5); Assistant Regional Chief Inspectors (5); and Regional Branch Managers (4).

Divisional—Inspectors in Charge (20) and Assistant Inspectors in Charge (36).

5. Question: Please forward all Postal Service internal regulations, directives, and memoranda governing opening of the mails, and the use of mail covers.

Response: See Exhibit "C."

Sincerely,

WILLIAM J. COTTER,
Chief Postal Inspector.

EXHIBIT A

1973 MAIL COVER STATISTICS—NATIONAL SECURITY

	January	February	March	April	May	June	July	August	September	October	November	December	Total	Average days
Federal Bureau of Investigation	23	20	28	27	36	10	20	28	12	23	19	22	268	115
Naval Intelligence Service		1					1			2			4	46
Army Intelligence Command	1					1	1			2			5	75
Air Force, Office of Special Investigations			1			1		1	1			1	5	78
Central Intelligence Agency				2									2	30
Total	24	21	29	29	36	12	22	29	13	27	19	23	284	

EXHIBIT B

MAIL COVERS—CALENDAR 1973

	January	February	March	April	May	June	July	August	September	October	November	December	Total	Average days
Postal inspectors	165	140	178	141	141	105	148	151	95	132	119	32	1,547	28.6
Internal Revenue Service	175	120	147	95	102	146	128	88	99	128	102	44	1,374	30.0
Bureau of Customs	46	22	42	40	40	12	1	0	1	5	11	0	220	28.0
Federal Bureau of Investigation	0	7	5	18	35	30	49	35	31	39	37	12	298	30.0
Bureau of Narcotics and Dangerous Drugs	35	10	8	11	19	23	5	3	6	4	3	10	137	27.2
Army Intelligence Command	0	1	0	0	4	0	6	1	0	5	1	0	18	50.0
Interstate Commerce Commission	0	0	0	0	0	3	0	0	0	0	2	0	5	30.0
Alcohol, Tobacco and Firearms	1	7	0	4	0	2	1	1	14	2	9	2	43	30.0
Secret Service	1	2	0	1	5	2	0	0	0	0	1	0	12	30.0
Department of Agriculture	6	0	1	2	2	1	0	0	0	0	0	0	12	30.0
Department of Labor	0	0	0	1	2	0	0	1	0	0	0	0	4	30.0
Air Force, Office of Special Investigations	0	0	1	0	0	1	0	2	0	0	0	0	4	30.0
Drug Enforcement Administration	16	7	27	7	18	7	13	18	26	28	19	8	194	30.0
U.S. Marshal	0	1	0	0	0	0	0	0	0	0	0	0	1	30.0
Naval Intelligence Command	0	0	3			0	0	0	1	0	0	0	4	30.0
U.S. attorney	6	1	1	1	0	0	2	6	0	1	0	0	18	30.0

Security and Exchange Commission	0	0	2	1	0	0	0	0	0	0	1	0	4	30.0
Attorney General	1	0	2	0	0	0	------	0	0	0	0	0	3	36.0
Department of Commerce	0	0	0	0	0	0	0	0	0	2	1	1	4	30.0
Department of Interior	1	0	0	1	0	0	0	0	0	0	0	0	2	30.0
Immigration and Naturalization Service	2	0	0	1	1	0	1	0	0	0	0	0	5	26.0
Naval Investigative Service	0	0	3	1	0	0	0	0	0	0	0	0	4	30.0
Organized Crime Division, Department of Justice	6	0	1	3	4	2	0	0	0	0	0	0	16	30.0
Department of Justice	3	0	0	0	1	0	0	0	0	0	0	0	4	30.0
Local police and sheriffs	34	29	33	24	38	33	30	10	21	10	22	13	297	30.0
County prosecutor	6	0	0	0	0	0	0	0	0	0	0	0	6	90.0
District attorney	6	2	1	2	3	9	3	4	0	1	4	0	35	30.0
States attorney	0	0	0	0	0	0	0	0	0	0	1	0	1	30.0
Department of Corrections	0	1	2	1	0	0	0	0	0	0	0	0	4	30.0
Human resources	0	0	0	0	0	0	0	1	2	0	0	0	3	30.0
Public safety	0	2	0	0	0	0	1	0	0	0	0	1	4	26.0
Narcotics/drugs (State)	3	1	1	0	0	0	0	0	0	0	0	0	5	30.0
State/local government	9	1	4	1	5	1	3	0	2	4	1	1	32	30.0
Fish/Wildlife	0	0	0	0	0	0	0	1	0	0	0	0	1	30.0
Drug abuse law enforcement	12	38	5	9	8	8	1	0	0	0	0	0	81	30.0
Local prosecutor	1	0	0	0	0	0	0	0	0	1	0	0	2	30.0
State criminal investigators	1	0	0	0	0	0	0	0	0	0	0	0	1	30.0
Department of Public Welfare	1	1	0	0	0	0	0	1	0	1	0	0	4	30.0
Health, food, drug (state)	0	0	0	0	0	0	0	0	1	0	0	0	1	30.0
Commission	0	0	0	0	0	0	3	0	0	0	0	0	3	30.0
Department of Public Safety	0	0	0	0	0	0	3	0	0	0	1	0	4	30.0
Total	537	393	467	365	428	385	398	323	299	363	335	124	4,417	

1974 MAIL COVER STATISTICS—NATIONAL SECURITY

	January	February	March	April	May	June	July	August	September	October	November	December	Total	Average days
Federal Bureau of Investigation	26	21	38	19	20	20	20	12	17	12	17	23	245	119.4
Naval Intelligence Service	1	------	------	1	------	------	------	------	------	------	------	------	2	30.0
Army Intelligence Command	1	------	2	------	------	------	------	------	------	------	------	------	3	70.0
Air Force Office of Special Investigation	2	2	1	------	1	1	1	1	------	1	------	------	10	63.0
Total	30	23	41	20	21	21	21	13	17	13	17	23	260	

	January	February	March	April	May	June	July	August	September	October	November	December	Total	Average days
Postal inspectors	202	241	160	173	92	92	123	118	96	97	102	54	1,550	28
Internal Revenue Service	248	132	105	124	124	131	143	113	90	105	84	53	1,452	42
Drug Enforcement Administration	17	36	18	33	22	22	15	21	10	15	10	9	228	27
Federal Bureau of Investigation	53	33	41	32	54	43	29	33	38	39	41	33	469	48
Secret Service	1	2	2	4	2	3	1	1	3	4	2	1	26	30
State and local	4	4	2	6	5	5	4	6	6	0	6	5	53	30
Local police and sheriffs	20	22	12	14	22	15	14	14	5	19	14	9	180	30
U.S.Air Force (OSI)	0	2	0	1	1	0	0	0	0	1	1	2	8	40
Army Intelligence Command	8	0	0	2	0	0	0	0	3	0	0	1	14	45
Alcohol, Tobacco and Firearms	1	1	0	1	0	0	0	0	0	2	0	0	5	26
U.S. Coast Guard	0	0	0	1	0	0	0	0	0	1	0	0	2	30
Department of Interior	0	0	0	0	0	0	0	0	1	0	0	0	1	30
U.S. Marshal	5	2	0	0	0	0	1	0	0	0	0	1	9	26
Royal Canadian Mounted Police	0	0	0	0	0	0	0	0	0	2	0	0	2	30
Bureau of Customs	7	2	1	2	3	2	5	8	6	1	12	3	52	30
Immigration and Naturalization Service	2	0	0	0	0	0	0	0	0	1	0	1	4	30
Department of Labor	0	0	1	0	0	0	0	0	0	0	3	0	4	25
Interstate Commerce Commission	2	0	0	0	0	0	0	0	0	0	0	0	2	30
District attorney	0	3	8	6	8	4	1	2	2	0	1	0	35	30
General State attorney	0	0	0	0	0	0	0	0	0	1	4	0	5	30
Local prosecutor	3	0	0	1	0	0	2	0	0	0	0	0	6	30
Department of Justice	9	0	2	1	2	3	1	1	1	1	3	1	25	41
Organized crime division, Department of Justice	1	1	0	0	0	0	0	0	0	0	0	0	2	30
U.S. attorney	3	1	0	1	0	0	0	0	0	0	0	0	5	30
Department of Commerce	0	0	0	0	0	0	0	0	0	1	1	0	2	30
Drug abuse and law enforcement	1	0	0	0	0	0	0	0	0	0	0	0	1	30
Department of Health, Education, and Welfare	0	0	0	0	0	0	1	0	0	0	0	0	1	30
Human relations (employment development department)	0	0	0	0	0	0	0	0	0	1	0	0	1	30
Human resources (Investigative Section)	0	0	0	0	0	0	0	0	0	0	2	0	2	30
Department of Public Safety	0	0	0	0	0	0	2	1	2	0	4	1	10	30
Local law enforcement	0	1	1	1	0	0	0	0	0	0	1	0	4	30
State Bureau of Revenue	0	0	0	0	1	0	0	0	0	0	0	0	1	30
Department of Welfare	0	0	0	0	1	0	0	0	0	0	1	0	2	30
U.S. Navy	0	0	0	0	1	1	0	0	0	0	0	0	2	30
Department of Agriculture	0	0	0	0	0	1	0	1	0	0	0	0	2	30
Total	587	483	353	403	338	322	342	320	264	291	292	174	4,169	

EXHIBIT B

Agency	Court orders	Duration of activity
U.S. Postal Inspection Service	323	The Federal Rules of Criminal Procedure, rule 41 (d) require that a search warrant be returned promptly. Search and seizure warrants directed at mail matter are in almost all instances served within a day of their issuance. This prompt service is attributable to the fact that the location or anticipated location of a suspect letter can be forecast with some specificity. Only in cases where unusual difficulty was encountered were any of the listed warrants outstanding for more than 2 days.
Drug Enforcement Agency	62	
Naval Intelligence	2	
Military CID	1	
State district attorney	1	
State enforcement agencies	10	
Department of Justice (Organized Crime)	2	
Local police and sheriff	30	
Total	431	

References

Appendix A—Postal Regulations

(*1*) *Postal Laws and Regulations* § *531* (*1879 ed.*)

Section 531. Postmasters not to give Information respecting Mail-matter.—Postmasters and all others in the service are forbidden to furnish information concerning mail-matter received or delivered, except to the persons to whom it is addressed or to their authorized agents. The messages on postal cards must not be read, except when necessary to facilitate their delivery, or for the purpose of determining whether the same are unmailable by reason of the presence of obscene words or pictures thereon, nor made known to others. A disregard of this regulation will be considered a violation of official trust, and will render the offender liable to removal. Postmasters may, however, when the same can be done without interference with the regular business of the post-office, furnish to officers of the law, to aid them in discovering a fugitive from criminal justice, information concerning the postmarks and addresses of letters, but must not delay or refuse their delivery to the persons addressed.

(*2*) *Postal Laws and Regulations* § *507 1887 ed.*)

Section 507. Postmasters not to give Information Respecting Mail Matter.—Postmasters and all others in the service are forbidden to furnish information concerning mail matter received or delivered, except to the persons to whom it is addressed or to their authorized agents or post office inspectors. A disregard of this regulation will render the offender liable to removal. Postmasters may, however, when the same can be done without interference with the regular business of the post-office, furnish to officers of the law, to aid them in discovering a fugitive from justice, information concerning the postmarks and addresses of letters, but must not delay or refuse their delivery to the persons addressed.

(*3*) *Postal Laws and Regulations* § *462* (*1893 ed.*)

Section 462. Postmasters not to give Information Respecting Mail Matter.—Postmasters and all others in the service are forbidden to furnish information concerning mail matter received or delivered, except to the persons to whom it is addressed or to their authorized agents or post-office inspector. A disregard of this regulation will render the offender liable to removal. Postmasters may, however, when the same can be done without interference with the regular business of the post-office, furnish to officers of the law, to aid them in discovering a fugitive from justice, information concerning the postmarks and addresses of letters, but must not delay or refuse their delivery to the persons addressed.

Postmasters and other postal officers and employees are strictly prohibited from making public, names, addresses, or private information obtained by them in the discharge of their official duties.

The agents of the Post-Office Department are furnished with the names and addresses upon letters and other articles of mail matter for the sole purpose of enabling them to make delivery thereof to the persons intended. Such names and addresses are to be regarded as confidential, and this confidence must be respected.

Advertisers and others have no right to expect that their plans for canvassing shall be aided by lists to be obtained through knowledge gained by postmasters in the discharge of their official obligations, and it is no part of the business of the officials of the Post-Office Department to furnish such names and addresses for pay or favor.

This regulation is necessary because of the evils brought about by the infraction or relaxation of this rule unwittingly by postmasters who have assisted and encouraged fraudulent schemes, such as "green goods" and swindlers, who rely upon the credulity of persons whose names and addresses have been obtained and paid for without disclosing their object.

(*4*) *Postal Laws and Regulations § 549 (1902 ed.)*

Section 549. Postmasters and all others in the postal service must not furnish information concerning mail matter received or delivered, except to the persons to whom it is addressed or their authorized agents, or post-office inspectors.

2. When the same can be done without interference with the regular business of the office, postmasters may, however, furnish to officers of the law, to aid them in discovering a fugitive from justice, information concerning the postmarks and addresses of letters, but must not delay or withhold the delivery thereof to the persons addressed.

3. Postmasters must not furnish lists of the names of persons receiving mail at their offices; neither must such information be furnished by members of postmasters' families. When a request for such information is received, accompanied by a postage stamp, such stamp should be returned to the writer, under cover of a penalty envelope, with the information that the regulations forbid furnishing the information desired. Lists of names sent to postmasters for revision must be returned to the senders when postage stamps are inclosed for that purpose; but no new names must be added to the lists. Postmasters may, if they so desire, however, cross off the names of those persons who have moved away or are deceased.

(*5*) *Postal Laws and Regulations § 523 (1913 ed.)*

Section 523. Postmasters and others in the postal service shall not give to unauthorized persons information concerning mail matter. They shall furnish such information to post-office inspectors, and may furnish it also to the addressee of mail matter or his agent, and, in the case of registered mail, to the sender or his agent, and they may give to officers of the law to aid in the apprehension of fugitives from justice information regarding the addresses, return cards, or postmarks on mail matter, but must not withhold such mail from delivery to the addressees. Information concerning money orders shall not be given to any person except the remitter or payee or the agent of either or to a representative of the Post Office Department, or under special instructions from the department.

2. On written request, postmasters at offices of address may furnish a State officer of any State having a law regarding the inspection of nursery stock coming into the State the names of persons to whom are addressed parcels of nursery stock received from any point without the State, marked as provided in section 478; but there shall be no delay in the delivery of such nursery stock to the addressees.

3. Complete or partial lists of names of patrons shall not be furnished by postmasters, post-office employees, or members of their families, but lists sent to postmasters may be corrected by the crossing off of the names of persons to whom mail can not be delivered or forwarded, and the lists shall be returned, whether corrected or not, when postage stamps are sent for that purpose. New names or addresses shall not be added.

4. Postmasters shall acknowledge the receipt of letters of inquiry or request addressed to them in their official capacity, using the penalty envelope when postage is not furnished, and if the information asked for is such as it would be improper or impracticable to give, the reason for declining to do so should be stated.

5. A postmaster summoned as a witness shall obey the summons and go into court, but shall refuse to testify in regard to mail matter or money orders, at the same time exhibiting this regulation. He shall then testify if so directed by the court.

(6) *Postal Laws and Regulations § 508 (1924 ed.)*

Section 508. Postmasters and others in the postal service shall not give to unauthorized persons information concerning mail matter. They shall furnish such information to post-office inspectors, and may furnish it also to the sender, the addressee, or the authorized representative of either, and they may give to officers of the law to aid in the apprehension of fugitives from justice information regarding the addresses, return cards, or postmarks on mail matter, but must not withhold such mail from delivery to the addressees. Information concerning money orders shall not be given to any person except the remitter or payee or the agent of either or to a representative of the Post Office Department, or under special instructions from the department. (See sec. 1533.)

2. Postmasters are permitted, though not required, to correct mailing lists, but the lists, whether corrected or not, shall be returned to the senders when postage stamps are furnished for this purpose. If a postmaster finds it practicable to correct a list he may cross off the names of persons to whom mail can not be delivered or forwarded; add the correct street, rural, or box number; correct initials where apparently there has been a bona fide intention to write a name known to the sender of the list; and when two or more names appear at any one address the head of the family may be indicated if known. Addresses of persons who have removed to other post offices shall not be furnished nor shall new names be added to the list.

NOTE.—Under the limitations of paragraph 2 and with the consent of the owner of the list corrections may be made at first and second class offices by substitute clerks at the owner's expense, at the rate indicated in sec. 337. Postmasters of third and fourth class post offices are not prohibited from making a reasonable charge for such work.

3. Postmasters may furnish information as to the number of rural routes at their offices and the number of boxes served by each carrier, after satisfying themselves that such information is not to be used for any improper or unlawful purpose.

4. Postmasters shall acknowledge the receipt of letters of inquiry or request addressed to them in their official capacity, using the penalty envelope when postage is not furnished, and if the information asked for is such as it would be improper or impracticable to give, the reason for declining to do so should be stated.

5. A postmaster or other postal employee summoned as a witness shall obey the summons and go into court, but shall refuse to testify in regard to mail matter or money orders, at the same time exhibiting this regulation. He shall then testify if so directed by the court

(7) *Postal Laws and Regulations § 702 (1932 ed.)*

702. Postmasters and others in the Postal Service shall not give to unauthorized persons information concerning mail matter. They shall furnish such information to post-office inspectors, and may furnish it also to the sender, the addressee, or the authorized representative of either when satisfactory identification has been established and the request is limited to information proper for the applicant to receive, and they may give to officers of the law upon proper identification to aid in the apprehension of fugitives from justice information regarding the addresses, return cards, or postmarks on mail matter, but shall not withhold such mail from delivery to the addressees.

See sec. 489, prohibiting the disclosure of names of boxholders; sec. 1404, of information concerning money orders; sec. 1625, of information relative to postal-savings accounts; and sec. 2061, of information regarding mail passing through hands of railway postal clerks.

2. Postmasters shall acknowledge the receipt of letters of inquiry or request addressed to them in their official capacity, using the penalty envelope when postage is not furnished, and if the information requested is such that it would be improper or impracticable to give, the reason for declining to do so shall be stated.

See sec. 1218, relative to furnishing receipts showing to whom, when, and where registered matter is delivered; sec. 442, as to prohibiting giving indorsements or testimonials.

3. Postmasters shall furnish, upon request, information as to the number of rural routes at their offices and the number of boxes served by each carrier; and,

at offices not having city carrier service, the number of post-office boxes in use at their offices, after satisfying themselves that such information is not to be used in any improper or unlawful purpose. (See sec. 585; also sec. 988 as to rural carriers.)

4. Postmasters and others in the postal service shall not furnish lists of names of patrons receiving mail at their offices, and, except as provided in paragraph 8 of this section and in accordance with the provisions of section 1218, shall not give information as to the post-office addresses of former patrons.

5. Postmasters shall not compile but shall correct, free of charge, as frequently as requested, mailing lists used officially by Members of Congress and Federal departments and bureaus.

6. Postmasters shall correct, not more frequently than twice a year, at the request and expense of the owners, including return postage, mailing lists submitted by State departments, municipalities, religious, fraternal, and recognized charitable organizations, and mailing lists used by the concerns submitting them for correction for the solicitation of business in connection with sales work.

7. Except as provided in paragraph 5, a minimum charge of 25 cents, payable in advance by cash or money order, shall be made at all offices for the correction of any mailing list bearing less than 25 names, and for any list of 25 names or more a charge of 1 cent for each name submitted shall be made, plus the postage for the return of such list. At first and second class offices the amount received for mailing-list corrections shall be accounted for in the quarterly reports to the Comptroller under the heading "Miscellaneous Receipts." At third and fourth class offices, postmasters shall make no accounting of moneys so received, the proceeds received being payable to the postmaster or employee who performs the work.

8. Corrected lists shall be returned promptly to the owners. Corrections shall consist of crossing off the names of persons to whom mail can not be delivered or forwarded; the correction of incorrect street names; the correction of incorrect local street, rural, or post offie box numbers; the correction of initials where apparently there has been a bona fide intention to write a name known to the owner of the list; and the indication of the head of the family, if known, when two or more names are shown for the same address. The new addresses of persons who have removed to the delivery of other post offices shall be furnished when reliable permanent forwarding orders are on file. New names shall not be added to a list.

9. A postmaster or other postal employee summoned as a witness shall obey the summons and go into court, but shall refuse to testify in regard to mail matter, money orders, or postal savings accounts, at the same time exhibiting this regulation. He shall then testify if so directed by the court.

10. Copies of papers in the files of the department or records in post offices, or copies thereof, shall not be furnished on the application of individuals, except in the discretion of the department in cases where a suit has been commenced and is pending involving the substance of the paper, document, or record itself, and then only upon the proper suopoena duces tecum issued by a court of record. In no case shall copies be furnished of the official bonds of officers connected with the service, except in case of suits related to said bonds or the execution thereof, or criminal prosecutions thereunder. (See sec. 1371 as to registered matter.)

(8) *Postal Laws and Regulations* § 702 *(1940 ed.)*

702. Postmasters and others in the postal service shall not give to unauthorized persons information concerning mail matter. They shall furnish such information to post-office inspectors and may furnish it also to the sender, the addressee, or the authorized representative of either, when satisfactory identification had been established and the request is limited to information proper for the applicant to receive. Postmasters may give to officers of the law, upon proper identification, to aid in the apprehension of fugitives from justice, information regarding the addresses, return cards, or postmarks on mail matter, but shall not withhold such mail from the addressees *or delay its delivery. If the information so given to such officers relates to a violation of the postal laws, the postmaster shall report his action immediately to the inspector in charge of the division in which his office is located.*

See sec. 489, prohibiting the diclosure of names of box-holders; sec. 1404, of information concerning money orders; sec. 1624, of information relative to Postal Savings accounts; and sec. 2061, of information regarding mail passing through hands of railway postal clerks.

See sec. 703, which prohibits access to mail matter in post offices by any persons except employees of the Postal Service; also sec. 2303, which requires information concerning postal law violations to be reported to the inspector in charge.

2. Postmasters shall acknowledge the receipt of letters of inquiry or request addressed to them in their official capacity, using the penalty envelope when postage is not furnished, and if the information requested is such that it would be improper or impracticable to give, the reason for declining to do so shall be stated.

See sec. 1218, relative to furnishing receipts showing to whom, when, and where registered matter is delivered; sec. 442, as to prohibiting giving indorsements or testimonials

3. Postmasters shall furnish, upon request, information as to the number of rural routes at their offices and the number of boxes served by each carrier; and, at offices not having city carrier service, the number of post-office boxes in use at their offices, after satisfying themselves that such information is not to be used for any improper or unlawful purpose. (See sec. 585; also sec. 988 as to rural carriers.)

4. Postmasters and others in the postal service shall not furnish lists of names of patrons receiving mail at their offices, and, except as provided in paragaph 8 of this section and in accordance with the provisions of section 1218, shall not give information as to the post-office addresses of former patrons.

5. Postmasters shall not compile but shall correct, free of charge, as frequently as requested, mailing lists used officially by Members of Congress and Federal departments and bureaus.

6. Mailing lists submitted by State departments, municipalities, religious, fraternal, and recognized charitable organizations, and mailing lists used by the concerns submitting them for correction for the solicitation of business by mail in connection with sales work, shall be corrected as frequently as requested at the expense of the owners, including return postage.

7. Except as provided in paragraph 5, a minimum charge of 25 cents, payable in advance by cash or money order, shall be made at all (first and second-class offices and third-class offices having city or village delivery services) for the correction of any mailing list bearing less than 25 names, and for any list of 25 names or more a charge of 1 cent for each name submitted (likewise payable in advance) shall be made, plus the postage for the return of such list. (At third- and fourth-class offices not having city or village delivery service, postmasters shall correct free-of-charge mailing lists containing less than 25 names, and for those lists containing 25 names or more, a charge of 1 cent a name may be made.) Furthermore, all lists submitted, whether for correction of address or elimination of duplicates, are to be considered mailing lists. At first- and second-class offices the amount received for mailing-list corrections shall be accounted for in the quarterly reports to the Comptroller under the heading "Miscellaneous receipts." At third- and fourth-class offices, postmasters shall make no accounting of moneys so received, the proceeds received being payable to the employee performing the work.

8. Corrections shall consist of crossing off the names of persons to whom mail cannot be delivered or forwarded, the correction of incorrect street names, the correction of incorrect local street, rural, or post-office box numbers; the correction of initials where apparently there has been a bona fide intention to write a name known to the owner of the list, and the indication of the head of the family, if known, when two or more names are shown for the same address. These lists are to be submitted by mail only and are not to be accepted by postmasters in any other manner except in cases of local firms having large mailing lists for correction. When a list of names is submitted in card form, and two or more names are shown for the same address, the card showing the name of the head of the family shall be endorsed "Head." If more than one family resides at the same address, the head of each family shall be shown by endorsing the cards involved. "Head 1," and "Head 2," and the cards containing the names of members of each family shall be endorsed "1" and "2," respectively. The same general procedure shall be followed when mailing lists are submitted in sheet form. The new addresses of persons who have removed to the delivery of other post offices shall be furnished when reliable permanent forwarding orders are on file. New names shall not be added to a list.

9. A postmaster or other postal employee summoned as a witness shall obey the summons and go into court, but shall refuse to testify in regard to mail

matter, money orders, or postal savings accounts, at the same time exhibiting this regulation. He shall then testify if so directed by the court.

10. Copies of papers in the files of the department or records in post offices, or copies thereof, shall not be furnished on the application of individuals, except in the discretion of the department in cases where a suit has been commenced and is pending involving the substance of the paper, document, or record itself, and then only upon the proper subpoena duces tecum issued by a court of record. In no case shall copies be furnished of the official bonds of officers connected with the service, except in case of suits relating to said bonds, or the execution thereof, or criminal prosecutions thereunder.

See sec. 1371 as to registered matter.

11. Where, in a pending suit, a commission has been issued for the taking of his deposition, a postmaster may on behalf of either the sender or of the addressee of mail delivered through his office, but not on behalf of third parties, give testimony in answer to interrogatories relating to the delivery and receipting for such mail.

(9) Manual of Instructions for Post Office Inspectors § 13.2 (July 1, 1941, ed.)

2. In the investigation of a case requiring that tracing of the addresses of mail and the observing of postmarks be made at a certain post office, the inspector may correspond with the postmaster, giving the necessary instructions and stating definitely the length of time this special service is to be continued. When the need has passed, the postmaster should be advised promptly, since this special service entails considerable clerical work.

(10) Postal Laws and Regulation § 41.4 (1948 ed.)

§ 41.4 Giving information about mail matter—(a) Restrictions on. Postmasters and others in the postal service shall not give to unauthorized persons information concerning mail matter. They shall furnish such information to post office inspectors and may furnish it also to the sender, the addressee, or the authorized representative of either, when satisfactory identification had been established and the request is limited to information proper for the applicant to receive. Postmasters may give to officers of the law, upon proper identification, to aid in the apprehension of fugitives from jusitce, information regarding the addresses, return cards, or postmarks on mail matter, but shall not withhold such mail from the addressees *or delay its delivery. If the information so given to such officers relates to a violation of the postal laws, the postmaster shall report his action immediately to the inspector in charge of the division in which his office is located.*

(b) Exception for official request. Upon official request of a representative of another executive department, agency, or independent establishment of the Federal Government and the presentation of proper credentials, postmasters may, when practicable, furnish for official use information regarding the addresses, return cards, or postmarks on mail matter, provided the labor involved in complying with the request does not interfere with postal business, or result in material cost. Such mail shall not be withheld from the addressee nor delayed in delivery. When a postmaster is in doubt as to the advisability of complying with such a request, or material cost is involved, he should write to the First Assistant Postmaster General for instructions, except that in cases involving registered, insured, or collect-on-delivery mail he should submit the question to the Third Assistant Postmaster General, Division of Registered Mail.

NOTE.—See § 27.10, prohibiting the disclosure of names of box-holders; § 70.4, of information concerning money orders; § 86.12, of information relative to Postal Savings accounts; and § 107.8, of information regarding mail passing through hands of railway postal clerks.

See § 41.13, which prohibits access to mail matter in post offices by any persons except employees of the Postal Service; also § 130.3, which requires information concerning postal law violations to be reported to the inspector in charge.

(11) Manual of Instructions for Postal Personnel, Ch. XIV, §§ 1 and 3 (1948 ed.).

Information Furnished

1. *Persons to whom information may be furnished.*—Postmasters and others in the Postal Service shall not give to unauthorized persons information concerning mail. They shall furnish such information to post office inspectors, and may furnish it also to the sender, the addressee, or the authorized representative of either, upon satisfactory identification and provided the information requested is proper for the applicant to receive. To aid in the apprehension of fugitives

from justice, postmasters may give to officers of the law, upon proper identification, information regarding the addresses, return cards, or postmarks on mail, but shall not withhold such mail from the addressee or delay its delivery. If the information so given to such officers relates to a violation of the postal laws, the postmaster shall report his action immediately to the inspector in charge of the division in which his office is located.

3. *To Government departments.*—Upon official request of a representative of another executive department and the presentation of proper credentials, postmasters may, when practicable, furnish for official use addresses or information concerning ordinary mail, provided the labor involved in complying with the request does not interfere with postal business. When a postmaster is in doubt as to the advisability of complying with such a request, he should write to the First Assistant Postmaster General for instructions, except that in cases involving registered, insured, or c.o.d. mail he should submit the question to the Third Assistant Postmaster General, Division of Registered Mails.

(*12*) *Post Office Manual, Ch. XIII, §§ 1 and 3 (1952 ed.).*

Information Furnished

1. *Persons to whom information may be furnished.*—Postmasters and others in the Postal Service shall not give to unauthorized persons information concerning mail. They shall furnish such information to post office inspectors, and may furnish it also to the sender, the addressee, or the authorized representative of either, upon satisfactory identification and provided the information requested is proper for the applicant to receive. To aid in the apprehension of fugitives from justice, postmasters may give to officers of the law, upon proper identification, information regarding the addresses, return cards, or postmarks on mail, but shall not withhold such mail from the addressees or delay its delivery. If the information so given to such officers relates to a violation of the postal laws, the postmaster shall report his action immediately to the post office inspector in charge of the division in which his office is located.

3. *To Government departments.* Upon official request of a representative of another executive department, agency, or independent establishment of the Federal Government and the presentation of proper credentials, postmasters may, when practicable, furnish for official use information regarding the addresses, return cards, or postmarks on mail matter, provided the labor involved in complying with the request does not interfere with postal business, or result in material cost. Such mail shall not be withheld from the addressee nor delayed in delivery. When a postmaster is in doubt as to the advisability of complying with such a request, or material cost is involved, he should write to the Bureau of Post Office Operations for instructions, except that in cases involving registered, insured, or collect-on-delivery mail he should submit the question to the Bureau of Finance, Division of Registered, Insured and C.O.D. Mail.

(*13*) *Post Office Manual, Ch. XIII, §§ 1 and 3 (1954 ed.).*

Information Furnished

1. *Persons to whom information may be furnished.*—Postmasters and others in the Postal Service shall not give to unauthorized persons information concerning mail, or mailing permits issued to others. They shall furnish such information to post office inspectors, and may furnish it also to the sender, the addressee, or the authorized representative of either, upon satisfactory identification and provided the information requested is proper for the applicant to receive. To aid in the apprehension of fugitives from justice, postmasters may give to officers of the law, upon proper identification, information regarding the addresses, return cars, or postmarks on mail, but shall not withhold such mail from the addresses or delay its delivery. If the information so given to such officers relates to a violation of the postal laws, the postmaster shall report his action immediately to the post office inspector in charge of the division in which his office is located.

3. *To Government departments.*—Upon official request of a representative of another executive department, agency, or independent establishment of the Federal Government and the presentation of proper credentials, postmasters may, when practicable, furnish for official use information regarding the addresses, return cards, or postmarks on mail matter, provided the labor involved in complying with the request does not interfere with postal business, or result in material cost. Such mail shall not be withheld from the addressee nor delayed in delivery.

When a postmaster is in doubt as to the advisability of complying with such a request, or material cost is involved, he should write to the Bureau of Post Office Operations for instructions.

(*14*) *Post Office Manual, Ch. XIII, §§ 1 and 3 (1954 ed., Old Manual Circular 5, January 10, 1955).*

Information Furnished

1. *Persons to whom information may be furnished.*—Postmasters and others in the Postal Service shall not give to unauthorized persons information concerning mail, or mailing permits issued to others. They shall furnish such information to post office inspectors, and may furnish it also to the sender, the addressee, or the authorized representative of either, upon satisfactory identification and provided the information requested is proper for the applicant to receive. ★Information may be given to law enforcement officers and others regarding the general direction to follow in order to locate an addressee. ★To aid in the apprehension of fugitives from justice, postmasters may give to officers of the law, upon proper identification, information regarding the addresses, return cards, or postmarks on mail, but shall not withhold such mail from the addressees or delay its delivery. If the information so given to such officers relates to a violation of the postal laws, the postmaster shall report his action immediately to the post office inspector in charge of the division in which his office is located.

3. *To Government departments.*—Upon official request of a representative of another executive department, agency, or independent establishment of the Federal Government and the presentation of proper credentials, postmasters may, when practicable, furnish for official use information regarding the addresses, return cards, or postmarks on mail matter, provided the labor involved in complying with the request does not interfere with postal business, or result in material cost. Such mail shall not be withheld from the addressee nor delayed in delivery.

When a postmaster is in doubt as to the advisability of complying with such a request, or material cost is involved, he should write to the Bureau of Post Office Operations for instructions.

(*15*) *Postal Manual, §§ 311.6 and 311.7 (1954 ed., Postal Procedures Transmittal Letter 6, August 10, 1955).*

311.6 Mail Matter

Furnish information concerning mail or mailing permits to post office inspectors and to the sender, the addressee, or the authorized representative of either on proper identification. Do not furnish such information to other persons.

311.7 Concerning Fugitives

Furnish to officers of the law, on proper identification, information regarding the addresses, return cards, or postmarks on mail to aid in the apprehension of fugitives from justice. Report the action immediately to the post office inspector in charge if the information furnished relates to a violation of the postal laws.

(*16*) *Postal Manual, § 831.44 (1954 ed., Organization and Administration Transmittal Letter 7, July 31, 1956).*

.44 Mail Cover.

Requests by postal inspectors in charge and postal inspectors for information regarding the addresses, return cards, or postmarks on mail, must be treated in strict confidence and complied with carefully and accurately. In obtaining the information, do not delay delivery of the mail. (See 311.6 and 311.7.)

(*17*) *Postal Manual, §§ 861.1 through 861.9 (1954 ed., Organization and Administration Transmittal Letter 112, August 11, 1965).*

861.1 Policy

The Post Office Department has established rigid controls and supervision with respect to the use of mail covers as investigative or law enforcement techniques.

861.2 Scope

These regulations establish the sole authority and procedure for initiating processing, placing and using mail covers. Any other regulations inconsistent or in conflict with these regulations are of no effect for postal employees.

861.3 Definitions

For purposes of these regulations, the following terms are hereby defined:

a. "Mail cover" is the process by which a record is made of any data appearing on the outside cover of any class of mail matter, including checking the contents of any second-, third- or fourth-class mail matter as now sanctioned by law, in order to obtain information in the interest of (1) protecting the national security, (2) locating a fugitive, or (3) obtaining evidence of commission or attempted commission of a crime.

b. "Fugitive" is any person who has fled from the United States or any State, territory, the District of Columbia or possession of the United States, to avoid prosecution for a crime, to avoid punishment for a crime or to avoid giving testimony in a criminal proceeding.

c. "Crime," for purposes of these regulations, is any commission of an act or the attempted commission of an act that is punishable by law by imprisonment for a term exceeding 1 year.

d. "Law enforcement agency" is any authority of the Federal Government or any authority of a State or local government one of whose functions is to investigate the commission or attempted commission of acts constituting a crime.

861.4 Authorizations—Chief Postal Inspector

.41 The Chief Postal Inspector is the principal officer of the Post Office Department in the administration of all matters governing mail covers. He may delegate by written order any or all authority in this regard to not more than four subordinate officials within his Bureau.

.42 The Chief Postal Inspector, or his designee, may order mail covers under the following circumstances:

a. When he has reason to believe the subject or subjects of the mail cover are engaged in any activity violative of any postal statute.

b. When written request is received from any law enforcement agency wherein the requesting authority stipulates and specifies the reasonable grounds that exist which demonstrate the mail cover is necessary to (1) protect the national security, (2) locate a fugitive, or (3) obtain information regarding the commission or attempted commission of a crime.

c. Where time is of the essence, the Chief Postal Inspector, or his designee, may act upon an oral request to be confirmed by the requesting authority in writing within 2 business days. However, no information shall be released until an appropriate written request is received.

861.5 Postal Inspectors in Charge

.51 All Postal Inspectors in Charge, and not more than three designees pursuant to delegations in writing, may order mail covers under the following circumstances:

a. Where he has reason to believe the subject or subjects are engaged in an activity violative of any postal statute.

b. Where written request is received from any law enforcement agency of the Federal, State, or local governments, wherein the requesting authority stipulates and specifies the reasonable grounds that exist which demonstrate the mail cover would aid in the location of a fugitive, or that it would assist in obtaining information concerning the commission or attempted commission of a crime. Excepting fugitive cases, any request from a Federal agency for a mail cover and the determination made shall promptly be transmitted to the Chief Postal Inspector for review.

.52 Except where mail covers are ordered by the Chief Postal Inspector, or his designee, request for mail covers must be approved by the Postal Inspector in Charge, or his designee, in each district in which the mail cover is to operate.

.53 Where time is of the essence, the Postal Inspector in Charge, or his designee, may act upon an oral request to be confirmed by the requesting authority in writing within 2 business days. However, no information shall be released until an appropriate written order is received.

861.6 Limitations

.61 No persons in the postal service, except those employed for that purpose in dead-mail offices, may break or permit breaking of the seal of any matter

mailed as first-class mail without a search warrant, even though it may contain criminal or otherwise unmailable matter, or furnish evidence of the commission of a crime.

.62 No mail covers shall include matter mailed between the mail cover subject and his known attorney-at-law.

.63 No officer or employee of the postal service other than the Chief Postal Inspector, or Postal Inspectors in Charge, and their designees, are authorized to order mail covers.

.64 Excepting mail covers ordered upon subjects engaged, or suspected to be engaged, in any activity against the national security, or activity violative of any postal law, no mail cover order shall remain in force and effect for more than 30 days. At the expiration of such period, or prior thereto, the requesting authority may be granted additional 30-day periods under the same conditions and procedures applicable to the original request.

.65 No mail cover shall remain in force longer than 120 days unless personally approved for further extension by the Chief Postal Inspector.

.66 Excepting fugitive cases, no mail cover shall remain in force when the subject has been indicted for any cause. If the subject is under investigation for further criminal violations, a new mail cover order must be requested consistent with these regulations.

861.7 Records

.71 All requests for mail covers, with records of action ordered thereon, and all reports issued pursuant thereto, shall be deemed within the custody of the Chief Postal Inspector. However, the physical housing of this data shall be at the discretion of the Chief Postal Inspector.

.72 The Postal Inspectors in Charge, shall submit copies of all requests for mail covers to the Chief Postal Inspector, together with reports of the action ordered thereon.

.73 If the Chief Postal Inspector determines a mail cover was improperly ordered by a Postal Inspector in Charge or his designee all data acquired while the cover was in force shall be destroyed, and the requesting authority notified of the discontinuance of the mail cover and the reasons therefor.

.74 Any data concerning mail covers shall be made available to any mail cover subject in any legal proceeding through appropriate discovery procedures.

.75 The retention period for files and records pertaining to mail covers shall be 8 years.

861.8 Reporting to Requesting Authority

Once a mail cover has been duly ordered, authorization may be delegated to any officer in the postal service to transmit mail cover reports directly to the requesting authority. Where at all possible, the transmitting officer should be a Postal Inspector.

861.9 Review

.91 The Chief Postal Inspector, or his designee, shall review all actions taken by Postal Inspectors in Charge or their designees upon initial submission of a report on a request for mail cover.

.92 The Chief Postal Inspector's determination in all matters concerning mail covers shall be final and conclusive and not subject to further administrative review.

(18) Postal Manual, §§ 311.6 and 311.7 (1954 ed., Postal Procedures Transmittal Letter 173, July 27, 1965)

311.6 Mail Matter.—Furnish information concerning mail or mailing permits to postal inspectors and to the sender, the addressee, or the authorized representative of either on proper identification. Do not give such information to others. See 123.51 and 312.1 regarding correction of mailing lists.

311.7 Mail Covers.—Authority to order a mail cover is restricted to the Chief Postal Inspector or your postal inspector in charge. Upon request of either of these officials, furnish them with the information regarding the address, return address or postmarks on mail. When specifically requested by the Chief Postal Inspector or your inspector in charge furnish such information to a designated postal inspector. Do not give such information to anyone else. Requests for mail covers

shall be treated confidentially and there shall be strict compliance with the instructions outlined in the request. (See Part 861).

(*19*) *Postal Service Manual, § 233.2 (1970 ed., Organization and Administration Transmittal Letter 1, October 1, 1970)*

.21 *Definition.*—A mail cover is the process by which a record is made of any data appearing on the outside cover of any class of mail matter, including checking the contents of any second-, third- or fourth-class mail matter as now sanctioned by law, to obtain information in the interest of (1) protecting the national security (2) locating a fugitive or (3) obtaining evidence of commission or attempted commission of a crime.

.22 *Authority.*—Only the Chief Postal Inspector or his designee may order mail covers. Under no circumstances shall a postmaster or postal employee furnish information as defined in 233.21 to any person except as authorized by the Chief Postal Inspector or his designee.

(*20*) *39 Code of Federal Regulations, Sec. 131.2(a) (1) (iv)*

§ 131.2 Classification

(a) *Description.*—(1) First-class mail consists of mailable:

(i) Postal cards.

(iv) Matter closed against postal inspection.

(*21*) *Postal Service Manual, Part 115; 39 Code of Federal Regulations, Sec. 115.1*

MAIL TREATED IN CONFIDENCE

First-class mail is given absolute secrecy while in our custody. No persons in the Postal Service, except employees of dead-mail offices, may open first-class mail without a legal warrant, even though it may contain criminal or otherwise unmailable matter or may furnish evidence of the commission of a crime.

§ 115.1 Mail treated in confidence

First-class mail is given absolute secrecy while in our custody. No persons in the Postal Service, except employees of dead-mail offices, may open first-class mail, without a legal warrant, even though it may contain criminal or otherwise unmailable matter or may furnish evidence of the commission of a crime.
(39 U.S.C. 401, 3623(d) [35 FR 19401, Dec. 23, 1970]

(*22*) *39 Code of Federal Regulations, Sec. 131.2(a) (3) (iii)*

§ 131.2 Classification

(a) *Description.*—(3) The following provisions are applicable to matter closed against postal inspection:

(iii) Matter closed against inspection includes mail of any class so wrapped as not to be easily examined, except second-, third-, or fourth-class matter sealed subject to postal inspection. See §§ 125.2(c), 134.8, and 135.7 of this chapter.

(*23*) *39 Code of Federal Regulations, Sec. 159.7*

§ 159.7 Dead mail

(a) *Definition.*—Dead mail is matter deposited in the mail which is or becomes undeliverable, or is unmailable, and which cannot be returned to the sender.

(b) *Treatment of dead mail in dead letter branches.*—(1) *Opening letters.* The dead letter branches dispose of dead first-class letters. Dead letters are opened at dead letter branches in an attempt to determine the name and address of the sender so that his property may be returned. Only those employees especially designated to open dead letters shall be allowed to treat such matter and then only under proper supervision. Do not ordinarily use substitute employees in dead letter branches.

(2) *Letters which can be returned to sender or forwarded to addressee.*—Return dead letters to the sender or, when the opening of the letter reveals the correct name and address of the addressee and the name and address of the sender is not found, forward the letter to the addressee; except:

(i) Destroy any letter which contains advertising matter obviously of no value to the sender.

(ii) Send all domestic letters, registered or ordinary, containing money or valuable enclosures "returnable to a foreign address," after recording when required, to the Postmaster, Dead Letter Branch, Washington, DC 20013.

(iii) Dispose of any letter in the categories listed in paragraphs (b)(8) and (b)(9) of this section and in §§ 159.75 and 159.76 of the Postal Service Manual in accordance with these instructions.

(3) *Letters which cannot be returned or forwarded.* Destroy letters which contain correspondence only and which are without sufficient information to enable return to the sender or delivery to addressee. Dispose of other letters in accordance with paragraphs (b)(8) and (b)(9) of this section and §§ 159.75 and 159.76 of the Postal Service Manual.

(24) *39 Code of Federal Regulations, Secs. 125.2(c), 134.8, and 135.7.*

§ 125.2 Wrapping

(a) Individually addressed copies and wrapped or tied together as a package by the mailer as required by § 125.3(b)(6) (i), (ii), and (iii) must be enclosed in wrappers or envelopes.

(b) All single copies addressed to Army or Air Force post offices must be enclosed in wrappers or envelopes.

(c) Heavy magazine should be wrapped singly, and publications of small size or of a flimsy nature should be placed in envelopes.

(d) Use white or other light-colored paper for wrapping. Do not use old newspapers.

(e) Second-class mail must be prepared so that it can be easily examined. Mailing of publications in sealed envelopes, wrappers, or other covers at the second-class rates of postage is considered consent by the sender to postal inspection of the contents. To assure that these articles will not be opened for postal inspection, customers should, in addition to paying the first-class rate of postage, plainly mark "First Class" or similar endorsement on the envelope, wrapper, or cover.

§ 134.8 Sealing

(a) *Examination.* Third-class mail must be prepared by the mailer so that it can be easily examined. Third-class mail which is not sealed or secured so that it may be handled by machines is not recommended. Mailing of sealed articles at the third-class rates of postage is considered consent by the mailer to postal inspection of the contents.

(b) *Marking.* All sealed pieces mailed at the single piece third class postage rate provided for by § 134.1(a) must be legibly marked, preferably below the postage and above the name of the addressee, with the two words "Third Class." The marking may be included as a part of a permit imprint, and it may be printed adjacent to the meter stamp by a postage meter, but it may not be printed by a meter slogan or ad plate. The marking will not be considered adequate if it is included as a part of a decorative design or advertisement. Only the markings required by § 134.4(b)(3) need be carried on sealed pieces mailed at the bulk third-class postage rates provided for by § 134.1(b).

§ 135.7 Sealing

Fourth-class mail must be wrapped or packaged so that it can be easily examined. Mailing of sealed parcels at the fourth-class rates of postage is considered consent by the sender to postal inspection of the contents. To assure that their parcels will not be opened for postal inspection, customers should, in addition to paying the first class rate of postage, plainly mark their parcels First Class or with similar endorsements.

(25) *39 Code of Federal Regulations, Sec. 61.1.*

§ 61.1 What is subject to examination

All mail originating outside the customs territory of the United States is subject to customs examination, except (a) mail addressed to Ambassadors and Ministers (Chiefs of Diplomatic Missions) of foreign countries, (b) letter mail known or believed to contain only correspondence or documents addressed to diplomatic missions or the officers thereof, or international organizations designated by the President as public international organizations pursuant to the International Organizations Immunities Act, and other mail addressed to such international organizations pursuant to instructions issued by the Department of the Treasury, and (c) mail known or believed to contain only official documents addressed to officials of the U.S. Government.

[From the Postal Bulletin, June 17, 1965]

POSTAL BULLETIN

ALL POSTAL INSTALLATIONS—5-CENT DANTE ALIGHIERI COMMEMORATIVE POSTAGE STAMP

The 5-cent stamp commemorating the 700th anniversary of the birth of the great Italian poet, Dante Alighieri, will be initially released through the San Francisco, Calif., post office, on July 17, 1965.

Douglas Gorsline's design simulates the style of early Florentine allegorical paintings. Dante is shown wearing a laurel wreath, symbolic of poetry, against a background related to the poem "The Divine Comedy."

To obtain first-day cancellations, collectors may submit requests to the Postmaster, San Francisco, Calif. 94101. See Postal Manual, section 145.3. Selected mint stamps will be available at the Philatelic Sales Agency, Post Office Department, Washington, D.C. 20260, on and after July 19, 1965.

All classes of post offices will receive an initial supply of the stamps under the automatic distribution schedule.

First- and second-class post offices requiring additional *bulk quantities* may submit a separate requisition (Form 3356) to the Bureau of Engraving and Printing (Item 456) with memorandum, POD 31, stating that the stamps are required in addition to those automatically furnished.

All post offices requiring *less than bulk* quantities in addition to the automatic distribution may submit a separate requisition (Form 17) to their RDPO and endorse at top "Additional." All requisitions not so endorsed will be returned.—*Office of the Special Assistant to the Postmaster General, 6–17–65.*

ALL POSTAL PERSONNEL—MAIL COVERS

Effective immediately, the following regulations govern procedures concerning mail covers.

POLICY

It is hereby declared to be the policy of the Post Office Department that rigid controls and supervision be established with respect to the use of mail covers as investigative or law enforcement techniques. In order that this policy be effectively promulgated, implemented and enforced, the following regulations are adopted.

SCOPE

The following regulations hereby establish the sole authority and procedure for the initiating, processing, placing and using of mail covers. Any other regulations inconsistent or in conflict with these regulations are of no effect for postal employees.

DEFINITIONS

For purposes of these regulations, the following terms are hereby defined:

"Mail cover" is the process by which a record is made of any data appearing on the outside cover of any class of mail matter, including checking the contents of any second, third or fourth class mail matter as now sanctioned by law, in order to obtain information in the interest of (a) protecting the national security, (b) locating a fugitive, or (c) obtaining evidence of commission or attempted commission of a crime.

"Fugitive" is any person who has fled from the United States or any State, territory, the District of Columbia or possession of the United States, to avoid prosecution for a crime, to avoid punishment for a crime or to avoid giving testimony in a criminal proceeding.

"Crime," for purposes of these regulations, is any commission of an act or the attempted commission of an act that is punishable by law by imprisonment for a term exceeding one year.

"Law enforcement agency" is any authority of the Federal Government or any authority of a State or local government one of whose functions is to investigate the commission or attempted commission of acts constituting a crime.

AUTHORIZATIONS—CHIEF POSTAL INSPECTOR

The Chief Postal Inspector is the principal officer of the Post Office Department in the administration of all matters governing mail covers. And he may delegate by written order any or all authority in this regard to not more than four subordinate officials within his Bureau.

The Chief Postal Inspector, or his designee, may order mail covers under the following circumstances:

1. Where he has reason to believe the subject or subjects of the mail cover are engaged in any activity violative of any postal statute.

2. Where written request is received from any law enforcement agency wherein the requesting authority stipulates and specifies the reasonable grounds that exist which demonstrate the mail cover is necessary to (a) protect the national security, (b) locate a fugitive, or (c) obtain information regarding the commission or attempted commission of a crime.

3. Where time is of the essence, the Chief Postal Inspector, or his designee, may act upon an oral request to be confirmed by the requesting authority in writing within two business days. However, no information shall be released until an appropriate written request is received.

POSTAL INSPECTORS IN CHARGE

All Postal Inspectors in Charge, and not more than three designees pursuant to delegations in writing, may order mail covers under the following circumstances:

1. Where he has reason to believe the subject or subjects are engaged in an activity violative of any postal statute.

2. Where written request is received from any law enforcement agency of the Federal, State, or local governments, wherein the requesting authority stipulates and specifies the reasonable grounds that exist which demonstrate the mail cover would aid in the location of a fugitive, or that it would assist in obtaining information concerning the commission or attempted commission of a crime. Excepting fugitive cases, any request from a Federal agency for a mail cover and the determination made shall promptly be transmitted to the Chief Postal Inspector for review.

3. Except where mail covers are ordered by the Chief Postal Inspector, or his designee, request for mail covers must be approved by the Postal Inspector in Charge, or his designee, in each district in which the mail cover is to operate.

4. Where time is of the essence, the Postal Inspector in Charge, or his designee, may act upon an oral request to be confirmed by the requesting authority in writing within two business days. However, no information shall be released until an appropriate written order is received.

LIMITATIONS

1. No persons in the Postal Service, except those employed for that purpose in dead-mail offices, may break or permit breaking of the seal of any matter mailed as first-class mail without a search warrant, even though it may contain criminal or otherwise unmailable matter, or furnish evidence of the commission of a crime.

2. No mail covers shall include matter mailed between the mail cover subject and his known attorney-at-law.

3. No officer or employee of the Postal Service other than the Chief Postal Inspector, or Postal Inspectors in Charge, and their designees, are authorized to order mail covers.

4. Excepting mail covers ordered upon subjects engaged, or suspected to be engaged, in any activity against the national security, or activity violative of any postal law, no mail cover order shall remain in force and effect for more than 30 days. At the expiration of such period, or prior thereto, the requesting authority may be granted additional 30-day periods under the same conditions and procedures applicable to the original request.

5. No mail cover shall remain in force longer than 120 days unless personally approved for further extension by the Chief Postal Inspector.

6. Excepting fugitive cases, no mail cover shall remain in force when the subject has been indicted for any cause. If the subject is under investigation

for further criminal violations, a new mail cover order must be requested consistent with these regulations.

RECORDS

1. All requests for mail covers, with records of action ordered thereon, and all reports issued pursuant thereto, shall be deemed within the custody of the Chief Postal Inspector. However, the physical housing of this data shall be at the discretion of the Chief Postal Inspector.

2. The Postal Inspectors in Charge shall submit copies of all requests for mail covers to the Chief Postal Inspector, together with reports of the action ordered thereon.

3. If the Chief Postal Inspector determines a mail cover was improperly ordered by a Postal Inspector in Charge or his designee all data acquired while the cover was in force shall be destroyed, and the requesting authority notified of the discontinuance of the mail cover and the reasons therefor.

4. Any data concerning mail covers shall be made available to any mail cover subject in any legal proceeding through appropriate discovery procedures.

5. The retention period for files and records pertaining to mail covers shall be 8 years.

REPORTING TO REQUESTING AUTHORITY

Once a mail cover has been duly ordered, authorization may be delegated to any officer in the Postal Service to transmit mail cover reports directly to the requesting authority. Where at all possible, the transmitting officer should be a Postal Inspector.

REVIEW

1. The Chief Postal Inspector, or his designee, shall review all actions taken by Postal Inspectors in Charge or their designees upon initial submission of a report on a request for mail cover.

2. The Chief Postal Inspector's determination in all matters concerning mail covers shall be final and conclusive and not subject to further administrative review.

* * * * * * *

Existing instructions will be revised accordingly. Postmasters shall not, under any conditions, place mail covers without prior approval from their Postal Inspectors in Charge.

JOHN A. GRONOUSKI,
Postmaster General.

ALL POSTAL INSTALLATIONS

JET AIRMAIL SERVICE—AM–9

On or about July 4, 1965, Braniff Airways, Inc. will inaugurate jet airmail service from Waterloo, Iowa.

An official cachet will be furnished for application to philatelic covers transported only on Braniff's first jet flight departing from Waterloo on that day. The covers will be back stamped at the terminus of the flight.

The usual philatelic treatment, outlined in section 145.5, Postal Manual, will be provided.

Patrons desiring to receive this cachet should forward their covers in another envelope to:

Postmater
Waterloo, Iowa 50701

First-flight covers should reach Waterloo at least 5 days before the flight date.—*Bureau of Transportation and International Services, 6–17–65.*

ARREST OF POSTAL OFFENDER

The following postal offender has been apprehended:

Ronald Guy Picklesimer.

Destroy the wanted circular concerning him.—*Bureau of the Chief Postal Inspector, 6–17–65.*

FIELD PRINTING AND DUPLICATING

1. Purpose

These instructions will enable postal installations to manage their printing and duplicating activities more effectively. They are in line with the President's policy for reducing paperwork and for saving manpower and money. The new procedures are effective immediately.

2. Program for Improvement

Major efficiencies in the duplicating, copying, and publication areas can be achieved under these procedures. The program will assure that:

Only necessary and justified publications are produced at the post office level.

Only necessary equipment is rented or purchased.

Printing and binding regulations of the Congressional Joint Committee on Printing are understood and followed.

Duplicating and printing activities are consolidated wherever possible.

Coordination of policy matters concerning duplicating and printing is achieved.

Responsibilities in these areas are correctly placed and clearly understood.

3. Field Printing

Field offices with duplicating equipment must follow the provisions of Handbook M–13, Field Printing, Duplicating and Related Services. That handbook is being revised and will include all necessary information on the subject. It will be distributed directly to offices with duplicating equipment.

4. Procurement of Equipment

The Congressional Joint Committee on Printing requires that requests for printing and duplicating equipment be approved by qualified personnel. Therefore, all field requests (except those from the Inspection Service) for the purchase or rental of printing and duplicating equipment must be sent on Form 73 to the regional procurement and supply officer with a detailed justification so that he can obtain the necessary approval. There will be no exception to the foregoing procedure.

5. Managing Local Publications

This section establishes a program for managing local publications and keeping them within reasonable bounds. It applies only to formal types of publications, manuals, handbooks, pamphlets, booklets, and brochures. Office memorandums, schemes and schedules and changes thereto, and internal circular issuance systems are not affected.

Postmasters will submit proposed publications in outline form to the regional postal systems division for regional approval. Request for approval will include justification for the publication, the estimated number of printed pages, the quantity to be printed, and a list showing the number to be distributed to each receiving point.

If the postal systems division determines that the proposal meets the following criteria, it will secure approval of the Regional Director and return the outline to the post office for preparation of the final manuscript. The postal systems division will indicate whether the publication is to be reproduced at the post office or returned to the regional office for final printing.

Consider the following criteria thoroughly before requesting approval for a publication:

a. Is the proposed publication absolutely necessary? Local publications must be limited to those which are essential to the service.

b. Does the proposal repeat Headquarters, Postal Bulletin, Postal Manual or other instructions? Such repetition *must* be avoided.

c. If the publication is considered to be essential, how much will it cost? An estimated per page cost of $150 is considered a reasonable figure (General Services Administration uses $400 per page). This cost includes such factors as salaries, draft preparation, approval time, priuting materials and equipment, and a factor for general overhead.

d. Does the proposal contain material which has nationwide possibility? If so, the postmaster should request the region to consider proposing a national publication.

INFORMATION SERVICE—POST OFFICE DEPARTMENT

Postmaster General John A. Gronouski today announced a new policy establishing more rigid controls and closer supervision over the use of mail covers as investigative and law enforcement techniques.

The new regulations, to be published in the official Postal Bulletin this week, are in accordance with agreement reached by the Postmaster General and Senator Edward V. Long in an exchange of correspondence. The correspondence followed a series of meetings between representatives of the Senate Subcommittee on Administrative Practice and Procedure, of which Senator Long is Chairman, and the Postal Inspection Service.

"The new procedures are designed to protect a beneficial investigative and law enforcement technique from any possible abuse," Postmaster General Gronouski said. "I believe the new regulation will fully protect the rights of the innocent, while providing assistance in bringing to justice those who would prey upon the innocent."

A mail cover is the process by which a record is made of any data appearing on the outside envelope or wrapper of mail, in order to obtain information in the interest of protecting national security, locating fugitives from justice, or obtaining evidence of commission or attempted commission of a crime.

The new regulations prohibit the placing of a mail cover without the approval of the Chief Postal Inspector in Charge for the region in which the cover is requested. The request must be in writing and must show reasonable grounds to justify the cover.

Postmasters will not be permitted to authorize mail covers under any circumstances. Previously, postmasters were permitted to authorize mail covers in cases involving fugitives on the request of properly identified officers of the law.

Only the Chief Postal Inspector or the Postal Inspector in Charge may approve mail covers when there is reason to believe the subject or subjects are engaged in any activity which would violate any postal statute. Previously, such covers could be ordered by postal inspectors, if covers were regarded as essential to obtain necessary evidence.

Postal Inspectors in Charge must submit copies of all requests for mail covers to the Chief Postal Inspector, together with reports of action ordered in each instance, for final determination by the latter.

Any data concerning mail covers shall be made available to any mail cover subject in any legal proceeding through appropriate discovery procedure.

The retention period for files and records pertaining to mail covers is increased from two years to eight years.

No mail cover will include matter mailed between the mail cover subject and the known attorney-at-law.

Except in cases involving fugitives, no mail cover will remain in effect when the subject has been indicted for any cause. If the subject is under investigation for further criminal violations, a written request must detail the necessity for a new mail cover.

The Chief Postal Inspector will retain custody of all reports issued pursuant to a mail cover.

The new regulations define a crime as "any commission of an act or the attempted commission of an act that is punishable by law by imprisonment for a term exceeding one year."

The amended regulations are effective immediately upon their publication in the Postal Bulletin.

Representatives of the various Federal law enforcement agencies met with Chief Postal Inspector Henry B. Montague and his staff today for a briefing on the new procedures.

RULES AND REGULATIONS

(National Flood Insurance Act of 1968 (title XIII of the Housing and Urban Development Act of 1968), effective Jan. 28, 1969 (33 FR 17804, Nov. 28, 1968), as amended, 42 U.S.C. 4001–4128; and Secretary's delegation of authority to Federal Insurance Administrator, 34 FR 2680, Feb. 27, 1969.)

Issued: February 28, 1975.

J. ROBERT HUNTER,
Acting Federal Insurance Administrator

[FR Doc.75-6253 Filed 3-11-75;8:45 am]

TITLE 39—POSTAL SERVICE

Chapter I—United States Postal Service

PART 233—INSPECTION SERVICE AUTHORITY

Mail Covers

The Postal Service has decided to republish the regulations governing the use of the mail cover as an investigative technique to make these regulations more accessible to the public, and to discourage confusion concerning the nature and uses of this important law enforcement tool. In this republication the Postal Service has updated the provisions dealing with the delegation of mail cover authority to reflect the present organizational structure of the Postal Inspection Service. However, no substantive changes have been made in mail cover procedures or safeguards.

The use of mail covers has been governed by regulations contained in § 233.2 of the *Postal Service Manual*, supplemented by provisions formerly contained in Part 861 of the *Postal Manual* of the old Post Office Department which have been retained as operating instructions by the Postal Inspection Service. The combination of these provisions under one heading in the Code of Federal Regulations will improve their accessibility and facilitate their interpretation.

A mail cover is a relatively simple investigative or law enforcement technique. It involves recording the name and address of the sender, the place and date of postmarking, the class of mail, and any other data appearing on the outside cover of a piece of mail. Mail is not delayed in connection with a mail cover, and the contents of first-class mail are not examined. As sanctioned by law, the contents of second-, third-, and fourth-class mail matter may be examined in connection with a mail cover.

In their new format, the mail cover regulations of the Postal Service continue existing procedural and substantive safeguards designed to assure the confidentiality of the mail cover process and prevent the unjustified use of mail covers. Mail covers are available to law enforcement agencies only in order to obtain information in the interest of (1) protecting the national security, (2) locating a fugitive, or (3) obtaining evidence of commission or attempted commission of a crime. Mail covers are ordered pursuant to a written request from a law enforcement agency only if the requesting authority stipulates and specifies the reasonable grounds that exist which demonstrate the mail cover is necessary for a legitimate purpose. No officers or employees of the Postal Service other than the Chief Postal Inspector, a Postal Inspector in Charge, and a limited number of their designees, are authorized to order mail covers. Only the Chief Postal Inspector, or his designees at Inspection Service Headquarters, may order a national security mail cover. Mail covers do not include matter mailed between the mail cover subject and his known attorney-at-law; and except in fugitive cases, no mail cover remains in force when the subject has been indicted for any cause. Any data concerning mail covers is made available to any mail cover subject in any legal proceeding through appropriate discovery procedures. These administrative safeguards afford significant protection to the privacy of the users of the mail, without compromising the effectiveness of the mail cover.

Accordingly, the Postal Service adopts the following amendments to the provisions concerning Postal Service management organization, procedure, and practice with regard to mail covers, effective March 14, 1975:

§ 233.2 [Redesignated]

1. In 39 CFR Part 233, § 233.2 *Withdrawal of mail privileges* is renumbered as § 233.3, and a new § 233.2 is added to read as follows:

§ 233.2 Mail covers

(a) *Policy.* The U.S. Postal Service maintains rigid controls and supervision with respect to the use of mail covers as investigative or law enforcement techniques.

(b) *Scope.* These regulations constitute the sole authority and procedure for initiating, processing, placing and using mail covers.

(c) *Definitions.* For purposes of these regulations, the following terms are hereby defined:

(1) "Mail cover" is the process by which a record is made of any data appearing on the outside cover of any class of mail matter, including checking the

contents of any second-, third-, or fourth-class mail matter as now sanctioned by law, in order to obtain information in the interest of (i) protecting the national security, (ii) locating a fugitive, or (iii) obtaining evidence of commission or attempted commission of a crime.

(2) "Fugitive" is any person who has fled from the United States or any State, territory, the District of Columbia, or possession of the United States, to avoid prosecution for a crime, to avoid punishment for a crime or to avoid giving testimony in a criminal proceeding.

(3) "Crime", for purposes of these regulations, is any commission of an act or the attempted commission of an act that is punishable by law by imprisonment for a term exceeding 1 year.

(4) "Law enforcement agency" is any authority of the Federal Government or any authority of a State or local government one of whose functions is to investigate the commission or attempted commission of acts constituting a crime.

(d) *Authorizations—Chief Postal Inspector.* (1) The Chief Postal Inspector is the principal officer of the Postal Service in the administration of all matters governing mail covers. He may delegate any or all authority in this regard to not more than two designees at Inspection Service Headquarters. Except for national security mail covers, he may also delegate any or all authority to the Regional Chief Postal Inspectors. All such delegations of authority shall be issued through official directives.

(2) The Chief Postal Inspector, or his designee, may order mail covers under the following circumstances:

(i) When he has reason to believe the subject or subjects of the mail cover are engaged in any activity violative of any postal statute.

(ii) When written request is received from any law enforcement agency wherein the requesting authority stipulates and specifies the reasonable grounds that exist which demonstrate the mail cover is necessary to (A) protect the national security, (B) locate a fugitive, or (C) obtain information regarding the commission or attempted commission of a crime.

(iii) Where time is of the essence, the Chief Postal Inspector, or his designee, may act upon an oral request to be confirmed by the requesting authority in writing within 2 business days. However, no information shall be released until an appropriate written request is received.

(e) *Postal Inspectors in Charge.* (1) All Postal Inspectors in Charge, and not more than three designees pursuant to delegations in writing, may order mail covers within their districts under the following circumstances:

(i) Where he has reason to believe the subject or subjects are engaged in an activity violative of any postal statute.

(ii) Where written request is received from any law enforcement agency of the Federal, State, or local governments, wherein the requesting authority stipulates and specifies the reasonable grounds that exist which demonstrate the mail cover would aid in the location of a fugitive, or that it would assist in obtaining information concerning the commission or attempted commission of a crime.

(2) Except where mail covers are ordered by the Chief Postal Inspector, or his designee, requests for mail covers must be approved by the Postal Inspector in Charge, or his designee, in each district in which the mail cover is to operate.

(3) Where time is of the essence, the Postal Inspector in Charge, or his designee, may act upon an oral request to be confirmed by the requesting authority in writing within 2 business days. However, no information shall be released until an appropriate written order is received.

(f) *Limitations.* (1) No person in the Postal Service, except those employed for that purpose in dead-mail offices, may break or permit breaking of the seal of any matter mailed as first-class mail without a search warrant, even though it may contain criminal or otherwise unmailable matter, or furnish evidence of the commission of a crime.

(2) No mail covers shall include matter mailed between the mail cover subject and his known attorney-at-law.

(3) No officer or employee of the Postal Service other than the Chief Postal Inspector, or Postal Inspectors in Charge, and their designees, are authorized to order mail covers. Under no circumstances shall a postmaster or postal employee furnish information as defined in § 233.2(c) to any person except as authorized by the Chief Postal Inspector, a Postal Inspector in Charge, or their designees.

(4) Excepting mail covers ordered upon subjects engaged, or suspected to be engaged, in any activity against the national security, or activity violative of any postal law, no mail cover order shall remain in force and effect for more than

30 days. At the expiration of such period, or prior thereto, the requesting authority may be granted additional 30-day periods under the same conditions and procedures applicable to the original request.

(5) No mail cover shall remain in force longer than 120 days unless personally approved for further extension by the Chief Postal Inspector.

(6) Excepting fugitive cases, no mail cover shall remain in force when the subject has been indicted for any cause. If the subject is under investigation for further criminal violations, a new mail cover order must be requested consistent with these regulations.

(g) *Records.* (1) All requests for mail covers, with records of action ordered thereon, and all reports issued pursuant thereto, shall be deemed within the custody of the Chief Postal Inspector. However, the physical housing of this data shall be at the discretion of the Chief Postal Inspector.

(2) The Postal Inspectors in Charge shall promptly submit copies of all requests for mail covers and the determination made thereon to the Chief Postal Inspector, or to his designee for review.

(3) If the Chief Postal Inspector, or his designee, determines a mail cover was improperly ordered by a Postal Inspector in Charge or his designee all data acquired while the cover was in force shall be destroyed, and the requesting authority notified of the discontinuance of the mail cover and the reasons therefor.

(4) Any data concerning mail covers shall be made available to any mail cover subject in any legal proceeding through appropriate discovery procedures.

(5) The retention period for files and records pertaining to mail covers shall be 8 years.

(h) *Reporting to Requesting Authority.* Once a mail cover has been duly ordered, authorization may be delegated to any officer in the Postal Service to transmit mail cover reports directly to the requesting authority. Where at all possible, the transmitting officer should be a Postal Inspector.

(i) *Review.* (1) The Chief Postal Inspector, or his designee, shall review all actions taken by Postal Inspectors in Charge or their designees upon initial submission of a report on a request for mail cover.

(2) The Chief Postal Inspector's determination in all matters concerning mail covers shall be final and conclusive and not subject to further administrative review.

2. In the table of sections of 39 CFR Part 233 the following entries are revised to read as follows:

Sec.
233.1 Circulars and rewards.
233.2 Mail covers.
233.3 Withdrawal of mail privileges.
(39 U.S.C. 401, 404, 410)

ROGER P. CRAIG,
Deputy General Counsel.

[FR Doc.75-6330 Filed 3-11-75;8:45 a.m.]

FEDERAL SEARCHES AND SEIZURES

(By Rex D. Davis)

MISCELLANEOUS

9.14 Tax Examinations

The requirement that tax returns be filed and that individuals must submit to examination of their records which relate to another person's tax liability are not ordinarily a search within the meaning of the Fourth Amendment. A person can, however, successfully resist the compulsory production of personal documents or the examination of personal records if the objective is his prosecution for a tax violation (see Section 1.71).

The defendant taxpayers sued to recover penalties assessed against them, including penalty for failure to file timely declaration of estimated income tax. The defendants' argument, in part, was that the law requiring the filing of an estimated return was an unreasonable search and seizure in violation of the Fourth Amendment. The District Court found against the defendants and the Court of Appeals affirmed, saying:

The contentions as to self-incrimination and unreasonable search and seizures appear to us to be frivolous. * * *

(Erwin v. Cranquist, CA 9 1958, 253 F.2d 26; cert. den. 353 U.S. 960, 78 S. Ct. 997, 2 L.Ed. 2d 1067.)

The defendants sought to vacate an order directing them to appear before a special agent of the internal revenue service to give testimony concerning another person's tax liability. The District Court refused to vacate the compliance order. One of the defendant's arguments was that the summons to appear was unreasonable since assessment was barred by the statute of limitations. The Court of Appeals affirmed the lower court's judgment, holding:

We conclude, therefore, that a Section 7602 examination made without an advance showing that the underlying tax liability is not time-barred is not necessarily "unreasonable." Constitutional immunity from unreasonable searches does not relieve a citizen of the testimonial duty to disclose information needed for the just and proper discharge of governmental functions. * * *

(Foster v. United States, CA 2 1959, 265 F. 2d 183; cert. den. 360 U.S. 912, 79 S. Ct. 1297, 3 L. Ed. 2d 1261.)

9.15 Mail Watch

Ordinarily, a mail watch does not constitute a search.

A "mail watch" or "mail cover" occurs where postal employees scrutinize the mail addressed to an individual and note the information contained on the outside of the envelope. It is distinguishable from the opening and searching of first class mail which is unconstitutional unless legally authorized (see Section 1.421).

Since there was no violation of the Postal Regulations we need not consider the question whether evidence obtained in violation of such regulations would be admissible in a federal court.

(United States v. Schwartz, CA 3 1960, 283 F.2d 107; cert. den. 364 U.S. 492, 81 S. Ct. 461, 5L. Ed 2d 373.)

There was no "taking" of the Costello's mail with intent to deprive them of it.

It was not prying into their business or secrets to note what the senders had made public on the face of the letters.

And the mere fact of detention without proof that it was for unlawful purpose is insufficient to constitute a violation of the statute.

Any delay here was merely incidental to a lawful watch authorized by the postal regulations.

The evidence shows no violation of Costello's rights under the Fourth Amendent.

(United States v. Costello, DC N.Y. 1957, 157 F. Supp. 461.) Defendant further suggests that the use of a "mail cover" tainted the Government's evidence. That is, a clerk was assigned in the Post Office to scrutinize all mail addressed to defendant at the Rittenhouse Hotel and to note the names and addresses of the senders. The motion to suppress cannot be granted for that reason, however, since it was not shown that the fruits of the mail watch were used (directly or indirectly) in the preparation of the government's charges. Furthermore, it has been held in this district that even where results of a "mail watch" are communicated to the Justice Department in violation of Postal Regulations, the evidence will not necessarily be suppressed. United States v. Schwartz, DC Pa. 1959, 176 F. Supp. 613.

(United States v. Kupper, DC Pa. 1959, 179 F. Supp. 264.)

SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS

(By William E. Ringel)

§ 249. U.S. Mails. An examination and recordation of the external markings on first class mail, limited to the notations of the name and address of a sender and his addressee, is known as a "mail cover" or "mail watch." The federal courts have held that such a "mail cover" does not violate federal postal laws or regulations. U.S. v. Cohen, 241 F Supp 269; U.S. v. Schwartz, 283 F 107; U.S. v. Costello, 255 F 876.

Such "mail cover" does not violate the constitution or the postal laws. In United States v. Cohen, supra, the court held:

"In any event, it is clear that the Constitutional guarantees do not extend to prohibit the practice of examining the external markings on first class mail and it has been held that this kind of 'mail watch' does not violate the Postal Laws. . . .

"There is manifestly no violation of constitutional mandate nor statutory guaranty that precludes the *exterior* inspection of a first-class letter or package." *Cohen* at 271–272.

However, a different rule prevails as to the right of postal inspectors to *open* first class mail. To seize and open first class mail, a warrant is required. *Ex parte Jackson*, 96 US 727.*See also: Oliver v. U.S.*, 239 F.2d 818, which held that sealed mail enjoys Fourth Amendment protection. Only first class bears the prohibition against opening. *People* v. *Garcia*, 62 Misc 2d 666, 669; 39 USC §§ 4057–4058(a).

Packages mailed as air parcel post are classified as first class mail. As such, they may not be opened and examined by postal employees without a warrant, unless that employee is opening dead mail in his official capacity. *People* v. Moraitis, 312 NY S2d 175, 178; 39 USC § 4057; Postal Manual, § 331.11.

THE LAW OF ARREST, SEARCH AND SEIZURE

(By J. Shane Creamer, Esq.)

INVESTIGATIVE TECHNIQUES

Mail Cover

In serious cases, the United States postal inspectors will operate a mail cover. This investigative technique entails the recording of details that appear on the outside envelopes of letters. The postal inspectors, without in any way delaying the mail, make a notation of the addresser and addressee of each letter as well as other pertinent data that appears on the outside of the envelopes. Federal courts have ruled that the mail cover is a lawful investigative technique; however, its use—particularly in recent years—has been narrowly limited by the Post Office Department. At the present time requests for mail covers will be honored by the Post Office Department only where there is a particularly serious crime or where there is a fugitive wanted for a grave offense.

Lie Detector Test

Lie detectors have been used a great deal by investigators as an interrogation technique. The results of the lie detector test are generally not admissible in evidence, so the primary purpose of using a lie detector has tended to limit its effectiveness to the investigative stage as compared with the trial level of a criminal prosecution.

Because of the Supreme Court's disapproval of lie detectors, police should be extremely cautious in using them as aids to interrogation—particularly if the object of the interrogation is to obtain incriminating evidence against the suspect.

Mr. KASTENMEIER. As announced, and I talked to most of the members of the subcommittee, I would tell those present for the record that I am requesting a closed hearing on one further area of investigation, which will follow, if the subcommittee concurs, after a 5-minute recess.

I am somewhat chagrined to make this request to the subcommittee. During the past 4 years, we have never had a meeting of this subcommittee closed to the public and the press.

However, this request is made pursuant to the request of the Justice Department, which has been discussed with the full committee chairman, and I feel disposed to honor it.

I will make the motion that there are matters that will either be in the name of national security, or violation of the law, or the Rules of the House of Representatives, or interfere with an ongoing investigation. Pursuant to that I would move that we recess for 5 minutes, to resume in a closed hearing with Mr. Cotter and the other witnesses.

If there are no other questions, gentlemen, I will put the matter to a vote. All in favor say aye.

[Chorus of ayes.]

Mr. KASTENMEIER. Opposed, nay.

Mr. DRINAN. Nay.

Mr. KASTENMEIER. I hear one nay. The motion is carried.

The subcommittee is recessed for 5 minutes, after which time we will resume in a closed hearing.

[Whereupon, at 11:45 a.m., the subcommittee adjourned, to reconvene after a 5-minute recess in executive session.]

SURVEILLANCE

Executive Session

TUESDAY, MARCH 18, 1975

House of Representatives,
Subcommittee on Courts, Civil Liberties,
and the Administration of Justice
of the Committee on the Judiciary,
Washington, D.C.

The executive session convened at 11:50 a.m., in room 2237, Rayburn House Office Building, Hon. Robert W. Kastenmeier [chairman of the subcommittee] presiding.

Present: Representatives Kastenmeier, Danielson, Drinan, Badillo, Pattison, Railsback, and Wiggins.

Also present: Bruce A. Lehman, counsel; Timothy A. Boggs, professional staff member; and Thomas E. Mooney, associate counsel.

Mr. Kastenmeier. I think we will convene, the other two members should be here shortly.

Gentlemen, the main purpose in this particular area of inquiry, with respect to Mr. Cotter being off the record, of course, is at the request of the Justice Department; and it concerns the pursuit of a 20-year program by the Central Intelligence Agency, which was revealed by Mr. Colby, both in front of the Senate Appropriations Subcommittee on Intelligence on January 15, and before the Bella Abzug Government Operations Subcommittee on March 5. That, in fact, there had been a program of opening of mail from 1953 to 1973, and what would presumptively be in violation of law; however, that it not a matter for this subcommittee to determine.

The basic question, Mr. Cotter, is: How was the Central Intelligence Agency able to conduct such a program without the cooperation of the Postal Service? I assume it did have the cooperation of the Postal Service, and if you could explain that to this committee, so eventually others will be able to cope with the implications.

TESTIMONY OF WILLIAM J. COTTER—Resumed

Mr. Cotter. I am at a slight disadvantage because there is a wealth of information pertaining to this entire matter, naturally, in the CIA's hands. In fact, after the Director of the Central Intelligence Agency made the announcement in the paper, a month or so ago, that they had been opening mail for 20 years, I was a little taken aback because I wasn't apprised that they were going to make that announce-

ment. Subsequently, however, I did go over to the Office of Security, and they made their files available to me; so, I have refreshed my recollections of the project.

Here is the way the project started. Back in 1952, the FBI, Alan Dulles, got in touch with the Chief Postal Inspector, at that time Cliff Garner.

Mr. DANIELSON. The gentleman said with the FBI.

Mr. COTTER. I beg your pardon, that's incorrect; it should have been CIA.

Mr. KASTENMEIER. At that time you yourself were a member of the FBI, before you joined the Central Intelligence Agency.

Mr. COTTER. No, sir, I was in the CIA. I was in the CIA since 1951. I was in the FBI from 1947 to 1951.

Back in 1952, the CIA, Alan Dulles, I understand—perhaps not Alan Dulles himself—but anyway, the CIA people got in touch with Cliff Garner and indicated they would like to survey Soviet mail; they did not precisely say whether it was incoming or outgoing mail. It was agreed to by the Inspection Service. However, it was not put into effect until 1953.

And I do believe there is some record to show that Mr. Dulles briefed Mr. Summerfield, the Postmaster General. Perhaps in 1953, or a little bit later, Mr. Summerfield perhaps said, "Fine," it should be very well contained and shouldn't be discussed as it was a national security matter.

Now, it's not clear exactly as to what the CIA briefed Mr. Summerfield, or the Chief Postal Inspector. In other words, I'm quite sure, in my opinion, that the postal people thought this was in effect a mail cover operation, covering the exterior—to watch somebody's mail going to the Soviet Union and perhaps coming back.

This project started in 1953. A couple years later, however, there was an indication, perhaps after 1955, they went one step further—the CIA people—and without the concurrence of the postal people surreptitiously appropriated some letters and opened the letters.

Mr. WIGGINS. Excuse me, Mr. Chairman, but it is still very unclear to me how the CIA surreptitiously could do anything with the mail unless it were physically delivered to them, and withdrawn from postal channels.

Mr. COTTER. Right, Mr. Wiggins. Generally speaking, with a mail cover, for example, the customer, the FBI, or anybody else, does not have access; the postal employee does the recording of the information on the exterior of the envelope.

In this case, however, it was different. There was a significant volume of mail coming from the Soviet Union, sacks of mail. So, they made space available, the postal people did, in New York City, and initially a postal inspector was with the CIA employee, or employees. But the employees of the CIA were authorized to actually shuffle mail, and sort mail, and get it in the categories they wanted to get it, and what have you. So, indeed, they did have access to it. And then later on, as I say, a postal clerk was responsible for getting the mail off the floor and maintaining observation of those fellows while they were working this mail. But obviously they did surreptitiously slip

some of these letters in their pockets, or something like that, removed it from the premises, opened it, took pictures of it, and got it back into the mail stream the next day.

Now, we had a postal employee working with this group in New York City for 16 years until he retired.

So, this was going on, and Postmaster General Summerfield was apprised of something, and he thought it was a good idea. Postmaster General Day was apprised—again, I don't know of what he was apprised, perhaps that they were recording the outside and taking photographs. They were taking photographs to speed it up, rather than to record all the material by hand. So, presumably he was apprised of the fact that this was going on; and it was going along like that until 1969, when a new administration comes in and William J. Cotter was appointed Chief Postal Inspector.

It just so happened that 20 years ago the Chief Postal Inspector was aware of that project in New York City, in 1952 to 1955. So, I came into the Post Office Department with that knowledge.

I left that area in December of 1955; I had been away in Europe and here and there, and hither and yon. But still, I knew it back in my mind. I presumed it was still going on. When I came into the Postal Service, nobody briefed me on this subject, and there wasn't any record of the project. But early in the game I was concerned, and I wanted to do something about it. I started to persuade the people back in the other organization to discontinue the project; and I think their files do show my constant expression of concern. Finally, as a consequence——

Mr. Wiggins. If the gentleman would yield. I'm not sure I knew of the state of your knowledge. Did you know of the mail openings, or did you just know of the mail cover?

Mr. Cotter. I knew of the mail openings. It was a small-time operation, mail-opening type of thing; and this was up in New York in 1955.

Mr. Wiggins. In what capacity did you learn the information?

Mr. Cotter. I was assistant agent-in-charge of their field office at that time.

Mr. Wiggins. Whose field office?

Mr. Cotter. The CIA's.

Mr. Wiggins. You learned that as a CIA representative——

Mr. Cotter. That is correct.

Mr. Wiggins [continuing]. Not postal, or FBI.

Mr. Cotter. No, sir. I knew it because I was in the CIA, and it was going on. And I knew it officially at that time, and in December of 1955 I moved out of it; thereafter, I had no official awareness of it; I went on to various other assignments. But still, when the appointment came for me to be Chief Postal Inspector, I knew of the project.

Mr. Wiggins. All right.

Mr. Cotter. But then, anyway, I was pushing to get rid of the project. And finally the Director of the Central Intelligence Agency, Mr. Helms said, "All right, let's get together," and I told him I was not interested in getting into the details of their sensitive project, but I wish they would either get exceedingly high approval for this project or discontinue the project.

I received the impression they thought it was still of significant value, and this is 1971, not only to them, but to the FBI. He said, "All right, I'll take care of it."

Three days later, I was called by Postmaster General Blount who said, "I had a meeting with your former boss and carry on with the project." I understood at that time also the Attorney General was briefed and thought—I understand—the project was fine. But again, I can't say what he was told, and I can't say what Red Blount was told. But I presume that the Director of the Central Intelligence Agency told them what was going on. This is 1971.

Moving a little later in 1971, the Postmaster General left, at which time I moved again to discontinue the project. In 1971–72, and particularly in 1972 when Watergate came along, I accelerated my efforts to get rid of the project; and several people in the CIA were agreeable to discontinue the project: the Director of Security, Howard Osborne; Tom Karamessines, the DDP; but not the CI people. The CI people wanted to continue; they said it was exceedingly valuable for foreign intelligence, and also the FBI allegedly said it was exceedingly valuable. But I finally gave them a deadline of February 15, 1973, either get superior approval for this project or discontinue it. They came back on the 13th of February 1973 for an extension while they worked something else out, and I said, "Suspend the project." They suspended it, and that's the end of the project. And that's the story.

Mr. KASTENMEIER. Apparently, as far as the time sequence, Mr. Colby's testimony, sparse as it is, concurs with that; it was a 1953 to 1973 project.

I take it then, that the Postal Service during this period of time was in a position of access, and giving access to the Central Intelligence Agency in opening mail, but as far as you are able to determine, the Postal Service itself did not provide personnel for the purpose of opening mail.

Mr. COTTER. That is correct. The only individual we provided, just one clerk in New York City to work with this group of CIA employees for some 16 years, one clerk, then he retired.

Now, we spoke to him and said, "Weren't you ever suspicious of what they were doing" and, yes, maybe he was. He noticed one letter that he saw 1 day come back in the mailstream the next day. "Well, did you ever invite it to the attention of your superiors?"

"No, I didn't."

In other words, he was too closely associated with these people over a long period of time. But nobody in the Postal Service, nobody, ever told me about it.

Mr. KASTENMEIER. Well, I take it a number of Postal Service people would have known this, the postmaster of the Post Office in New York?

Mr. COTTER. Negative. That was way out in Kennedy, just a little operation; they would drag a mailbag off—and I'm amazed, 20 years it goes on, that it didn't "hit the fan" somehow.

Mr. KASTENMEIER. It did not take place in San Francisco, and other——

Mr. COTTER. That's a different one. There was one other one in San Francisco. It was a smaller one and occurred on maybe four different

occasions, 1970, 1969–70, perhaps 1971; I don't have the dates before me, but relatively insignificant in comparison. This was Chinese mail, the same type of thing. They put in a request to me. When I became Chief Inspector, I immediately designated my deputy, James Conway, to handle the liaison with CIA. They got in touch with me when they wanted to do something and I said, "Write a top-secret letter or something to my deputy, James V. P. Conway," which they did. He authorized them to do it; that is, a mail cover, and admonished them, "Don't touch the mail, don't take the mail off the premises," and so forth. But according to Mr. Colby they still did the same thing on the west coast.

Mr. KASTENMEIER. The procedure was, presumably, when they, the agents of the Central Intelligence came across letters in the sacks that would appear to have higher than normal interest, they would remove them and photograph them?

Mr. COTTER. Apparently they had watch lists.

Mr. KASTENMEIER. Oh. In terms of such activity, presumably they could have pursued a court order, or warrant, and, of course, they preferred not to, naturally. But theoretically they might have attempted to obtain a warrant. Of course they obtained this through other means. It is doubtful whether they could have shown proper cause, or anything.

Mr. COTTER. Of course, here you are getting into the intelligence business, and they probably had very, very valid reasons: in other words, perhaps they were trying to develop communications links with agents they have in the Soviet Union. That is getting into sensitive, classified reasons, and they had a long list of them. And also, as to the value, they assured me and also the FBI—I didn't speak directly to the FBI on the subject—that it was invaluable information; but I can't personally attest to that.

Mr. KASTENMEIER. On that point. Now, the program has been terminated for a period of almost precisely 2 years. To your knowledge, has the Central Intelligence Agency since that time made strenuous efforts to resume that program because it had been invaluable?

Mr. COTTER. I have seen no indication whatsoever. There is a very, very cool, and very, very quiet relationship with CIA. With the FBI it's a normal relationship. The FBI wasn't directly involved in the operation of the project. Whatever they got was through the CIA operation.

Mr. KASTENMEIER. Your own personal sensitivity to this suggests that you prefer some other procedure to be followed if ever, say, the Intelligence Agency were to have such access to mail.

Mr. COTTER. Oh, indeed. I'm not clear in my own mind yet precisely what their legal people's interpretation is as to their mandate. And again, I mentioned here, who knew about it? Presumably, Postmaster General Blount? Attorney General Mitchell? They say, "Presumably fully." "How much higher?" I ask. "Any Presidents?" There is nothing on the record, and there again it would be Mr. Helms to respond to that. I personally feel Presidents were aware of this: I personally feel the National Security Council was involved in this type of thing, but that's just a feeling. The files that were made available to me by CIA didn't go above the Postmaster General-Attorney General level.

Mr. KASTENMEIER. In the 20 years of that program—and obviously Mr. Colby and Mr. Helms, and other people can testify to that and presumably will, in due course, if not before this subcommittee, before another forum—presumably all Postmasters General did know it occurred.

Mr. COTTER. I don't know. The three that are mentioned: Summerfield, Day, Blount. Gronouski is not mentioned. Klassen didn't know anything—I didn't mention anything to Klassen. I didn't mention it to Ted Klassen because I was still pushing my efforts to discontinue the project. Maybe I should have given them a deadline earlier, but I was pushing them to stop the project. You know, time goes by. You start in 1 month, and before you know it's 6 months later. So, I know he didn't know about it; and, of course, Ben Bailar didn't know about it until after the fact.

Mr. KASTENMEIER. I have pursued this long enough. I would like to yield to the gentleman from California.

Mr. DANIELSON. I have no questions.

Mr. KASTENMEIER. Bob.

Mr. DRINAN. Mr. Cotter, do you know any of the circumstances why Mr. Silberman came to the chairman of this committee, Mr. Rodino, and asked that this be off the record?

Mr. COTTER. None other than this. When I was invited to testify before this subcommittee, I was wondering about the Rockefeller Commission, whether or not their "nose might be out of joint" because I'd been invited here; and the Rockefeller Commission, I presume, would want to talk to me with regard to this subject. I asked a member of my staff, "Who is the counsel of the Rockefeller Commission, call and get the name of the counsel of the Rockefeller Commission." And before he knew it, he was talking to the counsel on the phone and mentioned the fact that I was coming over here. And the next thing I heard, they said they would like to have somebody come and see me, which they did on Friday. The next thing I did, I had a call——

Mr. DRINAN. Who did you see on Friday?

Mr. COTTER. Mr. Baker.

Mr. DRINAN. Who is he?

Mr. COTTER. Harold Baker, a senior member of the staff of the Rockefeller Commission from Champaign, Ill.

Mr. DRINAN. OK.

Mr. COTTER. Next, I had a call from the Director of Security of CIA. He made reference to the fact that I was coming before the Kastenmeier subcommittee. I didn't tell him, so I presume he might have heard it from the Rockefeller people.

Mr. DRINAN. What's his name?

Mr. COTTER. Charles W. Kane.

Mr. DRINAN. What did he say?

Mr. COTTER. He said, "You are going before the subcommittee," and I said, "Yes." And I mentioned to Mr. Baker of the Rockefeller Commission, I said, "I'm going before the Kastenmeier subcommittee next week, do you have any observations?"

"No. Tell them the truth: we don't have any control over Congress; whatever Congress says, and that's it."

So, the fellow from CIA called and he said, "I understand you are going before the Kastenmeier subcommittee" and I said, "That's cor-

rect. I'm just going to answer their questions"; and that was the end of that.

Mr. DRINAN. How did this get to Mr. Silberman? Why is he trying to——

Mr. COTTER. I don't have the slightest idea. There was nothing generated from the Postal Service to my knowledge.

Mr. DRINAN. All right.

Mr. COTTER. If there is anything generated, it's presumably CIA.

Mr. DRINAN. Well, Mr. Silberman indicated to the chairman there was pending a possible criminal investigation. Do you know anything about that?

Mr. COTTER. No; but I wouldn't be surprised if the Justice Department is aware. For example, we kept the Justice Department aware of what I know. I sent them a letter at the end of January, telling them everything I know, to Jack Keeney, the Acting Assistant Attorney General of the Criminal Division at Justice. And they asked us, "Well, what about the fellow who was moving the mail sacks up there, and so on, in New York City. Let's have him interviewed." We had him interviewed and kept Justice apprised as to what was going on.

Mr. DRINAN. I take it, Mr. Cotter, that you have no difficulty yourself in just having this as a public hearing.

Mr. COTTER. As far as I'm concerned, I said, "I'm just going to tell the truth." The sensitive aspects are the CIA. Whatever the purpose of this, the whole program, what they got out of it, who knows. I don't know what they got. If, for example, they ever got a piece of information that could have saved the life of President Kennedy, something like that. Who knows.

Mr. DRINAN. Mr. Chairman, I just want to say for the record that I abstained from the vote going into executive session, and I'm very apprehensive about it. Frankly, I don't know what Mr. Silberman said except insofar as you reported it, what his motivation is, or whether he was reached by Charles Kane.

I feel very uneasy that somehow, inadvertently, I'm a part of the coverup by the CIA.

I yield back the balance of my time.

Mr. KASTENMEIER. Mr. Wiggins?

Mr. WIGGINS. Thank you, Mr. Chairman.

The program which you described commencing operationally in 1953, or thereafter, involved an interception of mail from foreign sectors, particularly the Soviet Union. Are you aware of any program involving the segregation of mail from U.S. senders, destined to foreign addresses?

Mr. COTTER. Well, I think the same thing applies there. I do believe that included mail going to the Soviet Union, as well as coming from there, presumably.

Mr. WIGGINS. I see. And with respect to the operation on the west coast, which was instituted during the period you were Chief Postal Inspector, was that also involved with mail from foreign senders, as well as to foreign senders?

Mr. COTTER. My feeling is that was just incoming mail from Red China. But I understand that they were interested, they told my

people they were interested in censorship possibilities, and so forth; all incoming, I'm quite sure.

Mr. WIGGINS. Did you understand that the operation on the west coast was to involve mail openings as well as mail cover?

Mr. COTTER. No, no: the only approval was for a cover. And I kept away from anything the CIA had to do with our organization: and our people gave specific instruction against moving of mail off our premises, and they also had instructions for supervising.

Mr. WIGGINS. Well, now, if you believed this to be a mail cover operation, why were not your existing regulations adequate to deal with that almost administratively without the necessity of exchanging top-secret correspondence?

Mr. COTTER. Because the CIA was involved, and because the CIA was talking about the fact that they were interested in, when they spoke to me, about the point of development of atomic energy in China.

Mr. WIGGINS. Well, now, in the normal mail cover situation which is authorized under certain circumstances, do you require that kind of in-depth justification from other sensitive agencies?

Mr. COTTER. In the national security, one would require a justification. And if it were necessary to classify it, yes, it is classified, in many cases we do. The FBI, many of their requests are classified, where they go into detail on the nature of the thing; and also other agencies will classify the letter requesting a mail cover.

Mr. WIGGINS. Now, with respect to this entire operation on the east coast and on the west coast, and during the full 20-year period of its life, were you dealing with foreign addressees and foreign senders?

Mr. COTTER. I don't have the slightest idea. Here again, in the case of the clerk, the clerk in New York City, for example, he would bring the mail sack of incoming foreign mail. Then the employees of the CIA who are reviewing this mail and recording it, with a camera, or something like that; those are all the people who saw that.

Mr. WIGGINS. Well, now, I can't believe you have not the slightest idea. Certainly CIA personnel should not have access to all mail flowing from Kennedy, that there was some segregation of mail. To your knowledge, was that segregation only of mail addressed to foreign destinations, or emanating from foreign sources?

Mr. COTTER. Yes; it was either originating in the United States, going abroad; or originating abroad, coming here. There was no domestic mail involved in that, no Sheboygan mail to Louisiana mail at all; it was strictly foreign.

