P U B L I C H E A R I N G

before the

SENATE JUDICIARY COMMITTEE

on

SENATE, No. 1417

(An Act to amend "An act concerning the interception of wire and oral communications, authorizing interception in certain cases under court order and prescribing procedures therefor, prohibiting unauthorized interception, use or disclosure of wire and oral communications, prescribing penalties for violations and repealing N.J.S. 2A:146-1," approved January 14, 1969 (P.L. 1968, c. 409).)

Held:
Assembly Chamber
State House
Trenton, New Jersey
January 30, 1975

Members of the Committee Present:

Senator James P. Dugan (Chairman)
Senator Alexander J. Menza (Vice Chairman)
Senator Raymond H. Bateman
Senator Martin L. Greenberg
Senator John A. Lynch
Senator Barry T. Parker
Senator John F. Russo

Also Present:

Assemblyman John T. Gregorio
Assemblyman Victor A. Rizzolo

I N D E X

SENATE, No. 1417

STATE OF NEW JERSEY

INTRODUCED SEPTEMBER 30, 1974

By Senator FAY

Referred to Committee on Law, Public Safety and Defense

AN ACT to amend "An act concerning the interception of wire and oral communications, authorizing interception in certain cases under court order and prescribing procedures therefor, prohibiting unauthorized interception, use or disclosure of wire and oral communications, prescribing penalties for violations and repealing N. J. S. 2A:146–1," approved January 14, 1969 (P. L. 1968, c. 409).

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Section 4 of P. L. 1968, c. 409 (C. 2A:156A–4) is amended to read as follows:

4. It shall not be unlawful under this act for:

a. An operator of a switchboard, or an officer, agent or employee of a 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. No communication common carrier shall utilize service observing or random monitoring except for mechanical or service quality control checks;

b. A person acting under color of law to intercept a wire or oral communication, where such person is a party to the communciation or one of the parties to the communication has given prior consent to such interception; or

c. A person not acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception unless such communication is inter-

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

cepted *or used* for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of this State or for the purpose of commiting any other injurious act. *Any person who unlawfully intercepts or uses such communication as provided in this paragraph shall be subject to the civil liability established in section 24 of this act (C. 2A:156A–24), in addition to any other criminal or civil liability imposed by law.*

2. Section 8 of P. L. 1968, c. 409 (C. 2A:156A–8) is amended to read as follows:

8. The Attorney General, a county prosecutor or the chairman of the State Commission of Investigation when authorized by a majority of the members of that commission, or a person designated to act for such an official and to perform his duties in and during his actual absence or disability, may authorize, in writing, an ex parte application to a judge designated to receive the same for an order authorizing the interception of a wire or oral communication by the investigative or law enforcement officers or agency having responsibility for an investigation when such interception may provide evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, loansharking, [dealing in narcotic drugs, marijuana or other dangerous drugs,] *violations of section 19 of the "New Jersey Controlled Dangerous Substances Act" P. L. 1970, c. 226 (C. 24:21–19),* arson, burglary, embezzlement, forgery, receiving stolen property *punishable by imprisonment for more than 1 year,* alteration of motor vehicle identification numbers, or larceny punishable by imprisonment for more than 1 year, *unlawful manufacture, purchase, use, or transfer of firearms, or unlawful possession or use of bombs or explosives,* or any conspiracy to commit any of the foregoing offenses or which may provide evidence aiding in the apprehension of the perpetrator *or perpetrators* of any of the foregoing offenses.

3. Section 9 of P. L. 1968, c. 409 (C. 2A:156A–9) is amended to read as follows:

9. Each application for an order of authorization to intercept a wire or oral communication shall be made in writing upon oath or affirmation and shall state:

a. The authority of the applicant to make such application;

b. The identity and qualifications of the investigative or law enforcement officers or agency for whom the authority to intercept a wire or oral communication is sought and the identity of whoever authorized the application.

c. A particular statement of the facts relied upon by the applicant, including: (1) The identity of the particular person, if known, committing the offense and whose communications are to be intercepted; (2) The details as to the particular offense that has been, is being, or is about to be committed; (3) The particular type of communication to be intercepted; *and a showing that there is probable cause to believe that such communication will be communicated on the wire communication facility involved or at the particular place where the oral communication is to be intercepted*; (4) The character and location of the particular wire communication facilities involved or the particular place where the oral communication is to be intercepted; (5) A statement of the period of time for which the interception is required to be maintained; if the character of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular statement of facts establishing probable cause to believe that additional communications of the same type will occur thereafter; (6) A particular statement of facts showing that other normal investigative procedures with respect to the offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ;

d. Where the application is for the renewal or extension of an order, a particular statement of facts showing the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results;

e. A complete statement of the facts concerning all previous applications, known to the individual authorizing and to the individual making the application, made to any court for authorization to intercept a wire or oral communication involving any of the same facilities or places specified in the application or involving any person whose communcation is to be intercepted, and the action taken by the court on each such application; and

f. Such additional testimony or documentary evidence in support of the application as the judge may require.

4. Section 11 of P. L. 1968, c. 409 (C. 2A:156A–11) is amended to read as follows:

11. If the facilities from which a wire communication is to be intercepted are public, no order shall be issued unless the court, in addition to the matters provided in section 10 above, determines that there is a special need to intercept wire communications over such facilities.

If the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, or are leased to, listed in the name of, or commonly used by, a licensed physician, *a licensed practicing psychologist*, an attorney at law, **[**or**]** *a* practicing clergyman, *or a newspaperman*, or is a place used primarily for habitation by a husband and wife, no order shall be issued unless the court, in addition to the matters provided in section 10 above, determines that there is a special need to intercept wire or oral communications over such facilities or in such places. *Special need as used in this paragraph shall require in addition to the matters required by section 10 of this act, a showing that the licensed physician, licensed practicing psychologist, attorney-at-law, practicing clergman or newspaperman is personally engaging in or was engaged in over a period of time as a part of a continuing criminal activity or is committing, has or had committed or is about to commit an offense as provided in section 8 of the act.* No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this act, shall lose its privileged character.

5. Section 12 of P. L. 1968, c. 409 (C. 2A:156A–12) is amended to read as follows:

12. Each order authorizing the interception of any wire or oral communication shall state:

a. The judge is authorized to issue the order;

b. The identity of, or a particular description of, the person, if known, whose communications are to be intercepted;

c. The character and location of the particular communication facilities as to which, or the particular place of the communication as to which, authority to intercept is granted;

d. A particular description of the type of the communication to be intercepted and a statement of the particular offense to which it relates:

e. The identity of the investigative or law enforcement officers or agency to whom the authority to intercept a wire or oral communication is given and the identity of whoever authorized the application; and

f. The period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

No order entered under this section shall authorize the interception of any wire or oral communication for a period of time in excess of that necessary under the circumstances. Every order entered under this section shall require that such interception begin and terminate as soon as practicable and be conducted in such a manner as to minimize or eliminate the interception of such communications not otherwise subject to interception under this act *by making reasonable efforts, whenever possible, to reduce the hours of interception authorized by said order.* In no case shall an order entered under this section authorize the interception of wire or oral communications for any period exceeding [30] *20* days. Extensions or renewals of such an order may be granted for periods of not more than [30] *20* days. No extension or renewal shall be granted unless an application for it is made in accordance with this section, and the court makes the findings required by sections 10, 11 and this section.

Whenever an order authorizing an interception is entered, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the court may require.

An order authorizing the interception of a wire or oral communication shall, upon a showing of special need by the applicant, direct that a communication common carrier use its best efforts to furnish forthwith the applicant with all information, facilities and technical assistance necessary to accomplish an in-progress trace or interception. This assistance shall be provided unobtrusively, and with a minimum of interference with the services that such carrier is affording the person whose communications are to be intercepted. Said order shall limit the hours that the carrier shall be obligated to provide said assistance, and shall specify the circumstances under which an obligation to provide assistance shall arise. Any communication common carrier furnishing such facilities or technical assistance shall be compensated for the costs of any assistance rendered to the applicant. Said carrier shall be immune from civil liability for any assistance rendered to the applicant pursuant to this section.

6. Section 17 of P. L. 1968, c. 409 (C. 2A:156A–17) is amended to read as follows:

a. Any investigative or law enforcement officer *or other person* who, by any means authorized by this act, has obtained knowledge

of the contents of any wire or oral communication, or evidence derived therefrom, may disclose or use such contents or evidence to [another] investigative or law enforcement [officer] *officers of this or another state, any of its political subdivisions, or of the United States* to the extent that such disclosure or use is appropriate to the proper performance of his official duties.

b. Any person who, by any means authorized by this act, has obtained any information concerning any wire or oral communication or evidence derived therefrom intercepted in accordance with the provisions of this act, may disclose the contents of such communications or derivative evidence while giving testimony under oath or affirmation in any criminal proceeding in any court of this or another state or of the United States or before any Federal or State grand jury.

c. The contents of any intercepted wire or oral communication, or evidence derived therefrom, may otherwise be disclosed or used only upon a showing of good cause before a court of competent jurisdiction.

7. Section 23 P. L. 1968, c. 409 (C. 2A:156A–23) is amended to read as follows:

23. In addition to reports required to be made by applicants pursuant to Federal law, all judges of the Superior Court authorized to issue orders pursuant to this act shall make annual reports on the operation of this act to the Administrative Director of the Courts. The reports by the judges shall contain (1) the number of applications made; (2) the number of orders issued; (3) the effective periods of such orders; (4) the number and duration of any renewals thereof; (5) the crimes in connection with which the conversations were sought; (6) the names of the applicants; and (7) such other and further particulars as the Administrative Director of the Courts may require.

The Chief Justice of the Supreme Court *and the Attorney General* shall annually report to the Governor and the Legislature on such aspects of the operation of this act as [he deems] *they respectively deem* appropriate including any recommendations [he] *they* may care to make as to legislative changes or improvements to effectuate the purposes of this act and to assure and protect individual rights.

8. Section 28 of P. L. 1968, c. 409 is amended to read as follows:

28. This act shall take effect January 1, 1969 and remain in effect until December 31, [1974] *1980.*

9. This act shall take effect immediately.

STATEMENT

This bill reflects the Attorney General's report and recommendations regarding the past 6 years of operation of the New Jersey Wiretapping and Electronic Surveillance Control Act, transmitted to the Governor and the Legislature September 16, 1974.

SENATOR JAMES P. DUGAN (Chairman): The public hearing on Senate Bill 1417 will now commence. There is an agenda that has been distributed to members of the administration and others who have evidenced interest in testifying before this committee. In concert with our staff, we have arranged with those members an agenda indicating the sequence of appearances for those witnesses who have asked to appear.

I realize just by a cursory examination of the list of witnesses that there are a number of public officials and others here who may have some conflict with the sequence of appearance as it presently exists. I would like to dispose of that immediately. If there is a problem and we can rearrange the schedule to accommodate someone who has emergent matters, I would like to do that now. I will read the list of witnesses as we contemplate hearing them. If there are any of you witnesses who would like to appear out of sequence, please bring that to my attention before we start: Senator Fay; Senator Wiley; Assemblyman Hamilton; the Public Defender; the Attorney General; Professor Blakey; Judge Kingfield; Judge Giuliano; David G. Lucas; Charles D. Sapienza; Karl Asch; Bernard Hartnett; Richard Singer; Prosecutors from Somerset, Essex, Hudson, Bergen, Middlesex, Camden, Atlantic; Harvey Weissbard; Francis Hartman; and William Bender. Is there anyone who has a problem with the order of his appearance? (No response.) I assume from your silence that no one wants to bring any request to my attention.

Therefore, we will start with the first witness, Senator John J. Fay, Jr., of Middlesex County, sponsor of Senate Bill 1417.

J O H N J. F A Y, J R.: Thank you, Mr. Chairman and members of the Judiciary Committee.

I appreciate this opportunity to speak on behalf of the bill which I was only too glad to sponsor. This reflects the amendments to our wiretap law recommended by the Attorney General. As you know, Attorney General Hyland and other experts from the law enforcement community and the judicial branch will appear before you today, and I will make no claim to be able to address all the technical issues which may be and should be better addressed by them. For added protection against Senator Menza and the ACLU, I have invited to be with me Deputy Attorney General Ed Stier of the Organized Crime and Special Prosecutions Section, and Deputy Attorney General Al Luciani of the Division of Criminal Justice Research Bureau.

For the last fifteen years in public service and particularly in the Legislature, I have had many occasions to talk with constituents and police officials who wanted to know what we were going to do about organized crime and official corruption which has in the past two decades brought such shame and ill-repute upon this State and our nation. I approached the Attorney General's report last fall critically bearing those conversations in mind. Then I offered to be the sponsor after being convinced from a study of all the records and all the reports on the wiretap law of the success of our criminal justice system during the past six years, with over 150 public officials convicted of crimes of corruption, and many criminal organizations, large and small, decimated in some cases and destroyed in others.

I can honestly tell my constituents and go on public record that we have done something to clean up our State. The fact of the matter is that we have done a great deal. On the State level alone we have had 486 convictions directly related to the wiretapping law. I have also been convinced that of these 486, none of them would have

been convicted without this power.

I am aware of the abuses of a law like this. I do consider it a real and imminent danger. I think the many abuses of which we are all aware, particularly on the federal level, have to give anyone a moment of pause, a moment to look around. But I also know, after being directly responsible and directly involved in this, that almost all of the abuses that have occurred have been found on the federal level, from the White House going back many years, all the way up and down the ladder.

I must respectfully take issue with those who may oppose the wiretap statute and the power it confers on our law enforcement officials on the State and county level. I strenuously disagree with those who oppose this statute on the grounds of privacy alone. I don't find the parallel between the rights of the loanshark and his victim. I don't find a parallel between the big drug pushers and their victims. I don't find a parallel between the rights of the corrupters and the people they are trying to corrupt or have corrupted when it affects the rights of our citizenry.

A wiretap is no more an invasion of privacy than a standard search warrant which is executed without prior notice to the parties. The right to privacy, as I said, is not absolute, but a right to be balanced with the right to be free from lawlessness. It is a right which we must zealously safeguard, to be sure, and one which we have safeguarded through numerous restrictive statutory devices and procedures and which we have included in the bill before us. These precautions have amply insured that when privacy yields to the higher demand of justice, it does so only to the extent of absolute necessity and consistent with constitutional dictates. In S 1417, we have tightened even further the parameters within which law enforcement

officials must operate, and demanded even higher accountability from those officials for their actions. The power is there for anybody in law enforcement, be he on the State or county level, who abuses this to be punished.

The challenge before this Legislature is not a threat to our privacy, but rather to the lawfulness in our State which we have strived so hard to achieve.

I must also take issue with those who argue that this tool has not been productive and at best is useful in waylaying petty gamblers and the like. I don't believe this to be true and I feel it is not true at all. Casual characterizations alone just don't hold up in the light of evidence that we have had in the last four years. We are not prosecuting gambling, but organized gambling of the variety that produces detestable pressures on our citizens and has been a cancer in our State and in our nation for too many years. The moneys from this have gone into loansharking operations, have gone into organized prostitution, and have gone into the corrupting of public officials. The documentation of this, I think, stands by itself.

What we also have to look at here are the alternatives. If we don't have this law, what do we have? I insist that the alternatives are complete immunity and the status quo of ten or twenty years ago. I, for one, feel that this is what we were elected to do and this is what our people want us to do, to strike at the major criminal elements in our State.

Therefore, I could never vote to deprive law enforcement officials of the very tool that has reached to the core of the underworld and has driven so many hoods and hoodlums beyond our borders.

Finally, I must take issue with those who condemn

wiretapping and electronic surveillance as a tool because of abuses of that tool which have occurred elsewhere. I fail to see any logic in the argument that because we have instances of abuse by private parties or other governments, we should deprive law enforcement officers of this power with strict judicially supervised controls. I also fail to see any logic in the argument which somehow links alleged abuses by agencies of other states with the operation of the Act in New Jersey. I think the records we have from the Attorney General's Office and the records we have from the Prosecutors' Offices show us no documented cases of abuses. And I note that in this jurisdiction we have prosecuted at least ten individuals for illegal eavesdropping since the enactment of our law. Moreover, our State Police perform a vital service to communications common carriers in New Jersey in assuring the integrity of their systems.

In summary, Mr. Chairman, I believe our Wiretap Act to be an essential law enforcement tool, proven in its effectiveness as well as in the privacies it protects. I believe the tighter restrictions and higher accountability which are proposed by the amendments contained in S 1417 will further enhance our Act by providing even greater insurance to our law-abiding citizens without impairing our ability to deal with crime and corruption. With these amendments, I respectfully urge that this bill providing for another six-year extension of the Act be reported out and passed into law. Thank you.

SENATOR DUGAN: Senator Fay, I am not going to ask you to document your statement because I know there are other witnesses here who are probably in a better position to do that than you are. But would you say in trying to summarize your testimony that you believe the results of the past six years of authorized electronic surveillance

justify the compromising of the basic and fundamental right of a citizen to his privacy? Is that the conclusion to which you have come?

SENATOR FAY: Yes.

SENATOR DUGAN: Do you agree with the premise that this is a basic and very fundamental and a very cherished right that we are attempting to compromise or surrender to some extent?

SENATOR FAY: Yes, I do. Of all of the weapons I know that I project as double-edged swords, this is one. I am convinced in the hands of a Prosecutor who suddenly decides to become a political hatchet man, there is no question about it that no one would be safe. I am very, very aware of our history of abuses in the last 25 or 30 years. But in the same period we are talking about, there has been a rise in political corruption, a rise in organized crime and a rise in the instances of citizens being at the mercy of these other forces. So as for a millennium, I don't know what that is. I do have mixed feelings about this kind of a weapon. But through my personal experiences and also as a citizen, I am also aware that,without it, the alternatives are even more horrifying.

SENATOR DUGAN: Then without this tool, organized crime and political corruption in your judgment would flourish?

SENATOR FAY: Yes.

SENATOR DUGAN: And you believe that the results of the past six years compel you to that conclusion?

SENATOR FAY: Yes, I do.

SENATOR DUGAN: But my question was more to the other aspect of the statement that I made to summarize your testimony. You believe that there is a very strict caution that we should exercise in dealing with this right of

privacy or surrender of it.

SENATOR FAY: Absolutely.

SENATOR DUGAN: Any questions?

SENATOR PARKER: I don't have a question to ask Senator Fay. But I want to know if this is the complete law that we have in Senate Bill 1417 or is this just extracts of the statute, the parts being amended?

SENATOR LYNCH: These are the amendments.

SENATOR PARKER: Could I have a copy of the full law?

SENATOR DUGAN: Yes.

Thank you, Senator Fay.

Is Senator Wiley here? I don't see either Senator Wiley or Assemblyman Hamilton.

Mr. Van Ness, the Public Defender, will be next.

