

PUBLIC HEARING

N.J. Legislature. JOINT COMMITTEE (OF THE LEGISLATURE) TO
INQUIRE INTO AND INVESTIGATE WIRE TAPPING AND
THE UNAUTHORIZED RECORDING OF SPEECH GENERALLY
BY MECHANICAL OR ELECTRONIC DEVICES OR ANY
OTHER APPARATUS - CREATED PURSUANT TO
SENATE CONCURRENT RESOLUTION NO. 4 (1956).

PROPERTY OF

RECEIVED

AUG 6 1956

DIVISION of State Library,
Archives and History
TRENTON

Held:
Assembly Chamber, State House
Trenton, New Jersey
July 23, 1956

MEMBERS OF COMMITTEE

Present:

Senator Malcolm S. Forbes, Chairman
Senator Donal C. Fox
Assemblyman Dominic A. Cundari

Absent:

Senator Frank W. Shershin
Assemblyman Paul M. Salsburg
Assemblyman Joseph M. Thuring

APPEARANCES:

Russell T. Kerby, Jr., Esq., counsel
to the Committee

974.90
C 5815 copy 2
1956

* * * *

New Jersey State Library

INDEX OF WITNESSES

	Page
H . Russell Morss, Jr. Prosecutor of Union County	3
Grover C. Richman The Attorney General State of New Jersey	19

SENATOR MALCOLM S. FORBES (THE CHAIRMAN): The Joint Legislative Committee to Study Wire Tapping and the Unauthorized Recording of Speech will begin this open hearing now. For the benefit of those present, I will introduce the members of the Committee who are here: Senator Fox from Essex County is on my extreme right, then Russell Kerby, who is counsel to the Committee, and on my left is Assemblyman Cundari, a member of the Committee from Essex County.

The purpose of this open hearing is to have the Prosecutor of Union County explain the developments at Newark the other day at the Committee's hearing when he expressed his opinion that wire tapping was legal under the existing statute, or his interpretation of that legality. We can ask Prosecutor Morss to first explain the position he has taken or gave to the Committee the other day, and then the Committee has asked the Attorney General to explain to this Committee his views on Prosecutor Morss' interpretation of New Jersey's present wire tapping statute.

So, Prosecutor, I guess it might be well for you to sit here where there is a mike handy for the purpose of recording your testimony.

Will you raise your right hand?

H. RUSSELL MORSS, JR., - was duly sworn as a witness by the Chairman.

THE CHAIRMAN: For the purposes of the record, if you don't mind, Mr. Prosecutor, we will just read into the record the purpose of the Committee as set forth in the statute:

(Reading) "It shall be the duty of said committee to make a study and investigation of the subject of wire tapping and the recording of speech generally by mechanical or electronic devices or any other apparatus; to inquire into and investigate whether unauthorized wire tapping and unauthorized recording of speech, generally, by mechanical or electronic devices or any other apparatus is being carried on by public or private bodies or agencies or by individuals in the State; to determine the need for broadening, if necessary, our present statutory provision covering wire tapping, and the need, if any, for legislation covering unauthorized recording of speech."

As to the powers of the Committee as they pertain to witnesses, I am quoting from the New Jersey Statutes: "All witnesses sworn before any such committee shall answer truly all questions put to them which the committee shall decide to be proper and pertinent to the investigation or inquiry; and any witness so sworn who shall swear falsely shall be guilty of perjury. No such witness shall be excused from answering any such questions on the ground that to answer the same might or would incriminate him; but no answers made by any witness to any such questions shall be used or admitted in evidence in any proceeding against such witness, except in a criminal prosecution against the witness for perjury in respect to his answers to such questions. Any witness who refuses to answer any questions decided by the committee to be proper and pertinent shall be guilty of a misdemeanor; and any witness who, having been summoned to appear before any such

committee, fails to appear in obedience to ^{the} summons or, appearing refuses to be sworn, shall be guilty of a misdemeanor."