Mr. WIGGINS. And this entire operation had a foreign address, or a foreign——

Mr. COTTER. That is my complete understanding.

Mr. DANIELSON. Will the gentleman yield?

Mr. WIGGINS. Yes.

Mr. DANIELSON. I'm trying to be helpful here. Mail outgoing to the Soviet Union is contained within a bag, or bags, separate from something that is going to Spain.

Mr. COTTER. Yes, sir.

Mr. DANIELSON. Likewise, incoming from the Soviet Union is contained separately in a bag, or bags of mail that came from the Soviet Union.

Mr. COTTER. That is correct.

Mr. DANIELSON. So, it was simply those bags that went through this procedure.

Mr. COTTER. That is correct. As Mr. Wiggins was interested here, there was no looking at bags with strictly domestic mail. I am very, very sure that is the case. And, of course, you can confirm it by talking to the fellow who was segregating the bags in New York City.

Mr. WIGGINS. Now, in arriving at your decision in 1972, or perhaps earlier, that you wished to discontinue that operation, did you have the opinion of any counsel, counsel's advice from your legal staff?

Mr. COTTER. No, sir.

Mr. WIGGINS. Back to the legal propriety of the operation.

Mr. COTTER. No, sir. I didn't speak to anybody in the Postal Service about this thing at all. I still felt constraint, and perhaps erroneously so because of all sorts of secrecy admonitions I had in my former position. This was considered a most sensitive project. For example, I didn't just run up to Red Blount and tell Red Blount there is a very sensitive project there; what I did was try to push those people to come back and brief Red Blount.

Mr. WIGGINS. Well, now, since this matter has been somewhat in public domain, have you sought the opinion of your counsel with respect to the legal propriety? And I don't want you to answer with respect to moral, or any other policy considerations, only the law.

Mr. COTTER. I did have a chat as soon as this matter came into the public domain. I briefed Ben Bailar, the new Postmaster General; and indeed, I also at the same time briefed Lou Cox.

Mr. WIGGINS. Who is he?

Mr. COTTER. General Counsel.

Mr. WIGGINS. I see.

Mr. COTTER. We didn't ask Lou Cox about the legal propriety of this because it is apparent opening mail is a violation of section 1702 of title 18, United States Code.

Mr. WIGGINS. It's not that apparent to me, but somebody can perhaps explain.

Mr. COTTER. Well, Lou's view was—on the other hand, the people at CIA had some other, and I hadn't had the benefit of what their legal interpretations are, how they handle this type of operation, emphasizing it's foreign intelligence and counterintelligence there, directed abroad.

But that's it. I did discuss it with Lou Cox, and I keep Lou Cox apprised of what's going on.

Mr. WIGGINS. Your answer is, you do not have, at least at this moment, the benefit of a department memorandum discussing the legal issues.

Mr. COTTER. No, sir.

Mr. WIGGINS. Let me see, do you know as a result of your briefing from your predecessor what his state of knowledge was, concerning this operation?

Mr. COTTER. I spoke to Henry—when I came aboard; Henry Montague was my predecessor as Chief Postal Inspector. When I came aboard, I don't recall his mentioning this project to me at all. I would see him fairly often: he is still in this neighborhood. He didn't know anything about it. He thought it was an exterior type-mail cover.

He thought it was a very sensitive thing, and he perhaps didn't want to know anything about it: that was the attitude at the time.

It was a cooperative effort. He knew that Postmaster General Day had been briefed; and Postmaster General Day reportedly thought it was a fine program. Again, there is no indication that Henry Montague informed Mr. Day, or apprised him of the depth of the damned thing; in other words, the opening aspect, since Mr. Montague himself was only aware of the mail cover aspect.

Mr. WIGGINS. But do I correctly understand your testimony, your predecessor had awareness of an operation.

Mr. COTTER. Oh, yes, sir, indeed.

Mr. WIGGINS. And he believed it to have been a cover operation, mail cover operation.

Mr. COTTER. That is correct. In fact, Mr. Montague was the inspector in charge of New York City in 1953, when the whole thing started. He was the first individual contacted by a representative of the CIA in New York City with regard to setting up this project. Later on he was appoined Chief Postal Inspector.

Mr. WIGGINS. That's all the questions I have.

Mr. KASTENMEIER. Mr. Badillo?

Mr. BADILLO. Was there ever any mail cover, or mail opening investigation, in Miami?

Mr. COTTER. Not to my knowledge.

Mr. BADILLO. Is it possible there could have been one without your knowing about it?

Mr. COTTER. It is possible. However, when I was talking to the CIA people the other day, they appeared to be very, very candid. They appeared to tell me, these are the things that happened, there was one here, and one on the west coast, and some other places. And the only ones the Postal Service was involved in was the New York City one and the San Francisco one.

Mr. BADILLO. What do you mean, one here, one on the west coast, and some other places?

Mr. COTTER. I didn't question them on the other places, but I gathered there may have been some other places.

Mr. BADILLO. There could have been one in Miami.

Mr. COTTER. That is correct.

Mr. BADILLO. There could have been one in Chicago.

Mr. COTTER. Indeed.

Mr. BADILLO. Is it possible there could have been such mail places outside of the United States?

Mr. COTTER. Oh, I wouldn't be surprised at all. I would think that would be a standard CIA-type operation abroad.

Mr. BADILLO. Are you satisfied, or have you inquired as to whether all of these activities have now ceased everywhere within this country?

Mr. COTTER. Postmaster General Ben Bailar directed a letter to CIA Director Colby the other day, precisely on this point, telling him he has responsibility for the sanctity of the mail, and it would not recur under his domain.

Although it has been reported that these programs ceased in February, 1973, I want your personal assurance that there are no more of these types of operations presently going on, planned, or ever to be undertaken.

This communication went from Postmaster General Bailar to the Director of the CIA a week-and-a-half ago.

Mr. BADILLO. You mean there is still no answer?

Mr. COTTER. I don't know.

Mr. BADILLO. It might still be going on, then.

Mr. COTTER. I doubt it.

Mr. BADILLO. That is not a question of opinion. There is still no confirmation from the CIA; it could be going on in New York, San Francisco, Miami, Chicago, Detroit, in 50 cities. Correct?

Mr. COTTER. That is correct, Mr. Badillo, unless the Postmaster General has received a response and I have not gotten the drop copy.

Mr. BADILLO. Did you know that Bella Abzug's mail was being opened?

Mr. COTTER. No.

Mr. BADILLO. Was the mail that was opened only with respect to Russia, in New York City, Kennedy Airport?

Mr. COTTER. I understand that was the large bulk of it. But there was a period of time when they had access to some Cuban mail.

Mr. BADILLO. Wasn't there some testimony about mail involving Paris, and the Viet-Cong delegation in Paris?

Mr. COTTER. I didn't see that, but as I recall, now that you mention it, that's correct. I do not know. I do not really know the magnitude of the area they were covering. It is my understanding, I know, in the early days, the Soviet Union. I heard later, Cuba.

Mr. BADILLO. It could have been Spain, right?

Mr. COTTER. Indeed.

Mr. BADILLO. Germany, Berlin.

After the Kennedy operation ceased officially, was there any application to continue pursuant to a court order?

Mr. COTTER. No, sir.

Mr. BADILLO. Has there ever been any application to continue a similar operation in San Francisco, Miami, or wherever else, pursuant to a court order?

Mr. COTTER. No, sir.

Mr. BADILLO. Now, when I asked you the question in public testimony as to when you have mail openings, you were very precise and specific about the fact, only when it's authorized by court order, or dead mail.

So, you knew then, did you not, that this was illegal, that kind of activity.

Mr. COTTER. Oh, indeed.

Mr. WIGGINS. That is a legal conclusion I can't make at this point.

Mr. BADILLO. He is a lawyer, he can make the conclusion, he can say it was not authorized.

Mr. COTTER. That's what I mean, it wasn't authorized.

Mr. WIGGINS. I don't want to debate what the law is, and I am seriously concerned as a member of this committee that we straighten up a very big hole in the law with respect to the fourth amendment application with respect to foreign—and I underline that word—intelligence operations. But I think it's an unresolved question.

Mr. BADILLO. That may be, but I am talking about the public testimony. The witness testified to the fact that the mail openings are

only authorized in two different instances. And I am asking him, since that was his public testimony—we are in executive session—whether he knew that was not authorized, he can certainly answer that.

Mr. WIGGINS. Go ahead, I stated my point. When we talk about illegality, that is a very gray area.

Mr. KASTENMEIER. Gentlemen, we are in the middle of a second quorum. It would have been my hope that we could have concluded this matter without reconvening at a later point. May I get a sense——

Mr. RAILSBACK. No questions.

Mr. DANIELSON. No questions.

Mr. KASTENMEIER. Not questions, but whether you want to make this quorum. Is there anyone intent on making this quorum, otherwise we will continue straight through.

Mr. DRINAN. That's fine.

Mr. KASTENMEIER. Mr. Pattison?

Mr. PATTISON. I am not sure whether to address this question to the witness, or to the whole panel here. I am a little bit concerned, we voted to close the session—Mr. Chairman, I am considering making a motion to reopen this session. I have learned nothing new in this executive session. In fact, I had breakfast with Mr. Colby this morning with 20 other people, and he told us precisely these very things. It seems to me to be a matter of record, it has been published in the newspapers. So, I think we may have given the press the impression that something very secret is going on here and there isn't.

I am seriously considering the advisability of continuing with this executive session because we are going to create the impression in the mind of the public that something new is going on here and it hasn't, at least up to this point it hasn't.

Mr. KASTENMEIER. May I say to the gentleman, I hope he won't make that motion because I think we have virtually concluded today's testimony.

I will seek to have the transcript of this released forthwith. But I do think I need to notify Mr. Silberman first.

Mr. PATTISON. I understand that part, that is why I was hesitant to make the motion. As long as I have your assurance, Mr. Chairman, that you will be going to the chairman of the full committee, and whoever he chose to go to, and advise him of the fact that nothing has transpired here that is anything new, or novel, and very quickly make an attempt to make this public knowledge.

Mr. KASTENMEIER. I was persuaded that the best course of action would be to go off the record to protect the rights of others, principally in any ongoing investigation: and I am talking of an investigation that obviously Mr. Cotter is aware of because he made reference to it.

I rather agree that nothing has been said, that I am aware of, that could compromise the rights of the witnesses, or others.

Mr. DANIELSON. I would like to make a——

Mr. BADILLO. Will the gentleman yield?

Mr. DANIELSON. Yes.

Mr. BADILLO. I would like to say, Mr. Chairman, that I hope that you would take up the question of releasing the transcript.

Mr. KASTENMEIER. Of course.

Mr. Badillo. And I reserve the right to subsequently make a motion. The impression that something is here that goes beyond the areas that have been discussed in public, and into the field of national security. One of the problems is that so many subjects are always covered over with the cloak of national security. We are getting to the point where we are participating precisely in what we are supposed to be investigating.

Mr. Kastenmeier. Mr. Railsback?

Mr. Railsback. Sometimes, I think, we are well advised to perhaps close up something that may be extremely sensitive, to protect somebody's rights. When we have done that, and when we learned that is not the case, I certainly agree with you that we should open it up.

Mr. Danielson. Mr. Chairman?

Mr. Kastenmeier. The gentleman from California.

Mr. Danielson. I would like to state that Mr. Railsback has very clearly stated what's on my mind. I think it was the proper thing for us to do, to go into closed session to receive primarily this information.

I agree with Mr. Pattison, I am not aware of anything that has come out here which has not already become public knowledge one way or the other; but that doesn't in any degree diminish the fact that we acted in a responsible manner to hear sensitive information, just as a court oftentimes examines something in chambers before presenting it before a jury.

Now, my belief is this transcript can safely be released, but I think we should conclude our responsibility by at least looking at it first—I'm not aware of anything damaging—but just to conclude our job we ought to look, and then release it.

I have one question only that I would like to ask the gentleman, if I may.

Mr. Kastenmeier. Sure.

Mr. Danielson. Do you know, of your knowledge, whether now, at least as of March 18, 1975, there remains in existence a mail-opening operation which is not sanctioned by a court order?

Mr. Cotter. No, sir.

Mr. Danielson. You do not know; or do you know that there is not?

Mr. Cotter. Well, I am aware of no such operation. I would be amazed if there is any such operation in existence.

Mr. Danielson. And if you knew of any, would you stop it?

Mr. Cotter. And if I knew of any, I would stop it.

Mr. Danielson. I have no other questions.

Mr. Wiggins. Mr. Chairman?

Mr. Kastenmeier. Mr. Wiggins.

Mr. Wiggins. If the gentleman is intending to make a motion here, let me at least express my concern.

There is nothing this witness has said, as I interpret it, that in any way jeopardizes national security interests, that would be prejudiced by disclosure.

But frankly, I question my ability to make that judgment alone, or the ability of five or six Members of Congress that disposed of the subject in 30 minutes, make an intelligent judgment on that issue.

For example, I do not know the exact extent to which the witness testified before the Abzug committee, or the Senate with regard to details of the operation. I do not know, for example, that the Russian Embassy knows that its mail has been opened; it may suspect it, but I don't know that it knows it. And if it does not know it, even though it suspects it, that may well affect the character of their operations in the future and may ultimately affect the national security interests.

What I am suggesting, Mr. Chairman, before we simply in a heavy-handed way say to the public, "Here it is," that we have the benefit of at least the observation of somebody who has more sophisticated knowledge of the "security interests," and be permitted to comment on the testimony. Then I would be in the position, and the subcommittee would be in the position of making an informed judgment, which I think it is ill-equipped to make at this time.

Mr. KASTENMEIER. May I address myself to this? What I would propose to do—and I hope the subcommittee will agree—is to have the transcript of this portion printed at the earliest moment and in addition to each of us having access to it, I would make it available to the full committee chairman, Mr. Rodino, and to Mr. Silberman, of the Justice Department, because of some fears that he expressed. There is nothing in here that would prejudice national security, in my belief, or the rights of individuals, or otherwise violative of the House rules.

And I would ask Mr. Rodino and Mr. Silberman to approve the release of the material forthwith, or for Mr. Silberman to indicate precisely why it should not be made so available, in clear terms.

I would convene the subcommittee——

Mr. DRINAN. I'm afraid that I don't find that acceptable, that we have to make the judgment, not Mr. Silberman; and he gave no shred of evidence as to why we should hold this. We acted in good faith, and it seems to me that now everyone here concluded there is nothing derogatory to any individual, and that it's not contrary to the House Rules to release this testimony. I don't want Mr. Silberman to have censorship, and I really think we should open it up. We acted in good faith, and I think that his request was respected, his request was improvidently granted. We now discover that nothing is here. And I think that we should make our own judgment and tell Mr. Silberman there is nothing here at all.

We should not give him a manuscript, and this is going to take days, it reflects badly on the committee that we are subservient to the Department of Justice. Then he may delay or postpone, say, "cut out page 7," or "page 8," and that would multiply our difficulties. The neatest, the cleanest thing to do is to say, "Mr. Silberman, we opened it, there was nothing there that warranted your closing it, or our closing it, and here is what the record states."

And that is what Mr. Cotter said that he has no request—and he is the witness—he has no suggestion that we should make this closed. Why should we act by some third party who is a has-been in the Department of Justice?

Mr. KASTENMEIER. Mr. Badillo?

Mr. Badillo. Mr. Chairman, I want to point out, too, I think it is a very dangerous precedent for the Justice Department to look over the transcripts of our hearings, and in effect evaluate them for us. I don't think we should, as members of the Judiciary Committee, want to give that right to the Justice Department, or any other agency. I think that is a decision we have to make.

And I would be very apprehensive having an executive session transcript being made available to an official in the executive branch of the Government.

Mr. Wiggins. You would rather make it available to the public.

Mr. Badillo. I think you have to make a decision, I'm prepared to make the decision. But I think we should make the decision, the members of the committee, not based upon an editing job by the Justice Department.

Mr. Danielson. Will the gentleman yield?

I trust that my brother Badillo knows that I don't feel there is going to be any editing.

Mr. Badillo. I look at this as an executive review.

Mr. Danielson. I don't even look at it as a review. I look at this as giving him an opportunity to show cause.

Mr. Kastenmeier. Yes.

Mr. Danielson. That often is done in court, you show cause, or it will be released.

Mr. Kastenmeier. He will not make any decision. In other words, it will be presented to him, that we propose to release this, does he have any cause to the contrary, so he can make a comment available to us.

Mr. Drinan. Mr. Chairman, there is one thing that he will not want to drop from this manuscript, where Mr. Cotter said, "Postmaster Day thought this was a fine program." Maybe he'll want to bring this up. But there are other statements here that I am certain he will say are embarrassing to national security; and once again, he is not the judge.

Mr. Kastenmeier. Well, in the final analysis this subcommittee will judge this as a majority; and I am not personally too well disposed to Mr. Silberman's judgment. As I pointed out to him yesterday, we have had no cooperation at all from the Justice Department.

But in any event, I hope that the subcommittee will go along on the basis that he will censor nothing, but he will have a chance to comment in a very limited period of time. We are in any event going to be restricted in time through the availability of the transcript to us, to the public. I think our Full Committee Chairman, Mr. Rodino, is also aware of this, and is entitled to comment.

But the final judgment resides with us collectively, and I trust we will be able to exercise it.

Mr. Drinan. Mr. Chairman, I don't want to press it too much, and the press is out there, and what do we say? I would just like to walk away, but somebody is going to have to say something, and they are going to ask you. I mean, we are waiting?

Mr. Kastenmeier. I am not going to comment on the substance of this because it is a closed session, other than to say that once the transcript has been reviewed I hope to have it released forthwith.

Mr. Railsback. Mr. Chairman, we will make the decision, and that is as it should be. But I think we are extending a courtesy, and for the Lord's sake, maybe it will help them be a little bit more cooperative with us. I expect us to make the decision, and I am not going to be influenced by him.

Mr. Pattison. I think as a committee we can decide now to open it up, unless there is some adverse comment from Justice, in which case then we will decide. In other words, there is no point in us coming back to make a decision, we can make the decision right now.

Mr. Wiggins. I don't have any objection to that.

Mr. Pattison. If they make a comment that is adverse, then I think we ought to come back.

Mr. Kastenmeier. That procedure will be followed. And, incidentally, we have other hearings scheduled, which may or may not be sensitive. At this point we have no present intention of holding them in closed session. I say this because we will be in sensitive areas for some time, we have to be somewhat more resistive of opportunities to make this unavailable to the public.

Mr. Pattison. I think we should have a showing from Justice the next time we do this with a little more meat and substance showing as to why it should be closed.

Mr. Kastenmeier. If there are no other questions or comments, gentlemen, we will proceed in that fashion.

I want to first extend to Mr. Cotter the committee's great gratitude for your appearance this morning, and for your openness, your cooperativeness, your information given to this committee, it was very helpful to this committee, and we appreciate, Mr. Cotter, your being here.

Mr. Cotter. Thank you, Mr. Chairman.

Mr. Kastenmeier. The subcommittee is adjourned.

[Whereupon, at 12:40 p.m. the subcommittee adjourned, subject to the call of the Chair.]

SURVEILLANCE

FRIDAY, MARCH 21, 1975

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:16 a.m., in room 2237, Rayburn House Office Building, Hon. Robert W. Kastenmeier [chairman of the subcommittee], presiding.

Present: Representatives Kastenmeier, Danielson, Drinan, Badillo, Pattison, Railsback, and Wiggins.

Also present: Bruce A. Lehman, counsel; Timothy A. Boggs, professional staff member; and Thomas E. Mooney, associate counsel.

Mr. KASTENMEIER. The subcommittee will come to order. As chairman, on behalf of the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, I am releasing today the transcript of the executive session hearing which the subcommittee conducted last Tuesday with Mr. William J. Cotter, Chief Postal Inspector of the U.S. Postal Service. The transcript covers the portion of Mr. Cotter's testimony which deals with the mail opening program of the Central Intelligence Agency.

The subcommittee agreed to hear this testimony in executive session at the request of Deputy Attorney General Laurence Silberman. Mr. Silberman urged that in this instance the subcommittee refrain from its usual practice of conducting all hearings in open public session and that this particular matter be raised in executive session.

He indicated to me that the CIA mail opening operation raised a number of questions including the issue of national security. The subcommittee, however, has determined subsequent to that closed session, that the public interest is best served by an open and honest presentation of the testimony taken from Mr. Cotter. This is consistent with the subcommittee's declamation not to withhold information from the public that is rightfully of public concern.

We have not heard from the Justice Department any further reason why this transcript should not be released this morning; accordingly, it is being released.

The substance of Mr. Cotter's sworn testimony is a presentation of the 20-year practice of the CIA, in direct violation of the letter and spirit of the law, to intercept, open, and duplicate the mail of American citizens.

I personally find this program to be a reprehensible manifestation of the view that so-called national security concerns outweigh the rights of citizens to privacy of their associations, papers, and commu-

nications. The public has the right to expect that their mail, even their mail to foreign friends, is not subject to the insidious snooping by zealous agents of the Federal Government.

Both Mr. Cotter and Mr. Colby, Director of the CIA claim that no such program is currently in existence. However, I believe that the American public has a right to the personal assurances of the President that the privacy of their mail is beyond the reach of even the CIA.

On my own I have written to the President today urging that he personally review the situation and give the public such assurances. In the meantime the subcommittee will continue to explore legislation which will respond to the issues raised by Mr. Cotter.

Today the subcommittee will further review the CIA mail opening program and will receive in public session, testimony from a witness who is singularly capable of explaining the purpose, value, and intention of the program. Dr. Melvin Crain was an employee of the Covert Operations Office of the Central Intelligency Agency.

He held a management position for 8 years. During that period of time he obtained first hand knowledge of the Agency's program to read the mail of American citizens who were corresponding with individuals residing in Communist countries. Dr. Crain is presently a professor of political science at San Diego State University, San Diego, Calif.

I will invite Dr. Crain to come forward as a witness. I will administer the oath to Dr. Crain as is the custom in this set of hearings.

[The witness was duly sworn by the chairman.]

Mr. KASTENMEIER. I believe you have a brief statement, Dr. Crain. We will be pleased if you will present it to us.

TESTIMONY OF DR. MEL CRAIN, PROFESSOR OF POLITICAL SCIENCE, SAN DIEGO STATE UNIVERSITY

Dr. CRAIN. Mr. Chairman and members of the subcommittee, I welcome the opportunity to furnish whatever assistance I can toward developing any information and recommendations concerning any unconstitutional, illegal and/or improper use of intelligence collection methods, including the U.S. mails, that are in violation of civil rights and civil liberties.

I am Mel Crain, and I reside at 8835 Harbison Canyon Road, El Cajon, Calif. I am a professor of political science at San Diego State University where I have taught since 1959. I received my master's and doctorate degrees in political science at the University of Southern California. I am a Navy veteran of World War II.

From December 1950 to August 1951 I was a civilian intelligence officer with the Air Force Office of Intelligence (AFOIN), Department of the Air Force. In addition to my basic responsibilities of intelligence research and analysis toward formulating the annual contingency war plan, I conducted liaison with other agencies within the intelligence community.

In August 1951 I was recruited by the Central Intelligence Agency to serve within the Clandestine Services. Specifically, I was employed in a research supervision capacity in the Operational Intelligence Research Branch which, along with the area divisions, including the

Domestic Operations Division, comprised then of the Office of Plans, often referred to as simply D/DP or Deputy Director of Plans.

When I resigned from the Agency, effective in August 1959, I was Deputy Chief of the Operational Intelligence Research Branch. Richard Bissell had become Deputy Director of Plans (D/DP) in January 1959, while Richard Helms long had been Assistant Deputy Director of Plans and, as I recall, served as Acting D/DP pending Bissell's assignment to the post.

Ours was a support function, that is, to provide planning and information for foreign intelligence operations, principally against the U.S.S.R. To the best of my knowledge, no one in our branch perceived that our responsibilities included counterintelligence or counter-espionage operations within the United States or against any of its residents, whether citizens or not. It was my understanding, at least, that such functions were outside the Agency's charter and, if they belonged anywhere, they were attached to the FBI.

It was with no little surprise, therefore, that one day late in 1958 I found myself extensively involved in mailtapping of American citizens. I had, it seems, been given a new clearance under the otherwise unidentified Staff D. At a small briefing, which I was directed to attend, I was assigned on a "need to know" basis to the exploitation of surreptitious mail surveillance.

That is, selected members of my staff, many of whom long had been cleared participants, were to receive and analyze copies of first-class letter correspondence written by Americans and posted to addressees within the U.S.S.R. and other Iron Curtain countries. Our purpose in so doing was to develop operational leads.

At this briefing session the briefing officer asserted that this mail-opening activity was the result of a joint operation among the CIA and the Post Office. The latter, I was told, had arranged special cleared areas in two major post offices in New York and New Orleans, with special cleared personnel using sophisticated technology. The letters were opened, reproduced, resealed, and sent on their way without interrupting mail flow or their opening in any way being detected.

We did, in fact, receive copies of such correspondence as I personally witnessed and handled. Indeed, I retained at least one copy which I will be glad to furnish to the committee as undeniable proof of letter surveillance within the United States. I estimate that we received on the average at least six letters per day. Most of them were of a personal nature to relatives or friends, though some were addressed to agencies or organizations within the denied areas. I accepted this explanation of the mail surveillance procedures, although I did not personally observe them or even know anyone who had.

Deviating from my statement for a minute, picture yourself in a relatively small room with a few other people and the briefing officer casually describing that America's first-class mail was being opened on a routine basis, reproduced and resealed, and that in no way physically or chemically could it be detected at any end of the mail chain whether or not it had been opened.

If you can picture that, then the briefing officer says,

This is unconstitutional and illegal but it is necessary to perform our mission, it is in the national interest. We are in a cold war, you know, and we have to do things like that.

In current jargon, this simply blew my mind, especially when the briefing officer allowed as how it was all unconstitutional and illegal, adding only that it was necessary to fulfill our mission, it was in the national interest and besides, weren't we in a cold war?

My efforts to stop this activity were to no avail. Nelson Brickham, my branch chief at the time, disagreed with my attitude and told me, "It's you against the organization." Brickham reminded me of this earlier conversation during a phone call in January of this year, the first time I had talked to Brickham in 16 years.

Nevertheless, I approached Richard Bissel, the D/DP and ultimate boss of the Clandestine Services, who professed both ignorance and of deep concern over the propriety of this activity, and assured me personally that he would put a stop to it forthwith.

Former Secretary of State, Dean Acheson, whom I also turned to for advice and help in this matter, displayed little, if any, concern despite my briefing copies of the open letters to him. I concluded that for the time being mine was a lost cause, what with the cold war mentality, the McCarthy anticommunist hysteria, et cetera.

I might add parenthetically here, too, Richard Bissell has reported to the press that he has not been certain about recalling our conversation. He did say if he had some vague recollection of mail opening, in any case he wouldn't tell me that because he thought it was appropriate. This is reported in the Hartford Times and in the New York Times, I believe.

I have no direct knowledge how long this mail surveillance had been going on, nor how long after my resignation from the agency it continued.

I think I share a common concern with the members of this committee, indeed with Americans generally, over the undeniable complicity of the Post Office with intelligence agencies in the invasion of privacy and the violation of constitutional rights of untold thousands of Americans.

It must not continue and it must not recur. The mail must go through all right, but unopened by spooks.

Now, to the best of my ability, I will gladly elaborate on any of the foregoing or attempt to answer any questions the committee may have.

Thank you, Mr. Chairman, for the opportunity to make this presentation.

Mr. KASTENMEIER. Thank you, Dr. Crain.

We will pursue the 5-minute limitation on questions asked of the witness. I would make the general observation that while this committee this morning is interested primarily in mail covers, and mail opening conducted by the executive branch, we are also interested in the invasion of privacy by other means such as wiretapping and electronic surveillance, and other forms of civilian and military surveillance and intelligence gathering.

Our sister committee, the Subcommittee on Constitutional Rights and Civil Rights, is interested in oversight of the Federal Bureau of Investigation, interested in the program of dossier keeping and data keeping, arrest records and various other activities which tend to run parallel with this subcommittee.

The legislation we have before us is cosponsored by well over 100 Members of the House of Representatives and covers many forms of surveillance or intrusion, including what you referred to in coining the word, as mailtapping.

Dr. Crain, this certainly is a generally philosophical question, and I don't mean to be necessarily contentious, but to explore your views. That a person having served in a number of capacities must have given all these matters some thought over the years, is obvious.

It must be obvious to every American citizen that in the process of intelligence gathering many activities were engaged in, which I suppose today, would be called reprehensible.

As to mailtapping, you probably share the common view of members of the committee that it is reprehensible, but do you distinguish between this activity on behalf of intelligence gathering which is permissible, necessary and allowable, in terms of protecting other civil liberties of citizens, and that which are not? How would you personally define the area of permissible actions, say, by an intelligence gathering agency?

Dr. Crain. Well, I think that the original charter—quotation marks—of the CIA which is contained in the 1947 National Defense Act, says that the agency shall engage in the collection and analysis of intelligence and evaluation of intelligence information. I think that is a proper and necessary function of the U.S. Government and of any modern, large government such as we are, at least so long as we have the division of nation states and anarchy states and the possibility of war threatens. We need to know the intentions and capabilities of potential enemies, and need to know potential friends, too. It is another thing to say we should engage in covert—what we used to call black—operations of all kinds to get some of this information.

My own experience tells me, and subsequent to my tenure with the agency I have been reinforced in this conclusion, that the vast majority of intelligence—and intelligence, incidentally, is just another name for information—that we needed in those days in the 1950's and even more so today, in my judgment, is available from open sources.

The agency is remarkably well set up to get this from open sources in a passive way. I say passive collection of intelligence, that is, they subscribe to publications all over the world; books, journals, monographs, reports, things you find in the libraries everywhere.

The agency has developed—and indeed health agencies up to national security agencies—have developed technological means of intelligence collection. All of these together, and I have only touched on them, I think, make it quite possible for this Government to collect the necessary intelligence information without resorting to covert means.

I think it is no more true today than in those days. Really, we had denied areas in the 1950's, like China. China is no longer a denied area.

Mr. Kastenmeier. Denied areas are countries to which we don't have, for example, missions or diplomatic posts?

Dr. Crain. That is right. We even had posts in the U.S.S.R. during the 1950's, but our diplomatic personnel was extremely limited although we lived and circulated within certain areas. The number of visitors from the West to the U.S.S.R. in the 1950's could be counted

on your fingers of two hands. Even if you can make a case for covert activities in those areas, even then, very little take was of any value from those operations.

Mr. KASTENMEIER. One last question, then I must yield my time. You mentioned in your statement counterespionage operations within the United States or against any of its residents. It is your view that mail-opening operations conducted overseas might be permissible but not within the United States, do you make that distinction?

Dr. CRAIN. Personally, I don't think there is a need for it but morally I find it reprehensible, too. I am not sure it isn't counterproductive in the long run. You don't get enough take and you alienate other people. You can't hide it; sooner or later it comes out. That is one of the problems this country is beginning to face; its moral image is tarnished by things like this.

Mr. KASTENMEIER. The gentleman from Illinois.

Mr. RAILSBACK. Thank you for your testimony.

Where did the orders come from that the briefing officer gave you to begin this operation, if you know?

Dr. CRAIN. Well, that is the problem, that has always puzzled me. I don't know. All I know is in an informal way I was told to go down to the briefing, and I knew from past experience that I was about to have a new clearance bestowed upon me. I was to be part of a new "need to know" area.

Mr. RAILSBACK. Who was the briefing officer?

Dr. CRAIN. I don't remember, and I don't remember that I saw him again. He was presumably from staff D, a metamorphosis that I think nobody could really pin down, out floating around in the agency there.

Mr. RAILSBACK. Did you have the idea this had been going on before?

Dr. CRAIN. Yes; it had been going on before. Members of my own staff were cleared and were using this source; that is why I was finally cleared. I was asking them embarrassing questions. The researchers were making their studies and coming up with information they couldn't attribute adequately and I was raising serious questions about it because I was a stickler for proper documentation. After all, people's lives are at stake in this planning and implementation.

They couldn't satisfy me. Finally they said, "Well, we had to clear you because you were about to blow it." That demonstrates the "need to know" principle pretty well. People could be administratively subordinate to a chief, have an investigation or project and the chief would not be aware of it. As far as I know my own division chief was not cleared.

Mr. RAILSBACK. Was all the mail to the U.S.S.R. channelled either through New Orleans, or I believe it was New York that you mentioned?

Dr. CRAIN. Yes. To my knowledge, only the outgoing mail was tapped. If they were doing the same thing with incoming mail I wasn't aware of it because we didn't receive those copies.

Mr. RAILSBACK. That was your assignment, anyway?

Dr. CRAIN. I would think we would have gotten those letters if they were doing that, but I don't know. All I know is we only got copies of the outgoing mail.

Mr. RAILSBACK. The briefing officer didn't tell you where the orders came from?

Dr. CRAIN. Well, he said—and this is all I have to go on although we talked about it with other people subsequently—this was a neat arrangement between the CIA, FBI, and the Post Office. This was a sophisticated intercept. They could open the mail by this means and reseal it without anyone knowing it.

It took place in two post offices. The presumption is that the FBI also got the take. The fact is, why else would they be involved. They would look at the copies from the point of counterintelligence. We were not looking from that point of view as we were looking for operational leads.

Mr. RAILSBACK. In addition to the Soviet Union, what other countries were involved?

Dr. CRAIN. Well, what we call the Iron Curtain countries, Eastern Europe. Frankly, we didn't see too much of that. Most of what I recall was to the U.S.S.R.

Mr. KASTENMEIER. The gentleman from California, Mr. Danielson.

Mr. DANIELSON. Thank you for your information which does corroborate an important part of the testimony that we received from Postal Inspector Cotter the other day. My questions will be directed only at trying to put things into perspective because I find that the words we use have meanings which are subjective to those of you who use them, and I want the ultimate record here to try to mean something objectively.

We have the use of the word mailtapping. That is not a defined term in Webster's. Will you tell us what you mean when you use mailtapping?

Dr. CRAIN. Yes. It is based on a singular interpretation, that is, the interception of mail—in this case it was first-class—but, interception without the permission of the sender or receiver by unauthorized people or agencies opening it, reproducing it, resealing it and—putting it in a nice way—in a covert way.

Mr. DANIELSON. Using it in that way distinguishes it from mail cover?

Dr. CRAIN. Yes; as I understand a mail cover.

Mr. DANIELSON. Mail cover is simply examining all of the information that appears on the outside of a piece of mail?

Dr. CRAIN. It is a relatively common practice; yes.

Mr. DANIELSON. That is the sense in which you use that term?

Dr. CRAIN. Yes.

Mr. DANIELSON. Another term which you used today, covert, means literally secret; does it not?

Dr. CRAIN. Yes.

Mr. DANIELSON. Does it have any special meaning in the sense you have used that word, those two or three words in your testimony?

Dr. CRAIN. I suppose this is part of my occupational or professional jargon from the past. The terms clandestine, covert, and so on, instead of secret, instead of spy missions, I referred to them as clandestine operations, et cetera. Covert is a very common word with me.

Mr. DANIELSON. The way you used covert you don't mean secret; everything you were doing was supposed to be secret; was it not?

Dr. CRAIN. Yes; certainly during the working day.

Mr. DANIELSON. I am only talking about your professional activities. Was it not all supposed to be secret? In fact, weren't you under some kind of Boy Scouts oath to keep it secret?

Dr. CRAIN. Yes; when we were assigned to the agency and when we left.

Mr. DANIELSON. I am interested in the word "covert" in the sense you used it. Correct me if I am wrong, but not only was it secret, everything you did was supposed to be secret; when it was something that was peppered or tinged with the feeling of something illegal, isn't that what you mean by covert?

Dr. CRAIN. Well, I suppose, yes, except that it didn't have that particular connotation to me in those days. But, looking at it in the perspective of opening of American citizen's mail, it would have that tinge, I think.

Mr. DANIELSON. You made a statement you didn't believe we needed covert activities; everything in the CIA is covert, as far as I know. Do you mean to say we don't need a CIA?

Dr. CRAIN. In lots of things the CIA is not really covert and those are in line with the original charter.

Mr. DANIELSON. Aren't those that type of covert operation?

Dr. CRAIN. It is called covert but I tend to think there are many things the CIA does, in my judgment, that should not be covert; they are not classified and should not be secret.

Mr. DANIELSON. Did you ever serve outside the United States or was all of your time within the United States?

Dr. CRAIN. Temporarily. I was abroad in other countries on several occasions for a few weeks.

Mr. DANIELSON. Not for any extended period of time?

Dr. CRAIN. No.

Mr. DANIELSON. I see my 5 minutes is up.

Mr. KASTENMEIER. The gentleman from California, Mr. Wiggins.

Mr. WIGGINS. Thank you, Mr. Chairman, and thank you, Professor, for sharing your testimony with us.

You mentioned in your prepared statement that you have a copy of a letter. Is this one of those letters that you received?

Dr. CRAIN. Yes.

Mr. WIGGINS. And you received it in your capacity as a member of the CIA?

Dr. CRAIN. Yes.

Mr. WIGGINS. Did you make that copy with the consent and knowledge of the CIA?

Dr. CRAIN. No; I did not. Well, it was the CIA's own copy.

Mr. WIGGINS. Do they know you have a copy?

Dr. CRAIN. They may know now.

Mr. WIGGINS. Did you advise them you took the copy?

Dr. CRAIN. No; I didn't.

Mr. WIGGINS. This is an example of a very much related problem of the surveillance which you conducted. As you say in your statement, your possession of the letter is undeniable proof that surveillance was carried on in the United States, in this case, by you, apparently in a clandestine way and apparently of a letter.

I might characterize that as filetapping. It raises some moral questions. Do you have any moral twinge about this?

Dr. CRAIN. Not really, because I considered that the mailtapping was unconstitutional and illegal, as the briefing officer said; I agreed with him. I had a higher morality in this.

Mr. WIGGINS. You took this out in 1958?

Dr. CRAIN. Yes. To my knowledge, the reason was to demonstrate to Dean Acheson, former Secretary of State then practicing law, to demonstrate to him that this was going on. I was hoping he would help me to stop this.

Mr. WIGGINS. Do you have any other documents that you took from the CIA in your possession?

Dr. CRAIN. Not that I know of, I don't believe I did. I am quite sure this is the only one, and the reason I did this and never returned it to the file. That is probably why I have it. I don't remember planning to hold it and reveal it 16 years later. As far as I know, I had forgotten I had it for a long time.

Mr. WIGGINS. Well, it raises a question. The mailtapping could be useful but we have a problem in the Government. People, for reasons which they deem to be good and sufficient, make unauthorized copies of correspondence and files and take them from their employer without the consent of the employer. I regard that to be at least questionable on moral if not on legal grounds.

It relates to this whole matter of surveillance. I am pleased that I have your assurance and testimony under oath, and you can review your testimony. You are sure you don't have other documents from the CIA in your possession?

Dr. CRAIN. Yes; the only other document I have is a letter from Alan Dulles thanking me for my years of service, et cetera, when I resigned.

Mr. WIGGINS. How did your testimony come to the attention of this committee?

Dr. CRAIN. I assume from newspaper accounts of my revelation.

Mr. WIGGINS. When was that made?

Dr. CRAIN. In January of—no; either late December or early January.

Mr. WIGGINS. Of this year?

Dr. CRAIN. Yes; 1974 or 1975. Incidentally, Mr. Wiggins, I might say with respect to the observation you made, there is one other recommendation I would offer—that we encourage an informing system like this; that we set up an ombudsman at least within the intelligence community and maybe for all Government employees and for private citizens, to have a small staff of people under a blue ribbon group, say, impeccable people, to whom anybody can repair.

Any Government employee or citizen could raise a complaint that, if in his judgment, something was going on illegal or unconstitutional or improper. This ombudsman would be a safe, clear, et cetera, place for such. If such a person had been available in 1959, I think we would have avoided a lot of grief we are going through now; I would have gone to him.

Mr. WIGGINS. I respect that. It certainly has some merit and we ought to consider it. But, I am frankly particularly concerned with your taking this from the CIA, as a former member of that Agency making copies of CIA documents without the knowledge of the Agency

and removing them and then discussing them when that person alone feels that the public interest would be served by their disclosure.

That is what, really, I am talking about, not about you. Let's talk about the problem then, instead of this illustration. There is a problem there to which this committee, perhaps, or this Congress ought to address itself; do you agree?

Dr. CRAIN. I am not sure there is, sir. As I indicated, I think there is a very good case for not having any covert operations at all. It is too easy to hide behind these things, too easy to do illegal and unconstitutional and immoral things, too easy to violate civil liberties and rights behind the classification of secret and so on. I do believe all of us have ultimately a higher morality. If you don't have these accessive classifications you don't have this problem.

I saw a dissertation on file with the CIA that was classified because somebody in the CIA put a stamp on it.

Mr. WIGGINS. I won't press the point. Clearly there is a moral issue involved with respect to an employee taking an employer's documents without his consent; and that can't be avoided.

I yield the balance of my time.

Mr. KASTENMEIER. I would like to comment on that before I recognize the gentleman from Massachusetts. I think during the impeachment inquiry we ran into it repeatedly, people making copies, as I recall, of documents which were meant for some other purpose being in some other file. I think the principle seems to be they are their own documents. Whether this was reprehensible or not, I think Mr. Wiggins raises an excellent issue here. I don't know if we can resolve it or not.

I recognize the gentleman from Massachusetts, Mr. Drinan.

Mr. DRINAN. Did you speak about these matters between 1959 and 1965?

Dr. CRAIN. Yes; I did on many occassions, including publicaly and on television.

Mr. DRINAN. Are you revealing anything new that has not been revealed before?

Dr. CRAIN. Maybe a couple of minor details, that is all.

Mr. DRINAN. Has the CIA contacted you?

Dr. CRAIN. No, they have not.

Mr. DRINAN. They never sought to remind you of your promise of confidentiality?

Dr. CRAIN. No.

Mr. DRINAN. When you speak of Richard Bissell, page 5, are you suggesting he was not really truthful with you?

Dr. CRAIN. I am inclined to view—certainly at that time I believed that he was sincere when he said he didn't know about this; he was as horrified as I about this and he would stop it.

Mr. DRINAN. Did you believe this when he said he didn't know about it?

Dr. CRAIN. At that time I did, yes. It is plausible, even now, he didn't know about it then, even though he was Chief of Clandestine Services. He came aboard in January 1959, I believe. I am not absolutely sure; that is the best of my recollection. It was long after the mail operation had been going.

What I do remember is I went to see Richard Helms who was the Assistant Deputy Director, and he had performed the administration

of that position for some time, as Acting Deputy Director. Conceivably, Mr. Bissell turned to Mr. Helms after my conversation and asked about it and Mr. Helms conceivably told him about it, and may have agreed it was a good operation after all and we should keep it. But it is pure conjecture on my part.

Mr. DRINAN. You indicated that these documents go to the FBI. About how many would be going to the FBI on a daily or yearly basis?

Dr. CRAIN. Well, they had the same copies as we did.

Mr. DRINAN. Why did you say only six letters a day; who screened them all?

Dr. CRAIN. I assume we all got copies of all the correspondence addressed to the U.S.S.R. and the Iron Curtain area. Under that circumstance it could have been three times that, I just don't remember. One thing, I didn't see it at all. I was in a supervisory capacity and several staff people actually did the processing of the copies that we got in our branch. It may have been many more copies; my own recollection is about six.

Mr. DRINAN. Well, did the FBI have personnel right there to receive these copies?

Dr. CRAIN. I don't remember that. I was just told we were a part of a trilogy who were exploiting the mail. I assume they received the same thing we did.

Mr. DRINAN. You don't actually know too much about it. Have you tried contacting former colleagues of the CIA to get further information?

Dr. CRAIN. We talked about it but you have to perhaps understand the climate of the times and the operation of the "need to know" principle.

Mr. DRINAN. Not then but now?

Dr. CRAIN. Since then.

Mr. DRINAN. You give us fragmentary information that doesn't really add much, and I am just saying you keep saying the same things. Did you go to colleagues or some other sources to try to get a corroborator that this massive surveillance went on? Do you know any more besides these six pages?

Dr. CRAIN. No; nothing short of speculation.

Mr. DRINAN. You haven't tried to find out?

Dr. CRAIN. Well, I haven't had the time or energy to do that. I should say. If I knew where and how to look I would, but I don't have access to probable sources. I could talk to former colleagues, I suppose, and I have placed a couple of phone calls. As I expected, I didn't get too much cooperation from them.

Mr. DRINAN. When did you start to talk about this, when you left in 1969?

Dr. CRAIN. I talked about it right away. I certainly told my students, not to be revealing something to them but as an example of some aspects of politics or government. I didn't always, I am sure, go into this much detail, maybe never.

Mr. DRINAN. There isn't much to tell; you are not telling us very much.

Dr. CRAIN. Well, I agree with you. It depends on the point of view, how much detail, but I didn't bring in copies of the letter to them.

Mr. DRINAN. I hoped to see a real, live, living spy come in here. Well, you told us what you knew and for that I am grateful. Thank you very much.

I yield the balance of my time.

Mr. KASTENMEIER. The gentleman from New York.

Mr. BADILLO. Dr. Crain, you say you have one copy of a letter and it is undeniable proof of the surveillance within the CIA. Do you have the copy with you?

Dr. CRAIN. Yes.

Mr. BADILLO. Will you furnish it to me now?

Dr. CRAIN. Yes.

Mr. BADILLO. Mr. Chairman, I ask that this letter be introduced as part of the record.

Mr. WIGGINS. I haven't read it. It seems we may be compounding a problem, among many other things.

Mr. BADILLO. As the chairman said, there were hundreds of these letters in the Judiciary impeachment hearings.

Mr. WIGGINS. I am not so sure, Mr. Chairman, that the sender of that letter would appreciate having his private correspondence on the front page of a newspaper. I take that as a whole, assuming here the person would be offended also if the FBI or the CIA looked at it and doubly so if it was published. Perhaps I could make a better judgment after glancing at it.

Mr. BADILLO. It has been made public.

Dr. CRAIN. And with the permission of the sender.

Mr. KASTENMEIER. The chairman is not yet aware of the contents of what has been handed to us.

Dr. CRAIN. It is a xeroxed copy of a copy, so it is not the original copy that we got.

Mr. KASTENMEIER. It has already been made public?

Dr. CRAIN. Yes, on several occasions.

Mr. KASTENMEIER. Well, without objection the committee——

Mr. DANIELSON. I reserve my objection until I have read it.

Mr. BADILLO. May I go on while he reads it?

Mr. KASTENMEIER. Yes. Let me only say that the committee will receive the letter subject to any objection that may come forward from a member of the committee.

In the meanwhile, you may proceed.

Mr. BADILLO. Earlier in the week we heard testimony from Mr. Cotter and the following exchange took place between us:

Mr. BADILLO. Was there any mail cover or mail opening investigation in Miami?

Mr. COTTER. Not to my knowledge.

Mr. BADILLO. Is it possible that it could have been done without your knowing about it?

Mr. COTTER. It is possible, however, when I was talking to the CIA people the other day, they appeared to be very, very candid; they appeared to tell me, these are the things that happened. There was one here and one on the West Coast and some other place, and the only place the postal service was involved in was the New York City one and the San Francisco one.

Mr. BADILLO. What do you mean, one here, one on the West Coast and some other place?

Mr. COTTER. I didn't question them on the other place but I gather there may have been some other place.

Mr. BADILLO. There could have been one in Miami?
Mr. COTTER. That is correct.
Mr. BADILLO. There could have been one in Chicago?
Mr. COTTER. Indeed.

Do you know if there was one in San Francisco?

Dr. CRAIN. I don't know that, no. The only ones mentioned were the New York and New Orleans office.

Mr. BADILLO. You know of no others?

Dr. CRAIN. This is my recollection, it could be faulty, but I think it is accurate. I took no notes or kept no diary on this.

Mr. BADILLO. Did you actually see men from the FBI; are you sure the FBI was involved?

Dr. CRAIN. No, I am not sure of anything except that we got copies of the mail.

Mr. BADILLO. But you said this was a three-agency operation?

Dr. CRAIN. That was what we were told.

Mr. BADILLO. But you didn't see the FBI, you say?

Dr. CRAIN. On other occasions, but not in connection with this.

Mr. BADILLO. Can you say of your own knowledge that you know the FBI participated in the mail-opening operation?

Dr. CRAIN. No, I can't. I have been careful what I say always. I have no direct knowledge that the FBI was involved. I have no direct information that the Post Office processed what we had. The only direct testimony I have is I personally handled and saw many copies, hundreds of copies of correspondence. It seemed to me that was at least circumstantial that it came from the Post Office. I don't know where you would get it from otherwise. But, I have no proof the FBI was involved at all, just what the briefing officer said.

Mr. BADILLO. Were you told why the FBI was involved?

Dr. CRAIN. As I recall, reference was made to getting derogatory information on people. You must remember the assumption was in those days by everybody, I guess, that anybody who corresponded with anybody within an Iron Curtain country was automatically suspect, why he was a Commie, that kind of climate.

Mr. BADILLO. The material secured by the CIA was turned over to the FBI?

Dr. CRAIN. No. The copies we got we did what we wanted with; and we did get the dossiers on people, incidentally.

Mr. BADILLO. You shared this with them?

Dr. CRAIN. They got other copies, that was my understanding. Again, I can't prove it.

Mr. BADILLO. Did anybody say they had a court order to permit this?

Dr. CRAIN. No, there wasn't, and I know of no order that would, in my judgment, be sufficient to open all mail to the U.S.S.R. But I didn't hear anything about that, no.

Mr. BADILLO. How would an ombudsman be able to handle this, if he was brought in to handle this—this also is illegal, isn't it?

Dr. CRAIN. This activity is illegal, as you say.

Mr. BADILLO. There is no court that would give such a blanket order?

Dr. CRAIN. Yes, but it was going on according to what I heard, for

20 years, of my knowledge close to a year. That is all I can prove it went on.

But an ombudsman—I didn't add to my suggestion. I think he should be answerable, and commissioned to be answerable to the House and Senate Judiciary Committees. Maybe that wouldn't be the best place, but that would be my own recommendation.

Mr. BADILLO. Do you know what happened to the information that was secured; what did you do with it, the letters you received?

Dr. CRAIN. The analysts in my branch looked at it from the standpoint of trying to develop what we called operational leads. That is, the question was, how can we use the sender of this letter, how can we use the receiver of this letter, how can we use the letter itself, how can the mail channel be used for collecting intelligence, can we recruit the sender as an agent, say, or can we get him to ask certain questions of the correspondee in the U.S.S.R., could we plant things in the mail?

This particular letter has to do with the exchange of college newspapers. I am sure we thought about the possibility of planting propaganda or intelligence information or sending secret information via this newspaper or in the papers that we received back, you know, the other exchange copies.

We used our imagination to see how possibly we could use this potential source.

Mr. BADILLO. During the period you were examining the opened mail, did you find anything that was, in your judgment, important for national security?

Dr. CRAIN. Well, I don't know unfortunately that anything came out of this. I am quite sure we made some recommendations about exploiting it, but from the national interest standpoint, we were concerned with developing collection assets, as it were, sources of foreign intelligence.

Mr. BADILLO. Thank you.

Mr. KASTENMEIER. The gentleman from New York, Mr. Pattison.

Mr. PATTISON. Dr. Crain, I would like to get back to this problem of lifting letters from files of employers. You said in your testimony that they had stated to you at the time in the briefing that this indeed was an illegal and unconstitutional operation?

Dr. CRAIN. Yes.

Mr. PATTISON. I take it in this matter of lifting a letter from a file you would make distinction between lifting a document from your employer which provided evidence of this illegality as opposed to some other document; the plans of some nuclear sub or something of that nature?

Dr. CRAIN. Oh, yes.

Mr. PATTISON. For instance, if you were an employee of a Government agency and instructed in writing to, let's say, arrange a bribe to some agency so that your employer would consider voting in a certain way if he got a certain amount of money, you would have no worry or feeling or immorality problem in lifting that particular letter?

Dr. CRAIN. No, sir.

Mr. PATTISON. Whereas, if it was just a letter in the file that said something about your employer or some letter from the employer to some other person, you would have some feelings about that?

Dr. CRAIN. Yes, of course. And I might just add, as far as that goes in this case, first, the document was not classified. Indeed, if it was going to be, it should be so highly so that the CIA should have looked at it.

Secondly, I was the employer, if you will; I was the owner of the letter. I was the acting chief of the branch and it was my function to be in charge of this, since it was unclear who ordered the whole thing and we were still looking to find out how it got set up.

Mr. PATTISON. My point is, you are the one who knows about it. you are only protecting yourself in any way you can, if you are going to be involved in an illegal activity. The best thing for you to do would be to retain some evidence of that because if you didn't your employer could deny it and you would lose your job and you would look like some kind of a nut, if you didn't have the evidence that this was going on.

Dr. CRAIN. I agree. I didn't have that foresight at the time, but I agree with you.

Mr. PATTISON. Thank you very much. I have no further questions.

Mr. KASTENMEIER. Dr. Crain, we have tried to distinguish between mail covers and mail openings and your term mail-tapping. Do you regard mail covers as a justifiable investigative technique?

Dr. CRAIN. I suppose if I would, it would be only under a court order. I consider all of this an invasion of privacy. If we are going to invade privacy we have to have a damn good reason for it.

Mr. KASTENMEIER. Going back to what you referred to as a trilogy of agencies, the Post Office, the FBI and the CIA, could you be more specific as to what you were informed the role of the Post Office Department was? I gather you indicated that, at least in New York, they provided floor space to work in. As far as you know, did they participate any further?

Dr. CRAIN. No, I don't. Again, I only know what the briefing officer and perhaps, others—since we discussed this, the way I remember. I did raise objection to it and we had conversations. I am not quite clear where I got the information I do have.

I was told there were certain physically cleared areas. I assumed physical barriers there in these two post offices and specially cleared personnel processed it. I am not sure if it was postal personnel or what agency. It could have been FBI personnel, could have been a third or fourth agency that was involved, I suppose. But we were told simply that it was cleared personnel.

Mr. KASTENMEIER. One other question, you mentioned a number of people, Mr. Bissell, Dean Acheson and I think you mentioned Mr. Helms, some of whom defended the program; perhaps your briefing officer and others agreed with you. Among those who defended the program, didn't they make the argument somewhat as you have made and Mr. Wiggins that there is a higher claim constitutionally or legally than the Post Office statutes on the question of national security which permitted certain activities above the statute itself; did it make any defense legally of that practice?

Dr. CRAIN. No, it just seemed to. It was there, a potential source and we should use it; it was our obligation to do it. My impression

was that it was violating the fourth, first and fifth amendment rights of American citizens, which was more important to me.

One other justification was given. My branch chief indicated that if the organization or the company—we used to call ourselves the company—if the company approved of it, if it was handed down to us as the thing to do, we should not question it. Practically speaking, you can't buck the organization anyway; that was further justification.

Mr. KASTENMEIER. The organization of your company these days, in the past few weeks, has been charged publically by the press with many things, some of which are denied. Perhaps one day we will learn the truth of the matter and perhaps we will not. Do you regard selectively, are you across-the-board opposed to all the things with which the agency is charged, or do you find some of them defensible and necessary?

Dr. CRAIN. Well, I am not sure which things you are talking about, but some of them I am not surprised at.

Mr. KASTENMEIER. What I am driving at is, you must know some other matters that offend people more today about agency operations than merely mail opening.

Dr. CRAIN. Well, yes. I came upon information, as a number of us did, but I didn't participate so I didn't have direct, firsthand knowledge. It came to our attention despite the "need to know" and compartmentization by the Agency by the mid-1950's at least that we were embarked on programs of overknowledge——

Mr. WIGGINS. I have no notion what the witness is about to say, but I gather he is about to describe some CIA activities, which, in today's terminology might be regarded as immoral or illegal. I would like to have an outline of what he is about to say in executive session before he says it in a public session.

Mr. KASTENMEIER. Well, I will only admonish the witness to respond in general terms. I don't think that this subcommittee wants to resort to executive session so as not to implicate other individuals or discuss illegalities of the other areas.

Dr. CRAIN. Yes; I plan to do that. Incidentally, what I was going to say has already been reported by others. Again, I don't have direct knowledge of this but I did get this information, in some cases, from the people who are credited with doing these things, so I tend to believe them.

Mr. KASTENMEIER. The purpose of my——

Mr. BADILLO. I think we should take a vote on this because we are going to set a very bad precedent here if we start muzzling witnesses because somebody is afraid of some illegality. I think the most important contribution that a congressional committee can make, especially in the past couple of years, has been that witnesses come here and have said things which reveal information which leads to inquiry and reveals the fact that something illegal was going on. That is how the Watergate case was broken.

I don't think the committee wants to accept the principle that when a witness might say something illegal and implicating he shouldn't be allowed to do this.

Mr. WIGGINS. Yes; your observation is occasioned by my remarks. I am only concerned about something which we can vaguely describe as national security. We have a former employee of the CIA whom some might call a spy, who is about to testify to his activities as a spy for the United States.

Now, I think this committee may well want to know those activities so it can take appropriate action if it deems it to be wrong. But, we are dealing with the possibility of it being in a sensitive area. If we blindly ask him to divulge in public his activities, it is not unlike taking a voir dire of witnesses out of the presence of the jury where the stakes are substantial, and blow the trial.

I am not trying to keep that information from our hands but I think we ought to evaluate whether or not it should be in the public domain and simply, whether it should be in that domain prior to that evaluation.

Mr. KASTENMEIER. The purpose of my question, and if others want to explore this more profoundly they may, the purpose is to ascertain whether or not it is of operations complained of, whether mail opening alone is involved, which is of concern to you in terms of the agency, and not necessarily to explore other areas. Now, that is not to preclude anyone else from doing so, but that is the purpose of my question.

Dr. CRAIN. Yes. Well, I would like to respond by saying that there are two things in that connection that are of concern. One is the consequences of exploiting the source that might be developed by the mail opening. But your other point, the mail-opening activity was the last straw, so to speak in a long series of improprieties that I thought the Agency was involved in.

These have been reported many times before and, indeed, admitted, as I recall reading in the press; such things as the overthrow of other governments, planned assassinations, the setting up of public regimes, and so on. This again, was information that trickled to me and to others in the Agency. Many people resigned when they heard about it, long before it was ever mentioned in public. I didn't witness and didn't participate and I can only report that which I heard about.

Mr. DANIELSON. I am going to continue the line I was pursuing, sir. In the first part of your statement you referred to your concern over procedures that you said were unconstitutional, illegal, or improper in the intelligence collection. I fully agree with you that neither the CIA or any other part of our government or individual should be dealing with the unconstitutional or the illegal.

But, I begin to recognize the problem when we come to improper, because in my opinion, that is almost entirely subjective.

Dr. CRAIN. I agree.

Mr. DANIELSON. What standard do you follow in deciding whether something is improper or proper? I am willing to stipulate for that answer that we are not talking about things otherwise unconstitutional or illegal; it is beyond illegality.

Dr. CRAIN. I wasn't sure, for example, and I am not sure now. I guess I would have to say that the opening of first-class mail by——

Mr. DANIELSON. It is illegal; let's not waste time on that. I will stipulate that is illegal.

Dr. CRAIN. In case it wouldn't be, it is improper at least.

Mr. DANIELSON. We are in Wonderland with Alice; what is improper—beyond unconstitutional which is verboten, illegal is verboten. Now, what is improper?

Dr. CRAIN. Anything that violates a person's privacy or civil rights or, even if it is unconstitutional, it substantially violates their rights—and I think that is improper.

Mr. DANIELSON. That would be unconstitutional; anything that is unconstitutional is ipso facto illegal.

Dr. CRAIN. There is no difference of opinion as to whether it is illegal or not.

Mr. DANIELSON. What you are really saying is, some things you personally find distasteful, repugnant to your own standards of propriety and, of course, you disapprove of those?

Dr. CRAIN. Yes; but I wouldn't try to prevent an agency from doing them simply on a matter of personal repulsion if I still thought it was OK for someone else to do it.

Mr. DANIELSON. I think we are in agreement that in the standard of impropriety we are in a real thicket because what is proper to one might not be to someone else, we are in trouble in that.

Dr. CRAIN. Exactly.

Mr. DANIELSON. In the background material that came with your statement you made reference that you used dossiers. Will you give me a definition of the difference between a dossier and a file?

Dr. CRAIN. All files are not dossiers, but I guess, all dossiers are files.

Mr. DANIELSON. It is not a file or vice versa if it relates to a person?

Dr. CRAIN. If it is a person, I suppose it would be called a dossier.

Mr. DANIELSON. In other words, if it is a file that you like it is a file, and if it is a file you don't like it is a dossier; is that pretty much it?

Dr. CRAIN. I guess it has a loaded connotation.

Mr. DANIELSON. You have a doctor's degree and are able to follow my questions. I feel strongly that you are ambivalent in your testimony on whether or not the United States should have a foreign or international intelligence operation.

In your formal statement, I believe it was in response to the chairman's questions, you conceded that in the real world in which we live it may be necessary to gather intelligence which you said was the same as information, concerning our enemies or potential enemies, or our potential friends.

That sounds like you do believe there should be an intelligence-gathering agency. On the other hand you came up with a comment to the effect that you thought perhaps all of these covert operations could be abandoned because we can get the information out of the library.

In the real world, should we have a foreign intelligence operation?

Dr. CRAIN. I think we should and I think we did, before we had a clandestine operation. The CIA used to operate like that.

Mr. DANIELSON. And now you are using the term with a special meaning to it?

Dr. CRAIN. Or covert, pardon me.

Mr. DANIELSON. Are not words really inadequate sometimes?

Dr. CRAIN. Exactly.

Mr. DANIELSON. I suppose since you have left the CIA 15½ years ago you have found the severance was probably complete, your flow of information was de minimus after that date?

Dr. CRAIN. Yes.

Mr. DANIELSON. So, you really don't know what was going on during the last 15 years except what you picked up from public sources of information?

Dr. CRAIN. Yes; although I think I am able to read between the lines. I think probably I know more than the "man in the street" about what has happened since then.

Mr. DANIELSON. Quite possibly, yes. Do you suppose that some brother and sister nations like the Soviet Union, et cetera, conduct any kind of an intelligence operation within our shorelines?

Dr. CRAIN. I assume they do. At one time I knew that they did.

Mr. DANIELSON. I assume you are right. I tend to agree with you there. Do you suppose that the Soviet Union and others similarly situated, perhaps, use our college newspapers, business magazines, and the like as vehicles for the transmission of messages?

Dr. CRAIN. I assume so, and if they don't they are foolish for not doing so; and we would be foolish if we didn't do the same.

Mr. KASTENMEIER. The gentlemen from California, Mr. Wiggins.

Mr. WIGGINS. I think we have pending, the question of whether the letter should be made a part of our records, more or less under a reservation on that question. I would like to explore more fully the consent of the sender that has been obtained.

Did you say this letter has previously been published?

Dr. CRAIN. It has been photographed and its contents published, whether in a pictorial form, I am not certain; I haven't seen it myself.

Mr. WIGGINS. In a newspaper?

Dr. CRAIN. More than one newspaper, at least two newspaper articles that I know of were written about the letter with following extensive interviews with the sender himself.

Mr. WIGGINS. You talked with him?

Dr. CRAIN. Yes, several times.

Mr. WIGGINS. Are you representing to us that the sender has no objection to including this letter as a part of our record?

Dr. CRAIN. I asked him at one time. First of all, when I first talked about the letter I refused to divulge who the sender was until I could talk to him. At the time he wrote the letter he was a student at Amherst. When I contacted him I asked him if he had any objection to my using his name, any objection to my using the letter; this was on the telephone. He said, none whatever.

Mr. WIGGINS. When did you obtain that consent?

Dr. CRAIN. It was sometime in January.

Mr. WIGGINS. This year?

Dr. CRAIN. Yes.

Mr. WIGGINS. And was the letter also published in substance this year?

Dr. CRAIN. Yes.

Mr. WIGGINS. Have you revealed its contents to any law enforcement officer or agency?

Dr. CRAIN. Not that I know of and I haven't attempted not to. If anybody wants to look at it, it is there.

Mr. WIGGINS. I have no objection to the request of the gentleman from California, Mr. Danielson.

Mr. DANIELSON. I withdraw my reserved objection.

Mr. KASTENMEIER. The Chair notes that there is no objection to the receipt and introduction of the letter as an exhibit.

[The document referred to follows:]

NOVEMBER 16, 1958.

Mr. V. SHEVCHENKO,
Student Council, Committee of Youth Organizations,
Moscow, USSR.

DEAR MR. SHEVCHENKO: I was most pleased to receive your recent letter concerning the proposed exchange of university newspapers. I was also interested to learn of the interest shown by the editors of Moscow State Universiyt publication and am waiting eagerly to receive communication from them.

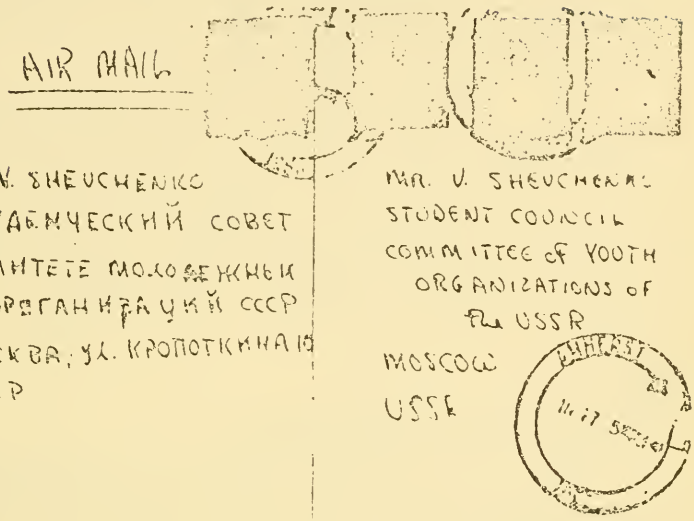
It is expected that the issue of the Amherst Student to which you refer will be ready for distribution in late December or early January. We are presently planning to ship 1000 copies of this issue for your use and distribution. I trust that it will be satisfactory to mail these copies to the address stated in your last letter to me.

With respect to the possibility of securing material for publication in this country, I have had several thoughts. For our purposes, I believe it would be desirable to establish a personal relationship with one or two students who would be able to contribute to the paper on a fairly regular basis. In the first article, such a student could perhaps briefly describe his background and interests. After such initial acquaintance, I feel his comments on problems of a more general nature, such as the recent conflict near Taiwan, would be more meaningful to his college audience.

We are of course also interested in other articles which would be written in a more impersonal fashion. I look forward to hearing your views on this matter, particularly as regards the mailing of the proposed issue of the Amherst Student.

Respectfully yours,

PAUL M. DODYK.


AIR MAIL
MR. V. SHEVCHENKO
СТУДЕНЧЕСКИЙ СОВЕТ
КОМИТЕТЕ МОЛОДЕЖНЫХ
ОРГАНИЗАЦИЙ СССР
МОСКВА, УЛ. КРОПОТКИНСКАЯ
СССР
MR. V. SHEVCHENKO
STUDENT COUNCIL
COMMITTEE OF YOUTH
ORGANIZATIONS OF
THE USSR
MOSCOW
USSR
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Mr. KASTENMEIER. The gentleman from New York, Mr. Badillo.

Mr. BADILLO. Who was the highest official in the CIA aware of the mail surveillance program, to your knowledge?

Dr. CRAIN. Well, after I told him, it was Richard Bissell, that I know of. The only person other than the Director himself and I don't know whether he was aware of it; I tended to doubt it.

Mr. BADILLO. I am trying to ascertain whether political decisions were being made by lower-level people who might embarrass the Agency and the Government. When you said that you were assigned to Staff D and that gave you a higher ranking and it was there that you were briefed, is that a special, secret unit?

Dr. CRAIN. I am also curious to know who Staff D really was. We were not told and we were discouraged from attempting to find out because, apparently, we were the repositors of a number of clearances. They had other things in their pocket that we didn't know about. Some of us didn't know that much and I can't really describe that to you.

The rules within the Agency, again, precluded this. Staff D was not a higher authority, it just was another clearance that they granted; we had a number of clearances, again, on the "need to know" basis that had nothing to do with secret or confidential or other classifications.

Mr. BADILLO. What evidence did you have that it was approved at a very high level?

Dr. CRAIN. Absolutely no evidence.

Mr. BADILLO. It was just an idea you had?

Dr. CRAIN. I have often speculated that it was a management arrangement. If it was with the three agencies, it could have been three people at corresponding levels at the Post Office, the FBI, and the CIA who could have gotten together and cooked up this scheme, if you will, without the upper echelons of the agencies involved; it is quite conceivable.

Mr. BADILLO. And the nature of the Agency is such that, as an agent, you didn't know?

Dr. CRAIN. And I wasn't supposed to know, legally.

Mr. BADILLO. That was the structure of this?

Dr. CRAIN. Right. That is one of the consequences of covert operation.

Mr. BADILLO. I mean, you get an assignment at a lower level, things like opening the mail, and then you find out that the people in Washington don't know about it at all?

Dr. CRAIN. Exactly; but I assumed at the time it was laid on at the highest level, but I don't have evidence of that. The more I looked and read and heard others talk about it, it doesn't seem it could have been laid on at the higher level; but, I don't know.

Mr. BADILLO. Were you involved with foreign nationals at all in the activities of the Agency?

Dr. CRAIN. Yes; not very often, but occasionally; I worked with some contract agents.

Mr. BADILLO. What is that?

Dr. CRAIN. A contract agent is a person who is under contract to the CIA to do certain things for them.

Mr. BADILLO. Is that a voluntary contractor?

Dr. CRAIN. Yes; it is for money. He does things just like a private business contractor.

Mr. BADILLO. Were they all foreign nationals?

Dr. CRAIN. All of them I had anything to do with were foreign nationals, that I recall, yes. I may have had some dealings with Americans but I can't recall at the moment.

Mr. BADILLO. What did you do with them?

Dr. CRAIN. Mostly they were hired, as it were, contracted to do specific research for us. They had language skills in most cases or particular knowledge, to cover with language skills. They were even able to do things our own staff couldn't do. We, at our research branch, had other kinds of contractors doing other things, but I had no contact with them.

Mr. BADILLO. Was it a voluntary relationship with the foreign nationals or did the CIA use their foreign status as kind of a club?

Dr. CRAIN. It was voluntary in the sense that it was technically for the money involved. There were other motivations, too, I can see, because some of them felt their immigration status would be enhanced. I remember considering at the time what a control we had over these people's lives. We were in a position to expel them from the country if they wouldn't help, or to enhance their immigration status if they did.

Mr. BADILLO. Were any other aids used to coerce these people?

Dr. CRAIN. Not that I know of, but what a tremendous potential. Again, I have no knowledge, but I did hear something about it.

Mr. KASTENMEIER. The gentleman from New York, Mr. Pattison.

Mr. PATTISON. Dr. Crain, just so those in the room from the press and the rest of the people in the room, including the CIA agents present have the benefit of the letter, which we have all seen, would you summarize the contents of the letter, please?

Dr. CRAIN. Well, yes.

Mr. PATTISON. Very briefly.

Dr. CRAIN. Yes. It was a letter from a student at Amherst College to a student at the University of Moscow, as I recall. Apparently it wasn't the first correspondence between the two of them and it was sort of firming up an exchange arrangement of college newspapers.

This American student was going to send 1,000 copies of whatever they called the paper—the Amherst Student, I guess—to Moscow. The implication was that he would reciprocate. Also the request was made in the letter to send along names of one or two students who might be interested in corresponding with Amherst students, American students.

Mr. PATTISON. Maybe to contribute to a column of the Amherst publication?

Dr. CRAIN. Conceivably, I don't remember that.

Mr. PATTISON. How would you characterize the contents of the letter, as perfectly normal or harmless?

Dr. CRAIN. An attempt at a cultural exchange.

Mr. PATTISON. No implications of spying?

Dr. CRAIN. No; I wouldn't think so, not at all.

Mr. PATTISON. Thank you.

Mr. KASTENMEIER. I have just one or two questions. If you know, in terms of the mail-opening procedure, was this selective or random;

that is to say, I take it there must have been tens of thousands of pieces of mail. Presumably, not all were opened. Do you know on what basis a selection was made?

Dr. CRAIN. In those days I don't know that there were tens of thousands of pieces. I think there was relatively little correspondence, relatively little physical access to the U.S.S.R.

Lots of people we talked to for intelligence purposes had relatives behind the Iron Curtain and didn't know where they were, how to get a hold of them. Many simply were afraid to even correspond, afraid that they would be the target of the KVD, or whatever the agency was that was charged with internal security in the U.S.S.R. Whether or not that was true, they believed it and it had a hampering effect on the correspondence. I believe we got it all.

Mr. KASTENMEIER. As a corollary, the telephone company conducted certain random recordings but they were entirely random. In this case, the question is the invasion of the privacy of the sender or receivers of first-class mail. Was this randomly done or was it done selectively, was there a list of people who might have been of special interest to those agents who were rummaging through the mail? In other words, was it a selective investigation or was it random?

Dr. CRAIN. It was total. We were told that all the mail going to the U.S.S.R., particularly—that was what we were particularly interested in—was opened. Now, again, I didn't see that take place but we were told that. We had hundreds and hundreds of them, I know that.

Mr. KASTENMEIER. Presumably not all of them were copied such as the one you made available to this committee?

Dr. CRAIN. Yes; all of them were copied and the originals sent on. They were momentarily delayed or opened and reproduced. We only got the machine copies, as it were.

Mr. KASTENMEIER. My last question is, you have recommended to this committee that a ombudsman procedure be instituted, presumably the Congress might create it itself, or perhaps the executive branch might establish it. Do you have any other potential legislative recommendations for us on the basis of your experience and your views on this matter?

Dr. CRAIN. At this point I think I might very well recommend legislation that would limit intelligence activities of the U.S. Government for the collection and evaluation and research functions, as far as a means of intelligence collection goes, aside from utilizing the open sources which I mentioned which are available, although some are a bit hard to get.

I recommend that we also use the technology which has been developed for intelligence gathering. The satellites that are in orbit, for instance, have highly sophisticated photographic and electronic capability. The U–2 was kind of a Model-T of that type of technology. You have the monitoring of electronic emissions, radio, radar, dilatometry, and so forth. This is really in the category of open information.

It is out in the air, why not pick it up and computerize it and so on. It is a tremendous source of information. My experience was, even in those days, that covert intelligence gathering got precious little of value, got almost nothing for the millions of dollars spent and the countless hours and the amount of energy that was spent on it.

Mr. PATTISON. I have one other question, very quickly.

Mr. KASTENMEIER. I recognize the gentleman from New York, Mr. Pattison.

Mr. PATTISON. As a former CIA agent, would you tell me if any self-respecting spy ever mailed something from the country he was spying on to the country he was spying for in the reliance that it wasn't going to be seen in some way; is it likely that a spy would put it into writing and send it through the ordinary mail?

Dr. CRAIN. Not if he didn't want it detected; he might do it for that purpose.

Mr. PATTISON. To throw you off the track that he was sending some information to some other country?

Dr. CRAIN. Particularly because it wouldn't be opened in England or the United States and some other countries that are not behind the Iron Curtain. If he sent it to an Iron Curtain country probably, you would assume it would be opened somehow.

Mr. KASTENMEIER. The gentleman from California, Mr. Danielson.

Mr. DANIELSON. I note that when you went to work for the CIA in August of 1951, you were employed in research supervision in the Operational Intelligence Research Branch of the CIA.

Dr. CRANE. Yes.

Mr. DANIELSON. When you resigned 8 years later you were Deputy Chief of the Operational Intelligence Research Branch; the same branch?

Dr. CRAIN. Yes.

Mr. DANIELSON. Did you ever work in any other branch?

Dr. CRAIN. No; I did not.

Mr. DANIELSON. Am I correct in my belief that since you spent your entire 8 years within one branch, the Operational Intelligence Research Branch, that you may have not known everything that went on in the CIA during those years?

Dr. CRAIN. You can certainly assume that, assuming that everyone in the CIA didn't know.

Mr. DANIELSON. Am I also correct, safe in assuming, you don't know all of the information that the CIA gathered from whatever source during those 8 years?

Dr. CRAIN. I am sure.

Mr. DANIELSON. Was it not the policy, and I am speaking of the total picture, to compartmentalize activities so the dissemination of knowledge within the organization was on a need-to-know basis?

Dr. CRAIN. Yes.

Mr. DANIELSON. Then on what basis is the basis for your statement that you were satisfied, based on your experience, that nothing of value was obtained with covert operations?

Dr. CRAIN. Well, because I was in the covert area. As far as the information from covert operations against the U.S.S.R., I was qualified as to the U.S.S.R. I remember that was the only, practically the only denied area. China was coming up, as it were, but it didn't pose the most immediate threat. We didn't need to know as much as we needed to know about the U.S.S.R. at the time.

I believe I was aware of the covertly obtained information or almost all of it. I was in a particularly advantageous position in that regard

because the function of our branch was to participate in the planning and the support of these clandestine or cover operations. We were necessarily quite close to them, including knowing what happened to them.

What information that was gotten, if any, from them was precious little.

Mr. DANIELSON. You show an ambivalence in answering my two questions. A moment ago you said most certainly I was correct, you didn't know everything going on and you didn't know all the information that was gathered. To the other, you said you were aware of almost all of it.

Dr. CRAIN. I didn't know a lot of things within the Agency but I indicated that I did know virtually of what was going on in the covert area against the U.S.S.R. Now, I might not have, but that is my belief.

For example, there were other areas of operation which I was not privy to, lots of details of the U–2 operation I wasn't privy to, and so on. But a good deal of the Agency is quite open.

Mr. DANIELSON. What you are saying, isn't it really the truth that you are very familiar with the information that came to your attention, but you are not familiar with the information that didn't come to your attention?

Dr. CRAIN. Yes.

Mr. DANIELSON. I think you understand, and I trust you understand me.

Thank you very much.

Mr. KASTENMEIER. I don't know that other people do.

Mr. DANIELSON. That is your opinion, Mr. Chairman.

Mr. KASTENMEIER. Thank you for your contribution.

Accordingly, the subcommittee stands adjourned until 10 a.m. on Tuesday next.

[Whereupon, at 11:52 a.m., the hearing was adjourned, to reconvene at 10 a.m. on Thursday, May 22, 1975.]

SURVEILLANCE

THURSDAY, MAY 22, 1975

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:10 a.m., in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier [chairman of the subcommittee] presiding.

Present: Representatives Kastenmeier, Drinan, Badillo, Pattison, and Railsback.

Also present: Bruce A. Lehman, counsel; Timothy A. Boggs, professional staff member; and Thomas E. Mooney, associate counsel.

Mr. KASTENMEIER. The subcommittee will come to order.

The subcommittee is meeting today for another in its ongoing series on wiretapping, electronic surveillance, and other forms of privacy invasion.

In this series of hearings, we have explored the monitoring activities of the Bell System and the use of mail covers and mail openings by the U.S. Postal Service and the Central Intelligence Agency. We have heard testimony on the range of surveillance techniques utilized by the FBI, the Secret Service, and other Federal investigative agencies and on the purposes and effects of political surveillance.

This morning, we will focus on the illegal use of wiretapping by a major metropolitan police department and the response of Federal investigative agencies to that illegal activity.

The question of the adequacy of FBI and Justice Department enforcement of the criminal provisions of title III of the 1968 Omnibus Crime Control and Safe Streets Act is especially relevant to the oversight jurisdiction of our subcommittee. We are the body within the House of Representatives directly charged with monitoring Justice Department enforcement of this statute.

In an effort to explore the extent and scope of illegal wiretapping in Houston, the subcommittee's staff traveled to Texas and interviewed a number of individuals with knowledge of illegal wiretapping. The picture which emerged was one of widespread, systematic use of electronic eavesdropping by local police with little serious effort by the Federal Bureau of Investigation to investigate and enforce the law. I should note that enforcement in Texas is a purely Federal function since Texas has no State wiretap law. In fact, the only effective investigative activity to date appears to have been carried out by the Internal Revenue Service incidental to a tax investigation.

In addition to these interviews, the staff obtained transcripts of a series of recorded conversations between Chief Lynn, our first witness today, and local police officers, which indicated a high degree of cooperation on the part of Bell Telephone Co. employees in illegal wiretapping operations.

Although the witnesses who will appear today have first-hand knowledge only of the use of illegal wiretapping and Federal enforcement efforts in Texas, I believe their experience will be helpful in understanding the scope of the problem, which unfortunatly is national.

I am pleased to call as our first witness this morning a gentleman that we have mandated to be present for this purpose. Our first witness is Carrol M. Lynn, chief of police of the city of Houston, Tex., the Nation's fifth largest city.

Chief Lynn, if you will please raise your right hand. Do you swear that what you are about to tell the subcommittee is the whole truth and nothing but the truth?

Mr. LYNN. I do.

Mr. KASTENMEIER. Thank you. You may sit down.

Chief Lynn, I understand you have a prepared statement. The committee would appreciate your proceeding from your prepared statement, sir.

TESTIMONY OF CARROL M. LYNN, CHIEF OF POLICE, HOUSTON, TEX.

Mr. LYNN. Thank you, Mr. Chairman.

My name is Carrol M. Lynn, I have been the chief of police of Houston, Tex., since January 9, 1974. Prior to that time, I served as director of the Houston Police Training Academy. The Houston Police Department is one of the largest in the country with over 2,500 officers.

During the summer of 1973, two Houston narcotics division officers were indicted and convicted in State court for violations of narcotics laws. The allegations arising out of the investigation of these two officers included charges of illegal wiretapping. These officers' convictions were the first public sign that all was not well in the Houston Police Department.

In late 1973, Houston elected a new mayor, Fred Hofheinz, who selected me to serve as his chief of police.

Soon after taking office, I became concerned that my own home and office telephones might be tapped. My suspicions were aroused when certain information discussed over my private telephone was disclosed publicly. A check by a private consultant confirmed that my telephones may have been tapped. Following the consultant's inspection, I notified the FBI Special Agent in Charge in Houston and requested that he initiate an investigation of what I considered a very serious violation of my privacy and of Federal law.

If I might describe that meeting?

Mr. KASTENMEIER. Yes, Chief Lynn.

Mr. LYNN. I went to him and asked if my lines might be checked. I told him of my suspicions, that things had been leaked over my telephone. I spent several hours with this gentleman.

He did everything that was possible to talk me out of making a complaint by throwing every roadblock that he could in front of me.

Finally, after I saw that it was almost hopeless, I became somewhat angry and started to leave. I did advise him that to be sure to make note that I had asked him to make this check for me, as it was a matter of Federal concern, not of my office. At this time, when I started to leave, he did stop me and said that he would check out my telephones, he would check into it.

I had suggested to him that he might check with the phone company, that it was very possible from what my consultant had told me that the lines might be checked directly or might be directed in the telephone company. To this he became very nervous and said that that was an absolute impossibility, that they simply could not go to the telephone company.

About 10 days after I made this request, a full 10 days, and which I am sure you well know, it takes only about 15 minutes to tap a line, two FBI agents, along with a gentleman from the telephone company, arrived at my office at the Houston Police Department. They asked me if this was the phone that I thought might be tapped. I told them that I thought that the private line on this phone was probably tapped or had been tapped 10 days ago.

They picked up the telephone. It is a regular telephone. They looked at it, and they said, you know these telephones are very hard to open up and look inside. They said, do you have a screwdriver. I said, no, sir. I usually do not keep a screwdriver in my office. It is not part of my working gear, but I will be glad to call the maintenance department and see if we can get one. And one of them said, wait a minute, I believe I might have one in my car.

At that point, I realized that the entire thing was a joke as far as any aid that I was going to receive from that source.

Mr. Kastenmeier. On or about what date was this, Chief Lynn?

Mr. Lynn. I do not have the exact date, sir. It would have been, I would say, early in 1974.

Shortly after that, I was notified by the agent in charge that my telephones were not tapped.

In addition to suspicions concerning my telephone, another incident occurred which increased my concern about illegal wiretapping. Nine Houston police officers were indicted on Federal charges which included IRS and wiretapping violations. To date, these men have not yet been tried, although the indictments were handed down nearly 1½ years ago. These indictments arose out of an Internal Revenue Service investigation centered on an alleged Houston narcotics dealer, not as a result of an FBI investigation, even though the FBI is the agency charged with the enforcement of Federal antiwiretap laws.

Finally, I determined to initiate a more thorough investigation of the matter myself. When it became known that such an investigation might be initiated, a former Intelligence Division supervisor who had left the Department paid a call on me and suggested that I watch what I did and said about the officers who had been indicted because I could get into trouble with a number of powerful people in Houston. He also stated that if certain officers started talking, they could bury a number of people. A few days later I again met with this individual in my

office. However, this time I had arranged to secretly tape-record the meeting and to find out more about what the individual knew about illegal wiretapping.

He admitted that he was aware of past wiretapping by the Department. When I asked him if the wiretapping was controlled, he stated that his part of it "damned sure" was, but he didn't think wiretapping by the Narcotics Division was. He stated that he had discussed his concerns about the Narcotics Division with former Chief Herman Short.

Mr. KASTENMEIER. Chief Lynn, when you say you asked him if his wiretapping was controlled, what do you mean by the word "controlled"?

Mr. LYNN. I was at that time, I believe, sir, I was referring to the techniques used where they climb the poles in front of people's houses, or how were they doing it, and he did point out to me that it was being done very sophisticatedly and with very little danger to the officers. In boasting about his own Intelligence Division's use of wiretapping, he stated, "These people were good at it, and we never had no problems whatsoever. But then, as time went on, then our people had the technical know-how."

When I asked how they got information about what line to tap, he stated that no one in the division other than he was able to obtain the information so far as he knew, and obtained it from the phone company. He did not name his source within the company, however.

When I asked if others, outside the division, had known of the illegal wiretapping, he stated:

"Well, there's two FBI's right over there now that was with us on one deal out here." When I asked if those FBI agents weren't upset by the illegal wiretapping, he said: "Didn't do a damned thing about it. Sat there and listened just like everybody else."

Following my recorded conversation with the former Intelligence Division supervisor, I called in three members of the Department's Communications Division to learn what they knew of the illegal tapping. Two were interviewed separately, then all three together. The interviews with these three individuals revealed that use of wiretapping by the Houston Police Department had been going on since 1967 or 1968 and that it had been used by at least four divisions: narcotics, intelligence, vice, and homicide. One of the men estimated that at least 40 to 50 officers were involved.

The wiretapping equipment was manufactured by the Communications Division. Its use was controlled by means of a logbook which individuals checking out equipment had to sign. However, by the time of my interviews, the logbook and the equipment had been destroyed. When I asked if other agencies were involved in the use of the equipment, I was told that on one occasion the Federal Bureau of Narcotics and Dangerous Drugs had asked for some assistance. The communications officer stated:

"The Federal Bureau of Narcotics and Dangerous Drugs actually called us from San Antonio, and they wanted us to do a schemats—schematic diagram—of our equipment. Our telephone was working far superior to anything they had, and I called Short—former chief—myself and said, "Do we cooperate?" He said, "Hell, no."

In addition, I was told equipment was supplied to police in the nearby community of Pasadena.

At one point in the interview with one of the Communications Division officers, I was told that three or four wiretap devices had been picked up by Bell Telephone employees in the course of maintenance. These devices were returned by Bell to the police department. One device was given back to Bell after removal of information connecting it with the police department, including fingerprints. Another high-ranking officer told me that an illegal police device had been returned to him personally by a top security officer of Southwestern Bell on one occasion.

Further, I asked one communications officer if the wiretap equipment had ever been used politically. He stated: "I do think it was used politically. I think, because some of the officers assigned to city hall came up and checked out what we call body mikes at one time or another during the life of an election year."

In addition to the interviews I personally conducted and recorded, interviews with the two convicted officers were conducted by a private consultant at my request. The transcripts of these interviews reveal the following:

Illegal wiretap evidence was often used in the department for the necessary probable cause to obtain a search warrant, especially in narcotics cases. The warrant application would simply disguise the use of wiretapping by stating that the information came from an unidentified informant. In fact, on some occasions, department funds which were reserved for paying informants were actually withdrawn from the department's account to make it look like an informant had been paid for the information.

These officers stated that Federal Bureau of Narcotics agents and Texas Department of Public Safety officers were, on occasion, involved with Houston Police Department wiretapping. They described one particular narcotics case in which Federal agents were involved and stated that one agent warned, "We should not be spreading it out too much that they were involved." The officers stated that Federal narcotics agents "were fully aware of wiretaps being conducted by the city."

Further, I was told by one Houston police officer that advance information about a possible Federal crackdown on wiretapping was readily passed on to the Houston police. According to this officer, the former chief of the Narcotics Division announced one day at a division staff meeting that a team of FBI investigators would be coming to town to "bust" wiretapping. He said that he had had the information passed to him from the chief's office and that wiretapping would be stopped for a while.

Finally, in addition to the interviews I have already described, I conducted one other secretly recorded conversation with the chief of security for Southwestern Bell in Houston. Although he personally denied giving illegal wiretap information to law enforcement officers since 1966, he admitted to me that he was aware that it was being done and that it was his policy merely to "look the other way."

Mr. Chairman and members of the subcommittee, in concluding my testimony, I would like to observe that in spite of all I have told you there have not been any indictments for illegal wiretapping in Houston other than those returned at the beginning of my term of

office which spurred my initial investigation. It is particularly disturbing to me that, to date, only a few patrolmen, at the bottom of the bureaucratic ladder, have had to face prosecution, while those above them who were equally involved in illegal wiretapping, including possibly Federal agents and telephone company personnel, continue to go free.

This concludes my statement.

Mr. KASTENMEIER. Thank you, Chief Lynn.

Why, in your view, was the local Federal Bureau of Investigation in Houston, unable to successfully uncover illegal wiretapping when you were able to come up with this evidence in such a relatively short period of time?

How do you account for that?

Mr. LYNN. It would only be one of two things. Either they were totally aware of what was going on and approved of it, or they were totally incompetent.

Mr. KASTENMEIER. Well, I do not think the latter is the case.

Would you describe more fully the telephone company's employee's role in these activities, other than the interview with the one executive you talked about?

Mr. LYNN. From the information I have gathered, it seems that one of the favorite things that a law enforcement officer would do would be to find a telephone company employee in the right position that had committed a violation of the law and instead of going ahead and putting him away or having him charged, a deal would be made where he would furnish information to the Department about where to place the wiretaps.

Mr. KASTENMEIER. Now, obviously the Houston Police Department no longer uses wiretapping, and I assume you do not even bother to seek warrants to authorize local wiretaps at this point?

Mr. LYNN. No, sir. Actually, as you well know, I believe it takes an action from the Federal agency to get a warrant and legally it is almost an impossibility for us to do this. This was one of the first orders I gave them I became chief of police, that anyone caught wiretapping would be personally taken by me to the U.S. attorney.

Mr. KASTENMEIER. Has the fact that you no longer wiretap impeded police work, police investigation, and conviction in Houston?

Mr. LYNN. No, sir, it has not. As a matter of fact, comparing 1973 and 1974, we made so many more cases in 1974 by using the old, traditional methods of hard work, investigation, that we have had to ask for more chemists to analyze our cases, and we have gone up from about 400 cases a month to 750 cases a month that we are making on narcotics alone. And the quality of the cases have gone up. Rather than it being a joint of marihuana, we are talking about heroin cases that we are making, hard drug cases, good cases.

Mr. KASTENMEIER. Now, I assume that there must have been considerable pressure on the average patrolman. Would you describe the effect of pressure in terms of making cases that may have previously existed?

Mr. LYNN. I can recall one incident very clearly where an officer told me that his supervisor handed him a list of names and simply told him, "I want these people placed in the penitentiary." He asked his

supervisor, "What have they done?" and in return, he said, "If you don't know how to put these people in the penitentiary, I will put you back on three-wheelers," which is a demotion, at least in status.

And I asked him, "Well, what did you do," and he said, "Well, first I tapped the telephones to see if any of them were doing anything wrong that I could make a case on." And he said some of them weren't, and I asked him what he did. And then he said, "Well, we always carried narcotics in our pocket"—and that was a routine thing with a narcotics officers at that time, they carried drugs—and he said that, "If I couldn't make it one way, I simply made it another."

Mr. KASTENMEIER. Do you understand that this was a unique case to this individual patrolman, or is this a common case at that time?

Mr. LYNN. I think it was far too common, sir.

Mr. KASTENMEIER. Chief Lynn, other than that which you have already described, has there been any outside pressure brought upon you by virtue of your disclosure of wiretapping, or a request of you or mandate to you to appear as a witness before this subcommittee today?

Mr. LYNN. Yes, sir, there has been a considerable amount.

Mr. KASTENMEIER. Would you explain that to the committee?

Mr. LYNN. Well, it is hard to even think about all of it, but I have had such things as people that are possibly facing indictment in front of the Federal grand jury that are well-known wiretappers, have gone to my bank, using false information to get my accounts. Although there is nothing that startling in them, I kind of have a feeling about my private papers, like I do about my telephones, and I just think that there should be some privacy there, unless the court orders them to be brought in.

I have had—several of my personal friends have been followed. They have been called almost on a daily basis, telling them that they had better get away from me, because I am going to fall and they will fall with me. Now, this is very difficult on friendship and on people that you have known for many years and trusted people.

I have had many people in the department who have been called, people in high rank and told the chief is after you, you had better be real careful in what you do, things to totally disrupt the operation.

I think the last thing that has happened was earlier in 1974 I put some information over my telephone. I made up a story that I wanted to see just how long it would take to get it back, because other information had been leaked. I got with a friend of mine, who I totally trust. We neither one discussed this story with anyone, not even our wives, and the story was simply that I owned an interest in a company in Houston and was going to sell it for $100,000—a nice round figure. And as a matter of fact, the story went that I actually was going to take the money.

We talked for about 15 minutes, after we had totally made up what we were going to say on the telephone, for about 15 minutes we talked. Two days later this story appeared in a Houston newspaper. I do believe this, that the paper is a very fine newspaper. The writer is no longer with them. And he was simply being fed information about it.

But, surprisingly enough, this same information is at this time being given to a State grand jury in Houston, Tex. And for the past 6 weeks,

I have received a telephone call at least daily that I have been indicted, or will be indicted, to which I always ask: "What for?" and the reply is, well, it really makes no difference, because an indictment will ruin you. And I think you have to agree that if I had been indicted I would probably not have been asked to be here this morning. It does take away one's credibility, even to be indicted, even though I would not worry about the petty jury, because I have not violated any laws.

So, these are some of the types of pressure that I have felt.

Mr. KASTENMEIER. Well, notwithstanding the fact that you did not want to come, or you did not ask to come, this committee mandated your appearance here this morning, but nonetheless I want you to know that we appreciate your straightforwardness and what you have communicated to us. I think you have discharged an obligation not only to the people of the city of Houston, but to the entire country by your appearance here this morning.

I would like to yield to my friend, the gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. Chief, what have you done with the evidence that you developed?

Mr. LYNN. I have turned all of it over to the Office of the U.S. Attorney.

Mr. RAILSBACK. Does that include the recorded conversations that you recorded?

Mr. LYNN. Yes, sir. Everything.

Mr. RAILSBACK. How many interviews have you had with the Justice Department or people representing them?

Mr. LYNN. I do not recall exactly. Probably in person, maybe five. I talked with them a few times over the telephone.

Mr. RAILSBACK. Has that been recent or over a period of time? Or when?

Mr. LYNN. In the beginning, when I first started talking to them, we have more conversations. There have not been too many recently.

Mr. RAILSBACK. How did you learn that the logs had been destroyed. You mentioned on page 4 that the logs had been destroyed. How did you find that out?

Mr. LYNN. I learned this from two different people. The one said he was 95 percent sure, and the other said that he could assure me that the logs along with the other equipment, had been burnt and describing the other equipment, said it had been busted up with a sledge hammer, buried, and some of it thrown in the bayou.

Mr. RAILSBACK. Have extensive interviews yet been conducted of some of these other people whose names you did divulge to the Department of Justice?

Mr. LYNN. It is my understanding that they have had several interviews with a number of people.

Mr. RAILSBACK. So there has been an investigation, either begun or is it still going on? Do you know?

Mr. LYNN. As far as I know, it still is.

Mr. RAILSBACK. Have you actually acted as a complainant or what has been your role?

Mr. LYNN. Sir, my role was one that I simply wanted the Houston Police Department to get out of the business of violating the law

to make cases. I wanted us to have a clean police department and that was my total interest in this thing.

After I turned it over to the Justice Department, I stepped out of it.

Mr. RAILSBACK. Did you have names of the telephone company employees involved in it?