S T A N L E Y C. V A N N E S S: I should start by saying, Senator, that the wiretapping activity has been addressed primarily at organized crime and not too many of those cases have found their way in the Public Defender's Office. Parenthetically, the few that have have occupied a great deal of time and occasioned large expenses. But institutionally, it is not a problem.

Basically, if I were to look at it from an institutional standpoint, I might be inclined to say, "Well, something that will get at organized crime might reduce the incidence of common crime, the drug addicts that we are dealing with."

SENATOR DUGAN: Mr. Van Ness, may I interrupt you. To me, that is a startling statement for you to make, that the Public Defender's Office does not routinely get involved in wiretapping cases. I was under the impression that a great many of the matters that your office handled did concern wiretapping.

MR. VAN NESS: There is not a large number. I wish that I could give you the exact figures. I will provide that for the Committee. Basically there is a natural selection involved here if it is a criminal activity of an organized nature. Many of those matters are handled by private attorneys. They don't get into the Public Defender's hands. We do have some. One court in Essex County has been consistently devoted to wiretapping matters. And we have had on occasion one or more attorneys in that court. But the kind of crimes that are detected by wiretapping are not the kind of crimes that frequently come to the Public Defender's attention.

What I was starting to say was that even though it is not an institutional problem - and I am not speaking from an institutional standpoint, but rather a personal one and, at least initially, a philosophical one. I would have to agree with the observation that Mr. Justice Holmes made some fifty years ago, or almost fifty years ago, that this is indeed a dirty business. At the time that Mr. Justice Holmes made that statement, the technology had not risen to the level that it presently enjoys where, frankly, if we are not careful - if you gentlemen are not careful - in either severely restricting this activity or eliminating it, the potential is clearly here for a police state activity. We need only look down the highway a couple of hundred miles and observe the experience of the last few years to understand the full dimension of the potential.

I would strongly urge that if the wiretapping bill is to be continued or if the law is to be continued, it be restricted even more severely than it presently is, particularly in connection with Section 12 of the law, 12 f, I believe, to be precise, where the Legislature

six years ago said that there should be an effort to minimize or eliminate the interceptions that do not relate to criminal activity. Unfortunately, in my judgment, the courts here have pretty much read that interdiction out of the statute. I would ask you to look at the case of State v. Dye that appears in 60 New Jersey where the court effectively held that police officials could monitor conversations extensively without regard to minimizing or eliminating inappropriate or irrelevant conversations, and that if they picked up something that was useful, something that tended to incriminate, some evidence of crime, they could use that, notwithstanding the fact that they may have monitored all conversations in a household over a 30-day period and found only a very small number having any relationship to criminal activity.

I think that allows police officials to swing a net that is so wide as to very much jeopardize what I believe to be a basic individual right in this country of privacy.

I think that the other amendments that have been suggested by the Attorney General move in the direction of more scrutiny and stricter controls. I think I would be more inclined to look at a limitation of 15 days as opposed to 20, since as I read the report of the Attorney General and the average length of time that they have kept taps on for useful purposes seems to be around 15 days. That would be a reduction from 30 in the present law to 15. And I am advocating the Attorney General suggesting the 20 days.

Also I would urge the Committee to consider restrictions as to hours of the day. Much of this activity we are talking about, bookmaking, can be, I am told, fitted into certain hours of the day when the activity takes place. Now, if that is the case, then I see no reason why the

conversations from a phone should be monitored for periods beyond what might be reasonable to expect would result in detection of crime.

Those would be basically my observations. I come back to the philosophy where I began. I think we are dealing with a very, very serious matter here and, if we are not willing to exercise the utmost caution, that we may find ourselves living in a society that none of us ever expected to live in, and it may be some years before 1984.

SENATOR DUGAN: Mr. Van Ness, you made reference to a concern that you had in the interception of extraneous conversations. What remedy would you suggest in the event that extraneous conversations were unreasonably intercepted? Would you suppress the entire conversation?

MR. VAN NESS: I would suppress the entire conversation where it appears in a particular case that the number or frequency of interceptions is unreasonable in relation to what was found. I know that is difficult to put into law. But I think you might consider language that would make it clear in Section 21, the exclusion of evidence remedy that the Legislature initially provided, that where in the opinion of the judge the police acted unreasonably in failing to eliminate or minimize non-pertinent interceptions, the remedy is for the entire series of interceptions to be suppressed. Otherwise, Section 21 doesn't mean anything because if they say you could suppress the irrelevant information, no one is reasonably likely to try to introduce the irrelevant information. So it really is an illusory remedy as the law presently stands.

SENATOR LYNCH: Mr. Van Ness, I believe your office participated in the case of State versus Dye, did it not?

MR. VAN NESS: That is correct.

SENATOR LYNCH: Section 12 of the Act specifically states as follows: "Every order entered under this section shall require that such interception begin and terminate as soon as practicable and be conducted in such a manner as to minimize or eliminate the interception of such communications not otherwise subject to interception under this act. . ." As I recall it, in the case of State versus Dye, the wiretap was on indiscriminately for roughly 110 hours.

MR. VAN NESS: One hundred and five hours, to be precise, and there were two and one-half hours of conversations.

SENATOR LYNCH: There were two and one-half hours of relative material that was properly intercepted.

MR. VAN NESS: Yes.

SENATOR LYNCH: The court refused to suppress that.

MR. VAN NESS: Yes. Actually, I think it would be more helpful if I were to trace another series of cases or another case, State v. Molinaro, I believe.

SENATOR DUGAN: Excuse me, Mr. Van Ness, some of the people in the back are having difficulty hearing.

MR. VAN NESS: I am sorry; I will speak up.

Senator Lynch, actually State v. Dye was decided in the period between the time that State v. Molinaro was decided by Judge Handler in the Essex County Court and the time that that decision was reversed in the Appellate Division. The Appellate Division opinion, a per curiam opinion, related to language that was employed in State v. Dye, as justifying the reversal. And I believe that the court in State v. Dye observed that anything in Molinaro inconsistent with the opinion that they were announcing in Dye was going to be reversed.

SENATOR LYNCH: Wouldn't you say that it is obvious from the language in Section 12 that the intent of the Legislature was that such conversation should not be intercepted?

MR. VAN NESS: That is exactly the point that I am making, yes, sir. I think that was the intent. That is not the law as it has been interpreted in my judgment, Senator.

SENATOR LYNCH: In other words, it is contrary to the statute.

MR. VAN NESS: That would be my observation of it. Of course, I was a litigant in that case. My opinion should be discounted accordingly.

SENATOR LYNCH: Under a strict interpretation of the statute, since such interceptions were illegal under Section 21, all that testimony should be dismissed.

MR. VAN NESS: That was the position we argued unsuccessfully.

SENATOR LYNCH: I think you were right about it. No further questions.

SENATOR MENZA: I have a couple of questions, Mr. Van Ness: What do you think about the concept of wiretapping, the necessity of wiretapping as a tool for law enforcement?

MR. VAN NESS: That is hard for me to answer in an intelligent fashion, Senator. I am not in law enforcement and haven't been in law enforcement for a dozen years, almost. It seems to me that there might be a better way to approach the problem. If we are talking about bookmaking as the primary problem - and as I look at the number of taps and particularly the successful taps, they seem to fall largely in the category of bookmaking - I probably, and I have been called radical before, would suggest that maybe some relooking at laws on gambling might be helpful. Perhaps it is analogous to the prohibition age when rum-runners made a lot of money and I think we would have

to conclude that organized crime was very active in those days. The elimination of prohibition and the regulation by the state seems to have had a salutary effect in driving organized crime out of that area of endeavor.

I personally am not deeply troubled by someone making a bet on a horse over the telephone when the State permits people to make a bet on a horse if they are able to go to Garden State Park or to Monmouth Park. I find no great assault on my senses of morality. I recognize that the problem is that the revenue derived from that illegal activity is used to finance other activities that might assault my senses of morality, as dull or as dim as they might be. But it seems to me that if the money can be taken out of it, then, of course, the problem would disappear with it.

SENATOR MENZA: The court's tendency is to let everything in - practically everything is relevant. Talking about bookmaking, for example, you will have a situation where the bookmaker receives his bet and then makes the next phone call to his girlfriend. If you make a motion to expunge that section, the court will respond or the prosecutor will respond that that is relevant for identification. It gets to the point that practically everything is relevant, even though the conversations have nothing to do with the actual bookmaking or whatever the subject of the crime is.

MR. VAN NESS: I can't comment on what the practice of the courts is in that regard. I do know that in Dye only 2 1/2 hours out of 105 hours of tape were relevant by the prosecutor's admission. In the Molinaro Case, I think roughly 45 percent of the conversations that were intercepted were conceded to be irrelevant to any criminal activity.

What I am suggesting is - and I do not hold out any

magic number - that if you exceed 50 percent, 51 percent of them being irrelevant, then we should strike out those things that are relevant. But I do think there is a rule of reason here. I am sure we wouldn't have any difficulty agreeing if someone's telephone had been monitored for 30 days and on one occasion in the course of 30 days someone was heard to place a bet with a local bookie, that that entire 30-day interval would have represented an unreasonable intrusion into the privacy of the people using that telephone.

SENATOR PARKER: Mr. Van Ness, I want to direct you, if I may for a moment, to Section 156A-4, which is 4 b and c, which I would call the consensual wiretap, where one party either through a grant of immunity or cooperation with the police for one reason or another consents. Do you have any comments in regard to that? It is my understanding that entrapment is basically illegal. When one consents to it and goes and wires oneself and has a phone conversation, why isn't that illegal? I don't understand it.

MR. VAN NESS: Well, I think there are really two issues here, Senator. As I understand the law of entrapment - and you will pardon me if I don't give you a perfect exposition of it - it is largely a factual determination that turns on whether the police informer or the police official merely gave the opportunity to a person willing to commit a crime or whether he went a step beyond and, in fact, occasioned the commission of a crime. If I am perfectly willing to engage in a criminal activity, if I am a drug dealer and you are a police informer, and you come up and I sell you drugs and I am subsequently arrested, I think that is just my hard luck for picking a bad customer. If, on the other hand, you are a close personal friend of mine who is suffering withdrawal pains and you have called on our past friendship and you have overwhelmed me, and if I had a supply that I really had no intention of selling, but you prevailed upon me to do so, we might have an

entrapment situation.

In the case of planting a microphone on someone, if there hasn't been entrapment, as I understand the law - and I guess it would come from the On Lee and the Lopez decisions in the United States Supreme Court - they do not consider that the same way as they would consider an intrusion into the privacy of both of us. In other words, you are consenting. An anology might be the person whose youngster was kidnapped and consented to the police listening on the telephone to see whether they could trace a call or not. So I really think it really turns on the facts.

SENATOR PARKER: Do you see any public service being served in not requiring them to get the judge to okay that?

MR. VAN NESS: No, I don't think that we can ever err by involving the Judiciary in reviewing the necessity for that kind of activity.

SENATOR PARKER: In other words, from what you know - and I will ask the Attorney General this - there would be no lost time or no harm to the State or no disservice to anyone by requiring court approval on this type of consensual tap?

MR. VAN NESS: Well, there might be a situation where there is an emergent matter. But that is covered in your warrant and nonwarrant with searches in the traditional body of Fourth Amendment law. So I don't see that as a great handicap and would not suggest that it should prevent the involvement of the Judiciary.

ASSEMBLYMAN PARKER: I also understand that only a few judges - and I was trying to find the section - are authorized by the Chief Justice to do this. Is that correct?

MR. VAN NESS: I believe there are six, but you had better check me on that.

SENATOR PARKER: That is not covered in the statute; that is a matter of interpretation of court rule?

MR. VAN NESS: As I understand the statute, the authority was given to the Chief Justice to designate certain judges to hear these matters. And it is my understanding the Chief Justice has done so.

SENATOR PARKER: Have any violations come to your attention, in other words, by police officers or anyone - individuals, prosecutors or anybody?

MR. VAN NESS: I could not say that abuse has come to my attention. But I would hasten to add for the reasons I set out initially, the infrequent occasions in which the Public Defender is involved in these matters, that there could be abuses that have not come to my attention. My concern is basically with the potential for abuse. That is what I would respectfully submit we should be concerned with here.

SENATOR PARKER: I think we are and that is why I have been trying to get to it. Do you know anyone who has been penalized at all?

MR. VAN NESS: Well, no, if I understand what you are meaning by abuse. Mr. Dye obviously was penalized by what I think was an inappropriate interpretation of the statute. But I can't put my finger on any instance.

SENATOR PARKER: Do you know of an instance where somebody, for instance, the prosecutor, has gone in and gotten a wiretap for something that was not considered a crime under the statute - or any law enforcement official or public official?

MR. VAN NESS: I would have to say I do not know of any, but I would not submit that none have occurred.

SENATOR PARKER: Then I will ask whether you think the penalties provided in Section 24 are sufficient to be any deterrent to any illegal activity, providing only

$100 a day in punitive damages and attorneys' fees. Shouldn't it be either a civil penalty or a crime for someone to commit?

MR. VAN NESS: I think it should be a crime for someone to violate the law. One hundred dollars a day scarcely seems in inflationary times like a very substantial license.

SENATOR PARKER: You can get that on unemployment.

MR. VAN NESS: If you want me to wax philosophic ---

SENATOR PARKER: No. I just wondered what your feeling was concerning the penalties for someone violating the Act.

MR. VAN NESS: I think we are talking about a very basic liberty that we are going to have to be more and more mindful of protecting. I think it is of primary concern that we do everything possible to see if there is going to be a wiretapping law that it not be abused. To the extent that criminal penalties ever deter anybody from doing anything, then certainly there ought to be criminal sanctions here.

SENATOR BATEMAN: Mr. Van Ness, I would like to ask you Senator Menza's first question in another way. With the restrictions that you suggest, is this dirty business necessary to good law enforcement in New Jersey?

MR. VAN NESS: There are numerous people in this room that could answer that question more properly than I can. But I don't think so.

SENATOR BATEMAN: You don't think so.

MR. VAN NESS: No. But that is strictly an opinion that is not based on a great deal of empirical evaluation. As I said, it seems to me that the focus has been on bookmaking, and I think bookmaking is a matter that could be handled in a different way.

SENATOR GREENBERG: The last question that was

asked of you by Senator Bateman, and the answer to that is what I really want to get into for a moment. I understand that you have a desire not to express an opinion with regard to the need, but we are interested in your view, because of your position and your experience.

I was about to ask you the following question: Based on what I heard from you in your statement, I would assume that you would be in favor of an extension of the wiretap statute with modifications, but I'm not sure now that the answer to that question is "no."

MR. VAN NESS: No. I think that I have failed to be clear in that regard. I do not favor an extension of the wiretap statute. If there is to be an extension - because while I have been philosophic here I am also realistic - I recognize the position that law enforcement people have taken on this, and they may well be able to justify why it should be continued. If indeed it is continued, then I would suggest the modifications that I offered.

SENATOR GREENBERG: On the question of modifications, have you read the Attorney General's proposed amendments prepared by his office?

MR. VAN NESS: Yes, I have.

SENATOR GREENBERG: I would like to draw your attention to the section dealing with "special need," which is Section 11 of the bill, on page 4, defining for the first time in statutory form "special need."

Do you have an opinion on the language?

MR. VAN NESS: I don't have the bill here.

SENATOR DUGAN: Here is a copy.

MR. VAN NESS: I view it as an improvement of the existing law. It expands the occupations that are covered; it makes clear that there would be no "special need" unless there was a showing that the person in that occupation was engaged in some criminal activity.

I think that is a needed improvement, yes.

SENATOR GREENBERG: Or is about to commit a criminal offense?

MR. VAN NESS: Or is about to commit an offense.

SENATOR GREENBERG: Do you have any trouble with that language?

MR. VAN NESS: On reflection, I would be troubled by "or is about to". I think it could be subject to abuse. I think it is still an improvement over nothing in the law, though.

SENATOR GREENBERG: Mr. Van Ness, I have just one more question. Do you have the bill in front of you?

MR. VAN NESS: Yes, I do.

SENATOR GREENBERG: Turn to the next page, page 5, lines 29 and 30, Section 12, dealing with what you testified about - minimizing or eliminating. There is an amendment proposed which reads: "by making reasonable efforts, wherever possible, to reduce the hours of interception authorized by said order."

MR. VAN NESS: Again, that is an improvement over the existing law, but I don't think it is a total answer to the problem that I was trying to bring to your attention.

I think that a trained police officer, particularly as the investigation progresses, should be able to tell, even if the tap is limited from ten to three, if the suspect's ten year old is getting on the phone to make arrangements for dancing lessons, or if the suspect's wife is getting on the phone to make arrangements for an assignation with someone other than the suspect, that it has no bearing on what the purpose of the tap is, that it should not be monitored, and that it

should not become a record. Where that kind of interception outweighs the relevant interception, then I think the relevant interception has to be suppressed to give any meaning to the law. Now, this is certainly an improvement to say where it is possible to do it.

SENATOR GREENBERG: But if you suppressed all evidence including the relevant evidence, the fruits of the tap, completely, then it would make this language unnecessary, I would assume.

MR. VAN NESS: It would make this language unnecessary, except as a guide to law enforcement officials. If the remedy were suppression of anything that w a s r e l e v a n t because the entire series contained so much information that was irrelevant, then the fact that it was done between particular hours of the day would not make much difference, but I think it would be useful.

SENATOR GREENBERG: Thank you.

ASSEMBLYMAN RIZZOLO: Mr. Van Ness, as the person who sat as the trial judge in the infamous Dye case, I find myself hard put to agree with Senator Lynch and to disagree with the Supreme Court in the decision, because I wrestled with that problem at a very early stage when there was no decision of any court with respect to the interpretation of the law.

It occurs to me to ask you how you would react to perhaps an amendment to the law which would put some sanctions and some teeth into prosecution against any law enforcement officer who monitored a noninculpatory conversation --along with that I say that I don't think there has been any prosecution against anyone; for example Mr. Dye didn't prosecute or sue civilly the officers who monitored his irrelevant telephone conversations--

in order to save taped conversations of an incriminatory nature coming within the parameters of the wiretap order. How would you react to that kind of suggestion?

MR. VAN NESS: I think that would take me to question my view of the whole exclusionary rule. Really what you are suggesting is what has been suggested as a substitute for excluding illegally seized evidence under the traditional warrant search body of law. I have little confidence that constitutional liberties can be adequately protected here by giving an individual a civil remedy against the illegal activity of the police.

I postulate the reaction of a jury when this now-convicted felon--- Let's say he is a dope pusher, and let's go to the traditional illegal search and seizure. Let's further hypothesize that indeed there is no doubt that there has been an illegal search and seizure, and we now have Mr. "X" in the dock and we convict him with the illegally obtained evidence. I have little confidence that a jury is going to award substantial damages against the police officer for having illegally seized the evidence that made Mr. "X" a convicted felon. So I guess it really boils down to this: Is there a remedy other than exclusion of the evidence that can hopefully prevent the overzealous ---

ASSEMBLYMAN RIZZOLO: Right. I thank you for your comments, and just to carry that one step further, I have one last question. I can respect your opinion with regard to a lack of confidence as to this really being effectually any safeguard at all.