Well, that's the general background. Now, in the course of the Committee's hearings and your appearance before the Committee the other day, it developed that there had been three instances of wire tapping undertaken by you or directed by you in Union County in the course of your duties as Prosecutor, and, in commenting on those specifics in general, you explained to this Committee that you felt that under the statute you, as Prosecutor, were entitled, or it was legal to direct that this wire tapping be undertaken, and I wondered if you would set forth for the benefit of the Committee and the Attorney General your legal position on this point.

MR. H. RUSSELL MORSS: Senator, for the purpose of the record and to clarify some statements that were attributed to you at your press conference, I should like to state first that a little over a week ago, two representatives of your Committee called on me at the Union County Prosecutor's Office and asked if I would voluntarily appear before a closed or secret session of your Committee and give any information which I could within the limits of my obligations which I felt would be helpful to your Committee. I was glad I could accede to that request because the question of wire tapping is one of exceeding importance to this State, particularly from the point of view of law enforcement officers and our problems as to how we are going to enforce certain laws in the State.

You will recall that I appeared before you and one other member of the Committee, Assemblyman Thuring of Hudson, and was on the stand approximately twenty minutes, during which time I stated that I had, in certain cases, obtained wire tap information and, in my opinion, under the circumstances, there was no violation of the law.

The New Jersey Wire Tap Act, which was adopted by the Legislature in 1930, is prefaced by this clause: "Any person"-- I am quoting from memory now-- "who shall wilfully and maliciously:" Then it sets forth three sub-paragraphs. The key to the meaning of the act, in my opinion, is found in the preface. The Legislature certainly inserted the words "wilfully and maliciously"--

SENATOR FOX: I would like to interject, if I may. Do you mind, Mr. Chairman?

THE CHAIRMAN: No, go right ahead.

SENATOR FOX: You refer to the preface and you are referring to the phrase "wilfully and maliciously"?

MR. MORSS: That's right.

SENATOR FOX: Thank you very much.

MR. MORSS: If you delete that phrase in the act, in my opinion it takes on an entirely different meaning, because then it would say, "Any person who shall" and it would be a rather universal exclusion. However, the act reads, "Any person who shall wilfully and maliciously." Bouvier's Law Dictionary, in defining "malice" in criminal law, states, "The doing of a wrongful act intentionally without just cause or excuse; a wicked and mischievous

purpose which characterizes the perpetration of an injurious act without lawful cause." Black's Law Dictionary defines a malicious act as the doing of a wrongful act without justification or excuse; malice may be inferred from the absence of just cause or excuse. It further defines a wilful act as an act done with intent to commit a wrong, either through actual malice or from which malice may be implied. Strange as it may seem,^{for} the purpose of criminal statutes, the words "wilful and malicious" are to all intents and purposes synonymous. This appears to be the opinion of Chief Justice Beasley in the case of Folwell v. State, 49 N.J.L.31, opinion of the Supreme Court of this State in 1886. At page 32, the Chief Justice said: "The word 'maliciously' when used in the definition of a statutory crime, the act forbidden being merely malum prohibitum, has almost always the effect of making a bad intent or evil mind a constituent of the offense. The whole doctrine of that large class of offenses falling under the general denomination of malicious mischief is founded on this theory."

Then he quotes the opinion of the Massachusetts Court in Commonwealth v. Walden, 3 Cush. 558, which I believe was an opinion by Justice Shaw, although my notes don't show it, in which it says: "...the word 'maliciously', as used in the statute relating to malicious mischief, was not sufficiently defined as 'the willfully doing of any act prohibited by law and for which the defendant has no lawful excuse,' but that, to the contrary, in order to justify a conviction under the act referred to, the jury must be satisfied that the injury was done either out of a spirit of wanton cruelty or of wicked

revenge. And even the word 'willfully' in the ordinary sense in which it is used in statutes, was said by Chief Justice Shaw to mean not merely 'voluntarily,' but to imply the doing of the act with a bad purpose..."