Mr. LYNN. There may have been some names turned over. I don't recall them at this time.

Mr. RAILSBACK. Thank you.

Mr. KASTENMEIER. The gentleman from Massachusetts, Mr. Drinan.

Mr. DRINAN. I want to thank you, Chief Lynn, for your appearance here, and I will defer most of my questioning until after we have heard from Mr. Farris, and I think we will be in a better position to understand everything.

But I have just two specific questions. Have the nine police officers who have been indicted been suspended from the force?

Mr. LYNN. Under the law, the Texas law, which officers operate under, I could not suspend them from the Department. I relieved them of duty with pay.

Mr. DRINAN. Which you have done?

Mr. LYNN. Yes, sir.

Mr. DRINAN. Chief, you say here once or twice in your testimony that you secretly wiretapped conversations, one of which was with the Chief of Security of the Bell System. Was that illegal?

Mr. LYNN. No, sir. That is totally legal. Before I entered into this investigation, I consulted with my attorney on what was the best way to preserve any type of information, and we researched or, well, he researched the entire laws on it and suggested that I do it in this manner.

Mr. DRINAN. Well, just one more point on that. How many times did you secretly tape conversations that you had with other individuals unbeknownst to them?

Mr. LYNN. I believe it was only six times.

Mr. DRINAN. All right. I would yield back now, and I want to thank you. And we will have further questioning at a later time.

Mr. KASTENMEIER. The gentleman from New York, Mr. Badillo.

Mr. BADILLO. Thank you, Mr. Chairman.

Chief, are you satisfied that there is no wiretapping going on now by the police department in your city?

Mr. LYNN. Well, I am satisfied that there is not any going on for criminal purposes.

Mr. BADILLO. I mean illegal wiretapping, of course.

Mr. LYNN. In the police department I am satisfied that there is no wiretapping, yes, sir.

Mr. BADILLO. Are you satisfied that there is no Federal agency that is conducting illegal wiretapping in Houston?

Mr. LYNN. On that, I would not really know. I could really only speak for my department there, as I really have not gone that deep into investigation of any Federal agency.

Mr. BADILLO. Aside from the visit you had by the special agent of the FBI, have you discussed this or been in communication with the FBI to determine whether they have been participating in any wiretapping?

Mr. LYNN. I have not asked them that specific question, no, sir. It really was out of my realm of jurisdiction, so I didn't ask them this question.

Mr. BADILLO. Aside from the statements that were made in your testimony, is there any evidence that you know of before you became the chief of any Federal involvement, particularly by the FBI in illegal wiretapping?

Mr. LYNN. To my own personal knowledge, I don't recall of it.

Mr. BADILLO. Well, when you found that the logs were destroyed, did you try to determine who destroyed them and on what authority?

Mr. LYNN. Yes, sir, I did.

Mr. BADILLO. And what did you find?

Mr. LYNN. I found that the person who was then the head of the criminal intelligence had supervised the destruction of all of the equipment.

Mr. BADILLO. Is that person still in the department?

Mr. LYNN. Yes, sir, he is.

Mr. BADILLO. Did you find out why this was done? Did you ask that person to come in and explain why this was done?

Mr. LYNN. I believe his statement was that when a new mayor came in that it was obvious that the heat was on, they would never be able to use the equipment again, and that they destroyed many things.

Mr. BADILLO. Well, have you taken any disciplinary action against that individual?

Mr. LYNN. Unfortunately, under State law, I cannot.

Mr. BADILLO. Why is that?

Mr. LYNN. If you do not take action within a period of 6 months, according to State law, you cannot take any action at all against a Houston police officer, unless he is indicted or found guilty.

Mr. BADILLO. One of the articles that appeared in the newspaper quotes you as saying wiretapping was so widespread that I would suggest that anyone in political life has probably been listened to. Could you describe more in detail what you mean by that?

Mr. LYNN. I am not totally sure I made that statement, but there has been a lot of statements that have been attributed to me that I didn't make. But, I would say that that is probably true.

Mr. BADILLO. Well, what you mean that almost anyone in political life has been listened to? Does that mean the mayor, the Congressman from the area?

Mr. LYNN. Oh, I think that the—that any person in a controversial position, which probably includes anyone in political life, I believe that they have been, in many instances, wiretapped on a fairly regular basis.

Mr. BADILLO. And who would be doing this wiretapping?

Mr. LYNN. Sometimes it would be people who would have a private interest. There are many people in the field of wiretapping who are not police officers. There are many private people who do this.

Mr. BADILLO. Well, do you think it was the police department that was doing the wiretapping of the mayor or the Congressman? Or was it the wiretapping where it was done, but the police with the FBI sitting and listening in, as you stated?

Mr. LYNN. On that particular statement, as I said, I don't recall making that particular statement, but I think that it really would

depend upon the Congressman, upon who the mayor was, upon who had the control, upon what was happening at the time. I would believe that if you had knowledge that you were transmitting over your telephone, that someone wanted bad enough, that it would not be too hard to obtain it.

Mr. BADILLO. Well, when this fellow came into your office and discussed wiretapping where he said it damn sure was controlled, and you have a long recorded discussion, did you ask him whether the wiretapping included wiretapping of political figures?

Mr. LYNN. On that particular man, I am—I don't recall if I asked him that question or not. I haven't reviewed those transcripts since I turned them over to the U.S. attorney's office. I don't recall.

Mr. BADILLO. Well, who has told you, and I don't mean the name, but who has told you that there was wiretapping of political figures?

Mr. LYNN. I have had people in the police department tell me, in their opinion, there was. I have had people on the outside, people who were themselves wiretappers, tell me that this was a fairly common practice.

Mr. BADILLO. And who did they say was doing it? Did they say it was being done by the police department?

Mr. LYNN. Sometimes; but sometimes it was being done by people in private industry and private life.

Mr. BADILLO. And sometimes it was done by the police?

Mr. LYNN. That was my information. That is what I was told.

Mr. BADILLO. Now, when you say that people have followed your friends in the last few days before you came before this committee, have you started an investigation to ascertain who is doing this?

Mr. LYNN. Well, it is a very difficult job to start an investigation on this, although we have——

Mr. BADILLO. Well, isn't that the normal thing for the police? I mean, I am worried that a chief of police suffers all of this. We, as individuals, might not be concerned, but when it happens to the chief of police and no action is taken, then the feeling of helplessness, I think, is a matter of major concern.

Mr. LYNN. I think when you are in any top office, as I am and you are, you are probably, in some areas, in a very weakened position. Any action I take that would appear to protect me would be probably blown clear out of proportion by some of the people that are in the media and some of the things you just have to, I think, learn to take and accept. Although, very quietly, in some people's spare time, we have been looking into some of this.

Mr. BADILLO. Have you asked the U.S. attorney to investigate the efforts that have been made to try to keep you from testifying?

Mr. LYNN. No, sir. I have not.

Mr. BADILLO. No further questions, at this time, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from New York, Mr. Pattison.

Mr. PATTISON. I have no questions at this time, Mr. Chairman.

Mr. KASTENMEIER. In which case, the committee thanks you for your testimony, Chief Lynn. And there may be further questions for you. But at this particular point, we will ask to come forward Mr. Anthony Farris, former U.S. attorney for the Southern District of Texas from the year 1969 to 1975.

Mr. Farris, may I ask you to raise your hand, sir. Do you swear that that which you are about to tell the committee is the whole truth and nothing but the truth?

Mr. FARRIS. I do.

Mr. KASTENMEIER. Thank you, sir. You may sit down, and you have a statement, Mr. Farris.

Mr. FARRIS. Yes, I do.

Mr. KASTENMEIER. And you may begin, Mr. Farris.

TESTIMONY OF ANTHONY J. P. FARRIS, FORMER U.S. ATTORNEY, SOUTHERN DISTRICT OF TEXAS

Mr. FARRIS. Thank you, Mr. Chairman.

My name is Anthony J. P. Farris, and I am an attorney with Farris, Pain and Horne in Houston. From February 14, 1969, to December 30, 1974, I served as U.S. attorney for the Southern District of Texas, with the principal office in Houston. The district is the eighth largest of the 94, and Houston is the fifth largest city in the country.

During my tenure, my office had the following successful prosecutorial record: 1969 through 1974, a 98.63 successful percentage for the 6 years; brought more successful civil and criminal pollution litigation (principally under the Refuse Act of 1899) than all my predecessors put together; increased the collection efforts of the office from a low of $455,303 to a high of $2,036,865 for a 6-year total of $7,944,427; remained in the top five in total narcotics prosecutions for 6 years and was first 1 year; more active civil rights cases than all my predecessors; and handled diverse and complicated civil cases successfully. All this in spite of a higher caseload per lawyer than all the seven U.S. attorneys offices, larger in size, than Houston. I also hired more minorities than all my predecessors put together.

I give you the above facts and figures, all being of record and all easy to check, because of the importance of your committee—also, I may not have another such opportunity. The above very successful record was put together with a staff that reached a peak of 32 lawyers, with at least 20 having no previous experience when they joined the office. Mr. Chairman, I long have resented hearing and reading remarks attributed to Federal judges from the district court to the Supreme Court level, to corporation lawyers in the ABA, and to Members of both Houses of Congress, questioning the ability of these fine young men and women. Many of these fine young lawyers, in every judicial district, consistently take the measure of some of the best criminal defense lawyers and some of the best big firm lawyers in the country. I might also add that most of the critics have never—repeat never—tried a criminal case on either side of the docket. Thank you for allowing me the time to get that off my chest.

I understand I am here to testify about allegations of illegal wiretapping by law enforcement authorities in Houston, Tex., about allegations of illegal wiretapping by Federal authorities in Houston, and about the degree of aggressiveness in investigating and prosecuting these alleged violations.

First, tax evasion investigations in these matters were commenced by the IRS in 1971 and culminated in the conviction of Sebastian

Mirelez, an alleged bigtime heroin dealer in Houston. Further investigation resulted in the conviction of a former Houston Police Department officer for perjury. Continuing investigation by the IRS resulted in the indictments of nine Houston Police Department officers on charges ranging from income tax evasion, sale of heroin, and civil rights violations, to illegal wiretapping. This investigation started in December 1972. The indictments were returned May 31, 1974. This case is now pending. Obviously, I am limited on what I can say.

The very thorough investigation by the IRS led to the conclusion that other HPD officers could have been involved in illegal wiretapping. I asked the IRS Criminal Intelligence agents to continue the already ongoing probe as to the wiretapping. The agents declined, informing me that Commissioner Alexander would permit them to conduct only title 26 investigations. And so, although they were already well acquainted with the case, they could not go on. We discussed the matter, orally, with the FBI in Houston, and finally, in April 1974, asked them in writing—with a copy to the General Crimes Section of the Criminal Division of the U.S. Department of Justice—to commence—if they had not already done so—a comprehensive investigation of the alleged widespread illegal wiretapping by the Houston Police Department.

Concurrently, of course, my office commenced an investigation by grand jury. I personally participated in some of these sessions of the Federal grand jury in Houston. Under the Federal Rules of Criminal Procedure, Title 18 U.S.C.A., Rule 6(e), I am limited by the rules of secrecy as to what I can discuss. I am likewise limited by rule 3 of the local rules of the U.S. District Court for the Southern District of Texas, which deals with release of information by attorneys, and specifically section "A" in criminal cases and section "B" in grand jury proceedings. Last, but not least, I am also limited by title 5 U.S.C., section 522(6)(7), on the disclosure of files and information compiled for law enforcement purposes and the regulations implementing that section, and Title 28, Code of Federal Regulations, Sections 16.21–16–26 on disclosures by both employees and former employees of the U.S. Justice Department.

On the matter of the allegations of illegal wiretapping by Federal agencies, there is little I can say. I read and heard various charges made that DEA agents allegedly participated in illegal wiretapping. To a much lesser extent, I read and heard the same allegation about FBI agents. I neither saw nor read any evidence, soft or hard, to support those charges. No one came forward to testify or to document those charges while I was in office.

My real main concerns have been that the investigations of the Houston Police Department have lasted so long and have affected some 2,300 officers when, at the most, some 50 were allegedly involved. Finally, I feel that the investigations in this case, as conducted by the Houston office of the FBI up to December 30, 1974, were less than thorough, less than aggressive, less than comprehensive, and less than enthusiastic.

Mr. Chairman, that is the end of my prepared statement.

Mr. Kastenmeier. Thank you, Mr. Farris.

The committee would like to take this opportunity to commend you for your obviously excellent service as the U.S. attorney, both statistically and otherwise, and the subcommittee and its parent group, the Judiciary Committee, is interested in the administration of justice and all the points that you raised earlier in your testimony as well.

Mr. Farris, why, as you have testified, was the illegal police wiretapping in Houston uncovered by the Internal Revenue Service rather than the Federal Bureau of Investigation. Normally, one would think they would uncover it.

Mr. FARRIS. I have asked myself the same question many times, Mr. Chairman. The charter of the FBI states that they are the Federal law enforcement agency charged with investigating violations for illegal wiretapping, and so one must presume that they did not know that it was going on, and so did not write reports on it which came to the U.S. attorney's Office, or else they did not know that it was going on and were not concerned.

Mr. KASTENMEIER. Now, when you asked the Internal Revenue Service to continue its investigation to find out the full extent of this illegal wiretapping in Houston, what happened then? Were they not able to do it at all or what?

Mr. FARRIS. That is correct. They had done such a tremendous job in putting together the case that resulted in the indictment of the nine past and present HPD officers that I felt with their already experienced background in the case that they would be the logical agency to do it, and since there was really a continuation that they would be the best.

However, due to the unreal and rigid and inflexible policy of Commissioner Alexander, they were not permitted to do so on the theory that they are charged by Congress to do only title 26 investigations. I think that is an unreal policy and most U.S. attorneys around the country feel the same way about it.

Mr. KASTENMEIER. What happened, what course of action did you pursue when they declined to continue the investigation; the IRS, that is?

Mr. FARRIS. Well, of course, I had conversations with Tom Jordan, the then special agent in charge of the FBI about the matter, and when we finally got the word that the IRS would not be permitted to continue the investigation, we then wrote a letter to the special agent in charge, Tom Jordan, with a copy to the general crimes section of the Criminal Division here in Washington, asking for them, for the FBI in Houston, to conduct an investigation, if they were not already doing so.

They finally got around to appointing, or rather assigning an agent, 1 agent out of 100 agents, to commence the investigation.

Mr. KASTENMEIER. As a former U.S. Attorney, what was your professional judgment as to the initial FBI response and inquiry into this allegation of illegal wiretapping?

Mr. FARRIS. It was such a poor job that it was, in my opinion, no investigation at all. And this was surprising, because the FBI is a very professional agency. When they investigate kidnapings or hijackings, or bank embezzlements, or bank robberies, they are tremendous. But here, they were not doing it.

Mr. KASTENMEIER. Did you get FBI reports coming into your office, and if so, describe the quality of those reports, on this same line of inquiry.

Mr. FARRIS. Mr. Chairman, generally they were short, sometimes just one page, and when I say they were pithy, I am being generous. Sometimes they included Xerox copies of newspaper articles, and generally they had nothing, no meat in them, nothing that we could use before a grand jury.

Mr. KASTENMEIER. Now, the subcommittee has before it and will receive as a part of the record a copy of a letter that you wrote on December 17, 1974, to the Attorney General, the then Attorney General being the Honorable William Saxbe.

[The letter referred to follows:]

U.S. DEPARTMENT OF JUSTICE,
Houston, Tex., December 17, 1974.

Re Houston, Texas Police Department; Violation of Title 18 U.S.C. 2510, et seq., F.B.I. Bureau File Reference 139–4467, F.B.I. Field Office File Reference 139–189.

Hon. WILLIAM SAXBE,
Attorney General,
U.S. Department of Justice,
Washington, D.C.

DEAR MR. SAXBE: In June of 1971, the Criminal Intelligence Division of the Internal Revenue Service, Houston, Texas, commenced an extensive income tax investigation of Sebastian Mirelez, a large heroin dealer in Houston, Texas. This investigation culminated in the conviction of Sebastian Mirelez and the imposition of a sentence of six years imprisonment. Further investigation with the assistance of Sebastian Mirelez, resulted in the conviction of a former Houston, Texas Police Officer for perjury before a federal grand jury. With the assistance of the convicted officer, Indictments were returned charging nine (9) additional Houston, Texas Undercover Narcotics Officers with income tax evasion, civil rights violations and narcotics violations. These cases are presently pending trial. The success of these matters is related directly to the performance of Criminal Intelligence Agents I. A. Filer, Jack Hollingshead, Don Nettles and Frank Zapalac of Houston, Texas. The dedicated, conscientious and competent efforts of these agents is unequaled in my experience as United States Attorney for the Southern District of Texas. Sebastian Mirelez dealt narcotics on a major scale on the streets of Houston, Texas, for years, apparently with purchased immunity from the Houston Police Department, Narcotics Division. All the Narcotics Officers indicted were veteran officers who worked in an undercover capacity. Needless to say, the apprehension of these individuals required labor beyond traditional investigation.

During the course of the income tax investigation, allegations arose reflecting the illegal interception of communications by the Houston, Texas Police Department. A portion of these allegations ripened to fruition and are contained as charges in the civil rights indictment presently pending trial. The Federal Bureau of Investigation is currently investigating the new allegations of illegal interception of communications.

On November 19, 1974, the new Chief of Police of Houston, Texas, Carrol M. Lynn and the new Captain of the Narcotics Division, B. G. Bond, delivered information to this office which confirmed our greatest fear that the Houston, Texas Police Department had utilized illegal electronic surveillance on a large scale. While useful and conclusive, the information in no way amounts to evidence sufficient to meet the burden of proof in Federal District Court. It is my opinion that an immediate and exhaustive investigation may result in evidence sufficient to present before a federal grand jury under Title 18, United States Code, Section 2510 et seq.—Interception of Communications. The information further *confirms positively* that the interests of society and justice, which are synonymous in my mind, could not be served by allowing the Federal Bureau of Investigation to investigate this matter.

To provide you with complete background information on the captioned subject enclosed are the following:

(1) Letter from Harris County District Attorney Carol S. Vance to Anthony J. P. Farris, United States Attorney, dated November 20, 1973, advising this office that allegations of illegal interception of communications by the Houston, Texas Police Department have already been presented to Tom Jordan, Special Agent in Charge, Federal Bureau of Investigation, Houston, Texas, by the Harris County District Attorney's Staff. Until the moment of receipt of this letter on November 23, 1973, this office had not been advised either by the Harris County District Attorney or the Federal Bureau of Investigation of the existence of such allegations. This letter is marked as *Exhibit 1.*

(2) Original referral letter dated April 29, 1974, from Ronald J. Waska, Assistant Chief, Criminal Division, Assistant United States Attorney to Mr. Thomas Jordan, Special Agent in Charge, Federal Bureau of Investigation requesting "that a comprehensive investigation commence immediately." Please note that this office furnished as enclosures to the F.B.I. four (4) alleged illegally intercepted tape recordings and a Nine (9) Page sworn affidavit by a former Houston Police Officer admitting the rampant utilization of interception devices by the Houston Police Department. This letter is marked as *Exhibit 2.*

(3) Letter dated September 12, 1974, from Ronald J. Waska, Assistant United States Attorney, Assistant Chief, Criminal Division to Mr. Robert Russ Franck, Special Agent in Charge, Federal Bureau of Investigation enclosing a newspaper article from the Houston Post dated September 12, 1974, describing an *admission* by a former police officer, Carlos Avila, that illegal interception devices were utilized by the Houston, Texas Police Department. This letter is marked as *Exhibit 3.*

(4) Letter dated September 12, 1974, from Ronald J. Waska, Assistant United States Attorney, Assistant Chief, Criminal Division to Mr. Robert Russ Franck, Special Agent in Charge, Federal Bureau of Investigation enclosing two newspaper articles from the Houston Post and the Houston Chronicle further describing *admissions* by former Houston, Texas Police Officer Carlos Avila and Assistant District Attorney Bob Bennett, that illegal interception devices were utilized by the Houston, Texas Police Department. This letter is marked as *Exhibit 4.*

(5) Letter dated September 23, 1974, from Ronald J. Waska, Assistant United States Attorney, Assistant Chief, Criminal Division to Mr. Robert Russ Franck, Special Agent in Charge, Federal Bureau of Investigation enclosing two newspaper articles from the Houston Post and the Houston Chronicle dated September 21, 1974, describing the setting aside of marihuana convictions because the convictions were supported by evidence obtained as the result of illegal interceptions conducted by the Houston, Texas Police Department. This letter is marked as *Exhibit 5.*

(6) Letter dated September 25, 1974, from Donald J. Waska, Assistant United States Attorney, Assistant Chief, Criminal Division to Mr. Robert Russ Franck, Special Agent in Charge, Federal Bureau of Investigation enclosing two (2) motions filed by the Harris County District Attorney's Office, Houston, Texas, and two (2) orders executed by a State District Judge setting aside marihuana convictions because the Houston, Texas Police Department gathered evidence through the use of illegal interception devices. This letter was marked as *Exhibit 6.*

(7) Letter dated October 31, 1974, from Ronald J. Waska, Assistant United States Attorney, Assistant Chief, Criminal Division to Mr. Robert Russ Franck, Special Agent in Charge, Federal Bureau of Investigation correcting an erroneous assertion on an F.B.I. Report and again referring to our request for "an exhaustive and diligent investigation of these serious allegations." This letter is marked as *Exhibit 7.*

(8) Excerpts of tape-recorded conversations obtained with the prior consent of one party as follows:

(*a*) between Houston, Texas Police Chief Carrol M. Lynn and Joe Humbarger, Assistant Superivsor, Radio Technician, Houston, Texas Police Department. This is marked as *Exhibit 8(A).*

(*b*) between Houston, Texas Police Chief Carrol M. Lynn and Lt. Joe Singleton, formerly with Criminal Intelligence, Houston, Texas Police Department. This is marked as *Exhibit 8(B).*

(*c*) between Houston, Texas Police Chief Carrol M. Lynn and Radio Technician Charles Everts, Houston, Texas Police Department. This is marked as *Exhibit 8(C).*

(*d*) between Houston, Texas Police Chief Carrol M. Lynn and Lt. J. D. Belcher, formerly with the Vice Division of the Houston, Texas Police Department. This is marked as *Exhibit 8(D)*.

(*e*) between Robert Tarrant, Criminal Defense Attorney, Houston, Texas, and Lt. Edward Kennedy, former lieutenant with the Narcotics Division and currently a lieutenant with the Communications Division, Houston, Texas Police Department. This is marked as *Exhibit 8(E)*.

(9) Excerpts from the transcript in *U.S.* v. *Dudley Clifford Bell, Jr.*, Criminal Number 72–H–361, United States District Court for the Southern District of Texas, Houston Division, which reflect statements made in open court by Mr. Richard DeGuerin, Attorney for the defendant, concerning the involvement of the Federal Bureau of Investigation in illegal electronic surveillance. This is marked as *Exhibit 9.*

(10) Letter from Houston, Texas Police Chief Carrol Lynn dated December 13, 1974, reflecting events in the F.B.I. investigation of the captioned matter which led to his conclusion that "I realized at this time that the whole investigation was a joke." This is marked as *Exhibit 10.*

(11) Memorandum from Captain B. G. Bond of the Houston, Texas Police Department dated December 13, 1974, reflecting in his opinion the unusual manner in which the F.B.I. conducted the captioned investigation. This is marked as *Exhibit 11.*

(12) Xeroxed copy of Federal Bureau of Investigation Report dated July 30, 1974, Page One with synopsis which indicates "no one has admitted having knowledge of any wire tapping aside from rumors." Subsequent investigative reports also reflect negative results. This is marked as *Exhibit 12.*

Numerous telephone calls and conferences with the Federal Bureau of Investigation, Houston, Texas, during which we expressed our concern and displeasure with the course of the investigation has resulted in no improvement. It is now apparent that further dilatory handling of this matter by the Federal Bureau of Investigation will result in loss of prosecutions by virtue of the *statute of limitations*. Therefore, it is imperative that we receive *immediate* investigative assistance from the Internal Revenue Service, Criminal Intelligence Division. Further reliance on the Federal Bureau of Investigation as the agency assigned jurisdiction in matters pertaining to Title 18, United States Code, Section 2510 et seq., in my opinion will be disastrous.

Accordingly, we respectfully urge the immediate designation of the Criminal Intelligence Division of the Internal Revenue Service, Houston, Texas, and specifically Agents I. A. Filer, Jack Hollingshead, Don Nettles and Frank Zapalac as the investigating authority for the captioned matter. As the basis for such an authorization we cite the following reasons:

(1) Vital experience and familiarity in directly related matters since June of 1971.

(2) Allegations of the possibility of participation of the local office of the F.B.I. in illegal electronic surveillance.

(3) Documented evidence as enclosed herewith of totally inadequate and unprofessional investigation by the Federal Bureau of Investigation, Houston, Texas.

(4) Documented evidence as enclosed herewith of partisanship between the Houston Police Department and the Federal Bureau of Investigation that has thwarted the investigation.

(5) Service to the interests of society and justice.

Furthermore, we request an immediate response to our request since each additional day of delay in investigation is resulting in a substantial detriment to the successful prosecution of this vital matter.

Very truly yours,

ANTHONY J. P. FARRIS, *U.S. Attorney.*

Mr. KASTENMEIER. Why did you write this particular letter? Would you explain that to the committee?

Mr. FARRIS. I will try, sir. Since I was not getting the needed investigation by the local office of the FBI, since I was not getting the case moving and the police department obviously was suffering morale-wise from the matter going on and on and on, and nothing happening, and since the Criminal Division itself had not answered either our

letter, a copy of the letter that we had sent the FBI in April, nor a copy of another letter that we had sent them in October, I felt that perhaps if I appealed to the Attorney General himself, that that would bring some results.

Mr. KASTENMEIER. To summarize the gist of your complaints to the Attorney General, what was the thrust of your letter to him?

Mr. FARRIS. Basically, I gave him a summary of how the initial investigation started, where we were at that point. I sent copies of our exhibits, if you will, of letters sent by me and received by me, including one from the local District Attorney, about having turned over some information to the FBI in the fall of 1973, and generally gave them an outline, including excerpts of some transcripts of the court proceeding, and the prosecution that we handled of a private wiretap, and asked that the IRS agents, the same IRS agents be brought back and assigned to the case. I believe I also mentioned that local FBI agents should not be used.

Mr. KASTENMEIER. Now, this was written December 17, 1974. What response did you get from the Attorney General?

Mr. FARRIS. Zip. None.

Mr. KASTENMEIER. So, not only did you get no cooperation from the Federal Bureau of Investigation of any note, but you did not get a response from the Attorney General, from the Justice Department itself?

Mr. FARRIS. None from the Attorney General, the Deputy Attorney General, the head of the Criminal Division, the Chief of the General Crimes section, the Assistant Chief, or even any of the minor lawyers in the general crimes section.

Mr. KASTENMEIER. Yet, the public in Houston, through the newspaper revelations and the like, and through the prosecutions already undertaken, knew, as a matter of fact, that this practice was widespread and was illegal and yet you could not get the cooperation of these Government agencies?

Mr. FARRIS. That is correct.

Mr. KASTENMEIER. I think that is outrageous, and I think it is incumbent upon this committee to see if we can help rectify that situation.

I yield to the gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. No questions. Thank you for your testimony. We appreciate it.

Mr. FARRIS. Thank you, sir.

Mr. KASTENMEIER. The gentleman from Massachusetts, Mr. Drinan.

Mr. DRINAN. Thank you very much, Mr. Farris, for your testimony.

When did you leave the office of U.S. attorney in 1975?

Mr. FARRIS. I left December 30, 1974.

Mr. DRINAN. Prior to your losing the total faith in the FBI, as indicated in your letter here, and your letter of that date on page 6 says that "Further reliance on the Federal Bureau of Investigation * * * will be disastrous," had you checked with Clarence Kelley?

Mr. FARRIS. No, sir, I had not.

I would like to correct one part of your question there, sir. I had not lost total faith in the FBI. I had lost total faith in the FBI in this case. I had not checked with Clarence Kelley, but then we had asked

Bill Cleveland, I say we, five U.S. attorneys, members of a subcommittee of the U.S. Attorneys Advisory Committee to the Attorney General in the fall of 1973, we had asked Bill Cleveland of the FBI to make arrangements in cases involving investigations of corruption or violations of Federal laws by police departments to make arrangements to bring in agents from other parts of the country, because we felt that it would not be healthy, and it would not be good to use the local agents who had to constantly deal with the police departments. And all Federal agencies have a mystique or something about keeping a rapport with the local law enforcement people, and I see nothing wrong with that. But, if the same agents that are supposed to be keeping a rapport with the police departments are also asked to investigate the police departments——

Mr. DRINAN. Nonetheless, sir, you dealt with Mr. Thomas Jordan regularly, did you not?

Mr. FARRIS. Yes, sir.

Mr. DRINAN. He was, and apparently is not now the Special Agent in Charge of the FBI?

Mr. FARRIS. Yes, sir.

Mr. DRINAN. Was he transferred for any reason connected with this investigation?

Mr. FARRIS. No, sir. He took, I believe he took an early retirement in May of 1974.

Mr. DRINAN. Well, in April, April 29 specifically, you sent to that office four allegedly illegal intercepter tape recordings and do I take it that Mr. Jordan's office defied the U.S. attorney?

Mr. FARRIS. No, sir, they did not defy the U.S. attorney. They just dragged their feet.

Mr. DRINAN. And why didn't you go to Clarence Kelley?

Mr. FARRIS. I hoped that the people on the scene here, the Criminal Division and the General Crimes Section particularly, would do that. They had done it in other cases. They had taken an interest in other cases always.

Mr. DRINAN. Well, it is still unusual, sir, that you write at the end of your tenure to the Attorney General setting forth the entire record with the FBI and particularly Mr. Jordan, the Special Agent in Charge, had quite literally defined the U.S. attorney and had failed to move forward with his duty to cooperate with the U.S. attorney. And I find it a little anomalous.

What is the U.S. attorney doing about the matter?

Mr. FARRIS. I do not know, sir. I have not discussed the matter with him.

Mr. DRINAN. Why have not the nine indicted been tried?

Mr. FARRIS. They were first indicted in February of 1974. The indictment was dismissed because of a technicality, and they were reindicted in May. And then we discovered that the same lawyers were representing all of the defendants including witnesses. We filed a motion asking that the court force the lawyers out and make them break it up so that the nine HPD would have separate lawyers.

The matter was, the ruling was handed down by the judge agreeing with the Government, and saying that all of the lawyers would be out. They then appealed the matter to the Fifth Circuit Court of Appeals and that is what is holding up that particular thing.

Mr. DRINAN. So it is not any political involvement, not foot dragging on the part of the FBI, it is just these legal technicalities, shall we say?

Mr. FARRIS. Yes, that is correct. But, of course, that case was an IRS case.

Mr. DRINAN. But, nonetheless, you are vindicating the administration of justice on the criminal side and you are saying, if I understand you correctly, there is no negligence whatsoever with respect to the delays caused in the trials of these nine indicted police officers?

Mr. FARRIS. None at all, sir.

Mr. DRINAN. Consequently you are denying what the Chief said, that there has been some delay here for political reasons?

Mr. FARRIS. I don't know if the Chief was conversant with the facts.

Mr. DRINAN. He intimated that. He did not say it. But, in any event, we have your testimony, and we will let him speak for himself.

Would you agree with Chief Lynn that there has been some involvement by the phone company? Chief Lynn says there are 200 employees of the Southwestern Bell that have been involved in complicity with wiretapping.

Mr. FARRIS. Sir, that brings us to rule 6(e), and I heard a lot of the testimony before the grand jury, and I cannot answer that question.

Mr. DRINAN. Because of the secrecy of the grand jury?

Mr. FARRIS. Yes, sir.

Mr. DRINAN. During all of this time, as the U.S. attorney, did you make any formal complaints against the negligence and the willingness to obey of the FBI? They were obviously impeding your investigation which you felt strongly and deeply about, and yet during all of these months, if I understand you correctly, and you state here on page 5 of your letter to Mr. Saxbe, "Numerous telephone calls and conferences with the Federal Bureau of Investigation, Houston, Tex., during which we expressed our concern and displeasure with the course of the investigation has resulted in no improvement."

But, I take it that you continued to spin wheels with the people in Houston, and you did not go to any other higher authority, either the Attorney General or Clarence Kelley, until this letter of December 17, 1974, which was really on the day of your departure, practically? Am I correct in saying you did not go to Washington?

Mr. FARRIS. Well, sir, I pointed out that we had sent copies of the correspondence to the Criminal Division and I hoped that, as they had done in the past, that they would rise to the occasion and do the right thing.

Also, since we had been turned down on the matter being investigated by the IRS, all we had left was the local FBI.

Mr. DRINAN. Yes, you knew, and this is what you revealed on December 17, 1974, that you knew that there was, that the police department in Houston had utilized illegal electronic surveillance on a large scale. Now, you lived with that knowledge for many months. And why did Mr. Tom Jordan, the special agent in charge, drag his feet? And are you suggesting, or intimating that he was involved, or was he just incompetent and negligent?

Mr. FARRIS. I am not suggesting that he was involved. I am not

suggesting that he was incompetent. I am not suggesting that he was negligent.

Mr. DRINAN. Well, you have said that, sir. You said he is negligent, you negotiated with him in numerous telephone calls and conferences. You cannot get off this question, sir. You have to say that he was negligent, or incompetent, if you want to, he was involved. You have to admit that he was negligent, he defied your orders, and he is the FBI agent in charge who allowed months and months to go by, where we have you writing to the Attorney General of the United States saying that the local FBI person here has really not cooperated, and that now this man has taken early retirement.

I am not sitting in judgment on him, but I have to tell you, whether this is sheer negligence on the part of the FBI or whether you are suggesting or intimating that the FBI is so involved with the local police officials that they were, shall we say, tainted with some corruption.

Mr. FARRIS. I am saying they were unconcerned, including the agent in charge, including the supervisors in that particular matter, and that also they were worried so much about keeping rapport with the police department that they did not want to stir things up.

Mr. DRINAN. You are accusing them of negligence in their duty, and practically going against that to which they have taken an oath to do: namely, to carry out impartially and objectively the administration of criminal justice. And over a period of months, this has gone on.

I have your testimony, and I thank you for it, and all I can say is that I wish at that time that the FBI at the higher levels had taken action and had been fully informed of this negligence that went on for a long time. We thank you, sir, for your testimony.

Mr. FARRIS. Thank you.

Mr. KASTENMEIER. I have no particular wish to quarrel with my friend from Massachusetts, but I think you were correct in bringing the matter to the attention of the Attorney General, with whom you have a direct line of responsibility, rather than to Mr. Kelley, to whom you are not directly responsible, nor is he directly responsible to you. I think it was a failure of the Office of the Attorney General to take seriously your complaint, because the Attorney General is responsible for the Federal Bureau of Investigation and Mr. Kelley, and was the proper person, it seems to me, to lean on Mr. Kelley. So, I think you did the right thing in terms of whom you went to ultimately for the purpose of redress here.

I would like to yield to the gentleman from New York, Mr. Badillo.

Mr. BADILLO. Thank you, Mr. Chairman.

I am concerned about the involvement of the FBI with the Houston police in the illegal wiretapping. And you have said that the FBI wanted to maintain rapport with the police department. The Chief indicated that he has reports that when there was illegal wiretapping taking place, that an FBI agent was sitting there and listening in too. Is that what you would call rapport?

Mr. FARRIS. I would not call that rapport, if, in fact, that happened. And I do not know that it happened, but if, in fact, FBI agents were sitting by and watching any law enforcement agency, any non-Federal law enforcement agency conduct an illegal wiretap, then they should be charged as accomplices, if the statute of limitations has not run out.

Mr. BADILLO. I say this because in your letter you say that Captain Bond from the narcotics division of the Houston Police Department delivered information to your office which confirmed that the police department had utilized illegal electronic surveillance. And you say: "This information further confirms positively that the best interest of society would not be served by allowing the Federal Bureau of Investigation to investigate this matter." Was there any information given by Captain Bond which indicated that the FBI was actively participating with the Houston Police Department in the illegal wiretapping?

Mr. FARRIS. I do not know whether it was from Captain Bond, or Chief Lynn, or perhaps in one of the transcripts, but I did get information late in November of 1974, just before I wrote the letter to General Saxbe, that at the very least one or two agents had been on the premises of an apartment where there was an illegal wiretap going on by police officers and had stood by. And, of course, we received no report of that from the FBI, so this was the first time we learned that this might have happened.

Mr. BADILLO. Do you know whether those one or two agents have ever been questioned, or were they questioned by you as to whether this happened?

Mr. FARRIS. No, sir. As I say, this was just before I wrote the letter to the General.

Mr. BADILLO. Thank you, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from New York, Mr. Pattison.

Mr. PATTISON. I have no questions.

Mr. KASTENMEIER. Does anyone have any further questions either of Mr. Farris or Chief Lynn?

Mr. DRINAN. Mr. Chairman?

Mr. KASTENMEIER. The gentleman from Massachusetts.

Mr. DRINAN. Mr. Farris, would you have any suggestion as to what this committee could do to draw tighter regulations or to alter statutory law so that it would be easier for U.S. attorneys or easier for law enforcement officials to prevent the FBI from condoning illegal wiretaps? I assume from the testimony that some evidence exists along that line. Would you have any suggestions as to how we could carry out our oversight duty, or how we could make regulations or laws with respect to electronic wiretapping that would prevent that happening again, what presumably has happened in Houston?

Mr. FARRIS. I think if you could prevail upon Director Kelley to promulgate a policy whereby agents are brought in from another area to investigate corruption in a police department, that would be certainly one giant step. It will never work, or hardly ever work. When we, the five U.S. attorneys in Arizona in 1973, when we brought this to the attention of Bill Cleveland, the only thought that Bill and the other fellows from the FBI had here in Washington is that they were affronted, they thought we were questioning their integrity, and they were ready to protect their flanks.

Well, that was absurd. We wanted to tighten up on an investigatory procedure, and it had nothing to do with questioning anybody's integrity. And if this committee could prevail upon the Director to promulgate that policy of bringing in agents from across the country

who did not have to worry about having rapport with the local law enforcement officers, they could worry about having rapport with the officers back home where they are, that would be a giant step.

Finally, as to the way that the law is written, I think perhaps that if you could withhold funds from any local area that is charged with having illegally wiretapped, suspend them, if you will, that is through LEAA grants, suspend them until the matter is cleared up, that that might have an effect. The power of the purse if very strong.

Mr. DRINAN. I have been thinking about that for a long time, and have recommended it. How much would that mean to Houston? They must get a very substantial amount of LEAA funds.

Mr. FARRIS. I could not answer that. Chief Lynn could answer that better.

Mr. DRINAN. Well, we thank you for your suggestions, sir. Thank you.

Mr. KASTENMEIER. The gentleman from Illinois, Mr. Railsback, has another question.

Mr. RAILSBACK. Was it ever suggested to you that you would be better off to let the whole matter drop, either directly or indirectly by anybody?

Mr. FARRIS. No, Congressman Railsback. I am afraid I am a hopeless case. I am known to be quite a maverick and they would know that if they had, people know that if they had suggested something that asinine to me, I would have told them to stick it.

Mr. RAILSBACK. What was Jordan's response to you when you brought it up with him?

Mr. FARRIS. Noncommittal, unimpressed, and unconcerned.

Mr. RAILSBACK. Thank you.

Mr. KASTENMEIER. The Chair has a letter which arrived this week and because it is, relatively, a short letter I think I will read it in the record and ask for your comment, because we appear to be talking about past events.

The letter, which was apparently dictated May 15, arrived here more or less May 19, and it is written to the committee from Lloyd M. Lunsford, attorney and counselor-at-law, 411 Spencer Highway, South Houston, Tex. It reads:

> Gentlemen, as a defense attorney I represent a Houston man charged with the murder by auto of the wife of the Chief of Police of Houston in the year 1972.
>
> During that time and at various other times, it became apparent that my private residence phones and office phones were being tapped. At one time, the actual wires were found running from our telephone lines under a fence to a telephone cable.
>
> Although numerous complaints were made to the FBI, Mr. Jerry Slaughter, head of the Security for Southwestern Bell Telephone Co. and the Police, I am quite certain that the wiretapping continued. The fear that is engendered in the average professional man and citizen by the fact that there is no one that you can trust to turn to in these circumstances should not be permitted to continue in the United States.
>
> I spent many of my young years fighting Nazism in Europe only to find it alive again in the United States.
>
> I do hope this committee will not take a mere cursory look at this problem, but will do all it can to excise this cancer on the Bill of Rights.
>
> Yours very truly,
>
> LLOYD M. LUNSFORD.

And there is a postscript on the next page.

P.S. This letter was dictated over the telephone to my secretary. Within two hours, a workman appeared behind our home and began working on our telephone lines. When I approached him, he refused to show me any credentials, and when I returned inside my home, my telephone was dead. I went outside again and complained, and he said he had disconnected it by mistake. A strange coincidence, perhaps.

LML.

Do you have any comment on that, as to whether this sort of terror to the legal profession and otherwise still goes on in Houston, Tex.

Mr. FARRIS. Well, I know several criminal defense lawyers that would not talk to me on the phone. When they wanted to talk to me, they would come down to the office when I was the U.S. Attorney, for fear of wiretaps.

Mr. KASTENMEIER. Chief Lynn, do you have any comment on that particular letter?

Mr. LYNN. That particular gentleman did call me, and told me the same story. I did not know he was writing it to you.

Mr. KASTENMEIER. Well, this suggests part of the scope of our problem.

And to the extent that it was an unpleasant task, indeed, for you to do so, and to the extent that you have contributed to our knowledge and our understanding of this problem, you are both to be commended, both you, Mr. Farris, and you, too, Chief Lynn.

The committee stands indebted to you.

This concludes our testimony this morning. The committee stands adjourned.

[Whereupon, at 11:32 a.m., the hearing was adjourned, subject to the call of the Chair.]

SURVEILLANCE

THURSDAY, JUNE 26, 1975

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:05 a.m., in room 2237, Rayburn House Office Building, the Honorable Robert W. Kastenmeier [chairman of the subcommittee] presiding.

Present: Representatives Kastenmeier, Danielson, Drinan, Badillo, Pattison, Railsback, and Wiggins.

Also present: Bruce A. Lehman, counsel; Timothy A. Boggs, professional staff member; and Thomas E. Mooney, associate counsel.

Mr. KASTENMEIER. The committee will come to order.

This morning the subcommittee reconvenes to hear three distinguished witnesses on the question of wiretapping and electronic surveillance.

The committee has two bills before us which would restrict the powers of the President and executive agencies in this area.

H.R. 214, sponsored by over 70 Members of the House of Representatives, would prohibit all wiretapping, bugging, surreptitious entry, opening of mail, or inspection of private personal records unless just approved by a court order based on probable cause that a crime has been or is about to be committed. The bill would greatly restrict wiretapping or other forms of surveillance conducted purely for purposes of obtaining intelligence information.

H.R. 141 deals only with the question of national security wiretapping and would permit no electronic eavesdropping for national security intelligence purposes unless prior court approval has been obtained. This approval would be based on probable cause that the subject of the surveillance was a foreign agent engaged in activities threatening the national security.

Prior to scheduling today's hearing, a number of letters were addressed to the Director of the FBI and the Attorney General requesting information necessary to evaluate the possible impact of the pending legislation on national security. Specifically, these letters requested the exact number of national security wiretaps for the last 2 years, the identity of the subjects of the surveillances, the identities of the agencies requesting the surveillances, and an opportunity to examine a representative sample of logs, transcripts, and memoranda based on such surveillances.

Nine months after our original request, the Attorney General on Tuesday of this week, supplied the subcommittee with data on the exact number of warrantless surveillances. During 1974, there were a total of 232 warrantless eavesdropping installations in place—190 wiretaps and 42 microphone devices. For 1973, the figures were considerably smaller—123 wiretaps and 40 "bugs."

The Attorney General has denied access to the other three requested items of information. He has also declined to testify personally before the subcommittee on this subject.

Today's hearing is particularly timely in view of Monday's ruling by the court of appeals, in *Zweibon* v. *Mitchell*, a case in which the Department of Justice asserted the authority of the Executive to conduct national security electronic surveillance of domestic organizations (in that case the Jewish Defense League), without a court order, as long as the organization plans unlawful activity directed against a foreign power or foreign based political group. The court of appeals rejected this argument, holding that where the subject of a tap was a purely domestic organization a warrant must be obtained prior to conducting electronic surveillance.

In another pending case, *United States* v. *Erlichman* (arising out of the White House plumbers operations), the Department of Justice has filed an amicus brief with the court of appeals arguing that the same constitutional principles allowing national security wiretapping without a warrant also permit surreptitious breaking and entering into private property without a warrant. I should note that this in sharp disagreement with the position taken by the Watergate Special Prosecutor in his arguments in that case.

These legal developments raise a number of questions which perhaps our witnesses today may hopefully assist the subcommittee in answering.

Our first witness is a very distinguished American, and the Congress and this committee are very pleased to welcome back the Honorable Dean Rusk, former Secretary of State. Secretary Rusk's comments will be particularly helpful in providing insight into the question of national security wiretapping from the perspective of one who, for many years, regularly used foreign intelligence information obtained, in part, through the use of warrantless wiretapping as a key advisor or principal advisor to the President and as a principal member of the National Security Council and, of course, as Secretary of State of this Nation. I, therefore, would like to greet Secretary Rusk. And in line with the policy on this area, conducted in the past by the committee, witnesses this morning will be sworn.

Secretary Rusk, do you swear that the testimony which you are about to give this subcommittee is the whole truth and nothing but the truth?

Mr. Rusk. I do, sir.

Mr. Kastenmeier. Secretary Rusk, I am pleased and honored to welcome you here this morning, and perhaps as a preface, I know you do not have a prepared statement, you could give the subcommittee the benefit of your thoughts on the question of warrantless wiretapping and national security.

TESTIMONY OF HON. DEAN RUSK, FORMER SECRETARY OF STATE

Mr. RUSK. Thank you very much, Mr. Chairman, and members of the committee. I am very glad to be here today, if I can be of any assistance to the committee on the very important matters that are before you.

I regret that the hospitality of three committees of the Congress at about the same time, and some other commitments which I could not avoid, made it impossible for me to find the time to do certain research that I wanted to do to prepare a systematic written statement. If there is anything which I say this morning which would lead you, Mr. Chairman, or the committee to want something spelled out in more detail, I will be glad to spend a little time and provide that for the record.

We have erected here on this continent a unique constitutional and political system, marked by the fact that we have a written Constitution specifically aimed at protecting the individual rights of private citizens and enforced by the courts against both the executive branch and the legislative branch. There are many things which all the king's horses and all the king's men are not permitted to do to private citizens, and I think it is very important that we preserve that system. Where questions of balance arise, as they normally do in almost all constitutional rights, there should be a strong bias toward individual liberty.

I testified a little over a year ago before some Senate committees exploring this same area that I would be reluctant to see judges brought into this mean, dirty, unpleasant, back alley game that goes on around the world in the field of espionage and counterespionage. At that time I felt that it was important to keep our judges out of that process in order that the judges themselves could always be in a position of acting in a goldfish bowl, either directly or potentially.

Since that time, on further reflection, I have rather changed my view, and I am inclined to think that we should, in the normal case, expect warrants in national security cases. I would, however, believe that the committee might want to consider whether it would limit the protections of our contemplated legislation to all persons in the United States and "subject to the jurisdiction thereof," picking up a phrase from the first sentence of the 14th amendment, because there are problems with agents who are here under diplomatic or other types of immunity, who are not normally subject to our laws in the usual sense, whose situation turns on international law, international community, reciprocity, the prospect of retaliation and the principal sanction of requiring their removal from this country. I am not clear that we would want to bring such personnel under the protection of statutory law.

I think we might note in passing that there is probably no way in which the Congress, by black letter law, can provide for all contingencies which might arise. John Locke and Thomas Jefferson both have commented briefly on circumstances which might require Government to act beyond the law in order to maintain the very structure of the society on which the legal system rests.

I would be inclined to put that aside at the moment, because those situations are of such extremity they would be self-evident to every-

one. For example, if we were subject to a nuclear attack, one of the first casualties would be the Constitution. But, it might also be worth noting that the law itself makes room for circumstances which could make certain actions legal, which under other circumstances would be illegal. For example, I cannot break and enter any farmhouse which I pass. But, if I am driving down the road at night and pass a farmhouse and I see flames licking out of the upstairs window, I think I would be entirely privileged to enter that farmhouse by breaking in the door or going through a window to assure that there was no one inside who is in danger of his or her life. So that there may be circumstances. Suppose that a foreign government were to inform our Government that they have good reason to believe that a small group has entered this country intent upon a plastic bomb attack upon the Congress while it is in session, or an attack upon the Supreme Court, or is planning to assassinate the President? I would suppose that those circumstances would require the President to take certain actions which in normal circumstances he ought not to take and might not be permitted by law to take.

So, I just mention the fact that in our law in a variety of ways, circumstances have a bearing upon what the law itself would say, either in terms of saying that it is lawful or that it is at least justified.

Now, I am concerned about what we mean by reasonable searches as opposed to unreasonable searches, because this is not spelled out in the Constitution. And I am concerned also about how we apply the concept of probable cause. As you know, under our extradition statute, the final decision in this country is made at the ministerial level, made personally by the Secretary of State. He must decide whether or not there is probable cause as found by the extradition magistrate, whether there is sufficient grounds to believe that if the allegations that are put before him were proved in court, there would be a basis for conviction. And the standard, therefore, on probable cause in that kind of a circumstance, or we might say in the normal criminal circumstance, would be rather strict.

I think there may be areas where the committee might wish to give some instruction to the courts with respect to how to find or what standards to use with respect to probable cause in two important fields. There may be others, as the committee deliberates.

For example, if there is reasonable grounds to believe that a person is operating as a part of an espionage net for a foreign government, it may be difficult to persuade a judge that there is probable cause, which if demonstrated in court, would lead to a conviction. Similarly, with this very difficult problem which has grown up in recent years of political terrorism, it may be that the danger of the threat is such that the committee might wish to give somewhat more detailed instruction to the courts as to what would constitute probable cause in that category as well. And there may be other agencies in which the same kind of consideration would apply.

Then, Mr. Chairman, I note in both of these bills which are before you that arrangements are made for reporting to committees of the Congress. About a year ago, I suggested that it would be a good idea for the Congress to establish an oversight or a watchdog committee comparable to the Joint Atomic Energy Committee, a committee which

has staff and facilities for receiving the most sensitive information and taking care of that information, a committee which has developed considerable reputation for discretion with regard to highly sensitive matters, and a committee, which so far as I know, is able to receive the most sensitive materials in one of the most sensitive areas in our public life; namely, the nuclear field. I am a little concerned about reporting to more than 100 Members of the Congress in the committees that are listed in these bills, partly because I think the chances of indiscretion are considerably increased. Partly because I am not sure that Congressmen and Senators will always want to have the information that is in front of them.

Back during the sixties, I once invited a subcommittee of the House Appropriations Committee down to the State Department to look at some of the very sophisticated technical aspects of espionage and counter-espionage. And I am sure that sophistication has further increased since that time. Well, the Committee, the Subcommittee was much interested in it, but when it was over I think two members of the Subcommittee said, "I am sorry that you did this, because I would prefer not to know what you showed me today." It may be that the Committee which receives such reporting ought to be ready for and equipped to understand the great sophistication and complexity of the electronic field in this international struggle which I have talked about.

It seems to me if such a committee were established in connection with other problems, such as oversight of the CIA or other kinds of activities now being discussed, that the national security kind of electronic surveillance might be a matter of concern to such a joint committee. Of course, such a joint committee would almost certainly have on it members of the House Judiciary Committee and would be able to give their colleagues assurances or lack of assurances, depending upon how they consider the situation to be.

So, those are the concerns, Mr. Chairman. I, myself, do not see any objection to bringing all wiretapping in this country under court warrant. I would be inclined not to try to cover those who are not subject to the jurisdiction of the United States. As far as the foreign scene is concerned, of course the writ of the Congress does not run to foreign governments. But I presume that you can instruct an American citizen or agencies as to the basis on which they might engage in activities abroad, and I would extend those, if you do that, to persons who are entitled to the diplomatic protection of the United States.

In other words, not let it turn just on citizens, but also on resident aliens who are entitled to our diplomatic protection. I do not know that that would, as a practical matter, make much difference, because foreign governments are very likely to engage in such activities, and I do not see anything that the Congress itself can do about it.

Well, these are some preliminary thoughts, Mr. Chairman, on which there might be some questions.

Mr. KASTENMEIER. Thank you very much, Mr. Secretary.

I take it then your recommendation is that the Congress consider putting national security wiretapping under title III of the Omnibus Crime Control and Safe Streets Act, but that either the definition of probable cause be modified or the act be limited to protect only those subject to our law. Is that correct?

Mr. Rusk. Well, I am a little bit at a disadvantage, because I had intended to do some research on the various applications of the concept of probable cause. But it seems to me that there might be different standards in the internal security field, the criminal field on the one side and such activities as espionage by a foreign government, or political terrorism. So I would think the committee at least ought to look at that rather carefully.

Mr. Kastenmeier. There are many who feel that this would be, of course, unduly restrictive.

Looking back over your particular tenure as Secretary of State, do you feel that the State Department could have gotten satisfactory results, notwithstanding the fact that you have been required to get a warrant in cases of wiretapping?

Mr. Rusk. It is just a little difficult to make an assessment because the information that came to me daily did not always—well, most often did not indicate the actual source. For example, a piece of information would come in saying "according to usually reliable sources," for example. Well, who knows? Once in a while, I would specifically ask for the source of a piece of information, and was almost never surprised. But I do not believe since wiretapping and bugging are not major sources of information anyhow, that the requirement to get a warrant would have been all that crippling. I assume that the Federal judges would be reasonably concerned about the national security as well as about individual rights, and that that balancing would go on in the minds of a judge as well as in the executive branch of the Government.

Mr. Kastenmeier. I take it, as Secretary of State, the State Department was primarily a user of intelligence, a user of the fruits of wiretapping. Was it itself operational in the field? Did the State Department itself install wiretaps?

Mr. Rusk. I would be surprised to learn that there was any such capability in the Department of State. For example, in my own office I had no ability technically to record my telephone conversations or to record conversations in my office. My concern was to be sure that someone else was not doing that without my knowledge. So, no; we relied upon the FBI and other agencies for various types of esoteric information.

Mr. Kastenmeier. Would not we need to clear certain wiretaps of foreign governments or foreign powers with the State Department to really have a knowledge of whether it was proper or political in that instance to do so?

Mr. Rusk. There were various interagency, interdepartmental committees, that would look at that kind of thing. It is a little difficult for me to go into detail here, but in terms of the magnitude of that sort of thing, it was much lower than most people suppose, but the State Department was, of course, aware of and participated in decisions with respect to electronic intelligence aimed at foreign governments or agents.

Mr. Kastenmeier. You have indicated that the warrant requirement should be, as far as activity within the United States is concerned, should be limited to U.S. citizens or those protected by U.S. law.

Mr. Rusk. Subject to the jurisdiction of the United States.

Mr. KASTENMEIER. Subject to the jurisdiction of the United States, and abroad you would apply the same standard?

Mr. RUSK. Abroad I would apply—and these are to some extent euphemisms—but abroad I would apply it to persons who are entitled to the diplomatic protection of the United States. You know, one could start out saying we could just aim this at the American citizens abroad, but we also have here in this country a good many permanent resident aliens who, in my view, would be entitled to our protection, and we might as well include them as well.

Mr. KASTENMEIER. Do you think that the Congress should restrict the use of intelligence wiretapping even though some foreign governments, not particularly friendly, use such methods or tactics? Is it arguable that we might be handicapped vis-a-vis foreign countries because of what we might impose upon ourselves to protect our civil liberties?

Mr. RUSK. Mr. Chairman, I think I would get at that not in terms of weakening our own protection of our own individual liberties under our own Constitution, but rather in not restricting unduly the capacity of our own Government to seek out and to deal with the operations of foreign governments in this country. It is true we are the target of a good many intelligence operations. Dozens of governments take us as a prime target, because whatever one's point of view abroad, influence on American policy is a major aim of most foreign offices. And so we cannot help but be a target of agents, espionage, and things of that sort.

I do not think that I would dilute the protections of American citizens on that ground, but I would suggest that you might want to consider not unduly crippling our own ability to seek out these foreign espionage agents and discover them, and send them home or take whatever action is appropriate.

Mr. KASTENMEIER. Your view about wiretapping and other forms of electronic surveillance being subject to judicial clearance by the executive branch, would that view also apply to other tactics, recently disclosed, that have been pursued from time to time in the past, and may still be, by the Federal Government, such as mail openings, mail covers, physical surveillance, the obtaining of telephone records surreptitiously, of breaking and entering, the obtaining of bank records, credit records, and the like—all of the litany of tactics used in part for national security purposes—should they also be subject to some limitations?

Mr. RUSK. Mr. Chairman, it would not be for me to try to tell this committee how to conduct your own business. My own personal reaction would be that you might want to consider whether you should not deal with these subjects in one category at a time. I am not sure that the same considerations that apply to, for example, electronic wiretapping or bugging, would apply to physical surveillance. I am not sure that this problem is the same as that which is reached with regard to bank records, for example.

Now, on some of the items that are mentioned in one of these bills, and I must confess that as a citizen I wondered whether those same limitations would be accepted by the Congress with respect to its own operations, because from the point of view of a citizen, an abuse of

privacy or constitutional rights by the executive branch or by the Congress is more or less immaterial. And it just may be that you might want to consider more than one bill, because some of the standards and some of the approaches may vary, depending upon the subject matter.

For example, the atmosphere in which we live is filled with all sorts of communications. Is it an invasion of privacy for people, or an intrusion into the business of the Government, for people to listen to police radio bands, to airport control stations? When I was here in Washington, I had a car radio in my car, and I used to laugh when I realized that there were a good many people, I was sure, spending 24 hours a day monitoring my car radio, when all that I would say over it was I will be in the office in 12 minutes, and please have a cup of coffee and a donut waiting for me. And the cost of monitoring that channel must have been enormous.

So, I just do not know how some of these things break down. You just might want to see what you want to do about wiretapping and bugging electronically, and then take a look to see how these other matters fit into other pieces of legislation. I happen to have a strong objection to unjustified opening of mail, and it does not help me very much to recall that our Founding Fathers searched the mails assiduously for a long time, looking for Tories and traitors and people like that, so this privacy of the mail has been developed over a considerable period of time.

But, I think some of these would justify asking for a warrant, some of them may not be capable of being judged by a warrant.

Mr. KASTENMEIER. I would only say that to the extent that Congress abuses citizens in this connection, it, too, ought to be subject to some sort of limitation; although the Congress, I do not think, is capable of dealing that secretly with people. I think we are more openly criticized by citizens. But if there are abuses, they too should be curbed.

I would like to yield to the gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. Mr. Secretary, we are glad to have you back.

Mr. RUSK. Thank you, sir.

Mr. RAILSBACK. Let me just ask you how extensively were these warrantless national security wiretaps used during your administration, if you know?

Mr. RUSK. I just do not know. I think you can get figures or have had figures from the FBI, for example, covering the years in which I was in Washington. But I just do not know.

Mr. RAILSBACK. Were you aware of any particular utilization that was of particular value of these warrantless wiretaps, national security?

Mr. RUSK. Mr. Railsback, I would have to say that it is difficult for me to distinguish between different types of highly sophisticated technical intelligence, because I was not provided in each case the exact nature of the source. I would say that we got very important benefits from the whole range of technical intelligence, including electronic intelligence. It was of some considerable importance.

Mr. RAILSBACK. That is all. Thank you.

Mr. KASTENMEIER. The gentleman from California, Mr. Danielson.

Mr. DANIELSON. I apologize for not being able to attend from the beginning of your presentation. On the portion I have heard, I want to thank you for some very realistic responses to the few questions. I

think we have to recognize always that we live in a real world, a pragmatic world, rather than the ideal which we hopefully will attain sometime.

Could you tell me, when you were Secretary of State, did you have the benefit of a device which would scramble your telephone messages?

Mr. Rusk. I had a scrambler for a time, and then they took it out because we discovered that it was susceptible to electronic eavesdropping, so we got rid of it. Now, there was a scrambling possibility in town to which I had access, but it was not in my own office.

Mr. Danielson. You had access to it anyway?

Mr. Rusk. Yes. That is right. Very often, it did not work. I mean, it was a very annoying kind of thing.

Mr. Danielson. I understand the more sophisticated this equipment becomes, the less reliable it becomes.

Mr. Rusk. I think that is a fair statement, sir.

Mr. Danielson. So, when you get the ultimate sophistication, you have the ultimate unreliability.

I know that there is a thread here that really I am trying to clarify in my own mind. When a message is broadcast by radio, it can be, we should all assume that it can be and therefore it is going to be received by anybody who really wants to listen to it. That should impose a discipline on the communicator to not broadcast anything that he does not want someone else to listen to, even if it is the cup of coffee and the donut.

But, I, for one, cannot, do not feel any great fear or disappointment or anger at somebody listening to a radio broadcast, even if it is on some so-called private band, because once you put it out there, somebody is going to listen to it, and very probably the one that you do not want to listen to it. That is why I go for scramblers, if they work.

For the telephone system, I think we have to apply very much the same analogy. We are offended when someone listens to our telephone messages, because it is an invasion of our privacy, really and truly. We rent a line and we are supposed to have the use of it exclusively. But, do you not think you, in your work as Secretary of State, you always bore in mind that that, though you were supposedly on a private circuit, that you knew that privacy could be broken, and you very nearly had to assume that it was being broken from time to time, your privacy could be invaded and, therefore, if you really wanted a private communication, you either had to have it delivered by a safe hand or in some cryptic manner. Did you not bear that in mind?

Mr. Rusk. Yes, Mr. Congressman. As a matter of fact, there is a very considerable disparity between the manpower and the time that is required for monitoring this sort of thing on the one side, and the output of information on the other. Anyone who is in a sensitive business comes to assume that anything he says over the telephone is very likely to be picked up by somebody and so again I think that there has been some exaggeration as to the importance or quality of the information that comes from the use of such devices.

But, nevertheless, I would not exclude them altogether, because they could be—you know, there are people who do not understand what you have just said, and sometimes they say things that do give you some glimpses into problems you might otherwise not have had.

Mr. DANIELSON. I think you have answered what was on my mind. When you were in this sensitive position of Secretary of State, there was always in your mind to one degree or another that what you were communicating could be picked up by somebody else, particularly on such a thing as a telephone?

Mr. RUSK. Well, there were a couple of weeks during which I thought somebody was bugging some of the special lines coming into my residence, and all of the agents came out there and could not find anything, and finally they discovered that the squirrels apparently liked the insulation on the lines, and everytime a squirrel's teeth hit the metal, it gave a reaction like it was being bugged.

Mr. DANIELSON. Thank you. I have no other questions, except to thank you for your participation, and let you know that I appreciate your making one other distinction. We cannot treat wiretapping, letter opening, and the like in the same manner we treat physical surveillance. Some of these techniques, in my opinion, have a very legitimate and useful purpose in the operation of a society, and I think you have to be rather selective if we put legislative restraints on these uses, and be very careful about it.

Thank you very much. No other questions.

Mr. KASTENMEIER. The gentleman from California, Mr. Wiggins.

Mr. WIGGINS. Thank you, Mr. Chairman.

Mr. Rusk, so much of our understanding of the law, the fourth amendment law and our perception of the whole role of the Government in obtaining information, is colored by the fact that we have developed a law in a criminal context and the old concept really relates to the criminal law. Probable cause makes more sense in a criminal context than it does in many other contexts, so I want to spin off that criminal problem and talk about pure intelligence, unrelated to the commission of, or the suspected commission of any crime.

Would you comment first on whether there is a need for pure intelligence, independent of any criminal activity?

Mr. RUSK. Oh, I think so, sir. If you would permit the addition of the word counterintelligence or counterespionage, because we do have, unhappily, a problem both of espionage and counterespionage with us in which many, many governments participate right around the globe.

As I indicated earlier, we are the target of many of them because of the importance of the attitudes of the United States. And much of this is not really related to the specific commission of crime, but is in the political and security field. And I think it is entirely possible that different standards ought to apply and, therefore, I did suggest to the committee that you might want to consider giving special instructions to the courts with respect to the applications of the fourth amendment concept of probable cause in such things as espionage, counterespionage, and political terrorism.

Mr. WIGGINS. Well, all of those three categories relate, at least in my mind, to possible criminal activity. But, let us talk in terms of the importance to the U.S. Government of understanding, for example, the bargaining position of a foreign power before you meet that foreign power in a Geneva or the importance to the U.S. Government in cracking a code. I take it it is not illegal for a foreign power to have a code, but I can understand where it may be very useful if the U.S. Govern-

ment could read that without the knowledge of its adversary or potential adversary power. That is the kind of pure intelligence I am thinking about. And I have to believe that there is a national interest in having that information. Perhaps you would disagree, and if you do disagree, I would like your comments.

Mr. Rusk. No. I agree with that, sir.

Mr. Wiggins. All right. Now, the problem is in acquiring that information. If we adopt standards which require that a warrant be issued prior to the conducting of activities which would accumulate that information, and if the warrant were issued on the basis of probable cause, probable cause to believe what? How would you respond to that question? You could not say probable cause to believe that a crime had been committed. But probable cause to what?

Mr. Rusk. Well, in two fields, Mr. Congressman. I would be inclined to instruct the courts in favor of the general interest and safety of the country along these lines, that rather than probable cause in the traditional sense of that phrase, that if there is reasonable grounds to believe that x might be engaged in a plot to attack the Congress with bombs, or the Supreme Court with bombs, or to assassinate the President, that the judge would not have to look at the normal meaning of probable cause to be able or willing to issue a warrant.

And similarly, I would try to find some language along that same line in the field of espionage and counterespionage, because in the very nature of these crimes, it is very difficult to get a probable cause really established in the sense that a prosecuting attorney or someone else might be held to in a criminal case without the assistance of some of these more sophisticated means of getting information.

Mr. Wiggins. I think I can grapple with the criminal aspects of this problem, at least I am confident that I can in the future. But I am still not certain I know how to deal with the problem of pure intelligence as distinguished from the collection of information related to a suspected crime. And I do not know what role the court would play in advising the FBI that it can, in some clandestine way, obtain information possessed by a foreign visitor to this country, if it is believed by the FBI that that information would be useful in terms of just understanding the position of a foreign power with respect to a matter of importance.

Mr. Rusk. Well, these things would require some judgment, and it might very well be that the kind of oversight committee to which I referred earlier could be of assistance in reaching a judgment that would be comfortable, both to the executive and the legislative branches of the Government.

For example, I personally do not believe that you can find the full black letter law with respect to either the CIA or NSA on the statute books, because I think the Congress knew, when they passed this legislation, that they have known over the years that both of these organizations were engaged in certain kinds of things that were not spelled out in the black letter of the law. I do not believe anyone had any misapprehension about that.

Mr. Wiggins. I think you are right. I think you are right. I think we are going to have to deal with it now, apparently.

Insofar as a national purpose is served by the accumulation of pure intelligence, any political intelligence, what difference does it make

whether that is gathered domestically or in foreign country or from a foreign citizen?

Mr. Rusk. Well, I think we are primarily interested here, it seems to me, in the constitutional rights of American citizens over against his or her own Government. I do not know any way in which you can legislate these foreign agents out of the country. I do not see how you can legislate how foreign governments are going to treat American citizens, when American citizens go abroad, because American citizens going abroad do not carry the Constitution piggy-back with them in their nap-sacks. So we are talking about the constitutional right of those in this country or abroad who are entitled to the protections of our Constitution. And I would think we could find a way to do a better job on that and still not cripple ourselves with regard to some of the very important information.

Now, most of our information comes from the public domain. I would say 85 or 90 percent, probably, because there is a blizzard of paper that is falling in upon the world, and much of the effort, manpower, and time of people in the intelligence community is spent in trying to pull all of this together, and examine it and collate it and draw conclusions from it. Then there is some very important and technical intelligence of the sort that is already in the public domain, such as satellites which are used to monitor performance on nuclear arms limitation and things of that sort.

The kind of thing we are talking about here today is not a massive part of the total effort, but it can be a very important part of the total effort, and at certain moments, could be almost crucial.

Mr. Wiggins. Well, I really have not apparently made myself—my point—to you clear, but I am going to abandon that in favor of another subject, because my time is running.

If we sort of adopt the same rules, by analogy, which exist in the case of issuing warrants at the present time, we would probably have a procedure in which a government official would prepare an affidavit, and present that affidavit to a magistrate or a judicial officer, the affidavit showing that there is probable cause to believe something. We will have to define what that something is, and what that warrant should issue. Therefore, under current procedures, the person searched may well have access to the affidavits. He could gain that access upon a motion to suppress, challenging the validity of the searching, if it ever went to trial, or he might gain access to the affidavit in an independent motion to quash.

However, the point is, the person searched may have the ability, under existing procedures, to read the supporting affidavit justifying the search. Now, apply that in the context of a truly national security matter where the person searched is almost, by hypothesis, antagonistic to the interests of the United States, do you see some problems here, and do you have any recommendations here to me on how we may meet that problem?

Mr. Rusk. Well, I think there have been a number of circumstances over the years when, because of the problem you mentioned, the government would elect to not to proceed with the case rather than reveal sources of information which it did not feel that it could reveal. There are times when agents are left in position in order to take a better look

at what they are doing and what they are up to. So, a judgment has to be made as to whether the Government, on its side, would wish to put itself in the position of having to reveal sources, even though those sources had been earlier approved by the judge. I do not see any way to avoid that choice or that decision at the moment.

Mr. WIGGINS. Well, I am going to think about some way, and I may call upon you, in your role as professor to help me. Thank you very much.

Mr. RUSK. All right, sir.

Mr. KASTENMEIER. The gentleman from Massachusetts, Mr. Drinan.

Mr. DRINAN. Thank you very much, Mr. Chairman. I am sorry that I was detained at another committee, Mr. Secretary, before I came here.

I am sorry that we have no text of your learned remarks. I protested yesterday that this was contrary to a rule of the House, and I never acquiesced in its waiver.

In any event, I went back to your testimony a year ago on May 9, 1974, in the Senate, and I wonder if you could tell me whether or not your position has changed on electronic surveillance from what you said at that time?

Mr. RUSK. Yes, Mr. Congressman. I did tell the committee before you came in that on the point of warrantless wiretapping for national security purposes, after thinking about it further I have come to the conclusion that in the usual case warrants should be obtained for national security wiretaps.

Mr. DRINAN. Why the usual case?

Mr. RUSK. Well, because I indicated earlier that I thought you might want to restrict your legislation, borrowing a phrase from the first sentence of the 14th amendment, to persons present in the United States and subject to the jurisdiction thereof, and not try to give protection to agents of foreign governments who are here under diplomatic immunity, who are governed by a whole set of laws and rules that do not turn upon internal legislation, but in international law, in comity, in reciprocity and retaliation, and the declaration of persona non grata and things of that sort.

Mr. DRINAN. Does this mean that article IV of the Constitution does not apply to aliens, and I will read you article IV.

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

Do I understand your testimony that you gave is that you feel that aliens or nationals of other nations in this country are not entitled to this protection?

Mr. RUSK. No; not aliens and nationals of other countries, Congressman. I referred to those persons present in the United States and subject to the jurisdiction thereof. The exclusion would be those who, in fact, are not subject to our normal criminal processes. I mean, you cannot arrest a person with diplomatic immunity and slap him into jail. You have to treat him in a different way.

Mr. DRINAN. You have suggested that a U.S. official can do electronic wiretapping on them without any warrant; is that right?

Mr. RUSK. I would think so, yes, sir.

Mr. DRINAN. Who would do it in the Federal Government?

Mr. RUSK. I would think the Attorney General under guidelines approved by the President, but it ought to be done by an Attorney General.

Mr. DRINAN. Would he have probable cause or something less?

Mr. RUSK. Well again, I expressed regret to the committee that I had not had an opportunity to do some of the research on the probable cause point that I would have liked to have done. I think that the definition or the distinction between reasonable and unreasonable searches and the context of probable cause would vary with the kind of problem we are faced with. For example, I think probable cause in the field of espionage and counterespionage and in the field of criminal political terrorism aimed at the destruction of one or another branches of the U.S. Government would be different from probable cause in the normal kind of criminal situation.

Mr. DRINAN. Why do we not let a judge decide? The judge could take it in camera, we could have a special court here in the District of Columbia, and only in that court could the Attorney General move to do electronic surveillance upon the individuals that you mentioned. What is so terrible about allowing a judge? That would be totally consistent with article IV and the Bill of Rights, and how would the results be different? Would his standard of probable cause, would his judgments on allowing or not allowing be different than that of the Attorney General?

Mr. RUSK. Well, I personally do not believe, and you may disagree with me, I do not believe that agents of foreign governments who are here protected by diplomatic immunity are entitled to all of the protections of our Bill of Rights.

Mr. DRINAN. Well, Mr. Secretary, would the judgment of a particular court that would be designated by Congress, would that really, in your judgment, be different from the judgment of the Attorney General? He would present the case, it would be in camera, it would be secret, and the judge would approve or disapprove electronic surveillance upon these individuals. What is so terrible about that? That would give protection to the Attorney General, it would say to the world that even these individuals do have the right to have a court pass on it, to review what the executive branch does. What peril is there in that?

Mr. RUSK. Well, if we could establish that on a reciprocal basis right around the globe, I would think it would be fine. But that is not the way the world works.

Mr. DRINAN. Should we not believe in giving rights to the people of the world?

Mr. RUSK. Yes, Mr. Congressman, but there are certain things——

Mr. DRINAN. Mr. Secretary, you are saying, in effect, that a lot of Federal judges are going to turn down the Attorney General, and I do not think that is so. And I want the Attorney General to be protected. I want to have every application for electronic surveillance to go through a court. I think that is totally consistent with our whole judicial system. I simply do not agree with your assumption that this is going to somehow disrupt the intelligence process. I do not see any evidence for it.

Mr. Rusk. Well, we both are exercising our privilege, Mr. Congressman.

Mr. Drinan. No. I just want some evidence for your assumption that to have the courts interfere or intervene by congressional statute would somehow interfere with the intelligence that the Attorney General and the State Department need.

Mr. Rusk. Well, in a few circumstances not involving the normal private citizen, American citizen, or alien within our jurisdiction, I think you and I would see it pretty much the same way. But again, in this pretty mean and dirty game that is going on in the world in which many governments participate, I cannot help but—I cannot quite get out of my mind Leo Durocher's remark that "nice guys finish last."

Mr. Drinan. You intimated that the Congress knew when it created the CIA that dirty tricks, if you will, were going on, and you say that by implication the Congress acquiesced in that. How do you justify that?

Mr. Rusk. No; I just indicated that not everything that the Congress knew the CIA would be doing was spelled out in the black letter of the law.

Mr. Drinan. That means electronic surveillance.

Mr. Rusk. And I also mentioned NSA in connection with that.

Mr. Drinan. NSA?

Mr. Rusk. Yes.

Mr. Drinan. We do not spell out a lot of things, but does that mean they have inherent powers? They have, as any agency has, only those powers granted to them by the Congress, and there is no such thing in the CIA or the NSA or any other agency as implied powers that are not conferred upon them by Congress. So by what right do they say that Congress did not spell these powers out; therefore, Congress must have known that we were going to do these things, Mr. Secretary? I was not around when the CIA went through, but I see nothing in that statute which says that they can collect and coordinate intelligence. I see nothing there that suggests that they have some mandate from the Congress. I do not want you to be saying that the Congress has really acquiesced by a sloppy statute in all that the CIA has done. I do not think that is a fair statement.

Mr. Rusk. No; but all I said was the Congress did not write into the public law everything that it knew at that time, at the time it passed the law, you did not spell that out. I am sorry, your predecessors in the Congress did not spell out in the functions of NSA in any detail, but I do not think anybody in the Congress was under any misapprehension as to what their functions were going to be.

Mr. Drinan. Mr. Secretary, my last question. How would you describe the problem that you have testified about, and what would you recommend, in essence, that the Congress do?

Mr. Rusk. Well, I would subject electronic surveillance to court warrants except for those who are not under the jurisdiction of the United States, who are here in our country. I would suggest to the committee that it look carefully at the standard of probable cause that you would expect the judges to use, and to raise the question as to whether in two fields, espionage and counterespionage on the one side, political terrorism on the other, whether those standards ought

to be the same as they might be in an ordinary criminal case. For example, I would suggest that if the Congress sets up a joint committee on intelligence comparable in its techniques to the Joint Atomic Energy Committee, that some aspect of this problem might be subject to its oversight, and reporting to it rather than to more than 100 Members of Congress that are on the 4 committees that are named in these bills.

Mr. DRINAN. Well, I thank you for that, and I commend you for having made some progress from your testimony a year ago. But I do not think that you have given a satisfactory explanation of why in this number of cases that you mentioned the Attorney General should have this unreviewable power.

Thank you very much.

Mr. KASTENMEIER. The gentleman from New York, Mr. Badillo.

Mr. BADILLO. Thank you, Mr. Chairman.

Mr. Secretary, I find your testimony very surprising, and perhaps we have been thinking in terms of opponents like Russia or China, but I find it very difficult to believe that a former Secretary of State would want a country in Latin America, for example, or Mexico to understand that we have Congress passing different sets of laws, one that would allow the U.S. intelligence agencies to have no restrictions at all on the Embassy of Mexico or of any Latin American country. I think that would make life very difficult for the Secretary of State if such a policy were to be adopted. Is that what you are proposing?

Mr. RUSK. Well, I would have preferred to have gotten into some of these things in private here rather than in a public hearing. But we are talking about things everybody in the world knows, so I do not suppose there are any particular problems on that. A good many of these countries abroad, as I said, target in upon the United States. There is no particular secret about that.

Mr. BADILLO. Are you recommending Congress enact a law saying that any citizen of Mexico, or Venezuela, or Argentina who comes to this country would not have the equal protection you have under the law?

Mr. RUSK. No, sir. That is not what I am saying.

Mr. BADILLO. Or to have his telephone tapped?

Mr. RUSK. No, sir. That is not what I am saying at all. Any person present in the United States and subject to its jurisdiction, and that would include all of these aliens who are in our country, tourists, permanent residents, and aliens.

Mr. BADILLO. But all of the diplomats are not subject to the jurisdiction.

Mr. RUSK. That is right.

Mr. BADILLO. Therefore, all diplomats in the U.N., for example, would automatically be subject to wiretapping?

Mr. RUSK. Under the general discipline and supervision of an attorney general and also the President, of course.

Mr. BADILLO. Well, but that is up to the will of the individual. In other words, they would have this protection legally. In other words, the Congress should provide no protections at all for any U.N. diplomat or any consul in any city in the United States, or any ambassador in Washington? That is your recommendation?

Mr. Rusk. That is my recommendation. You can do with it what you wish.

Mr. Drinan. Would the gentleman yield?

Mr. Badillo. Surely.

Mr. Drinan. If this is so widely known, Mr. Secretary, that everybody does it, why do you need the congressional blessings on it?

Mr. Rusk. I am not suggesting the congressional blessings. I am just suggesting you not get into it in that particular regard.

Mr. Badillo. Mr. Chairman, I would suggest that we get the present Secretary of State to address himself to this situation, because I certainly know, with respect to many friendly countries, that one of the things that we are accused of by the present Secretary of State is passing legislation which interferes with the relations with other countries. And I know that most of the countries that I have been to, England, for example, would feel that this would be a very serious violation of our agreements with them.

Mr. Secretary, I would like to get very specific because we are debating a very specific bill, that is in the subcommittee. We are not talking about just general principles. What we are focusing on specifically is the question of one, whether or not there should be a search warrant and a penalty if the Federal employee searches any private dwelling used or occupied as a dwelling without a warrant. Would you agree that that category should be encompassed in our legislation?

Mr. Rusk. I think so.

Mr. Badillo. OK. No. 2, procures or inspects——

Mr. Rusk. Which bill are you reading from?

Mr. Badillo. I am reading from H.R. 214 on page 4, No. 2, "procures or inspects the records of telephone calls, bank, credit, medical or other business or private transactions of any individual without a search warrant or the consent of the individual." Would you agree with that?

Mr. Rusk. Provided the Congress would accept that same limitation upon itself, because an abuse of that right by the Congress is just as obnoxious to me as a private citizen as abuse of it by the executive branch.

Mr. Badillo. Well, it might be a question as to whether an officer of the United States is a Member of Congress, but I would agree.

Mr. Rusk. Well, that would surprise me if it were found that a member of the legislative branch were found to be an officer of the United States.

Mr. Badillo. But if the amendment would include Congress you would support that?

Mr. Rusk. I suggested earlier, sir, I thought that maybe, after all, you know, I am here as a private citizen, and I do not pretend to be an expert on these matters, but it seems to me the committee might want to consider whether it deals with these different kinds of problems in separate legislation.

Mr. Badillo. That is why I am trying to get you pinned down to the specific things that we are dealing with here, and we are pointing out one, two, three, and four, and I want to know whether you agree on those either taken in one, two, three, four together or separate bills, and I just want to get the specific matters from you. But you would agree with No. 2 if it included Members of Congress?

Mr. Rusk. Well, within the other observations I made today about persons under our jurisdiction, for example.

Mr. Badillo. Yes. I understand.

Mr. Rusk. And also on the reporting side.

Mr. Badillo. No. 3. opens any foreign or domestic mail not directed to him without a search warrant. Would you agree with that?

Mr. Rusk. If you bear in mind that there are times when circumstances are included in the law. For example, if you had anybody who had reason to suspect that a particular first-class mail package would include or contain a plastic bomb, I would hope somebody would open it.

Mr. Badillo. Well, have you read or are you familiar with the Rockefeller Commission report on the domestic activities of the Central Intelligence Agency?

Mr. Rusk. Yes.

Mr. Badillo. The report points out there was a mail surveillance operation conducted by the CIA in New York City, and that in 1 year the CIA intercepted the outside of 2,300,000 pieces of mail, and photographed a certain number of them, and that they opened a certain number of them.

Mr. Rusk. I think the report said they opened about what, 7,000?

Mr. Badillo. 8,700.

Mr. Rusk. Something like that; yes.

Mr. Badillo. Do you agree we are not talking then about plastic bombs or anything else that is just general, ongoing year-round operation, would you agree that that should be covered within this?

Mr. Rusk. I think normally the opening of mail ought to be under a court warrant.

Mr. Badillo. Would you agree that if that is done by a government agency, that those who carry it out should be subject to penalties? That is what the law provides, you see, that if this is done, you know, on page 5 it provides that a person shall be fined not more than $10,000 or imprisoned not more than 1 year.

Mr. Rusk. Well, I really have not addressed that particular point.

Mr. Badillo. That is a very important point, and I would like to get your opinion on it, because Mr. Rockefeller in his recommendations, after having made findings specifically about the CIA mail opening, recommended that the President should call in the CIA and tell them not to do it again.

Mr. Rusk. Right.

Mr. Badillo. And I do not think that that is a recommendation for change. I think in view of the findings of the Rockefeller Commission report that there has to be some penalty imposed because the opening of mail was prevalent, that unless there is a penalty we would not be really writing meaningful legislation, and that, really, is the heart of these bills. Not the question of whether there should be probable cause or reasonable cause as the bill provides, but whether or not a penalty shall be imposed on the offices, including the President of the United States, if they do not obey the law. And, really, I would like to get your thoughts on that even though they are not final thoughts on it.

Mr. Rusk. Well, Congressman, I am not trying to evade, but I just have not thought about it. And it seems to me that is a very compli-

cated matter. I will be glad to send you some comment later about it if you wish. But I am a little reluctant to try to toss off an indepth view on something as serious as this.

Mr. BADILLO. Well, except that this is the heart of the bills we are discussing. The question before us is whether a penalty shall be provided, because otherwise we are not really accomplishing anything if we merely say as Vice President Rockefeller suggested, do not do it again, fellows.

Mr. Chairman, do you have a question?

Mr. KASTENMEIER. Well, I was going to suggest that if, indeed, Mr. Rusk desires at a later date to communicate his thoughts to the committee on these questions, we would be most pleased to hear from him.

Mr. RUSK. Thank you.

Mr. BADILLO. And also I would like your thoughts on whether the penalty should extend to a hired agent because the bill merely says any officer, agent, or employee of the United States who opens any foreign or domestic mail, or who intercepts any wire communication. But as you know, and as you pointed out, many times the person is hired and is not technically an officer of the United States, so that the question is if somebody hires an informer or some other agent to do this, whether that person ought to be subject to a penalty. That is the crucial issue in these bills.

Mr. RUSK. What about receiving such information from anybody who has used these mails whether you are in Government or whether you are a member of the news media, is that going to be a crime?

Mr. BADILLO. Well, I think that this is one of the questions, because in some other situations we have been told, and I think you yourself have testified you read material and you really did not know who obtained it, and many people said they did not want to know who obtained it, but that is another way of closing your eyes to reality. I think if the person should have known or should have inquired as to whether the material was illegally obtained, he should be held responsible too. And I would appreciate your thoughts on that subject.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. The Chair observes there is a vote on, and the committee is required to recess for perhaps 12 or 15 minutes for a vote on the floor. And Mr. Pattison of New York has not had an opportunity to ask the Secretary questions. Would you be able to remain, sir?

Mr. RUSK. Yes. I have no problem.

Mr. KASTENMEIER. Thank you. And I would also say the same to Mr. Kelley and the other witnesses. The committee will stand in recess for 15 minutes.

[Short recess.]

Mr. KASTENMEIER. The committee will resume its hearings.

The committee, upon its recess, was hearing testimony from the Honorable Dean Rusk, and at this point I will now yield to the gentleman from New York, Mr. Pattison.

Mr. PATTISON. Mr. Secretary, I would like to follow up on some of the questions that have been asked, and particularly the concern that was expressed by Mr. Wiggins. I take it that we can agree that warrants for wiretapping and other surveillance make sense for citizens

and those people who are under the protection of the laws of the United States, whether they be citizens or not?

Mr. RUSK. That is my view.

Mr. PATTISON. I suppose that we can also agree that the warrant system is really just a procedure, and even under a warrant system that we will have invasions of privacy? In other words, judges will grant warrants improvidently?

Mr. RUSK. That is possible, and I personally do not see any way in which the Congress can prevent that.

Mr. PATTISON. As all procedures——

Mr. RUSK. There are always those possibilities.

Mr. PATTISON. You try to do as good a job you can by setting procedural standards?

Mr. RUSK. That is correct, sir.

Mr. PATTISON. And I also take it your primary objection to having warrants required in the case of people who are not entitled to protection of our laws is that, as a matter of fact, in many cases the standard that is formally required for a warrant; that is, probable cause that a crime is or is about to be committed, would be an impossible standard to fulfill because, indeed, many times you do not have any idea that a crime is going to be committed? You simply want to get some intelligence relating to some noncriminal activity, but which is important to the national security of the United States?

Mr. RUSK. Or to protect yourself against espionage on the part of those who are sent here for that purpose.

Mr. PATTISON. And who would not be committing a crime either? In other words, let us take the case——

Mr. RUSK. Well; it might be committing a crime, but would not be subject to the normal criminal law because of certain immunities.

Mr. PATTISON. OK. Either way. But let us take a case where it was, as Mr. Wiggins was saying, pure intelligence.

Mr. RUSK. Right.

Mr. PATTISON. You do not even suspect that a crime is going to be committed, so that therefore——

Mr. RUSK. That is correct.

Mr. PATTISON [continuing]. You would be incapable of showing probable cause that a crime is or might be committed.

Mr. RUSK. That is correct.

Mr. PATTISON. What would your reaction be for a requirement for a warrant in those cases where you are talking about people who are not under the protection of the laws, but which would have a different standard? Now, I am not sure what that standard would be, but it seems to me that to perceive what you are trying to do is simply a separate decisionmaking process to get it out of one person's hands, to get it into some sort of review procedure so that in a number of cases you can at least have some protection that the one person who was interested both in the result and in the means does not have all of the power. In other words, let us, for want of a better word, suppose you could get a warrant from a judge in those cases where it is important to get the information, and that is, the judge would have to review what you are saying. In other words, you would have to convince the judge that it was important not that a crime was going to be committed, but it was important.

Mr. Rusk. I can imagine that theoretically, Mr. Pattison. As a matter of principle, I would not object to it. I am not experienced in legislative drafting, but I should think it might be rather difficult to frame such legislation.

Mr. Pattison. I would agree with you. I am trying to get the principle.

Mr. Rusk. It might be possible for a discreet oversight committee with full access to all of the information to assist, say, the Attorney General, the President, develop the kinds of guidelines and supervision that would go a long way toward meeting the difficulty that you see.

Mr. Pattison. In other words, what I am trying to get to is all warrant procedures are simply a means of review of executive discretion, and it may be that probable cause that a crime is going to be committed is not an appropriate standard to apply in all reviews. I think you are saying that in cases where you have people who are not entitled to protection of our laws, probable cause is not an appropriate standard. But that does not necessarily mean to say that, therefore, you could have no procedure at all in those cases, or that perhaps the procedure which would have a different standard, which would not be probable cause that a crime has been or is about to be committed?

Mr. Rusk. Yes. And I thank you, sir, for helping me understand now a little bit more what Mr. Wiggins had in mind, because there are some intelligence targets or purposes that do not really strictly get involved in the criminal law as such or with offenses as normally understood. As I say, I think it might be theoretically possible. But for example, if you knew through unchallengeable information that there are certain persons in this country who are here for the purpose of penetrating certain aspects of our nuclear establishment, you might want to have them under some sort of continuing surveillance of some sort. Well, I do not know whether you ought to ask judges to give you a blank check for, say, a year or two at a time, that kind of thing. That makes me a little bit nervous.

Mr. Pattison. But is not the object to separate or to add another voice in the decisionmaking process?

Mr. Rusk. I think that can be done, sir, and I think we ought to start with the suggestion that has been made, and which I fully agree with, and that is that to the extent possible, the Attorney General be removed from the partisan political context. Traditionally, and not always exactly, the Secretaries of State, Treasury, and Defense are supposed to remain somewhat outside of partisan political combat. I would think it would be most important of all that the chief law officer of the Government be similarly removed.

Now, this cuts into both parties because both of them have used political people in that office from time to time. I would like to see that politically insulated from the political process.

Mr. Pattison. But we really could not legislate that very well, could we? I suppose we could have an independent——

Mr. Rusk. No; but you could make it very uncomfortable for those who try to make it the other way, because the Congress has an enormous capacity to make things uncomfortable.

Mr. Pattison. That raises another point. That point is there is sort of an assumption there that if the Attorney General were, in fact, an

independent person, not politically connected, that he would, or that you could competently put these decisions in his hands.

Mr. RUSK. But in consultation with the right kind of oversight committee. That does not bother me at all.

Mr. PATTISON. In other words, you do not object to the idea of a warrant where you have to go to someplace and follow some kind of procedure. What you would object to primarily is using those criminal standards of probable cause that a crime is about to be committed?

Mr. RUSK. That is correct.

Mr. PATTISON. In the case of noncitizens who are not under our laws.

Mr. RUSK. Particularly in the two fields of espionage and counterespionage and political terrorism.

Mr. PATTISON. Thank you, Mr. Chairman. I have no further questions.

Mr. KASTENMEIER. Actually, Mr. Secretary, there are, I guess, more or less three options here. One is to proceed to do nothing with the present law. Another is to provide for some other procedure in cases of national security. And another presumably is to ban the use of wiretapping, as H.R. 214 does, completely. And you would be totally opposed to that?

Mr. RUSK. I would be opposed, Mr. Chairman, to a total ban of electronic techniques.

Mr. KASTENMEIER. To clarify a colloquy that went on before, as to a distinction between the protection of U.S. citizens and other aliens under the protection of the United States, certain foreign citizens who are here on diplomatic missions or otherwise have a legal status quite different from persons or people under our Constitution, is that not correct? That is to say, under international law, under comity, or under agreement, or under our own national law, they would not qualify as persons?

Mr. RUSK. I think there is an important distinction, Mr. Chairman. Diplomatic immunity does not constitute a license to disobey the law or commit crimes. The procedures by which you deal with it are radically different because diplomatic immunity, and this we have an interest in worldwide ourselves on the basis of reciprocity, or retaliation and considerations of that sort, diplomatic immunity simply provides different procedures to deal with obnoxious violations on the part of diplomatic personnel.

Mr. KASTENMEIER. Well, that concludes the questions I have. And to the extent that in the future, after having thought about other aspects, you care to communicate with this committee, we would invite and solicit your opinion.

On behalf of the committee, I would like to express our appreciation for your coming today as a private citizen to help us with this rather difficult group of questions on which we seek some counsel and wisdom. Thank you very much.

Mr. RUSK. Thank you, Mr. Chairman.

Mr. KASTENMEIER. Next, the Chair would like to call two witnesses, the Honorable Clarence Kelley, Director of the Federal Bureau of Investigation, a distinguished public servant, and in place of the original representative of the Justice Department, the Honorable John C. Keeney, Assistant Attorney General of the Criminal Division, we have with us this morning, Mr. Kevin T. Maroney.

Gentlemen, may I invite you to come forward and take your places at the witness table. And may I extend the oath to you as I have all of the other witnesses preceding.

Mr. Maroney, and Mr. Kelley, would you raise your right hand. Do you swear that the information you are about to tell the committee is the whole truth and nothing but the truth?

Mr. KELLEY. I do.

Mr. MARONEY. I do.

Mr. KASTENMEIER. Gentlemen, Mr. Kelley, which of you would like to proceed first? You both have statements. Mr. Maroney?

TESTIMONY OF KEVIN T. MARONEY, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE

Mr. MARONEY. Mr. Chairman and members of the committee, I appreciate this opportunity to present for your consideration the views of the Department of Justice on H.R. 214 and H.R. 141.

Although there is some similarity between the two bills, they are really quite dissimilar. I want to discuss H.R. 214 first and then I will discuss H.R. 141.

H.R. 214 appears to be designed basically to achieve three general purposes. First, it would require court orders to permit law enforcement activities which have been carried on heretofore without such orders. Second, it would subject Federal law enforcement agents to criminal penalties for failing to obtain court orders as required. And finally, it would call for the making of certain new reports to the Committees on the Judiciary of the Senate and House of Representatives concerning intercepted communications and authorizations to open mail.

H.R. 214 can be divided into three general parts. In order, these parts concern: (1) searches without warrant; (2) interceptions of wire and oral communications; and (3) reporting to the Congress on intercepted communications and mail openings. For purposes of a clearer presentation I shall discuss each of these parts of H.R. 214 separately.

Searches without warrant—section 3 of the bill. Section 3 of H.R. 214 would amend 18 U.S.C. 2236 to enlarge its scope and to punish Federal agents for wrongfully conducting any of several kinds of searches and for wrongfully intercepting or attempting to intercept wire or oral communications. The indirect effect of this would be to require law enforcement agents to obtain court orders for many activities that have been carried on to date without such orders.

As background, let me point out the state of existing law regarding warrantless searches of property. At present, the victim of a warrantless search of property by Federal agents has two remedies. He can sue the offending agents civilly and seek to recover damages under the principles enunciated in *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). Or he can call the matter to the attention of Federal officials for possible prosecution under 18 U.S.C. 2236. This statute, which has been in effect since 1948, is applicable only when Federal agents invade a private dwelling without a warrant, or when they search any other building or property without a warrant or reasonable cause, and with malice. Initial violations of 18 U.S.C.

2236 carry a maximum penalty of $1,000 fine; subsequent violations a maximum of $1,000 fine and 1 year's imprisonment.

The first thing that would be done under the proposal would be to recodify 18 U.S.C. 2236, changing only the penalty provisions. Under the proposal a first offense would be punishable as would any subsequent offense, by a maximum $10,000 fine and 1 year's imprisonment.

The second thing that would be done under the proposal would be to enlarge 18 U.S.C. 2236 to reach, with the penalties I just mentioned, any Federal official who "procures or inspects the records of telephone calls, bank, credit, medical, or other business or private transactions of any individual without a search warrant or the consent of the individual."

A third provision would enlarge 18 U.S.C. 2236 to punish any Federal agent who opens any foreign or domestic mail directed to him, without a search warrant or the consent of the sender or addressee in violation of 39 U.S.C. 3623(d). This statute applies now only to mail of domestic origin, not foreign mail, and has been limited by judicial construction to first-class mail. *United States* v. *Van Leeuwen*, 397 U.S. 249 (1970).