How would you react to, if not a right for civil prosecution or going into that area, a

departmental charge against the officer who does this - who goes beyond that which is contemplated by the act, by the letter and spirit of the act, and goes into irrelevant conversations - to make him subject to discipline, to removal from his job, et cetera? I don't think there has been any action along this line ever.

MR. VAN NESS: That is the other proposed remedy for eliminating the exclusionary rule. I have to say in candor, I have even less confidence in that remedy than I do in the civil action as a means to protect the constitutional rights of someone who has been subject to an illegal search and seizure.

ASSEMBLYMAN RIZZOLO: Can you give the reason for that briefly?

MR. VAN NESS: Well, it occurs to me that the police function is to apprehend and convict those persons who are committing crimes. I would like to think that there was equal emphasis placed on doing that in a legal fashion, but my experience - and we do have some experience in this area - suggests that it is not unusual for the police to apprehend people by means other than a close observance of the Fourth Amendment. If the emphasis is putting people in jail who committed crimes, I accept that as their function and applaud them for pursuing it, but I cannot at the same time be confident that they are going to punish those people who are most effective in fulfilling the primary function by giving them departmental charges or disciplining them internally. I think it is too much to ask of a police agency.

ASSEMBLYMAN RIZZOLO: Just one other question. If the disciplinary action were handled not by the

law enforcement officer or in that realm, and were taken out of it, how would you feel about that? Would that change your opinion at all?

MR. VAN NESS: It makes it a harder case. But I still think that the exclusionary rule has not been given the trial that proponents had hoped it would be given when they announced the Mapp decision. I would not be ready to substitute that for exclusion of illegally obtained evidence.

SENATOR RUSSO: What about a criminal penalty even though the likelihood of its actually being carried out would probably be just as limited as the civil or departmental; nevertheless, a threat, just in case it is ever carried out, might be effective, aside from the exclusionary rule for a moment. What is your thought on that?

MR. VAN NESS: I think I observed to Senator Parker that, yes, to the extent that the criminal sanction deters people from breaking the law, fine.

I don't view it as an adequate substitute, though, for reasons that I think you inferred in asking the question.

SENATOR RUSSO: Fine. Now, my main question is in regard to the number of orders granted. We have apparently proceeded in the years from 1969 to 1973 a more than 400% increase in the number of wiretap orders granted. Apparently, if the information that we have is correct, during that period of time that we have had this dramatic increase, not one judge has ever seen fit to say to one prosecutor, "You are not justified in asking for this order. I am not going to grant it." At least that is the information that we have.

Could you give us your reaction to that, and whether or not that is an indication either that the

prosecutors are being awfully careful and only asking for them when they are justified, or that the judges are not being careful enough?

MR. VAN NESS: You could draw either conclusion from it, Senator, and I am not in a position to draw one or the other, really. I don't know. It has often been said in the area of the regular search warrant that no particularly close scrutiny is given in some instances.

We have here specially selected judges by the Chief Justice, and I would be most surprised if the level of scrutiny were not higher than I would have associated with magistrates in the regular warrant. So,it may very well be that the prosecutors are being extraordinarily careful and that all of their affidavits are compelling under the most careful scrutiny. It could be the other, but I really cannot choose between the two.

SENATOR DUGAN: Thank you very much, Mr. Van Ness.

SENATOR DUGAN: Attorney General William F. Hyland.

General Hyland, I think that a lot of the questions the Committee has are suggested by the questions and the responses that were put to Mr. Van Ness and came from him.

I realize that you put a great deal of time and thought into the statement that you gave us but perhaps, without reference to that, you could highlight some of the concerns that are evidenced by the questions. Basically, the need or the justification for Senator Fay's position must rest with you as the principal law enforcement agent in the state, to justify the surrender, or the compromise, of this basic right of privacy that we have been talking about. Can you respond to that kind of concern that has been evidenced by the Committee?

ATTORNEY GENERAL WILLIAM HYLAND: I think so. Let me first say that I have with me this morning Matthew Boylan, Director of the Division of Criminal Justice; Deputy Attorney General Peter Richards of the Organized Crime and Special Prosecution Section; and Professor Robert Blakey, whom I will introduce more fully in a moment.

Many of you may remember that Professor Blakey testified before the predecessor of this Committee in 1968, at a time when the entire package was being put together by this Committee and by a special committee that, as I recall, was chaired by the present Congressman Forsythe. I want to thank him, publicly, for coming back again to give us what I think may be a useful outside measurement of the progress that New Jersey has made in the last seven or eight years, since those days that we all remember so well when we were highlighted fairly regularly in Life Magazine and elsewhere as being a

State that had failed to measure up to its law enforcement responsibilities.

I believe that my tendencies are shown by the use made of the Wiretap Authority in 1974. We made only 24 applications as contrasted with a high of 87 in 1971. This illustrates the concern that has been pointed out here: The balance that the Legislature had to make in 1968 and that we are called to make again now between concern over privacy and its invasion, and concern - on the other hand - over rights that are just as sacred to the people of this State and the nation, and they are the right to be protected from abuse of their person and abuse of their property by law-breakers.

My tendencies, being of a fairly conservative nature with respect to invasions of privacy, would lead me to reflect very carefully - as I have - before recommending that the Wiretap Act be extended. I have made the judgment that you are calling for: On my set of scales and with the experience that I gained on the State Commission of Investigation, and during the period of time as Attorney General that this problem was under consideration in my office, things need to be done in law enforcement that cannot be done effectively without recourse to wiretapping on a very carefully supervised and selective basis. So, I would have to disagree with the Public Advocate to that extent.

During 1967 and 1968, when the hearings that I referred to were being held and when we were on the receiving end of great notoriety and criticism throughout the nation -whether deserved or not in comparison to the law enforcement circumstances of other states - a number of devices were put together by this Legislature to equip the state and county law enforcement community with the weapons that were thought to be needed.

It will take me just a moment to recite those major steps, but I respectfully suggest that part of the fabric that was developed in those days was the act that is now under review now and without which some of the weaponry and the total program that was developed will begin to fall apart.

The Legislature passed, in those days, an act permitting immunity to be granted to witnesses, which has been found to be an indispensable tool by the federal and state authorities throughout the country in gaining convictions. It created the State Commission of Investigation, an agency balanced between the executive and legislative branches of government, representing both of them equally, and which had the capacity to investigate matters where criminal conduct was not necessarily involved, or at least the outset was not known to be criminal in character.

The Criminal Justice Act of 1970 also came out of those hearings and deliberations and gave us what I have thought to be, and what Professor Blakey has confirmed to be in my discussions with him this morning, probably the most outstanding criminal justice structure of any state in the nation.

The Criminal Justice Act - you will recall - gave to the Attorney General's office supervisory responsibilities with regard to county prosecutors, so gradually we have been able to look at crime, of the organized character or of the modern nature that transcends municipal and county boundaries, as we should look at it on a statewide basis.

That act also created the Division of Criminal Justice, so that we moved from a posture, in 1970, of having approximately five Deputy Attorneys General who were the sole legal resources at the state level in the

criminal area, to a position where we have approximately seventy five Deputy Attorneys General today, who support the Grand Jury that was also created back in those days - giving us one of the first statewide Grand Juries in the nation - and who are also handling most of the appeals that come out of the prosecutor's office. So, we have, today, a research and talent bank of an Appelate character, unlike any other state in the nation.

So, what I would hate to see is the unraveling of the good that was done in those days by the superficial conclusion that wiretapping, which admittedly is a messy business, has been abused by the people in whose hands the responsibility for carrying out the act has been placed. We should not be charged with the abuses that are made by non-law enforcement people, but should have some assurance that they probably are far more limited than they otherwise would have been, except for the fact that we have a very strong act.

We should not be charged with the excessive use of these weapons, nor should it be suggested that the judges of the state have not performed their duties, because the assertion has been made that no judge has turned down an application for electronic surveillance. Rather, we should get some comfort from the suggestion that justice can be properly taken from that; that the people charged with the responsibility of implementing the act are doing it very responsibly.

I am not in a position to say whether or not an application has been turned down by the judiciary because the bulk of the applications, in the more recent years, have been make by the county prosecutors' offices in the aggregate, as opposed to our office. I think the statement is probably correct with respect to the Attorney General's office. I can tell you that,

with regard to the 24 applications that were made in 1974, before they reached my desk they had 6 or 8 independent reviews, beginning with the investigators who first developed the premise that in no other way would the evidence that they felt could be obtained, be obtained, except by recourse to electronic surveillance.

The state police not only have a review apparatus but the Division of Criminal Justice has one as well. The individual Deputy Attorney General in charge of the matter at a given point, when an application is under consideration, has the responsibility in the first instance, on behalf of the Division of Criminal Justice, to make the judgment about whether an application should be formulated. It then goes through the various steps until it finally reaches the Director, now Mr. Boylan. It then comes to me and I look at it very carefully, as I assume the Superior Court judges that have been appointed for this purpose by the court do.

We have had a fairly amazing record, I think, of convictions that are directly traceable to the use of the Wiretap Act - almost 500 as far as our office is concerned during that period of time, that is since 1970. In the same period of time, where a prosecution has been brought, it depended in large part - or exclusively - upon evidence secured in the fashion provided for by the act. We have had only 11 acquittals. So, that ratio of almost 500 convictions to 11 acquittals, I think, says something not only for the utility of the act but also for the great saving that we can probably never measure, the great saving that must be present to the state and to the counties insofar as when you have this kind of evidence. You have something very significant and it leads, in a great number of cases, to pleas and in those instances, where you are at large to go to court, you know that you

have some reliable information that, if it had been secured through an informant, for example, has been corroborated in some fashion by getting it down on tape.

SENATOR DUGAN: General, I think we have started to get to the thing that concerns many of us. We have to make the same judgment that you were confronted with and the same judgment that Mr. Van Ness was confronted with, and we are only going to be intelligently able to do that if we can have a catalog from you of the results that are directly attributable to authorized electronic surveillance since 1969. Frankly, the 500 convictions since 1970 - that figure alone - does not satisfy me of anything. The nature of those convictions -- could they have been handled in another way, as Mr. Van Ness suggested? Those are the things that trouble me - the justification for the answer "yes" or "no" to that question.

Can you break down those figures a little bit more to tell us what crimes were being committed and what the targets of those investigations were - the nature of the crimes?

ATTORNEY GENERAL HYLAND: I am going to ask Mr. Richards to amplify my preliminary answer. But I don't think we can look at the statistics - even though I have offered them - as being totally persuasive in one direction or another.

SENATOR DUGAN: I agree with you.

ATTORNEY GENERAL HYLAND: For example, many of these prosecutions have been directed at organized crime rings and at organized crime figures. This isn't comparable to picking up bookmakers who had an isolated operation - if there can be such a thing.

Mr. Richards, I think, who was present all throughout the period of time that these particular prosecutions were made, can amplify the types of targets

that have been involved in making use of the wiretap rights.

SENATOR DUGAN: Well, perhaps we can get, Mr. Richards, the number of arrests that were consequent to electronic surveillance conducted by your office during this period of time.

MR. RICHARDS: Those figures are quite extensive. I have totals for each year, Senator. In 1969, which was the first year of the statute's operation, there were 33 court authorized installations which resulted in 102 arrests.

SENATOR DUGAN: What were the charges?

MR. RICHARDS: I can break these down in extensive detail, if you wish, for each year because I have totals in general categories.

SENATOR DUGAN: Give us those general categories. Give us some illustration.

MR. RICHARDS: Well, in 1969 of the 102 arrests there were 86 for gambling, 11 narcotics, 5 for conspiracy to commit murder, and that comprised the total.

In 1970--

SENATOR DUGAN: Mr. Richards, if I may interrupt you, how many of those would you characterize as organized crime activities?

MR. RICHARDS: Well, I think if you define organized crime, Senator, as any group which conducts a criminal enterprise in a structured manner - that is, not an individual street crime, but a crime where some sort of organization does exist and there is some sort of hierarchy - I would say that virtually all of those arrests were of that nature.

SENATOR DUGAN: Specifically, I am addressing my question to the gambling arrests which seem to constitute the bulk of those arrests. Where in the

hierarchy do the arrests fall - how far up in the hierarchy or how low in the hierarchy are these 87 defendants?

MR. RICHARDS: Well, I would say in the early years, Senator, of the electronic surveillance program, that we were able to penetrate to levels in the gambling hierarchies that we investigated to which we had never been able to penetrate before, without the use of electronic surveillance.

SENATOR DUGAN: Where is that?

MR. RICHARDS: Those levels were the top-most levels. We were able to get the prosecutable cases against persons who were at the very top of those organizations.

SENATOR DUGAN: Can you give me an example of that?

MR. RICHARDS: Well, one example, I believe, is the Zicarelli case which was a very complicated prosecution and which originally involved a "bug" placed in a location used by Mr. Zicarelli as an office. He - from the information that we obtained - was the very top level of that operation.

I might point out that although that investigation began as a gambling investigation, it ended up with indictments for conspiracy to commit murder and also with a number of significant subsequent prosecutions which involved the interconnection between organized crime and public corruption. We were able to prosecute a number of public officials as a result of the investigation that came out of that microphone eavesdropping in the Zicarelli case.

SENATOR DUGAN: That was in what year?

MR. RICHARDS: That was in -- well, the original installation was in 1969. I believe the investigation extended well into 1970; it was a very lengthy investigation.

SENATOR DUGAN: Subsequent to that, can you give us some additional examples of members of the organized crime hierarchy that were convicted consequent to electronic surviellance?

MR. RICHARDS: I do not have with me a specific list, by name, of persons who were convicted and I'm not sure it would be appropriate for me to name particular individuals who have not been previously named on the public record as members of organized crime. I can assure you though, Senator, that I've been in this business for approximately 11 years now - obviously, a significant part of that time preceeded the existence of court-authorized wiretapping - and from my own personal experience it was totally impossible without the use of this technique - before the Legislature permitted us to use it - to penetrate the levels to which we were able to penetrate with the use of court-authorized electronic surveillance.

SENATOR DUGAN: Well, in making our judgment - perhaps I am being a little obscure in this question - we have to determine-- Certainly we applaud the work that was done in the Zicarelli case as a consequence of this, but we are concerned about the impression that some of the members of the committee have and that the public has, that the results of this are the netting of a lot of small fish involved in gambling - taking numbers or horse betting. If that is the case, is it sufficient justification for authorizing the activity?

MR. RICHARDS: Let me make two points in response to that, Senator. First of all, I am not saying that in every gambling case, every person in each case is at the top of the enterprise. We, naturally, in the course of an investigation indict defendants at all levels. So, the effort we make is to eliminate, or at least create a

vacuum for a period of time with regard to an entire gambling enterprise. We try to extend a gambling investigation if we possibly can into other criminal areas in which the same people are involved.

I come back, again, to the Zicarelli case, where the spinoff cases were situations where public officials were being paid to protect Zicarelli's gambling operation. So, the core of the situation was gambling, although all the cases were not gambling.

The second thing that I would point out is that in some instances the statistics are misleading because when you get into later years where there are a larger number of wiretaps, as we progressed and learned more about the use of the law, subsequent to 1969, our investigations, I think, became more sophisticated. When you see "x" number of taps for gambling, it may very well be that three or four or five of those taps were in the same case. In other words, we will start at a certain level in a gambling operation where we are able to obtain probable cause for a wiretap. From that we will progress to additional wiretaps as a result of probable cause that we obtain from the first one. We call them "jumps" in our police jargon. That series of jumps, each one of which goes to a new telephone and which progresses higher up in the organization, of course, statistically, is counted as one more tap. However, that whole series of taps may be simply one case and result in one prosecution of a number of people at various levels of the enterprise.

As I said, we seek in these cases to reach, through this extraordinary technique, the highest level that we possibly can. When we start an investigation with the basic information that we have, we try and evaluate, before we use the wiretap, the potential for reaching the top level of an organization. I can't say that we are

always 100% successful but we do our best to reach levels that, without wiretapping, would be impossible to reach.

SENATOR DUGAN: Some of the--

ATTORNEY GENERAL HYLAND: May I interrupt for just a moment? I don't want to interrupt this line of questioning but I do have a time problem with regard to Professor Blakey that I would like to point out to the committee. We have to get him out of here by 1:00. Would there be any objection to his presentation at this point, so that he could then be questioned?

SENATOR DUGAN: No problem.

ATTORNEY GENERAL HYLAND: He has come here from Syracuse today and has to get a plane.

SENATOR DUGAN: No problem at all, General. Professor Blakey.

P R O F E S S O R G. R O B E R T B L A K E Y: My name is Professor G. Robert Blakey. I teach at Cornell Law School. Between 1967 and 1971 I was the reporter to the American Bar Association's project on electronic surveillance. I am also a member of the National Commission for the Review of Federal and State Laws Related to Wiretapping.

I am appearing, however, today - I hope this is very clear on the record - solely as a spokesman for the American Bar Association. Nothing that I say should be attributed to the National Commission. Our study of wiretapping on the federal and state level is not yet finished and no individual commissioner is authorized to speak in their behalf.

SENATOR DUGAN: When do you expect the report, Professor?

PROFESSOR BLAKEY: Probably January of next year.

SENATOR DUGAN: I thought there was an interim

report that might be coming forth in March.

PROFESSOR BLAKEY: There will be a series of hearings which will include an examination of the New Jersey situation in March, but that will not represent the conclusions of the commission.

I appear today before you as a spokesman for the American Bar Association. Between 1967 and 1971 a select committee of prominent lawyers and judges throughout the United States spent a considerable period of time studying the wiretapping and electronic surveillance problem. Those involved included a number of prominent people. I will mention only several for you: Judge Hastie from the 3rd Circuit; Louis Powell, who was then a private lawyer in Virginia; Judge Lumbard of the 2nd Circuit; Judge Burger, now Chief Justice Burger. These were among those names whom, I am sure, you would immediately recognize.

I was privy to all those discussions - and they were long, deep, detailed, and heated - when they wrestled with the problems, Senator, that you are now wrestling with and it was not an easy decision that they made. But they did recognize, I think, in the end, that a balance had to be struck between privacy on the one hand and justice on the other.

The standards developed at that time were ultimately embodied in a full book and, rather than outline them for you in detail, I will make available to you - to the committee - nine copies of the study. I hope it will be enough.

In this context I only want to emphasize one or two very broad points. The first one is the necessity for the making of distinctions. All of us use "wiretapping" loosely - very often loosely - to refer both to private activity and public activity. When we speak about public activity it is easy to talk about public and lawful

activity and public, unlawful activity. I am, quite frankly, very surprised that I have been here for almost one-half a morning and nobody said anything about Watergate yet. It has become a cliche that hides, I suggest, too many things.