Without going into any other authorities, gentlemen, in considering this statute, to which your attention is directed at the present time, it was my contention to the Committee that this is a question of fact, that, as a matter of law and fact, a person who has justifiable cause to wire tap in this State was not violating the New Jersey Wire Tap Act, because it is circumscribed^{by} the words "wilfully and maliciously." I illustrated it, and I don't necessarily say it is confined to law enforcement officers, nor do I say that law enforcement officers can tap under all circumstances. I think you will recall that I said they couldn't do it arbitrarily; they couldn't go on a fishing expedition, but where they had the information from a reliable source that a crime is being committed and that telephones are being used in connection with the commission of a crime, they not only had the right to resort to the obtaining of wire tap information but, in fact, they very likely under the doctrine of the Winne case had a duty, because the statutes of this State impose a duty upon the Prosecutor of the county, unlike most District Attorneys and Prosecutors in other states, to detect the commission of crime. That, I think I can say without fear of contradiction, is peculiar to New Jersey. That obligation is imposed both on the Attorney General and the County Prosecutors. In

most other states that obligation resides in the Sheriff's Office.

That, sir, as briefly as I can state it, is my concept of the law. I don't say that this act, and I want to clarify this because it seems to be the impression-- I don't say that this act gives law enforcement officers carte blanche to wire tap, but I do say that under justifiable circumstances they have the right to wire tap, and I think, in connection with Section 605 of the Federal Communications Act, there is no prohibition there. The only prohibition there is one that prohibits you from divulging the contents of the intercepted message, and it has been so interpreted by the Attorney General's Office of the United States.

THE CHAIRMAN: Prosecutor, on that point, just for clarification: You said it does not give a Prosecutor carte blanche; there must be justifiable circumstances. Under your interpretation, wouldn't the law enforcement officer be the sole interpreter of what are justifiable circumstances?

MR. MORSS: That is so under the present law and you will recall I pointed out that I, personally, and I think most of the Prosecutors, feel that those activities should be regulated by the courts and it should not be left to the sole discretion and responsibility of the law enforcement officer.

THE CHAIRMAN: But you feel, under your interpretation of the statute, that under the present statute it is?

MR. MORSS: Yes, that at the present time it is.

THE CHAIRMAN: And that there is in law no regulation of it, and the sole determinant of whether it can be done or not is any law enforcement officer who might be concerned with it

MR. MORSS: The one who is responsible for enforcing the laws must make the decision as to whether or not to resort to wire tapping.

THE CHAIRMAN: Thank you. Do any members of the Committee have any questions?

MR. KERBY: Would you mind defining for me the words that have been used quite extensively this morning "law enforcement officer"?

MR. MORSS: Well, sir, the Attorney General is probably the supreme law enforcement officer, ipse; you go all the way down to the State Police, the ABC, Fish and Game Wardens, County Prosecutors, County Detectives, Municipal Chiefs of Police, and the patrolmen on the beat. They are all law enforcement officers. Our Supreme Court has said that the County Prosecutor is the foremost representative of the Executive Authority in the enforcement of the law at the county level..

MR. KERBY: Would you say, Mr. Prosecutor, that a Warden would be privileged, upon suspicion of a crime which was to be committed, to wire tap without going to any other higher authority?

MR. MORSS: What type of warden, sir? Are you talking about a jail warden?

MR. KERBY: You mentioned a Game Warden.

MR. MORSS: A game warden? If it comes within the scope of his duties to enforce the fish and game laws, and this is a rather extreme case, I think, sir, but -- well, you asked me who were the law enforcement officers of the State, and I tried to tell you. Even the Tenement House Inspectors are law enforcement officers. If it was his responsibility by law to detect that crime, then I would say it would be his duty to use all means available to detect that crime within reason and within the law.

MR. KERBY: Would you say that a plain clothesman on duty is a law enforcement officer, and I assume, under your definition, would also be entitled to tap a wire if he thought he could prevent the commission of a crime?

MR. MORSS: Now, sir, under the strict interpretation of the law, the answer is yes. I don't feel it should be that way.