Finally, the proposal would enlarge 18 U.S.C. 2236 to punish any Federal official who intercepts, endeavors to intercept, or procures any other person to intercept any wire or oral communication except as authorized under chapter 119. This same activity is now punishable under 18 U.S.C. 2511 by a maximum $10,000 fine and 5 years' imprisonment. Thus, the proposal would reduce the maximum penalty available to a $10,000 fine and 1 year's imprisonment. Skipping ahead for the moment, however, section 4 of this bill would amend 18 U.S.C. 2511 so that its criminal provisions would apply only to persons other than Federal agents.

Insofar as the proposal would retain the existing scope of 18 U.S.C. 2236 and 18 U.S.C. 2511, while elevating only the penalty provisions, the Department has no objection to the proposal.

The Department's position on the proposal with regard to the opening of the mails can be stated very briefly. Enlarging upon the present statute (39 U.S.C. 3623) by creating a protection for foreign mail and for packages other than first-class mail would likely interfere with the customs inspections of such mail entering from abroad, and would be objectionable for that reason. See *Cotzhausen* v. *Nazro*, 107 U.S. 214 (1882). The Postal Service and the Bureau of Customs may wish to make further commentary on the provision, and the Department would defer to their views.

From the standpoint of the Department of Justice, there is a very basic objection to be made to the provision that would criminalize the inspection of records of telephone calls and of bank, medical, credit, or other business or private transactions, without a search warrant or consent of the individual. The approach being taken is fundamentally wrong. The proposal, if adopted, would have the most detrimental effect upon law enforcement.

An essential ingredient in obtaining a search warrant under rule 41 of the Federal Rules of Criminal Procedure is a showing of probable cause. Another instance where a showing of probable cause is required is for the arrest of an individual. Probable cause, then, con-

cerns very basic individual rights. A fundamental fault with this proposal is to require a showing of probable cause to justify investigative efforts that must be undertaken before facts can ripen into probable cause and that concern third parties.

A criminal investigation must begin somewhere. Many, if not most, criminal investigations are instituted upon the basis of allegations and suspicions. Federal agents do not usually start out with probable cause to believe that a certain person committed a certain offense, and that certain items of real evidence, or the fruits of crime, or contraband can likely be found at a certain location. Investigations ordinarily proceed by inquiring of a large number of people in the hope of developing evidence amounting to probable cause. When investigators go to written records, they are not doing anything essentially different from when they ask questions of the persons who made or were involved in making the record, except that the records preserve memories that may be lost.

The proposal would lump together, as necessarily private, records of telephone calls, bank, credit, medical, and "other business records." Investigators could not look into such records without probable cause. It is not clear whether, without probable cause, the investigators could ask questions of the persons who would have made such records. It would seem plain, in any event, that the proposal threatens to hamstring criminal investigations.

An analogy may be drawn to the matter of testimonial privileges. These privileges prevent the disclosure of confidential communications, but taking the doctor-patient and lawyer-client privileges for example, they do not generally prevent testimony about the fact of the relationship of nonconfidential matters. McCormick on Evidence, 2d Ed. 1972, pp. 185–186, 215–216.

If one were investigating a criminal assault and had reason to believe that the perpetrator had received a serious gash on his arm, the investigator might canvass doctors and medical clinics to try to locate a person who treated the criminal and who might be able to describe him or identify him. Surely there would be nothing wrong in this; nor should it be wrong for records to be examined as a help perhaps in finding the doctor in a clinic who treated the offender. In other words, investigations have to be carried on in very general ways. It would be the exceptional case to start with probable cause to believe that a certain person possesses a particular record of pertinence to an investigation. I would emphasize to the subcommittee, in sum, that the proposal would interfere with quite ordinary investigative techniques.

The fourth amendment protection to which a person is entitled ought not to be extended solely because the person wishes something to be private. As the Supreme Court said in *Katz* v. *United States*, 389 U.S. 347, 351–52 (1967), the fourth amendment: "protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not subject of fourth amendment protection. [Citations omitted.] But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."

The *Katz* case then raised the matter of the person's reasonable expectation of privacy. Many of the kinds of transactions that would be covered under the proposal are indeed "private" transactions, in

that they are not displayed for general public consumption. But they are hardly "private" transactions in any other sense. Records kept of these transactions, especially when owned and maintained and used by the other parties to the transactions, are records that are commonly inspected by or at least exposed to a number of people. For instance, one expects that when a check is written, records of its progress through the clearinghouses and eventually on the books of the drawee bank will be seen by many people. No expectation of privacy in such records, at least as the phrase is used in *Katz*, would appear to exist. Indeed, courts have been unwilling to recognize a fourth amendment right enforceable by an individual in records of that individual's transactions with others, when those records are the property of the other party to the transaction. For example, *United States* v. *Baxter*, 492 F. 2d 150, 165 (9th Cir. 1973) (telephone toll records); *United States* v. *Fithian*, 452 F. 2d 505 (9th Cir. 1971) (telephone toll records); *Harris* v. *United States*, 413 F. 2d 316 (9th Cir. 1969) (bank records); *Disek* v. *United States*, 405 F. 2d 405 (8th Cir. 1968) (bank records). See *Gotkin* v. *Miller*, 379 F. Supp. 859, 863 (E.D. N.Y. 1974) (medical records). Thus, it would seem that the proposal would make records sacrosanct far beyond what is now the law.

It is our view that a warrantless search is not unreasonable unless the Government, without probable cause or exigent circumstances, intrudes into an area in which the "proprietor" has a reasonable expectation of privacy. See *Katz* v. *United States*, 398 U.S. 347 (1967). Those things which an individual exposes to public scrutiny, things which he does not himself safeguard from third parties, are not protected by the fourth amendment. It follows that records of transactions of an individual which, in the normal course of events, can be viewed or obtained by persons whom that individual evidences no desire to select or restrict are not iems in which the individual has an expectation of privacy. Records of credit transactions present a cogent example.

Before a business will extend credit or a bank will loan money to an individual, an extensive inquiry into that individual's credit history is usually undertaken. An individual's credit history is often reviewed even without his knowledge or consent. This credit history consists of records of many transactions which would fall within the language of the proposed amendment of 18 U.S.C. 2236. If H.R. 214 were enacted, private individuals and businesses would still have free access to records of these transactions but investigative agents of the Government would subject themselves to criminal liability if they inspected the same records without a warrant. Such a situation does violence to the concept of "expectation of privacy" as an underpinning of the fourth amendment.

As noted before, often the initial stages of an investigation consist of a check of records such as telephone calls, business transactions, et cetera. In many cases, certainly quite frequently in organized crime investigations, probable cause that a crime has been committed or that a certain individual is linked with the commission of a crime cannot be made without the results of an informal check of these records.

H.R. 214 would require a warrant supported by probable cause for obtaining information which is itself frequently the basis for a show-

ing of probable cause. The job of a Federal law enforcement officer would be made measurably more difficult and time consuming under such a regimen. He would be forced to wait a matter of days, sometimes weeks, to enable him to obtain each piece of evidence, each new lead. Hotel guest lists, airline passenger lists, records of purchases of poisons, firearms, explosives, and drugs would be out of reach without obtaining legal process.

H.R. 214 would make the job of the Federal agent more hazardous as well. It would prohibit him from inspecting or procuring records of "other private transactions." Such language places the burden on the agent to determine what is a private transaction upon pain of rather severe penalties if he errs. The statute's inhibitory effect would be considerable. Under these circumstances, the provision is arguably unconstitutional because it fails to sufficiently inform those who are subject to it what conduct on their part renders them liable to penalties. *Connally* v. *General Construction Company*, 269 U.S. 385 (1926). The criminal penalty aspect, however, is not the cause of our major concern; the proposal is fundamentally objectionable for being an unnecessary hindrance to criminal investigations.

Interceptions of wire or oral communications—section 4. The primary thrust of section 4 of H.R. 214 is to repeal certain provisions in chapter 119 of title 18 that allow for or pertain to emergency interceptions of wire or oral communications made without first obtaining court orders. The proposal is to repeal (1) the provisions of 18 U.S.C. 2511(3) concerning presidentially authorized electronic surveillance directed at "foreign intelligence" and domestic insurrection; (2) the provisions of 18 U.S.C. 2518(7) permitting interception without a court order when an official specially designated by the Attorney General reasonably determines that an emergency situation exists, with respect to conspiratorial activities threatening the national security or characteristic of organized crime, demanding that interception be made without waiting for a court order, and where grounds do exist upon which a court would enter an order authorizing the interception, and (3) the provisions of section 2518(a)(*d*) requiring simply that an inventory be served upon persons who are intercepted under section 2518(7).

Regarding the proposed repeal of 18 U.S.C. 2511(3), I want to emphasize that the statute says simply that nothing in the provisions on interception of wire or oral communications shall limit the constitutional powers of the President to conduct certain national and domestic security surveillances. It is clear that the present statute does not confer any authority upon the President that he may or may not otherwise have. That was so held in *United States* v. *United States District Court*, 407 U.S. 297 (1972).

A repeal of the provision would not take away any authority of the President under the Constitution. While it is hard to complain then of any real damage that would be done by the proposed repeal, I would simply submit that the present provision is an appropriate one, in recognizing a potential power in the President, the precise dimensions of which have yet to be developed in the courts.

Regarding the proposed repeal of the provisions for emergency interceptions, the effect of the proposal would be to make all such inter-

ceptions, no matter how threatening the circumstances and no matter how urgent the need for quick law enforcement action, per se, unreasonable without a court order. To consider such interceptions per se unreasonable would be anomalous, since it is constitutionally permissible to conduct searches and seizures without warrants in emergency situations—see, for example, *Warden* v. *Hayden*, 387 U.S. 294 (1967)—and intercepting communications can have no higher standing in the law than the matter specifically dealt with in the fourth amendment. Besides, the present statute specifically requires the emergency interceptions to be based upon grounds that would pass muster if there were time enough to obtain the court order; and the statute requires the Government to go into court within 48 hours to seek an order approving the interception. This Department does not want provisions abolished that can serve to avert grave dangers, and certainly the existing provisions have been drawn properly to protect individual rights.

I can hardly improve upon the argument that was made in support of the emergency provisions when they were enacted in 1968. In support of the provisions allowing emergency interceptions when the conspiratorial activities involved are characteristic of organized crime, the legislative history of the present statute shows the following:

"Often in criminal investigations, a meeting will be set up and the place finally chosen almost simultaneously. Requiring a court order in these situations would be tantamount to failing to authorize the surveillance. The provision [section 2518(7)] reflects existing search warrant law in which the principle of emergency search is well established (*Carroll* v. *United States*, 267 U.S. 132 (1925); *Schmerber* v. *California*, 384 U.S. 757 (1966))" Senate Report 1097, 90th Congress, 2d session 104 (1968).

I would also mention that the American Bar Association has supported emergency electronic surveillances, when safeguarded by provisions for subsequent judicial review and approval or disapproval—provisions that, I mentioned, do exist in the present law. See "A.B.A. Standards, Electronic Surveillance," section 5.2 (1971).

So far as I am aware, the emergency interception provisions have not been used, but this hardly undermines the provision. It shows instead that the provisions have only a very limited applicability and yet a very obvious importance for law enforcement. It would seem inherently unwise to repeal provisions which add flexibility to the Government's response to espionage, sabotage, and organized criminal activity, especially since there has been no abuse of these provisions.

The third item addressed in this portion of the statement deals with the making of the reports to Congress and the present requirements would be changed and added to by this legislation. In the interest of brevity, unless someone has a question on it, I will defer reading those three pages relating to the reporting requirements.

Mr. KASTENMEIER. Without objection, your statement in its entirety will appear in the record so that your omission will not be reflected.

[The prepared statement of Mr. Maroney follows:]

STATEMENT OF KEVIN T. MARONEY, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE

Mr. Chairman and members of the committee, I appreciate this opportunity to present for your consideration the views of the Department of Justice on H.R. 214 and H.R. 141.

Although there is some similarity between the two bills, they are really quite dissimilar. I want to discuss H.R. 214 first and then I will discuss H.R. 141.

I. H.R. 214

H.R. 214 appears to be designed basically to achieve three general purposes. Firstly, it would require court orders to permit law enforcement activities which have been carried on heretofore without such orders. Secondly, it would subject Federal law enforcement agents to criminal penalties for failing to obtain court orders as required. And finally, it would call for the making of certain new reports to the Committees on the Judiciary of the Senate and House of Representatives concerning intercepted communications and authorizations to open mail.

H.R. 214 can be divided into three general parts. In order, these parts concern: (1) searches without warrant; (2) interceptions of wire and oral communications; and (3) reporting to the Congress on intercepted communications and mail openings. For purposes of a clear presentation I shall discuss each of these parts of H.R. 214 separately.

1. Searches without warrant (Section 3 of the bill)

The proposal.—Section 3 of H.R. 214 would amend 18 U.S.C. 2236 to enlarge its scope and to punish Federal agents for wrongfully conducting any of several kinds of searches and for wrongfully intercepting or attempting to intercept wire or oral communications. The indirect effect of this would be to require law enforcement agents to obtain court orders for many activities that have been carried on to date without such orders.

As background, let me point out the state of existing law regarding warrantless searches of property. At present, the victim of a warrantless search of property by Federal agents has two remedies. He can sue the offending agents civilly and seek to recover damages under the principles enunciated in *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). Or he can call the matter to the attention of Federal officials for possible prosecution under 18 U.S.C. 2236. This statute, which has been in effect since 1948, is applicable only when Federal agents invade a private dwelling without a warrant, or when they search any other building or property without a warrant or reasonable cause, and with malice. Initial violations of 18 U.S.C. 2236 carry a maximum penalty of $1,000 fine, subsequent violations a maximum of $1,000 fine and one year's imprisonment.

The first thing that would be done under the proposal would be to recodify 18 U.S.C. 2236, changing only the penalty provisions. Under the proposal a first offense would be punishable, as would any subsequent offense, by a maximum $10,000 fine and one year's imprisonment.

The second thing that would be done under the proposal would be to enlarge 18 U.S.C. 2236 to reach, with the penalties I just mentioned, any Federal official who "procures or inspects the records of telephone calls, bank, credit, medical, or other business or private transactions of any individual without a search warrant or the consent of the individual."

A third provision would enlarge 18 U.S.C. 2236 to punish any Federal agent who opens any foreign or domestic mail not directed to him, without a search warrant or the consent of the sender or addressee in violation of 39 U.S.C. 3623(d). This statute applies now only to mail of domestic origin, not foreign mail, and has been limited by judicial construction to first-class mail. *United States* v. *Van Leeuwen*, 397 U.S. 249 (1970).

Finally, the proposal would enlarge 18 U.S.C. 2236 to punish any Federal official who intercepts, endeavors to intercept, or procures any other person to intercept any wire or oral communication except as authorized under chapter 119. This same activity is now punishable under 18 U.S.C. 2511, by a maximum $10,000 fine and five years' imprisonment. Thus, the proposal would reduce the maximum penalty available to a $10,000 fine and one year's imprisonment. Skipping ahead for the moment, section 4 of this bill would amend 18 U.S.C. 2511 so that its criminal provisions would apply only to persons other than Federal agents.

Insofar as the proposal would retain the existing scope of 18 U.S.C. 2236 and 18 U.S.C. 2511, while elevating only the penalty provisions, the Department has no objection to the proposal.

The Department's position on the proposal with regard to the opening of the mails can be stated very briefly. Enlarging upon the present statute (39 U.S.C. 3623) by creating a protection for foreign mail and for packages other than first class mail would likely interfere with the customs inspections of such mail entering from abroad, and would be objectionable for that reason. See *Cotzhausen v. Nairo*, 107 U.S. 215 (1882). The Postal Service and the Bureau of Customs may wish to make further commentary on the provision, and the Department would defer to their views.

From the standpoint of the Department of Justice, there is a very basic objection to be made to the provision that would criminalize the inspection of records of telephone calls and of bank, medical, credit, or other business or private transactions, without a search warrant or consent of the individual. The approach being taken is fundamentally wrong. The proposal, if adopted, would have the most detrimental effect upon law enforcement.

An essential ingredient in obtaining a search warrant under Rule 41 of the Federal Rules of Criminal Procedure is a showing of probable cause. Another instance where a showing of probable cause is required is for the arrest of an individual. Probable cause then concerns very basic individual rights. A fundamental fault with this proposal is to require a showing of probable cause to justify investigative efforts that must be undertaken before facts can ripen into probable cause and that concern third parties.

A criminal investigation must begin somewhere. Many, if not most, criminal investigations are instituted upon the basis of allegations and suspicions. Federal agents do not usually start out with probable cause to believe that a certain person committed a certain offense, and that certain items of real evidence, or the fruits of crime, or contraband can likely be found at a certain location. Investigations ordinarily proceed by inquiring of a large number of people in the hope of developing evidence amounting to probable cause. When investigators go to written records, they are not doing anything essentially different from when they ask questions of the persons who made or were involved in making the records, except that the records preserve memories that may be lost.

The proposal would lump together, as necessarily private, records of telephone calls, bank, credit, medical, and "other business records." Investigators could not look into such records without probable cause. It is not clear whether, without probable cause, the investigators could ask questions of the persons who would have made such records. It would seem plain, in any event, that the proposal threatens to hamstring criminal investigations.

An analogy may be drawn to the matter of testimonial privileges. These privileges prevent the disclosure of confidential communications, but taking the doctor-patient and lawyer-client privileges for example, they do not generally prevent testimony about the fact of the relationship or non-confidential matters. *McCormick on Evidence*, 2d Ed. 1972, pp. 185–186, 215–216.

If one were investigating a criminal assault and had reason to believe that the perpetrator had received a serious gash on his arm, the investigator might surely canvass doctors and medical clinics to try to locate a person who treated the criminal and who might be able to describe him or identify him. Surely there would be nothing wrong in this; nor should it be wrong for records to be examined as a help perhaps in finding the doctor in a clinic who treated the offender. In other words, investigations have to be carried on in very general ways. It would be the exceptional case to start with probable cause to believe that a certain person possesses a particular record of pertinence to an investigation. I would emphasize to the Subcommittee, in sum, that the proposal would interfere with quite ordinary investigative techniques.

The Fourth Amendment protection to which a person is entitled ought not to be extended solely because the person wishes something to be private. As the Supreme Court said in *Katz* v. *United States*, 389 U.S. 347, 351–52 (1967), the Fourth Amendment: ". . . protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. [Citations omitted.] But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."

The *Katz* case then raised the matter of the person's reasonable expectation of privacy. Many of the kinds of transactions that would be covered under the proposal are indeed "private" transactions, in that they are not displayed for general public consumption. But they are hardly "private" transactions in any

other sense. Records kept of these transactions, especially when owned and maintained and used by the other parties to the transactions, are records that are commonly inspected by or at least exposed to a number of people. For instance one expects that when a check is written, records of its progress through the clearinghouses and eventually on the books of the drawee bank will be seen by many people. No expectation of privacy in such records, at least as the phrase is used in *Katz*, would appear to exist. Indeed, courts have been unwilling to recognize a Fourth Amendment right enforceable by an individual in records of that individual's transactions with others, when those records are the property of the other party to the transaction. *E.g., United States* v. *Baxter*, 492 F.2d 150, 165 (9th Cir. 1973) (telephone toll records); *United States* v. *Fithian*, 452 F.2d 505 (9th Cir. 1971) (telephone toll records); *Harris* v. *United States*, 413 F.2d 316 (9th Cir. 1969) (bank records); *Dosek* v. *United States*, 405 F.2d 405 (8th Cir. 1968) (bank records). See *Gotkin* v. *Miller*, 379 F. Supp. 859, 863 (E.D. N.Y. 1974) (medical records). Thus, it would seem that the proposal would make records sacrosanct far beyond what is now the law.

It is our view that a warrantless search is not unreasonable unless the Government, without probable cause or exigent circumstances, intrudes into an area in which the "proprietor" has a reasonable expectation of privacy. See *Katz* v. *United States*, 389 U.S. 347 (1967). Those things which an individual exposes to public scrutiny, things which he does not himself safeguard from third parties, are not protected by the Fourth Amendment. It follows that records of transactions of an individual which, in the normal course of events, can be viewed or obtained by persons whom that individual evidences no desire to select or restrict are not items in which the individual has an expectation of privacy. Records of credit transactions present a cogent example.

Before a business will extend credit or a bank will loan money to an individual, an extensive inquiry into that individual's credit history is usually undertaken. An individual's credit history is often reviewed even without his knowledge or consent. This credit history consists of records of many transactions which would fall within the language of the proposed amendment of 18 USC 2236. If H.R. 214 were enacted, private individuals and businesses would still have free access to records of these transactions but investigative agents of the Government would subject themselves to criminal liability if they inspected the same records without a warrant. Such a situation does violence to the concept of "expectation of privacy" as an underpinning of the Fourth Amendment.

As noted before, often the initial stages of an investigation consists of a check of records such as telephone calls, business transactions, etc. In many cases, certainly quite frequently in organized crime investigations, probable cause that a crime has been committed or that a certain individual is linked with the commission of a crime cannot be made without the results of an informal check of these records. H.R. 214 would require a warrant supported by probable cause for obtaining information which is itself frequently the basis for a showing of probable cause. The job of a Federal law enforcement officer would be made measurably more difficult and time-consuming under such a regimen. He would be forced to wait a matter of days, sometimes weeks, to enable him to obtain each piece of evidence, each new lead. Hotel guest lists, airline passenger lists, records of purchases of poisons, firearms, explosives, and drugs would be out of reach without obtaining legal process.

H.R. 214 would make the job of the Federal agent more hazardous as well. It would prohibit him from inspecting or procuring records of "other private transactions." Such language places the burden on the agent to determine what is a private transaction upon pain of rather severe penalties if he errs. The statute's inhibitory effect would be considerable. Under these circumstances, the provision is arguably unconstitutional because it fails to sufficiently inform those who are subject to it what conduct on their part renders them liable to penalties. *Connally* v. *General Construction Company*, 269 U.S. 385 (1926). The criminal penalty aspect, however, is not the cause of our major concern; the proposal is fundamentally objectionable for being an unnecessary hindrance to criminal investigations.

2. Interceptions of wire or oral communications (Section 4)

The Proposal.—The primary thrust of Section 4 of H.R. 214 is to repeal certain provisions in chapter 119 of title 18 that allow for or pertain to emergency interceptions of wire or oral communications made without first obtaining court

orders. The proposal is to repeal: (1) the provisions of 18 U.S.C. 2511(3) concerning Presidentially-authorized electronic surveillance directed at "foreign intelligence" and domestic insurrection; (2) the provisions of 18 U.S.C. 2518(7) permitting interception without a court order when an official specially designated by the Attorney General reasonably determines that an emergency situation exists, with respect to conspiratorial activities threatening the national security or characteristic of organized crime, demanding that interception be made without waiting for a court order, and where grounds do exist upon which a court could enter an order authorizing the interception; and (3) the provisions of section 2518(8)(d) requiring simply that an inventory be served upon persons who are intercepted under section 2518(7).

Regarding the proposed repeal of 18 U.S.C. 2511(3), I want to emphasize that the statute says simply that nothing in the provisions on interception of wire or oral communications shall limit the constitutional powers of the President to conduct certain national and domestic security surveillances. It is clear that the present statute does not confer any authority upon the President that he may or may not otherwise have. That was so held in *United States* v. *United States District Court*, 407 U.S. 297 (1972). A repeal of the provision, would not take away any authority of the President under the Constitution. While it is hard to complain then of any real damage that would be done by the proposed repeal, I would simply submit that the present provision is an appropriate one, in recognizing a potential power in the President, the precise dimensions of which have yet to be developed in the courts.

Regarding the proposed repeal of the provisions for emergency interceptions, the effect of the proposal would be to make all such interceptions, no matter how threatening the circumstances and no matter how urgent the need for quick law enforcement action, *per se* unreasonable without a court order. To consider such interceptions *per se* unreasonable would be anomalous, since it is constitutionally permissible to conduct searches and seizures without warrants in emergency situations, see, e.g., *Warden* v. *Hayden*, 387 U.S. 294 (1967), and intercepting communications can have no higher standing in the law than the matter specifically dealt with in the Fourth Amendment. Besides, the present statute specifically requires the emergency interceptions to be based upon grounds that would pass muster if there were time enough to obtain the court order; and the statute requires the government to go into court within forty-eight hours to seek an order approving the interception. This Department does not want provisions abolished that can serve to avert grave dangers, and certainly the existing provisions have been drawn properly to protect individual rights.

I can hardly improve upon the argument that was made in support of the emergency provisions when they were enacted in 1968. In support of the provisions allowing emergency interceptions when the conspiratorial activities involved are characteristic of organized crime, the legislative history of the present statute shows the following: "Often in criminal investigations a meeting will be set up and the place finally chosen almost simultaneously. Requiring a court order in these situations would be tantamount to failing to authorize the surveillance. The provision [section 2518(7)] reflects existing search warrant law in which the principle of emergency search is well established (*Carroll* v. *United States*, 267 U.S. 132 (1925); *Schmerber* v. *California*, 384 U.S. 757 (1966))." S. Rep. 1097, 90th Cong., 2d Sess. 104 (1968).

I would also mention that the American Bar Association has supported emergency electronic surveillances, when safeguarded by provisions for subsequent judicial review and approval or disapproval—provisions that, as I mentioned, do exist in the present law See A.B.A. Standards, Electronic Surveillance, § 5.2 (1971).

So far as I am aware, the emergency interception provisions have not been used, but this hardly undermines the provisions. It shows instead that the provisions have only a very limited applicability and yet a very obvious importance for law enforcement. It would seem inherently unwise to repeal provisions which add flexibility to the Government's response to espionage, sabotage, and organized criminal activity, especially since there has been no abuse of these provisions.

3. Making reports to the Congress (Section 5 and 6)

The Proposal.—Section 5 of H.R. 214 would make substantial changes in 18 U.S.C. 2519, which requires the making of reports about intercepted wire or oral communications. The reports currently required are of three kinds: (1)

reports made by judges to the Administrative Office of the United States Courts: these are required within 30 days of a denial, or the expiration, of an interception order and describe the applications for interception orders in detail; (2) the annual report made by the Attorney General to the Administrative Office of the United States Courts: this compiles the information in the judges' reports and adds information generally describing the interceptions made during the year; and (3) the annual report made by the Administrative Office of the United States Courts to the Congress: this summarizes the material presented in the judges' reports and the Attorney General's report.

Under the proposal only the first type of report—the report of the judges to the Administrative Office—would be preserved intact. In place of the other reports would be reports to be made primarily to the Congress by judges and by law enforcement agents. The effect of the proposal would be to require reports to the Congress much earlier and in greater detail than is required under existing law.

Specifically, the proposal is to require the judges to make the presently required reports on interception orders both to the Administrative Office and directly to the Judiciary Committees of the Senate and the House of Representatives, and to report certain additional information besides. Within 30 days of the expiration or denial of an interception order, the judges would be required to report the names of all parties to any intercepted communications, furnishing at the same time a copy of the court order; and, within 60 days of authorizing or denying an interception, the judges would be required to furnish the Congress a complete transcript of the proceedings. In addition, H.R. 214 would require the person authorized to make an interception—the law enforcement agent—within 90 days of the date of an interception order and within 60 days of the termination of any resulting interception, to make a report to the Judiciary Committees of the Congress, and to the Administrative Office of the United States Courts, concerning the disposition of all records of any such interception and the "identity of action taken by all individuals who had access to any such interception."

Furthermore, Section 6 of H.R. 214 would create a new statute, which would be 18 U.S.C. 3117, to require the making of reports similar to those required under the proposal regarding intercepted communications, but concerning the issuance of warrants to authorize the opening of mail.

In particular, it would be impracticable to require the making of reports by the law enforcement agents who accomplish the actual interceptions. The law enforcement agency involved should bear the responsibility, rather than the individual agent, to make full and accurate reports of any kind that may be required. Furthermore, the better administrative practice is to centralize information as much as possible, making just one or only a few supervisory officials responsible for keeping a log controlling the disposition of records of interceptions and the persons having access to and utilizing the records. These matters may very well be controlled within an agency by personnel other than those who make the authorized interceptions, and, accordingly, the responsibility for making accurate and full reports on such matters should not lie with the individual agents.

Furthermore, and in general, it is the net effect of Sections 5 and 6 of H.R. 214 to expand and to speed up the existing requirements for making reports to the Congress. Such an expansion would encumber judges and law enforcement personnel, would be expensive to implement and be time-consuming and, would, in the Department's view, lack any counterbalancing legislative purpose. It would seem excessive to require the preparation and transmission to the Congress of typewritten transcripts of judicial proceedings in authorizing and denying interceptions. And while H.R. 214 would impose a duty of secrecy upon the Congress, we feel that, particularly with regard to cases *sub judice* (following upon the authorization of interceptions), the Congress should not require so prompt and detailed reporting. We believe that the Congress would not ordinarily be inclined to take legislative action tied to an actual case pending in court but would more properly consider remedial legislative action only after completion of the judicial proceedings. In general, too, we feel that the present statute, which affords the Congress information of considerable scope on an annual basis, is well designed to meet legislative needs and could be supplemented, when necessary and appropriate, by the Department furnishing additional information.

II. H.R. 141

I will turn now to H.R. 141, which would amend Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. § 2510, *et seq.*), with respect to electronic surveillance practices and procedures. H.R. 141 would add a specific requirement that electronic surveillance in all national security cases, including those aimed squarely at foreign intelligence collection, be undertaken only when authorized by a judicial warrant based on probable cause. Coordinately, the bill would strike out Section 2511(3) which currently disclaims any limitation by Congress on the constitutional power of the President to authorize national security electronic surveillance.

The Department has long taken the position that the President of the United States and, through him, the Attorney General possess constitutional authority to utilize electronic surveillance techniques when deemed essential as a means of gathering information to protect the nation against actual or potential attack or other hostile acts of a foreign power and to gain foreign intelligence information. The President derives such authority primarily as the commander-in-chief of our security forces under Article II, Section 2 of the Constitution.

There can be cited in support of this viewpoint several Federal cases acknowledging a constitutional power in the President to deal specially with foreign intelligence matters. See, e.g., *United States* v. *Clay*, 430 F.2d 165 (5th Cir. 1970), *rev'd. on other grounds*, 403 U.S. 698 (1971) ; *United States* v. *Hoffman*, 334 F. Supp. 504, (1971) ; *United States* v. *Brown*, 484 F.2d 418 (5th Cir. 1973), *cert. denied*, 415 U.S. 960 (1973) ; *United States* v. *Ivanov*, 494 F.2d 593 (3rd Cir.), *cert. denied*, 419 U.S. 881 (1974). Another case that shows very clearly that some Presidential power exists in this area is *United States* v. *United States District Court*, 407 U.S. 297 (1972).

We have to recognize, at the same time, that difficult questions are involved here as to the precise extent of the President's powers to conduct national security surveillances in the absence of warrants. See, e.g., *Zweibon* v. *Mitchell*, which was decided just a few days ago in this circuit—F.2d—(en banc), holding that the President has neither constitutional nor statutory power to authorize a wiretap on a domestic organization (the Jewish Defense League) that is neither the agent of nor acting in collaboration with a foreign power, notwithstanding that the purpose of the wiretap is to gather foreign intelligence information. To the extent that the President has the special constitutional authority mentioned, we have some difficulty as to how far Congress might be able to limit the exercise of the power. And, to the extent any asserted power may be lacking in a particular instance, we submit that the proposed legislation is unnecessary to curb any such asserted power.

The nature of the sensitive intelligence involved in these cases often is such that it may not be susceptible of evaluation by persons who do not regularly deal with foreign affairs and intelligence matters. The judgment involved requires consideration of matters not readily available to the judiciary. Furthermore, the need to acquire foreign intelligence and diplomatic information essential to the United States may involve such dangerous situations as the Cuban missile crisis or the outbreak of hostilities in the Middle East. It is obvious that it would be impracticable in such situations to comply with the detailed requirements of the bill without seriously hampering our ability to acquire vital intelligence as quickly as possible.

I think I can safely say that this Attorney General, as well as prior Attorneys General, would be and would have been more than happy to shed the responsibility of implementing the Presidential delegation of responsibility to authorize electronic surveillance in the interests of national security and foreign intelligence, and to aid the President in the conduct of foreign affairs.

But the difficulties in such an approach are very real. We should bear in mind that such surveillance is and has been utilized, not for purposes of gathering evidence for criminal prosecution, but primarily for purposes of aiding decisions relating to the conduct of foreign affairs and to prevent the flow of national defense information to potentially hostile nations.

Such surveillances must be kept secret in order to be effective at all. It is axiomatic that the greater the dissemination of a secret, the greater the risk involved.

Moreover, if the Government were required to apply to a court for a warrant, the court would have to consider the matter *in camera* rather than on an open record, its ruling would have to be kept secret, and the rationale for the decision

would not be available to another judge in a different district who might be faced with a similar request.

The result would inevitably be a lack of uniformity of application by the more than 500 federal judges available for exercising jurisdiction over such applications.

The reporting requirements of H.R. 141 would, of course, further compound the security problems.

I would also like to point out, as I have in the past, that the present situation is not such as to leave the Executive without a check on the propriety and legality of its activities in this area. In any criminal case in which a defendant makes an appropriate motion, the Government is required, under law, to advise the court and the defendant if the latter has been overheard by any government agency on an electronic surveillance. The court then reviews the circumstances attendant upon such overhearing. If the court determines the overhearing was lawful, it seals the government's submission for review by an appellate court. If the court determines the overhearing was unlawful, the government's submission would be turned over to the defendant and hearing on the question of taint would be in order.

This procedure has, to date, been followed in hundreds of cases.

In short, the abuses that may be regarded to have occurred over the 35 years of implementation of the national security wiretap authority are, in my opinion, behind us. The Supreme Court's ruling in *Katz*,[1] and subsequent decisions on the government's obligation to disclose any overhearings, on appropriate motion, have provided the reasonable check on the Executive's action in this area.

Mr. MARONEY. Thank you, Mr. Chairman.

Now, going then to the second bill under consideration today, H.R. 141, which would amend title III of the Omnibus Crime Control and Safe Streets Act of 1968 with respect to electronic surveillance practices and procedures.

H.R. 141 would add a specific requirement that electronic surveillance in all national security cases, including those aimed squarely at foreign intelligence collection, be undertaken only when authorized by a judicial warrant based on probable cause. Coordinately, the bill would strike out section 2511(3) which currently disclaims any limitation by Congress on the constitutional power of the President to authorize national security electronic surveillance.

The Department has long taken the position that the President of the United States and, through him, the Attorney General possess constitutional authority to utilize electronic surveillance techniques when deemed essential as a means of gathering information to protect the Nation against actual or potential attack or other hostile acts of a foreign power and to gain foreign intelligence information. The President derives such authority primarily as the Commander in Chief of our security forces under article II, section 2 of the Constitution.

There can be cited in support of this viewpoint several Federal cases acknowledging a constitutional power in the President to deal specially with foreign intelligence matters. My formal statement sets forth a number of cases in which courts of appeal have specifically addressed themselves to this Presidential power and have affirmed the existence of the power and the legality of the power under the Constitution.

We have to recognize, at the same time, that difficult questions are involved here as to the precise extent of the President's powers to conduct national security surveillances in the absence of warrants.

[1] *Katz* v. *United States*, 389 U.S. 347.

See, for example, *Zweibon* v. *Mitchell*, which was decided just a few days ago in this circuit en banc, holding that the President has neither constitutional nor statutory power to authorize a wiretap on a domestic organization—the Jewish Defense League—that is neither the agent of nor acting in collaboration with a foreign power, notwithstanding that the purpose of the wiretap is to gather foreign intelligence information. To the extent that the President has the special constitutional authority mentioned, we have some difficulty as to how far Congress might be able to limit the exercise of the power. And, to the extent any asserted power may be lacking in a particular instance, we submit that the proposed legislation is unnecessary to curb any such asserted power.

The nature of the sensitive intelligence involved in these cases often is such that it may not be susceptible of evaluation by persons who do not regularly deal with foreign affairs and intelligence matters. The judgment involved requires consideration of matters not readily available to the judiciary. Furthermore, the need to acquire foreign intelligence and diplomatic information essential to the United States may involve such dangerous situations as the Cuban missile crisis or the outbreak of hostilities in the Middle East. It is obvious that it would be impracticable in such situations to comply with the detailed requirements of the bill without seriously hampering our ability to acquire vital intelligence as quickly as possible.

The next paragraph, Mr. Chairman, commenting on the bill's definitions of foreign agents and foreign principals I would request be stricken from the statement. Upon review of it, I do not think it is well taken, and we would like to withdraw that without objection.

Mr. KASTENMEIER. Are you referring to those four lines?

Mr. MARONEY. The next paragraph on page 17.

Mr. KASTENMEIER. Only those four lines on page 17?

Mr. MARONEY. Just those four lines, yes.

Mr. KASTENMEIER. All right. You may proceed.

Mr. MARONEY. I think I can safely say that this Attorney General, as well as prior Attorneys General, would be and would have been more than happy to shed the responsibility of implementing the Presidential delegation of responsibility to authorize electronic surveillance in the interests of national security and foreign intelligence, and to aid the President in the conduct of foreign affairs.

But the difficulties in such an approach are very real. We should bear in mind that such surveillance is and has been utilized, not for purposes of gathering evidence for criminal prosecution, but primarily for purposes of aiding decisions relating to the conduct of foreign affairs and to prevent the flow of national defense information to potentially hostile nations.

Such surveillance must be kept secret in order to be effective at all. It is axiomatic that the greater the dissemination of a secret, the greater the risk involved.

Moreover, if the Government were required to apply to a court for a warrant, the court would have to consider the matter in camera rather than on an open record, its ruling would have to be kept secret, and the rationale for the decision would not be available to another judge in a different district who might be faced with a similar request.

The result would inevitably be a lack of uniformity of application by the more than 500 Federal judges available for exercising jurisdiction over such applications.

The reporting requirements of H.R. 141 would, of course, further compound the security problems.

I would also like to point out, as I have in the past, that the present situation is not such as to leave the Executive without a check on the propriety and legality of its activities in this area. In any criminal case in which a defendant makes an appropriate motion, the Government is required, under law, to advise the court and the defendant if the latter has been overheard by any Government agency on an electronic surveillance. The court then reviews the circumstances attendant upon such overhearing. If the court determines the overhearing was lawful, it seals the Government's submission for review by an appellate court. If the court determines the overhearing was unlawful, the Government's submission would be turned over to the defendant and a hearing on the question of taint would be in order.

This procedure has, to date, been followed in hundreds of cases.

In short, the abuses that may be regarded to have occurred over the 35 years of implementation of the national security wiretap authority are, in my opinion, behind us. The Supreme Court's ruling in *Katz* and subsequent decisions on the Government's obligation to disclose any overhearings, on appropriate motion, have provided the reasonable check on the Executive's action in this area.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. Thank you, Mr. Maroney. And having your formal presentation, I will ask Mr. Kelley to make his statement before resorting to questions.

TESTIMONY OF HON. CLARENCE D. KELLEY, DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, ACCOMPANIED BY JAMES ADAMS, ASSOCIATE DEPUTY DIRECTOR

Mr. KELLEY. Thank you.

Mr. Chairman and members of the subcommittee, I appreciate very much this opportunity to discuss H.R. 141 and H.R. 214.

I would like to make it quite clear at the outset that I share both the concern for individual privacy rights and the fear of governmental misconduct in areas addressed by these bills that obviously inspired this proposed legislation.

However, I feel very strongly that provisions of these bills would seriously impair vital operations of the FBI. They would, in fact, have a crippling impact upon the FBI's ability to fulfill its important national security and extensive criminal justice responsibilities.

These are extremely critical and urgent responsibilities.

I need not impress upon you the general crime situation that besets our Nation today. Data compiled by the FBI indicates that serious crime in this country soared a shocking 17 percent last year compared with the year before, during which some 8.6 million serious crimes were committed. All sections of our country have experienced this substantial rise in crime, and the American public is justifiably concerned with the wave of lawlessness and violence that threatens them.

As the Attorney General pointed out in releasing these latest crime figures, they represent "a dismal and tragic failure on the part of our present system of criminal justice." As he correctly indicated:

> There are many cases of crime, but among them is the failure of our system to move quickly and effectively to detect and punish offenders. All segments of the criminal justice system need help and support if we are to do better, and all segments must recognize the serious responsibility to do better.

You may be sure that the FBI is doing all in its power to improve and to intensify its efforts to counter this upsurge in crime.

Faced with this massive increase in criminal activity, it seems to me that we must carefully and critically consider the imposition of any further restrictions on essential investigative techniques.

Although, for obvious reasons, I cannot in open session provide a detailed analysis of threats to our Nation's security, I can assure you that they are substantial.

This country has been designated by the intelligence services of Communist bloc countries as a prime target. The intensity of their operations against us may be gaged by the steady increase of intelligence officers assigned to the United States. Hostile intelligence operations carried out by these individuals are highly sophisticated and varied in nature.

It is abundantly clear that we must be no less capable in our efforts to counter this serious threat.

The recent report to the President by the Commission on CIA Activities within the United States acknowledged the necessity for a counterintelligence function. The Commission recognized the impossibility of "informed decisionmaking without an intelligence system adequately protected from penetration." It concluded:

> A vital part of any intelligence service is an effective counterintelligence program, directed toward protecting our own intelligence system and ascertaining the activities of foreign intelligence services, such as espionage, sabotage, and subversion, and toward minimizing or counteracting the effectiveness of these activities.

I will not address the constitutional issue that this legislation raises concerning congressional authority to limit the powers of the President in matters affecting national security. This is more properly within the purview of the Department of Justice. My observations will rather be limited to the probable effects of these bills on FBI operations.

In this regard, our major concern with H.R. 214 is that it would drastically curtail, if not eliminate, the intelligence function of the executive branch of the Government. It does this through the imposition of a warrant requirement for a variety of investigative techniques, including electronic surveillances and access to certain records. The warrant must be based on a standard of probable cause which requires a reasonable belief that a crime has been, or is about to be, committed. This means that we cannot employ any of the techniques governed by this legislation until a crime has occurred or is imminent.

It must be understood that one of the major purposes of the intelligence function is to provide the President with all pertinent information needed to make an informed and responsible judgment on matters relating to internal security. This is vitally important in connec-

tion with his obligation to protect the Nation against threats of foreign origin. He cannot, of course, wait until these very serious threats become clear violations of Federal law before taking protective action. On the contrary, he must be able to collect in advance and on a continuing basis that information which is necessary for a complete and accurate assessment of the threat.

No other course of action is logical; anything less would be irresponsible.

The Supreme Court has acknowledged the power of the executive branch, within constitutional limits, to "protect domestic security" by "collecting and maintaining intelligence with respect to subversive forces."

The basis for this executive authority is predicated upon the President's sworn duty to "preserve, protect and defend the Constitution of the United States." Certainly he has no less an obligation in matters relating to foreign subversion.

I must stress that this gathering of information is not necessarily undertaken for the prosecution of criminal acts, but rather to obtain intelligence data considered essential to the protection of our national security.

The distinction between the collection of intelligence information to protect the national security and a search made in connection with a criminal investigation was well recognized by the Supreme Court in a 1972 case commonly referred to as the *Keith* decision.

As Justice Powell pointed out, the emphasis is on "the prevention of unlawful activity or the enhancement of the Government's preparedness for some possible future crisis or emergency."

I should emphasize that investigative activity in the field of national security is not usually based on a complaint or on a known violation of law, as in a criminal case where investigation is aimed at establishing the elements of the crime. Justice Powell correctly noted that the focus is less precise, and the targets are more difficult to identify. In addition, he pointed out that "The gathering of security intelligence is often long range and involves the interrelation of various sources and types of information."

It was for these reasons that the Court stated in Keith, referring to domestic intelligence cases, that "the Congress may wish to consider protective standards which differ from those already prescribed for specified crimes in title III."

It was suggested, for example, that applications for an intercept in domestic security cases might be made to a specially designated court, and, additionally, that the time and reporting requirements need not be so strict as those applied to the investigation of ordinary crimes.

Indeed the implication is that given the nature of intelligence-gathering, a relaxed version of probable cause might suffice. This is consistent with earlier opinions by the Court holding that something less than traditional probable cause might be adequate to support searches which are not directed at the prosecution of crime.

Despite these pronouncements by the Court, H.R. 214 proceeds in exactly the opposite direction by imposing requirements in national security investigations which are even more stringent than those presently applied in criminal cases.

I would also like to draw your attention to the reporting requirements of H.R. 214 concerning interception of wire, oral and other communications.

It is my belief that these place an unnecessary administrative burden on the FBI. Among other things, they require that basic facts surrounding an order authorizing or denying an interception be reported to the Administrative Office of the U.S. Courts within 30 days after the request for an order is approved or denied.

In addition, we must report the names of all parties to the intercepted communications and the nature of the facilities from which the communications were intercepted to specified congressional committees and their staffs on a quarterly basis. The widespread dissemination of such information, including the identities of all parties involved in such intercepts, raises serious privacy considerations which should be of concern to this subcommittee. In addition, the unauthorized disclosure of such information could jeopardize ongoing investigations of an extremely sensitive nature.

Section 3 of this bill would prohibit the procurement or inspection of records of telephone calls, bank, credit, medical, or other business or private transactions of any individual without a search warrant or the consent of the individual.

Requiring a warrant to obtain access to this information would severely impede, or in some cases, actually preclude our investigative operations.

As an example of this, let us consider a bank fraud involving the transfer of funds into several accounts under fictitious names.

Now in order to undertake an investigation of this crime, it would be necessary to trace the embezzlement from the actual removal of funds to their placement in the bogus accounts. There is simply no other way to do this than by extensively reviewing the records of numerous depositors, which might involve hundreds of files. This is the initial step of the investigation, and at this point, it would not be possible to set out sufficient facts from which a magistrate could conclude there was probable cause to believe a particular check was located in a specific account.

The same problem encountered in the situation just described might occur in attempting to review other types of records enumerated in this legislation.

One of our recent major cases strikingly illustrates the crucial value of access to records during the initial stages of an investigation. The case in point involved the bombing destruction of property valued in the millions of dollars.

As the indictment indicates, although one of the suspects was immediately identified as having been at the crime scene prior to the explosion, it was only through our review of telephone toll records, obtained by subpena, that we were able to tie in a number of other suspects. Subsequent investigation provided sufficient corroborating information to sustain indictments.

Here again, our ability to review pertinent records early in the investigative process was absolutely essential to the successful solution of this crime.

I realize full well that this authority must be used in a responsible manner, and I believe that this can be done in accord with a reasonable concern for privacy rights.

As you are aware, the FBI is charged with the investigation of numerous Federal laws in which interstate activity is an essential element of the offense. Oftentimes in these cases, records are the only means of establishing the interstate character of the offense.

I might add that this legislation extends protection to records, insofar as law enforcement is concerned, to a degree far beyond that which governs private access. For instance, when I write a personal check, I have no assurance—nor any expectation—that it is a privileged document. During the normal course of business, it will be seen by any number of individuals who might use the information for any purpose they desire.

Again, I fail to see why law enforcement in the legitimate exercise of its authority must labor under far greater restrictions in this respect than are imposed on the public at large.

I would like to now direct my remarks to H.R. 141.

This bill would impose warrant requirements on all electronic surveillances. In drafting this proposal, a conscientious effort has been made to accommodate the intelligence needs of the executive branch in matters of national security. The bill departs from the traditional probable cause standard by permitting electronic surveillances where there is cause to believe that the person under investigation is a "foreign agent." As a result, it is not necessary in each instance to show that a crime has been or is about to be committed.

Nevertheless, the bill is unduly restrictive since it requires a degree of certainty that is seldom attainable in the early stages of an intelligence investigation. We might, for example, have positive information that an individual is a foreign intelligence agent. But unless it can be established that he is presently engaged in particular activities intended to undermine the security of the Nation, it would not be possible to intercept his wire or oral communications.

Furthermore, electronic surveillances in such cases are seldom intended to produce evidence, but rather to help assess the probable intelligence role of a subject. This data may relate to his patterns of movement, known associates, and other information regarding his activities. Such knowledge is essential if the FBI is to effectively fulfill its counterespionage responsibilities.

Other adverse results can be expected from an extension of the restrictive provisions of title III to security electronic surveillances.

For example, the 30-day limit on orders and extensions is inconsistent with our needs in counterespionage investigations. In these cases, it is necessary to employ electronic surveillances for as long as the threat exists. Continuing coverage is necessary, as I have indicated earlier, to obtain valuable operational planning information to govern the allocation of our resources and to devise means to counter the activities of the subjects of these investigations.

Title III also requires that the application for an electronic surveillance contain detailed information concerning the facts and circumstances justifying the issuance of an order. In the absence of special provisions in the law to assure the secrecy of such information, I am

opposed to providing information of the most sensitive nature in connection with these applications.

It is further required under title III that the interception be kept to a minimum and that it terminate upon attainment of the authorized objective. The problem is that it is not possible to know which conversations detected through the surveillance might be of future relevance from an intelligence standpoint.This makes it difficult to minimize the interception of communications in such cases.

In addition, title III provides that persons named in the order be informed of its issuance or denial not later than 90 days after the termination of the surveillance. The issuing judge may in his discretion require that third parties to the intercepted communications also be notified of the surveillance. This requirement alone would render electronic surveillance useless to the FBI in conducting counterespionage investigations.

Let us suppose that an electronic surveillance was conducted under title III on a known foreign intelligence officer who was acting under diplomatic cover, and conversations with his Ambassador were overheard.

Should H.R. 141 become law, the surveillance must be discontinued after 30 days. Within 90 days after its termination, it would be necessary to notify the intelligence officer and, perhaps, the Ambassador that a surveillance had occurred.

With this possibility of disclosure, I can assure you that we would not consider undertaking such a surveillance. Given these limitations, the intelligence officer can operate with the knowledge that he has complete immunity from electronic surveillance.

In summary, I believe that if title III were to be amended by H.R. 141, electronic surveillance in national security matters would be eliminated. Under these circumstances, no responsible official would approve the utilization of this technique, even in situations when its use appeared reasonable and prudent to secure vital national interests.

Mr. Chairman and members of the subcommittee, I have attempted to bring to your attention certain provisions of the bills under consideration which I believe are ill advised.

I can certainly appreciate the desire to strengthen society's protections against unwarranted invasions of privacy. I must nonetheless question the heavy price that this proposed legislation exacts in terms of the FBI's ability to enforce the laws of this Nation, particularly those aimed at safeguarding our national security. Given the alarming crime rate today and the increasing threat of foreign subversion, this price is far beyond reason.

Moreover, in view of the exhaustive studies presently being conducted concerning matters covered in these bills, I feel that it would be premature for Congress to act on these proposals at this time. A great deal of information has been provided by the FBI and other intelligence agencies within the Government to the Senate Select Committee on Intelligence Activities. In addition, at the request of Chairman Edwards of the House Subcommittee on Civil and Constitutional Rights, the General Accounting Office is conducting an intensive study of certain Bureau intelligence operations.

With this wealth of information at its disposal, it would seem the Congress would be better prepared to make the kind of informed judgment that is required in matters of such vital interest to our Nation.

Mr. Chairman, thank you for permitting me to testify. This concludes my remarks. My associates and I will be pleased to answer any questions you may have.

And I have with me Mr. James Adams, who is Deputy Associate Director, and he may be called upon. Do you want to swear him in also? Is that a possibility?

Mr. KASTENMEIER. Should it be necessary for Mr. Adams to answer any questions, we can administer the oath then.

Thank you, Director Kelley.

With respect to the point you make at the end, of course, there are other forums indeed that are looking at this, or at collateral and somewhat similar problems. But it is this subcommittee that has the legislation. The Select Committees on Intelligence Activities have no legislation whatsoever before them. We will heed whatever recommendation they are presently making, have made, or may make in the future.

I am going to reverse the order of questioning with respect to Mr. Maroney and Mr. Kelley, and I will yield to the gentleman from New York, Mr. Pattison, first.

Mr. PATTISON. I do not have any questions right now, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from New York, Mr. Badillo.

Mr. BADILLO. Yes. Mr. Kelley, you oppose the requirement of finding probable cause, and you cite Supreme Court opinions that say that perhaps there should be something less than probable cause that might be acceptable. Would you be prepared to accept anything less than probable cause?

Mr. KELLEY. Yes, sir.

Mr. BADILLO. What would you be prepared to accept?

Mr. KELLEY. I think reasonable grounds; that as a result of the pursuit of all investigation, it is possible to believe that there has been, or will be a crime committed or there is a need for the gathering of intelligence.

Mr. BADILLO. And if there were such a requirement, you would be willing to submit that to a judicial forum that you were conducting this as a part of an investigation, is that correct?

Mr. MARONEY. May I interject?

Mr. KELLEY. Amplify.

Mr. BADILLO. Sure.

Mr. MARONEY. I would think we still would not, for the reasons that I mentioned in my statement. That is, that in that kind of a procedure we are injecting the courts into an area with which they are necessarily not totally familiar.

Mr. BADILLO. Why is that?

Mr. MARONEY. The area of the collection of foreign intelligence. The courts deal with crime.

Mr. BADILLO. No. Both of you testified that obviously you cannot say that you have probable cause at the beginning of your investigation because the investigation is determinative of probable cause, but I think you are sophisticated enough to understand that what we are

talking about here is that the American public has seen repeated instances of violations of the law by the FBI and the CIA without authority. The question is, can we be sure that you are conducting an investigation, not just checking on the records of Congressmen or other people, without being related to an investigation. Are you willing to accept anything that will justify to a judge that you are carrying out a function that has to deal with inquiring into a violation of national security, or the commission of a crime without having to say that you have the probable cause for it?

Mr. MARONEY. Where we are dealing with the commission of a crime we have no problem, and we do presently operate under title III, for example, if we want a warrant in a criminal case. But here we are talking, I take it, primarily about the area of foreign intelligence collection, not dealing with criminal matters.

Mr. BADILLO. That is not what your testimony seems to indicate. You say here in your testimony on page 1 under the proposal that section 3 of H.R. 214 would amend 18 U.S.C. 2236, the indirect effects of this would be to require law enforcement agents to obtain court orders for many activities that have been carried on to date without such orders. That is your testimony.

Mr. MARONEY. Maybe I misunderstood the thrust of your question. I thought the thrust of your question was that we would be willing to accept the standard of less than probable cause in making an application to a judge for an authorization to put on a foreign intelligence electronic surveillance.

Mr. BADILLO. That is one instance, but the other——

Mr. MARONEY. And the other instance, if you are talking about searches, of course, they are presently covered by the statute by which warrants are required. If you are talking about mail opening, I submit that also is presently covered by statutes which prohibit opening of first-class mail.

Mr. BADILLO. Well then, what do you mean when you say the indirect effect of this would be to require law enforcement agencies to obtain court orders for many activities that have been carried on to date without such court orders? Which activities are you carrying out to date without such court orders?

Mr. MARONEY. That is directed to the requirements of this bill which says that if you want to go and inspect the records of a bank, or go to a credit agency to get a credit check, or get any kind of business records of that kind that you have to first get a court order.

Mr. BADILLO. You are doing that now without the court order? What else are you doing now without a court order?

Mr. MARONEY. I would say all of these things, interviewing witnesses and then in the area of electronic surveillance.

Mr. BADILLO. You are doing electronic surveillance without a court order?

Mr. MARONEY. In the national security area, yes, sir.

Mr. BADILLO. But not in the criminal areas, just national security?

Mr. MARONEY. Not in the crime area. We are limited to provisions of title III in the crime area, and we do follow title III, and the Attorney General personally is required to authorize an application even to a district court for a warrant for an electronic surveillance in a criminal case.

Mr. BADILLO. Are you doing any mail opening now without a court order?

Mr. MARONEY. Not to my knowledge.

Mr. BADILLO. All right. Now then, going on to the national security, is there any standard that you would be willing to accept below a probable cause?

Mr. MARONEY. If you are referring to a standard lower than probable cause in connection with making an application to a judge for foreign intelligence or electronic surveillance, I submit we would object to that for the reasons that I set forth in my statement.

Mr. BADILLO. Because you do not want to go to a judge? Is there any forum that you would be willing to go to, a special committee of Congress, or a joint committee like the Joint Committee on Atomic Energy or something like that?

Mr. MARONEY. Well, I do not know. You mean to go to get an authorization before the fact?

Mr. BADILLO. Yes; without having to show probable cause, just legitimacy.

Mr. MARONEY. I would think not. On the other hand, the question arose this morning with Mr. Rusk as to the possibility of an oversight committee, and I think the Department has previously committed itself, and Mr. Kelley I am sure committed himself, I believe, to complete disclosure to an oversight committee.

Mr. BADILLO. I am on the oversight committee, Mr. Edwards' committee, and I am still waiting for him to give us the information on the Members of Congress where supposedly there are materials available, and it is combined with press clippings and other matters, and we had a hearing about 6 months ago and have not received any answer to that. So that authority is very weak. You see, also that is after the fact. You are talking about long after the fact.

The point is, as I understand your testimony, you object to this provision on the specific things, but you really are saying that you are not willing to go before any forum prior to carrying out an investigation, whether it is a judicial forum, administrative forum, or legislative forum?

Mr. MARONEY. We do not think the courts are the appropriate forum for review of this kind of application.

Mr. BADILLO. All right, the courts are not. Is there any other forum that is appropriate?

Mr. MARONEY. Frankly, I would not think a congressional committee before the fact. Now, as a matter of oversight, requiring disclosure to a congressional committee, that is a different matter.

Mr. BADILLO. Is there any forum that you are willing to accept before the fact?

Mr. MARONEY. Well, do you want to set up a three-judge court?

Mr. BADILLO. I do not want to set up, I just want to know.

Mr. MARONEY. National wiretap court or something?

Mr. BADILLO. I just want to know what your bottom-line position is. What I gather is that you do not really, you do not want to have any control of any type.

Mr. MARONEY. That is not true, Mr. Congressman.

Mr. BADILLO. What is the control you would accept?

Mr. MARONEY. You are concerned with abuses as you should be.

Mr. BADILLO. Yes.

Mr. MARONEY. We think one way to handle that is through an oversight committee where there would be a requirement of reporting, you know, under appropriate security safeguards to that committee so that the committee can keep a check on what is being done, much in the manner as the CIA oversight committee was supposed to do. But additionally, additionally I believe, as I indicated, that there is a judicial check on what is being done. You know, it is not as if the Attorney General can authorize these things and put them in a secret drawer with the assurance that it is never going to come out and be reviewed by anybody or any other branch of Government, because the chances are very good it will be reviewed by some other branch of Government some day. And maybe not too far away. Because any time in a criminal case, as I indicated, that a defendant makes an appropriate motion, if he had been overheard on any one of these wiretaps, the Government has an obligation to make that disclosure to the court, and the court then has the obligation to make a determination of legality or illegality of the tap.

Mr. BADILLO. No further questions.

Mr. KASTENMEIER. The gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. Yes. I want to thank you for coming. But I would like to pursue his questioning.

I have some problems with what would be the difficulty in having, as you suggested, possibly a three-judge court that could become expert in the cases of application for national security warrant lists, or not warrant lists, but wiretaps, electronic surveillance? In your statement, you objected to having 500 district court judges, I think, hear these applications, and I can understand, I can frankly understand that, and I agree with it. But I am wondering, suppose we were able to do this, set up a central court with judges that would become expert in foreign national security wiretap cases, and further suppose that we really did reduce the standard. In other words, instead of having a probable cause standard, take the standard that appeared in the chairman's bill, 141, which would be, I think the language is "cause to believe," and then even further suppose that instead of limiting it to a crime or the threat of a crime we go even a step further and deal with a potential threat to national security. Now, given that kind of a situation, what would your reaction be, either one of you?

Mr. KELLEY. Mr. Congressman, it is difficult, of course, to say just what is the best. In assessing the possibility of this you must keep in mind always the security of the information. Right now this is pretty well-assured. You also must have review, which is by a number of people.

Mr. RAILSBACK. Mr. Kelley, let me just interrupt you a moment about your security of information. Who knows right now about a request for a national security wiretap? The individual that wants it, an agent that might want it. Who else? The Department of Justice, the Attorney General. All those people know about it. Are you suggesting that it would open it up to more of a threat of disclosure to have a judge, one judge? You know, that bothers me. Right now you tell

me what the accountability is of the Attorney General or anybody else that approves this wiretap? Who is he accountable to, and what is his standard? What is the Attorney General's standard right now in approving a national security tap?

Mr. ADAMS. Mr. Chairman, could I be sworn in?

Mr. RAILSBACK. Let me just ask Mr. Kelley, whom, incidentally, I have a very high regard for, and I frankly agree with some of the points in your statement. But I would like you to answer that question.

Now, Mr. Kastenmeier, may I also suggest, Mr. Adams, if you have something you would like to contribute, you might consult with Mr. Kelley and let him answer.

[Pause.]

Mr. KELLEY. May I read to you a section of a paper that I prepared, that might be pertinent? Frankly, I have not refreshed myself on it.

The personal approval of the Attorney General is required before any nonconsensual electronic surveillance may be instituted within the United States without a judicial warrant. All requests for surveillance must be made in writing by the Director of the FBI and must set forth the relevant factual circumstances that justify the proposed surveillance. Both the agency and the Presidential appointee initiating the request must be identified. Requests from the Director are examined by a special review group which has been established within the Office of the Attorney General. Authorization will not be granted unless the Attorney General has satisfied himself that the requested electronic surveillance is necessary for national security or foreign intelligence purposes important to national security.

Mr. RAILSBACK. How is that?

Mr. KASTENMEIER. May I interrupt my friend. Perhaps I should be assisting the witness by saying that the Attorney General himself in a letter earlier this week, June 24, to the full committee and the subcommitee has said on this point, "Personal approval of the Attorney General is required," et cetera. "In addition, the Attorney General must be satisfied that the subject of this surveillance is either assisting a foreign power or foreign-based political group, or plans unlawful activity directed against a foreign power or foreign-based political group. And, finally, he must be satisfied that the minimum physical intrusion necessary to obtain the information will be used."

These apparently are standards articulated by the Attorney General himself.

Mr. RAILSBACK. If I may speak to that, the thing that bothers me is that how are these standards promulgated right now? Who promulgates the standards? Who decides what procedure is to be followed right now? Is it by a statute, or is it by a broad authorization, or is it under the broad, general powers under the national security position of the Commander in Chief? How are these rules promulgated, and even more relevant, what is to prevent a future Attorney General from adopting more relaxed standards?

Mr. MARONEY. The standards are promulgated by the Presidential delegation to the Attorney General.

Mr. RAILSBACK. By whom?

Mr. MARONEY. By Presidential delegation.

Mr. Railsback. Who established that group, who set up that ground and under what statute or what law?

Mr. Maroney. This is a delegation by the President to the Attorney General to exercise this authority.

Mr. Railsback. I mean, who set it up?

Mr. Maroney. Well, President Roosevelt is the first President who initiated that. And as we have asserted in numerous cases, and as a number of courts have adopted, the authority to do so in this area flows from the Constitution to the President.

Mr. Railsback. Well, let me ask you this: What statutory accountability now is there that runs from that agency or the Attorney General to account to the American people or to Congress? Is there any statutory accountability, or is it done strictly on a voluntary basis?

Mr. Maroney. Well, there is no statutory accountability that I know of. Congress has explicitly stayed out of this area by virtue of 2511(3) of the Omnibus Crime Control and Safe Streets Act.

Mr. Railsback. But that is since 1968. That does not account for any of the preceding years when we did not even have that.

But let me ask you this: Do either of you really think that by having a judge that would be a special judge, that had some expertise, do you really think that that would involve any more risk than the present system, except by having one more man involved?

Mr. Maroney. Not really. One problem with it, I think, is that it certainly would not be a full-time job for one judge.

Mr. Railsback. No; it would not have to be. It would not have to be. I think maybe, I think maybe you would need one judge and that is all to do that.

Mr. Maroney. Well, Congressman, I understand the British use this system of a three-man commission that I assume is part of their executive branch, and do utilize that three-man commission for this purpose. Whether such a commission would be feasible under our system, you know, I think it might well be.

Mr. Railsback. Rather than the courts?

Mr. Maroney. But I certainly do not think that it is a viable alternative to the present system to say we should go to whatever district judge we might happen to be in and to present him with something that is totally alien to his day-to-day business.

Mr. Railsback. I agree with you. I agree with that. I also agree with Mr. Kelley's, I think, concern about limiting the cause to believe to an actual sense, either committed or about to be committed. I think perhaps that would interfere with what perhaps would be a justifiable possibility, a justifiable intelligence gathering desire. But I am just saying I think we ought to be able to work something out. Right now there is a great distrust on the part of the American public about having a prosecutor, a man in charge of law enforcement, handle that kind of a decision.

That is all I have.

Mr. Kastenmeier. The gentleman from California, Mr. Danielson.

Mr. Danielson. Thank you, Mr. Chairman, and thank you Mr. Maroney and Mr. Kelley for your help.

I am fearful that we are going to have a vote in a few minutes, so I think I will do what everyone else has done. I will not ask any

questions. I will tell you what I feel at this point. It is based in large part upon what you have told us and Secretary Rusk has told us.

I think, first of all, the problem that we are confronted with is now beginning to emerge, at least to the point where everyone can see it. The idea that the President, and the Attorney General acting for him, can approve surveillance in intelligence cases ideally is just great, and it did serve us, I suppose, during most of our history. We are all aware of the events of recent years which have shown that that has gotten out of control, and now there is a great disaffection and distrust in our land, and we have to review whether or not the approval of the Attorney General and the President is sufficient or whether we have to add to that.

Somehow we all naively seem to feel that if we do not know how to do it in the Congress, and if the executive department messes it up, then we should have a judge do it. The first fallacy is that assumes that a judge is better qualified than a member of the executive department or a member of the legislative department to do the job. I have no evidence that a judge is better qualified to pass on the desirability of an electronic surveillance 'security case than does anyone else. Commonsense says that people who deal in intelligence matters, in the international relations, who are aware of techniques and practices used in those activities are probably better qualified to pass judgment as to the need for surveillance than would be a person whose constitutional responsibility is to remain impartial and to sit as a judge of one of our courts.

I just glanced at article III of the Constitution, and I am again reminded that the judicial power of the United States shall extend to all cases in law and equity and to controversies. None of these matters are cases in law or in equity, nor are they just controversies. And I respectfully submit they are not within the judicial power of the U.S. courts.

It is also naively submitted in one of these statements perhaps, perhaps one of the bills that we should report to the administrative officer of the court periodically. I submit that that would be really nothing. It would be a burden on the courts. The administrative officer of the court is sort of a chief clerk of the court, and what he wants to be doing with electronic surveillances is beyond my knowledge.

No, I prefer to restrict the functions of the courts to that which they are supposed to do; namely, to try cases and controversies and remain impartial. They may eventually have to pass upon a controversy that arises out of this kind of activity, and they should not be involved in it in a preliminary stage.

Now, I think there are a couple of sections in these bills which are surplusage. The statement that we are not limiting the power of the President or not adding anything to his powers under the Constitution, as far as I am concerned, is an idle act since we can neither add to nor subtract from the President's powers by legislation.

Now we get down to the nut of it, and as I think you are telling us, I recognize the distinction between criminal investigation and prosecutions on the one hand and intelligence gathering and use on the other hand. In the first case we are trying to gather evidence for the purpose of using it later in a prosecution if that should be the

proper end. In intelligence we rarely have a prosecution, very rarely. I have seen no statistics, but the prosecutions in our courts for espionage, and sabotage and related activities are a tiny fraction of the investigations that have gone on. We investigate intelligence in order to obtain knowledge, and to be certain that others who are not entitled to it are not obtaining the knowledge that they are not supposed to have, and which would jeopardize our internal security and foreign security.

Now, in the criminal law case I think we already have rather good safeguards. We need probable cause for warrants, warrants for search, warrants to arrest. We have a mass of precedence to give us guidance. But we have got one problem that is growing out of this distrust of the executive department, and that is now instead of getting a warrant at the time you want to make an arrest, or getting a warrant when it is time to make a search and seizure, the pressure seems to be, and I am going to call it naive because I think there is no malintent here, the pressure seems to be to get a warrant before you ever start your investigation.

I have done a lot of investigating in my life, and I respectfully submit that there is no point, there is no way to get a warrant until you at least have some evidence. You have to have a starting point. And if this Congress were to require a warrant before you commenced your investigation, you might as well all lie down and let the criminal world take over. It is just the hen and the egg situation. You have got to get a starting point before you get to the sophisticated stage of the warrant.

So as far as I am concerned, any legislation that this committee puts together will receive my support or not receive my support depending upon whether we have a practical treatment of that very real problem.

And lastly, a different rule applies in intelligence cases. I would like to have them relate to the Attorney General and to the President. I think ideally they should. But as I said before, the people have been burned. We all have. We are gun-shy. We are worried and properly should be. Experience has shown us that that is not necessarily enough. Perhaps we need to put together some other kind of a body. I am not going to call it a court, but some kind of body to supplement the President and the Attorney General, and to lend his blessing, or his denial to opportunities to use this type of surveillance. I do not care if it is a full-time job or not, sir. It would have to be a full-time occupation. I mean, I think the person selected should be of the very highest creditability, and that is about all they ought to do, and they ought to be ready, available 24 hours a day.

My last point here is how we are going to do that. I do not know. I do not know if we should do it. I wish we could have total faith in the Attorneys General and the Presidents that I would like to have, but I do not want the pendulum to swing too far, and in an effort to prevent the abuses we have seen in the last few years require that we destroy our own ability to protect ourselves against those who would break our domestic laws, and those who wish us no good in international relations. That is my position on this thing, and I will yield back the balance of my time.

Mr. KASTENMEIER. The gentleman from New York, Mr. Pattison.

Mr. PATTISON. Thank you, Mr. Chairman.

I must say I was rather stunned by the overwhelming nature of the testimony. I almost felt that it was an all-out attack on the fourth amendment to the Constitution. I think that we should keep in mind what we are here for, and it was well said, I think, by a quote from the Federalist papers which was quoted by the former FBI Director, Assistant Director Mr. Sullivan. And I think it is worth quoting, because, I think, it sets the context of what we are trying to solve here. And he quotes from the Federalist papers:

> In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the government, and then in the next place oblige it to control itself.

Now, that is our problem. We are not here to attack the fourth amendment. We are trying to work out a system that is sensible for all of us so that we can govern the people who are doing the governing.

One of your statements was particularly troubling to me, and it appears on page 10. You say, "Again, I fail to see why law enforcement in the legitimate exercise of its authority must labor under far greater restrictions in this respect than are imposed on the public at large." Now, are you really serious about that? Do you really want to know why the Government is under certain restrictions and the people are not under those restrictions? I think that is very basic to our whole constitutional system in this country. I would like to have an enlargement from you, if I could, on that statement. I am just absolutely shocked by that statement.

Mr. KELLEY. The provisions set out apply to law enforcement, but they do not apply to private people, and it just appears that this is a matter which could logically be extended to us, as Mr. Danielson said, to protect the people by virtue of a proper investigation leading toward the uncovering of criminal activities, or activities in the security field. After all, Mr. Congressman, we are in the field of trying to reduce crime and protect the people without invading privacy, without violating the law and using reasonable efforts to do everything short of this type of thing, we want to have all of the capabilities we can have. We are not desirous of this order to have a short cut. We are not wanting to shove off and get on to short cuts. We just want to do the job the best that we can to be implemented by the most viable systems that we can. That is the only thing I can answer to you. We just feel that we need this in order to do a proper job.

Mr. PATTISON. I understand, sir, but my problem is when you make a statement that law enforcement is under certain restraints and you cannot understand why they should be under restraints that are less than private individuals, you fail to understand that our whole Constitution restrains government. That is what it is all about. It does not restrain private individuals, but it restrains the power of government, and that statement just seems to me to show a fundamental misunderstanding of that basic part of our system. Perhaps you did not mean to say that. But it stuns me to have the chief law enforcement officer, or one of the chief law enforcement officers of this Nation saying that. And the Constitution does not say I cannot deprive somebody of free speech, it says that the Government cannot deprive people of free speech. Private individuals can do that.

Mr. MARONEY. Well, if I may, Congressman?

Mr. PATTISON. Yes.

Mr. MARONEY. As I understand Mr. Kelley's thrust of his position on that point, as was the thrust of ours, that these bills would unduly impede the investigative agency in appropriate conduct of an investigation, of a criminal investigation.

Mr. PATTISON. I got that from your statement. This part of the statement goes way beyond that. That is what I was getting at.

Mr. MARONEY. I think though, at least I think it should be read in the context of what went before, and that is that the bill would unreasonably impede the investigative process. I certainly do not think there is any indication to express a view that law enforcement is not subject to legal checks. It is. There are all kinds of restraints.

Mr. PATTISON. Thank you. I just have one other comment. On page 3 and then again on page 14 you have some statements about something that I am not aware of. The third paragraph on page 3 says, "This country has been designated by the intelligence services of Communist-type and bloc countries as a prime target." It goes on to say, "The intensity of their operations against us may be gaged by the steady increase of intelligence officers assigned to the United States." Then on page 14, it says in the second to last paragraph, the penultimate paragraph, "Given the alarming crime rate today and the increasing threat of foreign subversion, this price is far beyond reason." Is there something, some new developments along those lines, the designation of us as a prime target, is there some documentation, or is that simply a statement of what perhaps we perceive to be the case?

Mr. KELLEY. Mr. Congressman, I do not have the information that I have given out in speeches and analyses and so forth, but there is an increase in this activity by virtue of the enlargement of the assignment of people to the diplomatic corps, consulars offices, tourist and visitors, many of whom we feel are intelligence gathering in reality.

Mr. PATTISON. Well, then, there is not something else that I should know about, or anything that I do not get from the newspapers? I mean, there is not any new development or evidence that you can tell us about that is different from what our normal perception has been about the efforts of foreign countries to gather intelligence from us and subvert us?

Mr. KELLEY. There is an emphasis apparently upon intelligence gathering, and I will be happy, if it is satisfactory, to send you the material that we have on that.

Mr. PATTISON. Fine. I would appreciate that.

One other question. On page 9, you talked about an explosion case, and you say, "It was only through our review of telephone toll records, obtained by subpena, that we were able to tie in a number of other suspects." When you obtain a subpena, what do you do? What do you do, just issue a subpena yourself?

Mr. KELLEY. No. No. We go to the court for that.

Mr. PATTISON. You go to court?

Mr. KELLEY. Yes.

Mr. PATTISON. What do you have to show?

Mr. KELLEY. A grand jury in this case.

Mr. PATTISON. You go to a grand jury and the grand jury issues the subpena?

Mr. KELLEY. Yes, sir.

Mr. MARONEY. The U.S. attorney.

Mr. KELLEY. Well, the U.S. attorney handles the grand jury, and through him they actually issue it.

Mr. PATTISON. So in that case, that would seem that the problem of a warrant would not be much of a problem in going before a judge? You have to have some grand juries doing some investigation, you have to have some kind of reason for issuing a subpena? You just do not issue them?

Mr. KELLEY. Just illustrative of the value of reviewing those records——

Mr. PATTISON. I understand what you were trying to do is you were trying to review some background records, but you had to follow a procedure to do it?

Mr. KELLEY. Yes, sir.

Mr. PATTISON. Something other than just internally yourself?

Mr. KELLEY. Yes. That is right.

Mr. PATTISON. So some procedures like that do not hinder you?

Mr. KELLEY. That is right. We have less than probable cause, then——

Mr. PATTISON. I understand that. I understand you have less than probable cause, but that is not to say that you do not have to have a procedure in order to issue a subpena and to obtain evidence. I mean, you do not sneak into a bank in the middle of the night and look at somebody's records. You have to get in there, get in the door and show some piece of paper to somebody with some authority behind it, is that not correct?

Mr. KELLEY. That is right.

Mr. PATTISON. And you have to go to somebody, somebody else other than your own personnel, somebody has to review your decision to investigate, whether it is a grand jury or somebody else, is that not correct?

Mr. MARONEY. As a practical matter, Congressman, I think the U.S. attorney would cause the subpena to be issued. He would advise the grand jury of the issuance of the subpena in connection with their pending investigation. Now, the grand jury could, of course, direct that he withdraw the subpena or say they do not want the records or some such thing as that.

Mr. DANIELSON. Would the gentleman yield?

Mr. PATTISON. Yes.

Mr. DANIELSON. I do not think the gentleman means that at a bank, for example, that the agent would go to the bank in the dead of the night and rifle through the canceled checks?

Mr. PATTISON. No. I say that is exactly what they do not do.

Mr. DANIELSON. You go to the bank and you tell the vice president that I am Joe Smith and I would like to see George Danielson's checks or some such thing.

Mr. PATTISON. At which point the bank says not a chance unless you show me some piece of paper.

Mr. DANIELSON. Maybe they do now, but they never used to.

Mr. PATTISON. Well, the banks that I used to represent considered themselves to be Swiss banks unless they got a piece of paper.

Mr. DANIELSON. As a lawyer, I learned my clients did a lot of things they did not tell me.

Mr. PATTISON. I have no further questions.

Mr. KASTENMEIER. Mr. Maroney, you heard the preceding witness, the former Secretary of State, Dean Rusk, testify that in his belief in cases of national security wiretapping, we could operate with a warrant system. You differ with that judgment, is that correct?

Mr. MARONEY. That we could operate with a warrant restriction?

Mr. KASTENMEIER. With a warrant system for national security wiretaps?

Mr. MARONEY. Well, what my first premise is, is that the present system is sufficiently curbed, so to speak, through the subsequent judicial review that does come to pass, and could be further enhanced by congressional oversight committees. I did not understand Secretary Rusk to say that we should be required to go get a warrant for national security intelligence tap, national security foreign intelligence tap. Maybe he did. Well, if he did——

Mr. KASTENMEIER. Although perhaps on grounds other than probable cause, he did. I was just wondering what your judgment was in that connection?

Mr. MARONEY. Well, the difficulties I have with it are as I previously stated in going to a judge, presenting him with a factual situation, many times very complex relating to the conduct of foreign affairs which just does not seem to me the judiciary is best equipped to cope with.

Mr. KASTENMEIER. That point was raised with Mr. Rusk as well, and that did not seem to bother him. And I personally would like to observe there have been several points of view on this side of the table in this regard. I can understand the special competence of the Federal Bureau of Investigation and even the Department of Justice if we are talking about matters that relate to criminal investigation but not when we are talking about intelligence or political judgments as to what is useful for the United States in the conduct of foreign affairs or defense. I could make a distinction between the foreign policy expertise of the President, a member of the National Security Council, or the Secretary of State and a casual judge. But I could not as between a member of the Justice Department, or a special agent for the Federal Bureau of Investigation and a judge.

Mr. MARONEY. I agree with that, Mr. Chairman. And it is my understanding, Mr. Kelley can correct me if it is not right, that under the current Department policies, the Attorney General will not authorize one of these foreign, straight foreign intelligence electronic surveillances unless the State Department has at least concurred in the request for the coverage.

Mr. KASTENMEIER. I understand according to the Attorney General's letter that he has formed a special review group for requests of this sort within the Justice Department, and that is the group which presumably would make the judgment of whether to go forward with these matters. Is that not correct? Are you familiar with his special review group as referred to by the Attorney General?

Mr. MARONEY. Well, I did not realize it was regarded as a special review group. I know that there are three special assistants to the Attorney General who are right on his staff, who do review his requests before they are presented to the Attorney General, and present them with their comments and recommendations. The Attorney General from time to time requests the review and recommendation of some of these requests by the Assistant Attorney General of the Criminal Division, or in his absence, it has happened that I would act for the Assistant Attorney General of the Criminal Division for that purpose. If that constitutes a special review group, I think there is that process.

Mr. KASTENMEIER. Yes. I quote the Attorney General directly as of June 24th, 2 days ago: "both the agency and the presidential appointee initiating the request must be identified." This is in connection with nonconsensual electronic surveillances in the national security field. "Requests from the Director are examined by a special review group which I have established within the Office of the Attorney General." This is not something dating back to President Roosevelt but obviously of recent vintage, since Edward Levi, as a matter of fact. "Authorization will not be granted unless the Attorney General," that is he himself, "has satisfied himself that the requested electronic surveillance is necessary for national security, for foreign intelligence purposes important to national security."

That is all very well. But I am not convinced that is sufficiently reassuring, given the concern expressed in many parts of the country with reference to what has transpired in the past. We have had many Attorneys General in recent years. I do not believe that any given Attorney General has that special national security or foreign intelligence competence that some ultimate decision should be reserved for him alone. And this is why I think the Congress is confronted with a number of proposals suggesting other alternatives, particularly in view of the cases in the last 20 years where the Department, so far as I can gather, has not really enforced criminal laws with respect to illegal CIA activities or other activities conducted by others which have a questionable basis in authorization, and on the surface of the activity constitute an illegality. At least I am not aware of any series of cases that the Department has pursued.

Therefore, I would suggest that there is reason for Congress to look for other methods of checks and balances and of assurances that the abuses which are complained about are surveyed by means other than the Attorney General himself, whoever that may be at the time. Now, I realize as a representative of the Attorney General you may have a different view, but I would hope that in the weeks and months ahead the Attorney General's Office would cooperate with the Congress in drafting a law. That the Attorney General would realize that things, unchanged, the law as it is, is not going to be satisfactory for purposes of the future for reassuring the people of this country that Fourth Amendment rights are, in fact, secure.

I appreciate the testimony of both you, Mr. Maroney and Director Kelley. I have personal confidence in you.

I have no further questions and this concludes the testimony today. And the committee stands adjourned.

[Whereupon, at 1:25 p.m. the hearing was recessed, subject to the call of the Chair.]

SURVEILLANCE

FRIDAY, JULY 25, 1975

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to call, at 10:20 a.m. in room 2226, Rayburn House Office Building, the Honorable Robert W. Kastenmeier [chairman of the subcommittee] presiding.

Present: Representatives Kastenmeier, Drinan, Pattison, and Railsback.

Also present: Bruce A. Lehman, counsel; Timothy A. Boggs, professional staff member; and Thomas E. Mooney, associate counsel.

Mr. KASTENMEIER. The hearing will come to order this morning.

The hearing today will concern that aspect of the privacy legislation before us dealing with bank credit and medical records. Unfortunately, a conflict with both the House and the full committee yesterday morning caused a cancellation of yesterday's meeting.

One of the witnesses orginally scheduled for yesterday, Congressman Stark of California, will be heard this morning, and Commissioner Donald Alexander of the Internal Revenue Service will be heard on September 8.

Financial and medical records can reveal the most intimate secrets of an individual's personal life. As Justice William O. Douglas recently observed, even a bank account may mirror "not only one's finances but his interests, his debts, his way of life, his family, and his civic commitments."

One's ability to protect the confidentiality of his bank, credit, and medical records is limited by the fact that these records usually are not in his own possession, but are maintained by his bank, a credit company, a hospital, clinic, or physician. With limited exceptions, there are few restrictions on the ability on these institutions or individuals to disclose to Federal agents data on their customers, clients, or patients.

In recent years, Congress has enacted several measures which are designed to protect the privacy of certain personal records. The Fair Credit Reporting Act of 1970, for example, limits the disclosure to governmental agencies of information held by credit reporting agencies to an individual's name, address, and place of employment. The Family Educational Rights and Privacy Act of 1974 restricts the release of student records by educational institutions, and the Privacy Act of 1974 imposes certain controls on the release of personal data maintained by Federal agencies.

At the same time, however, Congress has broadened the ability of government, in certain instances, to intrude into the privacy of personal records. For example, the Bank Secrecy Act of 1970 authorizes an Internal Revenue Service Agent to demand reports of any transaction involving a financial institution "at such time, in such manner and in such detail as he may require." The Supreme Court, in the recent case of *California Bankers Association* v. *Schultz* (1974) held that the broad unilateral authority granted to Government agents by the Bank Secrecy Act does not violate the fourth amendment. Similarly, the court in *United States* v. *Bisceglia*, decided only last February, gave its approval to the broad use of so-called John Doe summonses by Federal tax agents.

During the last Congress, the issue of the privacy of medical records was raised in the context of the debate on rules of evidence. However, an attempt to include a physician-patient privilege in the rules was rejected, leaving the matter subject to State law.

During the current session of Congress, a number of bills have been introduced which are designed to protect the privacy of personal records. H.R. 214, the focus of today's hearing, is a comprehensive bill which, in addition to restricting the use of electronic surveillance, surreptitious entry and mail opening by Federal agents, also creates a new standard for the inspection and procuring of records of bank, credit, medical, or other business or private transactions.

I should note that we are not alone in considering legislation on the issue. A subcommittee of the House Banking and Currency Committee will be considering H.R. 2752, the Right to Financial Privacy Act, which is authored by one of today's witnesses, Congressman Pete Stark. Congressman Stark's bill is directed solely at the privacy of records held by financial institutions. In addition, our sister Judiciary Subcommittee on Constitutional and Civil Rights has jurisdiction over legislation dealing with the dissemination of criminal arrest records.

Today's session will, for the first time in our current series of hearings on surveillance practices and procedures, explore the proposals in H.R. 214 for restrictions on Federal investigators in areas other than electronic surveillance and mail opening.

Our first witness this morning is Hon. Pete Stark of California. The Chair notes, however, that we have a recorded vote on S. 555, the Farm Rural Development Act; and correspondingly, in connection with our practice, which is to recess during recorded votes, but to proceed during quorums. I will need to call a recess for an approximate period of time for 10 minutes, after which we will call on Congressman Stark.

We will recess until 10:40.

[A brief recess was taken.]

Mr. KASTENMEIER. The committee will come to order.

We will resume the morning hearing on H.R. 214. The Chair is very pleased to greet, as our first witness, Hon. Pete Stark of California. Congressman Stark is a former bank president, and one of the plaintiffs in *California Bankers Association* v. *Schultz*, a case which I referred to earlier. He is also the author of the Right to Financial Privacy Act, and a cosponsor of H.R. 214.

I am very pleased to greet Congressman Stark.

TESTIMONY OF HON. FORTNEY H. STARK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. STARK. Thank you, Mr. Chairman, members of the subcommittee, for the opportunity to testify this morning. I am pleased to present my strong support for H.R. 214, and for the broad purposes that it seeks to achieve. I would like to submit my written statement for the record, and paraphrase some of it for you this morning, and then answer any questions you may have.

Mr. KASTENMEIER. Without objection, your statement will be received, and be made a part of the record.

[The prepared statement of Hon. Fortney L. Stark follows:]

STATEMENT OF HON. FORTNEY H. (PETE) STARK, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Chairman and members of the subcommittee, I appreciate the opportunity to appear before you today. As a cosponsor of H.R. 214, I am pleased to take this time to present my strong support for this legislation and for the broad purpose it seeks to achieve.

More specifically, I appear here to explain my own involvement in this issue as it relates to bank records—those records on individual accounts held by financial institutions. The Bill of Rights Procedures Act would apply to these records, and I am in strong support of its provisions in this area. I have introduced legislation which takes a somewhat different approach, and think it will be of interest to you to know that action on it, and on an identical bill authored by Senator Alan Cranston, is likely in both bodies this fall.

The Right to Financial Privacy Act, which was cosponsored by 102 of my colleagues in the 93rd Congress and 68 this session, has broad bipartisan support. Clearly, this issue is uppermost in the minds of many of our constituents, who believe their Fourth Amendment rights are violated by current practices of disclosing information from bank accounts they believed were private.

My involvement in this matter dates back to 1971, and to the implementation of the Bank Secrecy Act of 1970. I was a bank president at that time, and learned of the new requirements I faced when the first Treasury regulations were promulgated in April, 1972. Let me, then, briefly recount the actions I took, when still a banker, which formed the basis for the legislation I have authored which is now before the Subcommittee on Financial Institutions of the Banking, Currency and Housing Committee.

The Bank Secrecy Act was passed in 1970, ostensibly to curb "white-collar" crime and federal tax evasion facilitated by the use of secret foreign bank accounts and foreign currency transactions. These secret bank accounts, it was surmised, permitted Americans both to avoid payment of U.S. taxes and to channel income from illegitimate operations out of the country and away from surveillance.

The Act, written in broad terms, granted sweeping authority to the Secretary of the Treasury to write regulations requiring financial institutions to keep records on their customers, including the checks drawn and their amounts, all deposits to the accounts, and in particular, all transactions involving the importation or export of currency of more than $5,000. A similar requirement was set on domestic currency transactions of more than $10,000. The financial institution had to microfilm, or otherwise record all the transactions mentioned above, and submit reports to the Treasury on all the covered transactions. The language of the regulations, however, was considerably broader than mandated by the Act itself. It would have had the effect of requiring reports by the financial institution of *every unusual currency transaction*, and the criminal liabilities for failure to comply were sufficiently strong to guarantee that the banker would choose to report far more than necessary to be sure of his compliance. Consider, for example, the following language on the scope of those foreign currency transactions subject to the reporting requirement: "Each person who physically transports, mails, or ships, or causes to be physically transported, mailed or shipped, currency or other monetary instruments . . . A person is

deemed to have caused such transportation, mailing, or shipping when he aids, abets, counsels, commands, procures or requests it to be done by a financial institution or any other person . . ." (Federal Register, Vol 37, No. 66, April 5, 1972).

Similar language was written to cover those domestic currency transactions subject to the requirements, and the end result was that little could be transacted through the bank that the banker felt sure could go unreported. In short, he was required to spy on his own customers.

I filed suit in June, 1972 to enjoin these regulations from taking effect as scheduled on July 1. The American Civil Liberties Union Foundation challenged the Act on my behalf in Federal District Court for Northern California, and the California Bankers Association soon joined as a co-plaintiff. A three-judge panel in San Francisco decided to grant a partial injunction against the Act later that year. They held that the reporting requirement on domestic currency transactions was unconstitutional, but upheld the foreign currency reporting requirements and recordkeeping sections of the Act.

The Treasury appealed the injunction, and the ACLU and the CBA (later joined by other individual California banks) cross-appealed the decision to the Supreme Court. The effect of the litigation, obviously, was to prevent any of the regulations from being implemented during that time.

In a decision handed down in June, 1972 (*Stark* v. *Connally*), the Supreme Court held in a six-three split that the banks' Fourth Amendment rights were not in any way abridged by the reporting requirements, and further, that the depositor plaintiff's lacked standing to challenge the reporting requirement since they had not engaged in the type of transaction referred to by the regulation. In skirting the real issue of expectation of privacy by the depositor, however, the majority opinion also included concurring views which reinforce my recommendations for legislative clarification of the Bank Secrecy Act.

Justice Powell, writing also for Justice Blackmun, clearly stated that any significant expansion of the reporting requirement would indeed touch on profound constitutional questions, and in fact, that their concurrence with the majority was based merely upon the apparently narrow initial Treasury regulations. Justice Powell wrote that "In their full reach, the reports apparently authorized by the open-ended language of the Act touch upon intimate areas of an individual's personal affairs. Financial transactions can reveal much about a person's activities, associations, and beliefs. At some point, governmental intrusion upon these areas would implicate legitimate expectations of privacy. Moreover, the potential for abuse is particularly acute where, as here, the legislative scheme permits access to this information without invocation of the judicial process. In such instances, the important responsibility for balancing societal and individual interests is left to unreviewed executive discretion, rather than the scrutiny of a neutral magistrate."

The Right to Financial Privacy Act of 1975 seeks to limit legislatively what the Court was unable to do due to lack of standing by the defendants. It answers the need for further clarification of the purpose and scope of the Bank Secrecy Act. Access to the records would be limited to four methods, each of which is governed by a section of the Act: customer consent, administrative subpoenas and summons, search warrants and judicial subpoenas. In any proceeding relating to the above means of access, *the customer is to have the same standing he would have if the records were in his possession.* This recognizes that the real dispute is between the customer and the government, and that their respective rights should be determined before the bank discloses any information in response to government requests.

1. *Customer authorization.*—A customer may authorize disclosure by giving a signed and dated statement to the financial institution or government agency, identifying the records which may be disclosed and the purposes for which it will be allowed. The customer retains the right to revoke such authorization at any time, and to examine the institution's records of each occasion on which his own records are examined.

2. *Administraitve Subpoenas and Summons.*—The normal rules governing administrative subpoenas and summons shall be followed when a federal, state or local government official seeks to obtain records. Before serving the summons or subpoena on the institution, the government official must first serve a copy on the customer, in person or by certified mail. Thereafter, the bank may comply with the subpoena only where the customer tells it to do so or where the bank

receives a court order directing it to comply. The customer must get notice of any subsequent governmental effort to enforce the subpoena by court order so that he will have an opportunity to challenge the request before the records are divulged.

3. *Search Warrants.*—Federal, state or local government officials may obtain financial records by means of a search warrant where probable cause has been established. Examination of the records may take place as soon as the warrant has been served on both the customer and the financial institution.

4. *Judicial Subpoena.*—Judicial subpoenas presently used by federal, state and local officials may be used to obtain records in the normal course of criminal proceedings. The subpoenas must specify that there is good cause for its issuance, that the information requested is relevant, and that a copy has previously been served on the customer, either in person or by certified mail. The customer has ten days to challenge the subpoena, and if he does not move to quash during that time, the financial institution may go ahead and allow disclosure. Where the customer tells the bank he has moved to quash the subpoena, the institution may disclose the records only when ordered to do so by a court which has heard and determined the customer's motion.

In addition to these stipulations concerning access by a government agency, the bill requires that information obtained by government officials will be used only for the specific purpose for which it was obtained in the first place, except where there is another statute which specifically authorizes the transfer of such information.

The recordkeeping and requirements of the Bank Secrecy Act are thus modified to apply only where such reports are required by a supervisory agency or by the Internal Revenue Code.

Hearings held by the Senate Financial Institutions Subcommittee in the 93rd Congress on identical legislation introduced by Senator Alan Cranston produced much useful testimony, and I urge the members of this Subcommittee to take note of the strong support voiced for the legislation at that time. I would, however, like to address briefly the major objections that were raised, as you may be confronting them in future deliberations on this issue.

Law enforcement agencies across the country feel that their check and fraud operations—their "bunco squads"—will be severely hindered by access limitations to customer records. I believe some accommodation can be reached to permit these agents access to enough *summary* information on an individual account for them to make a determination of criminal intent.

For example, in the examination of an NSF check, a bank officer might be permitted to reveal to the law enforcement agent the date the account was opened (and/or closed), the balance in the account, the number of other checks drawn on the account which were returned for insufficient funds, and perhaps other pertinent information. This information would of course be revealed without the agent actually seeing the bank records of the individual in question. A procedure such as this would permit the law enforcement agent to determine whether or not there might have been intent to commit fraud, and if so, a search warrant can be obtained after probable cause is established. At that point, the records in question could be fully examined.

Related needs for access to summary information by other local government agents could logically be met in similar fashion. For example, testimony presented in the Senate hearings last year by the Child Welfare Division of the Alameda, California County District Attorney's office revealed that bank accounts are frequently examined before charges are brought in child support cases. Surely this information could be made available to the D.A.'s office without the records themselves actually being examined, and more important, without any superfluous information being revealed. Clearly this is a more delicate question involving the constitutional rights of the absent parent, but again, there is ample room for compromise, and hearings on this legislation would undoubtedly reveal the kinds of accommodations that could be made.

Two other significant groups in California have voiced reservations about these access limitations—the check investigating associations (related both to the law enforcement agencies and or the District Attorneys offices) and grocers associations. The latter depend heavily on the former for all investigative work, and my personal belief is that we probably ought to suggest that this is a less-than-holy alliance, since other commercial enterprises have been able to perform this function amply by themselves. Again, though, opposition from these groups might

be quelled if the police "bunco squads" were able to continue to make initial judgments about criminal intent. The extension of that function—to actually collect the payment—should not be performed by public officials for private merchants, and there is no reason to sanctify such cooperation through a further abridgment of the constitutional rights of the customer.

The Subcommiteee might find it instructive to look at a similar bill working its way through the California Legislature at this time. This bill requires a search warrant or administrative or judicial subpoena or summons to obtain access to bank records, and requires the agency to issue a copy of such to the customer. Access is prohibited until the customer has had 10 days in which to move to quash this order. An exception is made for law enforcement officials if they obtain a court order, but the customer must still be notified within 30 days of the examination of his records.

This bill is likely to be signed into law in the near future, and it will surely serve as model legislation for other states.

A California Supreme Court decision in the case of *Burrows* v. *Superior Court of San Bernardino* has already radically altered the positions of California banks with respect to disclosure of their customers' records. The court held that a bank customer has a legitimate expectation of privacy in his records, and that the California Constitution protects those records from access by law-enforcement agents unless access is made according to legal process.