One thing I'd like to point out to you about Watergate, though, is that, fascinatingly enough, but for the 1968 Act, Watergate would have been a D.C. burglary. It would not have been a national investigation. It is not often pointed out in the press that when Mr. Liddy and Company broke into the Democratic National Headquarters they violated the Federal Wiretapping Statute and it was only because they violated that statute that the F. B. I. got involved. It was that statute that ultimately resulted in the prosecution and conviction. Also, it has not been pointed out that there is, in that statute - as there is in the New Jersey statute - a provision for civil damages and the Democratic National Committee has recovered a six figure recovery against the people responsible for that tap. I would suggest to you that those criminal remedies and those civil remedies have done a lot to turn around the attitude in this country that would make wiretapping, outside of the court order system, perhaps acceptable.

It was, then, a law consistent with the American Bar Association's standards that turned around what potentially could have been a very bad situation.

The second point I'd like to make to you is that we really have to look at the heart of what is involved here, and that is the violation of privacy. We have to distinguish between the kinds of violations of privacy. When we talk about a non-consensual tap - a true wiretap or bug - that is the heart of what we are talking about. In that area we clearly need the most rigorous sort of

court-order supervision - indeed, more than court-order supervisicn, prosecutor supervision of the police.

I would urge upon you - as the American Bar Association standards embody - a distinction, though, between consensual taps and non-consensual taps. The non-consensual taps are not truly invasions of privacy. There is no functional difference between me walking in and talking to you in a private conversation and walking out and mechanically recording what the two of us said, together, on a piece of paper with a pencil, than there is in me walking in with a body recorder on me. If there is a difference between the two situations, the difference is, in one situation, with a body recorder, an accurate recordation is made; one depends on memory and the other depends on electronics. If we too easily make the analogy between a bug - meaning a bug that invades privacy by---

SENATOR DUGAN: Excuse me, Professor, is that the only difference that you see?

PROFESSOR BLAKEY: Yes. It seems to me the real issue in electronic surveillance - wiretapping and bugging - is privacy. The real issue in one-party consent surveillance is accuracy.

SENATOR DUGAN: Isn't there a difference between the consent of both parties? The consent of one party is obvious in these cases. The other party is consenting to a conversation with an individual, not necessarily consenting to have this conversation recorded.

SENATOR PARKER: Under a grant of immunity or some other--

PROFESSOR BLAKEY: But the conversation, Senator, - let me suggest to you with all due respect - is, in fact, recorded anyway - in the man's memory.

SENATOR PARKER: Yes, but it is subject to cross-

examination and all the other vagaries of a normal trial instead of the entrapment procedure--

PROFESSOR BLAKEY: Well, I am not suggesting that this is--

SENATOR PARKER: --which is setting a man up.

PROFESSOR BLAKEY: Let me suggest this to you: The heart of what's involved, particularly in a corruption case - and I would impress this upon you - is, the possibility that the police can come in with a tape and record the conversation; this is a protection for the privacy of an honest public official. Bluntly, if they cannot come in with a recording -- you know and I know that there are a lot of slimy individuals in the world who, when they get involved in criminal prosectuions, are perfectly willing to try to talk their way out by offering up some public official as the "sacrificial lamb". What protects you, as an honest public official from an accusation that you have been taking money if the only thing that you have to stand on is your reputation? You would have to put that reputation on trial against the testimony of another man. It may well be, in fact, that the jury will believe you - you as against the other person - but you know as well as I do that you will have been indicted, you will have been tried and probably your political career is ruined.

If the police have the opportunity to put on that slimy individual a tape recorder and put him into a conversation with you and allow you to come out and lay it all out on the table, in that situation--

SENATOR DUGNA: Professor Blakey, I am sorry, I appreciate the thrust of your argument but I also appreciate the thrust of Senator Parker's question. There is a great difference in recording conversations when something - as Senator Parker suggests - is the circumstance surrounding and prompting that conversation, than there

is when an ordinary conversation takes place between two people.

PROFESSOR BLAKEY: Senator, I wonder what you are inferring there? Are you asserting that you should have the right to deny that you previously said something that you said to the individual?

SENATOR DUGAN: No. I think perhaps Senator Parker would like to answer that.

SENATOR PARKER: I can understand some of the circumstances where the consensual tap may be essential. If you are going to have one, and you have offered immunity or some other reason for it, why not get a court order? Tell me why a court order wouldn't be just as effective? You then have control under the statute.

PROFESSOR BLAKEY: I have no problem with subjecting consensuals to control. Any form of police surveillance should be subjected to control. But we have to carefully ascertain what the nature of the control is. The traditional search warrant practice is based on a showing of probable cause, it is based on the showing of time and limitation, it is based on a direct invasion of privacy - to seize from you some particular piece of property under the context of a wiretap of your conversation without your consent. It is a forcible intrusion on you that has been narrowly circumscribed by our constitutional traditions.

What we have when we have a consensual involvement is no different than a visual observation. Would you want the police to obtain a court order before they follow someone? Would you want the police to obtain a court order before they really have a conversation?

SENATOR PARKER: If they are using the electronic devices, I think, yes.

PROFESSOR BLAKEY: Why does the electronic device

make a difference in this context, where one of the parties consents and one of the parties could always testify in another proceeding later without regard to the surveillance? It seems to me that what the surveillance adds to is an accurate record and that's all.

SENATOR PARKER: I don't think that necessarily is wrong -- that that would be an accurate record.

It seems to me that you are invading the man's privacy just as much by luring him out. These gentlemen know of a couple of cases that I am personally familiar with where this resulted in convictions. Nobody quarrels about that, but that was a consensual device.

I also know of a case that is now pending before the Supreme Court on an ethics matter which was done the same way and is not a violation of the statute. I was going to ask the General this later, whether you can have a consensual tape with something outside the crimes that are listed in here. This was.

PROFESSOR BLAKEY: As I read the statute the answer is yes.

SENATOR PARKER: I think that is a mistake.

PROFESSOR BLAKEY: Let me press on you, Senator, the difference in the interests involved when one party already consents and one party is already free to testify, the only thing recording adds is an accurate presentation of what has occurred.

SENATOR PARKER: You've already got that man's testimony before you get him and go into the consensual tape. How many times have you had a consensual tape without offering immunity or some other type of plea bargaining with the other party?

PROFESSOR BLAKEY: Would you want to have to put on trial a public official without a tape?

SENATOR PARKER: We are all subject to that and

public officials are all convicted even if they are indicted, as far as I am concerned. I am not so much worrying about myself because I hope that the old files that we used to have in the State Police don't have anything. I am willing to take that gamble. I think it is a two edge sword and I think they are not necessarily illegal nor should they be abandoned. But I think we should have the same control, the same reporting, the same supervision by the Attorney General that we have in the other taps because normally you are setting somebody up in those consensual taps.

PROFESSOR BLAKEY: Well, if a person is set up and is induced to say something that is not true, the general law of entrapment moves in and supresses the evidence. If he says something that is, in fact, true--

SENATOR MENZA: Most of us here are attorneys. I have been doing criminal law for 16 years and I have never won an entrapment case in my life.

MR. BOYLAN: Perhaps the reason why - to interject, Senator Menza - is that in an entrapment case you've never had the benefit of a recording of the entrapping conversation and there is presently pending in the court system, and working its way through it, an entrapment case in which the prosecutor's office did record the conversation, and, like Watergate, it's there. There are no two ways about it. It can be a two way sword as an affirmative assistance to people in entrapment.

Senator Parker speaks about - or spoke about - entrapment to Stan Van Ness. The big handicap in an entrapment case, from a defense point of view, is that the pre-disposition allegedly existing in the defendant's mind - which is the central issue - is always the subject of testimony which is not verifiable through a tape. It is generally alleged through conversation which cannot be

checked out in any way other than through the accepted cross-examination technique and that's the end of your defense. In many ways, although I can see a lot of merit in what you say about sending the man in to manufacture the conversation - which is what you are really saying - or because he has an advantage, if you have a tape recording of all those conversations, I think that the defense bar will find - and I doubt that it ever has had a case where it had had a conversation in entrapment - it would be at a great advantage.

SENATOR DUGAN: Let me say this, Professor, and then we will get back to your formalized statement instead of these side-bars that we are having, one, the concern that I have is, I realize that the consenting party has surrendered his privacy but it is the non-consenting party to that conversation who has not surrendered any privacy, and it is being taken from him by--

PROFESSOR BLAKEY: He ran the risk that the person he talked to would talk to someone else.

SENATOR DUGAN: I don't think it is a risk that should be imposed upon him, necessarily - that he risk talking to an electronic device in addition to the person to whom he is talking.

Let me say one other thing. In response to Mr. Boylan and your reference to Watergate, I have some reservations about the conclusions you drew in that respect, that the Watergate convictions were brought about by the Electronic Surveillance Act - the Federal Act. My recollection of the result that was achieved at Watergate is that it was a consequence of a persistent, aggressive legislative investigation, which brought about those convictions.

PROFESSOR BLAKEY: The conviction was based on the 1968 statute.

SENATOR DUGAN: Well, I don't think it played as--

PROFESSOR BLAKEY: I concede your point.

SENATOR DUGAN: Okay. Let's get back to the formal part of your statement.

ATTORNEY GENERAL HYLAND: That's the beauty of having an Attorney General who used to be a legislator.

PROFESSOR BLAKEY: The chief difference between our situation today and our situation pre-1968 is that we do have, now, in light of the 1968 statute on the federal level and the New Jersey Wiretap Statute, a body of material experience from which we can make a judgment about the difficult question of the balance between privacy and justice. I am generally familiar with the New Jersey experience. I read, carefully, the Attorney General's report. I have also examined, carefully, his recommendations for change in the statute and I would associate myself in general terms with them.

I would suggest only one possible additional amendment. In 1967 I published in the Notre Dame Law Review a suggested model electronic surveillance control act. In major outlines the statute adopted by New Jersey followed that statute.

One provision was not included. It was a conformity to federal law provision, a general clause in the end that would permit a state judge, acting on a case-by-case basis, to conform, if necessary, the actual state procedure to the potential varying requirements of federal law.

I raise this with you, again, in this regard: There is now pending in the National Congress a review of the Federal Wiretapping Statute. It is likely that that statute will go through and will go through with a change in terminology. Consequently it is also unlikely that

the New Jersey statute, however you draft it now, will exactly parallel, in language, the federal statute. In order to avoid any potential conflicts between the new federal statute, which would set national standards, and your own New Jersey Statute, I would suggest that you might want to consider authorizing judges, on a case-by-case basis, to follow either the New Jersey Statute or the Federal Statute, whichever is stricter, and explicitly authorize them to do that.

Let me place, if I might, the New Jersey experience in the context of what I understand to be the general experience in states elsewhere, and on a federal level. Now, primarily, with the operation of the court order system I can tell you, frankly, among law enforcement officials and other people, the New Jersey experience is considered the model. The enactment of the New Jersey Statute, particularly as part of an overall package designed to increase both the effectiveness and fairness of New Jersey practices and procedures, is repeatedly pointed to as the way things ought to be done.

The President's Crime Commission, in 1967, recommended not simply a wiretap statute but grand jury immunity contempt and heightened prosecutor capability. New Jersey, perhaps with one other exception - Florida - is one of the few states to have taken seriously the recommendations of the Crime Commission in 1967 and your record here, particularly compared to the period of time prior to that legislative package, is really remarkable.

I won't suggest to you that you have eliminated organized crime, or that you have even begun to eliminate organized crime, or that there are no instances of political corruption in this state, but what I think I can tell you, as an outsider looking in, is New Jersey now has about it an atmosphere of professionalism, of competency, of

dedication, and a will to use the tools carefully and effectively. Given a sufficient period of time I think the beginning of the end will be seen.

I would suggest to you too that you see - and I echo now the Attorney General's comment - that this Wiretap Statute is not something by itself; it is part of a package. If you are not going to have the kind of professional prosecutor supervision that the Criminal Justice Act gives you, I would recommend that you not enact this. I repeat that, if you are not going to have the kind of professional prosecutor responsibility that you now have in the Attorney General's office and elsewhere - if you didn't have that - I would not recommend that you adopt a Wiretap Statute. It is really out of a concern for privacy and the effectiveness and fairness of the criminal justice system that I would recommend it to you.

New Jersey now has a particularly felicitous combination of tools and people and I would impress upon you that you not take away the people and you not take away the tools, that you let them be and, in the context of appropriate restrictions, move forward.

Let me end by telling you, at least in one concrete way, of a wiretap story outside of New Jersey. This was in Kansas City, Kansas. There was a man named Cox who had, over a period of time, controlled a major part of the narcotics, loansharking, fencing and prostitution in the area. The local police were wholly incapable of dealing with him. The federal people came in and with one wiretap, in 19 days, produced 19 narcotic convictions. In addition, during the course of that wiretap, they overheard a plot to kill a federal witness. They, literally, called a police helicopter and flew to the man's house and took the potential victim out the back door while

the assassins were coming in the front door. That case, in a very dramatic way, can be repeated in a number of other instances. It is the difference between wiretapping and conventional investigations. I don't suggest to you that case could not have been made without wiretapping - it could, indeed, have been made, perhaps, without wiretapping. But it would have been a homicide prosecution had there not been a wiretap. As it was, it was a prosecution for conspiracy to murder. That difference - the difference between allowing the police to intervene before a crime occurs and making police simply people who go around "closing barn doors after the horse is gone" - is the real difference between wiretapping and conventional techniques.

Don't, I beg you, deprive your people of the ability to do the job.

SENATOR DUGAN: Professor, it struck me that this might be an isolated incident that you are predicating your endorsement of the electronic surveillance authorization on when you recited that dramatic story you just told. Is that usual?

PROFESSOR BLAKEY: It is probably more common than not, if the wiretapping is done in an aggressive and, as Mr. Richards indicated, a walk-up fashion. If you move from the street manifestations into more centrally controlled positions you will come in contact with people who are in the position not simply of being a "bookie" but also of being a "loanshark", of also ordering people killed. As you move into that level that is not normally penetrable, simply with informants or consensual taps, it is at that point that you are able to intervene in active criminal behavior. And it has been generally true on the Federal level that taps have produced spinoff situations that have allowed the police to be affirmative.

I would also say to you, out of my own personal experience, I worked in the federal law enforcement establishment under Attorney General Robert Kennedy from 1960 to 1964 and I had available to me as an organized crime prosecutor the F.B.I., the Internal Revenue Service, the Bureau of Narcotics - really, the finest investigative forces in the country - but I did not have available to me electronic surveillance, and because I did not have available to me electronic surveillance, I know that there were cases that we did not make that we could have made. I now know people who are operating in the Organized Crime and Racketeering Section in the Department of Justice and their ability in the post 1968 period to identify, apprehend, and convict major members of the national syndicate is just dramatically different. Those cases simply would not have been made and I can sit here for more time than you have and give you, literally, one war story after another.

Let me give just one more - a classic illustration of precisely the same situation: About 1968, shortly before the 1968 statute was enacted, there was a special narcotics prosecution in the District of Columbia. An attempt was made to identify who was distributing narcotics in the District. They identified approximately 10 people with an informant penetration. They were not able to get beyond the street level. The 1968 statute was enacted and a request was made of then Attorney General Clark that a wiretap be authorized. He denied it on the grounds that he thought it was not necessary - not illegal but not necessary. The investigation proceeded but nothing occurred. A change of administration occurred and a change of policy in wiretapping occurred. A new wiretap order was authorized and in 6 weeks what was approximately 10 to 15 people being identified moved up into 54 being identified. Not only

did it take out the entire distribution network in the District of Columbia - the black wholesaler selling within the city - it also took out the three Cosa Nostra importers from New York, a crooked policeman, a crooked lawyer and a crooked doctor. The statute, in that case, was sustained as Constitutional. The case is James Vs. the United States in the District of Columbia.

I could, literally, spend more time than you have, repeating again and again that kind of story, where corruption and high level organized crime figures were reached with wiretapping that simply could not have been reached without it.

SENATOR BATEMAN: I'd like to hear a few more war stories. There seems to be a -- we are not getting anything but bookmakers syndrome among some of the lawyers in the Legislature. So, if you have some more, I'd like to hear a few more.

PROFESSOR BLAKEY: Let me put it to you this way: If you are investigating a very complex, organized crime situation, it may well be that a "bookmaking" prosecution is the effective way of moving out a multi-service syndicate.

Here in the State of New Jersey I am sure you are familiar with the fact that Sam DeCavalcante has been identified as a boss in one Cosa Nostra Family. He was, in fact, identified, apprehended, and convicted through a federal wiretap in a gambling case. But to the degree that he was identified, apprehended and incarcerated through gambling prosecution, frankly, does not bother me. It was a violation of federal law. He was investigated with all due regard to his rights. He plead guilty in response to the wiretapping situation. That it was a gambling case does not bother me.

SENATOR DUGAN: Senator Bateman, we were about

to get to that point with Mr. Richards when we interrupted. I hope we persue that with some vigor to support the other side of the coin, if that is appropriate.

I know you have only a few more minutes, Professor. Senator Menza would like to ask you another question.

SENATOR MENZA: Wiretapping is as good as the fellow whc wiretaps. Wiretapping, quite frankly, frightens the heck out of me. What frightens me is that oftentimes law enforcement, particularly attorneys, is not subject to the cannons of ethics, it seems to me, in wiretapping.

It appears to me that perhaps it is a valuable tool. But it would appear to me that if it is abused, the prosecutor, or the Attorney General, or whoever he may be, should also be subject to this civil and criminal liability, do you agree with that?

PROFESSOR BLAKEY: I couldn't agree with you more. The 1968 statute, that I had a hand in drafting, not only makes it a crime to unlawfully wiretap, it makes it grounds for supression of evidence and it also makes it a civil tort. It, very uniquely, removes judicial immunity from the traditional doctrine in this area. You can obtain a punative damage judgment against a federal judge who, negligently, authorized a tap he should not have authorized.

SENATOR MENZA: Here is another problem. You look at the wiretap affidavit and the detective usually says, "a reliable informant, whose name is not mentioned, gave us information that Joe Bloe is doing something or another". You really can't do anything about those affidavits. It is very difficult to question the wiretap, based upon those affidavits. Ultimately, it is very difficult to determine whether in fact the prosecutor has violated his canons of ethics. You know what I am trying to say.

PROFESSOR BLAKEY: I grant you that it is tough.

The guy comes in and says, T-1, a confidential informant, says such-and-such, therefore give me a wiretap order. It comes time for the motion to supress and you want to know whether T-1 exists. It seems to me that that is not particularly, or peculiarly, a problem to a wiretap; that's also true in normal search and seizure law and what you ought to have in New Jersey, if that is particularly your problem, is the provision that is not uncommon in federal practice. Where a question is raised about whether T-1 exists or whether T-1 is another wiretap, perhaps an unlawful wiretap, an in camera disclosure can be made to the judge of who T-1 is, or what the T-1 source is. If the judge is truly satisfied that this is a confidential informant whose life would be in danger if he were revealed to the defendant--

SENATOR MENZA: You are also aware of the fact that practically all of the affidavits - or a great many of the affidavits - do state, always, it is the opinion of the detective, or whoever it is that signs it, that this man is involved in organized crime, which is almost a magic word. Everything is organized crime. The bookmaker who is booking and making $500 a week is organized crime. This may be the thing that tends to freighten the legislators - "we've got to get organized crime". Everybody concedes that we have to get organized crime but we wonder sometimes whether that is the case.

I wonder, for example, if we put all the wire-tapping together in the State of New Jersey, not so much from the Attorney General's office but from the prosecutor's office, how many guys have we gotten in the last year or the year before who were in organized crime. Of course, I don't refer to the U. S. Attorney's office or the Attorney General's office because they have been very effective with it - very.

PROFESSOR BLAKEY: I'll be candid with you. It may be telling tales out of school. I am not sure every case on the federal level involving a bookmaker is one that really has a relationship with organized crime. You people have been practicing law.

MR. BOYLAN: I think in answer to your question - the Chairman raised this question earlier - is not so much the actual result, in terms of either war stories or in terms of gamblers or who you catch through wiretapping, but the existence of a wiretapping statute forces people who might engage in crimes through the use of phones from not engaging in crimes and, secondly, forces people who are about to engage in criminal activity to actually meet and sit down so that they can be observed by law enforcement officers, because it is only through an actual meeting that the crime - whatever it might be - can be planned and plotted. I don't think you would have had Appalachia in 1957 if the participants in that particular meeting were assured that they could use, freely, the phones that were available, because in New York, from which many of them came, you had wiretapping back in 1957.

I think the focus has to be not only on the results, which is certainly a ligitimate inquiry of this panel - as indeed all of the employees of this panel have been directed, really, to problems that ligitimately arise under the statute - but, if you didn't have a wiretapping statute, albeit as strictly circumscribed as you want, you would then, in New Jersey, permit people to engage in crime over the phone, or engage in plotting crimes, or whatever, out of the state as well as in the state which, now, they are reluctant to do.

Secondly, I think the fear of the use of wiretapping is much more widespread than the actual use of it. The actual use of it on the federal level - and certainly

on the Attorney General's level - is very limited. But it is the thought that it is employed in large measure by people who are about to engage in crime that deters crime.

Judge Herb Stern would tell you that in most of his major political corruption - in all of his major political corruption - cases there was no wiretapping. It is not that it is absolutely essential to the successful prosecution of certain types of crime, particularly in the area of political corruption, but that it is an effective deterrent to people who may commit crime. I think that must be kept in mind by your committee when you deliberate on the statute.

SENATOR DUGAN: That is one of the problems that I was going to try and solve in my own mind and to continue to question Mr. Richards about.

It seems to me that most of the results achieved in the United States Attorney's office in the political corruption area and many of the other areas you made reference to - organized crime - were not made consequent to electronic surveillance.

MR. BOYLAN: I don't think there is any question--

SENATOR DUGAN: And it was done very effectively.

PROFESSOR BLAKEY: The real test is not one of statistics. Because you can make a political corruption case without wiretapping and without even a consensual proves that some cases can be made without it.

The test is that there are some cases that cannot be made without it and it is not the statistical number of them, it is the significance of them. I'm very old fashioned when I believe that the one basic principal in American law is that nobody is above the law. And the fact that nobody is above the law carries a big message to people all throughout the community - the

law-abiding and the non-law-abiding. When you have, for a considerable period of time, a certain number - not statistically large but significant because they are there and visible to the community - of people who are not indicted and are not prosecuted and not convicted, that says something about whether you have equal protection under the laws.

What the wiretapping tools give you, if they are carefully used - and I am not suggesting a large number of wiretaps but carefully and selectively used - is, they let you jump up and move in deeply into conspiracies that otherwise you cannot do, not at all but cannot do with sufficient numbers of time that you carry the message out to the community that nobody is above the law.

SENATOR DUGAN: Well, we are here to determine what that law is. I suppose, as a postscript to that, even the prosecutors of the state and the Attorney General and everybody involved with the administration of law have to remember that very basic principle, that nobody - in government or out of government, defendant or prospective defendant, or agent of the law enforcement agencies in this state- is above the law. Senator Greenberg?

SENATOR GREENBERG: Just one question, Professor. Thank you Mr. Chairman.

Professor, is it your view that there are fewer conspiracies as a result of the existence of wiretapping, or that prosecution is more effective as a result of wiretapping?

PROFESSOR BLAKEY: I really can't say that there are fewer conspiracies. I think they are probably a little more complicated than they once were and I wouldn't suggest to you yet that there is less organized crime than there was before.

I suggested at the beginning that we are beginning

to make inroads; that we are beginning to hold out to people of all levels in our society the fact that anybody can be prosecuted.

SENATOR GREENBERG: Well then, perhaps the question ought to be asked of Mat Boylan because he is the one who indicated that the threat of it is probably as significant as its use. Is it your point that the threat of it has reduced the existence of crime where it exists?

MR. BOYLAN: Yes. I believe that the existence of a wiretap law in New Jersey has been an effective deterrent to the commission of crime in New Jersey because it has placed an impediment in the consumation of crime which, on an organized level, would like to use the same tools as any other commercial or professional organization, namely the avoidance of meetings and use of a phone to communicate instructions or to devise plans. Consequently, the very existence of it has, in large measure, contributed to the improvement which we all seem to note in the State of New Jersey in the area of criminal activity.

Its existence is a deterrent because to the extent that you place impediments in the way of consumating a crime you can effectively deter that crime. It is an investigative tool on one level, useful in certain areas. Senator Bateman would be very interested to know that it is very effective in its use against narcotics. In the State Attorney General's office, out of its 24 applications last year, 7 were in the area of narcotics. It is very effective there and it has been used in the area of burglary distribution of stolen goods.

However, we must keep it in perspective. It is a tool in the first instance and, secondly, I say that it is a deterrent to the actual commission of crime insofar as it prevents the easy consumation of crime, or the easy

execution of crime. This, in no way, avoids the need to keep it under close scrutiny and, as the Chairman indicated, a very tight leash because it has the potential for abuse.

Unfortunately, the one thing that Watergate did prove is that when men are bent upon violating the law, they can go outside it. It was not law enforcement - and I was surprised that Senator Fay may have conveyed that impression - it was not Federal law enforcement that was involved in the Watergate episode. It was private citizens, or public officials, acting in a private capacity to engage in a whole range of activities which brought into question, how secure are we in our privacy. I think what the Chairman is directing this committee's attention to with many of his questions is, the reasonable expectation of privacy can only be secured one, through effective control over it - such as you are considering - and, second are foremost, through the integrity of those who are given the responsibility of enforcing the law. We have no allegation in our office that prosecutors are abusing the wiretap statute. We do have some indication that there is, maybe, widespread abuse among the private citizens.

In fact, there was a very dramatic indictment by the U. S. Attorney's office in the summer of 1974, where the easy access to bugging devices were used by private personnel.

I don't think that this committee should be concerned with the excessive abuse of it by ligitimate law enforcement personnel. I don't think anyone should take away from Watergate the impression that it was federal law enforcement in any way that abused it; it was people bent on violating the law and when they are bent upon violating the law, of course, no tool will prevent that.

SENATOR GREENBERG: Thank you, Mr. Chairman, I

have other questions but I will wait my turn.

SENATOR DUGAN: Well, we are going to have a little bit of difficulty in managing the schedule today. I would like to break for lunch when we conclude the testimony of the Attorney General and those that he brought with him. After that, we will break for lunch and take 45 minutes. As you will remember, the schedule certainly suggests realistically that we are not going to be able to finish today.

I would like to stick pretty close to the order of witnesses that I mentioned before. Some of them are down at the bottom of the list. We will have another hearing. There will be an opportunity to solicit the testimony of all those other witnesses. There are some, I am sure, that will not be able to get back to us with great facility and we will handle those witnesses today too.

After what I call the break for lunch, I would like those witnesses who have not yet been heard to indicate whether they would like to come back on another date or wait to be heard today.

I think we will get to the-- Is that the bulk of your testimony, Professor?

PROFESSOR BLAKEY: Yes. I would only like to add that I appreciate the opportunity to appear here and testify and the very graciousness with which you have let me testify out of turn so that I can get back to school.

SENATOR DUGAN: Well, we very much appreciate your appearance, Professor.

Now, are there any questions the committee would like to direct to Professor Blakey?

Senator Lynch?

SENATOR LYNCH: Professor, will you generally comment about the New Jersey wiretap statute as it presently exists?

PROFESSOR BLAKEY: As it presently exists?

SENATOR LYNCH: Yes.

PROFESSOR BLAKEY: In general outline it reflects the federal law and it reflects the American Bar Association's standards and, thus, in my judgment, meets a proper balance between privacy and justice.

I don't say that in derogation of the suggested amendments by the Attorney General. I view them, essentially, as tightening an already tight statute and, frankly, improving what I thought was a pretty good draft the first time around. But I would be the last one to suggest that any product, produced by anybody, can't be improved on further examination.

I think the experience that New Jersey has now had for some six years has put them in a unique position to evaluate how the so-called federal law appropriately fits within the practice and procedure in New Jersey.

For example, I understand there is a recommendation that the actual time be narrowed in New Jersey. That makes sense in New Jersey's context because of, frankly, the close relationship New Jersey's prosecutors have to the police. It doesn't take all that much time to get a wiretap order here.

I can tell you on the federal level it takes almost five or six weeks to get an order approved, which means that if you have a 20-day authorization process rather than a 30-day one, they couldn't get back in time to get the renewals, given the administrative structure they have set up down there.

I think New Jersey with its streamlined administrative structure can afford to cut down from 30 days to 20. That would be a bad amendment on the federal level.

SENATOR LYNCH: Do you have any comment to make

about indiscriminate monitoring under a legal wiretap?

PROFESSOR BLAKEY: That is a-- It is five minutes to one and my little speech on that particular subject takes about one-half hour, but let me see if I can sum it up for you.

The language in the New Jersey statute, minimize or eliminate, frankly, is my own and what it sets for law enforcement is a goal. It does not tell them how to go about it. The thought was, in drafting that particular provision, that what you would have to do in any one situation would depend upon the facts of that situation.

Now there are at least two basic practices that have developed. New Jersey has adopted a practice of extrinsic minimization. That is, by court order the time of surveillance is limited to certain hours of the day but within that period of time there is total recordation, with certain exceptions. I understand that lawyer-client conversations are not overheard and perhaps if an indicted defendant were to walk into the tap it would be shut off.

But, on the whole, New Jersey has extrinsic minimization. On the federal level, and in most other states, a practice of intrinsic minimization is adopted. That means, as each new person comes into the tap there is an attempt made to identify who he is and whether he is one of the authorized persons to be listened to. An attempt is made to identify the subject matter of the conversation and if it falls within the range of conversation that you are allowed to listen to - that is, both person and subject matter - the tap continues. If the people change or the subject matter changes, there is actually a shutting off of the tap as it goes along.

The difficulty with that process is that as you sample back and forth and listen, as conversations shift and turn, you get what appears to be an edited tape. And

the dilemma that you face, solved here in New Jersey by full listening, is that any exculpatory conversation that occurs in part, or included in the inculpatory conversation, is picked up.

On the federal level, you give up the chance that when you sample out, you will sample out an exculpatory conversation to minimize privacy. I am afraid that is just simply an inherent dilemma.

I do not think, necessarily, that the New Jersey practice is less good than the federal or that the federal is better than the state. It seems to me it is not how you get there but whether you get there that counts. It is my understanding that on the whole the ratio of guilty to innocent conversations in New Jersey ends up favorably with the general ratio outside the state.

SENATOR LYNCH: Thank you.

SENATOR DUGAN: Thank you very much, Professor.

The committee indicated that there are only a few more questions that they, individually, would like to ask of you, General, so we will see how far we can get in about five minutes and if we can't conclude, we are going to break for lunch. I think Senator Bateman indicated that he has an area of inquiry for the Attorney General.

SENATOR BATEMAN: General, the area of carefulness seems to be critical to whether this kind of law can work or can't work. You indicated there are 24 approved taps through your office in 1974. How many might have been turned down?

ATTORNEY GENERAL HYLAND: They would never reach me, Senator. Maybe Mr. Atier or Mr. Richards could respond to that. I don't know about rejections, I only make a judgment about the ones that reach my level.

MR. RICHARDS: I don't have specific statistics on that, Senator. I think the review procedure that is

followed by the Attorney General's office and by the State Police is outlined very thoroughly in the Attorney General's report, which you all have.

SENATOR BATEMAN: Would it be a few or a lot?

MR. BOYLAND: I think the answer to that question is in really knowing the difficulty of getting a wiretap. The applications are made rarely and then allegedly for good reason. So, there are very few turned down but there are not many made.

SENATOR BATEMAN: There was a letter in the Law Journal which indicated that New Jersey had 29% of all the wiretaps in the United Stated, total, over the period of our law, and more than all the federal wiretaps combined. Are those meaningful statistics or do they indicate that New Jersey is one of the few states that-- Are they accurate and are they meaningful?

ATTORNEY GENERAL HYLAND: Well, I think they have something to do, in the first instance, with the type of act that we have. I could not compare our experience with other states as well as these gentlemen could.

MR. RICHARDS: I am not 100% certain what your question is, Senator.

MR. BOYLAN: The Law Journal quoted an article in which New Jersey has 29% of the total number of wiretaps issued in the country and, secondly, we have more wiretaps than the federal government.

MR. RICHARDS: I think also that it shows that New Jersey, both at the state and local level, has had an aggressive program under the use of the law and, perhaps, that our problems are more acute than the problems of some other states where the use has been considerably less.

Many states don't have it and many states do not have the resources to operate laws that they do have.

SENATOR BATEMAN: One last question on carefulness.

From what you have seen, most of the wiretaps come through the prosecutor's office in New Jersey. From what you have seen, are you convinced that they are being handled with the kind of care that you discussed and we are talking about, through the prosecutor's office?

ATTORNEY GENERAL HYLAND: Yes. I think so. And I think the safeguard there is that the sitting six judges of the Superior Court are resorted to by the county prosecutors, as they are resorted to by the Attorney General's office. So, I think there is a common thread of the requirements that are expected by the judiciary under the act and that would be the best way I would have of measuring the quality of the applications made by the prosecutors.

ASSEMBLYMAN BATEMAN: Thank you. That is all, Mr. Chairman.

SENATOR DUGAN: Senator Greenberg?

SENATOR GREENBERG: Yes. General, on the subject of the consensual taps, I have your report in front of me and in it you talk in terms of," private consent interceptions may serve a ligitimate purpose" and it is that word "may" and our concern with the subject, as is evidenced by the questions and answers this morning, that I would address myself to.

First, let me ask you, with regard to the existence of the authorization or ligitimatization of private consent interception, I assume you are in favor of the continuing authorization for their existence?

ATTORNEY GENERAL HYLAND: Yes. We have recommended that, although we have modified the statute in two respects by making the violation extend to the interception and the use of the material that is intercepted and, secondly, by making it quite clear that the civil penalties that are available under the statute are available for violations of that.

We said in the report it may be of value because there are incidences where the first contact we have with somebody who alleges that a crime has been committed is when it comes in to us in the form of a tape made in the consensual fashion by some private citizen, or some public official who is being threatened or intimidated, or what have you. To rule those out would have an impact upon law enforcement. We were trying, in the report, to make clear that it doesn't have just an impact upon the private sector for that reason.

SENATOR GREENBERG: With regard to that, the next question deals with the subject of whether or not application to a court should be made for that purpose. Do you have a view on that?

ATTORNEY GENERAL HYLAND: I have talked to our people about that and they may want to add to what I say but there are instances where an individual doesn't come in to our Division or to a prosecutor's office until the very last moment when he is being pushed by a loanshark, or something of that kind. We think that one of the difficulties of subjecting the consensual procedure to the full judicial prosecutorial review procedure that is otherwise involved - one of the disadvantages of doing that - is there are times when we simply don't have the time to do that.

Do either of you gentlemen want to add anything to my answer?

MR. STIER: The problem with judicial orders with respect to consent recordings - again, we are talking about an area that is not controlled by the 4th amendment, as the Supreme Court has stated - is, where do you set the standard and how do you make it workable? If you set the standard too high, you would very seriously impair our ability to develop some of the most significant cases

that have been developed by the State Grand Jury.

If you set the standard low enough to make it workable from a law enforcement standpoint, you would make the standards meaningless.

It seems to me that what we are concerned about is not really the act of recording, but the use to which it is put. I can assure you that whatever we do in the course of our investigations in the field of consent recording is processed through the criminal justice system.

SENATOR GREENBERG: Some of us have a problem with the act itself, in addition to the use to which the recording is put.

Some of us disagree with the Professor's testimony that if you said it and it is on tape, you should have no problem with it being there and accurate. Some of us have great difficulty with that.

MR. STIER: Well, I would only respond by saying that in considering any limitations on consent recording, the State Legislature be cognizant of the differences in use of consent recording in the private sector as opposed to the law enforcement sector.

I can sit here for, perhaps, an hour reciting example after example of significant prosecutions that have been developed by the State Grand Jury through the use of consent recording, prosecutions where we are certain of the quality of the evidence and the character of the information we receive because it is on tape and it is accurately recorded.

SENATOR GREENBERG: But you haven't seen the facial expressions of the individuals and you haven't subjected the recording to cross-examination, there are a whole lot of difficulties with that. You can have a conversation outside in the hall right now with regard to the preparation of testimony at this hearing and not

want that conversation repeated for any one of a number of reasons. That is the problem.

SENATOR DUGAN: With that comment, we are going to break for lunch. I have been promising you that for the last hour.

General, I don't think that we have concluded our inquiry of you and your office but I would like to interrupt now and ask you if you would be available on another date, when we reconvene this public hearing. We will try to make it mutually convenient.

ATTORNEY GENERAL HYLAND: That would be preferable.

(Lunch Break)

AFTERNOON SESSION

SENATOR DUGAN: We are now going to reconvene the Senate Judiciary Committee's hearing on Senate bill 1417. The first witness this afternoon will be Judge Frank J. Kingfield.

J U D G E F R A N K J. K I N G F I E L D: My name is Frank J. Kingfield, and I was assignment judge of Mercer, Somerset, and Hunterdon Counties for approximately 13 years, from September 1960 to August 1973. I was one of four assignment judges orginally designated to grant wiretap orders. I continued in that capacity until I retired in August of 1973. There are now six judges who are designated to grant wiretap orders.

My first order was issued on April 28, 1969, and the last one was issued on August 21, 1973. During that interval of time, I granted 476 orders.

I feel very strongly that there is an imperative need for the use of electronic surveillance in the administration of justice. In many of the wiretap orders I granted, it became apparent that organized crime existed in New Jersey. This became apparent, also, from the fact that many defendants chose incarceration in lieu of giving incriminating testimony against higher-ups in the crime syndicate. Likewise, a few top syndicate leaders preferred confinement as a result of contempt hearings for a refusal to testify before the State Criminal Investigating Committee, even though they were granted immunity from prosecution.