Below is a brief excerpt from this decision. (I would urge you to note, parenthetically, that the Court refused to say whether bank records are also protected by the Fourth Amendment to the United States Constitution. This failure to resolve the question of state versus federal constitutional rights may prove troublesome to California banks—one might argue, for example, that the *Burrows* decision restricts only state law-enforcement agents, and not federal agents working on the same case but under federal authorization. The prospect of the emergence of two separate standards, one for federal investigative purposes and one for state purposes, does not seem to suggest the emergence of a well-thought out policy).

(From the *Burrows* decision) : ". . . That the bank alters the form in which it records the information transmitted to it by the depositor to show the receipt and disbursement of money on a bank statement does not diminish the depositor's anticipation of privacy in the matters which he confides to the bank. A bank customer's reasonable expectation is that, absent compulsion by legal process, the matters he reveals to the bank will be utilized by the bank only for internal banking purposes. *Thus, we hold petitioner had a reasonable expectation that the bank would maintain the confidentiality of those papers which originated with him in check form and of the bank statements into which a record of those same checks had been transformed pursuant to internal bank practice.*" (emphasis added)

". . . The People advance no governmental justification for such a sweeping exploratory invasion into an individual's privacy. Their primary assertion is not that it is essential to effective law enforcement to obtain bank records without judicial process, or even that the interests of a person in the confidentiality of his financial affairs is outweighed by the advantages to society in disclosure of the information. Instead, it is argued, banks have an independent interest in cooperating with law enforcement officers because financial institutions desire to foster a favorable public image, and like any good citizen, to assist in the detection of crime. However laudable these motives may be, we are not here concerned with the conduct or reputation of banks, but with whether the police violated petitioner's rights by obtaining from banks, without legal process, documents in which petitioner had a reasonable expectation of privacy."

". . . The mere fact that the bank purports to own the records which it provided to the detective is not, in our view, determination of the issue at stake. The disclosure by the depositor to the bank is made for the limited purpose of facilitating the conduct of his financial affairs; it seems evident that this expectation of privacy is not diminished by the bank's retention of a record of such disclosure . . . *If, as we conclude above, petitioner has a reasonable expectation of privacy in the bank statements, the voluntary relinquishment of such records by the bank at the request of the police does not constitute a valid consent by this petitioner.*" (emphasis added).

At this point, I would also like briefly to discuss parallel problems we face with access to these records by the Internal Revenue Service.

As members of the Subcommittee are aware, a recent U.S. Supreme Court decision in the case of *U.S.* vs. *Bisceglia* upheld the authority of the IRS to issue administrative summonses in the name of John Doe, taxpayer, with the result that IRS agents are now freely examining all records held by some financial institutions, even though they may not be investigating the tax liability of any particular individual. (Note, however, that many banks are refusing to cooperate with this procedure, and at least attempt to detemine whether the IRS investigation is civil or criminal before deciding how much information, if any, they will make available to the agents). Many have said, in short, that this decison has the effect of sanctioning unlimited IRS fishing expeditions through bank records.

In response to widespread concern over this procedure, IRS Commissioner Donald Alexander implemented new guidelines for the issuance of John Doe summonses. In effect, each agent is now required to seek the approval of the District Supervisor before each one is issued and this, ostensibly, will curb whatever potential for abuse now exists. While I commend the Commissioner on his efforts in this matter, and for the obvious concern he has demonstrated, I submit that this further approval requirement is virtually meaningless.

While my bill would not directly limit IRS administrative summons powers, legislation could easily be written that would make parallel limitations apply to this sweeping administrative authority.

In fact, the Oversight Subcommittee of the Committee on Ways and Means, of which I am a member, is presenty exploring this question, and hopes to recommend some some clarifying language to the full Committee when its Tax Reform package is drafted this fall. We have had a day of hearings in Subcommittee on this very issue, and expect to have some suggested language ready after the recess. I do not know how severe a limitation of the John Doe summons it will be, but at the very least I expect it will require a 10-day waiting period for customer notification.

While both a compromise such as this on the IRS summons power, and strict access conditions in my own bill do not go nearly as far as the Bill of Rights Procedures Act, I believe they represent a realistic approach to a problem sustained by two strong, competing interests—the expectation of privacy on the part of the bank customer, and the legitimate need for information gathering on the part of government agencies for regulatory use. We cannot deny the importance of either of these interests, and must seek a solution that adequately serves both needs.

The bill I have introduced would define in the law what has now been said by the California Supreme Court. It would establish a policy, without ambiguity, which holds that bank records are simply an extension of one's personal possessions. This policy would affirm that Fourth Amendment rights against unreasonable search and seizure must be interpreted to apply to possessions that are not physically within the boundaries of the home, but are nonetheless personal property. What this bill would establish, in effect, is that society has evolved to a point at which the legal limits of the home itself must be redefined. The old Anglo-Saxon concept of "curtilage" in common law—meaning the area including and surrounding one's house—is now so archaic as to be meaningless.

Access conditions to personal records of all sorts by government agencies must be delineated, and the Mosher bill would serve this purpose amply. My own bill, in a much narrower frame, would do the same with respect to the physical (or at least microfilmed) records held by financial institutions. We will soon be faced with the much greater problem of access to electronically-stored data in financial institutions, as well as in other public and private agencies. Establishment of access conditions such as those I am recommending for bank records will serve as a useful precedent in dealing with the more sophisticated questions posed by data banks.

I appreciated this opportunity to appear before you, and hope that this explanation of my efforts is of some use to you as you deliberate on the Bill of Rights Procedures Act. Thank you for your time. I am available to answer any questions you may have.

Mr. STARK. The bill I introduced, which deals with just a small segment of the privacy problem covered by H.R. 214, is not in conflict with H.R. 214, but might in fact substitute for parts of it. My bill

seeks to correct a loophole in the privacy dyke that was inadvertently created by the Bank Secrecy Act.

The Bank Secrecy Act is a misnomer, in that it was not trying to keep anything secret. It was, indeed, trying to find organized crime skimmings that were deposited in secret Swiss bank accounts. So the act should have been more aptly titled, "piercing the veil of secrecy on overseas deposits." But in writing this bill, there were several facets of it that created a tremendous legal invasion of individuals' privacy.

The Secretary of the Treasury was authorized to order all banks to photocopy all financial documents—checks, credit vouchers from charge cards, that sort of thing, bills, notes, and to keep track of all financial records. Further, the bank had to report foreign cash transactions of $5,000 automatically to the Treasury, and domestic transactions of $10,000. The kicker came when it went on to say, any other cash transactions which seemed out of the ordinary or "unusual" also had to be reported.

This put the banker, as I was then, in the position of watching over however many hundreds or thousands of accounts he might have in his bank, and reporting to the Secretary of the Treasury any transaction that could be construed as unusual. I do not recall that appearing in any charter for a bank or savings and loan I was familiar with. In addition, the Treasury could then pass this information on to any other governmental agency and by letter ruling, he could change the amounts. In fact, he could have lowered those $5,000 and $10,000 limits to $100; require the banks to, in effect, police its customers.

I don't have to recount for you here what a clear and concise and detailed record or personal profile even the most naive financial person could build on any one of us here if he could take our canceled checks—which he would have photocopies of and the credit card vouchers which he would have photocopies of.

For example, let us say you were interested in the NRA or the ADA membership list. All you would have to do as Secretary of the Treasury is find a member, trace his check for a membership to the organization, follow that to the bank that was depositing the membership checks, and in short order, literally produce with the recall of computers a photostat of every canceled check of everybody who was sending in the $25 membership subscription. You could build on the possibilities of this sort of thing, and they boggle the mind.

It is not a question of closing a loophole on a practice. It is a question of changing a law which we, in our wisdom—unfortunately, before I got here—put into law.

That, in brief, is the basis for what my bill is trying to correct. H.R. 214 covers this, but with a broader brush. I am not an attorney, so I hope you will forgive me if I use layman's jargon here, which may not be accurate. As I understand the final Supreme Court decision in *CBA v. Schultz*—in which I was a plaintiff both as a bank and an individual—as an individual, I was found not to have standing to sue, and the Court did not feel the bank's fourth amendment rights had been abridged.

But very clearly, in a concurring opinion, Justice Powell said if the amounts to be reported were $5,000 and $10,000, he really did not see any urgency or any real danger of invasion of privacy. But he said

that with the amount open-ended in the law, there was obvious need for legislation to clarify intent, and for the Congress to decide what was a reasonable amount. If they did not, then it would be something that they felt that the Court would have to act on.

I think the Supreme Court, while they ruled against us in the case I like to call *Stark* v. *Connally*, was really laying down the gauntlet to the Congress to change the bill. I would also like to add that a bill working its way through the California Legislature is something I hope you will look at—it is closely related to mine, but has been amended to answer some of the objections raised by law enforcement.

There is yet another problem that we run into in closing up bank records. As you know, the Oversight Committee on Ways and Means is looking at the IRS and the John Doe summons as a procedure that needs to be tightened up.

You will get some criticism of my bill from a variety of law enforcement people. The State of California has an unusual trade association called the Check Investigators Association. It is, in fact, sponsored by the major supermarkets and various sergeants from the bunco squads of police and sheriffs' departments. It is a very cozy practice for the supermarkets, who get a lot of insufficient fund checks, to turn them over to some sergeant in the police department, have them go down to the bank, and the bank then literally just lets them run through the records to find out what they are looking for—which is intent. If there is no criminal intent, then the supermarket has to go back and collect the funds.

I do not ever recall that cashing a check carried with it any kind of guarantee by local law enforcement officials that if the check was not good, through some inadvertent oversight on the maker of the check, there was any right for the police department to go collect on it. That seemed to me to be a commercial risk. So the police feel that it would be more difficult for them to do this sort of thing if the provisions in my bill were to be applied.

We are willing to make a provision in our bill, and a related one has been made in the bill now in the California Legislature, to trade limited information with responsible authorities to, in effect, help them establish criminal intent. The bank now trades credit information with people who reasonably have a right to know, and could give law enforcement agents information such as whether or not, in the banker's opinion, this was a habit—how many items have been returned, whether the account had been at any time in the past 30 days large enough to cover such a check. But beyond that, not anything else could be disclosed without some kind of a procedural subpena.

I think that, no matter how pesky it is to track down a lot of bounced checks, I do not believe you should violate a constitutional protection just for the convenience of one of our commercial segments. By the way, welfare offices in California also see these records, to help track down errant fathers. Although this is a commendable and maybe even important cause, the end would not seem to justify the means.

I hope that, as you proceed in hearings on H.R. 214, that you will note that we will soon have to deal with major mechanization in an age of computers. That many even result in redefining some legal concepts. One that is of relevance here is "curtilage," which I understand is an

old criminal term from Anglo-Saxon law, defining where an area of a person's private property extended. When they lived in walled castles, the curtilage was the wall. Then it was added to define, if you were a farmer, the immediate out-buildings near your home. These were areas where you could be protected from robbery or other intrusion.

As we begin to think in a modern society, to protect only the financial records that are within the curtilage—or the home—is too old fashioned. We either have to decide that the curtilage is expanded to include electronic data processing, storage vaults away from your home, or redefined to include copies of records, whether you own them or not. As I say, however, not being a lawyer, I am not really well equipped to address myself to this legal point.

Having been involved in the changeover in the banking industry from hand records to computer records, and seeing the advantage of that to the public, I think a whole new concept of how we address these areas of secrecy and privacy is needed. I am pleased that you gentlemen are addressing yourselves to it. I will now be glad to answer any questions you may have. Thank you for giving me the chance to appear this morning.

Mr. KASTENMEIER. We appreciate your remarks.

In order to aid us, as we are not specialists in financial or banking records, your own comments would be especially useful.

What would a banker be confronted with in terms of demands made on him by Federal agencies?

Mr. STARK. Let me portray for you what would take place in a national bank. The Comptroller of the Currency—and to some extent, the Federal Reserve—really is the only agency who has the right to come into a bank and look at any or all records. They have been absolutely scrupulous, to my knowledge about further disclosure—even to the extent of getting into real battles with other Government agencies about protecting the records of banks and the records of individuals in banks.

So, when a bank examiner walks in, he obviously has the run of any of the records. To my knowledge, that information has never been shared.

Mr. KASTENMEIER. No abuse?

Mr. STARK. The bank examinations are not even a record of the bank. They are a property of the Comptroller, and the banks are not even allowed to use the bank examination as an advertising, or to show to somebody else, because that is against the law.

On the other hand, the most common sort of visitor that one would get is an Internal Revenue agent, who would have what we used to call pocket summons. They were, in effect, signed summons with a blank line, and the agent would have a pocketful of them, usually one already typed out with the name of a taxpayer. If he found something unusual in the course of examining that one customer's records, he might then sit down and write out a few more and lay them on your desk, to see the records of a few more customers.

The reaction to these varied from bank to bank. Our practice was twofold. If you put aside the telephone war tax protesters, we treated these as attachments, and would not honor them without giving the person, whose account it was, notice.

The bank had 24 or 48 hours to respond. Our policy was not to let the agent look at the records at that time, but to say, OK, we will notify whoever's records they are, and you can come back. The reason was that if we objected, they could go into court in 99 out of 100 cases and subpena the records, which meant that a bank officer would have to go down to Federal court, so you would end up paying an attorney's fee. It was easier for many bankers just to agree to the summons, since if you didn't you knew they were going to go in and get a subpena anyway.

We did have the right not to respond immediately. However some banks, I would suspect, particularly in smaller towns where there are not computer runs, would just bring the agent in behind the counter, as it were, and sit him down at the bins of ledger cards, and let him plow through to his heart's content—which, in effect, gave the agent a run of bank records. Yet other banks would be very careful to just give him a copy of the documents requested.

The practice, I think, got very loose. It got so loose that I have seen occasions where the same thing would happen with local police officials. Once a bank gets in the habit of responding to anybody who seems to have any kind of official purpose, they very quickly just seem to open up the back office and let the agent run through.

This also could depend on the customer. If it is a very important customer, the bank officer is going to be much more concerned about the privacy of that customer. It is one of those unfortunate things, but their concern, I imagine, would be in direct proportion to the size of the account; so that it is probably a little easier for those less well-to-do economically to be spied on than it is for somebody whose name would invoke instant recognition by a bank officer.

The FBI would, on occasion, ask to see bank records. But in my recollection, they generally had either court orders or search warrants, and were very meticulous about knowing exactly what they needed, and really not wanting much more. And if they followed checks through to another account, in my limited experience, they would not even ask to go on until they went back and got another search warrant. They seemed to be much more professional in what they were going after. Generally, they knew much more precisely what they needed than the Internal Revenue agents.

Mr. KASTENMEIER. In a nutshell, then, our concern here is with the IRS and its practices, in our efforts to achieve some reasonable curtailment of Government surveillance in order to protect rights.

Mr. STARK. I would think so. I would say that the FBI, in criminal investigations particularly, is sensitive enough to getting evidence in the proper way that they seem to be very formal about it. I cannot think, offhand, of other agencies that we ever ran across with any frequency.

Mr. KASTENMEIER. In the national security field, in terms of medical records, the famous case of Mr. Ellsberg and Dr. Fielding involved a burglary of records—that would not occur in bank situations? There has not been, to your knowledge, a burglary of bank records by an agency of the Federal Government or anyone else?

Mr. STARK. It would be awfully tough. It would not be very hard to infiltrate. Even the CIA—most of their agents are probably bright

enough to get a job in the bank. Once inside, it would be simple, because in a bank you rely on confidentiality; in practically every bank employee's handbook, violation of confidence is cardinal cause for dismissal. Any discussion outside of the bank of a customer's affairs is really grounds for instant discharge. So that you have, as a bank employee, unlimited access to the records, and from that standpoint it would be quite simple to spy, as it were, inside a bank.

Mr. KASTENMEIER. At this point, the Chair will observe that there is another record vote in 15 minutes. I have no more questions. Let me ask, in all fairness, if the three other members of the committee here wish to take 5 minutes each or so, we could try to conclude with Congressman Stark. And if that does not work, we could recess.

Mr. STARK. I would be happy, if we do not have time, to respond in writing to any questions that you or your staff have.

Mr. KASTENMEIER. I yield to Mr. Railsback.

Mr. RAILSBACK. I read your testimony. It was very interesting to me, because I have not had much experience as far as banking and financial affairs.

Let me ask you this, maybe along the same lines as the chairman's question. Not your bank, or your former bank, but do other banks, perhaps, let other people see these private records? In other words, the FBI, it is my recollection, indicated that we might be putting them at a disadvantage compared to what other people are able to get a hold of if we enact this.

Mr. STARK. On occasion, the sergeant from the bunco squad was able to come through, and people behind the counter got so used to knowing that one sergeant that he almost had the run of all the checking account records.

Mr. RAILSBACK. What about a creditor?

Mr. STARK. The only case I know of is what we used to call the bagmen from the gambling casinos in Nevada, who would come in every Monday morning and be outside the bank at 8 o'clock with a bagful of checks, waiting to see if they were good. In one branch we acquired, we found bank employees letting this employee of the casinos in behind, as he went around sorting out his checks. We undid that procedure. But there could be special cases where there are just sloppy habits.

Mr. RAILSBACK. Would the Better Business Bureau be able to check credit?

Mr. STARK. There is jargon used now in credit trading information. You have phone banks that exchange information with credit bureaus and large retailers. Sears, Montgomery Ward, and the large credit retailers call in to ask about an account. They will ask about a certain customer, and ask whether you could certify a loan, or an account. We will rate accounts letters A to Z, on the average balance—high three figures, average two figures. Beyond that, no specific information is given. That is the kind of information I alluded to that might be made available under some kind of very precise controls to agencies that show a need to know.

Mr. KASTENMEIER. The gentleman from Massachusetts, Mr. Drinan.

Mr. DRINAN. Thank you, Mr. Chairman. I may say that my image of bank presidents has been greatly improved by your presence here.

Would the dissent in what I call the *Stark* v. *Schultz;* would the dissent satisfy you, that Douglas, Brennan, and other dissenters—

would that satisfy the requirements? You want to incorporate the dissent.

Mr. STARK. Yes.

Mr. DRINAN. You note here that Senator Cranston has an identical bill in the Senate. What is the status of that, precisely, in the 94th Congress?

Mr. STARK. There has been no action yet in the 94th Congress, but we expect hearings this fall. The Senator and I held hearings in California, and he held hearings in the last Congress. One would hope that with that kind of bipartisan support over there, that if we report a bill on the House side, that they will bring it up over there.

Mr. DRINAN. I thank you for your presentation; also for the matter on the IRS that you were not able to get into here. I am glad of this; your Subcommittee on Ways and Means is doing something about the decision.

Mr. KASTENMEIER. The gentleman from New York.

Mr. PATTISON. Am I correct to assume that the banking community would favor this type of bill?

Mr. STARK. At this point, I think we have unqualified approval from the California Bankers Association; the American Bankers Association has it under advisement. The American Bar Association has given us what they call a qualified approval. The ACLU has approved it. We have tried to touch bases with all of the trade groups, the public interest groups. To my knowledge, we are offending none. We may not have unqualified endorsement from all of them. I do not know that we have any opposition, except this opposition that we are trying to massage, from the check collectors.

Mr. DRINAN. Would the gentleman yield? When the American Bankers Association, the American Bar Association, and the ACLU all agree, I think we have to investigate further.

Mr. PATTISON. It raises some serious questions.

I was counsel to several banks, so one of our biggest problems was just exactly this. Someone would come in. They would want some information, probably legitimately. They did not know what to do. They did not want to go to court about it. They did not know what they should do and what they should not do. The rules were not very specific. If the rules were specific, it would have been very, very helpful for most bank counsel and to most banks.

Thank you. I have no further questions.

Mr. KASTENMEIER. In which case, the committee expresses its gratitude to you.

Mr. STARK. Thank you, Mr. Chairman.

Mr. KASTENMEIER. We will recess for 10 minutes, after which we will reconvene to hear Mr. James Merritt, counsel to the Crocker Bank in San Francisco.

[A brief recess was taken.]

Mr. KASTENMEIER. The committee will reconvene.

The Chair is very pleased to greet James Merritt, counsel to Crocker National Bank of San Francisco.

Mr. Merritt has a comprehensive lengthy statement with appendixes and obviously has made a contribution with respect to financial privacy.

We are very pleased to greet you, Mr. Merritt. Without objection, your statement in its entirety, together with its attachments, will be received and be made a part of the record.

If you like, you may summarize.

[The prepared statement of Mr. Merritt follows:]

STATEMENT OF JAMES E. MERRITT, ATTORNEY, MORRISON & FOERSTER, SAN FRANCISCO, CALIF.

Mr. Chairman and members of the committee, I appreciate this opportunity to appear before you to testify in connection with your consideration of the "Bill of Rights Procedures Act of 1975," H.R. 214.

As my remarks will make clear, H.R. 214 does not provide sufficient safeguards for protection of bank records. Instead the approach of the "Right to Financial Privacy Act of 1975," H.R. 2752, is both more comprehensive in providing protection for bank customers and more flexible in permitting proper access to bank records by law enforcement agencies, although there are amendments I suggest you consider with regard to H.R. 2752. Thus, I will direct my remarks both to H.R. 214, the bill before you, and H.R. 2752, which I recommend as an amendment to or substitute for H.R. 214 insofar as bank records are concerned.

Fair procedures governing access to bank records is a particularly appropriate subject for Congress to consider at this time. At no prior time during my experience has the state of the law been as unclear as it is today. Bank customers believe that their records are protected by some right of privacy based upon recent legislation such as the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, and court decisions. To protect those expectations of privacy Crocker National Bank and other banks are taking heretofore unprecedented steps to require law enforcement agencies to obtain court orders before records are released. These efforts are placing unaccustomed burdens upon the Internal Revenue Service and other law enforcement agencies.

In these circumstances legislation which will clearly set forth procedures protecting bank customers' rights of privacy in a manner that can be readily administered by both the law enforcement agencies and the banks is needed.

During my years of practice as an attorney, I have been involved with subpoenas, summons and other demands for information from banks regarding their customers as a representative of a government agency, counsel for customers whose records were requested and most intensively in recent years as counsel for a major national bank, Crocker National Bank. Particularly in connection with representing Crocker National Bank I have been daily involved in reviewing demands for information from the bank by a vast array of Federal and State agencies and officials in connection with investigations of customers of the bank. I hope my discussion of these experiences and the difficulties they present to bank customers and to the bank as custodian of the records will be helpful to you in your consideration of the proposed legislation.

To my knowledge no bank would deliberately refuse to cooperate with proper law enforcement activities. On the other hand, it is and has been, the position of Crocker National Bank and I am certain most other financial institutions to protect their customers' right of privacy. To do so it is Crocker's policy to notify a customer whose records are sought to be examined of the demand to the greatest extent possible. Sometimes it is not possible or necessary because the customer cannot be reached or the agency withdraws its demand. But, to the extent we can, we seek to obtain the customer's consent if he wishes to agree to release his records, or if the customer wishes to contest the production or examination of the requested documents we try to insure that he has that opportunity.

Under existing law a great burden is placed upon financial institutions to act as a defender of their customers' rights. This burden is in terms of time of bank personnel, out-of-pocket costs in searching records and preparing copies of records and costs in obtaining legal advice as to the sufficiency of any demand for information. Moreover there are substantial costs incurred in communicating or attempting to communicate with the bank's customer, on one hand, and the law enforcement agency, on the other hand. I will supply more information regarding these expenses later. I should point out here that bank records are sought frequently in private litigation. This area seems to be beyond the scope of any proposed legislation. Generally those demands are resolved by arranging

for the two parties, one of whom is usually a bank customer, to get together and agree upon the manner of production of bank records. Of course, in those cases, the bank customer as a party litigant has an opportunity to participate directly.

In past years and at the present, with the probable exception of California, the normal situation has been for a police officer, an Internal Revenue Agent, or another law enforcement official to appear at a bank branch in person and request certain records relating to a specific customer. (Those situations in which the customer is unidentified, as in *United States* v. *Bisceglia*, —— U.S. —— (1975), present a much different problem.) Normally the investigating agent will speak with the manager of the branch. If the manager is hesitant in producing the records the agent will prepare a so-called "pocket summons" and serve it upon the manager.

At this point there is pressure upon the bank personnel: (1) to comply with an apparently authorized law enforcement official, and (2) to permit review of the records immediately with the promise, express or implied, that if the bank officer does it will save time and money. This inducement for immediate production is premised upon the representation that the investigating agent by an immediate review can limit the number of records and, if copies are produced, can make it unnecessary for the officer to personally deliver such records to an agency or court at a future date.

These pressures are not inconsiderable. Moreover, it should be borne in mind that the bank official is not a lawyer nor is he or she generally familiar with the statutory and other requirements which apply to determine the validity of such a demand. As a result, in the past, these informal requests and subtle pressures have frequently achieved the objective of the investigating agent and the records have been made available.

This may still be a normal practice in all states except California. The reason I make an exception for California is the 1974 California Supreme Court decision in *Burrows* v. *Superior Court*, 13 C.3d 238 (1974). (A copy of excerpts from the opinion is attached as Exhibit A.) *Burrows* is a landmark case. The circumstances involved an informal demand by the police to obtain copies of an attorney's financial statements from various banks. The attorney was under investigation for grand theft arising from the misappropriation of a client's funds. At least one bank complied with the informal request.

The attorney moved to suppress the use of such bank information and the California Supreme Court held that it should be suppressed. The Court held that under the California Constitution's provisions equivalent to the Fourth Amendment prohibition against illegal searches and seizures that bank customers have a reasonable expectation of privacy in the records relating to their financial affairs maintained by the bank even though the records are owned by the bank and are in its custody. The result is that without sufficient "legal process," however that is defined, it is a violation of a bank customer's California constitutional rights if financial information is obtained from a bank by law enforcement officials. On rehearing the Court engrafted an exception relating to crimes committed against the bank similar to section 5(b) of H.R. 2752.

A similar result was reached by the United States Fifth Circuit Court of Appeals in *United States* v. *Miller*, 500 F.2d 751 (1974), which the United States Supreme Court has agreed to hear upon the Solicitor General's petition for certiorari. 33 U.S. Law Week 3641 (Supreme Ct. No. 74–1179). (A copy of the Solicitor General's petition for certiorari is attached as Exhibit B.)

In light of this judicial activity the obvious question is *why should Congress act?* I submit it is clear Congress should act for several reasons. First, as with all judicial opinions the law enforcement agencies continue to contest the scope and applicability of the Court's opinion. Second, it is not at all clear that the individual bank customer will prevail in the *Miller* case. Third, federal law enforcement officials have informally stated their position to be that *Burrows* has no application to federal investigations after July 1, 1975. Their theory is that *Burrows* created a state privilege and that under the new Federal Rules of Evidence state privileges do not apply to federal questions. Fourth, even under *Burrows* and possibly *Miller*, if it is sustained, the individual's remedy is a motion to suppress after the information has been obtained. Neither case clearly provides standing to the bank customer to receive notice of the demand for his records or the opportunity to contest the validity of that demand in advance of production of the records.

Lastly, what constitutes sufficient "legal process" is unclear. Under *Burrows* and *Miller* it would be left to be resolved on a case-by-case basis. Legislation such

as H.R. 2752 would specify clearly the procedures which must be used and thereby eliminate a generation of litigation regarding the legal sufficiency of a vast array of demands for information which appear to be valid on their face. Of course, H.R. 2752 also provides specific remedies for the individual against law enforcement officials and bank personnel for violations of the restrictions on disclosure which remedies are not at all clearly available under existing law.

These reasons why Congress should act also point out present deficiencies in H.R. 214 by comparison to H.R. 2752. Thus, for example, a bank customer could contest the legal sufficiency of a search warrant under H.R. 214 only after the documents sought were produced by way of a motion to suppress. Similarly, H.R. 214 does not provide that notice must be provided to a bank customer nor does it state that the customer, has standing to challenge the legal sufficiency of the demand for information in advance of production of the records. These are serious deficiencies in the proposed legislation.

Apart from notice to the customer and the grant of standing in all proceedings in which an effort to obtain a customer's records are made, Congress should consider the problem of who should bear the substantial financial burden which in its cumulative effect upon financial institutions is staggering.

Let me first discuss several of the recent cases and situations I have encountered which I believe demonstrate the desirability and need to provide notice to and standing for bank customers.

I would like to call your attention to the published opinion in *United States* v. *Burbank*, —— F. Supp. ——, 74–2 USTC ¶ 9779 (S.D.N.Y. 1974), which illustrates the need for these procedures. In *Burbank*, the IRS served an administrative summons under section 702 of the Internal Revenue Code of 1954 upon two financial institutions requesting records relating to a Canadian company for purposes of obtaining information to provide the Canadian tax authorities in order to determine the company's Canadian tax liability. The basis for this cooperation between the IRS and Canada was cited to be Article 19 of the Income Tax Treaty Between Canada and the United States. (This is a common treaty provision and should be considered in connection with section 10 of H.R. 2752 and H.R. 214.)

The point of referring you to the *Burbank* case is that the Court held the summons invalid because Section 7602 only grants the IRS authority to obtain information in order to determine a United States tax liability. Most importantly, however, the Court dismissed the customer's suit on the grounds the customer lacked standing. Therefore, if the financial institutions had not joined in resisting the summons an illegal summons would have been enforced over the customer's objections. Indeed, the opinion implies that the customer's attorney had to convince the financial institutions to resist the summons as they were otherwise inclined to comply.

As an attorney for a bank this is my pet peeve, so to speak. The bank customer is the party with the greatest interest in insuring that the demands for information are proper. Under current law, even in California after *Burrows*, law enforcement officials refuse to provide notice to the bank customer and take the position, sustained by the courts, that the customer lacks standing to object and participate in the summons or subpoena enforcement process. Not only is this a denial of fairness, if not due process to the bank customer, but it imposes an intolerable burden on the financial institutions who are unfamiliar with the particular matter and cannot judge whether the information sought is relevant, a harassment of the customer, an invasion of attorney-client privileged matter, or otherwise might be properly objectionable.

Personally I believe these decisions are incorrect if the customer has a privilege in his financial records under *Application of Code*, 237 F. Supp. 274 (S.D.N.Y. 1964), rev'd on other grounds 342 F.2d 5 (2d Cir. 1965). Unfortunately to date the courts do not agree with me.

In this basic legal framework as it exists today (and I hope I have made it clear that this area of the law is in a state of flux and is likely to remain unstable without appropriate legislation) I would like to recite several examples of the types of demands which are daily being made upon banks and, I assume, other financial institutions.

Case No. 1.—This month we received a subpoena from the United States Attorney in the Southern District of New York to appear in New York within 12 days with all records regarding a customer's credit card for an 11-month period during 1971 and 1972. The bank has thus far been unable to contact the customer

by phone or mail. I received the subpoena the day before appearance was required and notified the U.S. Attorney by telegram and we would not comply because New York was more than 150 miles from San Francisco and hence the subpoena was invalid under Rule 45(e)(1) of the Federal Rules of Civil Procedure. He subsequently notified me that the Federal Rules of Civil Procedure were inapplicable because this was a criminal case. The subpoena gave no such indication. I then requested personal service as required by the Federal Rules of Criminal Procedure which he agreed to make, but to date, to my knowledge, no such service has been made. Perhaps this is a technical objection, but should the bank comply with a subpoena that is procedurally defective?

Literal compliance with the subpoena would have cost several hundreds of dollars in travel expenses as well as time to locate and copy the requested records. In addition, it required several hours of time of bank personnel and their counsel merely to communicate or attempt to communicate with the parties in the case and to review the subpoena to determine its validity.

Case No. 2.—Several demands have been made informally by police for records of customers' bank balances. No subpoenas or summons were served in these cases, merely letters, telephone calls, or personal visits to bank branches. The rationale of the police officers was that the information was required to determine if the customer had issued checks without sufficient funds. That would be a crime against the bank as viewed by many California district attorneys and hence does not require sufficient "legal process" under *Burrows*. We have requested the Los Angeles District Attorney to obtain an opinion from the California Attorney General regarding this interpretation of *Burrows* and in the meantime refuse to comply with such informal demands without the written consent of the customer.

Section 5(b) of H.R. 2752 would make it clear that financial institutions could and should report crimes against themselves, but would require legal process for the law enforcement officials to obtain records.

Case No. 3.—In March, 1975, we received an administrative subpoena duces tecum requiring the production of all credit card records for an individual and a company for a three-month period in 1974. The subpoena further *ordered* the bank not to disclose the existence of the subpoena or its service upon the bank for 90 days.

This nondisclosure requirement upon threat of unspecified "proceedings and penalties" shocked me. We began research in the area and discovered that the statutory provisions which conferred subpoena authority upon this agency provided that the individual under investigation might be entitled to a grant of immunity, but only if he claimed his privilege against self-incrimination prior to production of the information or records.

Our response in this instance was to write to the issuing agency pointing out this denial of required legal process amongst other deficiencies as grounds for refusal to comply. We have received no subsequent request to my knowledge.

Case No. 4.—Earlier this year in connection with an IRS criminal investigation we advised the IRS Special Agent that we would require that notice be given to the bank customer and that the customer be allowed to appear in connection with any summons enforcement proceedings. Shortly thereafter a grand jury subpoena duces tecum was served upon the branch manager for the records the Special Agent had sought.

In addition to certain specified accounts for which specific documents were requested the subpoena requested all cashier's checks purchased by or made payable to 14 individuals or companies throughout a 21-month period during 1972 and 1973.

I was unable to contact the customer or the customer's attorney and appeared in the United States District Court to move to quash the subpoena. I contended that the subpoena could be interpreted to require all branches of the bank and its subsidiaries to search their records. Crocker National Bank has over 360 branch offices in California and various lending offices outside California and the United States. Thus compliance would involve searches at more than 360 locations and involve costs estimated to be in excess of $28,000. The Judge limited the scope of the subpoena to the records located at the branch served.

I further contended that *Burrows* established a privileged interest of the customer in the records and that under *Cole*, the customer was entitled to notice and the opportunity to appear. On these grounds the Judge overruled the motion to quash and ordered compliance. He did order payment of the costs of providing copies of $85.00.

Case No. 5.—Earlier this year a grand jury subpoena was served upon an office of the bank located in New York City requesting:

"Any and all records, including but not limited to transcripts of accounts, loans, placements, ledgers, foreign exchange contracts, credit files, legal files, customer files, correspondence files, checks and deposits, credit and debit memoranda, records of telephone messages and messages sent by electronic or radio means and other memoranda and correspondence for the period June 1, 1972 through February 28, 1975 relating to the following:"

The subpoena then listed some 29 entities or individuals, some of which appeared to be foreign companies.

This, I hope, is as bad an example as we will obtain of an overly broad subpoena, although we have received another request to produce records that were 13 years old. In addition, by requesting "legal files" the subpoena apparently sought attorney-client privileged communications.

Fortunately, the solution in this case was that upon protest and representation that the particular office served had no such records the subpoena was withdrawn. However, like many large metropolitan banks, Crocker has foreign offices in addition to its domestic offices. Should it have been required to search each domestic and foreign office for these records the costs would be truly staggering; I estimate them to be in excess of $70,000.

This particular case raises the question of production of records from offices of banks located in foreign countries. That involves two problems: (1) how to obtain jurisdiction of other offices than the office served, especially if the other office is in a foreign country, and (2) should records be compelled to be produced from a foreign country office if such production will subject the bank to civil or criminal penalties under the laws of that foreign country. At the present time it appears to be the position of the IRS that if production of the records will merely subject the bank to civil liability to its customer under the laws of the foreign country that the IRS will seek to compel compliance. Neither of these questions have been definitely resolved by the courts, but the answers which are emerging appear to be that: (1) only the office served need comply unless the summons or subpoena expressly requests production of records from another office and (2) unless it would clearly violate criminal laws of the foreign country the summons or subpoena will be enforced.

Resolution of these problems appears to be beyond the intended scope of the legislation you are considering today, but you may wish to expand your concern to these areas. In that event, I will be happy to supplement the record with further information related to these problems.

Case No. 6.—The bank has very recently received at least two informal requests from collection officers of the IRS for information regarding customers' accounts purportedly under section 6333 of the Internal Revenue Code of 1954. (IRS Forms 2270, "Notice of Requirement to Exhibit Books and Records" and FL–94 which is a form letter.) No time is specified for production of the records or information sought and the implication in Form 2270 is that immediate production is requested.

Interestingly, section 6333 authorizes the IRS to obtain information regarding a taxpayer's finances "if a levy has been made or is about to be made." Neither of the requests referred to were accompanied by a Notice of Levy or a representation that a levy had been or was about to be made. Indeed the only decided case under this section involved a situation where no levy was pending and the IRS agent prepared the form in the employer's office and immediately reviewed the records—the classic "pocket summons" approach.

In both of these instances I wrote to the IRS and said that without a Notice of Levy or written representation from the District Director that a levy was about to be made the request was not authorized by section 6333 and the bank would not comply. To my knowledge no further response to either request has been received.

Other situations which I have not included as cases involve frequent demands by IRS Special Agents to review the banks microfilm records of checks. Although the Agent may have a specific taxpayer in mind his review of the microfilm would provide access to information regarding thousands of other customers. These other customers' privacy would be invaded and I am certain if a particularly prominent or controversial name appeared it might catch the attention of the Agent.

Lastly during the Vietnam War there were many so-called telephone tax protests. It was not uncommon to receive requests to reveal the account for a list of 50 or more individuals from the IRS without specifying from which branch of the bank such information was sought and without the use of an administrative summons. The IRS was generally most cooperative in withdrawing these requests, but the fact they were made implies some compliance may have been obtained.

These six cases are typical of the demands made by law enforcement agencies for production of bank records. You will note that I did not include a single instance involving the use of a search warrant. Search warrants have occasionally been used. During the first six months of this year I can recall only two instances in which I was involved with a demand made by search warrant and they involved routine crimes such as murder and theft.

I believe that this fact demonstrates the most glaring deficiency in H.R. 214 as proposed. It deals solely with search warrants and those instances in which Federal law enforcement agencies can establish probable cause that a crime has been committed. The reasons law enforcement agencies seek bank records does not fit that pattern.

As illustrated in Case No. 6, many demands for information are made simply in connection with attempts to collect tax liabilities. In those situations you may well wish to place governmental agencies in the same position as other creditors with no further rights to demand production of information. This indeed was the general principle of the Federal Tax Lien Act of 1966 with regard to priorities as a creditor. However, if governmental agencies are to have greater information gathering powers in this area I believe it is necessary for Congress to act to make it clear what those procedures should be.

The other cases demonstrate that law enforcement agencies are seeking bank records to determine if a crime has been committed and frequently solely to determine civil liabilities for taxes. These types of activities have been sanctioned by the United States Supreme Court since *United States* v. *Powell*, 379 U.S. 48 (1964) which held that to enforce an IRS summons under Section 7602 the IRS need not make a showing of "probable cause."

I do not believe it is necessary or desirable to require a showing of "probable cause." However, it is essential that procedures be adopted which will insure that requests for bank records are made only in connection with proper governmental functions in administering the law. Procedures whereby the citizen who may be adversely affected may challenge the request and which place the financial burden upon the party seeking production of the records will provide such insurance. At least I suggest these restrictions to you as a reasonable first step towards providing protection for the citizens right of privacy balanced against the government's need to know.

Although I recommend the approach of H.R. 2752 instead of or by way of amendment to H.R. 214, there are problems with H.R. 2752 which I would like to discuss later. I would now like to discuss the financial burdens imposed upon banks in attempting to comply with law enforcement demands and to protect their customers' rights.

With regard to the matter of costs let me first refer to the testimony of Mr. Richard L. Wood, Vice President, First National Bank of Chicago, on July 18, 1975, before the Subcommittee on Oversight of the House Committee on Ways and Means, in which he stated that the average cost to the First National Bank of Chicago in complying with IRS summons was approximately $225 per summons. If this is multiplied by a conservative estimate of the number of similar demands upon a bank the size of Crocker Bank during the course of a year (which we estimate to be more than 2,000) the cost are more than $650,000 per year. Although these estimates are just that, it appears that the average cost of compliance with a summons or subpoena for large, medium and small banks is in the range from $225 to $350. A very large bank such as Bank of America may receive 5,000 to 6,000 IRS summons during a year for a compliance cost of $1,000,000 to $2,000,000. (These are an estimate based upon only very preliminary surveys and should not be relied upon without a more thorough study except for providing a most general impression of the magnitude of the problem.)

In my office we have 4 attorneys in charge of reviewing these matters and many others who assist us. Our time records for the months of February through May, 1975 show that we devoted approximately 300 hours to these problems. If those hours were charged to the client at the purely hypothetical rate of $50 per hour the legal fees involved would average $3,750 per month.

However, those costs are only the tip of the iceberg. Three vice presidents for operations screen matters before they are referred to us. We have also trained 12 operations officers throughout the state of California to assist in screening demands for information. Beyond that we have prepared instructions and are in the process of preparing a manual for each branch manager to have available to instruct him in the procedures to be followed when demands for information are made upon him. The accumulated daily time of all of these bank officials and employees together with the associated costs of copying, preparing letters, telephone calls and if necessary personal appearances is a material drain on any bank's resources. Most importantly these procedures do not meet the basic requirements of fairness to the bank depositor even if they are 100% efficient. Only by giving notice to the depositor and allowing him to participate in these proceedings as a matter of right will fairness be achieved.

There are reported judicial opinions which deal with the costs involved in compliance with IRS summons which I would be remiss should I fail to call them to your attention. First, is the opinion of Judge Teitelbaum of the Western District of Pennsylvania in *United States* v. *Pittsburgh National Bank, et al.*, —— F. Supp. —— (Feb. 3, 1975). In that case six summons were served on three banks by an IRS Special Agent. Together the three banks would have been required to search their records at a total of 276 banking locations. Judge Teitelbaum ordered the IRS to pay the costs incurred by the banks in searching their records and producing copies which he estimated to involve several thousands of dollars. In doing so his reasoning was as follows:

"I think we must also closely examine the due process factor of requiring banks or other institutions to go to the considerable expense of assembling such documents. It seems to me that what is not fair is not due process and that the Government should pay the cost of such search as a condition precedent to obtaining any documents. . . .

* * * * * * *

"It is my belief that before these banks, or indeed any others, are required to spend thousands of dollars in employees' time in response to a § 7602 summons, the IRS should have some basis to believe that: 1. the records do exist and are in possession of the bank; 2. the records sought do have some bearing on the customer's income tax liability; 3. the IRS has exhausted all other and less costly alternatives to obtain the same documents.

* * * * * * *

". . . Toward that end, in this instance, I feel that the best means to insure compliance with each of the three elements set forth above is to obligate the IRS to pay the bank the actual costs of searching their records."

I find Judge Teitlebaum's reasoning persuasive. That is, if the requesting agency must bear the costs of the search for and production of the records they will be more careful in making certain that they can demonstrate a need to obtain the information requested. Congress, in providing access to Federal government records by the Freedom of Information Act, placed the financial burden on the requesting party. I see no reason why it should not similarly be placed on the requesting party when it is the government which seeks records. To the contrary, for the reasons stated I believe that to place the financial burden upon the government would serve the basic purpose of H.R. 214—to restrict unwarranted government snooping into citizens' financial affairs.

Unfortunately this case stands apart from the vast majority of judicial decisions which have considered the question of costs. The prevailing view is that expressed by the Tenth Circuit in *United States* v. *Continental Bank & Trust Company*, 503 F.2d 45 (10th Cir. 1974). Also see *United States* v. *Dauphin Deposit Trust Co.*, 385 F.2d 129 (3rd Cir. 1967), *cert. denied*, 390 U.S. 921. In *Continental Bank & Trust Company* the bank resisted an IRS summons. It alleged that compliance would require direct costs of $1,500. Therefore the bank claimed the summons was an unreasonable search under the Fourth Amendment and an unlawful taking of property under the Fifth Amendment. The Court rejected both arguments finding such costs to be the normal burden of citizens and a part of their general duty to respond to governmental requests.

Moreover, in the *Continental Bank* case, the bank tried to assert its customer's rights of privacy. The Court rejected these claims on the grounds that the bank had no standing to assert its customer's right of privacy and that such rights could not even be asserted by the customer if before the Court because the cus-

tomer could not establish a reasonable expectation of privacy. It is only as to this later point—that bank customers have a reasonable expectation of privacy in records of their financial affairs, that *Burrows* and *Miller* conflict with the *Continental Bank* case.

The *Continental Bank* case provides a unique twist of the standing argument. When combined with *Burbank* we find that under *Burbank* the depositor lacks standing because he is not the party named in the summons and under *Continental Bank* the bank lacks standing to assert the depositor's rights—specifically his right of privacy! The bank then may only object upon technical procedural grounds, the customer on none.

I will not burden you with a discussion of the host of other cases. But I will point out that in one case the cost of compliance by the bank was estimated to be almost $30,000. *United States* v. *First National Bank*, 173 F. Supp. 716 (W.D. Ark. 1959). See also *United States* v. *Jones*, 351 F. Supp. 132 (M.D. Ala. 1972) and *United States* v. *Zions First National Bank*, —— F. Supp. ——, 75–2 U.S.T.C. ¶ 9581 (D. Utah, June 23, 1975) (costs involved totalled $4,247.38).

I should now like to speak to the specific proposed legislation. First, H.R. 214 is primarily directed towards surreptitious information gathering by wiretaps and other means. The restrictions that would be imposed by H.R. 214 may be appropriate in that area. However, as applied to bank records I believe it is too restrictive for the reasons stated.

The standard of "probable cause that a crime has been or is about to be committed" would apparently prevent IRS civil investigations and eliminate Section 7602 summons. It would also prohibit obtaining information regarding a taxpayer's assets in connection with collection efforts. On the other hand the bill is in some respects too narrow as it would apply only to Federal investigations and would not similarly restrict state investigations. As you gentlemen are aware this subject is under consideration by other Committees. The IRS summons procedures under § 7602 and related sections present concerns from the law enforcement agencies' view that are peculiar to the tax area. If, as it appears, the House Ways and Means Committee is going to act in that area amendments to the Internal Revenue Code may be the most appropriate method of remedying the procedural problems in that area.

As you know the proposed "Right to Financial Privacy Act of 1975," H.R. 2752 provides the basic remedies of requiring notice to the bank customer and granting the bank customer standing to contest demands for information. Those points I strongly support. As I noted before, such provisions will aid both banks and their customers by providing for a timely review of subpoenas, etc. by *all* interested parties.

There are other aspects of H.R. 2752 some of which are touched upon by my testimony today upon which I wish to comment.

One, the costs to the financial institutions of complying with subpoenas and other requests are considerable. Such costs should be borne by the parties substantively involved and not by the custodian of the records. Law enforcement agencies should bear the costs of searching and copying as well as witness fees. Customers should bear the costs of obtaining copies of the reports of examinations in Section 6(c) of H.R. 2752, as well as the costs of obtaining copies of the records furnished to law enforcement agencies, if requested.

Second, I believe the language on line 12, page 6 of the bill may be ambiguous. To clarify that language I suggest the insertion of the following phrase after the word "records" on line 12: "pursuant to a customer authorization under section 6(a)." In connection with the customer authorization contemplated in section 6 it would seem appropriate for a financial institution to incorporate the notice that the customer may revoke the authorization at any time and obtain a copy of the record of any examinations so authorized at his cost in the form of authorization itself instead of requiring a separate form.

Third, the cases cited illustrate the broad descriptions of records requested which you may wish to consider in connection with the definition of "financial records" in section 3(b). In this area it would be desirable at the outset to make it clear whether a law enforcement agency may obtain the name of a bank customer or a person's account number and the fact that the person is a bank customer without legal process. Recently we have received letters requesting the bank to confirm that certain named individuals were customers and if so their account numbers.

Fourth, the definition of "customer" should include someone who has in the past utilized or patronized the financial institution, but who is no longer patronizing the institution. Moreover, the definition may not include someone who unsuccessfully sought to patronize the institution. For example, a person who applied for, but was not granted, a loan, but who in the process provided certain information in connection with the application.

Fifth, the definition of "supervisory agency" in section 3(c) when considered in connection with section 11(b) and section 12 appears to be materially deficient. Under the Bank Secrecy Act of 1970 which is not part of the Internal Revenue Code, financial institutions are required to report certain transactions to the Treasury Department. Failure to include the Treasury Department within the definition of "supervisory agency" would therefore appear to preclude those reports of foreign currency transactions. (Form 4790) If that is the intent I am not certain I would disagree, but I would not wish to inadvertently achieve that result at the risk of substantial litigation.

Moreover, the Federal Trade Commission and other agencies have certain functions under the Fair Credit Reporting Act which require examinations and disclosure. 15 U.S.C. § 1681s Unless those agencies are included within the definition of "supervisory agency" the status of their right to examine credit records would be unclear.

Sixth, section 5(b) may pose a problem if the institution must show records to prove that a crime has been committed, for example, forgery. A distinction may be drawn if the bank is initiating the report of the crime for it is then acting in its own behalf and should be entitled to furnish sufficient information to establish "probable cause." If not, an institution reporting a crime may be subject to an action for defamation, etc. This situation is to be contrasted with the insufficient funds problem in Case No. 2, in which the investigation is initiated by law enforcement agencies.

Seventh, section 6(b) I believe properly prohibits requiring an authorization in order to do business with the institution, but it should not preclude inclusion of the authorization in standard banking forms with a box to check if the customer desires to grant the authorization, provided, of course, that the form itself makes it clear that the customer need not check the box.

Eighth, it should be made clear that section 9 includes grand jury subpoenas. Unless they are specifically included it may be argued that section 9 applies only to subpoenas for production in connection with trials. No other section, with the possible exception of section 7, could be interpreted to apply to grand jury subpoenas. The examples to which I have testified today make it clear that grand jury subpoenas should be included within the scope of this legislation. Indeed, because an accused may not have counsel when appearing before a grand jury and because grand juries rarely act independently of the prosecutor safeguards of the nature prescribed by H.R. 2752 are most needed in connection with grand jury subpoenas.

Ninth, Section 14(a)(1) is an open invitation to extensive litigation concerning the definition of the term "violation." As experience in the truth-in-lending area shows, such term should be defined with great particularity to avoid later problems of interpretation. Potential problems include the following: (i) is a simultaneous release of the same information to multiple agencies more than one violation; (ii) does it constitute multiple violations if the requested information is given over piecemeal, or to different agencies, or is recopied later for dissemination by the receiving agency or agencies; and (iii) does it constitute multiple violations to gather and release information kept at separate branches, locations and by subsidiaries and affiliates.

In conclusion, I personally, and on behalf of Crocker Bank and its customers, welcome your efforts to provide fair procedures whereby the customers of banks may participate in their own behalf to protect their right of privacy. This is an important area of the law in which there is every evidence that a fair and easily administered procedure will not evolve from the judicial process. Accordingly, legislation of the nature of H.R. 2752, the "Right to Financial Privacy Act of 1975" is badly needed and I recommend that the approach of that bill be adopted in further consideration of H.R. 214 insofar as it pertains to bank records.

Thank you, Mr. Chairman and Members of the Committee, for the courtesy you have extended to me today in appearing before you.

TESTIMONY OF JAMES E. MERRITT, ATTORNEY, MORRISON & FOERSTER, COUNSEL TO THE CROCKER NATIONAL BANK OF SAN FRANCISCO

Mr. MERRITT. Thank you very much. I will try to summarize it. I would like to have it made a part of the record.

Mr. Chairman and members of the committee, I appreciate the opportunity to appear before you today to testify in regard to H.R. 214.

I would also like at this time to supplement the record by adding to it an American Banker's Association publication, "A Banker's Guide to IRS Procedures for Examinations of Customer Records and Levies of Customer Accounts."

Mr. KASTENMEIER. The Chair has looked through this, and it is appropriate, and accordingly will receive it and make it a part of the record.

[The material referred to follows:]

A Banker's Guide to IRS Procedures For Examinations of Customer Records and Levies on Customer Accounts

THE AMERICAN BANKERS ASSOCIATION
1120 CONNECTICUT AVENUE, N.W., WASHINGTON, D.C. 20036

Preface

The American Bankers Association has received many inquiries from its member banks concerning Internal Revenue Service summonses and examinations of bank records, and levies on bank customers' accounts and other property in connection with IRS tax investigations of bank customers. Banks have experienced many difficulties and misunderstandings in attempting to comply with IRS procedures in these areas. This has led to considerable expense, customer complaints, and possible penalties which may be imposed for failure to comply properly with IRS requirements.

This manual is intended to assist bank officers who are charged with handling IRS summonses and examinations of bank records, and levies on customers' accounts and other property. This manual explains Internal Revenue Code requirements, suggests practical procedures to be used in complying with the Code requirements, explains options which are available to bankers in certain situations, and recommends certain procedures for dealing with customers in connection with these issues.

The manual does *not* pertain to IRS examinations made in connection with a bank's own tax return. Moreover, it does not contain information concerning investigations of bank customers by other U.S. government agencies such as the FBI.

WARNING: This manual is not a substitute for legal counsel. Each IRS summons, examination, or levy situation may involve matters which are not treated in this manual and should be referred to the bank's legal counsel.

Inquiries concerning this publication should be directed to John F. Rolph III, Tax Counsel (202-467-4202) or Henry C. Ruempler, Assistant Tax Counsel (202-467-4932), or c/o The American Bankers Association, 1120 Connecticut Ave., N.W., Washington, D.C. 20036.

Contents

One. Examination and Summons of Bank Books and Records

Sections 7601-7605 of the Internal Revenue Code

A. Prior to an Official IRS Summons

The Internal Revenue Service is authorized to investigate all persons who may be liable to pay any internal revenue tax.[1] As part of an investigation, it is common for the IRS to seek to examine the bank records of the taxpayer under investigation. In addition to this authority, the IRS may also summon bank officers to produce such records and/or give testimony.[2]

The IRS has developed certain time-saving procedures which are designed to produce information about taxpayers while enabling the IRS to examine a taxpayer's bank records without resorting to the issuance of an official IRS administrative summons for the production of records. If a bank does not respond to these informal procedures, or if the information supplied is deemed insufficient, the IRS will generally issue an official summons.

At the outset, it is important for a banker to identify an informal—and unofficial—request for financial information about a customer when he receives it. Since an official IRS summons is made only on Form 2039 (Exhibit 1), any other form used to make an examination request should be considered unofficial. Some examples of such informal requests are attached as Exhibits 2 and 3. Exhibit 2 is Form 3N81. Exhibit 3 is Form PL-426. The IRS also uses other forms to examine and produce records, but none is the official summons. In addition, the IRS agent may simply present himself at the bank and ask to examine records on the premises.

When an unofficial request for information is made, or when an agent presents himself at the bank to examine records, *the bank has the right to refuse to furnish the information or to refuse to permit the examination of its records without statutory penalty.*

1. 26 U.S.C. §7601(a) Internal Revenue Code. (All subsequent section references will be to Internal Revenue Code unless otherwise designated.)

2. §7602(1), (2) & (3).

It is to be emphasized that a bank may choose either to respond affirmatively to a request to examine or produce records, or it may refuse to respond to such a request. At least two factors to be weighed in making this decision are:

1. *Maintenance of Good Customer Relations*—This involves maintaining, to the maximum possible degree, the confidential nature of its customers' banking transactions. In many cases this means a bank will elect to refuse an unofficial request and instead require an official IRS summons. However, some IRS requests are fairly routine and inconsequential—such as whether a given taxpayer has an account with that particular bank. In those situations it may be to the advantage of the bank and the customer (and the IRS) to respond to the request when it does not involve a breach of the confidentiality of customers' affairs. A bank could be liable to its customer for disclosing information when such disclosure is not required by law.[3]

2. *Costs to Bank*—The costs to a bank in connection with an IRS investigation of a bank customer may vary, depending upon the approach that the bank takes. These costs may involve the diversion of bank employees' work effort, and the use of reproduction and other bank equipment. The cost may vary depending upon whether (a) the bank responds to an unofficial request for records or information, and uses its own employees and equipment to produce the information requested or (b) the bank permits an on-premises examination by the IRS in which case the IRS may use its own reproduction equipment or the bank's reproduction equipment, and bank personnel monitors the examination, or (c) the bank refuses to respond to an unofficial request, in which case an IRS summons may be issued, which may involve an appearance by a bank officer before the IRS and the production of books and records, etc. which pertain to the tax investigation.

The costs which a bank incurs in connection with an IRS tax investigation of a bank customer may or may not be reimbursable by the IRS, depending upon circumstances. (See Part Three.)

3. See *Peterson* v. *Idaho First National Bank*, 83 Ida. 10, 367 P 2d 284, (1961). *Paton's Digest of Legal Opinions*, Banks & Banking §19:1 Supplement Vol. 1. Compare also with note 20.

If the bank voluntarily chooses to comply with unofficial requests, it should consider the following procedure:

1. Ask the IRS agent for his identification.
2. Verify the name, address, and possibly the social security number of the bank customer against that of the person being investigated.
3. Ask the agent if this *specific* taxpayer is under investigation for his own tax liability. If the answer is no, the bank should request an official summons. There is a substantial legal question as to the validity of an IRS investigation of other than a specific taxpayer.[4]
4. Determine whether the investigation is civil or criminal in nature. Criminal investigations cannot be conducted with an administrative summons.[5]
5. Some initial determination of relevance must be made. Generally speaking, bank records are relevant material in any income tax investigation.[6] However, if there is concern that the material requested does not seem to be appropriate for a tax investigation, the bank should consider refusing the request.
6. The bank should consider whether the records are sufficiently described to avoid requiring a burdensome search for vaguely specified records.
7. The bank should also consider whether the request would impose an unsatisfactory financial burden on the bank.
8. Keep a record of the cost incurred, date of compliance with the request, and what documents were turned over to the IRS.

If a bank begins to comply with an unofficial request for the production or examination of a taxpayer's bank records, and encounters difficulties or does not obtain answers from the IRS agent in connection with the foregoing procedures, it is recommended that the bank should consult counsel on whether to refuse to honor the request and request an official summons (Form 2039). The recourse to the Form 2039 summons will ensure that the confidentiality of the records of a customer's banking transactions is protected to the maximum possible degree.

In any situation in which a bank chooses to cooperate with an on-the-premises examination of bank records, *the bank should make every possible effort to preserve the confidentiality of the records of any other bank customer.* For example, if records of more than one depositor are in a particular file or on a particular role of microfilm, the bank should permit the IRS to examine only such files or film as pertain to the particular taxpayer.

B.

IRS Administrative Summons

The official administrative summons described in Section 7602(2) of the Code is Form 2039 (Exhibit 1). This summons is used to obtain the production of specific books and records which may be relevant to a tax investigation. The Code provides that the person named in the summons will be required to appear before the IRS not less than 10 days from the date of the summons.[7] The request for information may include information concerning a customer's checking account records or loan applications.[8]

A summons is required to be served in person by an IRS agent. If the summons is mailed, the bank should refuse it automatically. A summons should be properly executed. On its face, it should contain the name of the taxpayer, the periods under investigation, the name and address of the bank to which the summons is directed, and the name of the IRS officer before whom an appearance will be made. The summons must identify specific books and records which are to be brought to the hearing by a bank officer in connection with the tax investigation. The summons will designate the place and time for appearance as well as the date of issue and the signature and title of the IRS officer by whom service is made.

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4. See for example the following recent cases: *U.S.* v. *Humble Oil & Refining Co.*, 74-1 U.S.T.C. ¶9186 (5th Cir., 1974), aff'g 346 F. Supp. 944 (S. D. Tex., 1972); *U.S.* v. *Theodore*, 73-1 U.S.T.C. ¶9477 (4th Cir., 1973); *U.S* v. *Clayton & Co.*, 73-1 U.S.T.C. ¶9452 (S. D. Miss., 1973); *U.S.* v. *Berkowitz*, 355 F. Supp. 897 (E. D. Pa. 1973).
5. *Reisman* v. *Caplin*, 375 U.S. 440, 449 (1964).
6. *U.S.* v. *First National Bank of Mobile*, 295 F. 142 (S. D. Ala., 1924), aff'd without opinion 267 U.S. 576 (1925).
7. §7605(a).
8. *U.S.* v. *Cleveland Trust Co.*, 474 F. 2d 1234 (6th Cir., 1973), cert. den. 42 U.S.L.W. 3190, Oct. 9, 1974.

A summons will always be accompanied by a Certificate of Service of Summons which certifies that the summons was served by a designated IRS representative on the bank on a specified date and time.

If the summons is properly executed and contains all of the information described above, the bank should then decide how to respond. The bank may choose to comply with the summons or may refuse to comply. Refusal may be based on one or more good faith challenges to the summons.[9]

If the bank chooses not to comply with the summons, it is recommended that it communicate its intentions to the IRS. A willful failure to respond or appear may result in a penalty under Section 7210 of the Code.[10]

In determining whether or not there is a basis for making a good faith challenge to a summons (and thereby requiring the IRS to obtain a court order), the following factors may be taken into consideration:

1. Is the investigation of a civil or criminal nature? If it is criminal in nature, the bank should challenge the summons because criminal investigations cannot be conducted with an administrative summons.[11]
2. Is the date for appearance designated in the summons at least 10 days after the date the summons was served? If the date of appearance is less than 10 days, the bank should challenge the summons.[12]
3. In the best judgment of a bank officer, are the books and records designated in the summons *relevant* to a bona fide tax investigation? If they are not revelant, this is one basis on which the bank can challenge the summons.[13]
4. Are the books and records described sufficiently in the summons to enable the bank to find the records without undue burden? A bank may challenge a summons on the ground that the books and records sought are so vaguely described as to impose an undue burden on the bank.[14]
5. Does the request for information in this summons, standing alone, or in combination with other IRS summonses in tax investigations, impose an undue financial burden on the bank? If this is the case, it is a basis for making a good faith challenge.[15]

If the answers to any of the above questions indicate a basis for challenging the summons, the bank should consult counsel and consider making such a challenge.

Although it is under no statutory obligation to do so, the bank may notify its customer of an IRS summons for records. The bank may have some reference in its contract with each depositor concerning notification. The bank should not attempt to advise the customer of his legal rights. If the customer objects to the IRS examination of the bank's records, the bank should advise him that, unless there is a basis for challenging the summons, the bank is compelled by law to comply.

The bank may not avoid the problem of a summons by turning the records over to the taxpeyer and then responding to the IRS by saying the bank no longer has the records. In that situation, the bank could be found guilty of civil contempt and liable to the government for damages.[16]

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9. *Reisman* v. *Caplin*, *supra*, note 5, at 445-46. It is understood that some banks, in refusing to comply with the summons, have successfully requested the IRS to obtain a court order without spelling out their reasons for challenging the summons.
10. See discussion of penalty under §7210 in *Reisman* v. *Caplin*, *supra*, note 5, at 446-47 and nn. 6 and 8.
11. See note 5.
12. See note 7.
13. *U.S.* v. *Powell*, 379 U.S. 48 (1964).
14. *Oklahoma Press Pub. Co.* v. *Walling*, 327 U.S. 186, 208-9 (1946); *U.S.* v. *First National Bank of Mobile*, 160 F. 2d. 532 (5th Cir., 1947). See also *U.S.* v. *Union National Bank*, 363 F. Supp. 629 (W. D. Pa., 1973) where a catch-all request was ruled unduly vague.
15. *U.S.* v. *Dauphin Deposit Trust Co.*, 385 F. 2d. 129 (3rd Cir., 1967), cert. denied 390 U.S. 921 (1968); *U.S.* v. *First National Bank of Fort Smith, Arkansas*, 173 F. Supp. 716 (W. D. Ark., 1959).
16. *U.S.* v. *Edmond*, 355 F. Supp. 435 (W. D. Okla., 1972).

C.

Court Orders

When a bank does not comply with or challenges an IRS summons, the IRS may seek a court order to require bank compliance.[17] A hearing is held in a United States District Court for the purpose of discovering if there is any cause why the administrative summons should not be enforced. It is at this time that the bank should seek a judicial determination as to the validity of any and all of its challenges to the summons.[18] The court will review the challenges and then determine whether or not to issue a court order to enforce the summons.[19] If the court issues such an order, the bank must comply with that order and it may do so without fear of any liability to its customer.[20]

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17. §7604(b); *Reisman* v. *Caplin*, *supra*, note 5, at 445-6.

18. *Donaldson* v. *U.S.*, 400 U.S. 517 (1971); *Reisman* v. *Caplin*, note 5, at 446.

19. The court may enforce only part of the summons or require the IRS to narrow its request. See *U.S.* v. *Union National Bank*, *supra*, note 14.

20. *U.S.* v. *Jones*, 351 F. Supp. 132 (M. D. Ala., 1972); *Brunwasser* v. *Pittsburgh National Bank*, 64-2 U.S.T.C. ¶9871 (W. D. Pa., 1964), aff'd per curiam 351 F. 2d. 951 (3rd Cir., 1966).

Two. Notice of Levy on Bank Customers' Property

(Sections 6331-6334 of the Internal Revenue Code)

A. Levy

If a taxpayer fails to pay his tax for any reason, the government is authorized to collect the tax by means of a levy on all the property owned by the recalcitrant taxpayer.[21]

In the case of a bank customer who fails to pay his tax, the IRS may serve a Notice of Levy on the bank to seize all of the customer's property which is held by the bank.[22] Thus, any funds held in the customer's accounts or any other property held, such as money in a safe deposit box, are seized by the government at the time the bank receives a Notice of Levy. After receiving the Notice of Levy, the bank may disperse the funds only to the IRS.[23]

1. Service of a Notice of Levy

A Notice of Levy (Form 668-A, attached as Exhibit 4) should be served on the bank in person by an IRS agent. However, it has been common practice in some areas of the country to serve a Notice of Levy by mail. *Service of a Notice of Levy by mail is invalid and should be refused by the bank, unless a prior agreement has been reached between the IRS and the bank to accept such service.* According to the IRS this agreement (Form 4427, attached as Exhibit 5) validates subsequent service of Notice of Levy by mail and designates the particular bank official to whom the Notice of Levy should be directed. However, there is no independent authority which supports the conclusion that service by mail is valid. According to the IRS many banks have found this procedure useful and have executed such agreements. If a bank chooses to accept a Notice of Levy served by mail, without having previously executed Form 4427, the bank may be liable to its customer in damages if the levy turns out to be wrongful or invalid.

There is no statutory duty requiring the bank to notify the customer of the Notice of Levy. According to the IRS, in all cases, a copy of the Notice of Levy is mailed by the IRS to the taxpayer.[24] Thus, the taxpayer will have already received notice of the tax assessment and deficiency.

Final Demand (Form 668-C, Exhibit 6) is often received by banks in connection with a levy. This form is a follow-up to the original Notice of Levy to remind the bank to turn over the property to the IRS.. If a bank fails to turn over property to the IRS, it is subject to liability and penalties.[25]

2. Effect of a Notice of Levy

A Notice of Levy takes effect when it is received by the bank officer.[26] In the case of personal service, this means that the notice takes effect when the form is handed to the officer by the IRS agent. In the case of a Notice of Levy served by mail, the levy is effective when the designated bank officer receives the notice. In either case, the bank should record on the form the time and date when the notice is received.

The IRS maintains that once a Notice of Levy is received by any office of a bank (main office or branch), the levy is effective for *all* bank offices, as of the time and date of service.[27] The levy covers any property owned by the taxpayer and held by the bank, regardless of which office actually has the property.

In certain situations, banks have worked out informal agreements with their local IRS representatives that the IRS will serve the Notice of Levy only on the branch where the customer's property is held. These agreements only establish an informal procedure and do not change the IRS position that a Notice of Levy served on any office of the bank is effective with respect to property held in all offices of the bank.

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21. §6331(a).

22. §6331(a); 26 C.F.R. §301.6331-1(a)(1) Income Tax Regulations. (All subsequent references to regulation sections will be from the Income Tax Regulations, unless otherwise designated.)

23. §6332(a).

24. Form 668A is actually a three-part form; an original and two carbons. The last carbon is labelled, "Part 3—To Be Furnished To Taxpayer."

25. §6332(c)(1) & (2).

26. See generally, *U.S.* v. *Pittman*, 449 F. 2d 623 (7th Cir., 1971); *U.S.* v. *Eiland*, 223 F. 2d. 118 (5th Cir., 1955).

27. There is a different rule governing a levy on property held in a foreign branch of a U.S. bank. See Regulations §301.6332-1(a)(2).

3. Property Subject to the Levy

The general rule is that all property owned by the taxpayer which is in the hands of the bank is subject to the levy.[28] It should be noted, however, that *state law* governs the question of whether and to what extent the taxpayer actually has an interest in property held by the bank in the taxpayer's name.[29] For example, state law is in control concerning the extent of a taxpayer's interest in joint account in a bank,[30] or in a partnership.[31]

With respect to checks in the process of clearance, the general rule is that the levy extends only to those funds actually on hand at the bank at the time the Notice of Levy is served and not to any other additional amounts which might have been acknowledged at that time.[32]

The IRS policy with respect to safe deposit boxes is that a levy merely freezes access to any box owned by the taxpayer. *The bank should not allow the IRS to examine or remove the contents of any safe deposit box without the taxpayer's consent or a court order.*

In certain situations the bank may claim or assert a superior interest in amounts owed to it by the taxpayer against the amount subject to the levy. This can be accomplished in one of two ways. First, the bank may simply set off the amount and turn over the remaining funds subject to the levy and communicate in a reasonable way to the IRS that it is asserting the right of set-off.

The bank right of set-off has been the subject of controversy. The courts have said that a right of set-off exists if it is exercised by the bank to the extent required by state law before the service of the Notice of Levy.[33]

In exercising a right of set-off, a bank should consult an attorney on its priorities vis-a-vis the government.[34] Banks which have withheld funds because of a mistaken belief that they had a superior interest—and therefore exercised a right of set-off—have been subject to the penalty for failure to turn over the funds to the IRS.[35] Also, the bank may turn over all the property subject to the levy and then bring a civil action under Section 7426 to recover which is subject to a superior interest in the bank's favor.[36]

Once the bank has turned over the property to the IRS it is discharged from any obligation to the owner of such property.[37] However, if the property surrendered *is not properly subject to levy*, the bank is not relieved from liability to the owner of such property.[38]

The federal income tax regulations provide that the owner of property which has been mistakenly surrendered in response to an IRS levy may obtain administrative relief under Section 6343 of the Code or may sue to recover the property under Section 7426.[39] If a bank has mistakenly surrendered property in response to an IRS levy, the bank may seek to recover such property under the same Code provisions.

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28. Regulations §301.6331-1(a)(1).

29. *Aquilino* v. *U.S.* 363 U.S. 509 (1963); *U.S.* v. *Bess*, 357 U.S. 51 (1958); *Morgan* v. *Commissioner* 309 U.S. 78 (1940).

30. Rev. Rul. 55-187, 1955-1 C. B. 197.

31. Rev. Rul. 54-213, 1954-1 C. B. 285.

32. Rev. Rul. 73-310, IRB 1973-29, 11; *U.S.* v. *Guaranty Bank & Trust Co.* 56 F. Supp. 470 (E.D. N. C., 1944).

33. See *U.S.* v. *Sterling National Bank & Trust Co.*, 73-2 U.S.T.C. ¶9494 (S. D. N.Y., 1973) appeal docketed No. 73-2300-01 2d Cir., 1973; *U.S.* v. *Bank of America National Trust & Savings Assn.*, 229 F. Supp. 906 (S. D. Cal., 1964), aff'd 345 F. 2d 624 (9th Cir., 1965), cert. denied 382 U.S. 927; *Bank of Nevada* v. *U.S.*, 251 F. 2d 820 (9th Cir., 1957), cert. den. 356 U.S. 939 (1959).

34. See §§6321-6325 which determine the priority of competing interests in property subject to a federal tax lien. For example, see *U.S.* v. *Wyoming National Bank of Casper*, 74-1 U.S.T.C. ¶9203, (D. Wyo., 1973).

35. *U.S.* v. *First National Bank of Commerce in New Orleans*, 73-2 U.S.T.C. ¶9751, (E. D. La., 1973) and *U.S.* v. *Sterling National Bank & Trust Co.*, *supra*, note 33.

36. *Citizens Bank & Trust Co., of Md.* v. *U.S.* 344 F. Supp. 866 (D. Md., 1972).

37. §6332(d).

38. Regulations §301.6332-1(c).

39. *Ibid.*

4. Penalty Provisions

Failure to turn over property subject to a levy can result in liability in the amount of property levied plus costs and interests, and 50 percent of such amount as a penalty under Section 6332(c) of the Code.[40] The penalty for failure to surrender property will not be applied if a bona fide dispute exists regarding the amount of property subject to the levy or concerning the legal effectiveness of the levy itself.[41] However, there is no formalized procedure on how this bona fide dispute is handled. Banks should consider consulting counsel if there is some reason to believe that the amount of property levied is incorrect or if there is some reason to feel that the Notice of Levy is defective in any way.

B.

Exhibition of Books and Records in Connection with an IRS Levy

If an IRS levy "has been made or is about to be made" on a bank customer's property held by the bank, the IRS is authorized to request the bank to exhibit books and records concerning the customer's property.[42]

If the bank has not received a Notice of Levy prior to or in conjunction with any form of request to exhibit books and records, the bank should determine whether a levy has been made or is about to be made. Unless the answer is in the affirmative, the bank should refuse to exhibit its books and records. It is possible that the IRS may wish to examine records prior to a levy; *however, the agent must inform the bank that a levy is about to be made, and an assessment has already been made.*

The IRS may make the request for bank records in any one of three ways. First, an IRS agent may request, in person, to see the records. Second, the IRS may serve Form 2270—Notice of Requirement to Exhibit Books and Records—(Exhibit 7) either in person or by mail. This form requires no written response on the part of the bank. It advises the bank that the IRS wishes to examine the bank records of a named taxpayer. Third, the IRS may use some form such as Form RC SE FORM ACTS 11 (Exhibit 8) which requests the bank to answer certain questions concerning the taxpayer's accounts and mail such answers to the IRS. According to the IRS, the bank may refuse to respond to any of these requests without statutory penalty. However, in the event of such refusal, the IRS may issue a summons under Section 7602 to examine the records.

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40. §6332(c)(1) & (2).

41. Regulations §301.6332-1(b)(2).

42. §6333.

Three. Reimbursement for Production of Bank Records

As previously discussed, a bank usually incurs certain costs when it responds to an IRS request for information about a particular bank customer. The amount of these costs varies depending on (1) the amount of information requested, (2) how the bank records are stored, and (3) the method by which the information is retrieved from the bank's files. It is established that a bank must bear some of the cost of cooperating with the IRS in a tax investigation.[43] However, in cases where the costs of record retrieval are substantial, the IRS may be asked to share in those costs. In fact, some banks routinely charge the IRS in cases in which a large amount of information is requested.

The major difficulty in this area is that there is no uniform practice for reimbursement of bank costs. There is no statutory provision authorizing IRS reimbursement of any cost in connection with the examination and production of bank records. However, a standardized witness fee and mileage fee is paid for any bank representative who appears before the IRS and gives testimony.[44] Some banks have obtained reimbursement through informal agreements with revenue agents and district directors, whereas other banks have been unsuccessful in obtaining such agreements.

The National Office of the IRS takes the position that banks should not be reimbursed for record production costs (including extra bank man-hours) because the IRS will bring its own reproduction equipment and personnel onto the bank premises to reproduce the records without cost to the bank. This IRS position ignores the fact that the bank is under a duty to preserve the confidentiality of the records of its other bank customers who are not under investigation at that time. Thus, it would always be necessary for the bank to have at least one employee monitoring the IRS investigation. The IRS states that, in the examination authorized under Section 7602, it usually does not seek to obtain copies of bank records but, instead, seeks to examine the actual records of the bank customer. It is understood that if the IRS requests a bank to make copies of a taxpayer's financial records, it will reimburse the bank for the copies requested.[45]

According to the IRS, the only situation in which the bank will be reimbursed for costs other than costs of reproduction is the situation in which a prior agreement has been executed between the bank and the IRS Assistant Commissioner (Compliance) concerning such reimbursement. Presently, there is only one such agreement in operation and that situation involves a central storage facility situated in a separate location and used by a large number of banks.

At the present time, several cases are pending in the federal courts concerning the extent of the bank's right to reimbursement from the IRS for these costs. The adjudication of these cases may result in a more definitive rule which will be uniformly applied.

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43. *U.S.* v. *Dauphin Deposit Trust Co., supra*, note 15.

44. 5 U.S.C. §503(b)(2); *Roberts* v. *U.S.*, 397 F. 2d. 968 (5th Cir., 1968); Rev. Rul. 68-645, 1968-2 C.B. 599.

45. *U.S.* v. *Jones, supra*, note 20; 43 Comp. Gen. 110 (1963).

Four. IRS Forms

Exhibit 1—Form 2039
Summons

Exhibit 2—Form 3N81
Unofficial Summons

Exhibit 3—Form PL-426
Unofficial Summons

Exhibit 4—Form 668A
Notice of Levy

Exhibit 5—Form 4427
Agreement to Accept Notice of Levy by Mail

Exhibit 6—Form 668C
Final Demand for Levy

Exhibit 7—Form 2270
Notice of Requirement to Exhibit Books and Records

Exhibit 8—Form RC SE ACTS 11
Unofficial Request for Information in Connection with Levy

Exhibit 1—Form 2039

Form 2039
(Rev. Oct. 1969)

Summons

Department of the Treasury
Internal Revenue Service

In the matter of the tax liability of

_____

Internal Revenue District of _____

Period(s) _____

The Commissioner of Internal Revenue

To _____

At _____

Greetings: You are hereby summoned and required to appear before

_____

an officer of the Internal Revenue Service, to give testimony relating to the tax liability or the collection of the tax liability of the above named person for the period(s) designated and to bring with you and produce for examination the following books, records, and papers at the place and time hereinafter set forth:

Place and time for appearance:

at _____

on the _____ day of _____, 19 ____ at _____ o'clock __.M.

Failure to comply with this summons will render you liable to proceedings in the district court of the United States or before a United States commissioner or magistrate to enforce obedience to the requirements of this summons, and to punish default or disobedience.

Issued under authority of the Internal Revenue Code

this _____ day of _____, 19_____

Original

_____ Signature

_____ Title

Form 2039 (Rev. 10-69)

Certificate of Service of Summons

(Pursuant to Section 7603, Internal Revenue Code)

I certify that I served the summons shown on the front of this form on:

Date	Time

How Summons Was Served

☐ I handed an attested copy of the summons to the person to whom it was directed,

_____

_____

☐ I left an attested copy of the summons with the following person at the last and usual place of abode of the person to whom it was directed

_____

_____

Signature	Title

Sec. 7603

Service of Summons

A summons issued under section 6420(e)(2), 6421(f)(2), 6424(d)(2), or 7602 shall be served by the Secretary or his delegate, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

Form 2039 (Rev. 10-69)

Form **2039–A**
(Rev. Oct. 1969)

Summons

Department of the Treasury
Internal Revenue Service

In the matter of the tax liability of

_____

Internal Revenue District of _____

Period(s) _____

The Commissioner of Internal Revenue

To _____

At _____

Greetings: You are hereby summoned and required to appear before

_____
an officer of the Internal Revenue Service, to give testimony relating to the tax liability or the collection of the tax liability of the above named person for the period(s) designated and to bring with you and produce for examination the following books, records, and papers at the place and time hereinafter set forth:

Place and time for appearance:

at _____

on the _____ day of _____, 19 ____ at _____ o'clock __.M.

Failure to comply with this summons will render you liable to proceedings in the district court of the United States or before a United States commissioner or magistrate to enforce obedience to the requirements of this summons, and to punish default or disobedience.

Issued under authority of the Internal Revenue Code

this _____ day of _____, 19_____

Attested Copy _____ _____
Signature Title

Form 2039-A (Rev. 10-69)

Excerpts From the Internal Revenue Code

Sec. 7602

Examination of Books and Witnesses

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

Sec. 6420

Gasoline Used on Farms

* * *

(e) Applicable Laws—

* * *

(2) **Examination of books and witnesses.**—For the purpose of ascertaining the correctness of any claim made under this section, or the correctness of any payment made in respect of any such claim, the Secretary or his delegate shall have the authority granted by paragraphs (1), (2), and (3) of section 7602 (relating to examination of books and witnesses) as if the claimant were the person liable for tax.

* * *

Sec. 6421

Gasoline Used for Certain Nonhighway Purposes or by Local Transit Systems

* * *

(f) Applicable Laws—

* * *

(2) **Examination of books and witnesses.**—For the purpose of ascertaining the correctness of any claim made under this section, or the correctness of any payment made in respect of any such claim, the Secretary or his delegate shall have the authority granted by paragraphs (1), (2), and (3) of section 7602 (relating to examination of books and witnesses) as if the claimant were the person liable for tax.

* * *

Sec. 6424

Lubricating Oil Not Used in Highway Motor Vehicles

* * *

(d) Applicable Laws—

* * *

(2) **Examination of Books and Witnesses.**—For the purpose of ascertaining the correctness of any claim made under this section, or the correctness of any payment made in respect of any such claim, the Secretary or his delegate shall have the authority granted by paragraphs (1), (2), and (3) of section 7602 (relating to examination of books and witnesses) as if the claimant were the person liable for tax.

* * *

Sec. 7605

Time and Place of Examination

(a) **Time and place.**—The time and place of examination pursuant to the provisions of section 6420(e)(2), 6421(f)(2), 6424(d)(2), or 7602 shall be such time and place as may be fixed by the Secretary or his delegate and as are reasonable under the circumstances. In the case of a summons under authority of paragraph (2) of section 7602, or under the corresponding authority of section 6420(e)(2), 6421(f)(2), or 6424(d)(2), the date fixed for appearance before the Secretary or his delegate shall not be less than 10 days from the date of the summons.

* * *

Sec. 7603

Service of Summons

A summons issued under section 6420(e)(2), 6421(f)(2), 6424(d)(2), or 7602 shall be served by the Secretary or his delegate, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

Sec. 7604

Enforcement of Summons

(a) **Jurisdiction of District Court.**—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) **Enforcement.**—Whenever any person summoned under section 6420(e)(2), 6421(f)(2), 6424(d)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner [1] for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner [1] to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner [1] shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

[1] Or United States magistrate, pursuant to P.L. 90-578.

* * *

Sec. 7210

Failure To Obey Summons

Any person who, being duly summoned to appear to testify, or to appear and produce books, accounts, records, memoranda, or other papers, as required under sections 6420(e)(2), 6421(f)(2), 6424(d)(2), 7602, 7603, and 7604(b), neglects to appear or to produce such books, accounts, records, memoranda, or other papers, shall, upon conviction thereof, be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with costs of prosecution.

* U. S. GOVERNMENT PRINTING OFFICE : 1969 O - 357-449 E I 25-1118272 Form 2039-A (Rev. 10-69)

Exhibit 2—Form 3N81

Address any reply to:

Department of the Treasury

District Director
Internal Revenue Service

Date: | In reply refer to:

Names of Taxpayers:

Years:

We would appreciate your help in connection with a Federal tax matter concerning the taxpayers named above. Please send us the information requested below.

We are making this request under the authority of section 7602 of the Internal Revenue Code, and any information you furnish will be held in strict confidence. We have enclosed a self-addressed, postpaid envelope for your convenience in replying. The copy of this letter is for your records.

Thank you for your cooperation.

Sincerely yours,
District Director

Enclosures:
Copy of this letter
Envelope

REPLY

Records of our institution show the above taxpayers have or had accounts as checked below. Details of the accounts checked YES are shown on the back of this letter.

	YES	NONE		YES	NONE
Checking Accounts	☐	☐	Safe Deposit Boxes	☐	☐
Savings Accounts	☐	☐	Other Accounts or Transactions	☐	☐
Savings Certificates	☐	☐			

SIGNATURE OF BANK OFFICIAL | TITLE | DATE

FINANCIAL INFORMATION

CHECKING ACCOUNTS

IN NAME OF, AND ADDRESS - ACCOUNT NUMBER	TYPE	BALANCE JAN. 1, 19	BALANCE JAN. 1, 19	BALANCE JAN. 1, 19

SAVINGS ACCOUNTS

IN NAME OF, AND ADDRESS - ACCOUNT NUMBER	19	INTEREST 19	19

TRUST ACCOUNTS

IN NAME OF, AND ADDRESS - ACCOUNT NUMBER	BALANCE JAN. 1, 19	JAN. 1, 19	JAN. 1, 19

SAFE DEPOSIT BOXES

IN NAME OF, AND ADDRESS - ACCOUNT NUMBER	LOCATION MAIN OFFICE OR BRANCH ADDRESS

LOANS OR MORTGAGES OF LAST 3 YEARS

IN NAME OF, AND ADDRESS	DATE MADE	ORIGINAL PRINCIPAL	CLOSED YES/NO	IF OPEN - MONTHLY PAY'T

SAVINGS CERTIFICATES

IN NAME OF, AND ADDRESS	DATE MADE	AMOUNT PURCHASED	LENGTH OF PERIOD	REMARKS

OTHER TRANSACTIONS

Exhibit 3—Form PL-426

U. S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
DISTRICT DIRECTOR

IN REPLY REFER TO

Code 421

In connection with routine activities of the Internal Revenue Service information is desired regarding the financial transactions reflected on your records with regard to _____
_____.

The information desired is requested in accordance with authority granted in Section 7602 of the Internal Revenue Code, and it would be appreciated if you would make your records available to the extent required by the Internal Revenue Service.

Very truly yours,

Internal Revenue Agent

Exhibit 4—Form 668A

FORM 668-A
(REV. OCT. 1971)
DATE

DEPARTMENT OF THE TREASURY—INTERNAL REVENUE SERVICE

NOTICE OF LEVY

TO

ORIGINATING DISTRICT

You are hereby notified that there is now due, owing and unpaid to the United States of America from the taxpayer whose name appears below the sum of → $

KIND OF TAX	TAX PERIOD ENDED	DATE OF ASSESSMENT	IDENTIFYING NO.	UNPAID BALANCE OF ASSESSMENT	STATUTORY ADDITIONS	TOTAL
				$	$	$
					TOTAL AMOUNT DUE	

You are further notified that demand has been made for the amount set forth herein upon the taxpayer who has neglected or refused to pay, and that such amount is still due, owing, and unpaid from this taxpayer. Accordingly, you are further notified that all property, rights to property, moneys, credits, and bank deposits now in your possession and belonging to this taxpayer (or with respect to which you are obligated) and all sums of money or other obligations owing from you to this taxpayer, or on which there is a lien provided under Chapter 64, Internal Revenue Code of 1954, are hereby levied upon and seized for satisfaction of the aforesaid tax, together with all additions provided by law, and demand is hereby made upon you for the amount necessary to satisfy the liability set forth herein, or for such lesser sum as you may be indebted to him, to be applied as a payment on his tax liability. Checks or money orders should be made payable to "Internal Revenue Service".

SIGNATURE	TITLE	ADDRESS (CITY AND STATE)

(Name and Address of Taxpayer)

CERTIFICATE OF SERVICE

I hereby certify that this levy was served by delivering a copy of this notice of levy to the person named below.

NAME

TITLE

DATE AND TIME

SIGNATURE OF REVENUE OFFICER

PART 1 — TO BE RETURNED TO INTERNAL REVENUE SERVICE

FORM 668-A (REV. 10-71)

20

Exhibit 5—Form 4427

Agreement to Accept Notice of Levy by Mail

Department of the Treasury
Internal Revenue Service

Instructions for Responding to a Notice of Levy

A Notice of Levy, Form 668-A, attaches funds due an employee, a depositor, or other person named on it. When you receive a Notice of Levy, we would appreciate your following these instructions:

1. Please have your representative sign, date, and note the time received above your name and address on all three parts of the form.

2. If you have funds due the person named, please send us your check, payable to the Internal Revenue Service, attached to Part 1. You may keep Part 2 for your records. Please give Part 3 to the person named.

3. If you do not have funds due the person named, please note this on the face of Part 1. Then return all three parts of the form to us.

Thank you for your cooperation.

Form 4427 (Rev. 3-72)

Name

The firm or individual named above agrees:

1. That the District Director may serve Notices of Levy, Forms 668-A, by mail to;

   _____

   _____

   and further agrees

2. To send the amounts due under the Notices of Levy to the District Director by check or money order, payable to the Internal Revenue Service.

If employer, please furnish the following information:

Our paydays for employees are _____.

We will require Forms 668-A _____ days before paydays.

_____
Signature of firm representative or individual named above

_____ _____
Area code and phone number Date

_____
Signature of Internal Revenue Service representative

_____ _____
Area code and phone number Date

GPO 928-556

Exhibit 6—Form 668C

FORM 668-C (REV. MAY 1967)	U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE **FINAL DEMAND**
DISTRICT	DATE

TO:

On _____, 19___, there was served upon you a levy, by leaving with _____ at _____ a notice of levy, on all property, rights to property, moneys, credits and bank deposits then in your possession, to the credit of, belonging to, or owned by _____ of _____, who was at the time, and still is, indebted to the United States of America for unpaid internal revenue taxes, together with additions provided by law which had accrued thereon at the time of levy, and which amounted at that time to the sum of $_____. Demand was made upon you for the amount set forth in the notice of levy, or for such lesser sum as you may have been indebted to the taxpayer, which demand has not been met.

Your attention is invited to the provisions of section 6332, Internal Revenue Code, as follows:

SEC. 6332. SURRENDER OF PROPERTY SUBJECT TO LEVY.

(a) Requirement.—Except as otherwise provided in subsection (b), any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

(c) Enforcement of Levy.—

(1) Extent of Personal Liability.—Any person who fails or refuses to surrender any property or rights to property, subject to levy, upon demand by the Secretary or his delegate, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of taxes (or the collection of which such levy has been made, together with costs and interest on such sum at the rate of 6 percent per annum from the date of such levy. Any amount (other than costs) recovered under this paragraph shall be credited against the tax liability for the collection of which such levy was made.

(2) Penalty for Violation.—In addition to the personal liability imposed by paragraph (1), if any person required to surrender property or rights to property fails or refuses to surrender such property or rights to property without reasonable cause, such person shall be liable for a penalty equal to 50 percent of the amount recoverable under paragraph (1). No part of such penalty shall be credited against the tax liability for the collection of which such levy was made.

(d) Effect of Honoring Levy.—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made who, upon demand by the Secretary or his delegate, surrenders such property or rights to property (or discharges such obligation) to the Secretary or his delegate (or who pays a liability under subsection (c)(1)) shall be discharged from any obligation or liability to the delinquent taxpayer with respect to such property or rights to property arising from such surrender or payment. In the case of a levy which is satisfied pursuant to subsection (b), such organization shall also be discharged from any obligation or liability to any beneficiary arising from such surrender or payment.

(e) Person Defined.—The term "person," as used in subsection (a), includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation.

Demand is again made for the amount set forth in the notice of levy, $_____, or for such lesser sum as you may have been indebted to the taxpayer at the time the notice of levy was served. If you comply with this final demand within five days from its service, no action will be taken to enforce the provisions of section 6332 of the Internal Revenue Code. If, however, this demand is not complied with within five days from the date of its service, it will be deemed to be finally refused by you and proceedings may be instituted by the United States as authorized by the statute quoted above.

SIGNATURE	TITLE	ADDRESS *(City and State)*

CERTIFICATE OF SERVICE

I hereby certify that this Final Demand was served by handing a copy thereof to:

NAME	TITLE	
PLACE	DATE	TIME
REVENUE OFFICER *(Signature)*		DATE

FORM 668-C (REV. 5-67)

U. S. GOVERNMENT PRINTING OFFICE : 1971 O - 102 - 072

Exhibit 7—Form 2270

FORM 2270
(REV. MAR. 1969)

DEPARTMENT OF THE TREASURY - INTERNAL REVENUE SERVICE

NOTICE OF REQUIREMENT TO EXHIBIT BOOKS AND RECORDS

To: *(Name and address of person holding books or records)*

Taxpayer: *(Name and address)*

Please make available for my examination any books or records in your possession or control containing evidence relative to property or rights to property belonging to the above named taxpayer (or in which the taxpayer has an interest) as of the date of service of this Notice, or if a notice of levy has been served, as of the time of service of such notice of levy. The inspection of these records is necessary because a levy has been made or is about to be made on property or rights to property belonging to the above named taxpayer. Authority for this request is provided by section 6333 of the Internal Revenue Code and corresponding regulations, which are quoted below.

REVENUE OFFICER *(Signature)*	OFFICE ADDRESS	DATE

EXCERPT FROM INTERNAL REVENUE CODE OF 1954

SECTION 6333. PRODUCTION OF BOOKS

If a levy has been made or is about to be made on any property, or right to property, any person having custody or control of any books or records, containing evidence or statements relating to the property or right to property subject to levy, shall, upon demand of the Secretary or his delegate, exhibit such books or records to the Secretary or his delegate.

REGULATIONS ISSUED UNDER SECTION 6333

SECTION 301.6333-1. **Production of Books.** If a levy has been made or is about to be made on any property or rights to property, any person, having custody or control of any books or records containing evidence or statements relating to the property or rights to property subject to levy, shall, upon demand of the internal revenue officer who has made or is about to make the levy, exhibit such books or records to such officer.

GPO 875-101

FORM 2270 (REV. 3-69)

Exhibit 8—Form RC SE ACTS 11

Department of the Treasury

District Director
Internal Revenue Service

Date | In reply refer to.

Notice is given that _____

_____

is indebted to the United States for unpaid Internal Revenue tax. Therefore, under authority of section 6333 of the Internal Revenue Code (quoted below), please furnish the information indicated by the box checked.

DISTRICT DIRECTOR

By: _____
(Revenue Officer)

☐ BANK ACCOUNTS AND SAFE DEPOSIT BOX

	CHECKING ACCT.	SAVINGS ACCT.	SERIAL NO. OF SAFE DEPOSIT BOX *(If any)*
Present credit balance on deposit in →	$	$	

☐ LOAN INFORMATION, ETC.

ORIGINAL AMOUNT OF OUTSTANDING LOAN	PRESENT UNPAID BALANCE	DATE LOAN MADE
$	$	
REPAYMENT TERMS	DESCRIPTION OF COLLATERAL	

OTHER INFORMATION *(As requested)*

EXCERPT FROM INTERNAL REVENUE CODE

Section 6333. PRODUCTION OF BOOKS — If a levy has been made or is about to be made on any property, or right to property, any person having custody or control of any books or records, containing evidence or statements relating to the property or right to property subject to levy, shall, upon demand of the Secretary or his delegate, exhibit such books or records to the Secretary or his delegate.

RC SE FORM ACTS-11 (12-71)

24

Mr. MERRITT. As my remarks will make clear, I think Congressman Stark's bill, which is a right to financial privacy act, is much more comprehensive than the legislation currently before you in dealing with bank records. I believe it is also more flexible in allowing access, proper legal access to bank records by law enforcement agencies.

I would suggest you seriously consider that type of approach to dealing with bank records in H.R. 214. Also, as I will point out later, I do have some suggestions for changes in Congressman Stark's bill. I think that this is a particularly appropriate time to deal with the question of fair procedures governing access to bank records.

As I could not help but notice in my hotel room when I arrived last night the cover of the Mainliner magazine has an article entitled "Privacy: How Much Should You Have?" It is a very brief article by a Professor Westin at Columbia University dealing with the right to privacy. Professor Westin, as you know is an expert in the area of credit records and bank records as well.

What I would like to try to do today is summarize the particular types of problems caused by the current state of the law and by the experiences that we have run into in trying to deal with these demands for information which are occurring daily as to bank records.

To do that I would like to put this into the context of the current case law situation. You mentioned several recent cases. There are others that really put the state of the law today in a very difficult situation, and I might add that the problem is bank customers have been led to believe by the tradition of confidentiality of the records as well as current legislation such as the Fair Credit Reporting Act and court cases to believe that they have the right to privacy in their records.

Banks, pursuant to some of these current cases, have been acting more aggressively than ever before, particularly in California, I should say, to protect those rights of privacy. These efforts by the banks are placing a burden that the law enforcement agenices, particularly the IRS, are unaccustomed to dealing with.

So there is a real need today for someone to sit down and take a hard look at what should be the law here and devise clear and easy administrative procedures.

It is our policy—I should say the policy of Crocker Bank, I am certain that is true of most financial institutions— No. 1, to comply with the legitimate demands for production of records by law enforcement agencies, but also to notify the customer of those demands and try to protect the customer's right to privacy.

Now frequently it is very difficult, if not impossible, to locate or communicate with a customer. We do try to make the effort of obtaining his agreement, if he will, or if he does wish to release the records pursuant to the request, or if he does not wish to make the records available, we make our best efforts to provide him a forum or opportunity to contest the production of those records. That is that area where we have the greatest problem. This does pose a substantial burden on the banks, both the burden in time and personnel, cost in searching the records, cost in producing copies, cost in communicating with the law enforcement agency on the one hand, the customer on the other hand, the costs in retaining the opinion of counsel as to whether or not a particular demand made upon the bank is legally sufficient.