From the orders and the affidavits I examined, it was apparent that extensive use of wire and oral communications is utilized by criminals to further their unlawful activities.

To combat organized crime as well as the other crimes specified in the Act, it is essential that law enforcement officers be accorded the most modern methods of crime detection, one of these being the

use of electronic surveillance, to obtain evidence of the commission of these crimes, which evidence could not otherwise be obtained. Without the use of electronic surveillance, prosecution witnesses can be contradicted or terrorized into changing their testimony; in some instances, they can even be liquidated so that incriminating testimony is not available.

The quality of proof introduced by the prosecution does make a difference.

One can always contradict the testimony of another witness, but this devise is not available when a defendant's own voice on tape serves as compelling evidence against him.

As you have heard from the Attorney General -- and I am sure that County Prosecutors can likewise vouch for this -- many defendants would not have been convicted or pleaded guilty if it had not been that wiretap evidence was available.

There is no question that this law does invade an individual's right of privacy, a fact of which judges who issue wiretap orders are fully aware. It is also of vital concern to legislators who must pass upon this Act.

Nevertheless, in view of the increase in crime in our State and from my experience in administering this law, there is an imperative need for its continuance. With the safeguards that have been written into the Act, the right of privacy is, to a large extent, protected.

The role of judges authorized to administer the law is not an easy one. They must scrutinize the applications carefully to determine that probable cause exists to issue an order. The judge must keep his records in a secure place and see to it that the

applicants conform to the sealing and service of inventory provisions of the law.

One thing that impressed me was the meticulous care by which the applications were prepared. That fact is only apparent to a judge who has to pass upon them.

It has been commented upon here this morning that no judge has ever turned down an order. I have -- several. Not only that, I have refused applications because of the way they were presented to me. They were then taken back and revised and then presented. So, granting an order is not automatic simply because a prosecutor or the Attorney General presents one to a judge.

In conclusion, I favor the extension of the law and trust that the Legislature will act favorably upon it.

I have a few comments about the amendments.

The first one I want to speak about is on page 5 of Senate 1417, line 44. The amendment speaks about the order that is presented to a carrier. It says, "An order authorizing the interception of a wire or oral communication shall, upon a showing of special need by the applicant, direct . . ." I do not think the words, "upon a showing of special need by the applicant," are necessary in that section. There is no reason why a carrier has to determine whether a "special need" is shown. It seems to me that if we are going to have "special need," that should be determined by a judge alone.

The other comment I might make concerns the time limit. I notice that you are reducing it from 30 to 20 days. My personal feeling is that even 20 days might be too long. I know from the orders and some of the sealings that I handled that, in the ordinary case, 10 days might be sufficient. If an

extension is needed for any reason, you might extend it for an additional 20 days.

The section that gives me the most difficulty is the one on page 3, section 11, that talks about -- and, of course, this was in the old law -- "a special need to intercept wire communications over such facilities" meaning public telephones. The difficulty with that is this: You do not define "special need" insofar as that paragraph is concerned. I know you define it on page 4 which deals with "special need" as to a lawyer and others. There you put into the bill a clause defining what constitutes "special need." It seems to me that "special need" should be likewise defined, if you are going to put it in, relating to a public telephone. I might point out that there is no provision in the federal law relating to public facilities. In other words, the law relates to wire interceptions generally. Even the ABA Standards, the book that was put out on electronic surveillance, is not too helpful. "Special need" is not defined even though it speaks of "special need" as this Act does.

One case that was decided on this in New Jersey was State vs. Sidoti, which was decided by Judge Handler at 116 Superior 70. He said this in that opinion regarding the use of a public telephone for bookmaking: ". . . the standard of 'special need' was intended to supplement those encompassed in section 10 of the act. . . . What was intended in section 11 to be embraced by 'special need' as an addendum to these standards imposed by section 10 is not self-relevatory." He suppressed the tap, and that was his reason for it -- that no "special need" was shown. When it went to the Appellate Division, 120 Superior 208,

on the very same facts, the Appellate Division found that "special need" existed.

Another case was State vs. Dye, which went to the Supreme Court. That was an order which I initially ordered; again, it was a bookmaking case. I remember that when the application came to me, I was concerned that the affidavit did not expressly indicate "special need." Yet, there was no question that the affidavit indicated that a crime was being committed over the public telephone. In that case, I entered the order, the order went up to the Supreme Court, and Justice Francis wrote the opinion. He said that "special need" existed in that case.

In neither Sidoti nor Dye did the court define "special need." It seems to me that, if we are going to have "special need" as a criterion to be used in granting an order involving the use of a public telephone, the Legislature should define what it means by "special need."

I have one other thought too with regard to public telephones. It might be well to consider putting in a clause saying that the tap should terminate immediately upon obtaining incriminating evidence.

I do favor the law; I think it is needed, but I think that if you are going to have the public facility clause in the Act, the "special need" should be defined.

SENATOR DUGAN: Judge, I notice that you were here this morning and you heard the colloquy that went on between the members of the committee and several of the witnesses. At one point this morning, we reached discussion about the supporting documents that were submitted to a judge for the granting of the application. Then, I think, we ultimately got to an application to suppress. The line of questioning

led to the point where the cornerstone of the application for the granting of the tap was information supplied by a reliable informant. I think it was Senator Parker who suggested that questioning e v e n the existence of a reliable informant is something that just is not manageable under our system of law now. Is that so?

JUDGE KINGFIELD: Well, it is difficult; it is very difficult. After all, the one thing you have to bear in mind is that any judge who issued an order--- I can assure you that of all the 476 orders I issued -- and I probably issued more than anybody in the State -- a crime was being committed. There is no question about the fact that in some of them, informants were used, but in others---

SENATOR DUGAN: What proof do you have, Judge, at that juncture that there is, in fact, a reliable informant in existence or that the information is not supplied by an illegal tap?

JUDGE KINGFIELD: The statement made by the law enforcement officer that the informant is in existence, that he is reliable, that he has been used in the past, that his use in the past has resulted in prosecution of---

SENATOR DUGAN: I understand that, but independent of his representations, is there any proof that you have of the reliable informant's existence?

JUDGE KINGFIELD: Other than that, no. What can you have?

SENATOR DUGAN: Is it appropriate for you to ask him to identify the reliable informant?

JUDGE KINGFIELD: It never occurred to me to do that. I took the position that a law enforcement officer--- I am satisfied that the ones I worked with -- of course, those from the Attorney General's office

and the prosecutor's office came back time and time again, so I got to know them quite well -- were honest, and I saw no reason to challenge their statements in an affidavit. After all, they were signing an affidavit which, of course, if false, was criminal.

SENATOR DUGAN: I understand that, Judge, but what is the difficulty that is presented to you or the law enforcement agency when an officer tells you the identity of the reliable informant?

JUDGE KINGFIELD: I don't quite follow your question.

SENATOR DUGAN: What difference would it make whether he said, "Judge Kingfield, the reliable informant is Joe Jones"?

JUDGE KINGFIELD: They go beyond that. It isn't necessarily--- Certainly, if he told me the name, it would not make any difference. The fact would remain that he indicated that he used a reliable informant who had been used in the past.

SENATOR DUGAN: I think it was Professor Blakey who mentioned that in some jurisdictions, when an application is attacked and an application to suppress the fruits of the wiretap is made on the basis that there really is no reliable informant in being and that it was, as a matter of fact, an illegal tap that gave the law enforcement agency the information upon which they predicated their application, there is an in camera proceeding where the law enforcement agency must satisfy the judge that there is a reliable informant in being.

JUDGE KINGFIELD: Well, I had no experience with suppression cases. Because I happened to be sitting in Trenton, most of the applications came my way. That was aside from all the other things I did.

SENATOR DUGAN: Would you put yourself in that position, Judge, prospectively rather than drawing on your past experience?

JUDGE KINGFIELD: Well, I am not aware that there were any abuses in the use of wiretaps. First of all, in every instance, there was evidence that a crime was being committed. Sometimes it is impossible to get evidence, particularly in organized crime, and to get witnesses. I have had cases down here of bribery where wiretap evidence could have been used but was not used, and the defendants were acquitted. It is easy to contradict another witness, but when you hear a defendant's own voice on tape, he just cannot contradict it.

SENATOR DUGAN: I understand your position in that regard, Judge. I was trying to get the benefit of your advice on how you would handle a situation where an application was made to suppress the fruits of the tap, and the application was predicated on the allegation and some incidental proof that there was, in fact, no reliable informant.

JUDGE KINGFIELD: If it developed at the hearing that there was no reliable informant, the evidence would be suppressed, obviously.

SENATOR DUGAN: I am going to yield to Assemblyman Rizzolo.

ASSEMBLYMAN RIZZOLO: Thank you, Mr. Chairman. Judge Kingfield, I know that you yourself did not try any of these cases, but as a sitting trial judge, do you feel that you would have had the authority, as they do in the federal court, to hold a Jackson-type in camera hearing to determine the identity of and the reliability of the informant, either prior to the trial on a motion to suppress or during the course of the trial itself? If so, would that not be a measure of protection afforded to defendants and, broadly speaking, to the right of privacy?

JUDGE KINGFIELD: I can assure you that many times I queried the applicants in addition to the affidavits I had. The affidavits are lengthy documents; they are not one or two page affairs; they sometimes run 10, 15, or 20 pages. Frankly, I do not see your concern.

SENATOR DUGAN: Let us assume, Judge, for purposes of responding to this question, that there is a legitimate concern about it. We would like to know how you would suggest handling that question if it did arise. I think Assemblyman Rizzolo put the question as well as I could.

JUDGE KINGFIELD: If I felt that there was not evidence to warrant the granting of an order, I would suppress it, certainly.

SENATOR DUGAN: Senator Russo, do you have any questions?

SENATOR RUSSO: Judge, here is my concern: This is an effective tool; there is no question about it, and it is a much needed one. However, I think most of us are concerned that if there are any abuses, or dangers of abuses, we may "lose the baby with the bath water"; we may lose this effective tool. I do not know how else to phrase this, and I do not mean any disrespect by it, but it seems as though what you have suggested is this: Where there is a representation of a reliable informant by the law enforcement authorities -- you have come to know these law enforcement people; they are honest men, etc.; they probably are; I'm sure of that -- perhaps, in effect, you have delegated the determination that maybe should be yours to them by accepting that representation and not looking behind it. What I think the Chairman and Assemblyman Rizzolo suggested is this: Might we not impose an additional safeguard here by requiring, where an

affidavit is based upon a "reliable informant," that an in camera hearing be held by you or the issuing judge, with a record made and sealed, where you would inquire, "Who is this informant, what has he done for you before, and what is the basis?" The law enforcement agency has determined that he is reliable, but might it not be an additional protective safeguard to require you, as the judge, to determine whether or not their determination is justified?

JUDGE KINGFIELD: Well, it might. Yes, it might, but many times the informant puts in the call himself. It specifies in the affidavit that the informant, in the presence of an officer -- we are talking about a gambling, numbers, operation, or the purchase of hijacked equipment, or the purchase of controlled dangerous substances -- makes the call. In other words, the telephone is dialed, the call is made, the purchase, or whatever, is consummated, or a date is made. To that extent, it seems to me that you do not need anything more. I agree with you that, possibly, where it is based upon an informant without some further evidence, you might need something like that.

SENATOR RUSSO: Judge Kingfield, you referred to an earlier remark made here about there having never been an application denied. I think I made that remark earlier.

JUDGE KINGFIELD: I saw it initially by another Senator in a newspaper.

SENATOR RUSSO: I think Senator Wiley made the remark on the Senate floor. Also, our staff information indicates that. Let me just read you one paragraph; maybe it is the terminology that is confusing me: "No request for a surveillance order in New Jersey has ever been denied. Those requests which the various New Jersey Supreme Court reports state

were 'withdrawn' are all orders which were granted but were never installed." That seems to be different from what you told us earlier if I understood you correctly. There may be a foul-up in our recording system, but according to the records we have, there has never been an application denied.

JUDGE KINGFIELD: Formally. In other words, where an application was presented, and the judge wrote "Denied" on it, no. What generally happens is this: If there is any question about whether or not the judge is going to grant an application, a prosecutor or an officer will visit the judge and talk about it. He might lay out what evidence he has and ask if it is sufficient. I have said in several instances, "No, I don't think you have enough."

SENATOR RUSSO: In effect, then, an application was really never made.

JUDGE KINGFIELD: Correct. I have had other instances where applications came in, and I was not too satisfied with them. The prosecutor would ask me what was wrong, I would tell him, he would ask for it back, I would give it back to him, and he would redraft it and resubmit it. Maybe after it was resubmitted, I would grant it; probably I did. So, it is not necessarily true that we just automatically grant them.

SENATOR DUGAN: Are there any other questions? (No questions) Thank you very much, Judge. The next witness will be Judge James R. Giuliano.

J U D G E J A M E S R. G I U L I A N O: Good morning, gentlemen.

SENATOR DUGAN: When I solicited this morning, Judge, those requests for a change in the order, we were all hoping that you would respond affirmatively and come up and ask for a rearrangement in the schedule so we could deny your motion. (Laughter)

JUDGE GIULIANO: That would have been the first time that a former judge asked to be heard out of turn, but I appreciate your asking me to remain.

First, I think I ought to mention the fact that I served 18 years on the Bench, and, before that, I served 13 years as an assistant prosecutor, and as the first assistant prosecutor for six or seven of those years in Essex County. I was assignment judge for one year in Middlesex County; Senator Lynch, you probably remember that. From 1966 to June 17, 1974, I served as the assignment judge in Essex County.

As far as the granting of orders is concerned, I think Essex County was second in number to Mercer, Judge Kingfield's vicinage. In 1970, there were some 15 orders granted by me; in 1971, some 32 orders; in 1972, 72 orders; in 1973, 50 orders; up to June 17, 1974, 41 orders. So, all in all, there were 210 orders granted by me.

There has been a discussion here about denials. You will find nowhere in any of the reports from Essex County that any application was denied. I did not only handle Essex County applications. I did handle Union County and some of the northern counties when the judge in that vicinage was not available, and I handled some Hudson County applications. I proceeded in the same manner as Judge Kingfield. I was very careful in reviewing the application, particularly the affidavit submitted by the law enforcement agency or the detectives associated with the prosecutor's office if the prosecutor was presenting the application on behalf of the police department in Essex County. Where I found that it was insufficient, I would not sign it. We would have a discussion, and then, in all instances, the prosecutor, whether it was Essex or another county, went back to his office and later provided further information which warranted the issuance of the order.

I should say that, being a former prosecutor and assignment judge and presiding in a county where the biggest concentration of crime existed, insofar as I am concerned, this Act should be continued and should pass both houses of the Legislature. I think it is a tool that is absolutely necessary. As has been stated, of course, there are abuses. There are abuses, I guess, in anything dealing with the law, particularly the criminal law. But, I do not think there have been any abuses as far as I can see, in the administration of this Act.

There has been a discussion here about informants. I never signed an order where an informer was referred to unless there was evidence to indicate, as Judge Kingfield has stated, that a telephone call was made. The officer dialed the number that was given to him by the informant; the informant would then hold the receiver in such a manner, as was stated in the affidavit, that the detective could hear the conversation, whether it dealt with narcotics or laying a bet with a bookmaker.

Without this Act being available to the prosecutors, I do not know how they are going to operate in order to try to minimize the rackets.

There was some mention made by Senator Bateman about the Law Journal article in regard to why New Jersey has as many wiretaps as it does. First, you have to consider the geographical situation of New Jersey: closeness to New York, closeness to Pennsylvania, routes going through New Jersey that continue on into Delaware, Pennsylvania, and New York. It seems that when the heat is on in New York, they come into New Jersey; when it is on in Pennsylvania, they again come into New Jersey; the same is true of Delaware. I think that is the reason why we have so many wiretaps as compared to New Mexico, Arizona, and other States that probably have not had their

first yet. We are in an unfortunate geographical position. As has been referred to by the Attorney General and as reported in magazines before this Act was first adopted, New Jersey was a crime-ridden State.

As Senator Menza probably knows, I was the sentencing judge in all racket cases.

SENATOR DUGAN: Judge Giuliano, what do you mean by "racket cases"?

JUDGE GIULIANO: Organized crime, syndicated crime.

SENATOR DUGAN: I have difficulty getting a precise definition of that. Is that any gambling case?

JUDGE GIULIANO: No. I sentenced in all gambling cases, and I also imposed sentence in all wiretap cases which resulted in convictions. It was by a directive of the Supreme Court.

SENATOR DUGAN: Are all gambling cases racket cases?

JUDGE GIULIANO: Not necessarily. I have some statistics that will show that they are not. I did all the sentencing in the gambling cases which resulted from wiretaps and search warrants, which were issued without wiretaps.

I have my 1971 records concerning defendants I sentenced that year. You may ask, "How do you know they were racket cases?" I conclude from what I have in my files that if I sent 77 of those defendants to State Prison, they must have been part and parcel of a syndicate. In addition, I sent 153 to the correctional institution, and I put 31 on probation. In regard to those probation cases, after conferring with the prosecutor, I concluded that they were not associated with syndicated gambling, or it may very well be that a few were helpful to the State and prosecution.

Someone mentioned today that bookmaking isn't too offensive. He probably didn't use those words, but I agree that a bet is not harmful. However, I ask you to read State vs. Ivan to see what former Chief Justice Weintraub had to say about organized and syndicated gambling.

In 1972, there were 444 defendants sentenced by me and, once in awhile, if I was not available, by the acting assignment judge, Judge Sugrue. In that year, there were 93 sentenced to State Prison. Now, I am not sending some small-timer to State Prison. I would not sentence some peripheral operator to State Prison unless he was part of a syndicate -- part of a large operation. In addition, 283 were sent to the Essex County correction center, and 51 were put on probation.

The last records I have are for 1973. I do not have 1974 because I retired in June, as you know. There were 299 defendants; 76 went to State Prison; 159 were sentenced to the correctional institution; 59 persons were put on probation.

This is just to give you an idea that all did not go to jail because I have been questioned about this. Some people have said, "You are sentencing this defendant to prison because of the directive from the Chief Justice." That was never so. We were bound by State vs. Ivan, and I have the report here if anyone wants to look at it.

There was also mention made by Mr. Boylan, I believe, that this Act is somewhat of a deterrent. Bookmakers and operators in the drug traffic are very much concerned, as I understand, with the right to electronic wiretapping. There is no question about it. I would like you to see what they had to say about me during telephone conversations. I wouldn't want to repeat it here, but you can imagine. (Laughter)

Without this Act, I think the enforcement of criminal law would be hampered. No State today can do without an Act such as we have in New Jersey. It is an absolute necessity. Of course, there have to be safeguards. Of course, the innocent party must be protected.

Judge Kingfield said he was one of four; I think he meant to say he was one of six. We were six judges designated by the Chief Justice. There was a good reason for it. It wasn't that we had a greater ability than some of the other judges. Many, many were just as fine and probably more competent. It was done to limit the number so that a certain procedure could be followed by all judges. In most respects, I think, all six judges followed the same pattern, even though there was no agreement among us.

Again, I repeat, this Act is an absolute necessity if you are going to try to combat organized crime.

Again, someone may think that bookmaking is not so bad, but when you see the results from bookmaking and read State vs. Ivan--- I would like to read just a short paragraph where former Chief Justice Weintraub said, "Here we are dealing with organized crime. The offense is in no sense an isolated excursion beyond the pale of the law induced by engulfing circumstances. It may be such as t o t h e particular individual at the bar, and if he alone were implicated in the criminal operation, a judge might well deal with him as he would with other first offenders. But when the offense serves the interests of a widespread conspiracy, it would be a mistake to think of the defendant as an isolated figure. He is part and parcel of an enterprise. The gambling racket is an ancient foe of society. It bilks the weak. It wrecks homes and destroys men.

It spawns embezzlement, larceny, and crimes of violence. It corrupts officialdom. It is reputed to be allied with other illicit traffic. The 'easy' money it yields doubtless finds its way under cover into legitimate fields, there to continue its polluting course."

Gentlemen, there is no question that there is organized crime in New Jersey. I think it has been minimized because of this Act and because of the alertness of many fine men including our Attorney General, Mr. Boylan, and the others in the Department of Justice. But, it is with us, and don't let anyone fool you that it isn't still here in New Jersey.

SENATOR DUGAN: Thank you very much, Judge. Are there any questions?

SENATOR MENZA: Judge, it is a fact that a higher proportion of bookmakers go to jail than those who commit other crimes. If I am not mistaken, you mentioned that many of these persons did go to jail on the basis that apparently they were involved in organized crime. What bothers me is that whether or not they had a relationship with organized crime was not the subject of their trial. It was the subject of what the prosecutor told the judge after they were convicted of some other offense. For example, oftentimes a person may be charged and convicted of bookmaking. That bookmaker will go to jail based upon---

JUDGE GIULIANO: Not necessarily.

SENATOR MENZA: If he does go to jail, he will go to jail based upon a representation made by a prosecutor or, perhaps, by a parole officer. These representations are not subject to confrontation or cross examination in a trial.

JUDGE GIULIANO: I have here a report that was given to me by Captain Miles which is a summary of the wiretaps and is only for Essex County: 1969, 4; 1970, 13; 1971, 35; 1972, 67; 1973, 48; 1974, 45. I do not know how many I issued in 1974, but I think Judge Blake issued 12, so I must have issued 33. Total arrests: 1937 as a result of wiretaps; 387 have pleaded guilty; 46 have been found guilty by trials; 19 have been acquitted; there have been some dismissals by the Grand Jury; the prosecutors are still pending 371 cases.

When I sent a defendant to jail, it was based upon his participation in the overall enterprise. His record was considered; his background was considered; everything was taken into consideration that should have been taken into consideration. Most bookmakers did go to jail, but I had to be satisfied that they were part and parcel of a syndicate. If a man was found with two slips in his pocket, I would never send him to jail. If the police happened to pick him up because they saw him writing down a bet, I would not send that man to jail. After a conference with the prosecutor, I would advise the prosecutor that, in my opinion, the man was not associated with organized crime, and I would act accordingly.

SENATOR MENZA: I understand what you are saying, Judge, but the almost incessant use of the words, organized crime, bothers me. It is almost a rationale for the wiretapping statute -- that almost every bookmaker is involved with organized crime. It's the magic word.

JUDGE GIULIANO: Mr. Menza, in my opinion, any bookmaker of any consequence has got to be associated with organized crime.

SENATOR MENZA: That is my question to you.

JUDGE GIULIANO: He has got to be. I am talking about a bookmaker who is doing more than $1000 a day. He has got to be associated with others. Bookmakers just do not operate alone unless it is a small-time operation of $30 or $40 a day. If he is doing more than $1000 a day, he is part of an enterprise. That is my feeling.

SENATOR MENZA: Let's assume, Judge, that a man is doing more than $1000 a day, and every time he gets a big bet, he lays it off to somebody else who ultimately lays it off---

JUDGE GIULIANO: Now you have answered the question. This is what we are talking about.

SENATOR MENZA: Is that all organized crime is?

JUDGE GIULIANO: No, not only that. Organized crime also operates in some instances -- I do not want to pinpoint any instance -- to the extent that there is protection. That is what former Chief Justice Weintraub intimated by his opinion in State vs. Ivins.

SENATOR RUSSO (Acting as Chairman in the absence of Senator Dugan): Are there any other questions from members of the committee?

SENATOR PARKER: I would like to follow through on that, Judge. I assume that the reason they have to be in with others is so that they can afford to bank the loans.

JUDGE GIULIANO: I do not think it is to "bank" the loans but to, what they call, "lay off." They lay off the bet. They cannot hold the bet. We'll say that Mr. A is working with Mr. X. He gets a $500 bet on a horse that is 5 to 1 on the line. He cannot afford to take that bet, so he lays it off with Mr. X, who is a top man in the syndicate. Maybe Mr. X has to get the approval of Mr. Y. That happens, and it has happened.

I think I talked about the informant. I think it would be a mistake to order the prosecutor to reveal his informant. There are cases which state that the prosecutor does not have to unless the informer is the one who makes the buy. Sometimes courts have held that that man ought to be revealed -- the man who made the buy.

SENATOR RUSSO: Why would it be a mistake, Judge, to require him to reveal it to the judge in camera and seal the records?

JUDGE GIULIANO: I am afraid of it. I am retired, but I don't know what has happened to my records. I hope that they are in a sealed place. We just had the Campisi case. I don't want to get involved in that. There were 20 witnesses according to the newspapers. I know nothing about it except that we had the first case in Essex County which I ordered to trial. There were 20 people. Nobody knew their names, but somehow, either a transcript or somebody talked--- It would have been a terrible thing, and that is why the pleas were taken -- not to reveal the names of those 20 people publicly. Of course, you can say, "Well, by telling it to the judge, nobody is going to find out." I don't know.

SENATOR RUSSO: If you do not tell it to the judge, you may have somebody who should not be wiretapped.

JUDGE GIULIANO: Again, I think we have to go back to this point: If the Governor has confidence in Prosecutor Lordi -- I take my own prosecutor; there are many others I could refer to -- and he has men under his supervision upon whom he relies, and if you cannot take the word of the prosecutor today, and if you cannot rely on his representations, we are in a bad situation. Our whole enforcement system would fall in that case. We have to depend upon the

sincerity and the truthfulness of the people who are in law enforcement. Of course, you will get a scalawag now and then, but if Mr. Lordi or the prosecutor from Union County or the prosecutor from Hudson County came before me on wiretapping, I certainly had faith in them as prosecutors. If we do not have faith in them, then we should not sign any of the orders.

SENATOR RUSSO: I certainly do not mean to reflect on any prosecutor because I spent 10 years as one myself in Ocean County. Nevertheless, you are dealing here with an unusual weapon, one that, as I said earlier, I happen to think is desperately needed. But, the inherent dangers that it carries with it are so great that I wonder if we can afford, under these circumstances, to simply make the assumption that we have appointed good men and have confidence in them. You know, the President appointed some good men, or so we thought, down in Washington, and we know what happened there. Is there a risk at all, and if so, is it not worth taking; namely, the risk of having this information revealed in confidence to the judge in chambers so that he can make the determination as to whether the informant is "reliable"? The prosecutor may mean well and have the best of motives, but he may be mistaken, or he may be relying on one of his subordinates who is mistaken.

JUDGE GIULIANO: This is a very difficult question to answer directly, as Judge Kingfield stated. I can say that it is the same as when you rely on an affidavit of an attorney who comes into your court for a fee. You rely on him; you feel that he is a member of the bar, that he is ethical, and that he rendered the services that he set forth in his affidavit. Maybe I would not allow him the amount that he wanted, but I would allow him a substantial amount.

I feel the same way with the prosecutor. A prosecutor does not just come in with an affidavit and say, "Informer 1 told me, Mr. Smith, the detective, that at a certain place and at a certain telephone number, there is an illegal operation going on." I do not think I want to inquire who that informer is so long as I am satisfied that the detective took the time to take that informer out to a telephone -- not in his office but to a pay telephone station or some other telephone -- the informer gave the telephone number to the detective, the detective then dialed the number, someone answered, the informer asked for Joe, the other party said, "This is Joe," and the informer then gave his bet or made arrangements to buy narcotics.

It might satisfy the desires of some members of the Legislature to require that the judge have an in camera hearing and ask the detective to divulge the name of the informer, but what would we be gaining? We would not be gaining anything. Who are we after? We are after the persons that the informer has fingered.

SENATOR RUSSO: Senator Dugan and Senator Menza both had to leave for other meetings in the State House that are quite important. I will remind the witnesses that a record is being taken, and that is really all that counts. Your testimony will not be given any less weight because all members are not here. Assemblyman Rizzolo, do you have any questions?

ASSEMBLYMAN RIZZOLO: Judge Giuliano, you asked what would be g a i n e d insofar as an in camera hearing is concerned, and you stated that what we are after is the person or persons against whom the warrant is sought. I suggest to you that what we have to gain

is the fact that you are holding a certain degree of responsibility and raising the level of that responsibility to a point where the officer himself knows that he has to account for his information. It has been my position -- I took it as a trial judge, and I take it now -- that the court does have the authority to hold an in camera hearing.

JUDGE GIULIANO: There is no question about that.

ASSEMBLYMAN RIZZOLO: The knowledge that the officer may have to produce the identity, albeit in camera---

JUDGE GIULIANO: There are cases that have held that, but I do not know of any in recent times. I may be wrong about that. I just want to make one comment regarding an article in the Ledger of January 29, 1975, about the potential for abuses. One paragraph of the article reads, "In a case that could be used to wipe out convictions of 600 other federal offenders against whom the same kind of evidence was used, the court held unanimously that the evidence should have been inadmissible because it was signed by a subordinate of the Attorney General rather than the latter personally." I think that happened in Washington where the Attorney General did not give the authority to his assistants to apply for orders. Now, some 500 or 600 of those orders are tainted, so to speak. We do not have that in New Jersey because it has been my practice to have the prosecutor designate and have placed on file who is t o a c t in his absence.

SENATOR RUSSO: Are there any other questions? (No questions) Judge, I want to thank you for coming here today; we appreciate your testifying.

JUDGE GIULIANO: It has been a pleasure.

SENATOR DUGAN: David Lucas, Commissioner of the State Commission of Investigation.

D A V I D G. L U C A S: Mr. Chairman, with me is Charles Sapienza, the Acting Executive Director of the State Commission of Investigation. I appear on behalf of the State's Commission in response to a request by your chairman that we appear and present testimony. That testimony will be in respect to legislation before you having to do with the continuation of the Wiretapping and Electronic Surveillance Act, which is embraced in N.J.S.A. 2A:156a-1, et cetera.

First, we say thanks for the opportunity to appear on behalf of the State Commission of Investigation. Our interest in the subject, as you might surmise, has at least two bases. The first and most pertinent is that we are one of the three designated parties in this statute, and I make reference to 2A:156a-8, which has given the capacity to authorize an application to a judge for an order authorizing wiretapping. Obviously we want that, and we request that that capacity be continued.

I inform the committee that it is my understanding that that capacity, while authorized, has yet to be utilized by the State Commission of Investigation.

Secondly, and the second basis, is that by statute and upon their request we are obliged to cooperate with the Attorney General and the several prosecutors, and that particular statute is 52:9m-5. We take that obligation seriously, and we are aware of their need for the continuing use of wiretapping as an investigative tool.

To get more to the point, generally, gentlemen, we endorse a continuation of the Wiretap Act for the period suggested by the Attorney General, i. e. six years. And generally, too, we endorse the changes suggested by the Attorney General in his report on wiretapping, dated

September 16, 1974. By implication, obviously, insofar as Senate Bill 1417, Senator Fay's bill, is a combination of those two things, we certainly would appear to, and do, endorse it; that is, the extension of the Wiretap Act and the modifications which it included.

We have a couple of comments about particular aspects of the act, that Bill 1417, to which we would draw your attention. First, there is a provision in it, Section 17 as it would be modified, which would provide for wider dissemination of information, that is, to investigators and law enformcement officers of other jurisdictions. We would certainly favor that aspect.

We have problems, or we think we do, with the term "special need." Now, we consider that as a term of art which is being used here in a rather deliberate fashion. We note under Section 11, the first paragraph, that the term is used with respect to tapping of or in a public place, without definition of what the term means. Section 11 as it is proposed would add a new paragraph, which relates to those instances where there might be tapping and a personal privilege exists, and again the term "special need" is used, and there, there is a definition given. Again, we refer you to Section 12, in which there would be an additional paragraph having to do with common carriers, and again the term "special need" is employed.

In this we go along with Judge Kingfield, whom we just heard. We think there may be some need of definition, so that there might be a consistency here in the definition, and thus in the interpretation of what we are talking about.

Finally, in Section 9, there is some new language to the effect of "showing that there is probable cause." That is, a showing apparently would have to be made in the application, and we suggest that we are not sure what

is intended here, whether there is a grammatical problem or something essential that is lacking or we are missing. We don't know whether what is hoped for is a statement of facts upon which a judicial officer would determine probable cause, or whether, for example, there is to be a mere statement by an applicant, "We have made probable cause" or whether what is intended is that there be such facts spelled out with such specificity that all of us could agree that probable cause was shown.

I'm talking about Section 9 as it is proposed, page three, lines 16 and 17.

Essentially that is our position. It is an endorsement of an extension of the act, and an endorsement of the modifications as contained in the Attorney General's report. Thank you.

SENATOR RUSSO: Thank you, Dave. I have been asked to direct several questions to you. We assume that the SCI does not engage in any but court ordered wiretaps; is that correct?

COMMISSIONER LUCAS: My information -- and the source of that is the one Commissioner who provides us with continuity, Charles Bertini, who has been there since the inception of the commission, and inquiry we have made of the staff, and my answer is predicated on that -- there have been no court authorized wiretaps.

The next question is, have there been any unauthorized wiretaps? My information, and again it is predicated on the same data, is that there have been none.

SENATOR PARKER: That is the consensual type wiretap?

MR. SAPIENZA: There have been no wiretaps or bugging. On the other hand, when you say consensual do you mean if one of the parties would consent to have their message recorded? I believe there have been rare instances

or few instances in the history of the Commission where a particular conversation between one of its agents and a witness was recorded, but that was only done after it was first made known to the attorney supervising the investigation and his consent was obtained.

SENATOR PARKER: The consent of the investigating officer, or the consent of the person he was talking to?

MR. SAPIENZA: Both.

SENATOR PARKER: And they were talking to a third party?

MR. SAPIENZA: Yes -- I don't want to mislead you, I mean the consent of the investigating officer being a special agent of the Commission and/or the attorney who was sitting in on the interview.

SENATOR PARKER: The law enforcement officer is the one that gave the consent to the ---

MR. SAPIENZA: It may or may not include the end party to the conversation.

SENATOR RUSSO: The next question is, is it your position that where materials concerning a witness come to the SCI through a court ordered wiretap, that witness has no remedy to test the insufficiency or the sufficiency of the wiretap order or its underlying affidavit? In other words, state your position on the fact the suppression remedy is not available to a witness before the SCI?

COMMISSIONER LUCAS: We have had no experience with respect to that precise question, inasmuch as we have not done wiretapping. But I would think by analogy, that a witness would have the same remedy he would have in a court following a wiretap gotten by the Attorney General

or a prosecutor, i.e., he would move to suppress. And on the Suppression Motion, he sets forth the basis upon which that suppression should be predicated, for example, no informant, failed to make a showing required by the statute, or whatever. I don't see how that remedy, which is presently in the statute, i.e., suppression, would be avoided simply because the SCI were to engage in wiretapping, if that became the case.

SENATOR RUSSO: Is it within the province of the legislature to make such a remedy available? Why do you think we should not do so when that remedy is already available against other law enforcement agencies?

COMMISSIONER LUCAS: Can we have the first part, please? There were two parts to that at least.

SENATOR: RUSSO: Yes. Is it within the province of the legislature to make such a remedy available?

COMMISSIONER LUCAS: The answer -- first, in all candor, I am in no position here to give you a law review type answer to that, having searched the several jurisdictions. My common sense answer to that would be, A, that the Forsythe Committee, after long study and deliberation, among its nineteen recommendations to this body suggested, quite particularly,the grant of wiretap powers to the SCI. Secondly, the fact that this body passed legislation making that specific grant, and,of course, there is attached to that a presumption of validity, and I would presume even a presumption of constitutionality, and the history of six years in which we have had it. That on its face and as a quick retort would be satisfactory to me. If there is to be an attack at some time, I suggest there is a proper forum for it. I don't and I wouldn't want to engage in any presumptions against validity.

SENATOR PARKER: I want to get back to Mr. Sapienza for a minute and back to this consensual tap.

I really find no problem with the wiretap bill, as far as the court ordered taps are concerned and the surveillance. I don't really feel that it is an invasion of privacy if it is done properly, and I don't really feel that it has been abused by the courts or anyone else. I am concerned with the consensual tap set forth in Section 4 of the act, where it states "one acting undercover," which I would assume would be your police officer. Am I correct in your telling me -- did I understand you correctly when you indicated that one of your law enforcement officers, one of your investigators, or whoever they might be, made a contact with Joe Schlom, and said, I'm going to make a buy or I'm going to do this, from that individual, and then he comes back and says to your investigator or your attorney supervising the file, I'm going to go out and take a bug and get this guy. Is that the basic circumstance?

MR. SAPIENZA: No, not for our agency. That probably would be the basic circumstances for a prosecutorial agency. What I'm thinking of is the circumstance where we have an informant or a complainant that comes into the office and wants to give a statement or a statement is even taken in the field, where you are dealing with someone that is proffering information to you, and you want to have an adequate and accurate recording of that information for your later purposes.

The example you gave me is very much a prosecutorial example, and that really is not our function. If we have a situation like that with narcotics ---

SENATOR PARKER: You would turn it over to the prosecutor?

MR. SAPIENZA: It would be to a prosecutor or to the Attorney General.

SENATOR RUSSO: Dave, the basis apparently for the questions that were asked of you earlier was a letter from Mr. Dickson of your organization, and reading from it he says -- this is dated October 11, 1974, to our committee -- "We take the absence of specific language, which might be deemed to encompass a Commission such as our own, to indicate a legislative intention not to make such a suppression procedure available to witnesses appearing before the SCI."

MR. SAPIENZA: I'm not familiar with that particular article. Does that have something to do with the proposed model penal code?

SENATOR RUSSO: Yes.