In past years, I think, the type of situation that Congressman Stark described to you was a typical practice. I do not think that is true any longer in California. I am not certain what the status is with regard to other States. But you would have an agent from the IRS or a police officer or other law enforcement personnel come to a branch of the bank. He would want to meet with the branch manager and request to review certain records. He might have a prepared summons in advance. More often he would just have a bank form in his pocket which he would prepare, if needed.

If needed, if the bank manager did not turn over the records upon his oral request—this is a so-called pocket summons approach that still exists. At this point there was real pressure upon the bank manager. No. 1, he had before him someone with apparent legal authority to examine the record, usually accompanied by a badge, uniform, some aura of authority. No. 2, he had the inducement. No. 1, you save yourself a lot of time and money if you would just let me look at the records now. I will probably be able to look into a very few records. If you give me copies I will take them with me and you will not have to come down to the agency or come into court at a later time at great expense to you and at great business inconvenience.

Those pressures, even on somebody sophisticated, like everyone here, are not inconsiderable on someone who is not a lawyer, who is not familiar with the legal restrictions upon the access to bank records or what has to be done in order to have a valid summons or subpena, those pressures are quite great.

I should say that this is the clean case. Quite frequently these pressures would be increased by the implication that you are not doing your country a service if you failed to comply with the request or that you are obstructing justice by failing to comply with the request.

I might add in this area it is my experience largely based upon discussion with bankers and all, unlike Congressman Stark, that that is an FBI tactic more so than an IRS tactic. The FBI does not have summons authority. They frequently will make informal demands and accompany the informal demands with a suggestion that you are not being loyal to your country if you do not comply with the FBI request.

The reason, I say there was an exception for California, is the current Supreme Court decision by the California Supreme Court in *Burrows* v. *Superior Court*. The *Burrows* case or the opinion in the *Burrows* case is one of the exhibits to my rather lengthy statement. Essentially that case held that under the fourth amendment equivalence in the California constitution there is a reasonable expectation of privacy by a bank customer and his financial records maintained by the bank, and accordingly, unless there is sufficient legal process, it is a violation of that customer's California constitutional rights to obtain his records.

The case involved a situation where a police officer investigating an attorney who had allegedly misappropriated funds from a client's account went to several banks and asked for information regarding that attorney's financial records. At least one bank made them available. The attorney moved to suppress and the court held that a motion to suppress should be granted.

I think that it is important; and I think it is a landmark case; and I think it is important to note what it does. It overrides the idea that you had to have a property interest in these records because it was premised upon the finding that the records were owned by the bank and they were in the bank's custody.

Nevertheless, the court held that there was a right of privacy under the classic U.S. Supreme Court test in the *Katz* case.

There is another current case and I have attached a copy of the Solicitor General's petition for certiorari to the U.S. Supreme Court that is the *United States* v. *Miller*. The holding in the *Miller* case is almost identical to the *Burrows* case except it was under the fourth amendment in the Federal Constitution. That case is up before the Supreme Court, certiorari having been granted in June.

In light of that judicial activity you might be wondering right now why should Congress act. And I would like to submit that there are several good reasons why legislation is needed.

First, with all judicial opinions, both Burrows and Miller will continue to be contested by law enforcement agencies seeking to narrow or seeking different interpretations of what those decisions require. No. 2, it is not at all clear what the *Miller* case would be before the U.S. Supreme Court. Most of the lower courts have gone to the contrary and found that the consumer had no standing.

The Federal law enforcement officials have informally stated that the Burrows opinion, the *Burrows* decision, will have no effect in Federal investigations as of July 1, 1975. It is their interpretation in the new Federal rules of evidence that those rules supersede any State privileges and that Burrows, in effect, was a State privilege between a bank and its customer.

Fourth, even if Burrows and Miller are sustained, what is the remedy that is provided? It is a motion to suppress after the information has been turned over to the Government agency. That is not a very good remedy from a lawyer's point of view, I submit. I think it is not a very good remedy from a customer's point of view.

Neither case provides standing to the customer clearly to participate in any summons or subpena enforcement proceeding in advance of production of the records. I think that that point, notice to the customer and giving him standing to intervene in any summons, subpena, enforcement proceeding, is a very important aspect of any right of privacy. He has to have the right to protect.

Lastly, what is sufficient legal process? That is going to be left to be decided on a case-by-case basis. If Congress can enact legislation that is comprehensive in this area, it will eliminate a generation of litigation that may or may not accomplish uniform results that would assure a grant of the right or privacy to the customer.

I think these reasons and why I would suggest that Congress act to point out deficiencies in the legislation before you, H.R. 214. H.R. 214 deals only with the search warrant area. Again, there the remedy would only be to move to suppress the information obtained after it had been obtained.

Similarly, H.R. 214 does not speak of notice or standing for the customer.

The third aspect of the problem which I would like the Congress to consider is the matter of cost and who should bear the substantial finan-

cial burden of producing bank records. I would like to discuss a few cases that had been decided recently in this area before I give you some examples from my own experience.

First, I would like to talk about the *Burbank* case. That is the *United States* v. *Burbank*. In that case the IRS served a summons on two financial institutions under section 7602, in order to assist the Canadian tax authorities in determining the tax liability of the company.

Now the interesting aspect of the *Burbank* case is that the court held that the summons was invalid. It said that section 7602 only granted the IRS authority to issue a summons and obtain information to determine a U.S. tax liability. However, the court dismissed the customer's suit. If the financial institutions had not joined the customer in resisting the summons and going to court, there would have been no remedy and a legal summons would have been enforced over the customer's objection.

The case discussion and the opinion makes it clear, at least implies, that the customer's attorney had to convince the financial institutions to resist the summons because their inclination was to comply. I think that this really is my major pet peeve, so to speak, and major problem in this entire area. That is that it is a bank customer as a party that should have the right to come in and resist a request for production of his records.

Even in California after Burrows we are not getting that result. Law enforcement officials do not give notice to the customers and they contend, and the courts continue to sustain the position, that that customer lacks standing because he does not have a property interest or his privileged interest is not sufficient or because the summons itself is addressed to the custodian of the records of the banks.

And that is the basic legal framework as it exists today and I think, or I hope I have made it clear, that this area of the law is in a state of flux and it is likely to remain so for some time without legislation.

Let me go into six specific examples which have occurred within the last few months that I have encountered as counsel for Crocker Bank. First one, case No. 1, I call it, we received a subpena from the U.S. attorney in the Southern District in New York that was served in California by mail that requested appearance in New York within 12 days with the records regarding the customer's credit card, an 11-month period between 1971 and 1972. The bank has thus far been unable to contact the customer by telephone or mail.

I received a subpena the day before appearance was required and notified the U.S. attorney by telegram that we would not comply because New York was more than 150 miles from San Francisco. Hence, the subpena was invalid under the Federal Rules of Civil Procedure. He then notified that the Federal Rules of Civil Procedure were inapplicable because it was a criminal case.

I looked at the subpena form. There was absolutely no indication on the subpena that it was a criminal case. I then requested personal service, as required by the Federal Rules of Criminal Procedure. To date, no such service has occurred.

Now that seems to be a very technical objection, but it should have been complied with the subpoena that is procedurally defective. It is this very issue that the *Burrows* case and the *Miller* case require the banks to deal with on a daily basis.

Literal compliance with that subpena would have cost several hundreds of dollars in travel expense to go from San Francisco to New York as well as the cost of searching for and producing the records and the time of bank personnel communicating with me, my time in research, my time in talking with the U.S. attorney and sending a telegram to him as well as efforts to try to contact the customer.

Case No. 2 is that type of situation that Congressman Stark was discussing with regard to the sergeant from the bunco squad, so to speak. We have had several demands where the police informally requested records of a customer's bank balance. The typical demand is in association with the claim that a check has been written with insufficient funds and that there was the intent to write a check which would bounce, so to speak.

In order to prove intent we had a request for the amount on the deposit in the account within a period of 5 days preceding the 5 days subsequent to the date that the check was drawn.

These are not accompanied by subpenas or summons or any other formal process. Usually it is a telephone call, a letter, perhaps a personal visit to the bank. The rationale of the police officers is that the information is required to determine whether a crime has been committed against the bank, and they say in the *Burrows* case that you do not need legal process if what is being investigated is a crime against the bank.

Now we have requested the Los Angeles District Attorney to obtain an opinion from the California Attorney General as to whether or not he concurs in this interpretation of the *Burrows* case. In the meantime we refuse to comply with these informal requests.

Section 5(b) of Congressman Stark's bill would deal with this problem where the financial institution itself should report a crime against it, but it would require police officers or law enforcement officials to obtain records relating to that crime by legal process.

The third case I would go into is one of the more abusive ones, but it demonstrates a different problem area before you.

In March of this year, we received an administrative subpena requiring production of all credit card records for an individual and company for a 3-month period during 1974. The subpena expressly ordered the bank not to disclose the existence of the subpena or its service upon the bank for a 90-day period. This expressed nondisclosure requirement upon threat of proceedings and penalties shocked me.

Actually, it is not infrequent that an IRS special agent will request a bank verbally not to notify the taxpayer of a request or a summons. However, I have rarely seen such a request in writing.

This was more shocking as we began to research the area and found that this particular administrative agency had subpena power under a provision which granted immunity or might grant immunity to the person being investigated provided that before the records were produced he came in and claimed his privilege against self-incrimination. It seemed obvious that the proposed requirement on nondisclosure

of the subpena was meant to circumvent the statutory right of the party under investigation to make a claim of privilege. We wrote to the agency and notified them that it appeared that they had not followed their own statutory procedures and that we would not comply with the summons for that reason, among others, and we have heard no more from them.

The fourth case deals with an IRS, typical IRS criminal tax investigation. We notified the IRS special agent in connection with this investigation that we would not produce records in response to his summons unless he gave notice of the summons to the taxpayer and permitted the taxpayer to intervene in the summons enforcement proceeding.

Shortly thereafter we received a grand jury subpena requesting the records that the special agent had previously sought.

In addition to certain specified documents, the subpena requested all cashier checks purchased by or made payable to some 14 different individuals or entities during a 21-month period in 1972 and 1973. This presented a problem for a small branch which this particular case involved, and the cashier checks are not maintained that way, not by whom they are made payable to or by whom they are purchased.

Thus, to go through the records required a manual review of every cashier check that had been issued during that 21-month period. I was unable to contact the customer or his attorney in this case. Once we received the grand jury subpena, I went to the district court and moved to quash the subpena. I moved that the subpena could be interpreted to require all branches of the bank to search records for requested documents. Crocker has over 360 branch offices in California and offices in other parts of the United States and outside of the United States. If we had been required to search every branch, the cost would have been some $28,000, according to my estimate. The judge limited the scope of the subpena and said that it would apply only to the branch which had been served.

Unfortunately, my objections on the grounds that the customer was entitled to notice under the *Burrows* case because he had a privileged interest and a standing to intervene in the proceedings, was overruled by the judge, and he ordered compliance. He did order payment of the cost involved of copying the records of $85.

The fifth case I would like to get into was the grand jury subpena served out of New York City on an office of a bank located in New York, and I will read what it requested:

> Any and all records, including but not limited to transcripts of accounts, loans, placements, ledgers, foreign exchange contracts, credit files, legal files, customer files, correspondence files, checks and deposits, credit and debit memorandums, records of telephone messages, and messages sent by electronic or radio means and other memorandums and correspondence for the period June 1, 1972, through February 28, 1975, relating to the following.

The subpena then listed some 29 different individuals or companies, any of which appeared to be foreign companies by their name. I certainly hope that this is as bad an example of an overly broad subpena as I will see.

In addition, I think by requesting legal files, the subpena apparently was trying to obtain attorney-client privilege documents. Fortunately, we were able to resolve this problem by protesting the subpenas being

overly broad and representing that the particular branch served had no records of any nature relating to any of the individuals or entities involved.

I would point out that the cost of compliance with that subpena, as I estimated then, would be in excess of $70,000. In addition, this case raises two problems which none of the proposed legislation to date seems to deal with. That is how is service to be affected, how is jurisdiction to be obtained over a branch office or a location other than the one served. The second problem area is what to do about production of documents from a foreign office of a U.S. bank or a foreign office of a bank located in another country doing business in the United States.

The problems there are that the current law seems to be that compulsory production of the documents from the foreign country will be required even though it will violate clearly the civil law of that country and subject the bank to liability from its customer for such production.

Indeed, it is not even clear that if it violated the criminal law of the foreign country, that the court would not order production of the records.

I believe the answer which is emerging as to the question of how to effect service over more than one branch or a different branch than that to which the subpena is directed that the subpena or summons itself must specify that it is requesting information from another specific branch. However, even that question is unclear.

Case No. 6 involves an entirely different situation in connection with attempts to collect or obtain information to assist in collection of tax liabilities. We have received very informal requests and standard IRS forms purportedly under section 6333 of the Internal Revenue Code. These forms demand or appear to demand immediate production of information regarding a customer's bank account balance, account number, whether or not a particular person is in fact a customer of the bank. However, the section only authorizes the IRS to obtain information or examine records regarding the customer's finances if a levy has been made or is about to be made. Neither of the requests I have mentioned were accompanied by a notice of levy or any representation that one had been made or was about to be made. I returned them to the IRS and requested that they provide us with a notice of levy or a written representation from the district director that a levy was about to be made in order to comply with the request. Otherwise I contended that it was not authorized under that section.

Unfortunately, however, the only decided case under section 6333 involves a situation where an agent came into a bank branch, asked to examine the records, said that he was attempting to find assets for collection purposes, sat out and wrote out a form requiring the production of the records, the classic pocket summons approach. The authority, as I have stated, had been there only if a levy had been made or was about to be made. The court's opinion made it clear that no levy was being made and none was subsequently being made. The court felt that there was a waiver, so to speak, of the customer's rights by producing the information in response to the request, even though the request was unauthorized.

Now that situation may illustrate the need for some other aspects of the Right of Financial Privacy Act. Those would be penalties which

would apply to law enforcement personnel and indeed to bank personnel for violations of the non-disclosure provisions.

These six cases are typical of the demands which are being made by law enforcement agencies for the production of bank records. You will note I did not include a single instance involving a search warrant and that illustrates a problem with H.R. 214. Search warrants have only occasionally been used to request bank records.

During the first six months of this year I have had up until yesterday only two instances in which a search warrant was used to make a demand. They involved so-called routine crimes such as murder and theft. The deficiency in 214 is that it deals only with search warrants and only in instances when Federal law enforcement agencies can establish probable cause that a crime has been committed. The reasons law enforcement agencies seek bank records is it simply does not fit that pattern.

As illustrated in case six many demands are made for information in connection with attempts to collect tax liabilities. The other cases demonstrate that law enforcement agencies are seeking bank records to determine if a crime has been committed, frequently solely to determine the taxpayer's civil tax liability.

These types of activities have been sanctioned since 1964 in the U.S. Supreme Court decision in the *United States* v. *Powell* in which it held that there was no requirement that the IRS establish probable cause in order to enforce its section 7602 summons.

I do not believe it is necessary or desirable to impose a probable cause requirement. I do believe it is essential that procedures be developed that will insure that requests for bank records are made only in connection with proper governmental functions. Procedures whereby the bank customer who may be adversely affected may challenge the request and which places the financial burden on the party seeking production of the records I believe would provide such insurance.

Let me talk briefly about cost, if I may. I would like to refer to the testimony of Mr. Richard L. Wood, vice president of First National Bank of Chicago. Last week before the Subcommittee on Oversight of the House Committee on Ways and Means he stated the average to the First National Bank of Chicago in complying with IRS summons was approximately $225. If this cost is multiplied by a conservative estimate of a number of similar demands upon a bank the size of Crocker during the course of a year, which we estimate to be more than 2,000, the cost is more than $650,000 per year. Although these estimates are just that, it appears that the average cost of compliance with a summons for subpena for a large, medium, and small bank is in the range of from $225 to $350. Indeed, a very large bank, such as the Bank of America, may receive 5,000, 6,000 IRS summons during the course of a year for compliance costs of $1 million to $2 million.

In my office we have four attorneys in charge of reviewing these matters and we have many others who assist us on a particular project. Our time records for the months of February through May of this year show we devoted approximately 300 hours to these problems. If you charge those hours at a purely hypothetical rate of $50 per hour, we have a legal fee associated with these requests of almost $4,000 per month.

Those costs are almost the tip of the iceberg. Three vice presidents for operations screen matters before they are referred to us. We have also trained 12 operations officers throughout the State of California to assist in screening demands for information.

Beyond that we have prepared instructions on the process of preparing a manual for each branch manager to have available to instruct him in the procedures to be followed when demands for information are made.

The accumulated daily time of all these people is staggering, I think the most important point is that these are substantial efforts. Even if they were 100 percent efficient, they do not accomplish the objective of providing fairness to the bank customer. I believe only by providing him notice of standing do you give him a fair chance to protect his right of privacy.

With regard to the magnitude of cost, I think that one reason they are so large is because of the unclear state of the law. I believe that if legislation were enacted that clearly defined the types of procedures which could be used to compel the production of bank records, that the cost would be substantially reduced both for the banks, their customers, and for the law enforcement agencies.

There is one judicial opinion with regard to costs that I just must call to your attention. That is the opinion of Judge Teitlebaum of the western district of Pennsylvania in the *United States* v. *Pittsburgh National Bank*.

The case involved six summonses that were served on three banks by an IRS special agent. Judge Teitlebaum ordered the IRS to pay the cost of compliance. I would like to quote to you his language and reasoning as to why the IRS should pay those costs.

> I think we must also closely examine the due process factor of requiring banks or other institutions to go to the considerable expense of assembling such documents. It seems to me that what is not fair is not due process and that the government should pay the costs of such search as a condition precedent to obtaining any documents.
>
> It is my belief that before these banks, or indeed any others, are required to spend thousands of dollars in employees' time in response to a Section 7602 summons, the IRS should have some basis to believe that, one, the records do exist and are in the possession of the bank; two, the records sought do have some bearing on the customer's income tax liability; three, the IRS has exhausted all other less costly alternatives to obtain the same documents.
>
> Toward that end, in this instance I feel that the best means to insure compliance with each of the three elements set forth above is to obligate the IRS to pay the bank the actual costs of searching their records.

I find his reasoning quite persuasive. If the requesting agency must bear the costs of the search and production of the records, they will be more careful in making certain that they can demonstrate a need to receive the information requested.

In similar situations, Congress has provided in the Freedom of Information Act, the Fair Credit Reporting Act, that the requesting party, in those cases the citizens should bear the cost. I see good reasons why the Government should bear the cost of requesting production.

At this time, frankly, bank records are cheap, fair game for any law enforcement agency. They are comprehensive, as Congressman Stark described, in terms of the types of affairs that can be discovered by review of the bank records, and they are free. An IRS agent can walk

in and get more information with one summons served upon a bank than any other possible way to get information available to him.

Unfortunately, the case I cited to you was contrary to the prevailing view. The prevailing view is set forth in a case, the *United States* v. *Continental Bank*, which is discussed in my statement.

One aspect of the Continental Bank case I would like to call your attention to is by comparison with the Burbank case. In addition to protesting the costs, the bank tried to claim its customer's right of privacy as a grounds for objection to compelling response to a summons. They said that they could not require, because of no standing. If you compare that with the Burbank case, the customer had no standing to assert his right of privacy.

Thus, if you combine those two cases you have, the bank may only protest a summons or subpena on technical grounds. The customer has no standing to object whatsoever.

I should now like to speak to the specific proposed legislation very briefly. I think the restrictions in the bill before you, H.R. 214, are quite appropriate in the area of wiretaps and surreptitious investigation. I do not feel that they are adequate or reasonable as applied to requests for bank records.

I discussed the standard of probable cause that a crime has been or is about to be committed. I think that is much too stringent a requirement to impose on our law enforcement agencies' efforts to obtain bank records.

The chairman noted earlier that the subject, the general subject of privacy is before several other committees or subcommittees of Congress during this session. I would suggest that, perhaps if the Ways and Means Committee is looking into the IRS summons procedures, that the best way of solving the problem would be by amendments to the Internal Revenue Code provisions themselves.

I would like to talk now about some problems which arose earlier. This is departing from my prepared statement. Similar legislation has been before Congress in prior years. There were hearings approximately 3 years ago. That is the last time, to my knowledge, that statements were submitted on behalf of the Treasury Department, at which time they objected strenuously to either the approach of H.R. 214 or the approach of Congressman Stark's bill.

As I recall, Eugene Rossitis, who was then Assistant Secretary of the Treasury, opposed the legislation on the grounds that it would impede civil and criminal investigations and because there was no showing that law enforcement agencies were abusing bank customers' right of privacy. He alleged that if you provided notice to the customer—and usually the customer is the party under investigation—it might endanger the safety of informers, undercover agents, that records may be destroyed, funds may be concealed, or that the suspect may flee.

I submit such hazards are simply unreal in the vast majority of cases. The only criminal tax investigations I have been involved in on behalf of the bank as the custodian of the records, or as the representative of the suspected taxpayer. It was never the situation that the request for the bank records was the first notice to the taxpayer that he was under criminal investigation. He always knew well in advance

of any attempt to obtain bank records that he was a suspect, many times, I should say, formally by a written letter that his case had been referred to the Intelligence Division or by the appearance of a special agent, which to any attorney familiar with tax investigations is the tipoff that it is a criminal investigation.

Thus, I would put the shoe on the other foot and suggest that law enforcement agencies, including the IRS, have not made a showing that providing notice to the bank customer and granting the customer's standing will impede legitimate investigations.

However, I do agree with some reservations that IRS and other enforcement agencies may express. As I have said, probable cause is too stringent a standard. Frequently, in sophisticated white-collar crimes, a careful analysis of bank records and many other documents is required before it can be determined that there is probable cause to believe that a crime has been committed.

An important reservation I have concerns the statute of limitations. In connection with criminal tax investigations, the IRS has a 6-year period from the date the return was filed or should have been filed within which to get an indictment. In the past, it has been suspected that taxpayers had opposed the enforcement of a summons in order to delay and prevent the IRS from obtaining sufficient information to sustain an indictment within the 6-year period.

I think it would be truly tragic if a grant of standing and notice to the bank customer were to assist in these delaying tactics. Tragic, as I say; the result will be that Congress will be compelled to override any such grant of standing and notice on the pleas of the law enforcement agencies.

I think that result can be avoided, though, if the legislation provides for a suspension of the running of the statute of limitations during the pendancy of any summons' or subpena's enforcement contested case in which the customer participates. So this 6-year period would be suspended during the year and a half or however long it takes for a customer to come in and resist a summons and seek appeal through the courts, or the Supreme Court, even. That would alleviate the problem, from the IRS' point of view of trying to get an indictment within 6 years.

Lastly, in those rare instances in which law enforcement agencies can establish a substantial likelihood that notice of a request for bank records will endanger the lives of informers or agents or otherwise seriously jeopardize the prosecution of the crime, an exception to the notice requirements may be provided. However, a strong showing of the likelihood that such horrible horribles would occur should be required before a court and a court order of nondisclosure obtained.

My hope is that if amendments of that nature are made to the proposed legislation that it will eliminate much of the opposition of law enforcement agencies. In my opinion, provisions of that nature would give them adequate safeguards for legitimate law enforcement activities in sensitive areas, without depriving the vast majority of bank customers who are not involved in any of those activities of their right of financial privacy, which seems to be the only solution that the law enforcement agencies can perceive.

The remainder of my prepared statement deals with approximately nine specific comments that I have to the proposed legisla-

tion, primarily in the form of Congressman Stark's bill. I would like to deal with only one or two of those, as they illustrate specific problems, then I will be happy to respond to any questions that you have.

I think the third point on page 29 of the statement with regard to the definition of financial records is important. It is important to clarify whether a law enforcement agency may obtain the name of a bank customer, a person's account number, or the fact that a specific individual is a bank customer, without legal process. This is an area with the attorney-client privilege, for example, where there is substantial litigation and controversy as to whether investigating authorities may require an attorney to divulge the name of his client or the fees the client is paying.

The definition of "customer" should have some technical revisions made. The definition of "supervisory agency" needs serious consideration in connection with the Fair Credit Reporting Act, where authority is given to a great number of agencies with regard to bank and credit records.

The last point I would like to make deals with the problem of grand jury subpenas. Grand jury subpenas raise a very serious problem because the accused does not have the right of counsel in a grand jury proceeding, and because, usually, grand juries rarely act independently of a prosecutor.

Indeed, several of the requests we have had that I used as examples involved grand jury subpenas. It is not celar to me, anyway, whether grand jury subpenas are included within those described in Congressman Stark's bill. I think they should be included, and specifically so.

Finally, there are problems with regard to definition of "violation" or "multiple violations." Should you enact legislation similar to the Right of Financial Privacy Act, if you do not act to clarify that area, it will simply add to the number of cases before the courts to try to resolve the intent of the legislation.

In conclusion, I, personally, and on behalf of Crocker Bank and its customers, would like to thank you for this opportunity to appear here today. I urge that you give serious consideration to legislation in this area. I think it is a classic example and an important area of the law where there is absolutely no evidence that a fair and easily administered proceeding or procedure will evolve in the judicial process. Thus, I think it is essential that legislation be provided as a remedy.

Thank you very much for the courtesy extended to me in appearing here. If you have questions, I will be happy to respond.

Mr. KASTENMEIER. Thank you very much, Mr. Merritt, for your long and comprehensive, detailed statement. Obviously, you are well equipped to deal with the questions raised by these pieces of legislation.

Mr. Drinan?

Mr. DRINAN. I would like to thank the witness on his comprehensive statement.

I would like to hear Dr. Grossman. I wish we had more time to discuss these matters with you. Thank you for your testimony.

Mr. KASTENMEIER. In which case, we will recess for 10 minutes and reconvene by 12:30, if Dr. Grossman will put up with us.

There may be certain questions. Mr. Merritt, I am inclined to say that if you are here, we might ask you some questions. I will not ask you to remain specifically for that purpose.

Mr. MERRITT. I will be happy to respond to any questions by letter, if I can. Unfortunately, I will not be able to stay around for a while. I have another meeting to attend.

Mr. KASTENMEIER. I appreciate that. If we have several questions for you, we can correspond.

Mr. MERRITT. I will be happy to do so.

Mr. KASTENMEIER. The subcommittee will stand adjourned until 12:30, at which time we will hear Dr. Grossman.

[A brief recess was taken.]

Mr. KASTENMEIER. The committee will reconvene. And now we are very privileged to greet Dr. Morris Grossman, representing the American Psychiatric Association. The Chair should further state that we are especially regretful that we were not able to reach Dr. Grossman earlier. We appreciate his patience.

I, perhaps, could also make some comment about his long involvement and professional accomplishments in this particular field. But, I think I will let the record speak for that. In any event we are very pleased to have our third Californian here as a witness this morning to speak particularly on the question of privacy of medical and psychiatric records.

Dr. Grossman, you have a statement of some 10 pages. Perhaps you would like to deliver it in full. Without objection, your statement, together with its attachments, will be received and made a part of the record.

You may proceed, sir.

Mr. DRINAN. If you would yield for a moment. I want to welcome Dr. Grossman. I hope there are not any more interruptions. I hope I do not have to go before we have a full discussion. I read your paper last night.

You made a massive intrusion on my privacy. I am glad you did.

I understand you simply wanted to delete the word "medical" from three lines in the bill. Just a total deletion of medical records from this coverage of this bill is the position of the American Psychiatric Association?

Dr. GROSSMAN. The reason for that, I am really here with expert knowledge in the area of medical records, I am limiting myself to that aspect. You will note, I make all delusions of having other reservations. But I do not think this is the time or place to voice them.

Mr. DRINAN. You just wanted to delete the word "medical"?

Dr. GROSSMAN. Make reference to the fact of medical records period.

Mr. DRINAN. Thank you very much. I yield back to the chairman.

Mr. KASTENMEIER. Dr. Grossman, you may proceed.

[The prepared statement of Dr. Maurice Grossman follows:]

STATEMENT OF DR. MAURICE GROSSMAN, CLINICAL PROFESSOR OF PSYCHIATRY, STANFORD UNIVERSITY SCHOOL OF MEDICINE; CHAIRMAN OF THE TASK FORCE ON CONFIDENTIALITY AS RELATED TO THIRD PARTIES OF THE AMERICAN PSYCHIATRIC ASSOCIATION

Mr. Chairman, and distinguished members of this committee. I am honored to appear before you, and thank you for the privilege of discussing H.R. 214. My particular interest is to explain why I am concerned that H.R. 214 will adversely

affect most patients in psychiatric treatment, or those contemplating seeking treatment for their ills, and even many patients being cared for by physicians who are not primarily psychiatrists. While the consequences would be most destructive for the former groups, the damage would involve a number consulting their physicians seemingly for "ordinary" somatic symptoms. Even those with the traumatic injury of accidents often find emotional problems associated with such experiences, and that makes them vulnerable to the release of information they convey in confidence to their physicians and surgeons.

This may seem far removed from the intent of H.R. 214. The bill would seem to forestall a repetition of the late unpleasantness, and the ongoing disclosures. As a psychiatrist I would consider my alarm possibly tinged with a bit of undue fear. To me the result of H.R. 214 would be surveillance without the restriction of the Bill of Rights. Perhaps as members of the legal profession some of you might consider my jaundiced view more generously and recognize the result as being gun-shy. I would like to explain the basis for my concern for my patients, those of my colleagues, and those treated by all other physicians.

May I first present briefly the damage that follows releasing sensitive, personal information, given privately and in confidence to a physician. It could result even from the knowledge that others could obtain this information illegally, or, worse, legally. Exploring the problem of those with "primary" emotional illness will offer a basis for understanding the effects on other medical and/or surgical patients.

Psychiatric symptoms and illnesses are intimately related to feelings, impulses, and memories that the patient has found threatening and unacceptable. In addition, the inability to cope with these hidden factors often follows real or fantasied experiences that cause distrust of those important to them. Healing can come about only by the gradual development of trust in the therapist, and that trust gradually permits the patient to bring out and disclose to another, the therapist, the threatening secret material which they had come to believe would destroy them if known. Their own early indoctrination of shame, guilt, humiliation and punishment because of these hidden factors, persist in today's anxiety, guilt, shame and low self-esteem, and compensatory mental symptoms. The fear of public disclosure and its consequences, while somewhat neurotic, is realistic, too, in today's social climate. The mere fact of seeking psychiatric help or even having any emotional problem has led to denial of employment and promotion, to loss of livelihood. It has led to ill-treatment from neighbors, fellow employees, and even from members of one's own family. Disclosure of secret impulses and thoughts has led to disruption of family life. The fear of such disclosure based on realistic experiences has led to suicide.

The fear of disclosure has led many to avoid, or, at best, to delay seeking medical help. Once in treatment, that same fear of disclosure has impeded treatment by the withholding of information. It is this recognition, not merely by the medical profession but by legislatures and court rulings, that has led to the establishment of privileged protection of such information. State [1] and Federal [2] Supreme Court rulings have stressed that such protection rests on solid constitutional grounds in the Bill of Rights. Wigmore's four postulates for the granting of privilege [3] do apply to physician-patient priivlege in coping with the emotional aspects underlying many medical and surgical conditions, and in preventing emotional illness that would follow disclosure of some other medical facts made known to physicians by patients.

In psychotherapy the needs for the privilege fit Wigmore's postulates even better than his discussion of why lawyer-client privilege is warranted.[4] Repeated documents from the psychiatric profession,[5 6 7] court decisions,[8 9] legislative

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[1] 2 Cal. 3d at 431–32, 467 P. 2d at 567, 85 Cal. Rptr. at 839.

[2] *Griswold* v. *Connecticut*, 381 U.S. 479, 484 (1965) quoted by Louisell, David W. and Sinclair, Kent, Jr., "The Supreme Court of California 1969–70". 59 *Cal. Law R.*, 42, Jan. 1971.

[3] 8 Wigmore, *Evidence*, Section 2285, p. 527 (McNaughten rev. 1961).

[4] Compare: Slawson, P. F., "Patient-Litigant Exception", *Arch. Gen'l Psychiatry* 21: 352, Sept. 1969, quoting Lord Justice Knight Bruce, and Doyle, Vincent, "The Privacy of the Individual", *World Med. J.* 21: 33, March–April 1974. (Same quote applied to both professions.)

[5] "Confidentiality and Privileged Communication in the Practice of Psychiatry" *Report No. 45*, Group for the Advancement of Psychiatry, New York, 1960.

[6] Slawson, P. F., *Supra* 4. 21: 347.

[7] Grossman, Maurice, Chairman, "Confidentiality and Third Parties", *Task Force Report 9*, American Psychiatric Ass'n., Wash., D.C., June 1975.

[8] *Supra* 1, quoted by Louisell et al *supra* 2. p. 31.

[9] *Supra* 2, as interpreted by Cal. Supreme Court, *supra* 1.

processes in seven of our states [10] have affirmed that such protection is a social need without which adequate psychiatric treatment cannot exist. The Commission for the Federal Judiciary in their proposed Code of Evidence approved by the U.S. Supreme Court documented the justification for Rule 504 that was the Psychotherapist-Patient Privilege, and amended it to include all physicians in recognition that all physicians, not merely psychiatrists, need this protection for their patients.

The need for this protection against invasion of this area of privacy, even by the courts themselves, has been explained in greater detail in my testimony before the Senate Judiciary Committee in the hearings on H.R. 5463 of the ninety-third Congress, the Federal Code of Evidence [11]. I would especially call your attention to the documentation of how the communications of such patients to their doctors are a mixture of distortions, fantasies, and often self-destructive fabrications, rather than factual details of truth. This will become more important as I relate it to H.R. 214, the bill now being considered.

H.R. 214 has the sincere and laudable purpose of attacking the growing menace of crime, and to legalize procedures that were and perhaps are still being used illegally. My experience suggests it will fail to do so on many grounds. It will open the door for abuses by overzealous, even if sincere, enforcement officers, not excluding district attorneys and some members of the judiciary themselves.

Not too long ago a police chief secured a search warrant to invade without warning the files of a newspaper. He sought photographs of an alleged student riot in order to file charges against participants. An appeal by the paper to the Federal court resulted in censure for violation of the First Amendment, and not using a subpoena, instead, that would permit the paper to defend itself from producing the documents. An injunction, however, was denied as unnecessary. The Court refused to assess penalties or legal fees on the assumption that the local officers would not repeat the transgression.

Several months later the District Attorney of the same jurisdiction issued a subpoena for the post-assault psychiatric records of the complaintant in a criminal matter. The psychiatrist agreed to answer the subpoena by the date given. When the D.A. demanded the records immediately, the physician indicated she needed to consult with hospital attorneys for guidance in the legal questions involved. The District Attorney refused to allow this and obtained a search warrant from a cooperative judge that included all clinic records, the psychiatrist's home and car, even though the physician still had five days or so to comply according to the subpoena. The searching officers went through all patients' files of the clinic, in the ostensible search for the one record involved. The hospital attorneys had indicated the records would be made available under proper protection. The matter was then referred back to the Federal Court that had dealt with the newspaper search. The judge decided this was a repeat of the same transgression. This time he ordered legal fees assessed against the offending parties. The newspaper case is being appealed.[12] H.R. 214 will encourage a great deal more of this that now takes place in isolated instances.

Psychotherapists have been served with subpoenas for records under circumstances where the confidential material was patently protected by privilege. Subpoenas were issued even though California law specifies the need to show good cause before such issuance, as does H.R. 214. Actually H.R. 214 authorizes search warrants instead of subpoenas. Subpoenas are routinely filled in with generalities and the summons issued routinely without review of the contents of the demand. When objections were made to one attorney that the subpoenaed records were privileged, he replied, "Take it up with the Judge in court." And it is true that an illegally issued court order must be followed until an opportunity to have it quashed.[13] In some cases where the judge ruled against the objection only to be overruled on appeal, the damage to the patient was already done. Worse, in some cases where the material had been erroneously released and later overruled by appellate courts, subsequent courts have ruled that the same record no longer

[10] California, Connecticut, Florida, Georgia, Illinois, Kentucky, Massachusetts. New York Legislature just passed a similar law now awaiting the Governor's signature.

[11] Hearings—Committee on the Judiciary, U.S. Senate, 93rd Congress, 2nd Session, H.R. 5463, June 4–5, 1974, p. 280–298. U.S. Gov't. Print. Off. 35–817.

[12] *Stanford Daily et al* v. *James Zurcher,* Civil Case C–71912 AJZ, U.S. Dist. Ct., N. Dist. Calif.

[13] *Broome* v. *Simon,* D.C. La. 1966, 255 F. Supp. 434.

was privileged because the erroneous release had broken confidentiality, a condition for privilege.[14]

That there are not isolated legal phenomena was underscored by discussion with bar association committees. The standard reply is that it is all part of adversary legal tactics. May I call your attention to this same phenomenon in Federal law. Until 1970 Federal statutes required a show of good cause before a judge could issue a subpoena. Then a Law Revision Commission stated it was law office protocol to ignore this anyhow. So the law that protected Fourth Amendment rights against search and seizure with the phrase "good cause" was amended to eliminate that requirement.[15] H.R. 214 will open the door to wholesale invasion of patients' constitutional rights in spite of the safeguards carefully written into the bill. Legal practice as it actually exists today ignores the niceties in both local and Federal jurisdictions. The carefulness in the issuing and handling of subpoenas in the recent national unpleasantness does not operate generally in the less publicized arenas.

Average patients do not have the means or the knowledge to protect themselves from the attacks on their constitutional rights from law enforcement entities. It might even be these latter depend on the adversary system to counterbalance their zealous efforts that might go too far. The average patient does not know how to use the adversary system, especially when dealing with government-supported prosecution. When faced with subpoenas or search warrants, they are intimidated into believing they have no right to resist the demand. Authorizing search warrants, H.R. 214 does not even permit the leeway of a subpoena to marshal a defense of one's rights. Many physicians and hospitals react as do patients as mentioned above. Many records have been handed over without exploration of the validity of the Court orders. In the case of H.R. 214's search warrants, this would be the only course available. To retrieve them later by court appeal would not eliminate the damage already done. H.R. 214 would create a lawful aura for the Ellsberg-Dr. Fielding type burglary. It would constitute a similar robbery with legal sanction. It creates search and seizure that does not have even the faulty protection features of the misused subpoena.

The underlying intent of the bill is clear from the language "where a crime has been or is about to be committed". From my reading in the press of court decisions and from usual police practice, it seems enforcement agencies cannot take action unless a crime has been committed. To do so in anticipation of a crime, they must demonstrate conspiracy, a crime in itself. The intent of H.R. 214 is surveillance without the restriction of the Bill of Rights. It opens the door to harassment of patients already harassed by their illness, and so twice vulnerable.

Would you also consider this facet of the problem. Few patients have criminal tendencies. Those involved in crime do not seek help for being criminal, nor are they about to disclose criminal activity. Those who do seek help for criminal tendencies, or even criminal activity, or who disclose it, usually do so in order to stop their criminal possibilities. Often the psychiatric patient fantasies criminal tendencies, and expresses guilt about assumed serious breaking of the law. Usually we find the guilt expressed stems from a deeper, more personal guilt that cannot be acknowledged. These are the distorted communications I noted at the beginning. Yet records expressing such "confessions" could be misused by prosecuting officials seeking a conviction, or in some cases to intimidate patients to confess to some other crime under threat of disclosure. In the military drug abuse program it was used to force drug users to become informants. I believe it is often done in civilian law enforcement circles.

Even when actual crimes have been committed, they were committed often for self-destructive purposes to mask the deeper, real source of their guilt. Destroying the credibility of doctors' ability to protect confidentiality destroys the very therapeutic process that will help the patients stop their antisocial behavior. They will avoid seeking help, or will not be free to cooperate with treatment. This was also demonstrated in the military drug abuse program. Those who volunteered for help were disillusioned by the disclosures made of them to others and the betrayal of the promise of non-punitive handling. One result was that Vietnam veterans on return to civilian life refused to trust the doctors of the

[14] California Law Revision Commission, Tentative Recommendation relating to Erroneously Ordered Disclosure of Privileged Information, April 1973.

[15] Federal Rules Civil Procedure, Rule 34, 28 USCA, notes to amendment March 30, 1970.

Veterans' Administration.[16] The more successful programs were the "street storefront" clinics run by staff who spoke their language and understood their viewpoints.

The hardened or syndicate criminal doesn't seek psychiatric help. H.R. 214 may only involve those trying to break out of the antisocial pattern, or, more likely, the largely innocent. Instead of coping with crime, H.R. 214 may be self-defeating in sabotaging the efforts to help those who do not want to be criminals. Successful efforts to divert people from crime should reinforce the structure and people to whom the young criminal turns for help. To be successful these sources must be able to promise confidentiality to those fearful of exposure.

I can only address myself to the inclusion of medical records as a subject of H.R. 214. You are in a better position to judge the constitutionality of authorizing such broad search and seizure powers as contained in H.R. 214. Already in the realm of medical records, the hazard has been greatly increased by the omission of physician-patient and psychotherapist-patient privilege from the Federal Code of Evidence passed by the ninety-third Congress. Had these privileges been established, judges petitioned for search warrants as contemplated by H.R. 214 would have been restricted from violating constitutional rights protected by such privilege. I hope you will sympathize with my layman's attempts to give a legal basis for supporting privilege and confidentiality, and my opposition to H.R. 214 on the grounds that it would destroy those elements without which psychotherapy would be crippled. I am moved and governed by the knowledge of actual destructive consequences on patients where these elements have been violated.[17]

In considering my attempt to justify my position on unfamiliar legal terrain, I am mindful of another thought. If I dare, I would suggest you consider that the real criminals usually turn to lawyers for help to skirt the fine line of legality in planning crime, whether fiscal or against property or person, or to escape from the consequences of those crimes. As noted, they do not turn to doctors. If H.R. 214 were amended on page 2, line 21; page 3, line 20; page 4, line 14 to insert the words "legal counsel" after "medical", I suspect the legal profession would soon supply the sophisticated legal arguments demonstrating the bill's unconstitutionality. In any case, my recommendation is you will amend those three lines by deleting the word "medical".

Again I want to thank you for the opportunity to present my views.

Reports From Psychiatrists of Patient Injury Due to Breaches of Confidentiality of Information Made Available to Others

(Please note that distortions have been purposefully made to hide identities. The essential facts are from multiple cases.)

1. A 24 year old schizophrenic patient, receiving EST in hospital improved and able to return to work. Patient not told actual diagnosis because of still fragile state. Insurance covered patients routinely are given forms to sign on hospital admission, includes permission to give information to insurance company. Hospital sent a report of the hospitalization as routine matter to get payment for bill, including diagnosis and suicide attempt. On return to work, patient found that fellow employees knew of the hospitalization, and diagnosis, and incidents. Insurance company sends report to employer on group contract coverage. Patient becomes paranoid toward her physician, expresses self about first learning about herself from employees; terminates treatment.

2. Similar case, with patient learning of diagnosis with notice from insurance company reporting they had paid the bill. Patients paranoid about how insurance company, and "their clerks" knowing all about it.

3. A very emotionally upset patient, first making inquiries from insurance company that no information would reach employer, was so assured. The entire therapy damaged, and patient worse when finds employer discloses knowledge of the treatment and other factors. Medical Director of the national company involved, and a high official in insurance organizations writes "we are obligated to tell the employer because he pays the premiums." (Note that such group

[16] Personal interviews with patients. Verbal communication from George F. Solomon, M.D. formerly Assoc. Prof. Clin. Psychiatry, Stanford.
[17] Grossman, *supra* 7, p. 53–59.

contracts are fringe benefits paid for by employees labor, and are only administratively paid for by employer.)

4. Patient called in for questioning about insurance report of psychiatric illness relative to security clearance even though no interference with work. Incident to security investigation, neighbors were asked what they might know about any psychiatric problem about this patient.

5. Reports of employers looking for excuses to separate employees based either on prejudice about psychiatric illness; or unwarranted concern they will add burden and increased insurance premiums on group policy.

6. One patient, spouse of employee covered by group contract, required intensive treatment because of extreme emotional decompensation, barely holding together, and very depressed. When husband filed claim for the costs of treatment covered by policy, he was told that employer would be told of his claim; that employer would be required to increase premium payments on all employees (declared not to be a fact by insurance industry representatives when discussed with them later); and intimidated him into dropping the claim out of fear of losing job. The physician was dissuaded from making follow-up inquiries both by husband and wife out of fear of losing job. Patient became worse.

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8. School systems who routinely turn down applications on any history of psychiatric care, derived from insurance questionnaires, without investigating the nature of the condition or treatment to determine whether it would have a deleterious effect on their teaching or contact with children. Many in treatment are better teachers than those who avoid it.

9. Many government agencies routinely request information about psychiatric treatment. If ignored, and later insurance information based on group policies discloses it, they may be separated on that ground. If they admit that they had treatment, they do not get job in first place. No effort is made to have individual examined to see how relevant the history is to present condition or job. (Incidentally I have found that the Department of Defense Industrial Security Review Agencies is the most careful to protect the confidentiality of material from employers; and to evaluate current condition in relation to the job. The one difficult problem still is that of those who admit to homosexuality.) (I understand the Civil Service Commission has just agreed to drop this section of the questionnaire for job applicants, and rely on current examinations.)

10. Two high officials in the Department of Defense, defending the practice of SPN identification on conditions of discharge that includes medical data, unequivocally declared before a Senate Committee that they consider obligated to tell employers of the reasons for the discharge. When the discharged milltary person, returned to civilian life, seeks employment. (Again, I understand that recently the use of SPN identifications have been dropped; but the question of attitude remains open.)

11. Records of a child's psychiatric condition and treatment made a permanent part of that child's school file when the treating psychiatrists has consultation with the current school teacher and parents, are often used in later years by others not having the benefit of the psychiatrist's help in understanding the information; nor allowing for changes as the child progresses; and has even been turned up in search for information in the adulthood of the patient long after school years.

12. Patients returned to stability and able to work, forced back into their psychotic state by misuse of material released from insurance files, security clearance files, that reaches other parts of employment situation. Undoing years of therapy is only part of the price. Suicide attempts; homicidal threats based on paranoid upheavals; all generated by real attitudes about them from fellow employees who repeat the information for either sadistic or thoughtless reasons.

* * * * * * *

14. Since spouses are often the ones covered by the group policy: and many insurance reports are required to go through the plant's personnel office, even a diagnosis can cause trouble. Not infrequently there is already some trouble in the family. The "well" member is not above using the fact of treatment to blame the "patient" for all the difficulty merely because the "patient" has been the one to accept the treatment. There have been cases where the spouse has used the diagnosis to threaten the "patient" as a means of dominating the household situation, even after the "patient" has recovered and become constructively functioning.

15. A variation of this, is where the insured spouse seeks divorce, or threatens or actually seeks custody of children. When the insurance report indicated merely that an emotional condition existed, but that the physician would discuss it directly with the medical director on condition that would not be disclosed else-

where, the insurance company refused to pay the claim. The husband kept threatening the wife, to get a report for him to turn in through employer channels. A "secret" insurance company memo about the treating physician went through channels to the employer, got to spouse, who showed it to patient, who showed it to M.D., example of how protected their records really are, even when it concerns themselves.

16. This last case represents another problem. When it was discussed with the insurance commissioner of that state, he replied it was an individual matter; and that payment would have to be sought in the courts. However, laws on privilege, would require opening up the entire record in court, so that the damage would again be done. It has been found that detailed questionnaires are designed mostly for that purpose. Even if sued, the insurance company would merely have the same amount to pay; and most people fearing the disclosure merely drop their claim for reimbursement.

17. There are many patients, covered by insurance, who will not use their benefits because it will get back to employer. We receive reports that there are many more, who need care, but cannot afford it unless paid for by the insurance they have, but forgo treatment rather than take a chance.

18. We have other reports from reliable sources, but which cannot be documented for obvious reasons, of people greatly in need of treatment, but because of critical nature of their employment, avoid treatment out of fear of disclosure from any source. Such groups are commercial pilots, military officers, certain professional men and women, people in high executive positions or on their way up the executive ladder. They can point to instances of those they know who chanced treatment, only to have leakage of information from some source interrupt their career.

19. These are not restricted to psychiatric cases alone. A surgeon hospitalized for a coronary attack, learned shortly after he was home that his automobile insurance had been cancelled. His broker informed him that his automobile insurance carrier had gotten word of his coronary through means of his hospital insurance report.

20. One of the patients listed above told of a claim for corrective eye surgery on a child that was refused by the insurance company although supposedly covered; and the family dropping the claim fearing repercussions from the employer. This was at a critical employment crisis in the industry.

21. A patient applied to her physician for a physical examination for life insurance. When her application was turned down, her agent obtained a full report for her, and indicated that her physician was responsible. That terminated that relationship. The physician reports he couldn't understand the rejection on his report per se.

22. At the March 1974 C.M.A. Annual Meeting, at a reference committee hearing, a physician reported a case who died, and whose life insurance payment was refused. Many years before in the course of some other illness, he noticed a benign nodule that was not treated. When the patient applied for insurance the nodule was not listed among old conditions. Since her application was less than two years before her death, payment was refused on the basis of a fraudulent application even though it had no bearing on the cause of death; and was so unimportant the patient probably forgot it. The information came from one of the insurance data storage centers, or in the course of investigation, using the blanket consent form, they searched old records and found reference to it in list of diagnoses.

23. One report is of a hysterical patient with hypochondriacal symptoms who had, as a result, many bouts of surgery. After a year or so of treatment, with focusing on underlying problems, the symptoms and the surgery came to an end. When the patient began using insurance, a demand was made for an official diagnosis. The physician used "Hysterical Personality Defect". Through some way unknown to the doctor, the actual diagnosis became known to the patient. In her fury she immediately stopped treatment. The next he heard she was back visiting surgeons again.

24. A patient who had been hospitalized for a severe emotional disorder had had extensive psychological testing done at the hospital. A claim for hospital payment had been sent in by the hospital. Again, as often demanded by carriers, the hospital sent along a full report. For some reason they even sent a copy of the psychological test report. (Our information did not include whether there was separate billing for the tests.) Because some questions had not been fully covered, the insurance company returned the whole application, including all the reports.

For some reason, they returned it to the patient instead of to the hospital. The attending physician reported that the material was more than the patient could tolerate at that time and resulted in a relapse. He also reported that in another patient the results could have had a permanent more drastic effect.

25. Special problems are those faced with disclosure via subpoena and court disclosure. Many cases are reported of individuals, involved in court procedures, having legitimate claims, e.g. after accidents; needing to secure compensation because of losses and medical costs; having severe emotional reactions after the event; and being told by their attorney the psychiatrist could be subpoened to testify, refused to consult anyone for the help they needed. This has been reported both by attorneys and physicians.

26. A variation of this is the patient already in treatment, who gets into court action. A number have had to forgo just settlement rather than chance testimony in court about their disclosures to their psychiatrists.

27. These fears are not without foundation. One case, a psychiatrist was forced to testify in detail about the patient's marital problems, at a deposition. Being a deposition, and understanding it had no relevance to the issue, but being made to testify anyhow, he went into the details when specifically questioned. He heard later from the patient, that every detail was read out in open court, in the presence of the spouse. The patient won the suit but had a destroyed marriage.

28. In another, the demand was to give the full record on a child. To do so, would have disclosed to the child in court that his real father had committed suicide, a fact he never knew. He refused to testify. We have no information on what basis he was able to avoid doing so.

29. In another case the psychiatrist answered some questions. When he refused to answer some that he thought would do irreparable harm to the patient, he was held in contempt of court. His appeals went all the way to the State Supreme Court without relief. Appeals to the Federal Courts have as yet not brought relief.

30. In California, welfare patients are limited to two visits a month. If a case requires more treatment than that, a Treatment Authorization Request (TAR), is required giving in detail, the clinical facts to substantiate how sick the patient really is. Someone photocopied a number of these TAR's to demonstrate how easily the information can be obtained. They were sent to me anonymously, so I have no way of knowing their source. The postmark was from Southern California. The typing and form was so varied, I can only assume they came from a central file. Some were of children telling of their various criminal activity. One told of the child witnessing one parent killing the other. Some contained information of sexual activity. The obvious facts are that only those who are very sick would require TAR's in the first place. Secondly, in order to get the authorization, all the severe pathological details have to be included (reports indicate how in some obvious severe cases, requests are refused.) The next obvious fact is that these written records are not secure. There is no evidence that these records are ever destroyed. Once California starts computerizing these records with a State wide interlocking system, access to such records can be done more easily, without leaving a trace.

In a report of the World Medical Association Congress meeting in Munich, Germany, October 1974, it was reported that such countries as Denmark and Belgium are already using all such information by all government agencies. The New York Times carried similar information from Sweden. The American Psychiatric Association, anticipating this problem, formulated a Position Paper in 1970, warning, and suggesting protective steps be written into any National Health Insurance legislation.

31. There has been a report that one state, computerizing its psychiatric records, used convicted inmates of its penitentiaries to transfer the crude, raw data to punch cards; making identifiable material available to those doing the work. The last report is that the project was finished.

JOURNAL OF CLINICAL COMPUTING,
Buffalo, N.Y., June 6, 1973.

HON. PETER H. BEHR,
State Senate, State Capitol, Sacramento, Calif.

DEAR MR. BEHR: I read, with great interest, the bill you have submitted to prevent insurance companies "from trafficking in the confidential medical records

of their clients". In the past our Medical School (State University of New York at Buffalo), our Law School, as well as this Journal have devoted a substantial effort to explore the all-important area of privacy and computerization of health data. Therefore, we look upon your bill as a pioneer step in the right direction. We would be glad to provide you with the scholarly material accumulating in our files on human freedom and the potential risk of automated medical records. In exchange, I would appreciate any further information you may have on this matter. Also, we plan to publish your recent release, to inform our readers about the laudable efforts of your office, to impose control on ruthless use of automated health data.

Looking forward to hearing from you,

Sincerely yours,

E. R. Gabrieli, M.D.,
Editor-in-Chief.

Senate California Legislature,
July 17, 1973.

Dr. E. R. Gabrieli,
Editor in Chief, Journal of Clinical Computing, Buffalo, N.Y.

Dear Dr. Gabrieli: We are having problems getting votes needed to pass this bill. There is lots of support but also considerable opposition from insurance companies.

We need more documentation of abuses and also more of your background material, Federal legislation, etc.

Thank you for your help.

Sincerely,

Robin Aurelius.

Enclosure.

The Shrinking Circle of Privacy

The right to privacy, jealously guarded, is the hallmark of a civilized country. But under the impact of a modern, complex society, the circle of privacy surrounding the individual is steadily shrinking. Michigan law professor Arthur R. Miller has testified that the average American is the subject of 10 to 20 dossiers in government and private files.

Yet a certain amount of privacy must give way to other legitimate needs. An applicant for a job, credit or insurance must provide relevant information. The operative word is "relevant." The need should be clearly established, and the information should be used only to meet that specific requirement. Unlimited access by third parties should be prohibited.

That is the purpose of legislation introduced last week in the California Senate to stop insurance companies from circulating confidential medical records in the open market for "sale, barter and exchange." (Blue Shield and Blue Cross, covering about 10 million Californians, said they did not exchange information with anyone.)

Sen. Peter H. Behr (R-Tiburon), author of the bill, which he sponsored at the request of the California Medical Assn., said numerous California insurance companies, after acquiring medical histories, feed this information into a central computer where it is available to other insurance company subscribers to the computer service. Behr reported that "this information, some of it . . . unverifiable hearsay, may find its way into credit reports and employe background checks." He said one computer firm, the Medical Information Bureau of Boston and Toronto, had gathered medical files on more than 12,000 Americans.

Behr's bill would require insurance companies to obtain an individual's approval for the release of information, and the authorization would be valid only up to the time permission was granted. That is a sensible regulation. Modern societies function on information, but in an age when, as Prof. Miller observes, technology makes it possible to store a 20-page dossier on every American on a piece of tape less than a mile long, our right to privacy could vanish into thin air—or, rather, into data banks, unless we keep them under control.

[From the Medical World News, June 1, 1973]

Data Taps Threaten Patient-MD Bond

In this age of thirty-party payers, computerized data banks, and, yes, semi-official spying, what is happening to the traditional secrecy of doctor-patient relationships? And how can doctors protect their private communications and records?

These questions, becoming more acute as national health insurance approaches, were raised anew last month on several fronts. At the American Psychiatric Association meeting in Honolulu, the APA's board of trustees, reacting by implication to the Daniel Ellsberg and Thomas Eagleton affairs of the past year, strongly protested "any unauthorized intrusion into . . . the doctor-patient relationship," especially in a psychotherapeutic context and particularly when "misappropriated information [is used] to discredit an individual or to influence the political process."

But Dr. Maurice Grossman of Palo Alto, Calif., chairman of the APA's task force on confidentiality as it relates to third parties, went further. He sharply challenged Dr. Peter G. Bourne, a 34-year-old White House drug abuse specialist, on the issue of centralized storage of psychiatric information in computers accessible to many agencies under the so-called umbrella departments now being set up by many state governments.

"We are all concerned about this one burglary," said Dr. Grossman, in reference to the break-in of Ellsberg's psychiatrist's office by Watergate conspirators. "What's going to happen to all this computerized information you have stored in intimate detail from mental health, public health, medical welfare, and, in some states, correction agencies?"

On another front, the California Medical Association testified in behalf of a state bill that would protect both patients and physicians against the dissemination of confidential information by third parties to fourth parties without specific consent. The measure, sponsored by Republican State Sen. Peter H. Behr, is aimed in part at the controversial Medical Information Bureau (MIB) located in Greenwich, Conn., an outfit that collects medical data on 12 million people and makes them available to some 700 life and health insurers.

Also on the legal front, the medical director of New York City's methadone maintenance clinics, Dr. Robert G. Newman, is awaiting a decision this month on his appeal from a contempt conviction. He was cited by a court for refusing to turn over photographs of clinic patients to the Manhattan district attorney in the course of a murder investigation. Interestingly, Dr. Newman's appeal is backed by the White House Special Office for Drug Abuse Prevention, which contends that the HEW Secretary can refuse such subpoenas on the ground that absolute confidentiality is necessary for the success of methadone programs.

Despite these challenges and expressions of concern, however, the potential for wider dispersal of medical information is mushrooming.

The Medicare system accumulates medical service data on something like five million people annually in its master computer at Baltimore. Most of the state-federal Medicaid programs have similar storage banks. And the Blues and commercial health insurers collect the same kinds of records on many millions more.

Alabama, Hawaii, New York, South Carolina, and Tennessee maintain data banks on their state-served mental patients, and the National Institute of Mental Health finances a multistate computer bank at Rockland State Hospital in Orangeburg, N.Y. This facility now stores patient information for the mental health systems of Connecticut, Massachusetts, Rhode Island, Vermont, and the District of Columbia.

For the most part, these huge collection and retrieval systems are separate and unconnected. The Blue Cross Association and National Association of Blue Shield Plans point out that they do not have access to client data stored by local member plans. The Bureau of Health Insurance of the Social Security Administration, as with most agencies running computers, permits access to its stored material only through specially cleared personnel who are under orders to make sure of the inquiring party's authority and need to know. In addition, the Medicare data on patients and their doctors are protected by federal criminal statute.

The director of the Multi-State Information System in Orangeburg, Dr. Eugene Laska, says MSIS will release data by patient name to mental health professionals with proper credentials if needed for follow-up. Significantly, though,

the New York legislature passed a law last year that gives the MSIS data absolute protection against subpoena by courts or legislative committees.

In the insurance industry and in some state government operations, however, there are unresolved problems about privacy—at least in the view of critics. The APA's Dr. Grossman says patient-psychiatrist confidentiality is being "eroded by insurance companies' demands for explanations when there's mental health care coverage. I know of one case in northern California," the Standard clinical professor told MWN, "where a psychiatrist was confronted by a credit bureau investigator demanding details of a patient's case. The credit man said he was acting for the insurance carrier, and he was armed with a copy of the release form signed by the patient."

In another case, the names of all patients treated privately by psychiatrists serving a Santa Cruz County mental health clinic were demanded by a bureaucrat—and refused on advice of the northern California section of the APA. A similar request to the director of mental health services in Contra Costa County, Calif., was also rejected, an action that led to the firing of that doctor by the county. He was reinstated only after a county physicians' strike (MWN, April 6).

The insurance industry is accused by Dr. Thomas Elmendorf, president of the California Medical-Association, of using MIB, its 70-year-old data pooling system, to "screen out the high-risk and rate-up the medium-risk applicants for health insurance." The result, as he sees it, is to turn such people out of the health care system without adequate insurance, making them often "a burden for providers and taxpayers."

Moreover, Dr. Elmendorf, a GP from Willows, Calif., fears that "what we've seen so far is only the tip of the iceberg. In my opinion, the problem is unbelievably great." In the medical field, he believes authorizations to release data—often included in fine print on insurance applications—should be approached in the same spirit as surgical consent forms and "truth in lending" laws.

To that end, he got the CMA to have Senator Behr introduce his bill, which would require insurance applications to carry the release clause in eight-point type and to specify all purposes for which medical information might be used and all parties that might get their hands on it. It would also restrict releasable information to that recorded up to the date the form is signed.

MIB's executive director, Joseph C. Wilberding, contends the bureau's purpose is primarily to alert life insurers to medical conditions that might affect insurability by red-flagging applications on which such conditions were deliberately or forgetfully omitted. The data are in code and are made available only to insurance company medical directors, who are honor-bound, Wilberding says, not to turn down a policy without checking the medical facts first-hand. Although he concedes that some insurers also use the system to screen health policy applications, he notes that "most health insurance is underwritten on a group basis" without individual assessments.

The question of state umbrella agencies and their potential invasion of medical confidentiality appears to be broader. In telling the psychiatrists about the growing trend toward such agencies—19 states either have them or are developing them—the White House's Dr. Bourne said his intention was to get specialists involved in defining their roles in the new setups before it was too late.

In Georgia, where he helped set up a department of human resources, Dr. Bourne says "a statewide computer network is being established into which uniform data are being fed from all of the human resource facilities in the state. These data are stored in a central computer file in Atlanta, and not only are available via remote terminal for immediate access anywhere in Georgia but are forming the basis for an extensive reporting and evaluation system."

In reply to Dr. Grossman's challenge on confidentiality, Dr. Bourne said he thought the issue "may be overrated," especially when weighed against the administrative efficiencies of such programs. "There's no reason why certain kinds of mental health information can't be specially safeguarded," he told MWN. "In the long run, though, the answer is not more confidentiality, but education to change attitudes toward psychiatric treatment."

But in the State of Washington, where an umbrella department is in operation, there is great concern over a requirement that mental patients' diagnostic and treatment data be entered in the computer by the patient's Social Security number. At the University of Washington-affiliated Children's Orthopedic Hospital, Dr. Michael B. Rothenberg and his staff in the behavioral sciences' division have circumvented the state by supplying "pseudo-Social Security numbers"

for young patients. But a proposed independent coding system for all mental patients' data was rejected by hospital administrators.

Special codes and cipher systems for computer data storage are being worked on by Dr. Arnold Pratt and a large staff at the computer research division of NIH to protect the institutes' clinical records from prying eyes. Dr. Paul Ertel, associate professor of pediatrics at Ohio State, who has been developing a prospective Professional Standards Review Organization, says the PSRO's computer access codes will be changed every two weeks, and only the system's designers will know how to get into all the computer programs.

But Dr. Laska of Rockland State Hospital says the answer lies not in computer security, but in the use to which society decides the data may be put. He points out that some state mental hygiene departments—not New York's—routinely check their files at the behest of agencies issuing gun licenses, a practice Dr. Laska doesn't approve of.

The University of Washington's Dr. Rothenberg asks what may be the hardest question of all those posed by state computer banks: "Is the state client entitled to less protection of his privacy than a private patient? If that's so now, should it be?"

TESTIMONY OF DR. MAURICE GROSSMAN, CLINICAL PROFESSOR OF PSYCHIATRY, STANFORD UNIVERSITY SCHOOL OF MEDICINE, CHAIRMAN OF THE TASK FORCE ON CONFIDENTIALITY AS RELATED TO THIRD PARTIES OF THE AMERICAN PSYCHIATRIC ASSOCIATION

Dr. GROSSMAN. I do appreciate being invited and having a chance to address this committee.

As far as being delayed here, if anything I have had a very profitable morning. First, it is nice to feel that it is all California morning. You know, we are a little bit chauvinistic in that way.

Mr. DRINAN. Only a little bit, Dr. Grossman?

Dr. GROSSMAN. I am being modest in my usual terms. It is not like Texas modest, just California modesty. There is no Representative from Texas here.

The other thing is I learned something else in listening to our Congressman from California, Mr. Stark. And also to Mr. Merritt, from the California banking system of Crocker National. And they pointed out something now, that I do call your attention to.

Mr. Stark, particularly made reference to the impact it would have on the banks and the banking community and the problems it would cause for them.

Mr. Merritt indicated what a problem it is for their clients particularly and then how it involved the banks and puts a sort of conflict of interest. In order to protect their client it is going to cause them a tremendous amount of money and effort. From the standpoint of medical records you have the same problem.

All we are concerned with is not with the doctor or the hospital, but the effect it has on our patients, as a matter of fact, it would be much easier for us simply to turn over records when we get a demand, rather than fight them and restrict them and all the rest, because we have nothing to gain. It is the patient who gets hurt and that is our concern if we are going to treat patients, not to do anything that hurts them.

I will refer later, and you have seen a list of actual cases where patients have been hurt by inadvertent or perhaps not so inadvertent release of information about them.

Some of them have to do with insurance records, that is true, or other pieces of information, but the important point I am trying to make with these cases, the information that has been given confidentially to a physician, particularly a psychiatrist's in the wrong hands can do a lot of damage. It can do a lot of damage in many ways.

The worst part is if it is done through a court system or a legal authority. It becomes a public record and it has a much greater chance of getting out of hand in areas where the damage can backfire against the patients.

So this is in sum total some of the things and the testimony you heard this morning emphasizes the fact that, as physicians we really have nothing to gain in protecting this. All we have to gain is the job we have to do for our patients. And that extends to protecting them from damage having to do with what happens to the records that we make. So that is the point of what I learned from this morning's session.

And I am glad I had a chance to be here for that. It not only hurts the patients in treatment who are submitting these communications for when they know the fact that information that they give to doctors, the psychiatrist, if they know that it is not going to be confidential, they are not going to seek treatment in the first place.

A lot of people who need treatment, simply will not come in to see a psychiatrist for two reasons: they find it difficult in the first place, to bring these difficult, sometimes embarrassing, sometimes guilt-ridden material to somebody else, even the therapist. Or the knowledge, for instance that they can lose their job if the information gets out, or other things can happen to them is really going to keep them from seeing and getting treatment.

And society has a lot to lose in that particular situation itself. This does not apply merely to psychiatrists. Though the usual legal argument is what is so confidential about a broken bone or a gall bladder x-ray, or pneumonia or hives or things like that is valid. But no patient is simply a broken bone or pneumonia or anything like that.

Every patient who comes in, if he is sick at the same time, will have emotional factors, just as the psychiatric patient.

So the general physician needs the same protection as the psychiatrist. In a sense I am speaking for all of medicine, but particularly as a representative of the American Psychiatric Association.

If you read a H.R. 214, superficially from my point of view, or at least look at the beginning of it at face value, it seems as if their first primary intent, really is to forestall the things that have been, during the recent unpleasantness, wiretapping, robbery of records, opening of mail; it is assumed that they are going on, according to the newspapers and that the primary intent of H.R. 214 is to see if they can do something about stopping that.

It may not be in the written statement, but as I contemplate, I thought if I really expressed my thoughts about this as a psychiatrist, I may sound a little paranoiac, because of my suspicions and whatnot. And really, not wanting to be put in that category, because it is not fashionable to be labelled so, perhaps you as lawyers, might be a little more generous and recognize my reaction, because I am gun

shy, by reason of a natural experience I have had with patients. As a result, I read the lines, I read between the lines, and perhaps I add into that things that have happened from the past.

But on that basis, I would feel that the results of H.R. 214 really legalizes this unwarranted surveillance practice that we have seen before. It legalizes it and deprives it of the protection of the Bill of Rights.

The mere fact that it indicates that they need a court order for a search warrant, it merely indicates that, yes, you can rob a doctor's office, yes, you can open mail, you can tap wires. All you have to do is get somebody to give you an order to do that.

And while the Bill of Rights indicates that you can have search and seizure on good cause in some measure, I would like to indicate from my experience why I feel that the way the law is written, to me at least it seems more like window dressing than a reality of protection. So, in some measure that will be the theme that I will try to develop. And I would also like to again reiterate, that my concern again, is for my patients, because of what I have seen happen to them, the patients and my colleagues, from the reports I have gotten from all over the country and because of my involvement with the California Medical Association in this same area, and through them, the American Medical Association.

The damage that has happened to physicians of all patients not only psychiatrists. The damage really follows, as I mentioned before from the release of sensitive personal information that is given privately and in confidence to a physician.

The only reason that a patient does this is that they are in trouble and they recognize that if they do not bring this all out and explain it and communicate it to a physician, he is not going to be in a position to help them.

That is the only reason patients give up their privacy in talking to a physician. They really do not have to have had actual evidence that the physician has given out this information. As long as they feel that their communication can be obtained and used by sources other than the physician, they are going to be anxious and apprehensive and they will already start having damage from the mere possibility that it is going to be done.

If they feel that it could be done illegally, by the exposures they have, they are going to feel twice as bad if they learn that it can be done legally now. It is the anticipation that what they will say is not going to be able to be protected by the physician that does as much damage as the actual exposure itself.

It occurred to me that it might be helpful if I were to really explain what goes on in the average patient and why this is such a disruptive process. It pertains, as I say, to patients of surgeons and other physicians, but I will use a psychiatric patient, particularly, to give you a background, because it lends itself better to illustration.

The reason that they got sick in the first place, is that they already have anxiety, guilts, doubts, fear of punishment, based on old experiences, things that they feel anxious about, that they feel guilty about, and things that they have been fearing will be exposed ever since they were little children.

This constant anxiety gets aggravated when you find in most of these patients in addition to these phenomena based on the early experiences, they also have other experiences and sometimes they are just fantasy experiences, sometimes they are real. Where they found they really could not trust in whom they needed to trust.

It often happens inadvertently. Parents are, in a sense they give children mixed signals, do not tell them they say, just tell me what happened, I just want you to tell me what happened and it will be all right nothing will happen.

Then they tell their parents what has been bothering them and the parent gets upset and then anxious and then punishes the child afterward.

It is surprising how often this happens. Sometimes it gets much worse in that it is a proposition that eventually they get the feeling that they cannot trust the people in whom they have to have trust. As the result of which, they come into therapy, already distress filled, and their own anxieties and guilts and feeling of being worthless, low self-esteem, still exists in the present era.

You may know of friends of your own, but it is so common. It does not make any difference how successful, how worthwhile a person is, if they feel this way about themselves, they are not convinced by their own accomplishments. They still feel they are worthless, bad. If people ever found out, their reputation would be shot to hell. They are all convinced of this even though everyone else sees them as ideal citizens that they would like to be like. The distrust comes along also, therapy becomes possible merely by the fact that gradually, the patient really begins to have trust in his physician.

No physician, not even a surgeon or an intern would be able to help a patient adequately if the patient did not develop trust in him, as a primary mechanism for treatment. You cannot do anything in psychiatry without the patients developing that trust. It does not come easily. The least slip up that you make, that you are dishonest with them or anything like that, the least indication that you have discussed them with a family member without telling them, brings up the barrier of distrust.

It is only when that trust begins to grow that gradually they will begin to tell you all these things that they feel horrible about: Their guilt, their shame, the things that they have done, that they are still doing that feel ashamed for or disguisting, whatever it may be. And the constant terror that if this ever got out, it would just destroy them. There is no question about that.

I would like to give you some examples to show you how devastating this can be and in those examples, you will see the real meaning of the source of these feelings.

I just picked out three cases from my own personal past experience, where the individuals, admired by their family, by their colleagues, very capable, intellectually superior, and superficially feel that they have nothing about. But they have never been able to get anywhere because of self-doubt and low self-esteem with a great deal of depression.

In the course of therapy we found that a great deal of it they felt that people would think they were dirty. One case in therapy, it

finally developed down, as a matter of fact in all three, but one of them was comprehensive.

She remembers the situation, what happened to her when she saw herself, I think in one case she was sitting on a potty and dumped it over and dumped over the fecal material. The governess got so angry and threatened her about it. In the process of recalling this, that old terror came back with such reality that my patient lost all contact with where she was during these few minutes that she was telling it.

The terror was so overwhelming that it was paralyzing and knocked out all awareness of reality. I do not know how familiar you are with physiologic science. When I had her sit up her pupils were so dilated and black with terror and she looked at me with a blank stare and I had to have her sit up for 5 minutes and look at her to get her back to recognizing where she was and that this terror really was the terror of when she was 2 years old.

That is how extreme it is today. I had a similar reaction recently with a patient over the same process and she developed a borderline psychotic state about 4 years ago. And it came out eventually because she felt she was dirty. I will not go into details why in order not to give way to a more recent case. Again, it went back to that same period. And while she was discussing that whole history in terror, she suddenly said she had that same feeling of unreality that she had when she had that borderline psychotic episode.

A third patient actually became psychotic in my presence in bringing this material out. It was so terrifying. And only by bringing this out to her that, look, this is in the past, that that psychotic symptom mentality in my presence disappeared.

The reason I bring this out is to indicate that these terrors of disclosure of things like that, while they apparently have to do with superficial things and go back so far and are so real that they are absolutely destructive in their own right.

I merely go into this to indicate that disclosure of information can be devastating.

I have tried to indicate how there is a psychological background for this terror of disclosure. But what complicates it is the disclosure today is destructive in reality because of our social climate. We can talk about people that ought not to be afraid of discussing their psychiatric illness and things like that, but the reality of it is if you have a history, you have seen a psychiatrist, you can lose your job. You apply for employment, they will not employ you if you have a history. If the information gets to your neighbors, ill treatment and scorn, extending not only to them, but we have instances where the neighbors have gotten a hold of it because people have investigated the neighbors. And pretty soon the neighbor's children are tormenting the children of the patient because their parent has been in psychiatric treatment.

I mean these are real factors, so that the fear of disclosure goes far beyond the psychological aspects of real terror. These are real dangers that exist. And the examples we have been given of all these current episodes of threat and damage that they have done. As a matter of

57-282 O - 76 - pt. 1 - 36

fact, in some of those cases and in many more that we have, families have been disrupted when the material has gotten out.

One case comes to mind where a woman was talking about the sexual problems they were having, the impotence of the husband, and it was brought out in a subpena, in a pretrial hearing deposition with the end result that the deposing attorney brought out the whole thing in court. I mean the woman won her suit, as I recall, but she lost a marriage, it really got broken up.

Children who find out about who their real parentage is and things like that are brought out. Families are disrupted. The newspapers are full of people, often adolescents, that had a terror that someone would find out about some of the material that even keeps them from going to a doctor, who commits suicide in a terror of what would take place.

So the threat and danger of this release of information is quite real and it can be quite drastic.

Mr. KASTENMEIER. Doctor, your graphic description of these cases makes a very serious point; perhaps less seriously, I should observe, than Father Drinan and his colleagues, who have another method of treating these cases.

Dr. GROSSMAN. I am sure that he is familiar with these situations from another point of view. But, the thing is this too: That it is not merely this threat is here, but this threat of disclosure will even keep them from seeing anybody or talking to anyone. They will not come in for the help that they need.

Also, the fear of disclosure would not come into treatment. I had one patient who it took me a year and a half before she really finally admitted that she had been fighting a year and a half from telling me something because she heard a friend of hers who had a similar information disclosed and she was very fearful of even telling me what the trouble was. And that impedes treatment too.

I would like to repeat that the recognition of the need to protect the release of this information has been substantiated by court decisions that have indicated that it is well grounded in constitutional rights. Legislatures of seven States have passed laws to protect this kind of information.

I got word last week that New York State passed a psychotherapist-patient privilege law and it is up before the Governor now for consideration.

I make a point throughout here, that the protection of this based on constitutional grounds even fits Wigmore's postulate for the establishment of a privilege. And to have Wigmore's postulates approved for a discipline, particularly, this really indicates that the recognized need for it is quite pronounced.

The supreme court in California, for instance, in viewing an exception was so concerned about how exceptions to this was, they indicated even when an exception exists, information should be limited through the absolute bare essentials. The only trouble is that the courts have not figured out how to apply that.

So, the supreme court decision in California has left us with an exception that really opens the barn door wide for the protection of the privilege.

Incidentally, I am sure as members of the Judiciary Committee, you are familiar with the fact that the Commission that wrote up the code of evidence and approved by the Supreme Court found that there was a valid base for including protection for psychotherapist-patient privilege under rule 504. I would like to call to your attention, when we brought these facts to their attention, the Commission itself modified rule 504 to include all physicians. The original was psychiatrists and psychiatric physicians in most States preliminary to psychologists and psychiatric physicians.

Under the code they realized that all physicians needed this protection in this particular area.

There is a substantial body of information that supports the position that we are taking. As far as H.R. 214 is concerned the important thing is the basis for these privilege protections is really by disclosure against courts themselves. In other words, courts do not have the right to force the release of this information. If I understand privilege correctly.

As a result, H.R. 214 vitiates this protection because they say a court can force the release of this information. That is the importance of trying to establish the validity of a basis for psychotherapists' patient privileges indicating this information ought not to be made public, not even by a court.

There are certain exceptions. And I have certain positions about that which I will not burden you with. I made reference to it in my testimony. It is available in the testimony. I think you have been given a copy of the Task Force Report No. 9 of the American Psychiatric Association, which also contains information why even the psychotherapist-patient privilege needs some strengthening and the reasons and arguments therefor.

If you wish to make that a part of the record, I would appreciate it, rather than go into details now.

Mr. KASTENMEIER. We will receive this report observing that you are the chairman of the task force.

It is a 60-page report and I assume that we can, perhaps, excerpt that which would be relevant to our proceedings.

Dr. GROSSMAN. I would recomend that, rather than the whole thing.

A lot of it has to do with other issues which you would not want to go into.

[The information referred to follows:]

Task Force Report 9
June 1975

Confidentiality and Third Parties

American Psychiatric Association

Task Force Reports

This is the ninth report in a monograph series authorized by the Board of Trustees of the American Psychiatric Association to give wider dissemination to the findings of the Association's many commissions, committees, and task forces that are called upon from time to time to evaluate the state of the art in a problem area of current concern to the profession, to related disciplines, and to the public.

Manifestly, the findings, opinions, and conclusions of Task Force Reports do not necessarily represent the views of the officers, trustees, or all members of the Association. Each report, however, does represent the thoughtful judgment and consensus of the task force of experts who formulated it. These reports are considered a substantive contribution to the ongoing analysis and evaluation of problems, programs, issues, and practices in a given area of concern.

Judd Marmor, M.D.
President, APA, 1975-1976

June, 1975

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CONFIDENTIALITY AND THIRD PARTIES

A Report of the APA Task Force on Confidentiality as It Relates to Third Parties

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CONTENTS

INTRODUCTION

GENERAL PRINCIPLES GOVERNING CONFIDENTIALITY OF PSYCHIATRIC TREATMENT AND DISCLOSURES TO THIRD PARTIES

The constitutional right to be secure in home and person is the basis of the general right to privacy all citizens are entitled to. In medicine this extends to the right of the patient to be secure in the privacy of his communications with his physician. In psychiatry, where it is the very essence of the profession to deal with the most private corners of the patient's personal life, security from abuses of privacy form a condition without which it would be difficult to practice psychiatry and psychotherapy at all.

Thus there is concensus in the medical world, the legal community and the general philosophy of our system of government that confidentiality of private communication is a right. In particular, psychiatric treatment requires a secure atmosphere of confidentiality in order to protect the patient's right to the pursuit of health and happiness. To create an affirmative and secure atmosphere of confidentiality will encourage individuals who need help to seek it without fear that there will be destructive disclosure to the rest of the community. In fact, the mere disclosure of the fact of psychiatric treatment is sometimes felt to be a hazard to the patient. Further, some diagnostic terms have discriminating social connotations and can cause injury to patients if made known to others.

The patient himself bears some responsibility to protect his own rights. Our position as the patient's physician also makes us responsible for the preservation of confidentiality. This responsibility is even more crucial when the patient's ability to protect his confidentiality is impaired by temporary regression incident to the therapeutic process, by his psychological state of function, or when, under financial duress, the patient permits release of information the consequences of which he only dimly perceives.

The unfettered ability to maintain absolute confidentiality in psychiatry seems desirable. However, problems are created when third parties have legitimate ethical rights to some information about a patient, his treatment process, or even certain specific elements of the treatment itself. Balancing these conflicting interests thus be-

comes the task of the psychiatrist. We must protect the integrity of the psychiatric process and the patient's clear right to privacy. But we are also asked to recognize that some information, usually with the patient's consent, and for advantages important to the patient, may properly be released to third parties. Lastly, in certain rare and special cases, our obligation to society may supersede the patient's rights.

Finding this balance is often not easy. It could be destructive to a patient to refuse to give information about him to a third party having a legitimate right to it. It would be destructive to the patient to reveal too much information. It would be extremely destructive to the treatment process also if the psychiatrist were knowingly to collude in a manipulation of facts. This search for the proper balance is generally best carried out in cooperation and discussion with the patient in the course of which it is the psychiatrist's responsibility to determine whether the patient's consent is truly informed and not based on either misunderstanding or coercion.

Those rare and special circumstances in which a physician's obligation to consider hazards to society may outweigh obligation to preserve the privacy of the patient, are crises in which there is clear, present and extreme danger to life or limb directed by the patient toward others or self. Such crises are often technical treatment problems and should, if possible, be handled within the context of treatment. Possibly outside consultation may be of help and should be carefully considered. Once, however, if in the psychiatrist's judgment this extreme danger from the patient toward self or others can no longer be contained within the treatment, protection of the patient or others may require a breach of confidentiality. In these circumstances confidentiality should be broken only to the extent necessary.

The principle that confidentiality should only be broken to the minimum degree necessary to achieve its desired end applies to all circumstances in which third parties have a legitimate right to information. These will be dealt with in turn.

Among the most common third parties requesting information about the patient or his treatment are family members. Here the psychiatrist must judge whether the disclosure of information will work for or against the patient. Where families, spouses, parents or children are involved it is wise to spell out the standards of confidentiality in the earliest stages of treatment. Even when the decision is to withhold all information, the family should not be entirely ignored but should be helped with whatever support is appropriate, for the emotional state of the family often directly affects the patient and his treatment.

When schools become the requesting third parties the decision to disclose also rests on whether such disclosure works for or against the patient. Often a school will modify its program in a therapeutic way if given appropriate information by the psychiatrist. On the other hand, there is the complication that such information may find its way into permanent school records where it will eventually become out of date and may be available to personnel who do not have the benefit of direct consultation with the psychiatrist. The fate of information once it is released to a third party is a serious problem, and efforts must be made to see that confidential information released to one third party remains confidential with respect to other third parties.

Employers become third parties requesting information in certain occupations where emotional health is felt to be significant in carrying out responsibilities. Generally, psychiatric examination to determine suitability for employment should be carried out independently of treatment and the treating psychiatrist. The judgment in such employment situations should rest on observable job behavior and not on the fact that the employee is in treatment. The long run advantage is to the employer as well as the employee if indicated treatment is sought early, and it is counter-productive for both if the treatment process stigmatizes an employee or makes him vulnerable to dismissal.

The second way in which an employer may request information about an employee's treatment comes from the fact that employers often pay a part or all of the employee's insurance premium. The employer, therefore, needs actuarial information about his employees' use of the insurance program so he may have the data from the insurance carrier that determines premiums to be paid and the cost benefit of his employer insurance program. In such cases information given to employers (or labor unions) should be in the aggregate and should never reveal specific information about an individual employee. Such aggregate data is sufficient for the purposes required and release of any more detailed information would constitute an unwarranted abrogation of confidentiality.

This brings us to the most important third party, the insurance company. Persons enroll in insurance programs to protect their future health and welfare. It therefore follows that the insurance company ought to do nothing which would defeat this aim. On the other hand, the insurance company has the right and some might even argue the responsibility to see that claims are justified and appropriate. It should do so, however, always in a way which will not undermine the patient's health and welfare. Any patient receiving care from any system of paying should have access to all medical services without jeopardizing privacy or confidential relationships with physicians.

Some insurance contracts limit coverage to certain illnesses or certain time periods, therefore insurance companies are entitled to information about patients which is pertinent to these areas. Thus it is necessary in many contracts to demonstrate that an illness did not exist prior to the effective date of the policy. Usually an indication that the patient had an illness which needs treatment is required. To substantiate the type and frequency of treatment given it may be necessary to give some information indicating the general degree of impairment the patient suffers unless treated. This information may be needed too for billing purposes. Finally, the fact that the patient suffers from a psychiatric condition covered by the contract may need to be stated. But in no case should a patient stricken by a condition be penalized because he has added a "burden" to the group. Furthermore, when the cost accounting of a group is made the individual's privacy should not be compromised and all data should be reported in the aggregate. The insurance companies' legitimate right to some information concerning patients is circumscribed. The precise diagnosis and even current "degree of disability" is probably not germane to the policy needs nor helpful to the insurance industry in answering the questions raised, when they follow the general medical model for actuarial purposes. They can usually be replaced by a general category of functional impairment. No information should be given which could in any way be used against the patient. Communications by psychiatrists with an insurance company should be directly with its physician representative, thus subjecting the receiving physician to the same ethical standards of confidentiality the treating physician has. If eligibility to enroll in an insurance program is in question, as it often is in life insurance and some health insurance, the matter should be determined by an examination designed for that purpose, and not by information from the treating psychiatrist.

Any national health insurance program should include strict safeguards of confidentiality built into any data collection or storage system. We must assure that the minimum necessary demographic and health information about the individual be separated from national health statistics. Accessibility to this data must be sharply and carefully limited.

One special sub-category of confidentiality is that of privilege. Here the third party is the court and special legal parameters apply. While it is not necessary here to go into great detail about privilege, we do feel that many of the same principles governing confidentiality also apply to privilege. (For clarification of the distinction between confidentiality and privilege see "Position Statement on Guidelines for Psychiatrists: Problems in Confidentiality", *American Journal of Psychiatry*, 126:10, 187-193, April, 1970.)

When information is requested it is the psychiatrist's responsibility to explore with the patient the risks of breaking or relinquishing the privilege, and he should discuss the nature of the material which might be divulged. When asked to testify the psychiatrist must be one of the agents protecting the patient's best interests. If information is demanded and legal recourse has been exhausted, only that information specifically required should be revealed and no more. And we should as psychiatrists work for the establishment of privileged statutes which will maximally protect a patient's privacy and the confidentiality of their treatment.

From the foregoing some basic principles can be extracted. These are enumerated following.

DEFINITION OF PURPOSE

To determine the nature of problems threatening confidentiality between patients and physicians, particularly through demands of third party interests.

AREAS OF CONSIDERATION BY THE TASK FORCE

Confidentiality and Insurance Coverage for Psychiatric Patients

The Task Force on Confidentiality as Related to Third Parties (TFC) began conferences with Medical and Claims representatives of the insurance industry to study their legitimate needs for information and to examine with them the nature of psychiatric illness and treatment processes. Efforts were made in an attempt to reach an accord on the following aspects of this problem.

New Code System. One important achievement of the TFC was the formulation of a new code for reporting psychiatric conditions to third party agencies for health insurance claims. The TFC met in May, 1971, with various insurance agency representatives, including a committee of medical directors (Life Insurance Medical Directors of America, LIMDA) and the Health Insurance Council (HIC). As a result, a new reporting system was designed using a specific code aimed at fulfilling insurance agencies' needs while not revealing unnecessary information which could be misused or otherwise be damaging.

This new system of reporting was presented to the Council on Professions and Associations before being sent to all the District Branches in the U. S. and Canada for their examination and comment. Generally favorable and constructive suggestions were made, with the exception of a few that unrealistically advocated sending no information at all. Following discussion by the Council, the Reference Committee and the speaker of the Assembly of District Branches and representatives of the Health Insurance Council arrangements were made and are currently underway for an actual trial in the field. (A copy of the working code system is attached as Appendix B.)

Methods of Reporting to Insurance Companies. Much of the need for information by the industry is for the administration of the insurance contracts. Reimbursement of medical expenses and disability payments, etc. depend on the nature and detail of different insurance contracts. There may be certain exclusions, and the date of onset is also important. For instance, benefits usually are limited to

actual onset during the period of employment. Another factor is the need for certain detailed data for the insurance company's actuarial department in determining risk factors in setting future premiums, and for predicting how much money would be set aside for reserve for claim payments.

Basic information required. It is the opinion of the Task Force that insurance carriers could reasonably expect the provider (the treating psychiatrist, in this case) to supply the following information:

1. Recognition that a psychiatric condition does exist. (In place of diagnosis, the new proposed code system would be used.)
2. Approximate date that patient recognized symptoms and need for treatment, when asked "date of onset". (Note that Task Force is recommending that patients supply this, requiring review by the treating psychiatrist.)
3. Nature of treatment in general terms.
4. Billing which shows frequency, cost of treatment, and whether office, home, or hospital treatment, to support fees charged.

It was agreed by the insurance industry representatives that when they need additional information, the medical director of the insurance company would write specifically to the physician involved asking specific questions and giving the reasons for needing this additional information. *The physician would not be in receipt of a form letter mailed by a clerk who has no knowledge of the problem.* In addition, it was agreed that the reply to the letter would go directly to the medical director under his safeguarding of confidentiality.

Limiting information given to the employer. The common practice, particularly in employer-linked insurance coverage, of forwarding sensitive information to employers was faced. This has been one of the most embarrassing and sometimes destructive abuses of confidentiality that our Task Force faced. Misuse of this personal and, at times, compromising material could have deep impact on an individual's career, social, or personal life. Awareness of such a danger, has, in many instances, deterred individuals from seeking psychiatric help, even though this was a provision of the plan. This issue was extensively discussed in our May, 1971, workshop with the LIMDA, and, on a number of occasions with the HIC representatives. We met with the Medical Relations Committee of HIC in July, 1973, and this concern was reiterated. In our discussion with representatives of the Health Insurance Council, they agreed to seek methods of quarterly experience reports to employers that would omit any identifying data concerning the employee or employees involved in creating the expenses on the program. The industry indicates they are required to make such reports to employers to justify premium charges. They

were not able to justify having to supply the names of the employees involved. We had adamantly maintained a position that given all the arguments from the insurance industry, employers have no need for and should receive no data that can be identified with a specific known employee. The problem of employer administered programs was discussed. They are a major source of patient information reaching the employer. As a result of our discussions, the AMA and the insurance industry have published agreements to discourage and hopefully to eliminate such programs eventually.

Life insurance examinations limited to non-therapist physicians. The point was stressed with the insurance representatives that, if at all possible, examination and reporting for life insurance eligibility be done by a physician other than the treating psychiatrist. The insurance representatives could understand that such a request for information could jeopardize psychotherapeutic relationship.

Concern with storage of sensitive information within the industry itself. There has been considerable concern and question about insurance data banks, where allegedly confidential information is shared with other companies or organizations without patients' knowledge or consent. Although insurance industry representatives deny that this is a problem, documented cases have been received of instances of information being leaked accidentally or otherwise to patients and their relatives, of questionnaires requesting irrelevant information, and of use of the Retail Credit Bureau to investigate claims. Although HIC has given assurance that the RCB holds such information inviolate, complaints have been received that such investigations have included questioning neighbors about the nature of illness, thereby disclosing that the patient has been in treatment and even hospitalized. Some complaints also indicate that health care data acquired for claim payment has been shared with other insurance companies for other purposes.

Local Programs. Particular attention needs to be paid to the local administration of specialized insurance operations, such as CHAMPUS, an insurance program for the dependents of service personnel. The Task Force has been concerned with limitations which need to be instituted regarding the information made available to central and clerical personnel and in one instance successfully intervened when a Blue Shield organization attempted to force compliance with a request to photocopy psychiatric records on CHAMPUS claims.

"Consent to Release Information" Statement.

Present forms are not informed consent. The Task Force has had great concern with the blanket release of sensitive information,

which has been the result of previous release policy. The patient often is not aware of, and therefore has not given informed consent to, the possible consequences of signing many of the present release forms. This is true also of the current AMA-approved changed form that differs in language, but not legal application, from the previously approved version. ("I hereby authorize the release of any medical information necessary to process this claim".)

The Task Force again stated its objection to the consent statement on the basis that it is not informed consent for the following reasons:

1. The patient does not know what is going to be released.
2. There is no limitation as to whom the information may be distributed once it is released.
3. There is no limitation as to what is considered necessary, nor who determines that.
4. It does not limit sources of information that then may be used for obtaining this vague concept of necessary information.

Limitation on information release. The Task Force recommends that the APA adopt a position approving forms only if the consent to release information is limited to a specific recipient, a specific purpose, and a specific time (in place of the current blanket release). There actually is nothing to prevent the patient from adding restrictions to a consent form if the basic information needed by the insurance carrier is kept in mind as mentioned above.

It was further recommended that the APA adopt a position encouraging its members to refuse to channel any sensitive information through employers, and that reports to medical directors of insurance companies be noted, "Any divulgence to other parties or for any other purpose will constitute a breach of confidentiality and of medical ethics".

National Health Insurance. Task Force investigation showed that none of the National Health Insurance plans had machinery for limiting the accumulation of medical data, nor for its protection from misuse. The APA issued a position paper for correcting this oversight in December, 1971. (This is attached as Appendix C.) Our Task Force carried this to certain Senators and Representatives. This resulted in a strong section on confidentiality in the law establishing the Office of Drug Abuse. This, in turn, had effect on Senator Ervin and the Subcommittee on Constitutional Rights in their work on medical data banks and abuse of privacy. Also, a section on confidentiality was included in HR 1 (the bill which created the PSRO's in the Social Security program) as a result of these efforts. Plans were suggested for broader study of this problem. The Task Force estab-

lished machinery to deal with these problems through legislative offices, as well as local levels when indicated.

These were two principles that the Task Force felt should be stressed. First, data required to assure an individual of medical care should be separated from the more complete and personal data needed for statistical purposes, administration or research. And, secondly, the data recorded should be protected from dissemination or misuse. Confidentiality of research data will depend on the mechanism and persons controlling the information machinery.

Legal Aspects of Confidentiality as it Involves the Courts.

Federal Codes of Evidence — Rule 504. Although many states have clear protection for physician- and/or psychotherapist-patient communications as part of their evidence codes thus creating privileged communication, the future of the protection in the federal courts is less certain. Recently, the Federal Codes of Evidence have been under the process of revision, a step that requires Congressional approval of the final code. Initially, all medical privilege was excluded. Then, psychotherapist privilege was reinstated.

The Task Force on Confidentiality initiated conferences with legal authorities to study the problems involved, which led to developing grounds for improving the protection. The information developed and the contacts made were used via some District Branches and their Congressional representatives to change the definition of psychotherapist to include all physicians treating "mental and emotional disorders". While this was desirable in itself, it became even more important in January, 1973, when the American Medical Association petitioned Congress to eliminate psychotherapist-patient privilege from the proposed code. Again, through the machinery established by the Task Force — working through state medical societies, their delegates to the AMA, and various legal authorities — the AMA reversed itself, and so notified the relevant Congressional committees. The Louisiana District Branch was particularly important in these endeavors. The proposed code is being evaluated by Congress, and will be rewritten.

This threat to elimination of this protection has been diminished, but is not absent and the need to strengthen the protection as noted originally still exists. (See Appendix G.) Congress later did eliminate Rule 504, but some senators advocate that it be restored.

Confidentiality as it involves the military drug-abuse program.

In response to a formal request by Senator Harold Hughes for a statement from the APA concerning the effect of the confidentiality or lack of confidentiality in treatment and rehabilitation program for

57-282 O - 76 - pt. 1 - 37

drug users, our Task Force has prepared a draft of a position statement for the American Psychiatric Association, presented in Appendix C. The statement was prepared after extensive discussions with persons involved in various aspects of such programs. The statement has three major thrusts:

1. A nonpunitive program must be truly nonpunitive, and volunteering for the program should grant protection for a confidential evaluation and on-going participation.
2. Medical records should be held inviolate in the medical treatment sector.
3. The patient's confidentiality should not be breached to civilian sources through the use of identifying codes, or through the comingling of personnel and medical records upon separation from the service.