MR. SAPIENZA: The question of remedies for matters before the SCI or of that matter is one that stems primarily from federal law, The Omnibus Crime Control Act. The question becomes whether or not, on a theoretical basis, someone would have the right to suppress information or questions based on such information, in a contempt citation, if he had refused to answer questions, and later those questions were introduced as evidence -- but as a matter of theory this exists, but as a matter of practice it does not insofar as we do not do wiretapping.

If we did and if that wiretapped evidence was later to be admitted, in let's assume a contempt situation where the questions would be evidential, I would certainly assume that at that point the judge would have a right to inquire. But if it is done at an earlier ground, when we are conducting our executive hearings -- there is a case directly on that point which indicated that it is a legislative function that is being pursued, and that a contempt hearing or a suppression hearing would not be in order, since there is no adjudicatory

process or no guilt or innocence at stake. I hope that answers your question.

SENATOR GREENBERG: I understand you to testify, Mr. Lucas, that you have not sought to utilize the authority given under the statute during its six years of existence with regard to wiretapping; is that correct?

COMMISSIONER LUCAS: My testimony is that based on the information given me, the commission has not.

SENATOR GREENBERG: Would you please tell us, since that six-year period, which was in the legislature's mind, as the period of time in which it would test to see how the statute would work and what the deficiencies were and what amendments might be necessary, et cetera -- now that that period is over, and you have had no need for it during that period of time, can you tell us why your organization should be continued in it as one of the organizations having the ability to make application for the taps?

COMMISSIONER LUCAS: A quick retort to that, Senator, would be that it is an effective investigative tool. There is a certain deterrence in the mere existence of the capacity to utilize it, particularly in the area in which we work, and we were committed to work in the area of organized crime by the Forsythe Committee and by our legislature.

I think the basis of the question is, if it was given to you, and you didn't use it, why shouldn't it be taken away from you? And my reply to that would be that you might ask that same question with respect to those counties in the state where the prosecutors have been given the same tool and have not had occasion to utilize it, and I suggest you would get probably the same response I am giving you; that is, that it is there. There are other investigative tools which we have too. I can think

of a lot of them right offhand, blood sampling, voice test, lie detector, et cetera, which we may or may not have used, or used in very few instances, yet no one would suggest, I think in all seriousness, that we simply be deprived of those tools simply because they are not presently being utilized.

SENATOR GREENBERG: Well, you have statewide jurisdiction?

COMMISSIONER LUCAS: Yes, sir.

SENATOR GREENBERG: The Cape May County prosecutor's jurisdiction does not. Unlike others who have spoken today, I do view the existence of the statute as constituting an infringement upon the rights of privacy, and there is a question in my mind of balancing those rights. So in balancing them, it does not suffice in my mind to me to say, well , it hasn't been used, but we might need it someday in the future, unless some demonstration of its potential need can be made where it has been considered and rejected, or conceivably you have not gotten into those areas which might require it, but some explanation as to why it has not been used during the period of time that it has been available, in the face of the testimony we have had today, of its validity and need for it, not only as a deterrent, but in actually aiding in the functions of the office which uses it?

COMMISSIONER LUCAS: I'm just thinking of a way of making an appropriate response to that. We start with the basic premise that it is no more than a tool. It is a tool whose capacity to use has been given us, and which for whatever reasons in the past they have not chosen to utilize. I think in dealing with it in those terms, that any responsible prosecutor will tell you that he goes to wiretap only as a last resort.

Now, if the circumstances had been with the State Commission in the five years prior to my going there, that

it was not necessary, and that the same end could be achieved through grant of immunity, subpoena power or public hearing, then responsibility dictated that they not utilize the tool given them; and I suggest that any responsible person in that position would make that kind of reasonable response.

SENATOR GREENBERG: Is it your view that those circumstances will change in the future, so that a responsible view in the future might be, let's tap?

COMMISSIONER LUCAS: I don't know. What may change are the facts or circumstances of a given investigation in which we think or have reason to believe, again as responsible people, that the tool ultimately must be utilized, in which event, I would think, we would go to its utilization.

But I can't again foresee that, any more than I can foresee that the people who gave us the initial capacity could foresee the extent of its utilization, either by us, by the Attorney General, or by any of the several prosecutors.

SENATOR GREENBERG: I hope you understand, and I don't mean to prolong this, but I personally would rather be in the position -- being responsible for making the decision as to whom to give this awesome power -- to give it to those who have demonstrated the need, and if other law enforcement activities or organizations or commissions such as yourself have not used it but might use it someday in the future, and you really don't know when or why or under what circumstances, I tend to think that I would rather have you come back to the legislature and say we need it, because we have demonstrated we have a need for it and we don't have it, rather than just dealing it out in the absence of the demonstration for need. I hope you understand my feelings.

COMMISSIONER LUCAS: I do, and I am sympathetic to it. I think, however, if you follow the logic of the position you must necessarily -- and I hope I am not doing harm toward a generalized position taken by the Attorney General and the prosecutors -- you would have to run some kind of tally of those counties in the state which again for the past six years have had the capacity and have not utilized it. And it follows from there, it strikes me, that you would then have to restrict the use of the tool to several counties where experience demonstrates that it has been necessary and not been permitted, and the other counties where experience has shown it has been permitted and not necessary.

SENATOR GREENBERG: Thank you very much.

SENATOR RUSSO: Thank you, Dave. We will be breaking at four o'clock. We will try to complete the next and last witness by that time.

Bernard Hartnett, Vice President and General Counsel of the New Jersey Bell Telephone Company?

B E R N A R D M. H A R T N E T T, JR.: Good afternoon. I have a prepared statement for you, gentlemen. I have said everything that I feel pertinent in the prepared statement.

(Whereupon the prepared statement follows:)

My name is Bernard M. Hartnett, Jr. I am Vice President and General Counsel of the New Jersey Bell Telephone Company. I appreciate the opportunity to come here today to present the views of New Jersey Bell with respect to the present New Jersey wiretapping law and to comment on those proposed revisions of it which would directly impact upon the operations of our business.

At the outset I want to stress that it is of paramount importance to the telephone business that the privacy of our customers in using our service be preserved. It is our objective that all customers be confident that they have the same privacy when using our facilities that they enjoy in face-to-face conversation. Without such confidence, the value of our service is seriously diminished. The protection of our customers' privacy has been a major concern of our business from its inception. We have consistently taken every reasonable step to insure that privacy was protected by keeping our physical plant and telephone records secure, by developing technologies which enable customers to complete calls by direct dialing without employee participation and by instructing all employees that it is a basic condition of their employment that they adhere strictly to company rules and applicable laws prohibiting unauthorized interception or disclosure of customer conversations.

Historically, our concern with privacy has led us to support state and federal legislation which would make wiretapping illegal and, consequently, we welcomed the federal Omnibus Crime Control Act and the New Jersey wiretapping laws insofar as they strengthened the prohibitions against unauthorized interception or disclosure of telephone conversations.

We recognize that it is the responsibility of the Legislature to balance our concern and the concern of the general public with the privacy of communications against the important law enforcement considerations which underlie our state wiretapping law and we respect the judgment of the Legislature that under proper court supervision wiretapping can be a useful tool in combating serious criminal activity. For that reason, we do not oppose extension of the existing law nor the additional controls proposed by the Attorney General.

There is, however, one major change proposed by S-1417 which we feel is inappropriate and we therefore want to explain our opposition to it. Before doing so, however, it is important by way of background for you to understand just what role the telephone company has been playing in connection with court ordered wiretaps as well as the policy considerations which limit that role.

The fundamental consideration which guides our policy in this delicate area is that we are in the communications business and should not become involved as an active participant in law enforcement. We recognize, of course, that a minimum amount of assistance must be provided to law enforcement authorities if the legislative purpose of the wiretapping law is to be accomplished. Basically that assistance is provided by giving to the law enforcement agency which presents a court order valid on its face data which we call line access information. This information identifies by cable, pair number or color and appearance locations the particular pair of wires which serve the subject's location and which connect him to the telephone company's central office. Equipped with this information, law enforcement agents can locate the subject's line and connect their intercepting equipment. It is important for you to know that telephone company personnel do not participate in any way in the wiretapping itself. That is done exclusively by law enforcement personnel.

We believe that this system of limited cooperation strikes the appropriate balance between the legitimate objectives of law enforcement and our equally legitimate desire to avoid an active law enforcement role.

Against this background, I am sure you will appreciate our concern with the proposed amendment to Section 12. This amendment would permit the court issuing a wiretap order to further direct on a showing of special need that a communications common carrier use its best efforts to furnish information, facilities and technical assistance necessary to accomplish an in-progress trace. It is understandable that there is frequently a great interest by law enforcement agents in identifying the source of calls received by the subject of a wiretap. It could well provide an important link in the investigative process but because of the policy which I have described, we have consistently resisted requests to do such tracing except in the most extreme situations such as kidnapping, homicide or threats to life.

Quite apart from this basic policy consideration, however, there are practical problems which also cause us to resist this proposal. Our experience in line identification efforts has shown that attempts to trace calls in progress are more often than not unsuccessful. This is particularly true when the call is of short duration or if it originates in a central office different from the one serving the subject line or if the central office involved is one in which the trace can only be accomplished manually.

To my knowledge, there is no other state with a wiretapping law which includes language such as that proposed here and even though the federal act was amended in 1970 so as to authorize the court to direct a communications common carrier to provide technical assistance, this assistance is limited to that necessary to accomplish an <u>interception</u> and does not extend to in-progress traces. New Jersey Bell as well as other Bell System companies have consistently rejected requests for such traces from federal as well as state and county law enforcement authorities.

Finally, however, you should know that we have had several discussions on this subject with representatives of the Attorney General's office in the course of which we made known our practical and policy objections to the concept of requiring in-progress traces. Although obviously it cannot meet our policy objections, the language of the proposal reflects a sincere effort on the part of the Attorney General's office to satisfy many of the practical objections which we raised and for that I thank the Attorney General and his staff.

In conclusion, I respectfully request that the points I have raised today be given your careful consideration in resolving this question.

(End of prepared statement.)

SENATOR RUSSO: We have a few questions for you, Mr. Hartnett. Can you describe briefly for us what is involved mechanically in placing a wiretap?

MR. HARTNETT: I think I can tell you, and I have covered in the statement what it is that the telephone company does with respect to our relationships with law enforcement agents that have the authority to wiretap. For those of you who are not familiar with the operation of the telephone system, let me try to say in the simplest way I can, that every telephone is connected to the serving central office by a single pair of wires, but that single pair of wires is generally enclosed in a cable with many, many other pairs of wires, perhaps fifty or perhaps eight hundred.

Each of those pairs of wires serving a particular subscriber is identified by number or by a color code, and by the number of the cable in which it is physically located. In order for a law enforcement agency to effectuate a tap, it is necessary for them to have that information, and basically that is the extent of the cooperation that we provide. We will tell them, upon presentation of a court order which is valid on its face, the kind of fundamental information which enables them to effectuate the tap. We will

tell them not only the cable number and the pair number or the color coding of that pair, but we will also tell them the places at which access to that pair might be obtained, terminal boxes, cross-connection points, and the like. There may be several such points between the subscriber's premises and the central office serving him, and it is necessary for the law enforcement agency to make the connection of their intercepting equipment at one of those points.

We do not physically do any of that. I think you should understand that very clearly. We provide the basic information which enables the law enforcement agencies to do it, but they alone are responsible for the completion of the tap itself. How they do that, I am really not in a position to explain.

SENATOR RUSSO: The proposed bill provides that the telephone company may be ordered to furnish in-process tracing assistance to law enforcement officials who are engaged in a lawful tap. Would you explain what an in-process tracing is? I guess that would be what you just described?

MR. HARTNETT: No. The in-progress tracing -- let's assume that there is a valid order authorizing the tap on a particular telephone, and the law enforcement agents hear in the course of that interception that the person calling into that number is perhaps a higher-up in the structure, and knowing where he is is important to them in terms of the investigative link in the continuing investigative process. They are obviously interested in finding out where that call is coming from, and that is what an in-progress trace is all about.

The language - and you will see in my prepared statement - that is really the only aspect of the present

law and the proposed amendment to which I take exception. Because what I have described to you as the basic kind of assistance we provide, the provision of information to the law enforcement agency is exceeded where a situation arises and a court might direct us to actually participate in the investigative process by attempting to trace that call.

I don't suggest that we have never done that. Obviously in the most serious kinds of cases, such as kidnapping or homicide or threats to life, a policy such as ours yields to the exigencies of such a stiuation. There is nothing unlawful about that. Our refusal to do it and our reluctance to do it has not been premised upon any belief that it would be unlawful for us to do it. It is basically premised on the idea that, as a matter of policy, we are in the communications business not the law enforcement business, and we should not be required to undertake activites which are essentially law enforcement activities.

SENATOR RUSSO: What has been the telephone company's policy under the present law when faced with such a request by law enforcement agencies.

MR. HARTNETT: I think I answered that question in my last answer.

SENATOR RUSSO: Does the telephone company have any opinion as to the advisability of this amendment to the wiretap law? Is the telephone company in the position to render this assistance at the present time, or would it require any great expenditures of money?

MR. HARTNETT: Well, it would depend on the volume, as to how much it would cost. The language of the bill does provide that the company can be reimbursed for any expenses that it would incur in that regard.

I might say, the practical kinds of problems that would be engendered really fall into two categories: One, that we are not in any sense able to assure that we could in fact successfully complete a trace. There are different technologies involved in different kinds of central offices.

There are some central offices where it would be possible to put up what we would call a trouble recorder circuit and we could automatically get that kind of a result, identifying the calling number, if in fact the call that you are attempting to identify originated in the same central office. If it came from another central office or from another state, it would be a very, very difficult thing to accomplish, and particularly if the call was of only a short duration. Physically it would almost be impossible to trace that.

There are other types of central offices where the tracing would have to be done on a manual basis, and that again -- if it was within the same central office it might take two or three people to do it, and it is a hit or miss proposition. You would succeed if you were lucky and the call lasted long enough, and if not, you would not succeed. But I should say this, that when this problem first surfaced with us, Judge Guiliano was kind of responsible for it. He included in an order earlier in '74, I guess it was in the spring of '74, a direction that we accomplish an in-progress tracing in a given situation.

We resisted that and challenged the authority of the court to order us to do that, and it was really as a result of that that we began some discussions with the Attorney General's Office. I should say that most of the practical difficulties that we talked about, apart from the

practical difficulties of actually accomplishing the trace, have been satisfied in the language that has been proposed by the Attorney General. Obviously, however, the basic policy objections remain, and to be in the position to be ordered to do this does force us into a posture to be an active participant in the law enforcement function, and we don't think that is appropriate for us.

SENATOR PARKER: Now you will have to carry liability insurance with that, right?

MR. HARTNETT: Well, we raise that as a practical objection, and I believe there is a provision in there that would hold us harmless in that regard.

SENATOR PARKER: I didn't read along far enough.

SENATOR RUSSO: How many unauthorized taps were discovered by the telephone company in each of the last three years? Were any of these by law enforcement agents? What action was taken by the company upon the discovery of these unauthorized taps?

MR. HARTNETT: Last summer Senator Dugan wrote to my predecessor at the telephone company basically asking the question as to what our experience has been in finding illegal taps. One of the things I mentioned in the prepared statement is that we certainly welcome the language of both the federal and the state wiretapping laws in making it a criminal offense and a serious one to engage in illegal wiretapping.

We think that that law has been pretty effective, because while we have a little over five million telephones in New Jersey, and we have quite a number of people who are out there working on them everyday, we have found -- and I prepared a brief statement on this too, which I thought you might ask about -- in 1970 we

had requests from 276 of our subscribers who wanted to have their premises and their telephone equipment inspected because they suspected that their line was being tapped. Of these 276 inspections that we made, we found 2 wiretaps. I can also give you the number of inspections and the number found for each of the years since then.

SENATOR RUSSO: Is it about the same proportion?

MR. HARTNETT: Well, it was up and down, but the highest number of those found was in 1972, when we found 20 out of 625 inspections.

SENATOR RUSSO: Were these all illegal taps?

MR. HARTNETT: All illegal.

SENATOR RUSSO: Were any of these by any law enforcement agency?

MR. HARTNETT: No, they were not. As a matter of fact, I think I should say that the kind found most of the time would be rather amateurish attempts at wiretapping, perhaps a small FM transmitter that is attached to a line, and the person trying to tap would have that frequency tuned in on an FM receiver around the corner, that kind of thing.

I don't believe that the law enforcement agencies operate in that fashion. Most of these taps were really the husband and wife kind of situation where they are seeking to find some evidence of domestic infidelity or the like.

What we do when we find them, we are very routine. We have an understanding and an arrangement with the state police, that they will be notified immediately. We tell the customer what we have found, and we usually have somebody stay there until a

representative of the state police arrives on the scene. The device is then confiscated by them, and whether there are prosecutions or not when they find -- if they are able to identify who is responsible for placing the tap, they do prosecute.

SENATOR RUSSO: Are there any other questions?

SENATOR PARKER: Yes. Mr. Hartnett, I am a little puzzled about the inclusion of this common carrier provision in Section 12, and we have had some comment on the special need, and what that means.

But what does "provided unobtrusively and with minimum interference" mean? Is that a measurable standard that the phone company or the courts or somebody can follow? I just wonder what in the world does that mean?

MR. HARTNETT: I think what they are talking about there is minimum interference with the basic operation of the telephone company's central offices. I think it was Judge Kingfield or Judge Guiliano who made a comment about putting in the hands of the communications company the responsibility for determining special needs. That is not the way I read that. I think that is still for the court to determine whether the special need has been shown; it is up to the prosecutor to show it.

SENATOR PARKER: I agree with you on that. I just wanted to know what the further definition meant, whether that meant something special to you and that was something that could be measurable?

MR. HARTNETT: No, no. Most of those words that are in that section, except for the phrase "in-progress trace" tracts identically with the language of the 1970 amendments to the federal Omnibus Crime Control Act.

That amendment was initiated on the federal level, because there were some telephone companies -- I think there was an independent telephone company in Nevada -- which had flatly refused to even provide the kind of cooperation that I described to you before, identifying cable pair information to the FBI in connection with an attempted wiretap case in that state.

This language was put into the 1970 law to make it possible for the courts to compel the communications carrier to provide certain kinds of assistance that the FBI was seeking, and which is rendered in all of the Bell System Companies, to my knowledge.

That similar amendment was not contained in the New Jersey Act, and what they have done here is to take most of that federal language and stick into it the phrase "in-progress trace" so that the kind of assistance that would be provided would embrace that as well.

I might point out that that federal act does not go as far as this would seek to have New Jersey go.

SENATOR PARKER: But the in-progress trace is where somebody is on a kidnap and you have to -- the type of thing where he would be on the phone and if you keep him on long enough you can find out where he is and what phone booth he is calling from and that kind of thing?

MR. HARTNETT: That's right. In those situations we have done it, and we will continue to do it.

SENATOR RUSSO: Thank you very much, Mr. Hartnett. I think that concludes our hearing for today. Thank you.