The preparation of the draft of the Task Force report, and contacts which were established with appropriate offices, had positive effects on the preparation of the regulations which were proposed by one of the three military departments. The Department of Defense has now decided to alter the use of SPN numbers to code behavior disorders among other items of reasons for discharge from service. These will no longer appear on any of the discharge papers available to the ex-military person or to employers. Reasons for discharge will be kept more securely in classified files.

We would recommend the acceptance and publication of the current draft of the position paper, and continued ongoing contact with the Department of Defense in regard to these issues.

Computer Bank Information and the Need for Increased Protection of Confidentiality.

It has become apparent from numerous sources that there are in existence data banks which contain sensitive medical information for purposes ranging from insurance to national security. This trend would seem to require immediate, positive steps to provide mechanisms of protecting confidential medical data.

The Task Force has always urged upon the American Psychiatric Association that it consider the problem an ongoing one, and adopt an active approach to coping with it.

In the fall of 1973 the Task Force in a report to the APA Council on Professions and Associations spelled out the need for a conference to consider "gathering, storing, and retrieval in information systems that would safeguard constitutional rights as well as the medical need for confidentiality and the privacy of the individual". We noted at the time that "the problem is getting out of hand, and that

the longer there is delay, the greater will be the problem in trying to institute a more acceptable system than is now growing by chance at its current explosive rate".

Happily, the sense of urgency of the Task Force received the sympathetic attention of then APA President, Dr. Alfred M. Freedman, the Medical Director, Dr. Walter E. Barton and others, who called together a representative group of national organization people to explore their common interests in this problem area. This led to more formal organization of a planning group, on which the Task Force Chairman served, to plan a major working Conference on the Confidentiality of Health Records with the cooperative participation of about 50 national organizations and agencies, representative of organized medicine and all of the major medical specialties, the insurance industry, law, hospitals, nursing, medical record keeping, behavioral science, consumer groups, government, and many others. The need for consumer groups to participate in such efforts was paramount.

The Conference was held at Key Biscayne, Florida, November 6-9, 1974 after about six months of preparation in which many of the participating experts prepared working papers of high quality that were sent out to all participants in advance.* Approximately 110 persons were in attendance.

A full report of the important conference will be published by the Association in the spring of 1975. However, the most auspicious single result of the meeting was the unanimous resolution of all participants (with two abstentions) that there should be formed an independently incorporated body tentatively titled National Commission on the Confidentiality of and Access to Health Records to serve the following purposes:

1. To promote and preserve the confidentiality of health care records and to establish guidelines and recommendations for appropriate access to them.
2. To propose legislation and regulations to study and analyze legislation and regulations, in formation or already introduced, and to make recommendations for action and implementation by sponsoring organizations.
3. To engage in educational activities serving as an information exchange between participating organizations, to develop and/or disseminate materials for public education on confidentiality and

*The Task Force Chairman, Dr. Grossman, notes: "This is an outstanding example of the combined efforts of a Task Force, working through Councils and the APA Reference Committee, supported by officers and trustees, having a major plan brought to fruition through the dedicated efforts of the APA staff."

the access of records and to serve as spokesman for the adoption of guidelines and policies relating to these matters.

4. To develop through surveys and special studies methods for improved handling of health care information that will provide for appropriate access and preserve confidentiality.
5. To accomplish other appropriate objectives not inconsistent with those enumerated, by any lawful and ethical means.

In December 1974, the trustees of the Association voted unanimously to support the National Commission which is now in the process of formation under the aegis of an Interim Organizing Committee comprising representatives of the APA, American Academy of Pediatrics, American Medical Records Association, American Hospital Association, Mental Health Law Project, and the National Association for Mental Health. It is anticipated that the new Commission will be incorporated and fully underway before the end of 1975.

RECOMMENDATIONS REGARDING EDUCATION COORDINATION WITH OTHER AGENCIES, AND THE NEED FOR AN ONGOING GROUP

Education concerning the problems of privilege and confidentiality should be made available in various areas.

Inservice Education Within the APA Structure.

It would be helpful if the councils, committees and task forces dealing with areas related to privilege and confidentiality were informed of the findings and progress of this Task Force. Such action would add to the coordination of the efforts of the APA in safeguarding confidentiality of sensitive medical data.

Inservice Education to All Psychotherapists.

We would recommend that the APA publish a pamphlet to cover such topics as the difference between privilege and confidentiality, how to respond to a subpoena, appropriate methods of record keeping that will preserve confidentiality, and an explanation and a description of how to use the new coding system, were it adopted, for reporting to the insurance industry.

Education to the Lay Public.

Through the lay press, the APA should attempt to clarify physician-patient privilege, confidentiality, and the importance of these concepts.

Coordination with Other Agencies.

Developing insurance forms and coding mechanisms which protect confidentiality. Coordination with the Health Insurance Council and other groups of the insurance industry will be critical for the potential success of the proposed coding scheme. Excellent contacts have been established with these organizations, but continued effort will be necessary so that there can be no question as to the importance attached to confidentiality by the psychiatric profession and to our concern that confidentiality must also become important to the

health insurance industry. These efforts could be furthered with involvement of other medical organizations, including the American Medical Association.

Workshop dealing with data banks. Our discussions with representatives of various organizations have convinced us that such a workshop should involve the American Psychiatric Association in effective collaboration with a number of other groups. Through involvement of groups, including other medical organizations and representatives of the insurance and data processing industries, as well as consumer organizations, we would hope to increase the likelihood of effective legislative action which would aid patients who seek psychiatric help.

Need for a Specific Ongoing Group within the APA Concerned with Confidentiality and Particularly with Confidentiality and Third Party Payment.

The rapidity of developments involving confidentiality and third party payment, their complexity, and the needs for continuous active involvement for satisfactory resolution, prompt our conviction that a specific group within the APA be charged with responsibility for issues involving confidentiality. It is our belief that the activity would require a long-term group with both "watch dog" and active corrective force, with the strong backing of the APA.

In an immediate phase, the active negotiations in which the current Task Force is involved with the insurance industry are still in a delicate period with the outcome extremely promising but by no means certain. These extensive activities and contacts with the relevant aspects of the insurance industry must be furthered and continued by an ongoing group of the APA, in an atmosphere of mutual respect with the insurance industry, but with firm concern on the part of the APA group for the needs of the patients, both current and potential.

The current Task Force has accumulated a great deal of information regarding desirable and undesirable practices in relation to the insurance industry, and plans over the coming year to convert that material to monograph form. Consideration of the evolving practices of third party payment and their implications for psychiatric treatment with regard to confidentiality should be an active part of the role of an ongoing group.

Contacts with members of Congress have proved to be extremely helpful to the current Task Force and should continue to be so for any ongoing action group of the APA. Congress passed and the President signed S-3418 into Public Law 93-579 December 31, 1974,

The Privacy Act of 1974. This protects personal data in Federal agencies and creates a seven-member commission to explore similar problems in other governmental and private areas.

We believe that a separate group in the APA should be formed concerned with confidentiality, and that the task should not be divided among a number of groups which also have other responsibilities. The area of confidentiality is extremely topical, represents one of the most direct ways in which psychiatrists can aid their patients in the non-therapeutic situation, and requires the considerable effort that only a vigorous, single-focused group can provide.

ACKNOWLEDGMENTS OF THE TASK FORCE CHAIRMAN

The Chairman would particularly call attention to the active work of Kenneth A. Ritter, M.D., of New Orleans; Jerome S. Beigler, M.D., of Chicago; Morton R. Weinstein, M.D., of San Francisco, Jean Craton-Neher, M.D., of Palo Alto, California and James M. Trench, M.D., of Hartford, Connecticut; among many individuals who worked actively in whatever we accomplished on the national scene.

Special credit should be given to Dr. Richard Johnson for the formulation of the Type I-VI Coding, and for the chronology and detailed reporting of our activities which has made it easier to compile this report; and to Frank M. Ochberg of H.E.W. for valuable suggestions.

The help of Central Office from Walter Barton, M.D. and his staff in counseling and cheerful cooperation not only made it possible for us to function, but added to the pleasure we derived from our task. As Chairman, I can only state the obvious, that my co-workers on the Task Force were all a dedicated, hard-working group. Their individual inputs balanced extremely well in reaching an aggressive, action-oriented approach, but still tempered with reason.

APPENDICES

Appendix A: General Principles Governing Confidentiality

1. Every person has a basic right to the pursuit of health and happiness, and privacy is a necessary prerequisite for this.
2. Psychiatric practice cannot properly achieve maximal effectiveness except where there is a secure atmosphere of confidentiality.
3. We are, together with the patient, chief advocates of an affirmative atmosphere of confidentiality.
4. Any authorized release of information to a third party should be made only after full discussion with the patient.
5. Only the minimum information required to meet legitimate needs should be released.
6. We should never collude with the patient in making false representation to a third party.
7. In rare and special cases where danger to persons, self, or others is imminent and can no longer be handled in the context of treatment, our obligation to society requires that we break confidentiality, but only to the minimum extent necessary to protect life or property.
8. The psychiatrist has the responsibility to determine whether disclosure of information to family members or other third parties will work for or against the patient and his treatment.
9. The boundaries of disclosure to third parties should be determined with the patient in the early stages of treatment.
10. Blanket consent for release of information is never satisfactory. Patients should give specific consent each time for each disclosure to each third party; informed consent should be limited to the specific purpose at issue and indicate that it is time limited for the purposes of the claim.
11. Insurance companies and other third parties have a legitimate right to certain information about a patient and his treatment.
12. Information should be released in a way that will promote the best interests of the patient and in such a way that it cannot be used against his best interest.
13. Information released to meet a legitimate need of a third party should be held in confidence by that third party. Such information must not be re-released to other third parties without the specific consent of the patient.

14. No person should be penalized by his insurance company because of receiving treatment.
15. Insurance cost accounting should always be made in aggregate without reference to confidential information concerning individuals.
16. Eligibility to obtain insurance or employment should be determined by examination for that purpose, not by reference to information from treatment.
17. National Health Insurance laws must have specifically detailed outlined legislative safeguards for the protection, gathering, storage, retrieval and distribution of data about patients, and not be cloaked in general terms.
18. Schools and employers should get information about treatment only when such release is in the interest of the patient and must take into account that the patient's condition is subject to improvement. School and work records reflecting treatment must therefore not brand the patient unfairly with no longer current information. Furthermore, such records should be destroyed after an appropriate short interval.
19. We should apply these same general principles to the problem of privilege, which is a separate and distinct sub-category of confidentiality.
20. We should work for the strengthening of laws and procedures to protect privilege, confidentiality, and the privacy of our patients and to secure the support of the public including our patients in this effort.

Appendix B: Proposed Coding for Mental Disorders

The realities of current and future health insurance coverage for psychiatric treatment will include the need to report some justification for the treatment, whether for hospital costs or physicians' services. In the past, using official diagnoses often led to the demand for completing detailed questionnaires plus repeated experiences of breach of confidentiality that were destructive both to the patient and the treatment process. Efforts have been made to demonstrate to the insurance industry that other forms of reporting might better serve the needs of our patients while meeting the needs of the industry more effectively.

The Coding System which is listed below has been formulated to divide reportable conditions, not due to physical or organic factors, into six general categories. These categories represent a synthesis of diagnosis with varying degrees of impaired function. It is for that reason that some diagnostic categories appear in more than one of

the six designations. The category type may possibly be changed in later evaluations as the clinical function of the patient changes.

Insurance reports would merely signify "Category I (or II, III, IV, V, or VI)" *instead of* DSM II diagnosis and code number which should be kept in the doctor's confidential file. This private evaluation would be available only under proper safeguards to peer review colleagues or to the Medical Director of the carrier. Such reports would go directly to the Medical Director and not through ordinary channels and would be protected by the medical ethics of the Medical Director.

We recognize that the insurance industry needs certain data for actuarial purposes. However, the extensiveness of treatment required and choice of treatment approaches can not be indicated by diagnosis alone. It is suggested that in reporting, the nature of proposed treatment be made available to medical representatives of the insurance carrier and any question about the appropriateness of the intensity or duration of treatment be referred to peer review procss.

A criticism from the insurance industry is that conditions in Category I would indicate no need for compensible treatment. This overlooks the factors of anxiety and/or depression liberated by such conditions. At the minimum it would require a diagnostic interview.

In general, the code tries to convey the general nature and seriousness of the condition at the presenting time of the report. While prognosis might be inferred, it cannot be specifically determined from the code number used. It is assumed that inquiries from the insurance carrier will be made by their Medical Director for a specified, concrete purpose. It is expected that this would not be a frequent occurrence, and under no circumstances be made available to any other party, nor even to the patient.

Proposed Coding For Mental Disorders

A. *Mental Retardation.*

B. *Mental Disorder* associated with physical or organic factors. (Would suggest the nature of the physical or organic factor be reported in general terms, e.g., endocrine, infectious, circulatory, tumor, etc.)

C. *Mental Disorder* currently considered of psychogenic origin.
   1. *Acute Situational* (basically healthy personality reacting abnormally to stress situation.)
   2. *Characteriological* or *Emotional* with fair adaptation in most areas (e.g., mild neuroses or character disorders, etc.)
   3. *Characteriological* or *Emotional* with less adequate adapta-

tion in some areas (e.g., oral type character disorders or neuroses, etc.)

4. *Characteriological or Emotional* with poor adaptation in some or involving many areas (e.g., infantile type neuroses or character disorders, and some forms of psychotic reactions, etc.)
5. *Severe Emotional Disorder* with poor or no adaptation in one or more crucial areas of functioning (e.g., extremely severe neurotic or psychotic syndromes.)
6. *Most Severe Emotional Disorder* with poor or no adaptation in enough areas to require constant supervision and not responding to continued, active psychiatric treatment (e.g., totally withdrawn psychotics, totally incapacitated conversion hysterics, some character disorders, etc.)

It is recognized that most patients cannot clearly fit a *text book* picture. The category selected will depend on the judgement of the psychiatrist considering all factors that pertain to any specific patient. The above examples are just that and are not intended for determining any one specific case designation. Similarly, the comparison below of the Type Codes to the DSM II Manual of Diagnoses is to be considered in like manner.

DSM II Breakdown for the Above Codes

Category I Acute Situational

Transient Situational Disturbances

307.0—307.4	Adjustment reaction of infancy, childhood, adolescence, adult and later life

Social Maladjustment without manifest psychiatric disorder

316.0	Marital maladjustment
316.1	Social maladjustment
316.2	Occupational maladjustment
316.3	Dyssocial behavior
316.9	Other social maladjustment

Category II Characteriological or Emotional Problem with fair adaptation, but with interfering symptoms requiring treatment

Neuroses

300.0	Anxiety
300.1	Hysterical
300.4	Depressive (reactive)

Personality Disorders

301.5	Hysterical
301.4	Obsessive Compulsive (less severe symptoms)
	NOTE: A good example where treatment can be difficult and long.

Behavior Disorders of Childhood and Adolescence (any of the less severe behavior problems in an otherwise apparently healthy young person)

308.0	Hyperkinetic reaction
308.1	Withdrawing reaction
308.2	Overanxious reaction
308.3	Runaway reaction
308.4	Unsocialized aggressive reaction
308.5	Group delinquent reaction
308.9	Other reaction

Category III Characteriological or Emotional Problems with less adequate adaptation in some areas

Neuroses

300.13	Hysterical, conversion type
300.2	Phobic
300.3	Obsessive compulsive (with more disabling symptoms)
300.4	Depressive (with more interference with functioning)
300.5	Neurasthenic
300.7	Hypochondriacal

Personality Disorders

301.1	Cyclothymic (moderate)
301.2	Schizoid
301.3	Explosive
301.4	Obsessive compulsive (more severe)
301.6	Asthenic (moderate)
301.81	Passive aggressive
301.82	Inadequate

Sexual Deviation

302	Series as listed (less severe problem with basically good ego strength)

Alcoholism

303.0	Episodic excessive drinking (addiction not clearly established)

Drug Dependence

304	Series as listed (less severe and with good ego strength)

Psychophysiologic Disorders

305	Series as listed (less severe with basically good ego strength)

Special Symptoms

306	Series as listed (less severe speech disturbances, tics, etc. with basically good ego strength)

Behavior Disorders of Childhood and Adolescence

308	Series as listed (more severe and in more troubled personality)

Category IV Characteriological or Emotional with poor adaptation in some or involving many areas

Psychoses

295	Schizophrenia series as listed, with some social functioning
296	Major affective disorders series as listed, with some social functioning

Neuroses

300.14	Hysterical, dissociative type
300.4	Depressive (severe but not psychotic)
300.5	Neurasthenic (severe and chronic)
300.6	Depersonalization

Personality Disorder

301.0	Paranoid
301.3	Explosive (severe with poor control)
301.7	Anti-social (severe)
301.82	Inadequate or infantile (marked)

Sexual Deviation

302	Series as listed (more severe problem with poor ego strength)

Alcoholism

303.1	Habitual excessive drinking
303.2	Alcohol addiction

Drug Dependence

304	Series as listed (if chronic, severe, and in a troubled personality)

Special Symptoms

306	Series as listed (if chronic, severe, and incapacitating; e.g., anorexia nervosa)

Psychotic Reaction

Short-term break with reality in otherwise fairly well integrated personality

Category V Severe Emotional Disorder

Neuroses

300	Series as listed, unable to function in a crucial area, but showing change in treatment

Schizophrenia

295	Series as listed, unable to function in one or more crucial areas, but showing response to treatment, and with history and onset suggesting some favorable possibilities

Major Affective Disorders

296	Series as listed (with some qualifications as under 295 in this category)

Category VI Most Severe Emotional Disorder

Any chronic neurotic, characteriologic, or psychotic disorder so poorly adapted that constant supervision is necessary, and having shown no response to previous active, continued treatment, but will require symptomatic treatment or constant supervision.

Examples of coding as noted above, many factors may be determined by the reporting psychiatrist that cannot be foreseen in such a generalized plan. He will obviously use his judgement as to how a specific patient fits the general *intent* of the Code system. The use of DSM II is dictated by it being the one officially adopted by the APA, and does not represent any judgement on its general acceptability. Again, it is being used to give some suggestions how the Code system might be

applied. It might be well to repeat that, whatever basis for using a Code number for any specific patient is used, it should be recorded in the psychiatrist's own records, since some form of peer review will probably be instituted. Some examples follow:

1. A brief emotional crisis period might be resolved in one interview, or the severity of the symptoms might require a brief period of intervention for the patient to cope with the crisis and regain his equilibrium. It might be diagnosed *"307.3 — Adjustment reaction of adult life."* It could then be coded *"I"*. If the same crisis really provoked an underlying neurosis, but with good reintegration, it could be coded *"II."*
2. A mild reactive depression which in DSM II is coded *300.4, Depressive Neurosis,* could use code*"II."*
3. A patient whose depression was more severe, but not psychotic, could have the same DSM II diagnosis, but be coded *"III."*
4. Making a diagnosis of *301.81, Passive-Aggressive Personality Disorder,* with enough interference in functioning could be coded *"III."*
5. A patient diagnosed *Schizophrenic* could be coded *"IV," "V,"* or *"VI,"* depending on the severity and interference of the symptoms, the nature of the onset, the response to treatment, or the chronicity and failure of responding to treatment; so could a *"paralytic"* conversion hysteric who had been neglected.

If, in special instances, the hazard to the patient of disclosure is exceptional, this should be made known to the Medical Director of the insurance carrier and the necessary information made known directly to him.

Appendix C: Position Statement on the Need for Preserving Confidentiality of Medical Records in Any National Health Care System

*This statement was approved by the Board of Trustees of the American Psychiatric Association on October 1, 1971, upon recommendation of the Task Force on Confidentiality as It Relates to Third Parties.**

Many approaches to establishing a national health care system are now being considered. Whatever system may eventually be adopted will inevitably entail the collection of intimate and private

*The task force included Maurice Grossman, M.D., chairman; Jack D. Barchas, M.D.; Richard G. Johnson, M.D. and Joseph Satten, M.D.

medical, psychological, and social data concerning those who use it. How these data are utilized can have a tremendous impact on the privacy and lives of identifiable individuals and, collectively, on the entire body politic. Protecting the confidentiality of medical disclosures is especially imperative for those who need and obtain psychiatric treatment, as has already been recognized, e.g., by the laws of many states, in court decisions, and in the drafting of the code of evidence for the federal judiciary.

Two separate bodies of data will be collected.

The first will include identification of the individual in the process of establishing eligibility for treatment and in reporting the treatment process. In our view the confidentiality of these data can be safeguarded by limiting the information disclosed to the least amount necessary for establishing eligibility and by developing methods to control overusage of the system. Review of such identifiable data, if it is necessary at all, should be minimal, and the availability of the data should be confined to carefully selected personnel at the treatment site. Under no circumstances should the data be duplicated and recorded elsewhere or rendered available to groups that are not connected with the treatment situation. The data should be used only to facilitate the treatment process.

The second group of data will be needed for program review, for the evaluation of the efficacy and efficiency of the system, and for medical and administrative research. These data will be computerized.

In the case of program review and evaluation, it will be vital to protect the identity of the patient with reference to the data that are collected and stored. (There can be no objection to identifying providers, individual or group, for whatever review is needed.)

However, medical research will entail the collection of much intimate data on the individual; this will require careful planning concerning how the material is to be stored and who will control accessibility to the data and for what purposes. Specific legislation governing these matters must be carefully framed if the confidentiality of the records of the individual patient is to be fully protected.

The framers of national health care proposals should be fully cognizant of the imperative need for safeguarding the confidentiality of medical records in the contexts described here.

Appendix D. Position Statement on
The Role Of Confidentiality In Volunteer Military
Drug Abuse Treatment Programs

The American Psychiatric Association was much encouraged and

57-282 O - 76 - pt. 1 - 38

pleased when the President and the Department of Defense adopted a policy of viewing the drug abuser as a medical problem, while still maintaining its efforts to eradicate the traffic in drugs. A treatment program written by the military establishment must be seen as positive action directed toward furthering the primary mission of the armed forces.

The role of confidentiality in successful psychiatric treatment has been well established. The development of a positive treatment atmosphere for a voluntary rehabilitation program for drug abusers is partially contingent upon the degree to which a psychiatrist can assure the patient of the confidentiality of his disclosures. The real or threatened adverse consequences of disclosure may cause personnel to avoid seeking treatment altogether or not to cooperate fully in the treatment regime.

As civilian psychiatrists, we can only recommend those things concerning confidentiality which we feel will help lead to an effective voluntary military drug abuse treatment program. In any program offering confidentiality, the limits of confidentiality must be defined. Any promise of nonpunitive action must truly be nonpunitive; otherwise, subsequent disillusionment of the treated person will create destructive reaction to both his treatment and the program in general. There have been examples of previous unsuccessful treatment programs where the limits of confidentiality were not well defined and, indeed, did not prevent secondary punitive action from taking place. This protection for those honestly seeking help will provide a more effective program and increase motivation for help.

The act of volunteering should only grant protection for a confidential evaluation prior to acceptance into the drug abuse treatment program, and for ongoing participation and cooperation in the program. In recommending this amnesty, we do not imply that personnel in treatment are immune from consequences of unacceptable behavior secondary to or not related to the fact of treatment.

Being labeled a drug abuser is punitive in itself. For that reason, as far as possible, all medical records of treatment should be held inviolate in the medical treatment sector. In military programs, as in civilian programs, both the patient and psychiatrist recognize that, at times, for various reasons, this confidentiality cannot be absolute. The medical unit and command unit must be aware of each other's needs and responsibilities, and adequately keep each other informed of factors that would represent a hazard to the treatment of the individual or to the command's mission. (Army regulation AR-40-42 is an existing example of these safeguards.)

There are three special considerations brought to our attention that could also seriously and adversely affect the viability of drug

abuse treatment programs:

First, compromising conditions for entering the treatment program should be avoided. For example, making amnesty or treatment conditional on the individual becoming an informer will seriously affect the credibility of the program. (The Army has taken note of this in Army regulation AR-40-42, paragraph 6G, which specifically deals with this point.)

Secondly, there have been reports of damaging breaches of the patient's confidentiality by critical information being released to civilian sources after discharge from military duty. One way of exposing individuals in drug treatment programs after separation from service has been the SPN number on discharge papers. We would urge re-examination of the policy of using these SPN numbers on discharge records that are not kept in confidential military medical files.

The third consideration is the intermingling of general personnel records and medical records at the National Personnel Record Center after separation from service. These medical records have been made available for other than military uses after personnel have returned to civilian life. For protection of confidential information, we would recommend an exploration of methods to separate from personnel records the medical records and references to medical diagnoses.

We are pleased that the Department of Defense is already considering the problem of confidentiality and we hope these comments will be of use in the implementation of its programs.

Proposed by the APA Task Force on Confidentiality
as Related to Third Parties

Maurice Grossman, M.D.
Richard G. Johnson, M.D.
Joseph Satten, M.D.
Jack D. Barchas, M.D.
Alan L. Krueger, M.D.

Appendix E: Recommendations Of The Task Force On Confidentiality As It Relates To Third Parties To The Council On Professions And Associations, October 1971

1. That APA adopt a position recommending its members limit information to insurance companies for health care reimbursement to the following:
   a. Recognition that an unspecified psychiatric condition does exist (in place of diagnosis).

b. Approximate date that patient recognized symptoms and need for treatment (or onset).

c. Nature of treatment in general terms.

d. Billing which shows frequency and cost of treatment.

e. Billing which shows whether office, home, or hospital treatment — to justify fees.

If any of the above proves discriminatory in special situations and information is withheld, peer review should be offered. (The IBM system demonstrates it can work.)

2. That APA adopt a position recommending its members refuse to channel any sensitive reports through employer agencies; and that reports to medical directors of insurance companies be noted, "any divulgence to other party or for other purposes will constitute a breach of the release waiver and of medical ethics."

3. That APA adopt a position that the reports for life insurance applications be obtained from examinations for that purpose and not from psychotherapists.

4. That APA adopt a position approving forms only if waiver to release information is limited for specific agent, specific purpose and time, (in place of current blanket release) with notation given in #2.

5. That APA pursue these proposals with the AMA to get their support for similar position.

6. That APA encourage Congress to write in safeguards for confidentiality as an integral part of the plan in whatever bill for national health care finally evolves.

   a. Some forms of coverage automatically obviate any need of information to support treatment availability.

   b. Confidentiality of research data will depend on the mechanism and persons controlling the information "machinery."

   c. "There is need to demonstrate and explain graphically the difference between its general medical model of treatment and the current model of psychiatric care in our present day status of the art." (Minutes of July 10-11 meeting).

7. That APA issue a statement supporting Senator Hughes' position on the impact of lack of confidentiality on the drug abuse program of the military (and eventually of the general civilian program).

8. That APA commend the Commission of the Federal Judiciary for retaining Code 504—Psychotherapist-Patient Privilege—BUT—
   a. Request them to strengthen it by adding to definition of psychotherapist, "or any licensed physician treating an illness with emotional components as cause."
   b. Request them to consider statement of psychiatrists' needs for protecting patients while defenses are down during therapy, to include version of Illinois law that extends the privilege to the psychotherapist as well; and that law's liberalization by deleting exceptions to the privilege.
9. That APA consider the suggestions from Louisiana, and notify its District Branches that the proposed Federal Code will be acted on in November; and that they enlist support of their congessmen to enact the above changes.
10. That APA consider, in any section of its code of ethics on maintaining confidentiality, NOT to include any exception, such as in AMA Section 9, "unless required by law," since being law abiding is a major ethic in itself. Further, that the APA discuss with the AMA the deletion of this phrase from Section 9, for reasons already given.
11. That APA undertake a sampling survey of its members to determine their attitudes on confidentiality and incidence of impairment in patients' welfare occasioned by released information or threat of such release.
12. That APA subsidize a sampling survey of the general public about their beliefs, how protected they are from physician disclosures, and whether it would affect them in any way.
13. That APA bring this problem to the attention of training centers, with the following goals in mind:
   a. To emphasize to medical students and psychiatric residents their responsibility for confidentiality.
   b. To teach them that record keeping must vary with purpose in mind, and awareness of ultimate fate of the records.
14. That APA elaborate its previously issued discussion of response to subpoenas, and issue it as a brochure with a description of the subpoena-issuance process and its implications, with specific steps to be taken at specific times.
15. That APA consider the need for "consumer" demand for such protection and explore ways of publicizing the problems. The current growing general unease about invasion of privacy of information could facilitate this.

16. That the APA trustees secure legal counsel's opinion for the Task Force about:
    a. Patient's blanket authority for release of information, especially in light of doctrine of enlightened consent, and substitution of limited consent form.
    b. Some members' use of form to be signed by patients waiving their right to permit release of, or demand for, records.
    c. Some members keeping no records, as way of defeating any demand for records.

17. That the trustees emphasize to all councils, committees, and task forces that some of their actions and recommendations might adversely affect the climate of confidentiality, and their recommendations should include safeguards to protect it.
    a. Much of our discussion relates to the province of the Committee on Psychiatry and the Law, and our minutes have been made available to them.
    b. Much of our discussion relates to the province of the Committee on Financing of Mental Health Care, and our minutes have been made available to them.
    c. Reference has been made to problems that might concern Committee on Children and Adolescents. It is recommended that relevant sections of our minutes, especially of the July 10-11, 1971 meeting be brought to their attention.
    d. The question of research records and confidentiality has been explored by another Task Force. Our Task Force is uncertain that reliance can be placed in ordinary governmental safeguarding of privacy.
    e. The impact of lack of confidentiality on treatment programs should be considered by the Committees on Alcohol and Drug Abuse.

18. And, most importantly, that the APA seek funding for a project to explore systems of safeguarding data, while accumulating the valuable detailed information that will be available in a national health care program. Further, the APA should seek ways of using this data to better understand psychiatric illness, its nature, its sources, its response to treatment. One limited goal would be to seek a system of classification that would be meaningful for etiology, prognosis, and treatment. The recognition that this will require intimate individual identifiable data makes more pressing the consideration of safeguarding this data in the initial planning stages.

Appendix F: Principles Governing Confidentiality And Disclosures To Third Parties (September, 1973)

1. *The Need*

There is a consensus in the psychiatric world, the legal community, and a general philosophy that psychiatric treatment requires a positive atmosphere of confidentiality to protect the patient's right to the pursuit of health and happiness (GENERAL PRINCIPLE I); and, even more important, to create that positive atmosphere of confidentiality that will encourage individuals needing help to seek that help without fear of destructive disclosure to the rest of the world. Less widely stated, but still recognized, is the fact that hazard to patients still exists in our social climate from disclosure of having been in treatment. Some diagnostic terms have discriminating social connotations and can cause injury to patients if made known to others. Although it is generally recognized that each patient is responsible for protecting his own rights, nevertheless, our relationship as therapists to those patients places us in the position of being their chief advocates for protecting their rights to confidentiality (GENERAL PRINCIPLE II). This need to be their advocate is increased when patients' ability to protect themselves is impaired by their psychological state or functioning; in states of temporary regression that may be incident to the therapeutic process; where patients give consent under duress; or where patients give consent, uninformed of the consequenses of their consent.

It would be ideal if we could have that social state where all patients could freely, but safely, speak of their psychiatric illness and treatment. For them to be able to openly accept this would truly facilitate seeking and cooperating in treatment. Realistically we have not achieved that social state even though improvements have taken place. Attitudes of a large part of our social world are still prejudicial and the livelihood and social well-being of some of our patients can be threatened in reality by the disclosures mentioned above, apart from any neurotic fear of discovery. It is in recognition of the reality of this social state that this report has been formulated.

2. *The Problem*

Problems are created, however, when third parties have both a legitimate and an ethical right to some information about the patient, the treatment process, or even disclosures during the treatment process. We must differentiate between our obligations to the patients in protecting their privacy and the disclosures they have made to us for the purpose of treatment; and the need to recognize that information which legitimately should be disclosed to a third party, often with

the patient's consent, for advantages that are important to the patient or conversely by reason of obligation to society that supersedes the patient's rights.

It would be just as destructive to the treatment process if we knowingly became a party to any manipulation of fact (as differentiated from withholding information because of confidentiality needs) (GENERAL PRINCIPLE III). For many reasons, it would be a breach of professional ethics; even more, it would be just as destructive to the psychotherapist-patient relationship in preserving the atmosphere of integrity necessary for effective psychotherapy. In general, whenever there is the problem of information to be released to any third party, it should be discussed with the patient beforehand, unless unusual circumstances make this impossible (GENERAL PRINCIPLE IV).

There are situations where a physician's obligation to consider hazards to society outweigh his obligation to preserve the privacy of the patient, even without his consent. These are usually when the patient and his behavior represent a clear and extreme danger to himself or others. Usually such crises are most frequently technical treatment problems. If possible, they should be worked out through treatment techniques. Also, outside consultation should be carefully considered. Once such resources have been sought and in the psychiatrist's judgment the patient represents an extreme danger to himself or others that cannot be contained therapeutically, it is necessary to notify others of the hazard for the protection of the patient or these others, and confidentiality should be broken to the extent necessary (GENERAL PRINCIPLE V).

3. *Special Situations*

There are special considerations that must be weighed in certain circumstances. Because of the growing involvement of third parties, *absolute* privacy in all situations is now a thing of the past, if it really existed beforehand. The problem is to minimize the effect of disclosure, on the treatment process, as it affects the patient, and as it affects other parties concerned with this privileged information. When information is to be divulged, it should be that minimum necessary.

4. *Family (And School) Requests*

The most common special situation is the request for information from family members. In many situations, discussing some of this information may actually help the therapy and directly and indirectly help the patient. It therefore imposes a burden on the therapist to decide whether disclosure operates for the patient or against

the patient (FAMILY PRINCIPLE I). This same applies to information disclosed to school teachers and others in the school system during the treatment of children. In this latter situation the problem is complicated by the school personnel making written records of this information that eventually becomes out of date or is misused by others not having the opportunity of first-hand consultation with the therapist. Where the family is involved, there should be prior agreement among the patient, the family, and the therapist on the standards of confidentiality that will be applied (FAMILY PRINCIPLE II). Even when total withholding of information is practiced, the involvement of the family should not be ignored, and they should be helped with whatever support they might need in the situation. This is based on the reality that the emotional state of the family is going to have a direct effect on the patient and be a subsequent influence on therapy of that identified patient.

5. *Insurance Reports*

Requests for information from insurance companies and/or employers who subsidize insurance programs for treatment cost reimbursement have become the most frequent imposition on confidentiality, with proportionately grave interference with patients' welfare. Inasmuch as insurance coverage constitutes a contract limiting to some extent the benefits to which the patient is entitled, there exists a legal and ethical need to give others information to determine whether the treatment costs are within the boundaries of the contract. Foremost, any patient receiving care through any system of paying for such care should have access to all medical services without jeopardizing their privacy or their confidential relationship with their physician (INSURANCE PRINCIPLE I). This latter condition is a necessary component of effective treatment. Therefore, no system should jeopardize such effectiveness. Secondly, since the purpose of insurance is to minimize the risk and impact of calamities by spreading the risk, no patient striken by illness in any form should be penalized because he has added "a burden" to the group load (INSURANCE PRINCIPLE II). The patient as an individual should have confidentiality protected by considering group experience in all cost accounting proceedings for whatever purpose.*

*Over 90% of health insurance coverage is through industrial group policies where all members of the group are blanketed in regardless of their state of health, other than excluding conditions whose onset antedated application of the contract. Some life insurance written on a group basis operates the same way with additional proviso that an examination is required for those over a specified age. Premiums are set to cover the statistical chance of poor, average, and excellent probabilities of morbidity or mortality. Even when added

Because of the reasons given above, treating psychiatrists will have to give some information if their patients are to have the benefit of insurance coverage (INSURANCE PRINCIPLE III). This information would include that a psychiatric condition, unspecified, does exist to indicate that there is a medical condition covered by the contract. In some situations, only to demonstrate that the illness did not exist prior to a contract where the contract excludes such illness, it will be necessary to give approximate date of onset of the symptoms complained of by the patient. To substantiate the type and frequency of treatment given, it may be necessary to give some information indicating the general degree of unspecified impairment. Peer review would be preferable. The general nature and frequency of treatment might have to be recorded for billing purposes.

No information given in a written report for these purposes should be in language that could be construed in any way, by anyone, to defame the patient. If necessary, such information should go directly to a physician representative of the third party, preferably in verbal communication, with statements that such information is being divulged under ethical professional obligation of the recipient as well to maintain confidentiality. This has been acceptable to a number of insurance companies, but subject to peer review on demand. Under no circumstances should any sensitive information from treating physicians, required for insurance purposes as given above about an identified individual, be routed through or be made available to an employer (INSURANCE PRINCIPLE IV).* Reporting to the employer for cost accounting purposes should be done on a group basis, without any identification of any patient creating any load on the system. Once this information has served the legitimate purposes given above, after medical evaluation of its application to the insurance contract, no further use should be made of this information in identifiable, individual recording or data storing. Since this will be even more complicated with the advent of national health care coverage,

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premiums are demanded for known pathology risks, the same evening out by distribution operates. To then eliminate those who are unfortunate enough to develop costly medical problems overlooks the fact that some under the same contract may never develop illness requiring payment for treatment.

*There are situations where an employer must be notified of circumstances developed in the treatment relationship to secure cooperation in therapy; or because the danger to society is greater than the obligation to the patient (see GENERAL PRINCIPLE V above). If this be so, the disclosure should be based on the general treatment situation and not incidental to insurance reporting. While some contracts demand processing of claim by employer, most carriers will accept report going directly to medical department of the insurance company. INSURANCE PRINCIPLE IV about employer access has been accepted by the AMA and the International Claim Association.

and because there will be a storage of much individual intimate material, a separate policy statement on this has already been formulated. The essence of this statement is that we must separate minimalized data needed to assure individuals' rights to care from the data needed for any statistical purpose of administration or research (NATIONAL HEALTH PLANS PRINCIPLE I). That data to be recorded for all purposes, the protection of the data once recorded, and the limitations of its accessibility should be an immediate and integral part of any initial plan for national health care coverage (NATIONAL HEALTH PLANS PRINCIPLE II).

6. *The Courts and Subpoenaed Information*

The first section of this position paper is especially applicable in court. The demand for information about our patients by courts or other governmental bodies via the power of subpoena presents special problems. Such demands are not as frequent as others, but when they occur, they can have a devastating effect on the patient and his psychotherapy. Recent developments have been more favorable to the protection of this information. This protection has been increased by judicial decision recognizing the importance of preserving this confidentiality, as exemplified by the California Supreme Court decision limiting disclosure to the bare minimum where exceptions to psychotherapist-patient privilege are written into the law. In that decision, they were quite explicit in stating that any further protection must come from legislative action, even though they recognized the seriousness of the existing threat.

The California Legislature, as did some other states, created the bulk of such protection in law in creating the act that provides psychotherapist-patient privilege. The exception that waived the protection for the patient litigant has been a destructive loophole as witnessed in actual court proceedings. The Federal court system was about to deny any protection, but finally in their proposed Code of Evidence incorporated a code similar to that in California.* Congress failed to accept this proposal. Illinois, which had a similar law, almost eliminated this exception entirely; but did modify it to improve the protection in divorce and child custody proceedings. This was accomplished through active efforts of the Illinois District

*Proposed Federal Rule 504 creating psychotherapist-patient privilege has three broad exceptions to this privilege. That labeled (c) reads: "*Condition an element of claim* or *defense*. There is no privilege under this rule as to communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense, or after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense."

Branch. The section protecting confidentiality in the act creating the Office of Drug Abuse Control specifies very clearly the conditions that a judge must consider before ordering the disclosure of confidential information. This resulted through effort via the APA.

To fully protect the confidentiality of our patients' communications, we must clearly separate the concepts of "privilege" and "confidentiality." The former term is purely legal indicating a right granted by law not to give information in a legal proceeding to influence the eventual outcome. It can be claimed only by designated parties and can be lost via various acts on the part of the owners of the privilege. In addition, information can be forced to be disclosed, and can be removed later by judicial determination that it should not have been disclosed, thereby preserving the legal purpose of privilege. This is one example where privilege is preserved but confidentiality is lost. The only safeguard to confidentiality is to legally protect the information from any disclosure.

It is in this area that the subpoena process often skirts the legal protection of the patients' privacy and the confidentiality of the information disclosed in therapy or fact of being treated or of diagnosis having been made. This requires that the psychiatrist, while honoring the subpoena, not divulge any information without the consent of the patient (COURT DEMAND PRINCIPLE I), or until the demand via subpoena has been legally evaluated and properly challenged, according to the laws of the jurisdiction in which a subpoena has been issued (COURT DEMAND PRINCIPLE II). In California and some other states, he has a legal obligation to challenge this demand. In other jurisdictions, including some Federal ones, where this legal obligation may not exist, he has an ethical obligation to do so and not release this information until all resources have been explored.

The characteristic deficiency and threat to confidentiality are inherent in the exceptions to privilege via the patient-litigant automatic waiver of the privilege protection, no matter how well protected by the limitations pronounced by the California Supreme Court as evident in actual proceedings that have followed that decision. It exists still in California law and in the current status of the proposed Federal Code, and certainly exists in the courtroom itself where these laws are interpreted. This requires that efforts be made to influence legislatures and Congress to limit the exceptions to psychotherapist-patient privilege based on experiences in the courtroom of the various states. If the langauge of the patient litigant exception cannot be removed entirely, it would be well to substitute the language of Section 408, Public Law 92-255: "In assessing good cause, the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relation-

ship, and (to the treatment services)" substituting for the last phrase "society's right to protect treatment." Until then, the issue needs to be challenged in the courts until precedent for adequate protection evolves. (See Appendix G.)

7. Employers

In certain occupations where the emotional health is vital to carrying out grave responsibilities, there is an obligation on the therapist to determine when and where breaches of confidentiality must be considered. It is our opinion that the judgment of danger should rest primarily on the observable job behavior and not on the mere fact that an employee is or has been in treatment. It is to the employer's benefit to encourage employees to seek early help for emotional problems. Any hazard to continued employment merely by disclosure of being in treatment will discourage such employees from seeking the help that they need to carry out those grave responsibilities safely. The applicability of GENERAL PRINCIPLE V on breaking confidentiality could apply if all the conditions are met and a clear hazard to others cannot be handled therapeutically.

In summation, the decision of whether or not to release information, while governed by the principles following, should be decided upon each individual patient and on each individual situation at the time the need for the release of this information is being considered.

Principles Governing Protecting Confidentiality in Disclosures to Third Parties

General Principle 1. Concensus is that psychotherapy requires a position atmosphere of confidentiality to protect patients' rights to the pursuit of health and happiness.

General Principle 2. We are the chief advocates for protecting our patients' right to confidentiality.

General Principle 3. Psychiatrists must never knowingly become a party to any manipulation of facts (as differentiated from withholding information dictated because of confidentiality) in dealing with third parties.

A. Unethical.

B. Just as destructive to psychotherapist-patient relationship as breach in confidentiality.

General Principle 4. Whatever is released to any third party needs to be discussed with the patient except in unusual circumstancs.

General Principle 5. When in the psychiatrist's judgment the patient represents an extreme danger to himself or others that cannot be

contained therapeutically, and it is necessary to notify others of the hazard for the protection of the patient or these others, confidentiality should be broken only to the extent necessary.

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Specific considerations are mandated for certain required release of information. Absolute privacy is a thing of the past. The problem is to minimize the effect of disclosure on the patient. Requests for information from family members is one of the most frequent impositions on confidentiality. In some situations, it may help therapy.

Family Principle 1.. The therapist must decide whether disclosure operates *for* patient or *against* patient. This applies to information to schools during therapy of children.

Family Principle 2. Where family is involved, there should be prior agreement on standards of confidentiality that will be applied.

Corollary — Even when total withholding of information is practiced, the involvement of family should not be ignored and they should be helped to whatever support *they* might need.

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Requests for information from insurance companies and/or employers for treatment cost reimbursement has become the most frequent imposition on confidentiality, with proportionately grave interference with patients' welfare.

Insurance Principle 1. Patients receiving care through *any* system of providing such care should have access to all medical services without jeopardizing their privacy or confidential relationship with their physician.

Insurance Principle 2. The purpose of insurance is to minimize the risk and impact of calamity by spreading the risk.

A. The patient stricken by illness in any form should not be penalized because he has added a "burden" to the group load.

B. The patient as an *individual* should have confidentiality protected by considering *group* experience in all cost accounting procedures for whatever purpose.

Insurance Principle 3. Treating psychiatrists will have to give some information if their patients are to have the benefit of insurance coverage.

A. That a psychiatric condition, unspecified, exists.
B. That symptoms began at an approximate date.
C. General degree of unspecified impairment.
D. General nature and frequency of treatment for billing.

Insurance Principle 4. Under no circumstances should *any* sensitive information from treating physician, required for insurance purposes about an individual, be routed through or be made available to employer.

Corollary — Once it has served legitimate purposes through medical evaluation, no further use should be made in identifiable individual recording or data storing.

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This will be even complicated with advent of national health care coverage. There will be storage of much individual intimate material. Who controls access to information is then vital.

National Health Plans Principle 1. We must separate minimalized data needed to assure individuals' rights to care from the data needed for any statistical purpose of administration or research.

National Health Plans Principle 2. The data to be recorded for all purposes, the protection of the data once recorded, and the limitations of its accessibility should *be an immediate and integral part of the initial plan.*

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The courts' demands for information is a less frequent occurrence, but when it occurs can have a more devastating affect on the patient and his psychotherapy.

Recent developments have been favorable.

1. California Supreme Court limiting disclosure to bare minimum when exceptions to psychotherapist-patient privilege exist.
2. Proposed federal code adopts limited psychotherapist-patient privilege.
3. Illinois further limits the exceptions to privilege.

Still needed:

Elimination of patient-litigant exception to privilege where it exists, and legislation to grant psychotherapist-patient privilege in those states where it currently does not exist.

Court Demand Principle 1. The psychiatrist, while honoring subpoenas, should refuse, within the framework of the law, to divulge any information about a patient without the consent of the patient.

Court Demand Principle 2. If the situation involves a legal waiver of the need for the patient's consent, the psychiatrist still has the obligation to discuss the matter fully with the patient and the patient's attorney in order to be certain that all concerned understand the possible consequences of the release of information.

Corollary — The law in this area varies and sometimes a psychiatrist may be ordered to testify when he believes he should not. In those circumstances, he will have to judge whether he will legally challenge the court order and risk a contempt citation. He would be well advised to secure legal counsel first.

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Employers

On jobs where emotional health is vital to carrying out grave responsibilities, the judgment of danger should rest primarily on observable job behavior and not on the fact that an employee is or has been in treatment. It is to employer's benefit to encourage such employees to seek early help for emotional problems. Any hazard to continued employment by disclosure from therapist will discourage seeking such help. (See General Principle 5)

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Schools and Psychotherapy of Children

Principles relating to families apply here. A special problem is tendency of schools to develop permanent records that can be used on behalf of the child still in school, but which are available for misuse after the child leaves school.

We believe the Commission on Children and Adolescents should explore this problem for recommendations (See List of Recommendations).

Appendix G: Testimony Submitted on Behalf of the American Psychiatric Association & The American Academy of Psychiatry and the Law on the Inclusion of a Strengthened Rule 504 (Psychotherapist-Patient Privilege) in the Federal Code of Evidence H.R. 5463

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Presented June 5, 1974 Before the U.S. Senate Judiciary Committee

Mr. Chairman and distinguished members of this committee, I am honored and privileged to appear before you in behalf of the American Psychiatric Association, which represents 21,000 of the 25,000 psychiatrists in the United States, and also for the American Academy of Psychiatry and the Law. With me is Stanley L. Portnow, M.D., Chairman of the Committee on Psychiatry and the Law of the American Psychiatric Association, and also appearing in behalf of the American Academy of Psychiatry and the Law.

Mr. Chairman, in addition to my statement, I request to have included in the record the references and attachments appended thereto.

In proposing a strengthened psychotherapist-patient privilege rule, I find myself quite uncomfortable. In the current climate invoking privilege is a most delicate subject. Secondly, my discussion may sound critical of a fellow profession, our legal colleagues. The laws on privilege are written by lawyers, for practice by lawyers, and passed upon by lawyers sitting as justices. To the latter problem I can only claim that some of my best friends are lawyers, — not being entirely facetious since they helped me to the legal insights I will call upon. If these insights are faulty, it will be because of my difficulties and not their efforts to enlighten me. Addressing the first problem, the approach to the privilege I advocate bears no resemblance to the current legal contest. I plead for privilege, but not for protecting myself, nor for psychiatrists as a group, nor for the medical profession. I plead for the protection of our patients. It would be far easier for any physician to hide behind the legality of a court subpoena, and simply turn over his records or freely testify. It is more arduous and

57-282 O - 76 - pt. 1 - 39

onerous to fight against subpoenas to uphold the greater ethic of protecting our patients who have placed their trust in us. A psychiatrist has gone to jail, and others have risked jail to so protect their patients. Psychiatrists and other physicians have spent tens of thousands of dollars of their own money, — not to protect themselves, — to avoid harm befalling their patients in this struggle to seek protection of confidential communications.

In essence I am really calling on you to act as a jury to pass upon the question of whether the health, welfare, and very lives of our people are being adequately protected, — the theme of our Constitution's Bill of Rights. The furor over one psychiatrist's office being invaded to get the records of one patient pales in the face of the fact that you will pass on the power to unlock every physician's file and mind about every patient's innermost fantasies, dreams, secrets and sorrows, and make them available to any lawyer, or prosecuting attorney for whatever righteous or unrighteous reason he may have. Rule 501 offers no protection because state laws are so full of loopholes they have been shown to be ineffective in actual practice (1). Approximately seven states have enacted psychotherapist-patient privilege laws (2), and these limit them to psychiatrists and psychologists; whereas proposed rule 504 included all physicians. Even so, at least in California, the patient-litigant exception has been used repeatedly to act as a barn door wide opening to attack the protection of the whole record (3) in spite of a California Supreme Court ruling (4) that disclosure must be limited and discreet.

I will not repeat endless evidence that effective psychiatric treatment rests on the patient's ability to unburden every thought, fantasy, feeling, wish to his therapist without restraint. This was documented by the Group of the Advancement for Psychiatry (5), acknowledged and accepted by the California Supreme Court in its *Lifschutz* decision (4), in the footnotes supporting Rule 504(1) as eventually proposed. There has been no argument refuting that this Rule 504 amply meets Wigmore's four criteria to support a privilege not to disclose confidential information (6).

Patients are not required to relate merely every fact, but every fleeting fantasy, wish, dream without restraint. This knowledge has often delayed people seeking help for years until the pressure of their misery drives them to chance trusting their physicians. They have already suffered hurt and distrust so trusting their psychotherapist does not come easy. The preservation of the environment of trust that no revelation will be revealed to another is what makes the practice of psychiatry possible, — and I am convinced, all of medicine. From my years of general practice I became convinced, as are many physicians, that the trust our patients put in us contributes

as much to the healing process as the chemicals we call drugs, or the surgical and other physical procedures, as effective as these physical agents have proven to be. Confidentiality is essential to the proper and adequate health care of all the people.

If you reflect also on the nature of the communications, it involves not only the patients, but what they tell of their wives and husbands, their children and parents, their friends and enemies, their bosses and fellow workers. Much is fantasy and distortion, created by the fickle human mind. How many would want to be judged on the basis of every fleeting thought, wish, emotional impulse that occurs to them? Who would dare to have them exposed publicly? Yet this is the stuff of which psychotherapy communications consist. In treatment, the patient is urged actively not to censor, not to control, not to hold back such thoughts that you and I, if fortunate, hold back, laugh off, ignore, and never relate to anyone. The mere fact that they were driven to seek help only emphasizes how disturbing these have been. Patients have been driven to suicide because of inability to tolerate them. To contemplate open disclosure has driven people to suicide overwhelmed by real or imagined shame. To avoid disclosure many have suffered conditions and diseases that led ultimately to the destruction of their health and life. Many have eventually suffered destruction of careers, homes, and future. Actual disclosure has done the same.

To add the threat that a legal demand can force such disclosures from a physician trusted not to do so, bound by ethics not to do so and not to harm his patients, compounds the problem for those who seek help. To relate cases where husbands have used such disclosed information to attack their wives, — or wives to attack husbands; where disclosure about parents have shattered the lives of children; or the effect on two lives by disclosure what one individual fantasied about someone close to him only begins to tell the story (3). A psychiatrist being forced to give a diagnosis or evaluation he has made of a patient, withheld from the patient because of the patient's emotional fragility to tolerate it at the time or to understand the significance of the information, is not only destructive to that therapeutic relationship but makes it impossible for that patient and many others to ever trust any other therapist. I have seen patients precipitated back into a psychosis that years of work had overcome. So much for the need for protection and the nature of the treatment process.

What follows are some thoughts that you can best judge for validity. The problem is weighing the value of society's need to preserve that confidentiality versus what I believe is the legal right to discovery, — the search for the truth. I am not a legal scholar but my search has led to some reading. I understand the origins of the sub-

poena, that stands for the compulsion to disclose, had its origin in the English Court of Chancery and rested on the King's right to demand disclosure (7). It isn't by chance that it became known as the Star Chamber; and Star Chamber proceeding developed a meaning well deserved (7). However, my readings indicate that the demand for the truth can be traced back through the English system to ecclesiastical courts where exacting the truth by torture, ordeals of fire and morsel, and combat were considered worthwhile in placing "need for truth" as supreme.

There are two parallels. The use of the subpoena to intimidate, frighten and hurt goes on. The niceties of Constitutional protection rigidly followed on the Washington scene are not adhered to so well in the average case. Even worse is the question whether the disclosures made during psychiatric treatment can be treated as fact, when fantasy and unconscious distortion play such a prominent role. I would ask you to give consideration to the nature of the evidence so produced, and how prejudicial it becomes. In fact by the introduction of such productions the chances are the proceedings are led away from the truth rather than to the truth.

The next question that bothers me is how the Constitution is interpreted. Article VI states "This Constitution . . . shall be the supreme law of the land". As I have been given to understand, court procedures including the rights of discovery stem from old English law. The Constitution was written to protect the people from abuses of government as found in that English law based on the Royal prerogative. Again Amendment IX states without equivocation, "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." Since the Declaration of Independence, that twin foundation of our Republic states that life, liberty, and the pursuit of happiness are such inalienable rights, and it seems appropriate that the Ninth Amendment makes these rights supreme in addition to the protection of the First, and Fourth Amendments. I believe I have emphasized and could further document that to withhold psychotherapist-patient privilege and physician-patient privilege violates just those rights to life, liberty and the pursuit of happiness, — especially so for the patients in the chambers of the psychiatrist, but not restricted to that branch of the medical profession.

My initial reference to the legal profession has to do with my perplexity in coping with legal logic. I understand that legal scholars have their own problems in resolving such dilemmas. Every argument I have read supporting lawyer-client privilege, if removed from the title identifying what is being defended, could apply verbatim to psychotherapist-patient privilege with even greater validity (8). I

understand the American Bar Association has been critical of Rule 504. I have not heard they have come out against lawyer-client privilege. Rule 501 would establish lawyer-client privilege nation-wide via all state statutes. The Supreme Court has held that the lawyer's records are his work products and therefore are not subject to subpoena for evidence about his client (9). The courts do not do the same for the psychiatrist's records in spite of two factors more pertinent than those that apply to lawyers. The psychiatrist records his spontaneous impressions of what he thinks the patient is really expressing and thinking, which is not exactly what the patient's words were (so called "interpretation of the contents"), — therefore a product of the psychiatrist's mind. Secondly, many psychiatrists keep no records at all of the patient's communications, demonstrating that the records are not for the benefit of the treatment or the patient, but for the study of the psychiatrist's own functioning and interpretations for ultimate verification. Thereby that patient and all subsequent patients benefit. To force all psychiatrists to give up record keeping would be a disservice to the research, teaching and improvement in the practice of psychiatry.

I would request the Committee to ask themselves what factors might influence the weighing of the two constitutional values involved. This request might also be considered by the American Bar Association. Originally the Federal Procedural Code insisted that a subpoena could be issued only by "showing good cause" (10). Court interpretations established that this required more than mere relevance to the issue; and required that there must be evidence the information was vital to the preparation of the case (11). In 1970 this Fourth Amendment protection was dropped. The Advisory Committee on Rules, after giving legal justification added, "(because) it reflects existing law office protocol" (12). I am sure this Committee and the Congress as a whole would not subordinate the First, Fourth, and Ninth Amendments of the Constitution to the convenience of the law office, to ease the efforts of practicing lawyers, let alone the support of interested groups who profit from using the threat of disclosure.

I am requesting you put a firm lock on the offices and minds of all physicians so that predators cannot invade the rights protected by the First, Fourth and Ninth Amendments through the legal permission of those trying to support justice in the courts. It is important to weigh whether the remedy for justice in seeking the truth does not create greater injustice reaching out to multitudes not even directly involved in the specific court action.

I would further implore that you strengthen the lock that is Rule 504 in two ways. This need is suggested by actual experience in the

California courts. Illinois recognized this when their legislature almost eliminated entirely the patient-litigant exception (section (d) (3) in 504). They finally compromised for divorce and child custody cases (13). The California Supreme Court tried to correct this in its *Lifshutz* decision, but lower courts have been unable to apply the rule suggested. A substitute for Rule 504 (d) (3), patterned after Section 408 (b) (2) (C) of P.L. 92-255 might be more helpful to the courts (14). This section 408 has held up well in courts. Otherwise the ills already demonstrated by the operation of a blanket waiver will continue to plague the courts. It places the patient wise enough to seek help in a position unfavorable to those who needed but avoided such help (15). The rights to the courts should not be conditional. It results in unequal application of the law. It has deterred people from seeking help as they pursue just claims. Evidence can and has been secured from sources other than the treating psychiatrist, but this has not stopped the inroads of confidentiality of the treatment relationship even in those states having protective privilege laws.

The argument presented that it permits scoundrels to hide behind the protection of the law (16) is a specious one. There are such cases. First, are the many to be harmed because of the few who may so try? Secondly, in each such case, there was a lawyer who took and filed the action before the physician was brought in. I leave the inference to you to avoid sticking my neck out any further.

To strengthen the lock even more, the original proposal for Rule 504 extended the protection to all physicians. In the few states having any protection it is limited to psychiatric physicians. The 504 wording in Section (a) "while engaged in the diagnosis or treatment of a mental or emotional condition" overlooks the frequent phenomenon that disclosure of a communication or finding of a condition might precipitate a mental or severe emotional condition, — sometimes if only revealed to the patient (e.g. labels of syphilis, gonorrhea, pregnancy, schizophrenia, latent homosexuality). I would suggest a modification of the wording to foresee these possibilities (17).

The question of extending the right to claim the privilege to the therapist is a moot point (see addendum). The protection is always of the patient and the patient's right. Extending to the therapist the right to claim the privilege seems indicated when the patient is incompetent to understand the consequences (e.g. mentally incompetent; having no knowledge of what he has actually communicated or therapist's observations and judgments withheld from patient because of patient's condition). Here we have a situation lacking informed consent. The other situation is where the patient's attorney is more concerned with a settlement (usually in contingency cases) than he is in what happens to his client. This latter is a question for the legal

profession to determine whether they want a physician to protect the client from his own lawyer. These situations do exist.

In summary I ask that you review the nature of the psychotherapeutic process; its dependence on trust that requires confidentiality; the nature of the evidence that would be labelled, used and misused as "fact" or "truth"; the availability of other sources of information. I also ask that you consider the effect of threatened exposure on those needing, seeking, or already in the process of treatment; in that light to recognize Wigmore's four postulates for privilege have been met even better for Rule 504 than for lawyer-client privilege. I would ask that you review the history of "ascertaining the truth in the courtroom" in juxtaposition to the protection sought by the framers of our Declaration of Independence and the Constitution. As a result I do hope you will restore a stronger lock for the protections in those documents by restoring a strengthened psychotherapist-patient privilege in the Federal Code of Evidence. I can do no better than to quote from David W. Louisell's review of opinions ". . . that whatever handicap privilege places upon adjudicatory process is not too high a price to pay for preserving inviolate certain essential relationships." (18) Preserving life, health and the pursuit of happiness should stand high in priority for such consideration.

Mr. Chairman, I also wish to emphasize to this committee that the inclusion of the psychotherapist-patient privilege can be inserted in addition to the traditional physician-patient privilege which must not be impaired in any way.

REFERENCES

1. Committee on Rules of Practice and Procedures, Judicial Conference of the U.S., *Preliminary Draft of Proposed Rules of Evidence for the U.S. District Courts and Magistrates,* footnotes Rule 504 (1969, p. 53).
2. California, Connecticut, Florida, Georgia, Illinois, Kentucky, Massachusetts.
3. Slawson, P.F., "Patient-Litigant Exception," *Arch. Gen'l Psychiatry* 21:347; Sept. '69 — Slovenko, Ralph, "Psychiatry and a Second Look at the Medical Privilege," *6 Wayne L. Rev.* 175-188 (1960) — *Robertson* and *Caesar* cases that reached California Supreme Courts; references are not available but can be secured if needed.
4. *re Lifschutz* 2 Cal. 3d. 415, 467 P. 2d 557, 85 Cal. Rptr. 829 (1970); *Roberts v. Sup. Ct.* 9 C 3d. 337 (Calif. Sup. Ct. 4/11/73) — Louisell, David W. & Sinclair, Kent, Jr., "The Supreme Court of California," 1969-70," 59 *Calif. L. Rev.* 30, Jan. 1971.
5. "Confidentiality and Privileged Communication in the Practice of Psychiatry" *Report No. 45,* Group for the Advancement of Psychiatry, New York, 1960.

6. 8 Wigmore Evidence, Section 2285, p. 527 (McNaughten rev. 1961)
   (1) Originates in confidence it will not be disclosed.
   (2) Confidentiality essential to the relationship.
   (3) The relationship should be fostered for the welfare of society.
   (4) The injury to the relationship greater than benefit gained to litigation by the disclosure.

7. Plunknett, Theodore F.T., *A Concise History of the Common Law* 4th ed. 1948 p. 172. — Webster's *New International Dictionary of English Language* unabridged, 2nd ed. 1960, p. 2458, G.&C. Merriam Co., Springfield, Mass. — *Oxford English Dictionary*, V.9, Pt.1, 1919, p. 833 ed. by Henry Bradley.

8. Compare:
   Slawson, *supra* 3, p. 352, quoting Lord Justice Knight Bruce. Doyle, Vincent, "The Privacy of the Individual," *World Med. J.* 21:p. 33 March April 1974, same quote.

9. Hickman v. Taylor, Jan. 1947, 329 U.S. 495, 67 S. Ct. 385 "Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and mental impressions of an attorney."

10. Federal Rules Civil Procedures, Rule 34 28 USCA.

11. *Fastener Corp. v. Spotnails, Inc.* D.C. Ill. 1967, 43 F.R.D. 204 *U.S. v. Am. Optical Co.* D.C. Cal. 1966, 39 F.R.D. 580.

12. See Ref. 10 *supra* notes to amendment March 30, 1970 Advisory Committee on Rules — "The revision of Rule 34 to *operate extrajudicially* rather than by court order reflects *existing law office protocol*" (emphasis added).

13. State of Illinois Statutes, Chapter 51, Evidence & Depositions, Section 5.2 (c) as amended 1971 — Beigler, Jerome S., "The 1971 Amendment of the Illinois Statute on Confidentiality: A New Development in Privilege Law," Am. J. Psychia. 129:3, p. 311, Sept. 1972.

14. *In re Lifschutz* *supra* 4, footnote 26.
   Suggestion for wording 504 (d) (3) — "When patient injects the issue of his mental or emotional state as a claim or defense the privilege will be waived only if a court of competent jurisdiction considers there is insufficient necessary evidence from sources other than the psychotherapist. In assessing such good cause the court shall weigh the public interest in protecting such communications, and the need for disclosure against the injury to the patient, to the psychotherapist-patient relationship and the effect on the treatment process. Even so, disclosure must be directed at specific questions that need answers."

15. *Roberts v. Sup. Ct. supra 4.*
   Grossman, Maurice "Proposed Federal Code of Evidence Rule 504 — Psychotherapist-Patient Privilege" Feb. 23, 1973, unpublished copy attached.

16. Wigmore, *supra* 6, Section 2220, p. 183.

17. Suggested wording — ". . . while engaged in the diagnosis or treatment of a mental or emotional condition, or receiving information that might precipitate a mental or severe emotional condition."

18. Louisell, etc. *supra* 5, p. 53.

ADDENDUM TO TESTIMONY

Case for the Psychotherapist Exercising the Right to the Privilege in Order to Protect the Patient
Maurice Grossman, M.D.

I would prefer to view the therapist exercising the right of privilege from another viewpoint, which was alluded to in Lifschutz's pleading, but received inadequate consideration in the Court's discussion of its decision. It would be based not on his *rights*, but on his *obligation*. Apart from his obligation to maintain a "safe atmosphere" for all prospective patients, he has an obligation to protect the individual patient *even from the patient himself*. The extreme case obviously is in the act of attempting suicide. But the same factors operate in other less manifest ways. This leads to my second approach to the problem.

The legal process sees every individual as competent to make decisions and therefore responsible for those decisions. Obviously, our society could not operate on any other basis. Yet the law recognizes that this is not so in certain circumstances. The gross circumstance of legal insanity and the resultant various complications of legal competence is the most obvious. The guiding principle rests on the relevance of the mental state to the act in question. *The individual's mental ability to adequately judge and control his act is the guiding principle.* In psychotherapy the patient is encouraged to drop *all intellectual controls* and to say anything that comes to his mind without censoring by reason or fact. In the process he drops all "adult," "mature" controls and regresses to earlier childhood and even infantile states of thought production and their verbalization. He might then release immature, even irrational emotional urges, impulses and thoughts. More important, he might, and often does, *associate these infantile resurgences to present day activities in his verbal productions in the therapeutic session.* The examination of these irrational impulses in the light of rationality, with the therapist's help, is the important instrument in therapy. Sometimes there is a tendency for the patient to "act out" these irrational impulses in everyday life. There is a cardinal rule for patients to avoid committing themselves to any irreversible act while in therapy until the irrational elements are understood. The reason for this is that all patients in intensive therapy, and to some degree all patients in any

psychotherapy, regress to these earlier states of feeling, thinking, and even functioning. In the course of this they sometimes act as various members of their childhood family, as they saw themselves then, or as they fantasied themselves in wishful thinking.

In other words, encouraged to drop controls they regress to where these productions are neither wholly factual or within their reasoning control. The psychological processes of repression and defensive distortion are accentuated during therapy, *and only the therapist stands as their protector against their irrational self.* The patient endows him with the cloak of a benevolent, non-punitive, protecting parent. It is this role that permits him to be effective. It is this role he must not jeopardize.

The law recognizes that at certain ages children are incapable of being held responsible. Many of the assertions of patients are from the childhood points of view. To take their utterances during a psychotherapeutic session as responsible fact would ignore the reality of the therapeutic scene.

The mere fact that they sought treatment is evidence enough that their conscious behavior and reactions were having irrational consequences. It is this more or less unconscious awareness of the irrationality of some segment of their being that makes patients reluctant to even disclose they seek the help of a psychiatrist.

I would then suggest that consideration be given to the psychotherapeutically induced intrapsychic state of the patient at the time he makes statements to a therapist; that it be viewed in the light of regressed distortion; and that it is a mixture of fact, fantasy and distortion that should not be acceptable as "evidence of fact." On this basis, in court, the therapist is in a position where he must protect the patient from having the proceedings of the therapeutic process taken at face value. The patient may not even know what he is actually saying or intending to do. Not infrequently in practice, patients are amazed at recorded statements and cannot explain how they came to say them. The therapist uses them as guideposts to the unconscious. To treat them as a "fact" in court would be a perversion of justice. At times patients will demand the therapist support lines of action that the patient is convinced is essential for his well-being. When the patient proceeds even after the therapist points out the irrational driving force, he might still attack the therapist for not having stopped him, if the act backfires.

The summation of the above is to support the proposition that the therapist needs the right of privilege to permit him to adequately exercise his responsibility as the protector of his patient, even from the patient himself. He must *always* refuse to testify on *broad principle* to make sure refusal in specific cases is not taken as an admis-

sion of some secret forbidding trait in a specific patient.

The question of informed consent as applied to waivers of privilege by patients in therapy is an entirely different aspect. The above discussion would be relevant to that. The reliance on the patient's waiver might well be questioned in this approach.

Some clinical examples are:

1. Patient reacts to current situation that evokes unconscious memory of childhood trauma and anger. Statements in therapy taken out of context of the therapeutic scene, would be a gross distortion of actual behavior on job. Yet he feels tremendous guilt about job performance based on his childhood guilt. His statements, in court, could be used by adversary as though they were facts, confusing a jury.
2. Those patients, because of neurotic needs, repeatedly feel they are committing grave crimes. The extreme are innocent individuals who come to confess they might be the culprit in publicized crimes. Lesser versions of these are apparent in other self-blame statements during therapy, especially when pushed into taking aggressive action like filing a lawsuit. *And these are not psychotic individuals.*
3. Freud's famous experience of adult patients reporting they had been raped at time of puberty; and his eventual realization they were reporting fantasies as though they had been real.
4. Those patients signing for release of information by therapist under social pressure (boss on job, husband of wife-patient); or the passive submissive patient who literally cannot refuse; and both groups depending on the therapist stepping in to say "No."
5. The insurance company refusing to pay for covered treatment, asking more and more details of the case. To file suit, the patient jeopardizes his privacy. In two instances, both non-psychiatric, the claimant dropped the issue without recovering his payments, out of fear of upsetting his employer who had the insurance contract.
6. Slawson's case is still relevant, even though divorce proceedings have changed. A patient's inability to collect insurance because to report desired information, would be through husband, the insured one, and might be used by him in child custody proceedings. In the one I know, the fear of it being used was based on unconscious dread, rather than any real danger; but the effect was equally as destructive at that stage of treatment.

7. The hypothetical school teacher suing for his job. The school administrators use knowledge of the teacher using group insurance for psychotherapy, demand the record to support their contention of unfitness, rather than testimony of actual job performance deficiencies. I would guess that the average judge would admit the whole record. There have been reported instances of misuse of psychological tests in basing action on such words as "latent homosexuality," "high on femininity scale" for men, "aggressive tendencies," etc. In court, any expert evidence that the terms have no relevance separated from any overt behavior, would not reduce the impact of such terms on a jury.

ADDENDUM TO TESTIMONY

Pub. Law 92-255, March 21, 1972

#408. Confidentiality of patient records.

(a) Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any drug abuse prevention function authorized or assisted under any provision of this Act or any Act amended by this Act shall be confidential and may be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section.

(b) (1) If the patient, with respect to whom any given record referred to in subsection (a) of this section is maintained, gives his written consent, the content of such record may be disclosed.

(A) to medical personnel for the purpose of obtaining benefits to which the patient is entitled.

(2) If the patient, with respect to whom any given record referred to in subsection (a) of this section is maintained, does not give his written consent, the content of such record may be disclosed as follows:

(A) To medical personnel to the extent necessary to meet a bona fide medical emergency.

(B) To qualified personnel for the purpose of conducting scientific research, management or financial audits, or program evaluation, but such personnel may not identify, directly or indirectly, any individual patient in any report of such research, audit, or evaluation, or otherwise disclose patient identities in any manner.

(C) If authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefor. *In assessing good cause the court shall weigh the public interest and the need for disclosure against*

the injury to the patient, to the physician-patient relationship, and to the treatment services. (emphasis added) Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure.

(c) Except as authorized by a court order granted under the subsection (b) (2) (C) of this section, no record referred to in subsection (a) may be used to initiate or substantiate any criminal charges against a patient or to conduct any investigation of a patient.

(d) The prohibitions of this section continue to apply to records concerning any individual who has been a patient, irrespective of whether or when he ceases to be a patient.

(e) Except as authorized under subsection (b) of this section, any person who discloses the contents of any record referred to in subsection (a) shall be fined not more than $500 in the case of a first offense, and not more than $5,000 in the case of each subsequent offense.

ADDENDUM TO TESTIMONY

PROPOSED FEDERAL CODE OF EVIDENCE
RULE 504 — PSYCHOTHERAPIST-PATIENT PRIVILEGE

This rule for privilege in psychotherapy recognizes *Constitutional* ground for such protection.* Not to grant such privilege would interfere with the rights of an individual to seek health and protect life because it is recognized that patients requiring psychiatric care would be reluctant to seek such care unless they were assured that disclosure of embarrassing or damaging material would not get beyond the physician they are consulting. Furthermore, for psychotherapy to be effective, it requires that patients hold back no material and disclose everything and anything that is involved in their emotional processes. Here again, this would not be possible unless the patients really were assured that there would be no release of such information beyond the therapist. This was recognized in the deliberations of the California Supreme Court in the *Lifschutz* case.

Based on these same principles, a similar law was first passed in Connecticut and was considered by all concerned, both in the legal and psychiatric professions, that it offered adequate protection to patients and the law. A similar law was adopted in California and is now part of the California Code.** A similar law was passed in Illi-

*California Supreme Court decision in *Lifschutz*. 2 Cal. 3d, 431-32, 437, 467, P. 2d at 567-68, 571-72, 85 Cal. Rptr at 839-40, 844.
**1970 Revision Article 7, Sections 1010-1028.

nois, and in 1971, amendments were necessary based on problems created by the law, based on the exceptions to the privilege that were incorporated as part of the basic law. These same problems have developed in the application of the Code in California. The source of the problems are the exceptions, based on the patient's mental or emotional condition being entered by the patient as an element of a claim or defense (California Section 1016; Federal Code Rule 504 (d)(3)).

The legal philosophy for this exception is that if patients use their psychiatric condition for a claim or defense, the truth concerning this requires access to all the material bearing on this; and that patients need not make the claim and can so preserve their confidential disclosures. In practice, it turns out that, because of this, patients are given the choice of pursuing just claims under conditions of costly emotional damage; or to forgo just claims, — conditions not suffered by claimants not in treatment.

Furthermore, this concept treats the disclosure of patients during treatment as facts that are of reliable truth. The actual nature of the revelations of patients in therapy are far from fitting these critera. The patients' emotional involvement in the material of disclosure results in distortions and often outright untruth, unconsciously produced, that are part of their neurotic or psychotic process. This is compounded by the nature of the therapeutic process that encourages patients to regress to childhood states during therapy in order to reach hidden childhood factors involved in their psychiatric problems. This forces the patient to drop all adult reality controls that keep healthy adults' thoughts and utterances in truthful perspective.

The California Supreme Court in the *Lifschutz* case recognized some of these factors, with particular reference to the extreme damage that could be done to such patients if their therapists were to disclose material given in such confidence. They tried to bridge the two factors involved, — that is, the patient's need for protection and treatment and the court's need for information, — by determining that disclosure should be restricted and limited to that information relevant to the proceedings. This decision seemed to resolve the problem, except that in practice in courtroom proceedings almost immediately following this decision of the California Supreme Court defendants (their insurance company attorneys) have insisted on free right to full disclosure, even in depositions, forcing psychiatrists to protect their patients at considerable hardship to themselves (Lifschutz going to jail, he and at least two others being forced to go through appeals that were more costly in time involvement than the $10,000 to $25,000 legal expenses each incurred in protecting their

patients).

In the case of Dr. Robertson, when the California Supreme Court accepted the appeal to review an adverse decision of the lower appellate court, the defendant settled for the original claim amount rather than risk a Supreme Court decision, suggesting the exclusionary section is used for harrassment of the patient and psychiatrist.

In actual proceedings, patients claiming their psychiatric condition in issue, still have to prove relevance and truth of such claim. Expert testimony other than their psychiatrist can be subject to cross-examination; or the patient can resort to the doctrine of res *ipso loquitor*. Therefore, sources other than the therapist are available for ascertaining the truth of the issue. In Dr. Robertson's case, a non-treating psychiatrist had examined the patient, was being used for the plaintiff, and was available for cross-examination. In another case involving a Dr. Caesar, an eminent psychiatrist called by the *plaintiff* patient, testified that the patient's mental state was not due to the accident in question, but the defendant's attorneys still pressed disclosure from the therapist, Dr. Caesar, — again suggesting harassment as a threat to psychiatric patients who sue.

Another problem has to do with legal view and legal procedures handling such information. If such information can be elicited in deposition where there is not the protection of the court itself, even though this information may be stricken from the record based on both the law and judicial protection, the damage to the patient has already been done. We have record of cases where such depositions were read in court with damage to the patient, and even though the information was then stricken from the record for legal purposes, the psychiatric damage had already been incurred. The question of legal admissibility and reversal is an entirely different problem from protecting the patient from breaches of confidentiality of the material given in private to their treating psychiatrist.

In North Carolina and in the section protecting confidentiality in the federal law setting up the Office of Drug Abuse Control and proposed legislation for Veterans Administration drug abuse treatment programs, protection was dependent upon requiring the judge in court to make a determination whether there were overriding needs for information that warranted intrusion and destruction of the patient's need for confidentiality. In the drug abuse program, the need was not really for the protection of the patient, but the recognition that the whole program and its success was dependent on patients feeling secure that their seeking treatment and records of treatment would not result in legal and other civil problems. As noted from the attachment, it can be seen that even this failed in New York City, where the trial court judge and the Appellate Division of the

New York State Supreme Court ruled that the photographs of all patients in the treatment program be made available to witnesses and legal authorities in a hunt for a suspected murderer. At last word, this was being requested for review by the New York State Supreme Court, with consideration of appealing to the United States Supreme Court if necessary.

Additional attention is needed to the problem of protecting patients in psychotherapy, not from the intent of the law, but from how it works out in actual practice.

Maurice Grossman, M.D.
February 23, 1973

Appendix H: Samples of Reports From Psychiatrists of Injuries to Patients Resulting From Breaches of Confidentiality
Compiled by Maurice Grossman, M.D.
Chairman of the Task Force

In the following illustrations, distortions have been purposefully made to disguise identification and in some instances the essential facts are gleaned from multiple cases.

1. A 24 year old schizophrenic patient, receiving EST in hospital improved and was able to return to work. Patient not told actual diagnosis because of still fragile state. Insurance covered patients routinely are given forms to sign on hospital admission. Includes permission to give information to insurance company. Hospital sent a report of the hospitalization as routine matter to get payment for bill, including diagnosis and suicide attempt. On return to work, patient found that fellow employees knew of the hospitalization, the incidents. Insurance company sends report to employer on group contract coverage. Patient becomes paranoid toward her physician; expresses self about first learning about herself from fellow employees; terminates treatment.
2. Similar case, with patient learning of diagnosis with notice from insurance company reporting they had paid the bill. Patient paranoid about how insurance company, and "their clerks" knew all about it.
3. A very emotionally upset patient, first making inquiries from insurance company that no information would reach employer, was so assured. The entire therapy damaged, and patient worse when finds employer discloses knowledge of the treatment and other factors. Medical Director of the national company involved, and a high official in insurance organizations writes "we are obligated to tell the employer because he pays the premiums." (Note that such group contracts are fringe benefits paid for by employees labor, and are only administratively paid for by employer.)
4. Patient called in for questioning about insurance report of psychiatric illness relative to security clearance even though no interference with work. Incident to security investigation, neighbors were asked what they might know about any psychiatric problem about this patient.
5. Reports of employers looking for excuses to separate employees based either on prejudice about psychiatric illness or unwarranted concern they will add burden and increased

57-282 O - 76 - pt. 1 - 40

insurance premiums on group policy.

6. One patient, spouse of employee covered by group contract, required intensive treatment because of extreme emotional decompensation, — barely holding together and very depressed. When husband filed claim for the costs of treatment covered by policy, he was told that employer would be told of his claim; that employer would be required to increase premium payments on all employees (declared not to be a fact by insurance industry representatives when discussed with them later); and intimidated him into dropping the claim out of fear of losing job. The physician was dissuaded from making follow-up inquiries both by husband and wife out of fear of losing job. Patient became worse.
7. School systems who routinely turn down applications for teaching positions on any history of psychiatric care, derived from insurance questionnaires, without investigating the nature of the condition or treatment to determine whether it would have a deleterious effect on their teaching or contact with children. Many in treatment are better teachers than those who avoid it.
8. Many government agencies routinely request information about psychiatric treatment. If ignored, and later insurance information based on group policies discloses it, they may be separated on that ground. If they admit that they had treatment, they do not get job in first place. No effort is made to have individual examined to see how relevant the history is to present condition or job. (Incidentally I have found that the Department of Defense Industrial Security Review Agencies is the most careful to protect the confidentiality of material from employers and to evaluate current condition in relation to the job. The one difficult problem still is that of those who admit to homosexuality. I understand the Civil Service Commission has just agreed to drop this section of the questionnaire for job applicants, and rely on current examinations.)
9. Two high officials in the Department of Defense, defending the practice of SPN identification on conditions of discharge that includes medical data, unequivocally declared before a Senate Committee that they feel obligated to tell employers of the reasons for his discharge, when the discharged military person, returned to civilian life, seeks employment. (Again, I understand that recently the use of SPN identifications have been dropped; but the question of attitude remains open.)

10. Records of a child's psychiatric condition and treatment made a permanent part of that child's school file when the treating psychiatrist has consultation with the current school teacher and parents, are often used in later years by others not having the benefit of the psychiatrist's help in understanding the information; nor allowing for changes as the child progresses; and has even been turned up in search for information in the adulthood of the patient long after school years.
11. Patients returned to stability and able to work, forced back into their psychotic state by misuse of material released from insurance files, security clearance files, that reaches other parts of employment situation. Undoing years of therapy is only part of the price. Suicide attempts; homicidal threats based on paranoid upheavals; all generated by real attitudes about them from fellow employees who repeat the information for either sadistic or thoughtless reasons.
12. Since spouses are often the ones covered by the group policy and many insurance reports are required to go through the plant's personnel office, even a diagnosis can cause trouble. Not infrequently there is already some trouble in the family. The "well" member is not above using the fact of treatment to blame the "patient" for all the difficulty merely because the "patient" has been the one to accept the treatment. There have been cases where the spouse has used the diagnosis to threaten the "patient" as a means of dominating the household situation, even after the "patient" has recovered and become constructively functioning.
13. A variation of this is where the insured spouse seeks divorce, and threatens or actually seeks custody of children. When the insurance report indicated merely that an emotional condition existed, but that the physician would discuss it directly with the medical director on condition that it would not be disclosed elsewhere, the insurance company refused to pay the claim. The husband kept threatening the wife, to get a report for him to turn in through employer channels. A "secret" insurance company memo about the treating physician went through channels to the employer, got to spouse, who showed it to patient, who showed it to M.D., example of how protected their records really are, even when it concerns themselves.
14. This last case represents another problem. When it was discussed with the insurance commissioner of that state, he

replied it was an individual matter and that payment would have to be sought in the courts. However, laws on privilege would require opening up the entire record in court, so that the damage would again be done. It has been found that detailed questionnaires are designed mostly for that purpose. Even if sued, the insurance company would merely have the same amount to pay and most people fearing the disclosure merely drop their claim for reimbursement.

15. There are many patients, covered by insurance, who will not use their benefits because it will get back to employer. We receive reports that there are many more, who need care, but cannot afford it unless paid for by the insurance they have, but forego treatment rather than take a chance.

16. We have other reports from reliable sources, but which cannot be documented for obvious reasons, of people greatly in need of treatment, but because of critical nature of their employment, avoid treatment out of fear of disclosure from any source. Such groups are commercial pilots, military officers, certain professional men and women, people in high executive positions or on their way up the executive ladder. They can point to instances of those they know who chanced treatment, only to have leakage of information from some source interrupt their career.

17. These are not restricted to psychiatric cases alone. A surgeon hospitalized for a coronary attack, learned shortly after he was home that his automobile insurance had been cancelled. His broker informed him that his automobile insurance carrier had gotten word of his coronary through means of his hospital insurance report.

18. One of the patients listed above told of a claim for corrective eye surgery on a child that was refused by the insurance company although supposedly covered; and the family dropping the claim fearing repercussions from the employer. This was at a critical employment crisis in the industry.

19. A patient applied to her physician for a physical examination for life insurance. When her application was turned down, her agent obtained a full report for her, and indicated that her physician was responsible. That terminated that relationship. The physician reports he couldn't understand the rejection on his report per se.

20. At the March 1974 C.M.A. Annual Meeting, at a reference committee hearing, a physician reported a case who died, and

whose life insurance payment was refused. Many years before in the course of some other illness, he noticed a benign nodule that was not treated. When the patient applied for insurance the nodule was not listed among old conditions. Since her application was less than two years before her death, payment was refused on the basis of a fraudulent application even though it had no bearing on the cause of death and was so unimportant the patient probably forgot it. The information came from one of the insurance data storage centers, or in the course of investigation, using the blanket consent form, they searched old records and found reference to it in list of diagnoses.

21. One report is of a hysterical patient with hypochondriacal symptoms who had, as a result, many bouts of surgery. After a year or so of treatment, with focusing on underlying problems, the symptoms and the surgery came to an end. When the patient began using insurance, a demand was made for an official diagnosis. The physician used "Hysterical Personality Defect". Through some way unknown to the doctor, the actual diagnosis became known to the patient. In her fury she immediately stopped treatment. The next he heard she was back visiting surgeons again.

22. A patient who had been hospitalized for severe emotional disorder had had extensive psychological testing done at the hospital. A claim for hospital payment had been sent in by the hospital. Again, as often demanded by carriers, the hospital sent along a full report. For some reason they even sent a copy of the psychological test report. (Our information did not include whether there was separate billing for the tests.) Because some questions had not been fully covered, the insurance company returned the whole application, including all the reports. For some reason, they returned it to the patient instead of to the hospital. The attending physician reported that the material was more than the patient could tolerate at that time and resulted in a relapse. He also reported that in another patient the results could have had a permanent, more drastic effect.

23. Special problems are those faced with disclosure via subpoena and court disclosure. Many cases are reported of individuals, involved in court procedures, having legitimate claims, e.g. after accidents; needing to secure compensation because of losses and medical costs; having severe emotional reactions after the event; and being told by their at-

torney the psychiatrist could be subpoened to testify, refused to consult anyone for the help they needed. This has been reported both by attorneys and physicians.

24. A variation of this is the patient already in treatment who gets into court action. A number have had to forego just settlement rather than chance testimony in court about their disclosures to their psychiatrists.
25. These fears are not without foundation. In one case, a psychiatrist was forced to testify in detail about the patient's marital problems at a deposition. Being a deposition and understanding it had no relevance to the issue, but being made to testify anyhow, he went into the details when specifically questioned. He heard later from the patient that every detail was read out in open court in the presence of the spouse. The patient won the suit but had a destroyed marriage.
26. In another, the demand was to give the full record on a child. To do so would have disclosed to the child in court that his real father had committed suicide, a fact he never knew. He refused to testify. We have no information on what basis he was able to avoid doing so.
27. In another case the psychiatrist answered some questions. When he refused to answer some that he thought would do irreparable harm to the patient, he was held in contempt of court. His appeals went all the way to the State Supreme Court without relief. Appeals to the Federal Courts have as yet not brought relief.
28. In California, welfare patients are limited to two visits a month to a psychiatrist. If a case requires more treatment than that, a Treatment Authorization Request (TAR), is required giving in detail, the clinical facts to substantiate how sick the patient really is. Someone photocopied a number of these TARs to demonstrate how easily the information can be obtained. They were sent to me anonymously, so I have no way of knowing their source. The postmark was from Southern California. The typing and form was so varied, I can only assume they came from a central file. Some were of children telling of their various criminal activity. One told of the child witnessing one parent killing the other. Some contained information of sexual activity. The obvious facts are that only those who are very sick would require TARs in the first place. Secondly, in order to get the authorization, all the severe pathological details have to be included (reports indicate how

in some obvious severe cases, requests are refused). The next obvious fact is that these written records are not secure. There is no evidence that these records are ever destroyed. Once California starts computerizing these records with a state wide interlocking system, access to such records can be done more easily, without leaving a trace.

In a report of the World Medical Association Congress meeting in Munich, Germany, October 1974, it was reported that such countries as Denmark and Belgium are already using all such information by all government agencies. The New York Times carried similar information from Sweden. The American Psychiatric Association, anticipating this problem, formulated a Position Paper in 1970, warning, and suggesting protective steps be written into any National Health Insurance legislation.

29. There has been a report that one state, computerizing its psychiatric records, used convicted inmates of its penitentiaries to transfer the crude, raw data to punch cards; making identifiable material available to those doing the work. The last report is that the project was finished.

June 15, 1974.

Special Note

Readers may also be interested in *Psychiatry and Confidentiality, An Annotated Bibliography*, prepared by the Library Staff of the American Psychiatric Museum Association, 1700 18th Street N.W., Washington, D.C., 20009, September, 1974. Mimeo, 51 pages, $2.50.

Dr. GROSSMAN. There is one aspect in that testimony that I would like to emphasize. The kind of statements a patient makes, the compounded fantasies and distorted memories and guilt reactions—they will often confess to things that never took place. They would even make accusations against people that never took place, based upon their own neurotic distortions, which are necessary for their own protection.

In searching for evidence and truth, to use statements that come out in psychotherapy statements, is really reaching for the moon, because most of it has no truth to it at all. And our problem is in therapy eventually getting to see and learn the internal inconsistencies of what the patient says, eventually get the patient to recognize that they are distorting in their memory and observation, in order to protect themselves.

And to have this information get into the hands of prosecuting officials or law enforcement officials is really devastating. Even in court procedures, the courts need to ascertain the truth, particularly psychiatric testimony as truth is the farthest thing from reality. It is anything but that.

I do believe that H.R. 214 does have a sincere and laudable purpose of trying to do something about this menace of crime and how can law enforcement agencies get the information to combat crimes of all kinds; whether it is financial crimes, as indicated in some measure by earlier speakers, or crimes against persons or property, is beside the point. I think there is a growing menace of crime, and the question is, how can we reinforce law enforcement to deal with it?

I think what it is doing, it is legalizing procedures that were, and may still be used, but from my point of view—and I would like to explain why—I think that this will fail in its purpose, particularly in terms of medical records.

Mr. KASTENMEIER. Dr. Grossman, you have stated a compelling case for why the records of psychiatric patients should not be given public disclosure, but do you not think there is a distinction to be made between a patient whose fantasies are reported and a different type of medical record such as the medical record a hospital would have as to admission dates of an individual with gunshot wounds? Do you not think some distinctions might be made between these two situations, between the psychiatric patient and the individual who is admitted to the hospital with gunshot wounds?

Dr. GROSSMAN. Well, I would like to answer the two questions. The first answer is, "Yes." The second thing is the gunshot wounds now have to be reported, by physicians and hospitals legally, and there is no exception sought to that. But when they then demand, on the basis, we want your whole record, then there is no distinction between the fact that there was a gunshot wound, the day of the gunshot wound, and other things that may be brought in there, that have to do with the emotional factors and destructive factors that are not particularly relevant to the gunshot wound.

When there are things that ought to be, factual material, we already have laws that indicate that they have to be reported, even before someone asks about them. And if there are such things, then you have another situation, and this is what occurs to me, in reference to H.R.

214, you do not need a law to say you can get that information by subpena; you can do it now. You already have laws where, if you have such information, that a person was admitted for a gunshot wound that was not reported, I think you already have the laws where you can get a subpena to get that record. It does not need a new law.

Mr. KASTENMEIER. Let me use a simpler case, but not the same, not a gunshot wound, some other wound, a knife wound. Does it also cover them?

Dr. GROSSMAN. I think so. Whenever you have an injury of that particular type, there is a legal obligation to report it. If they do not, then the doctor or the hospital has broken the law.

Mr. KASTENMEIER. What you are saying, and I do not want to quibble, is that there are already adequate laws for having access to that sort of medical information, in which society has a compelling interest—sufficient for law enforcement purposes.

Dr. GROSSMAN. That is my understanding. The reason I said I wanted to qualify my yes answer is that my experience has been that they do not merely go in and indicate what information do you have relevant to the situation. They say, I want to see your whole record. They will come in and demand a photocopy of everything in the record.

If they have had multiple admissions, for example, they will go and say, we want a photocopy of all your records, including psychiatric records.

Mr. KASTENMEIER. Could we have a standard which would say information other than psychiatric information may be disclosed?

Dr. GROSSMAN. This would apply to psychiatry, but I am speaking for other physicians. The girl who comes in who is pregnant—nowadays, she can see a physician and get an abortion legally. In the old days—but it is legal now to get an abortion—if they were to disclose that information, she might not have an emotional problem now, but the disclosure of that may create an emotional crisis. So there are some instances of medical information which are, in and of themselves, not psychiatric but emotional, which, if disclosed could create an emotional problem. This is where it gets sticky.

I really do not know what the answer is. I understand what you are trying to say, and recognize that there is a need to get certain information. My concern is that they use these search warrants and subpenas to get a broad category of all information.

I made reference to the fact that the California Supreme Court had a case that had to do with an exception of the psychotherapist's privilege. If the patient is a plaintiff, and if psychiatric records is a part of their complaint, there is no privilege, but the supreme court ruled, in going after the record, they have to limit themselves to the details that are just relevant. The trouble is that the courts find, we do not know what is relevant, unless we make the whole record available, so we are right back where we were.

The point you are raising is a valid one, and the problem is how it applies in actual practice. That is the thing. I really do not know what the exact answer is.

Mr. KASTENMEIER. Let me ask you this, Dr. Grossman. Quite apart from your objections, as I understand them, to H.R. 214, is the present state of Federal and State law with respect to medical records

acceptable to you and to the AMA, or to any other group of people interested in medicine?

Dr. GROSSMAN. I will give you a twofold answer. The first answer is, no. The second answer is, I think you will find it very hard to write a law—we want more than I think we are probably entitled to. The present state is not, but I will try to explain why.

As you recall, when 5463 of last session, that had to do with the Federal Code of Ethics, was passed, all privilege sections were knocked out, and it was substituted 501 that indicated State laws and privilege would apply in the various jurisdictions. The problem is that physician-patient privilege, which began in New York about 1820, or thereabouts, has so many exceptions to it that for practical purposes, it is no protection at all. As a result of that, physicians really have no protection now in the States, and certainly, it was knocked out of the Federal Code.

As I said, seven States have written psychotherapist-patient-privilege law. New York is waiting for the Governor to sign it. They put the exceptions in there. One is patient litigant exceptions. If the patient is the litigant, and his condition is either a part of his claim or a defense, there is no privilege. It is an absolute exception.

In the testimony that I refer to in that little pamphlet, the task force report, I suggested a modification of that, that the judge would have to consider the case on an individual basis before he applied the exception, in order to at least put part of a lock on that barn-door exception that opened up the whole thing.

And also, the Federal proposed code included all physicians. The State codes that I refer to include psychologists and include psychiatrists. But general physicians see the same kind of patients, see the same kind of problems, and have no protection now in any jurisdiction, State or Federal. I would like to see a privilege law that is modified or modeled after psychotherapist-patient privilege, but made to apply to all physicians in similar circumstances.

Mr. KASTENMEIER. I think in conclusion, I would observe, that on the basis of the testimony that we have heard today, including that of Dr. Grossman, H.R. 214 treats the subject too superficially to be relied upon in its present form.

I think that the testimony today was very enlightening and helpful in suggesting the shortcomings of the bill before us in the area of medical, financial, and banking records.

Dr. Grossman, on behalf of the committee, let me express our gratitude and appreciation to you, not only for the work you have done in this field in the past, but particularly for appearing today. If we need to rely upon you in the future, perhaps we might again consult with you.

Dr. GROSSMAN. I appreciate being here. I appreciate your kindness to hear me out, and I hope that I can be available, should you want to make further inquiry.

I do thank you.

Mr. KASTENMEIER. This concludes today's hearing on H.R. 214. We will recess subject to a future call of the Chair.

[Whereupon, at 1:20 p.m., the committee recessed, subject to the call of the Chair.]

CONGRESS OF THE UNITED STATES,
COMMITTEE ON THE JUDICIARY,
Washington, D.C., March 21, 1975.

The PRESIDENT,
The White House,
Washington, D.C.

DEAR MR. PRESIDENT: As Chairman of the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, I have legislative responsibility and concern regarding surveillance techniques. Pursuant to these responsibilities, the Subcommittee heard testimony from Mr. William J. Cotter, Chief Postal Inspector of the Untied States Postal Service, on Tuesday, March 18, 1975. Mr. Cotter verified reports that the Central Intelligence Agency maintained a program of intercepting, opening, and reproducing the mail of American citizens.

Mr. Cotter, however, was unable to assure the Members of the Subcommittee that no such program is currently in existence. Mr. President, as you know, the privacy of the public's mail is a matter of serious concern, and I ask that you promptly review the situation and give the public assurances that there is no current program of opening the mail of United States citizens except as provided by law.

Sincerely yours,

ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice.

THE WHITE HOUSE,
Washington, D.C., April 21, 1975.

HON. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in further response to your letter to the President of March 21 concerning intercepting, opening and reproducing the mail of American citizens. Let me say at the outset that we share your concern for the privacy and other important Constitutional rights of U.S. citizens.

With respect to your specific inquiry, I should like to draw to your attention the testimony of CIA Director William E. Colby last January before the Senate Appropriations Committee. Mr. Colby stated that:

"From 1953 until February 1973, CIA conducted several programs to survey and open selected mail between the United States and two Communist countries. One occurred in a US city from 1953 to February 1973, when it was terminated. One took place during limited periods in one other area in November 1969, February and May 1970 and October 1971. One other occurred in August 1957. The purpose of the first and extended activity was to identify individuals in active correspondence with Communist countries for presumed counterintelligence purposes, the results being shared with the FBI. The others were designed primarily to determine the nature and extent of censorship techniques. The August 1957 case was to try to learn the foreign contacts of a number of Americans of counterintelligence interest. I repeat that there has been no mail survey in this country by CIA since February 1973."

I believe that Mr. Colby's statement is adequate assurance that the Central Intelligence Agency has no current program of opening the mail of United States citizens.

Very truly yours,

PHILIP W. BUCHEN,
Counsel to the President.

SURVEILLANCE

MONDAY, SEPTEMBER 8, 1975

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, in room 2226, Rayburn House Office Building, at 10:15 a.m., the Honorable Robert W. Kastenmeier [chairman of the subcommittee] presiding.

Present: Representatives Kastenmeier, Danielson, Drinan, Pattison, and Railsback.

Also present: Bruce A. Lehman, counsel; Timothy A. Boggs, professional staff member; and Thomas E. Mooney, associate counsel.

Mr. KASTENMEIER. The committee will come to order for the purpose of further consideration of H.R. 214 and other bills affecting the right of privacy.

Historically, Americans were able to protect the privacy of their personal papers and financial records by keeping them under their own control within the protective boundaries of their homes or places of business. Increasingly, however, we must share this sensitive information with financial and credit institutions.

As the Supreme Court of California recently observed: "Disclosure of financial affairs to a bank is not entirely volitional, since it is impossible to participate in contemporary society without maintaining a bank account."

The same court also recognized the extent to which financial records can reveal our private secrets stating, "A bank depositor reveals many aspects of his personal affairs, opinions, habits, and associations. Indeed, the totality of bank records provides a virtual current biography."

The legislation under consideration by the subcommittee this morning—H.R. 214, the Bill of Rights Procedures Act—recognizes the increasing importance of bank and credit records in our private lives and provides for the first time, that these records be brought under the protection of the fourth amendment. The bill would prohibit inspection or procuring of bank and credit records by any Federal agent unless a warrant based on probable cause that a crime had been or was about to be committed had just been obtained.

This morning's hearing was originally scheduled as the first of 2 days of hearings which were to have been held on July 24 and 25. However, it was necessary to postpone the first of those 2 days until today due to a conflict in scheduling with the full Judiciary Committee.

The subcommittee was able to hear from Congressman Pete Stark and Mr. James Merritt of the Crocker National Bank on July 25, however. Both Congressman Stark and Mr. Merritt recommended that the subcommittee consider amending H.R. 214 by substituting for its financial privacy section, the provisions of H.R. 2752, Congressman Stark's proposed Right to Financial Privacy Act. Briefly, H.R. 2752 retains for Federal agents a range of investigative techniques broader than those authorized by H.R. 214, while providing for adequate protections for personal privacy. These investigative techniques are: inspection with customer consent, inspection by means of an administrative summons issued after notification of the bank customer, a search warrant based on probable cause, and a judicial subpena issued by a court.

Our witness this morning is the Honorable Donald C. Alexander, Commissioner of the U.S. Internal Revenue Service. I understand that Commissioner Alexander's statement will address both H.R. 214 and Congressman Stark's proposed amendment H.R. 2752.

Before proceeding, I would like to announce that the subcommittee will not hear from the International Conference of Police Associations, as announced, because they have withdrawn their request to testify.

We understand that the conference has dropped earlier objections to the bill which it had desired to make known to the subcommittee.

On behalf of the entire subcommittee I would now like to welcome Mr. Donald C. Alexander, Commissioner of the U.S. Internal Revenue Service.

I realize, Mr. Commissioner, that you have had to appear before many congressional committees this year, and I hope our request has not added unduly to your burdens. We appreciate your being here this morning, sir.

TESTIMONY OF HON. DONALD C. ALEXANDER, COMMISSIONER, U.S. INTERNAL REVENUE SERVICE, ACCOMPANIED BY WARREN BATES, ASSISTANT COMMISSIONER, INSPECTION; WILLIAM E. WILLIAMS, DEPUTY COMMISSIONER; MEADE WHITAKER, CHIEF COUNSEL; SINGLETON B. WOLFE, ASSISTANT COMMISSIONER, COMPLIANCE; AND ROBERT H. TERRY, COMMISSIONER, ACCOUNTS, COLLECTIONS, AND TAXPAYER SERVICE

Mr. ALEXANDER. Thank you, Mr. Chairman, and it has not added unduly to the burdens of the Internal Revenue Service, because we welcome the opportunity to discuss this very important issue with your committee.

I would like to introduce those at the table with me. On my left is Mr. William E. Williams, Deputy Commissioner of Internal Revenue, and on Mr. Williams' left Mr. Warren Bates, our Assistant Commissioner, Inspection. On my immediate right, Mr. Meade Whitaker, Chief Counsel of the Internal Revenue Service, and on Mr. Whitaker's right, Mr. Singleton Wolfe, our Assistant Commissioner, Compliance.

With your permission, I would prefer not to read my prepared statement, but instead to summarize it, and have it inserted into the record.

Mr. KASTENMEIER. Without objection, we will be pleased to accept your statement.

I have a statement which is dated July 4, 1975. We will accept that for the record and you may proceed.

Mr. ALEXANDER. We have a further statement of September 8, 1975, Mr. Chairman, and I would hope that you would have that.

Mr. KASTENMEIER. Without objection, your statement of September 8, 1975, will be incorporated in the record in full.

[The prepared statement of Hon. Donald C. Alexander follows:]

STATEMENT OF DONALD C. ALEXANDER, COMMISSIONER OF INTERNAL REVENUE SERVICE

Mr. Chairman and members of the subcommittee: Let me begin by expressing my appreciation for the opportunity to meet with you and discuss the provisions of HR 214, "The Bill of Rights Procedures Act of 1975." Certainly, none of us here is unmindful of the issues and events which have led Mr. Mosher and many others to support the measures embodied by HR 214. And certainly, the policy and procedures of the Internal Revenue Service are in complete consonance with the principal thrust and most of the provisions of the proposed legislation. The Bill does contain, however, one provision which would severely restrict our current tax law enforcement activities, and ultimately would seriously threaten the Service's ability to mount an equitable, professional compliance program. I am referring here to that portion of HR 214 which provides for the amendment of Section 2236 of Title 18 of the U.S. Code to bar the procurement or inspection of records of telephone calls, or the bank, credit, medical, or other business or private transactions of any individual.

Access to the records of an individual's or organization's financial transactions is necessary to permit the Service's agents to determine whether a taxpayer has filed a correct return. In those cases where the taxpayer has failed to file a return, access to financial records is essential in order to permit the Service to establish the amount of tax due. When the taxpayer refuses to permit the Service's representatives to have access to those records in his or her possession, or when the records in the taxpayer's possession are inadequate to make the proper determination, or when we must seek corroboration of the validity of the taxpayer's records, the Service must be able to gain access to relevant documentation in third party hands. Since the bulk of our enforcement activity is in the civil area rather than criminal, and would thus not merit the issuance of a search warrant, HR 214 would effectively bar the Service from access to records in third party hands in the majority of our investigations.

Further, the basic purpose of our Intelligence Investigations is to determine whether or not a tax crime has been committed. In most cases, we would be unable to ascertain whether a crime has been committed prior to examination of the records in question. Absent access to financial records, we would have to rely largely upon informants to establish probable existence of a crime. And, even then, we would ultimately require the corroboration of the financial records, *as we do now*, before we could satisfy ourselves as to the actual existence of any tax crime.

The IRS summons authority is contained in 26 U.S.C. 7602, and has its roots in federal statutes going back over 100 years. From the inception of the nation's first income tax legislation during the Civil War, this summons power and the access to financial data which it provides were viewed as intrinsic to the revenue collection process. This authority is critical to the orderly administration of the tax laws not only because it permits our agents and officers to readily determine the correctness of a return, to "make" a return where none has been filed, and to determine the proper amount of tax due, but also because it aids our ability to collect outstanding tax liabilities through the discovery of assets which may have been concealed, or are otherwise not readily apparent.

In short, the access to and use of such financial information is integral to the daily tax administration process, and is not merely an adjunct of the Service's less frequent criminal tax enforcement activities. The Supreme Court recognized this view regarding 26 U.S.C. 7602 earlier this year in *United States v. Bisceglia*, (95 S. Ct. 915, 919), when it stated that:

> The purpose of the statutes is not to *accuse*, but to *inquire*. (Emphasis Added). Although such investigations unquestionably involve some invasions of privacy, they are essential to our self-reporting system, and the alternatives could well involve far less agreeable invasions of House, business, and records.

The basic nature of the Service's investigative authority is further defined in *United States vs. Powell*, 379 U.S. 48, 57 (1964), which explains Internal Revenue's broad powers of investigation by analogy to the Grand Jury.

Mr. Chairman, I am not unmindful of the power implicit in these two court findings. The Service has long recognized the responsibility which it bears in administering this power. Our procedures regarding the use of the administrative summons clearly reflect this concern. The provisions of the Intelligence portions of the Internal Revenue Manual dealing with General Investigative Procedures make clear the rights and obligations of witnesses and taxpayers under the Fourth, Fifth, and Sixth Amendments. The discussion of the use of the administrative summons makes it clear that the first duty of the Service representatives is to obtain all information from taxpayers and third parties voluntarily. Several reflective, cautionary paragraphs of our investigative procedures spell out the seriousness attendant upon the issuance and enforcement of a summons, all bearing out the basic message that a summons should be issued only when other avenues of achieving voluntary access have been exhausted, and when the value of the information sought will clearly outweigh the time, expense and legal impact involved.

To provide the Committee with some sense of scale regarding our actual use of administrative summonses, Mr. Chairman, I would have liked to present you with some comprehensive Service-wide statistics. Unfortunately, I have found that we have not kept data on this aspect of our operations and that the one significant study which we made in this area, some 6 or 7 years ago, was of questionable validity. It seems reasonably certain, however, that the Service issues administrative summonses by the thousands each year. Let me just add, by the way, Mr. Chairman, that if someone asks me this question a year from now, I intend to be able to give a considerably more definitive answer.

Now we are well aware, Mr. Chairman, that the issuance of several thousand summonses, even though they may represent less than a fraction of one percent of our total enforcement cases and collection accounts, still looms large in the eyes of this Committee, and others concerned with the implications of this power vis-a-vis the personal privacy of American citizens. Because of this, we are carefully examining all aspects of our use of the administrative summons, and have recently issued instructions to the field tightening up on our summons procedures. From now on, for example, advance supervisory approval will be necessary for the issuance of third party summonses. Moreover, Mr. Chairman, I believe it is extremely important that the Committee take particular note of the fact that the Service's summons authority is not an unbridled one, in spite of its broad power. As the Supreme Court indicated in the *Bisceglia* decision, the public is afforded substantial protection from any potential abuse of this authority "by the provision that an Internal Revenue Service summons can be enforced only by the courts." Thus, should a financial institution or a taxpayer feel compelled to resist compliance with an IRS summons, the issue must be referred to a court for resolution before any further action may be taken. The court emphasized that, "Once a summons is challenged, it must be scrutinized by a court to determine whether it seeks information relevant to a legitimate investigatory purpose, and is not meant 'to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other reason reflecting on the good faith of the particular investigation'."

In summary, Mr. Chairman, I believe that our record of performance, coupled with our own circumspect procedures and the judicial constraints on summons enforcement combines to present a sound mechanism for responsible tax administration. And we are not resting on this status quo. As an example, earlier

this year, when the *Bisceglia* decision brought the question of IRS summons authority before the general public, we reviewed our procedures once again, and in the case of so-called "John Doe" summonses, we raised the level of approval. Now, we do not issue a "John Doe" summons without prior concurrence by the appropriate Division Chief and the Regional Counsel.

Another piece of pending legislation, HR 2752, the "Right to Financial Privacy Act of 1975", presents a different approach to the issue of protecting the individual whose financial transactions are reflected by records in third party hands. Under HR 2752, the customer would have the same rights with respect to the records of transactions of banks and other financial institutions as if those records were in his personal possession. Although the mechanics provided by HR 2752 would differ substantially from those under HR 214, the net impact upon the Service's operations would be much the same; our normal compliance procedures would be largely abrogated.

As I indicated in my comments regarding H.R. 214, the Service requires access to third party financial records in order to corroborate a taxpayer's records, or to establish proper tax liability absent access to taxpayer's records. HR 2752 would insert the taxpayer between the Service and any financial institution by requiring that, before the IRS may gain access to records in institutional hands, it must first serve an administrative summons on the taxpayer, who would have the option of either approving the institution's cooperation with the Service or directing the institution to withhold access.

In some cases, such approval would be forthcoming, since taxpayers often cooperate with the Service in attempting to establish their proper tax liability. In other cases, however, we would be seeking access to institutional records because the taxpayer has already denied the Service access to his or her own records, principally upon Fifth Amendment grounds. The prior notification aspects of HR 2752 would permit such taxpayers to seek injunctions delaying access, to remove records from third party hands, or to otherwise delay IRS enforcement of the tax laws. Moreover, and most basic of all, HR 2752 would stipulate that the taxpayer would have the same rights to records of his or her financial transactions held by financial institutions as if those records were actually in the taxpayer's personal possession. This would have the effect of extending to all customers of financial institutions Fifth Amendment protection of the records held by these institutions. This would, in turn, substantially curtail the Service's ability to secure proof of both civil and criminal tax law violations in a large portion of its normal audit, collection, and intelligence cases. Using the provisions proposed by this measure, noncompliant taxpayers could easily prevent Service access to one of our most important sources of evidence of tax law violations.

The Service subscribes to the widely-held view that commercial financial transactions are in the "stream of commerce", whereby records of such transactions are not subject to the protections afforded by the Fourth Amendment, save when such records are in the personal possession of the taxpayer. Under this view, records in the hands of third parties are also not subject to the Fifth Amendment provisions regarding self-incrimination. The Supreme Court has endorsed this position in *California Bankers Association, et al. vs. Shultz*, (416 U.S. 21; 1974). In this decision the Court, discussing the record-keeping requirements of the Bank Secrecy Act of 1970, made some basic statements concerning records for revenue purposes:

> The fact that a large number of banks voluntarily kept records of this sort before they were required to do so by regulation is an indication that the records were thought useful to the bank in the conduct of its own business, as well as in reflecting the transactions of its customers. We decided long ago that an Internal Revenue summons directed to a third-party bank was not a violation of the Fourth Amendment rights of either the bank or the person under investigation by the taxing authorities.

In this same decision, the Court further held that a depositor-plaintiff incriminated by evidence produced by a third party sustains no violation of his or her own Fifth Amendment rights. As I say, we are in complete agreement with the Court's position in this decision and numerous others sustaining the general view that the records kept by financial institutions regarding their customers' transactions are the property of the institutions, and not the customers.

In summary, Mr. Chairman, we are aware of the Committee's concerns regarding the potential for abuse of power represented by the Service's administrative summons authority. I hope that the nature of my remarks to you here today has indicated to you the degree to which I actively share your concern. But I am deeply disturbed at the thought that enactment of HR 214, HR 2752, or similar proposals would substantially curtail the Service's ability to obtain the information necessary to administer and enforce the revenue laws. I do not believe that the interests of this Committee and the IRS are incompatible, however, and I believe that there are areas in which we can find common ground. In particular, we believe that the notification of bank customers that the IRS has examined their records would be an acceptable arrangement in most audit cases. Further, we would agree that financial institutions should keep a detailed log of who has had access to records concerning customer transactions. In conclusion, Mr. Chairman, we would like to work closely with you in the development of further legislative proposals in this area.

Mr. ALEXANDER. Thank you, Mr. Chairman.

The Internal Revenue Service shares the concerns of this committee about taxpayer privacy, and particularly the privacy of individuals.

We are here today to discuss with you the question of striking a proper balance between protection of individual privacy and maintaining an effective, a comprehensive, and a fair tax system, that depends, as ours does, upon the willingness of more than 80 million individuals to comply with the system.

Our system of self-assessment is almost unique in the world. While like every institutional system it is not perfect, we know of no better tax system. It is our duty to maintain its effectiveness and to maintain its fairness. It is our duty to obtain the information that we must have to supplement that that is voluntarily given us, but to obtain only that information, and to obtain it in a way that is mindful of not only the Constitution, but of the right to individual privacy transcending the Constitution. The policies and procedures of the Internal Revenue Service are consonant with the principal thrust of most of the provisions of the proposed legislation.

The bills H.R. 214 and 2752 contain one provision that would severely restrict our current administration and enforcement of the tax laws, and threaten our ability to maintain the effective and the fair tax system that you have a right to expect from us.

You mentioned the provision relating to access and limiting access to financial records without a search warrant, or the consent of the particular individual. Well, access to an individual's or an organization's or a business entity's financial transactions is necessary in the enforcement of the tax laws, to determine whether that person or that entity has filed a correct return. It is essential if that person has not filed a return, and we are engaged in the effort which we must make to determine whether that person should have filed a return.

Most of the vast store of information that the Internal Revenue Service acquires is given to us voluntarily, but we must obtain information from those who don't or won't supply it to us, and information to supplement—or in some cases correct—that which is supplied to us. Since the vast bulk of this activity is in civil rather than criminal cases, and therefore would not merit the issuance of a search warrant, the provision that concerns us in H.R. 214 would effectively bar the

service from access to records in third-party hands in almost all of our investigations.

Last year the Internal Revenue Service conducted 2,465,000 audits, of which the majority were audits of individual taxpayers. We had less than 10,000 criminal investigations, and less than 3,000 of these reached the prosecution recommendation stage. Although it is the civil side that gives us most concern in connection with H.R. 214 and 2752, our Intelligence Division, in attempting to determine whether a tax crime had been committed, would be similarly restricted. We might be forced to rely largely upon informants, in order to establish the probable existence of a crime, and the Internal Revenue Service is limiting the use of informants, for we found that problems which have not escaped the scrutiny of Congress and the press, have arisen in some cases where informants were utilized as a means of developing information with respect to probable or possible tax crimes.

We believe the access to and use of financial information is vital to our daily tax administration process, and we have had this access under present section 7602 of the Internal Revenue Code and its predecessor for over 100 years.

The Supreme Court earlier this year addressed the question of John Doe summons—the use of a summons where the identity of the taxpayer is unknown. The Chief Justice stated in his opinion upholding the use of a John Doe summons: "We recognize that the authority vested in tax collectors may be abused as all authority is subject to abuse. However, the solution is not to restrict that authority so as to undermine the efficacy of the Federal tax system which seeks to assure that taxpapers pay what Congress has mandated and prevents dishonest persons from escaping taxation, and thus shifting heavier burdens to honest taxpayers."

This statement of what we have an obligation to do, and what we have an obligation to do reasonably and sensibly and mindful of the rights of individual privacy, is what we are seeking to do.

The same problems, of course, arise in connection with the approach used in H.R. 2752. Giving a fifth amendment privilege to bank records would, we think, be a step of concern to the Chief Justice when he warned against "restricting that authority so as to undermine the efficacy of the Federal tax system."

We have taken certain steps earlier this year and more recently to reexamine our procedures in connection with summonses and to tighten up on these procedures. For example, immediately after the decision in the *Bisceglia* case in the Supreme Court to which I referred, upholding our right to use John Doe summonses, we tightened up on the exercise of that right by requiring approval—as a condition to the issuance of such a summons—by the chief of the particular division employing the investigative officer, and approval by regional counsel, our lawyers. We now require advance supervisory approval for all third party summons.

I would like to correct my statement, at the top of page 6 of the September 8 version, indicating that there is an exception for criminal cases. We require this approval in all cases now, Mr. Chairman.

We propose to change the form of our administrative summons. The back of the form contains excerpts from the Internal Revenue Code concluding with an excerpt from the provision imposing penalties upon those who would willfully refuse to comply.

The American Bankers Association has produced a banker's guide to IRS procedures for examinations of customer records and levies on customer, and they did a very good job in spelling out both our rights and our obligations, and their rights to question an administrative summons, and to challenge it. The well advised know their rights. The poorly advised do not. It is up to us to make sure that all know their rights.

Another matter of concern to the banks, and discussed in this banker's guide, is the cost imposed upon the custodians of financial records by our calls upon those custodians for the production of records. We are concerned about this problem as well, and this morning we were exploring a solution by which we would pay the same amounts for the same documents as we call on the public to pay under the Freedom of Information Act when the public is requesting information from us.

A legislative solution might be in order here, Mr. Chairman, and we would welcome the opportunity to work with this committee in the furtherance of striking a reasonable balance between individual rights to privacy and our duty to administer the Internal Revenue laws.

Thank you.

Mr. KASTENMEIER. Thank you, Commissioner Alexander, for a helpful and illuminating statement.

In order to ascertain how the revenue service views this area of activity in terms of protection, let me ask you the following: The traditional test used by the Supreme Court in determining what is constitutionally a protected area of personal privacy is whether the activity in question enjoys the "expectation" of privacy.

I would ask you, do you feel that most Americans do or do not have an expectation that a bank or credit institution will keep their records confidential?

Mr. ALEXANDER. I will try to answer that difficult question as best I can, Mr. Chairman. All of us are governed by our backgrounds. My background was that of a private practitioner in the tax field before I assumed my present position.

I would think that most Americans believe that there are certain rights of access on the part of the Government to their bank records, and one of those rights is a right by the Internal Revenue Service, exercisable however only in good faith, and limited by a standard of relevance as well as a test of good faith. I think that would be the expectation of individuals, and that was the expectation of the individuals with whom I was in contact when I was in private practice.

Now, of course, I am looking at this issue from the standpoint of my present obligations, and perhaps I can't see it as clearly as I should.

Mr. KASTENMEIER. Let me ask further, and I ask this out of ignorance I suppose; I don't know what the practices have been. I know

there have been in recent years allusions, made in other proceedings of this committee that the Internal Revenue Service has from time to time exercised selective standards for such inquiry based on other than a belief that the individual may not have filed a return or paid a sufficient amount. Whether these are political or whether these are organized crime types or whatever, I suppose most Americans could even now sympathize with an effort that was directed to, let's say, organized crime.

The question I pose to you is a general one. To what extent is there a policy, previously existing or currently existing, which selects out individuals or groups for reasons other than expectation of a tax violation?

Mr. ALEXANDER. We have attempted to eliminate selective enforcement. I am not certain that in an agency as large as the Internal Revenue Service, with as many investigators as the Service has, using the term "investigators" very broadly, that that effort will ever be fully successful, but the effort is surely necessary, and I think that it is being successful.

First the question of selective enforcement of those whose views—social views, economic views or political views—may not coincide with that of the majority or the group in power, is completely antithetical to sound, fair and reasonable administration of the tax laws. I hope that not only the present Internal Revenue Service but the future Internal Revenue Service will find no basis whatever for any selective enforcement based upon such an improper standard.

Second, the question whether different rules should be applied to those who meet their obligations as citizens but for their failure to meet their tax obligation, and those who are generally beyond the pale in meeting their obligations: organized crime figures, narcotics traffickers, and even the professional who refuses to abide by the laws. Some think that there the Internal Revenue Service was marching, to some extent, down the wrong street that in its zeal to enforce the tax laws against those who are unwilling to abide by other laws, against those who make their living from questionable activities, perhaps the Service could find itself using the tax laws as not a tool but a weapon. The tax laws are not designed to be used as a weapon.

Surely modern-day Al Capones should be called on to meet their tax obligations or face the penalties for not meeting them, but they should be called on because they have failed to meet their tax obligations, not because of who they are. Otherwise we get into the matter of making choices, and making choices without regard to the most effective means of utilizing the limited resources available to us is an area which, in the judgment of those now in charge of Internal Revenue, does not lend itself to sound, effective, comprehensive tax enforcement.

Mr. KASTENMEIER. I couldn't agree with you more, even though as much as anyone I would like to see certain people brought to justice, but to use the tax laws in a way not originally conceived I think is a distortion, using it either for punitive or law enforcement purposes other than those directed to the question of taxation itself.

You indicate that even the provisions of H.R. 2752 providing for administrative summonses go too far to permit the Internal Revenue Service to comply effectively with its mandate as a law enforcement agency. Other than the present practice, is there any other way, any other mechanism, which you are aware of, with which you could live, and yet would provide a measure of appropriate security to those who would want to be protected against what they would consider review of their bank records in an unnecessary fashion?

Mr. ALEXANDER. On the last page of my statement, on page 10, I mentioned one item which I did not touch on when I summarized our position, notification to customers. H.R. 2752 calls for prior notification and a right to refuse. We think that would hamstring us in trying to administer the tax laws, but contemporaneous notification to the customer, notification to the individual at this point, is now a matter of choice of the financial institution. We are suggesting here that contemporaneous notification might be added as a mandatory standard, but we are not suggesting prior notification because of the problems that prior notification and the other aspects of H.R. 2752 would we think create for tax administration.

Mr. KASTENMEIER. After the fact notification or contemporary notification?

Mr. ALEXANDER. Contemporary or after the fact notification, and taxpayers have rights at this time, as I mentioned, to contest administrative summons. These rights are, of course, spelled out in this banker's guide.

We would propose, in our change of the summons form, to make the unwary as well as the wary aware of their rights.

Mr. KASTENMEIER. Yes; I appreciate that.

Let me back up a moment.

We determined earlier that it is your policy that individuals and groups not be selected out for any other reason than for tax purposes for such investigations.

On what basis presently do you conduct investigations, on random selection, or is there some sort of reason that you have for selecting, for the purposes of examination of bank records, for that alone, singling that out, financial institution records, for desiring access?

Mr. ALEXANDER. The question of examination of bank records will come after there has been this initial selection process for audit.

Mr. KASTENMEIER. And the selection process is done on the basis of review?

Mr. ALEXANDER. The selection process is not based on a random sample. It is based in large measure upon a scientific system and an objective system that we call discriminate function, or DIF. Based upon a computer examination of a number of factors on a taxpayer's tax return, the computers check these individual tax returns to see which ones are most in need of correction. The success of this particular program, as objective as humans can make it, is shown by the fact that our rate of no change, that is audits that resulted in no change in liability, has decreased from over 40 percent before we instituted this program to 23 percent last year, the lowest in history.

We believe that a purely objective system of selection is the best possible system, given the self-assessment system that we have in this law of ours, and we also believe that we should have a top heavy audit program, that we should audit a much larger proportion of those with high incomes than we do of those with low incomes, so we audit only about 1 percent of those in our lowest category, $10,000 and under using the standard deduction, while we audit a far, far higher percentage of individuals with adjusted gross incomes of $200,000 or more, and we eyeball or check, take a quick look, at all such individual returns.

As far as investigations of those who haven't filed returns with us at all, we have a different problem, because the computer there is not helpful to us except in indicating that an individual may have filed a return in a prior year or years, and therefore we should be interested in finding out why that individual has stopped filing with us. There we rely on canvasses. We rely on the use of such things as the Yellow Pages, to try to see whether people who should be filing returns with us or should be on our mailing list are not on our mailing list.

Mr. KASTENMEIER. Obviously in terms of access banks I assume they have been cooperative. To what extent does a bank have or not have the right to fail to cooperate with the Internal Revenue Service in terms of bank records? Does the law require their total cooperation and compliance, or do they have the right to withhold full cooperation from you?

Mr. ALEXANDER. Banks have the right to withhold cooperation from us under certain circumstances, and I would like, Mr. Chairman, if I may, to make part of the record this banker's guide to which I referred, which spells out with particularity rights as well as obligations of banks.

Mr. KASTENMEIER. Without objection, we will be pleased to accept the material you referred to. It is the ABA work.

Mr. ALEXANDER. Yes; put out by the American Bankers Association in 1974. It is relatively current. Of course, the *Bisceglia* case was decided in 1975 dealing with John Doe summons. Banks can question relevance. Banks can question whether the summons may impose an undue financial burden, as I mentioned. We are proposing to deal with this issue.

[See p. 504 for publication referred to.]

Mr. Chairman, in the *Bisceglia* case itself the bank questioned the breadth of the summons as initially issued, and the summons was modified by the Federal district court to narrow it down. Banks are concerned about whether our inquiry into the financial affairs of taxpayer A may expose to us the affairs of taxpayer B, C, and D.

We like to prevent imposing financial burden on the banks, by copying what we need ourselves, and by finding it ourselves. Banks are, and with good reason, concerned about our searching their records, so on frequent occasions they conduct the searches themselves at their expense in many situations, find the information that we need, that is relevant to our inquiry, and give it to us.

Mr. DRINAN. Mr. Chairman?

Mr. KASTENMEIER. The gentleman from Massachusetts.

Mr. DRINAN. Commissioner, I wonder if many banks have adopted precisely what is in the section that we are talking about here, section 3 of the bill, namely, that they require the consent of the individual before they will collaborate with IRS.

Mr. ALEXANDER. I am not sure whether I can respond to that, Father Drinan. Perhaps Mr. Wolfe would be in a better position than I to respond to your specific question.

Mr. WOLFE. As a general rule the banks do not do that. They do want to be protected, so they will request that we give them a summons. We quite often refer to this as a friendly summons, and on occasion we will also, before we go, ask the taxpayer to give us a letter of authorization, but as a general rule the banks do not challenge unless the summons in their opinion is so broad so as to cause an undue amount of work on their part.

Mr. DRINAN. What does the banker's guide say about the duty or the right of a bank to state to IRS "You are not going to see any deposit here unless the depositor knows about it"?

Mr. WOLFE. I read that. It has been some time since I read it.

Mr. Commissioner, do you have that part handy?

Mr. ALEXANDER. I thought, Father Drinan, that there was a statement in part of this pamphlet that discusses administrative summons of bank records and the notification of the particular customer, but I cannot find it at this particular time. I think that for the sake of good customer relations a bank would want to notify the customer, and a bank should. As I suggested earlier, Father Drinan, I wonder whether there shouldn't be a requirement administratively imposed—or perhaps legislatively imposed—as a condition to the service of a third party summons that notification be given to the taxpayer at the time.

Mr. DRINAN. Why doesn't IRS do it? The one concession you make on page 10 is that "We believe the notification of bank customers that the IRS has examined their records would be an acceptable arrangement."

Why doesn't IRS send them a post card? That solves the problem to some extent.

Mr. ALEXANDER. Yes; in this consideration of modifications of our procedures that we are discussing, Father DRINAN, we do include that as one of the items to be considered. Notification, of course, involves certain costs as well as certain benefits. Perhaps in the past the costs were considered not to be commensurate with the benefits.

Mr. KASTENMEIER. Will you yield to the gentleman from Illinois on the same point raised by the gentleman from Massachusetts?

Mr. Railsback. Mr. Alexander, I can understand how requiring a subpena with a showing of probable cause could really create problems. I think you make that point very well, but what I am wondering is what would be wrong? Right now your administrative summons is directed to a third party oftentimes. Take the *Bisceglia* case. In that case, assuming that it was a bank involved, and bank would have to be the one to resist, and not the individual taxpayer himself or herself who has received absolutely no notice.

I wonder what would be wrong—this is right along the same lines as Bob Drinan—with having the IRS simply give a notice of summons, and then give that individual, who is directly affected while the bank isn't, a certain period of time within which to do what was done in the *Bisceglia* case, maybe to challenge the breadth of the summons.

Mr. Alexander. If we were dealing entirely with scrupulous individuals, then your proposal would have very great merit. Unfortunately, we are not. Unfortunately, a requirement of prior notification with a corresponding right to delay——

Mr. Railsback. Not prior. Let me make it clear. I think that a summons, once served, would probably have the same effect as a subpena duces tecum. It would literally freeze in the bank's hands those materials or documents. What I am talking about is kind of a simultaneous notice of summons.

Now the value in doing that would be this: You would not have your probable cause showing. You would have exactly what you have now, except you would, in effect, be giving the taxpayer the opportunity to resist if he saw fit, by going to court.

Mr. Alexander. Yes. Well, the simultaneous notice is the point that I was attempting to address. The prior notice in H.R. 2752, as well as the fifth amendment privilege, are the points that give us trouble in H.R. 2752.

Mr. Railsback. Let me just ask you one other question, and this is really my interest. I think that perhaps we could protect the Service and at the same time afford the taxpayer, who is directly affected, the right to judicially resist. I think in most cases he would not resist.

Mr. Alexander. Probably in most cases he would not, if, as it certainly should be, the summons were not too broadly drawn and the summons were issued in good faith.

Mr. Whitaker, do you have any comments on this point of Mr. Railsback?

Mr. Whitaker. You might want to comment, Mr. Commissioner, on the effect on collections of issuing a simultaneous notice to the taxpayer when a summons is issued to a third party.

Mr. Alexander. We have been talking about audits, Congressman. In collection we have a different problem and one to which I think you adverted. If the summons froze the account at the time that it was issued, and notice given, we would have one thing, but if the taxpayer, and again I am talking about the few who are unscrupulous rather than the many who comply, if the unscrupulous taxpayer is given a chance to make off with the funds, one can reasonably expect the taxpayer to take advantage of that opportunity.

Mr. Railsback. I can understand that.

Now I refer you to the banker's guide to IRS procedures. I think it is the last paragraph in B, where they specifically say:

> The bank may not avoid the problem of a summons by turning the records over to the taxpayer and then responding to IRS by saying the bank no longer has the records. In that situation a bank could be found guilty of civil contempt and liable to the government for damages.

I think that perhaps we could strike an accord, and maybe even strengthen that and spell it out, but at the same time give the taxpayer some notice, but simultaneous and not advance notice. You might think about that.

Mr. ALEXANDER. I certainly will, Mr. Railsback, and I will think about how this would operate in both our collection process as well as our audit process, because while the bank might be called on to preserve the records by reason of a summons, the bank would presumably not be called on to preserve the funds by reason of that summons, unless we served a simultaneous levy.

Mr. WHITAKER. There are, Mr. Railsback, one or two other circumstances which certainly ought to be kept in mind in drafting this type of legislation. One involves in the *Bisceglia* type case, which is unusual. Nevertheless, in that circumstance the Internal Revenue Service had no way to determine who the taxpayer was. It was a matter of getting information which only the bank had. There would be no way that the Service could have given notice in that case.

There are other instances, which come up in collection a great deal, where what the Service needs to know is whether or not a taxpayer has an account or the name and address of a taxpayer. Sometimes the Internal Revenue Service needs to know what kind of records the bank has, and certainly consideration should be given to letting this type of preliminary inquiries be made so that the Service can, in the final analysis, determine whether it needs records from the bank at all.

I am simply saying that there are certain steps which need to be taken into account to avoid too much burden on everybody, including the banks and the taxpayer.

Mr. KASTENMEIER. Do I understand that in addition to collection and levying as a problem which prior notification would involve, you mentioned before the unscrupulous taxpayer, that you feel that the taxpayer could cause the records to be removed from the bank prior to the effective time or date of such summons? What tactic could an unscrupulous taxpayer employ other than removing his funds from a bank?

Mr. ALEXANDER. Although recognizing the statement that Congressman Railsback read, and the authority cited for that conclusion, we would hesitate to rely upon that as a full deterrent against the unscrupulous taxpayer taking advantage of prior notifications to remove not only funds but records.

Mr. KASTENMEIER. Is it the practice than an individual may go to the bank and ask for all records pertaining to his financial transactions and cause the bank to deliver to him all such records, or does the bank in fact have the right to retain such records?

Mr. ALEXANDER. We are discussing, sir, the relationship of the individual depositor to the bank rather than the relationship of one of our investigators. I don't know.

Mr. WHITAKER. It is my understanding of the law, Mr. Chairman, that the banks' records are properly the banks and the bank has an absolute right to retain them.

Mr. KASTENMEIER. If that is the law, is that also the practice?

Mr. WHITAKER. In my own experience, like the Commissioner, in the private practice of law, most banks keep their records or microfilm them simply for their own protection. They sometimes will destroy or turn back——

Mr. KASTENMEIER. Therefore, prior notification would not be particularly tactically damaging to the Internal Revenue Service, except to have a taxpayer remove funds from such a bank. He could not come into possession of all of the records. The bank would certainly retain whatever records would be the normal practice to retain.

Mr. WHITAKER. I think there are some fairly rare circumstances where an investigation may be jeopardized by the taxpayer knowing about it ahead of time, but maybe Mr. Wolfe could comment on that better than I.

Mr. KASTENMEIER. It may be a small point, but I am curious as to what disadvantage the Internal Revenue Service might have as a result of prior notification, other than removal of funds themselves.

Mr. WOLFE. Mr. Chairman, there would not, in my opinion, be too many disadvantages as far as the bank is concerned because, as Mr. Whitaker said, these are the bank's records. It might have other effects on the examination or the investigation, whereby an unscrupulous taxpayer might, by this notification, try to throw roadblocks in other ways. It would make our job, I think, more difficult. I don't think that it would legally deter us from going ahead.

Mr. ALEXANDER. As a practical matter it would slow us down.

Mr. WOLFE. Right, that is a problem. There is one other thing. In the *Bisceglia* type case, where we know a transaction has happened but do not know the name or names of the taxpayers, it would of course be impossible for us to give anybody prior notification of this.

Mr. ALEXANDER. And because of that, as well as other attributes of the John Doe summons, we think those should be extremely sparingly used and should be subject to this dual, high-level review before they could be used at all.

Mr. KASTENMEIER. Does the gentleman from Illinois have further questions?

Mr. RAILSBACK. No.

Mr. KASTENMEIER. The gentleman from California.

Mr. DANIELSON. Under the 1970 act, it is my understanding that the financial institutions are required to keep a record of each check, draft, or similar instrument together with an identification of the party for whose account it is to be deposited or collected, et cetera. I recognize the need of the Government to have access to financial records in efforts to on the civil side determine whether or not a proper income tax return has been prepared and filed, and also in criminal cases to extend that same function even more deeply into the record, but I find—and I know constituents who have spoken to me find—that this provision that a bank must keep a record of each check, et cetera, to be offensive to their inherent, innate sense of privacy.

I would imagine that out of the checks drawn in this country by other than business corporations at least, the bulk of them are to pay a

grocery bill or the public utility bill or rent or a department store or something like that, and it seems to me personally, and to many of my constituents, to be offensive that the Bank of America, for example, has a digit account of every nickel we have spent, and for what? You pay the gardener and so on.

I would like your comments on that, because I think that we have to have a reconciliation of people's right to be private individuals, and the necessity of the Government raising revenue to meet its own needs.

Could this not be narrowed somewhat?

Mr. ALEXANDER. Congressman Danielson, this again involves precisely the reconciliation or the tension that you described, the right to privacy versus the limited right to know on the part of those who have a duty to know. This of course is a matter for the legislative branch to consider, as the Supreme Court has upheld the recordkeeping requirements of the 1970 act. We discuss this issue briefly on pages 9 and 10 of our statement of September 8.

We believe that as the agency having the greatest number of contacts with individuals, and having the responsibility, not of investigating on an after-the-fact basis when a crime has been committed, to find out who committed it, but instead of investigating almost 2,500,000 cases, not to see whether a crime has been committed, but whether a taxpayer is fully complying with the tax laws, that this responsibility depends upon our ability, within reasonable limits, to obtain records of financial transactions.

What we have to do again is strike a proper balance between what we really need to do our job, and the limited invasions of individual privacy that are necessarily imposed by the law, including the 1970 act and section 7602 of the Internal Revenue Code, that give us these powers.

Mr. DANIELSON. I do not quarrel that the Supreme Court said it is constitutional. But I am one of those who believes everything that could be constitutional is not necessarily, therefore, good. It may not be bad, but it is certainly not necessarily good. I do not quarrel with the constitutionality.

Do you require—under this law, as a practical matter, is a bank required to keep track of the fact that I might write a check for $1.98 to pay for something? And if so, how long do they have to keep that record?

Mr. ALEXANDER. Who is the house expert on the 1970 act?

I do want to point out that this matter is one that far transcends the Internal Revenue Service and its responsibilities and obligations but, instead, is a matter of Treasury policy and statutory enactment. I do not know the specific answer to your specific question, as I think is obvious.

Mr. DANIELSON. Well, I certainly will accept your answer because I do not know it either.

Mr. ALEXANDER. I will find out and submit it for the record.

Mr. DANIELSON. I will say this, that when my constituents ask me those questions, they assume I know the answer and I frankly do not.

I will also add that the question does not come up as often as it used to. But in 1971, 1972, when these things were new and immediate, I got

a lot of complaints, and even today I get an occasional one. I would like to know the answer.

Could it not be—I am speculating now, could we not maybe eliminate some of the irritation by cutting them off on checks in an amount of under $500, for example?

Who cares about paying five bucks to have your cat neutered, for heaven's sake. How long must these records be maintained?

Mr. WHITAKER. It is my impression that there is a 5-year record retention requirement. I believe there is a minimum cutoff, but I am talking from——

Mr. DANIELSON. Would you gentlemen be good enough to give me an answer on those questions, because those are the ones I get?

Mr. WHITAKER. We will be delighted to.

Mr. ALEXANDER. We certainly will.

Mr. DANIELSON. If there is not a limit, would you consider one, because we all know that you can reduce these things to an absurdity and I think you would do away with a lot of the public irritation if you get these little pebbles out of their financial shoes, so they will not be rubbing all the time.

Mr. ALEXANDER. We will check the regulations to see what they require.

Mr. DANIELSON. This information I may get may even be false, I have not checked it, but the public believes that is the situation.

Mr. ALEXANDER. We are not interested in $1.98.

Mr. DANIELSON. I know. You should not be and I do not think you are.

Mr. ALEXANDER. In the first place, it would be unwise use of resources. We do not have enough people to audit all the returns in the United States, and thank God for that.

Mr. DANIELSON. Let me say this: I believe you, but I do not think that most people out in our districts realize that, they think that every check they write is logged on some kind of a computer, with all the data about how many four-leaf clovers in an acre, stuff like that, ready to be regurgitated every time you push a button. They find it offensive.

If I could get an authoritative statement from you folks which I could simply Xerox, if that does not violate the copyright laws now, and send out every time I get such a complaint, my people would say hooray and feel real good about that. So I am asking for that.

The last question and I am using up my time: There is a provision of law that you folks may order these financial institutions to maintain such records of evidence as the Secretary of the Treasury may prescribe. Have you amplified this keeping track of checks under that authority?

Mr. ALEXANDER. I think the Treasury regulations have been issued under this authority.

Are we talking about authority under the 1970 act?

Mr. DANIELSON. Yes.

Mr. ALEXANDER. We do have certain recordkeeping requirements under the Internal Revenue Code, but those relate to the taxpayers themselves. Regulations have been issued under the 1970 act. I am sure everything that has been issued can be reconsidered.

Mr. DANIELSON. The thrust of my questions, in case you missed it, and the hoped-for answer is, I would like to have you take some of the sting, the unnecessary sting out of this law because I realize and I accept the fact that you have to have access to financial records in order to perform the essential function of raising the revenue to support us spendthrifts here in Congress, providing for the national needs. So I want you to be able to collect your revenue, but I would also like to have you take the irritation, the sting out of the laws as they exist, because it adds to the general public disfavor with government that you find so prevalent today.

Mr. ALEXANDER. We will undertake to supply this material, Congressman Danielson.

[The material referred to follows:]

FINANCIAL RECORDKEEPING BY BANKS

In order that records of financial transactions may be obtained for law enforcement purposes by legal process such as a subpoena or administrative summons for use in criminal, tax, or regulatory proceedings, United States Treasury regulations (attached) require banks, including savings and loan associations and credit unions, to identify customer accounts with social security numbers or employer identification numbers and to keep originals or copies of the following for 5 years:

1. Signature authority documents.
2. Statements, ledger cards or other records showing complete account activity.
3. Checks, drafts, or money orders drawn on the bank or issued and payable by it *for over $100* excepting checks or drafts on accounts that normally average 100 or more items per month or 100 or more on each occasion when issued under the following categories: payroll, dividend, employee benefit, insurance claims, medical benefit, government agency brokers or dealers in securities, fiduciary account, pension or annuity, and those drawn on other financial institutions.
4. Debits or charges in excess of $100 except for service charges.
5. Credit extensions over $5,000 except those secured by real property.
6. Records of international transfers of funds or investment securities over $10,000.

Banks must keep for two years records needed to reconstruct a demand deposit account and to supply a description of each deposited check over $100 and to trace each such check.

Operating guidelines for compliance with Treasury regulations are summarized in the attached booklet prepared by the American Bankers Association.

SUBPART C—RECORDS REQUIRED TO BE MAINTAINED

§ 103.31 Determination by the Secretary.

The Secretary hereby determines that the records required to be kept by this subpart have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

§ 103.32 Records to be made and retained by persons having financial intrests in foreign financial accounts.

Records of accounts required by § 103.24 to be reported on a Federal income tax return shall be retained by each person having a financial interest in any such account. Such records shall contain the name in which each such account is maintained, the number or other designation of such account, the name and address of the foreign bank or other person with whom such account is maintained, the type of such account, and the maximum value of each such account during the reporting period. Such records shall be retained for a period of 5 years and shall be kept at all times available for inspection as authorized by

law. In the computation of the period of 5 years, there shall be disregarded any period beginning with a date on which the taxpaper is indicated or information instituted on account of the filing of a false or fraudulent Federal income tax return or failing to file a Federal income tax return, and ending with the date on which final disposition is made of the criminal proceeding.

§ 103.33 Records to be made and retained by financial institutions.

Each financial institution shall retain either the original or a microfilm or other copy or reproduction of each of the following:

(a) A record of each extension of credit in an amount in excess of $5,000, except an extension of credit secured by an interest in real property, which record shall contain the name and address of the person to whom the extension of credit is made, the amount thereof, the nature or purpose thereof, and the date thereof;

(b) A record of each advice, request, or instruction received regarding a transaction which results in the transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit, of more than $10,000 to a person, account, or place outside the United States;

(c) A record of each advice, request, or instruction given to another financial institution or other person located within or without the United States, regarding a transaction intended to result in the transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit, of more than $10,000 to a person, account or place outside the United States;

§ 103.34 Additional records to be made and retained by banks.

(a) (1) With respect to each deposit or share account opened with a bank after June 30, 1972, by a person residing or doing business in the United States or by a citizen of the United States, such bank shall, within 45 days from the date such an account is opened, secure and maintain a record of the taxpayer identification number of the person maintaining the account; or in the case of an account of one or more individuals, such bank shall secure and maintain a record of the social security number of an individual having a financial interest in that account. In the event that a bank has been unable to secure the identification required herein with respect to an account within the 45-day period specified, it shall nevertheless not be deemed to be in violation of this section if (i) it has made a reasonable effort to secure such identification, and (ii) it maintains a list containing the names, addresses, and account numbers of those persons from whom it has been unable to secure such identification, and makes the names, addresses, and account numbers of those persons available to the Secretary as directed by him.

(2) The 45-day period provided for in paragraph (a) (1) of this section shall be extended where the person opening the account has applied for a taxpayer identification or social security number on Form SS–4 or SS–5, until such time as the person maintaining the account has had a reasonable opportunity to secure such number and furnish it to the bank.

(3) A taxpayer identification number for a deposit or share account required under paragraph (a) (1) of this section need not be secured in the following instances: (i) accounts for public funds opened by agencies and instrumentalities of Federal, State, local or foreign governments, (ii) accounts for aliens who are (*a*) ambassadors, ministers, career diplomatic or consular officers, or (*b*) naval, military or other attachés of foreign embassies and legations, and for the members of their immediate families, (iii) accounts for aliens who are accredited representatives to international organizations which are entitled to enjoy privileges, exemptions and immunities as an international organization under the International Organization Immunities Act of December 29, 1945 (22 U.S.C. sec. 288), and for the members of their immediate families, (iv) aliens temporarily residing in the United States for a period not to exceed 180 days, (v) aliens not engaged in a trade or business in the United States who are attending a recognized college or university or any training program, supervised or conducted by any agency of the Federal Government, (vi) unincorporated subordinate units of a tax exempt central organization which are covered by a group exemption letter, (vii) interest bearing accounts maintained by a person under 18 years of age opened as part of a school thrift savings program, provided the annual interest does not exceed $10, and (viii)

Christmas club, vacation club and similar installment savings programs provided the annual interest does not exceed $10. In instances described in paragraph (a) (3) (vii) and (viii) of this section, the bank shall, within 15 days following the end of any calendar year in which the interest accrued in that year exceeds $10, use its best efforts to secure and maintain the appropriate taxpaper identification number or application form therefor.

(4) The rules and regulations issued by the Internal Revenue Service under section 6109 of the Internal Revenue Code of 1954 shall determine what constitutes a taxpayer identification number and whose number shall be obtained in the case of an account maintained by one or more persons.

(b) Each bank shall, in addition, retain either the original or a microfilm or other copy or reproduction of each of the following:

(1) Each document granting signature authority over each deposit or share account;

(2) Each statement, ledger card or other record on each deposit or share account, showing each transaction in, or with respect to, that account;

(3) Each check, clean draft, or money order drawn on the bank or issued and payable by it, except those drawn for $100 or less or those drawn on accounts which can be expected to have drawn on them an average of at least 100 checks per month over the calendar year or on each occasion on which such checks are issued, and which are (i) dividend checks, (ii) payroll checks, (iii) employee benefit checks, (iv) insurance claim checks, (v) medical benefit checks, (vi) checks drawn on government agency accounts, (vii) checks drawn by brokers or dealers in securities, (viii) checks drawn on fiduciary accounts, (ix) checks drawn on other financial institutions, or (x) pension or annuity checks;

(4) Each item in excess of $100 (other than bank charges or periodic charges made pursuant to agreement with the customer), comprising a debit to a customer's deposit or share account, not required to be kept, and not specifically exempted, under paragraph (b) (3) of this section;

(5) Each item, including checks, drafts, or transfers of credit, of more than $10,000 remitted or transferred to a person, account or place outside the United States.

(6) A record of each remittance or transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit, of more than $10,000 to a person, account or place outside the United States;

(7) Each check or draft in an amount in excess or $10,000 drawn on or issued by a foreign bank which the domestic bank has paid or presented to a nonbank drawee for payment.

(8) Each item, including checks, drafts or transfers of credit, of more than $10,000 received directly and not through a domestic financial institution, by letter, cable or any other means, from a bank, broker or dealer in foreign exchange outside the United States;

(9) A record of each receipt of currency, other monetary instruments, investment securities or checks, and of each transfer of funds or credit, of more than $10,000, received on any one occasion directly and not through a domestic financial institution, from a bank, broker or dealer in foreign exchange outside the United States; and

(10) Records prepared or received by a bank in the ordinary course of business, which would be needed to reconstruct a demand deposit account and to trace a check in excess of $100 deposited in such account through its domestic processing system or to supply a description of a deposited check in excess of $100. This subparagraph shall be applicable only with respect to demand deposits.

[38 F.R. 2175, Jan. 22, 1973, as amended at 38 F.R. 3509, Feb. 7, 1973]

§ 103.35 Additional records to be made and retained by brokers and dealers in securities.

(a) (1) With respect to each brokerage account opened with a broker or dealer in securities after June 30, 1972, by a person residing or doing business in the United States or a citizen of the United States, such broker or dealer shall within 45 days from the date such account is opened, secure and maintain a record of the taxpayer identification number of the person maintaining the account; or in the case of an account of one or more individuals, such broker or dealer shall secure and maintain a record of the social security number of an individual having

a financial interest in that account. In the event that a broker or dealer has been unable to secure the identification required within the 45-day period specified, it shall nevertheless not be deemed to be in violation of this section if: (i) It has made a reasonable effort to secure such identification, and (ii) it maintains a list containing the names, addresses, and account numbers of those persons from whom it has been unable to secure such identification, and makes the names, addresses, and account numbers of those persons available to the Secretary as directed by him.

(2) The 45-day period provided for in paragraph (a)(1) of this section shall be extended where the person opening the account has applied for a taxpayer identification or social security number on Form SS–4 or SS–5, until such time as the person maintaining the account has had a reasonable opportunity to secure such number and furnish it to the broker or dealer.

(3) A taxpayer identification number for a deposit or share account required under paragraph (a)(1) of this section need not be secured in the following instances: (i) Accounts for public funds opened by agencies and instrumentalities of Federal, State, local, or foreign governments, (ii) accounts for aliens who are (*a*) ambassadors, ministers, career diplomatic or consular officers, or (*b*) naval, military or other attachés of foreign embassies, and legations, and for the members of their immediate families, (iii) accounts for aliens who are accredited representatives to international organizations which are entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act of December 29, 1945 (22 U.S.C. sec. 288), and for the members of their immediate families, (iv) aliens temporarily residing in the United States for a period not to exceed 180 days. (v) aliens not engaged in a trade or business in the United States who are attending a recognized college or university or any training program, supervised or conducted by any agency of the Federal Government, and (vi) unincorporated subordinate units of a tax exempt central organization which are covered by a group exemption letter.

(b) Every broker or dealer in securities shall, in addition, retain either the original or a microfilm or other copy or reproduction of each of the following:

(1) Each document granting signature or trading authority over each customer's account;

(2) Each record described in § 240.17a–3(a) (1), (2), (3), (5), (6), (7), (8), and (9) of Title 17, Code of Federal Regulation;

(3) A record of each remittance or transfer of funds, or of currency, checks, other monetary instruments, investment securities, or credit, of more than $10,000 to a person, account, or place, outside the United States;

(4) A record of each receipt of currency, other monetary instruments, checks, or investment securities and of each transfer of funds or credit, of more than $10,000 received on any one occasion directly and not through a domestic financial institution, from any person, account or place outside the United States.

[37 F.R. 26518, Dec. 13, 1972, as amended at 38 F.R. 2176, Jan. 22, 1973]

§ 103.36 Nature of records and retention period.

(a) Wherever it is required that there be retained either the original or a microfilm or other copy or reproduction of a check, draft, monetary instrument, investment security, or other similar instrument, there shall be retained a copy of both front and back of each such instrument or document, except that no copy need be retained of the back of any instrument or document which is entirely blank or which contains only standardized printed information, a copy of which is on file.

(b) Records required by this subpart to be retained by financial institutions may be those made in the ordinary course of business by a financial institution. If no record is made in the ordinary course of business of any transaction with respect to which records are required to be retained by this subpart, then such a record shall be prepared in writing by the financial institution.

(c) Records which are required by § 103.34(b)(10) to be retained by banks shall be retained for a period of 2 years. All other records which are required by this subpart to be retained by financial institutions shall be retained for a period of 5 years. All such records shall be filed or stored in such a way as to be accessible within a reasonable period of time, taking into consideration the nature of the record, and the amount of time expired since the record was made.

§ 103.37 Person outside the United States.

For the purposes of this subpart, a remittance or transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit to the domestic account of a person whose address is known by the person making the remittance or transfer, to be outside the United States, shall be deemed to be a remittance or transfer to a person outside the United States, except that, unless otherwise directed by the Secretary, this section shall not apply to a transaction on the books of a domestic financial institution involving the account of a customer of such institution whose address is within approximately 50 miles of the location of the institution, or who is known to be temporarily outside the United States.

SUBPART D—GENERAL PROVISIONS

§ 103.41 Dollars as including foreign currency.

Wherever in this part an amount is stated in dollars, it shall be deemed to mean also the equivalent amount in any foreign currency.

§ 103.42 Photographic or other reproductions of Government obligations.

Nothing herein contained shall require or authorize the microfilming or other reproduction of

(a) Currency or other obligation or security of the United States as defined in 18 U.S.C. 8, or

(b) Any obligation or other security of any foreign government,

the reproduction of which is prohibited by law.

§ 103.43 Availability of information.

The Secretary may make any information set forth in any report received pursuant to this part available to any other department or agency of the United States upon the request of the head of such department or agency, made in writing and stating the particular information desired, the criminal, tax or regulatory investigation or proceeding in connection with which the information is sought and the official need therefor. Any information made available under this section to other departments or agencies of the United States shall be received by them in confidence, and shall not be disclosed to any person except for official purposes relating to the investigation or proceeding in connection with which the information is sought.

[37 FR 2176, Jan. 22, 1973]

§ 103.44 Disclosure.

All reports required under this part and all records of such reports are specifically exempted from disclosure under section 552 of title 5, United States Code.

§ 103.45 Exceptions, exemptions, and reports.

(a) The Secretary, in his sole discretion, may by written order or authorization make exceptions to or grant exemptions from the requirements of this part. Such exceptions or exemptions may be conditional or unconditional, may apply to particular persons or to classes of persons, and may apply to particular transactions or classes of transactions. They shall, however, be applicable only as expressly stated in the order of authorization, and they shall be revocable in the the sole discretion of the Secretary.

(b) The Secretary shall have authority to further define all terms used herein.

[38 F.R. 2176, Jan. 22, 1973]

Operational Guidelines

For Compliance By Commercial Banks

With The Treasury Regulations On Financial Recordkeeping And Reporting Of Currency And Foreign Transactions

As Revised

AMERICAN BANKERS ASSOCIATION
1120 Connecticut Avenue, NW
Washington, D.C. 20036

This is a guide to help you comply with the "Regulations on Financial Recordkeeping and Reporting of Currency and Foreign Transactions" issued by the Treasury. It was first published in 1972, but has been updated to reflect all amendments and interpretations of the regulations through April 1, 1975. Future amendments or interpretations issued by the Treasury will be reported in Capital, the weekly publication of the American Bankers Association.

The guide was prepared by the American Bankers Association for the use of its members. Questions or comments can be directed to Terrence H. Klasky, Government Relations Group, American Bankers Association, 1120 Connecticut Avenue, N.W., Washington, D. C. 20036.

Revised edition, April, 1975

Operational Guidelines

OBJECTIVES

The regulations have two objectives:

☐ To require the maintenance and preservation of records of financial transactions for possible use in criminal, tax, or regulatory proceedings.

☐ To identify those who attempt to further their illegal activities by conducting their transactions in currency, by using foreign financial facilities, or by the international transportation of currency or bearer instruments.

It should be pointed out that Public Law 91-508, which these regulations are implementing, makes it clear that any information in a bank's records required by the Secretary of the Treasury or other law enforcement agency will not be automatically made available for law enforcement purposes, but can only be obtained through existing legal process.

DEPOSIT ACCOUNT RECORDS

1. Taxpayer Identification Numbers

All banks must secure within 45 days after the opening of the account, subject to extension where the customer has applied for either an employer identification number or social security number, and maintain a record of the Taxpayer Identification Number of all savings and demand deposit accounts opened or reopened after June 30, 1972, and upon the automatic extension of certificates of deposit. In determining the proper identification number to be obtained for accounts the following guidelines should be followed:

FOR THIS TYPE OF ACCOUNT	OBTAIN SOCIAL SECURITY NUMBER OR EMPLOYER IDENTIFICATION NUMBER OF:
1. An individual's account	The individual
2. Husband and wife (joint account)	The husband
3. Adult and minor (joint account)	The adult
4. Two or more individuals (joint account)	Any one of the individuals

5. Account in the name of guardian or committee for a designated ward, minor or incompetent person	The ward, minor or incompetent person
6. Custodian account of a minor (Uniform Gifts to Minor Acts)	The minor
7. So-called trust account that is not a legal or valid trust under the State law	The real owner
8. A valid trust, estate, or pension trust	Legal entity. Do not furnish the identifying number of the administrator, executor, or trustee unless the legal entity itself is not designated in the account title.
9. Corporate account	The corporation
10. Religious, charitable, or educational organizational account	The organization
11. Proprietorship account held in the trade name of business	The proprietorship
12. Partnership account held in the name of the business	The partnership
13. Association, club, or other tax-exempt organization	The organization
14. A broker or registered nominee	The broker or nominee

A Taxpayer Identification Number need not be secured in the following instances:

a. Accounts for public funds opened by agencies and instrumentalities of Federal, State, local or foreign governments.

b. Accounts for aliens who are:

1. Ambassadors, ministers, career diplomatic or consular officers.

2. Naval, military, or other attaches of foreign embassies and legations, or members of their immediate families.

3. Accredited representatives to international organizations entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act of December 29, 1945, and their immediate families.

4. Temporarily residing in the United States for a period not to exceed 180 days.
5. Not engaged in a trade or business in the United States who are attending a recognized college or university or any training program supervised or conducted by any agency of the Federal Government.

c. Unincorporated subordinate units of a tax exempt central organization which are covered by a group exemption letter.

d. Interest bearing accounts maintained by a person under 18 years of age opened as part of a school thrift savings program, provided the annual interest does not exceed $10.

e. Christmas Club, vacation club and similar installment savings programs, provided the annual interest does not exceed $10.

If a customer does not have a social security number or has lost his card or forgotten his number, he should contact the local office of the Social Security Administration.

To obtain a new employer identification number the applicant should sign an authorization stamped by the bank on the back of Part 2 of Form SS-4 (Application for Employer Identification Number) containing the following language:

Please furnish the EIN being applied for to:

NAME _____

ADDRESS _____

SIGNATURE* _____

TITLE _____

*Individual who is authorized to sign Federal tax returns.

The form should be completed in duplicate, and the bank should mail one copy to the Internal Revenue Service while retaining the other copy.

Form SS-4 may be obtained from the nearest Internal Revenue Service Center.

NOTE: Failure to secure such identification within the 45 day period will not be deemed a violation if (1) the bank has made a reasonable effort to secure such identification, including a mailed written request informing the customer that the bank

is required to maintain, for the use of the Treasury, a list of customers who have failed to supply the bank with the number within the 45 day period; and (2) the bank maintains a list containing the names, addresses, and account numbers of those customers from whom it has been unable to secure such identification, and makes that information available to the Secretary of the Treasury when directed.

2. Account Records

An original or microfilm or other copy or reproduction of most demand deposit or savings account records must be retained for five years.

The specified records include:

☐ Signature authority documents.

☐ Statements, ledger cards or other records showing complete account activity.

☐ All checks, clean drafts, or money orders drawn on the bank or issued and payable by it. *Reproductions must show face and reverse of all checks except those on which the reverse is blank.* If there is no check or draft corresponding to a pre-authorized paper entry, it is necessary to maintain the customer's authorization to charge his account and a memorandum list of entries for 5 years.

(Note: This requirement is waived for all checks drawn for $100 or less or drawn on accounts that normally average 100 or more checks per month over the calendar year or over 100 on each occasion when issued, provided these checks fall in one or more of the following categories; payroll, dividend, employee benefit, insurance claims, medical benefit, government agency, brokers or dealers in securities, fiduciary account, pension or annuity, and checks drawn on other financial institutions.)

☐ All debits in excess of $100 except service charges or periodic charges based on previous agreements with the customer.

☐ Banks must retain for two years all records including deposit tickets needed to reconstruct a demand deposit account.

In addition, banks must retain for a two year period all records needed to trace a check in excess of $100 deposited in a demand deposit account or to supply a description of a deposited check in

excess of $100. This would include originals or copies of all records prepared or received that would be needed for tracing, including proof and entry run tapes or their equivalents; however, the retention of these records is not necessary if the deposited items are microfilmed while they are still associated with the deposit ticket.

The regulations state that the records to be retained may be those made in the ordinary course of business. If no record is made in the ordinary course of business of any transaction with respect to which records are required to be retained, then such a record must be made in writing.

All records required to be retained by these regulations should be filed or sorted in such a way as to be accessible within a reasonable period of time taking into consideration the nature of the record and the amount of time expired since it was made.

Interpretations have been issued by the Treasury which exclude from the definition of deposit account the following categories: mortgage escrow accounts, bearer certificate of deposits, and credit card programs.

3. Funds Transfers or Receipts

Each bank must retain for five years the original record or a copy of the following:

☐ Each item, including checks, drafts or transfers of credit in excess of $10,000, remitted or transferred outside the United States.

☐ Each remittance or transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit of more than $10,000 outside the United States.

☐ Each check or draft of more than $10,000 drawn on or issued by a foreign bank which the domestic bank has paid or presented to a non-bank drawee for payment.

☐ Each item of more than $10,000 received directly by letter, cable or other means (not through a domestic financial institution) from outside the United States. This includes checks, drafts, or transfers of credit.

☐ Each receipt of currency, other monetary instruments, checks, or investment securities, and each transfer of funds of credit, of

more than $10,000 received on any one occasion directly and not through a domestic financial institution, from a bank, broker or dealer in foreign exchange outside the United States. Border state banks should see Section 103.37 for special treatment of transactions with certain people outside the United States.

CURRENCY TRANSACTIONS AND SHIPMENTS

1. Currency Transaction Reports

Deposits, withdrawals, exchanges of currency, or transfers of currency, as well as other payments valued at more than $10,000 in any transaction, must be reported by all financial institutions. These reports must be made to the Secretary of the Treasury on Form 4789 within 45 days of the date of the transaction.

Form 4789 requires that the party to the transaction be identified by his Social Security number, employer identification number, or by one of his bank account numbers, unless he is not a customer, in which case his driver's license number or other appropriate document normally acceptable as a means of identification will suffice.

Except as otherwise directed in writing by the Secretary of the Treasury, a bank need not file Form 4789 for transactions with an established customer maintaining a deposit relationship with the bank, in amounts which the bank may reasonably conclude do not exceed amounts commensurate with the customary conduct of business, industry or profession of the customer. However, the bank must make a list of such customers available to the Secretary of the Treasury or his designee if called for.

Reports are not required of transactions with Federal Reserve Banks or Federal Home Loan Banks, and transactions solely with or originated by financial institutions or foreign banks.

These instructions, effective July 1, 1972, supersede current Treasury regulations requiring reports of currency transactions on Form TCR-1.

2. Transportation of Currency or Monetary Instruments

Persons who physically take or send more than $5,000 in the aggregate of currency or other monetary instruments on any one occasion outside the United States must report the fact at the time. This must be done by filing Form 4790 with the Commissioner of Customs addressed as required by the instructions on the form. A

transfer of funds through normal banking procedures which does not involve the physical transportation of currency or monetary instruments is not required to be reported on Form 4790. In addition it is not necessary to report transactions in foreign currency for non-resident customers performed through brokers outside the United States unless they involve the physical transportation of currency, bearer investment securities, or negotiable instruments in bearer form. Transfers by means of bank check, bank draft or wire transfer need not be reported.

Persons receiving currency or other monetary instruments worth more than $5,000 on any one occasion from outside the United States have 30 days in which to file Form 4790 with the customs officer in charge at any point of entry or by mail to the Commissioner of Customs addressed as indicated on the form.

Reports on Form 4790 are not required by a bank, or a foreign bank, in respect to currency to other monetary instruments mailed or shipped through the Postal Service or by common carrier or with respect to normal overland international or monetary instruments from or to an established customer in amounts which the bank may reasonably conclude do not exceed amounts commensurate with the customary conduct of the business, industry, or profession of the customer concerned. The report is not required of a person who is not a citizen or a resident of the United States who mails or ships from abroad currency or other monetary instruments to a bank through the Postal Service or common carrier.

While this requirement will not ordinarily affect a bank, if it directly sends or receives currency or monetary instruments via a courier to or from a customer, a report must be filed. The regulation defines "monetary instruments" as coin, or currency of any country, travelers checks, money orders, investment securities in bearer form or otherwise in such form that title passed upon delivery and negotiable instruments in bearer form or otherwise in such form that title passes on delivery. Monetary instruments do not include bank checks made payable to the order of a named person which have not been endorsed, or which bear restrictive endorsements.

Both Form 4789 and 4790 may be obtained from any Internal Revenue Office, and in addition, Form 4790 may be obtained from any office of the Bureau of Customs.

OTHER RECORDS TO BE MADE AND MAINTAINED

Banks must record and retain details of all extensions of credit for more than $5,000, except those secured by real property. Details must include customer's name and address, amount, nature or purpose of credit extension, and a date. Originals or copies must be retained for five years.

Banks must also keep a record of each advice, request, or instruction it receives or gives to another financial institution or other person located within or without the United States regarding a transaction intended to result in a transfer outside the United States of funds, currency, other monetary instruments, checks, investment securities or credit in amounts of more than $10,000.

ENFORCEMENT

The final portion of the regulations delegates responsibility for assuring compliance by commercial banks to the appropriate financial regulatory bodies. Public Law 91-508 provides a number of specific civil and criminal penalties for willful violations of the law or regulations issued thereunder. These are set out in section 103.47 and 103.49.Special attention should be given to these sections.

EXEMPTIONS

Any request for an extension of time for compliance with the regulations or other exemption from any of the provisions of such regulations should be directed to, Mr. James B. Clawson, Deputy Assistant Secretary, Department of the Treasury, Washington, D. C. 20220.

Mr. ALEXANDER. I do want to state, sir, that we at Internal Revenue do not want to characterize Congress as spendthrifts or anything else. We love, respect, and admire Congress.

Mr. DANIELSON. Look, I have skin that thick [indicating]. You could not bother me at all. But I am always accused of being a spendthrift. So I just accept that. It is easier than arguing about it.

Thank you, sir.

Mr. ALEXANDER. One thing that you can reassure your constituents about is that we have an obligation to maintain the privacy of the material that we obtain.

Mr. DANIELSON. You do?

Mr. ALEXANDER. We intend to fulfill that obligation.

Mr. DANIELSON. You did. We noticed that in the impeachment hearings. We hope you keep it up.

Mr. ALEXANDER. We hope to do a better job. In this respect, we need a tighter law. Under the law as we find it, we hope we can do a better job, and we are trying to do it.

Mr. DANIELSON. Thank you.

Mr. KASTENMEIER. The gentleman from Massachusetts.

Mr. DRINAN. Thank you. It is nice to have you here, you and your associates.

In all candor, if a vote were taken right now on this subcommittee, as I read the tea leaves, your position would not prevail.

Let me tell you some of the reasons why, frankly, I could not vote for your position at this time. I do not know how often this occurs, this administrative summons. You say that a year from now you will be able to tell us exactly how many, but you admit that you do not know. On page 5 of your statement, you say that IRS puts these administrative summons out by the thousands each year.

In the next paragraph, you say there are several thousand but that they may—that is "may"—represent less than a fraction of 1 percent. Well, I do not know how many there are. Several thousand could be like 100,000 or it could be 4,000. You do not know and I am not pressing you on it, but you recognize the danger in these things.

I am certain that if the average American recognized that most banks, virtually all banks, allow IRS to come in and look at what IRS wants to look at, they would be really demanding that their banks say no to the IRS. You admit the problem, and you say now that higher approval will be necessary. I do not know how high they have to go, but I would assume, there is no evidence of it, that the number, which is several thousand, is going down. But you do not tell us that. So I have no facts to go on.

Right now I would have to say, we will let IRS live with this for a time. We will put through this law and let the consent of the individual depositor be required, or at least give notice to him. Maybe he would never consent. He would be reluctant: at least give him notice.

It seems to me that is required just in basic fairness to the individual, and that every American thinks his bank account is protected and IRS is not going to look at it, at least not without my knowledge.

That is the question as I see it. I have some other questions, but did you want to react to those comments?

Mr. ALEXANDER. We do not know how many summons are issued. We have done our best to try to obtain figures for you. We do not have good figures. I do not want to give you bad figures. So we do not know. This concerns us.

We believe that the number is going down, and we are convinced that the requirements that we have discussed with you will further decrease it. Why? Because advance managerial approval is required. Human as we all are, the chances of an action being taken when two have to concur before the action can be taken are less than if one person makes the decision. We will have figures for you. We do not have them now.

I can understand your concern about our inability to supply you with the dimensions of this problem.

Mr. DRINAN. As a result, Commissioner, I find that you have not proven your main proposition on page 1, where you state that one provision of this bill "would severely restrict our current tax law enforcement activities and ultimately would seriously threaten the Service's ability to mount an equitable, professional compliance program."

I do not think you have proved that.

Mr. ALEXANDER. I can understand your views, Father Drinan.

Mr. DRINAN. All right.

Mr. ALEXANDER. We believe that the Chief Justice's statement is applicable.

Mr. DRINAN. That the which?

Mr. ALEXANDER. The Chief Justice's statement.

Mr. DRINAN. In the *Bisceglia* case?

Mr. ALEXANDER. Yes. in *Bisceglia*, however one may pronounce it. You have heard three different pronunciations from this side of the table, which shows that we do not march in lockstep.

Mr. DRINAN. There are also three different opinions. I tend to think that with Stewart and Douglas dissenting, also Blackmun and Powell concurring, I would think some points must be raised. But I have another difficulty: Right now banks, if they so decide, can simply say no to IRS.

Well, I find it difficult to reconcile this because the chap who is lucky enough to go to a bank that takes this position has all types of rights that his brother down the street might not have.

It seems to me that IRS is perpetuating something that is inequitable and, if you want to insist that this is essential to IRS, why do you not say that a bank must comply.

Mr. ALEXANDER. With giving notice?

Mr. DRINAN. No; must comply with IRS, without giving notice. In other words, you cannot have it both ways. You are saying that we do not want them to be precluded from our inspection, but you are not taking the hard line and saying that we want a law that will require the banks to let us look at a depositor's account without his knowledge or consent.

Mr. ALEXANDER. Whenever we ask, for whatever we ask, for whatever reason we ask, of course we do not want that right and we should not have that right. Certainly there should be limitations upon the right of this agency, as well as other agencies, to inquire. Certainly

we must inquire only in good faith and not for purposes of harassment. Certainly we should require that which is relevant and not that which is irrelevant.

Mr. DRINAN. I agree that it has to be reasonable and relevant. But I think the difficulty that all the members of the panel have had here is that this is done without the knowledge or consent of the individual depositor. That is the violation of privacy, it seems to me and to other members of the panel. You concede in essence that it is a violation of privacy and yet you say, well, this is necessary.

Well, if it is necessary, then the banks should be uniform and IRS should say, Mr. Banker, we want to make it a law that you must collaborate with us, without the knowledge or consent of the depositor. That would be a more logical and acceptable position than the present position saying we hope, banks, that you voluntarily collaborate with us. Because that brings up a very severe discrimination against the man who is unlucky enough to get a bank that likes to collaborate with the IRS.

Mr. ALEXANDER. We are concerned, Father Drinan, about this problem of different treatment of taxpayers depending upon whether the bank gives the taxpayer notice or whether it does not.

One of the problems that we have addressed this morning is the question of uniform treatment of taxpayers. Uniformity, of course, can be achieved in two directions: One by an absolute requirement and the other by the imposition of uniform and comprehensive and broadgage standards of reasonableness. We prefer the latter course.

Mr. DRINAN. All right.

Thank you very much, Commissioner.

I yield back the balance of my time.

Mr. KASTENMEIER. Thank you.

I just have one or two questions left.

One of the difficulties in analyzing the problem is that there are, as I gather, a number of purposes and processes by which the Internal Revenue Service makes inquiries of the bank with reference to a depositor. I take it there is a class of case where the Internal Revenue Service is primarily interested for purposes of intelligence; then there is a case where the IRS is interested because it has reason to believe the taxpayer has made a mistake or has underpaid in the nature of a civil violation rather than criminal fraud.

The third case might well be where it is reasonable to believe that a criminal fraud has been committed or, fourth, you may want to proceed against the taxpayer to levy on his funds.

All these may involve somewhat different administrative or civil or criminal processes. We have to, I suppose, analyze each one separately in terms of what it means as far as privacy, what is a reasonable requirement, both for you to get your job done and to protect the privacy of the individual. So we are not talking just about one question, whether a warrant should issue, particularly if it is for a noncriminal purpose.

This will require some analysis on the part of the committee. What is further complicating is what the gentleman from Massachusetts suggests; there is not necessarily uniformity on the part of the third party—the bank, the financial institution—to comply. I do not know

whether there is any difference between, let's say, a California State Bank and a Federal Reserve Bank elsewhere in the country, in terms of the nature of the institution, or whether certain State laws would seem to abet a course of action with reference to cooperation on the part of the banks different from banks in other States.

Could you give me a general comment on the latter in terms of uniformity? Does the character of the financial institution determine in any wise its policy toward IRS in terms of compliance with IRS processor requests?

Mr. ALEXANDER. I will ask Mr. Wolfe to amplify this, with respect to the character of the institution.

With respect to the geographic locality of the institution, we have found that in certain areas, particularly in the far West, banks were somewhat quicker to assert the right and somewhat slower to comply than other areas. To some extent it depends upon the group to which the banks belong, such as the California Banker Association, which tested the constitutionality of the 1970 act.

Mr. Wolfe, in your experience, do you know whether there is any variation other than those described?

Mr. WOLFE. Mr. Commissioner, I know of no other variations as to the type of financial organization, no.

Mr. KASTENMEIER. I would also observe that as banks, for example in California, tend to emphasize different interests, perhaps on the part of their depositors, complaints, customers, and other banks, particularly through the American Banking Association, tend to be moving in the direction of uniformity, I take it you have sort of mixed directions at the present time. There are many bankers who would seek uniformity on the part of bankers with respect to cooperation or to responding to legal processes, in terms of IRS or any other appropriate Government agency.

I assume that there is a major body pressing in that direction, is there not?

Mr. ALEXANDER. I think so, if I fully understand your question, Mr. Chairman I should point out that in our collection process, where we know the identity of the taxpayer, where we know the taxpayer owes his tax and we know the taxpayer has not paid the tax and what we are seeking to do is to collect the tax by finding sources of funds and then by using our statutory power of levy with respect to those funds we do find considerably varying degrees of cooperation.

Now Mr. Robert Terry, our Assistant Commissioner for Accounts, Collections, and Taxpayer Service, is here.

Do you have anything to say to amplify my statement, Mr. Terry?

Mr. TERRY. I think that the relationship that might exist between the local bank managers and the revenue officers in some cases might make a difference in their willingness to honor the summons and to proceed with the disclosure of information, but I do not have anything beyond that.

Mr. KASTENMEIER. In terms of collection, I do not think the committee is interested particularly in that aspect for the reason that I assume the Internal Revenue Service is not that differently placed from others who, learning where assets are, attempt to garnishee, or through garnishment or other process to collect assets from an individ-

ual. That does not seem to involve a breach of privacy unless through that process one gains intelligence and information concerning others.

Sometimes banks, as you indicate, are concerned about that. So we would be interested really in the other three purposes.

I am wondering, as a matter of practice, do you distinguish between the intelligence and information-gathering, investigative process, as apart from the process used for purposes of where you have reason to believe a mistake has been made, even though the process may be civil in character; is there any distinction between the procedure that the IRS uses with respect to a taxpayer, a depositor, who has made a mistake or where he is being audited for criminal investigative purposes?

Mr. ALEXANDER. Oh, yes, there is a distinction. And part of this distinction in the narrow sense of the inquiry that you are making, is reflected in the difference in treatment between the John Doe summons, where we do not know the identity of the taxpayer, and the ordinary administrative summons, where we do.

More basic, however, are the limitations that the Service is imposing upon its information-gathering activities. We have discussed these activities with Father Drinan and others on Chairman Rosenthal's committee, and we have recently instituted new and strict procedures under which we make it clear that when we are engaged in information-gathering as contrasted with working cases, that we gather only that which is directly related to our job of administering and enforcing the tax laws, and we have greatly curtailed the amount of money that we spend in this exercise.

In 1973 our Intelligence Division spent almost $12 million in information- or intelligence-gathering; that had been reduced in the most recent fiscal year 1975 to $4.3 million. We think that reduction is sound in connection with tax enforcement and in connection with proper utilization of resources.

Mr. KASTENMEIER. Thank you, Mr. Commissioner.

This will conclude this morning's hearing.

Mr. DRINAN. Mr. Chairman, one last question, if I may.

Mr. KASTENMEIER. The gentleman from Massachusetts.

Mr. DRINAN. Commissioner, in the *Bisceglia* case I was interested in learning what statutory power, if any, the Federal Reserve System had to report to the IRS.

You will recall that there was an unusual collection of decrepit $100 bills which added up to $20,000, and in accord with regular Federal Reserve procedures the U.S. Supreme Court says in its majority view the Cincinnati branch of the Federal Reserve reported these facts to the IRS. That obviously began the whole case.

Is that pursuant to some statute?

Mr. ALEXANDER. I think so. I think again, Father Drinan, and we are talking about a statute implemented by regulation, I would like to inquire further into this and supply you the exact wording of the regulations and the statute for the record.

Mr. DRINAN. Does the Federal Reserve do this often?

What kind of information comes into IRS from the Federal Reserve on a regular basis?

Mr. ALEXANDER. Mr. Wolfe, can you answer this question?

Mr. WOLFE. It does not do it often, but as I recall it is spelled out in the regulations when they do do it. If it is above a certain amount, they do refer it to us, and, of course, as it did in this case, it appeared to be one we needed to look into.

Mr. DRINAN. What is the statute that gives them that power, though? That seems to erode everything that I have been reading, everything we have been talking about.

Mr. WOLFE. I think it is the 1970 Act, Mr. Congressman, that we were discussing that give them——

Mr. DRINAN. The Bank Secrecy Act?

Mr. WOLFE. We will check it out and furnish it for the record.

[The material referred to follows:]

REPORTING CURRENCY TRANSACTIONS

United States v. Bisceglia, 95 S.Ct. 915 (1975), concerned two deposits in November 1970 of $20,000 each in old $100 bills by a bank in Kentucky to the Cincinnati Branch of the Federal Reserve Bank of Cleveland, after which the facts were reported to the IRS. Regulations in 31 C.F.R. Part 102 in effect in 1970 provided for reporting by banks to Federal Reserve Banks of such unusual currency transactions on Form TCR–1.

That procedure was no longer required after June 30, 1972 and was then superseded by 31 C.F.R. Part 103 now providing for reports by banks directly to the IRS (not through the Federal Reserve Banks) on Form 4789, Currency Transaction Report (attached with instructions on the back). A copy of 31 C.F.R. 103.22 is also attached. These regulations are authorized by sections 221–223 of Title II–Reports of Currency and Foreign Transactions, P.L. 91–508, codified in 31 U.S.C. 1081–1083.

Domestic currency transaction reports by banks to the IRS are only required for transactions in currency of more than $10,000. Exceptions are provided for interbank transfers and transactions between a bank and established customers maintaining a deposit relationship, in amounts which the bank may reasonably conclude do not exceed amounts commensurate with the customary conduct of the customer's business.

Secretary. The Secretary of the Treasury or any person duly authorized by the Secretary to perform the function mentioned.

Transaction in currency. A transaction involving the physical transfer of currency from one person to another. A transaction which is a transfer of funds by means of bank check, bank draft, wire transfer, or other written order, and which does not include the physical transfer of currency is not a transaction in currency within the meaning of this part.

United States. The various States, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States.

[37 F.R. 6912, Apr. 5, 1972, as amended at 38 F.R. 2175, Jan. 1973]

SUBPART B—REPORTS REQUIRED TO BE MADE

§ 103.21 Determination by the Secretary.

The Secretary hereby determines that the reports required by this subpart have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

§ 103.22 Reports of currency transactions.

(a) Each financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000.[1]

(b) Except as otherwise directed in writing by the Secretary, this section shall not (1) require reports of transactions with Federal Reserve Banks or Federal Home Loan Banks; (2) require reports of transactions solely with, or originated by, financial institutions or foreign banks; or (3) require a bank to report transactions with an established customer maintaining a deposit relation-

[1] Forms filed as part of the original document.

ship with the bank, in amounts which the bank may reasonably conclude do not exceed amounts commensurate with the customary conduct of the business, industry or profession of the customer concerned. A report listing such customers who engage in transactions which are not reported because of the exemption contained in this paragraph shall be made to the Secretary upon demand therefor made by him.

§ 103.23 Reports of transportation of currency or monetary instruments.

(a) Each person who physically transports, mails, or ships, or causes to be physically transported, mailed, or shipped, currency or other monetary instruments in an aggregate amount exceeding $5,000 on any one occasion from the United States to any place outside the United States, or into the United States from any place outside the United States, shall make a report thereof. A person is deemed to have caused such transportation, mailing or shipping when he aids, abets, counsels, commands, procures, or requests it to be done by a financial institution or any other person. A transfer of funds through normal banking procedures which does not involve the physical transportation of currency or monetary instruments is not required to be reported by this section.

(b) Each person who receives in the U.S. currency or other monetary instruments in an aggregate amount exceeding $5.000 on any one occasion which have been transported, mailed, or shipped to such person from any place outside the United States with respect to which a report has not been filed under paragraph (a) of this section, whether or not required to be filed thereunder, shall make a report thereof, stating the amount, the date of receipt, the form of monetary instruments, and the person from whom received.

(c) This section shall not require reports by (1) a Federal Reserve bank, (2) a bank, a foreign bank, or a broker or dealer in securities, in respect to currency or other monetary instruments mailed or shipped through the postal service or by common carrier, (3) a commercial bank or trust company organized under the laws of any State or of the United States with respect to overland shipments of currency or monetary instruments shipped to or received from an established customer maintaining a deposit relationship with the bank, in amounts which the bank may reasonably conclude do not exceed amounts commensurate with the customary conduct of the business, industry or profession of the customer concerned, (4) a person who is not a citizen or resident of the United States in respect to currency or other monetary instruments mailed or shipped from abroad to a bank or broker.

Form **4789**
(April 1972)
(Replaces TCR–1)
Department of the Treasury
Internal Revenue Service

Currency Transaction Report

File a separate report for each transaction
(Complete all applicable parts—see instructions)

Part I **Identity of person who conducted this transaction with the financial institution**

Name (Last, first and middle initial) | Social security number

Number and street | Business, occupation or profession

City or town, State and ZIP code

Part II **Person or organization for whom this transaction was completed (Complete only if different than Part I)**

Name | Identifying number

Number and street | Business, occupation or profession

City or town, State and ZIP code

Part III **Description of transaction** (If additional space is needed, attach a separate schedule)

1. Nature of transaction (check the applicable boxes)
   - ☐ Deposit
   - ☐ Withdrawal
   - ☐ Currency exchange
   - ☐ Check cashed
   - ☐ Check purchased
   - ☐ Traveler's checks purchased
   - ☐ Security purchase (specify) .....
   - ☐ Other (specify)

2. Total amount of currency transaction (in U.S. dollars) | 3. Amount in denominations of $100 or higher | 4. Date of transaction (Month, day and year)

5. If other than U.S. currency is involved, please furnish the following information:

Currency name | Country | Total amount of foreign currency

6. If a check was involved in this transaction, please furnish the following information (See instructions):

Date and amount of check | Payee

Drawer of check | Drawee bank and City of location

Part IV **Type of identification presented in this transaction**

By customers:
- ☐ Savings account number.....
- ☐ Checking account number.....
- ☐ Share account number.....
- ☐ Loan account number.....
- ☐ Safety deposit box number.....
- ☐ Other (specify)

By others:
- ☐ Driver's permit ..... State ..... Number
- ☐ Passport ..... Country ..... Number
- ☐ Alien ID card ..... Country ..... Number
- ☐ Other (specify)

Part V **Financial institution reporting the financial transaction**

Name and address | Identifying number (see instructions)

Business activity

Sign here ▶ ..... Authorized signature ..... Title ..... Date

General Instructions

This report is required by Treasury Department regulations (31 Code of Federal Regulations 103).

Who Must File.—Beginning July 1, 1972, each financial institution (as described in these instructions) shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000.

Exceptions.—Financial institutions are not required to file Form 4789 for transactions:

(1) with Federal Reserve Banks or Federal Home Loan Banks;

(2) solely with, or originated by, financial institutions or foreign banks; or

(3) between a bank and established customers maintaining a deposit relationship with the bank, in amounts which the bank may reasonably conclude do not exceed amounts commensurate with the customary conduct of the customer's business, industry or profession.

However, upon request each bank shall submit a report listing those customers who engage in transactions which were not reported because of the exemption in (3).

When and Where to File.—This report shall be filed on or before the 45th day following the date of the transaction with the Internal Revenue Service Center, 11601 Roosevelt Boulevard, Philadelphia, Pennsylvania 19155. Forms may be obtained from any Internal Revenue Service office.

Identifying Number.—Social security number or employer identification number if other than individual.

Identification Required.—Before any transaction is effected a financial institution shall verify and record the identity, and record the account number on its books or the social security or taxpayer identification number, if any, of a person with whom or for whose account such transaction is to be effected. Verification of identity for a customer of the financial institution depositing or withdrawing funds may be by reference to his account or other number on the books of the institution. Verification of identity in any other case may be by examination, for example, of a driver's license, passport, alien identification card, or other appropriate document normally acceptable as a means of identification.

Penalties.—Civil and criminal penalties are provided for failure to file a report or to supply information, and for filing a false or fraudulent report. See sections 103.47 and 103.49 of the regulations.

Specific Instructions

Part I.—(1) In the address block, enter the permanent address of the person conducting the transaction.

(2) In the social security block, enter the social security number of the person conducting the transaction. If the person has no number, write "None" in this block.

Part II.—(1) In the name block, individuals should enter their last name, first name and middle initial, if any, in that order. All others should enter their complete organization name.

(2) In the identifying number block, enter the social security number or employer identification number.

Part III, line 6.—This part should be completed only where a check is cashed or a bank check is purchased with currency.

Part IV.—See instruction "Identification Required," above.

Part V.—Institutions may also enter in the name and address block other identifying information.

Definitions

Bank.—Each agent, agency, branch or office within the United States of a foreign bank and each agency, branch or office within the United States of any person doing business in one or more of the capacities listed below:

(1) a commercial bank or trust company organized under the laws of any state or of the United States;

(2) a private bank;

(3) a savings and loan association or a building and loan association organized under the laws of any state or of the United States;

(4) an insured institution as defined in section 401 of the National Housing Act;

(5) a savings bank, industrial bank or other thrift institution;

(6) a credit union organized under the laws of any state or of the United States; and

(7) any other organization chartered under the banking laws of any state and subject to the supervision of the bank supervisory authorities of a state.

Currency.—The coin and currency of the United States or of any other country, which circulate in and are customarily used and accepted as money in the country in which issued. It includes United States silver certificates, United States notes and Federal Reserve notes, but does not include bank checks or other negotiable instruments not customarily accepted as money.

Financial Institution.—Each agency, branch or office within the United States of any person doing business in one or more of the capacities listed below:

(1) a bank;

(2) a broker or dealer in securities, registered or required to be registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934;

(3) a person who engages as a business in dealing in or exchanging currency as, for example, a dealer in foreign exchange or a person engaged primarily in the cashing of checks;

(4) a person who engages as a business in the issuing, selling or redeeming of travelers' checks, money orders, or similar instruments, except one who does so as a selling agent exclusively, or as an incidental part of another business;

(5) an operator of a credit card system which issues, or authorizes the issuance of, credit cards that may be used for the acquisition of monetary instruments, goods, or services outside the United States.

(6) a licensed transmitter of funds, or other person engaged in the business of transmitting funds abroad for others.

Person.—An individual, a corporation, a partnership, a trust or estate, a joint stock company, an association, a syndicate, joint venture, or other unincorporated organization or group, and all entities cognizable as legal personalities.

Transaction in Currency.—A transaction involving the physical transfer of currency from one person to another. A transaction which is a transfer of funds by means of bank check, bank draft, wire transfer, or other written order, and which does not include the physical transfer of currency is not a transaction in currency within the meaning of this part.

Mr. ALEXANDER. These deposits were made in November of 1970.

Mr. DRINAN. I have the facts. I just want to know. That seems to be a large loophole in anything related to privacy in banks if the Federal Reserve, the moment it gets the deposit, can just give this information. I could see where they could give it to the Treasury, that is quite relevant. But when they just hand it over to IRS, and this poor Mr. Doe had no knowledge whatsoever that he was being turned in to IRS——

Mr. ALEXANDER. The bank may have notified Mr. Doe. We, of course, wanted to find out from the bank who Mr. Doe was to see whether these $40,000 in tattered old $100 bills had tax consequences.

Mr. DRINAN. A last question.

I have been intrigued as to whatever happened to Mr. Doe. Where did he get these decrepit $100 bills?

Mr. ALEXANDER. I share that interest, Father Drinan.

Mr. DRINAN. Thank you.

Mr. KASTENMEIER. The gentleman from California.

Mr. DANIELSON. I would like to state that I tend to like the suggestion contained in Mr. Railsback's of Illinois, comments of conceivably something like a simultaneous notification. The Supreme Court has volunteered and I presume correctly, that so long as these summonses can be enforced only through the courts, the taxpayer is not without remedy because he can always go to court.

I am also inclined to believe that that sort of reasoning, while technically correct, does not hit anywhere near home. I practiced law for a long time. If a citizen came in to me and wanted me to file a petition in the U.S. district court to enjoin the enforcement of that summons or some such thing, I am going to have to charge a pretty substantial fee. It is a lot of work. The average taxpayer just does not have that kind of money sitting around.

It is one of these things you have a right to do, but you do not have the money with which to do it. I think it is illusory in many instances.

The simultaneous notification, though, would help.

One of you getlemen raised the point of a levy in the collection case. I question whether that is too much of a problem. You could hardly make a levy until you know against whom you are going to make it—there could be a few cases, the John Doe one—and until you know the amount.

So I would say you are already armed with the essential information for the levy before you have to go to work and serve the summons, in most cases. I hope you folks will think about that. I am going to do a little thinking about it.

Lastly, on this keeping of these extensive records, which bothers me, perhaps we could have a change in the law to require some kind of a triggering act.

If you people start a tax investigation, suppose your computer says this is a "diff" case, and we should investigate it, maybe you could then trigger the recordkeeping by notifying the bank. Maybe that is impracticable, but I want you to think, have your brain trust think along that line. It might help.

Next to the last, a suggestion—I know you have always referred to the criminal fraud portion of your operation as the intelligence

section. As a matter of public relations, it might be a good idea to change that. You know most people think of intelligence, they perceive it as something like the National Security Administration or the FBI, spies, saboteurs, all those evil things. You are really talking about criminal tax cases.

Maybe you could come up a with a euphemism which will do just as well without triggering the negative public feeling, that "Here are these tax people delving into things that are not their business at all."

I do know all of your criminal cases, I guess, have a collateral civil case, and many of your civil cases evolve into a criminal case. You have two different diciplines, but you might just call it your criminal division. The Justice Department does, and gets away with it.

Now one final question. How many checks are drawn in a year? Do you have any idea?

Mr. ALEXANDER. I have no idea.

Mr. DANIELSON. It must be an unpronounceable "illion" of them. All of those are in computers?

Mr. ALEXANDER. Well, a series, I would hope, of computers somewhere. But we can ask the American Bankers Association. I am not sure how good our relations are.

Mr. DANIELSON. I do not want you to waste your time to satisfy a curiosity on my part, but it must be an incredible number.

Mr. ALEXANDER. It certainly would be.

I was thinking about my household, considering the number of checks that my bookkeeper—namely, my wife—draws.

Mr. DANIELSON. You pay the water bill and all those things and they are lodged forever, I guess, in a computer someplace.

Well, I will be happy if you will just answer the two questions that I posed to you. This other one is astronomical so I will not ask you.

Thank you.

Mr. KASTENMEIER. In conclusion, the Chair would like to say that we this morning have focused on one aspect of the Internal Revenue Service, investigating private financial records of individuals maintained by banking and other institutions and the right of privacy in that connection.

We are not unmindful that the jurisdiction of this committee does reach other questions of invasion of privacy, surveillance, wiretapping, and the view which Internal Revenue Service in terms of past operations has been associated with, at least in public, but which I gathered have been discontinued at the present time, which we did not touch on this morning. Nonetheless, the committee is interested in other tactics used as well as the maintenance of bank records and access to these records.

For purposes of H.R. 214, that is our primary concern; I would like to maintain a future relationship with your office in terms of considering some other potential pieces of legislation or variations of the legislation before us, and their effect upon you. We can do this subsequent, of course, to this meeting.

In conclusion, further, I would like to thank Commissioner Donald Alexander and his very competent staff for their intelligence and for the right testimony this morning.

Gentlemen, you have all been very helpful. Thank you.

Mr. ALEXANDER. Thank you.

Mr. KASTENMEIER. This concludes the meeting this morning. We stand adjourned.

The committee will meet at 10 o'clock on Wednesday for the purpose of discussing H.R. 214.

[Whereupon, at 11:43 a.m., the subcommittee adjourned.]