MR. KERBY: I understand.

MR. MORSS: We have recommended for years that there be a regulated wire tapping act under the supervision of the courts of this State, just as they have in New York.

MR. KERBY: Do you feel also that the Chief of Police of any municipality has the same privilege that you had as a Prosecutor to tap the wires?

MR. MORSS: I do, sir.

MR. KERBY: And also a Sheriff of the county?

MR. MORSS: If it comes within the scope of his duties as a law enforcement officer. There is some confusion now in the laws since the Winne case as to just what the

Sheriff's duties are. Certain Sheriffs still assert their authority as law enforcement officers. Other Sheriffs have not asserted that authority.

MR. KERBY: Then the capsule of it at this time is that any law enforcement officer, regardless of how high his authority in relationship to the Attorney General down, can be permitted, without going to a superior, to tap a wire as long as he does it in a manner which is not wilful or malicious, where he feels that the detection of a crime--

MR. MORSS: Under a strict interpretation of the law. Remember, sir, there is one other thought here: This is a penal statute. It is a statute contrary to the common law and it must be strictly construed.

SENATOR FOX: Well, Mr. Prosecutor, boiling this down, if I get your philosophy correctly: Number 1, so far as law enforcement officers are concerned, and I think under the Winne case it says the lowest chanceman on the beat to the highest law enforcement official of our State are charged with the responsibility of enforcement of the criminal law. That is correct, is it not?

MR. MORSS: Yes, sir. I have a copy of the Winne opinion here, if you wish to see it.

SENATOR FOX: Well, that's all right. Number 2: I think you have indicated a great variant point-- that unless the act, as it applies to 2A:146-1, is done, first of all, wilfully and, secondly, maliciously, which we know in the law implies an illegal or ethically immoral act, done with an evil intent, there is not a

violation of the statute. Is that correct?

MR. MORSS: Substantially, I think that is what I am trying to say.

SENATOR FOX: Well, let me ask you this, and I am also asking this for the purpose of clarification: In connection, for instance, with the perpetration of a homicide committed during arson, robbery, etc. I mean, there the intent is implied; the intent requisite for the conviction of murder is implied. Is that correct, sir?

MR. MORSS: Yes. Our cases have said anybody who uses force, the law implies an evil intent.

SENATOR FOX: But in the interpretation of this statute, is it your thought, and I am interested in it because there are no decisions on it, that by virtue of the specific statement of the term "wilfully and maliciously," that of necessity those two are absolute requisites for the violation of the statute?

MR. MORSS: That is correct, sir, and I think that is the law of our State.

SENATOR FOX: So that, if a law enforcement officer,-- and I am going to take yourself, for an example, or the Chief of Police of the City of Newark, or any cop or detective,-- utilizes a tap in the course of his duty for the detection of crime, that would obviate perhaps the latter part, the malicious part; he does it wilfully, he does it of his own volition; that we know; but where it is done without malice and in an attempt to procure evidence for the enforcement of the criminal law, that cannot be

construed as malicious.

MR. MORSS: That would be my opinion but, in the final analysis, that is for the grand jury or the petit jury to say under this act. I think, Senator, it is a question of fact-- a complaint could be filed against any law enforcement officer for wiretapping, but the burden would be on the prosecution to establish beyond a reasonable doubt that he did it for malicious purposes. And that, as you know, is always a question of fact.

SENATOR FOX: Let me go a little bit further on that. And I trust you don't mind if I ask some of your own personal impressions. You have been a Prosecutor in one of our major counties for some time. Do you have any thoughts, or I mean would you care to express your philosophy with respect to the utilization of tapping in connection with the detection of crime?

MR. MORSS: Yes, sir. We had an example the other day, a very vivid example.)

SENATOR FOX: First of all, without the example. I would like to have an expression of your thoughts on it.

MR. MORSS: Well, I feel the need for wire tapping is principally limited to a certain type of crime, although it can be used in all types of crime under certain circumstances. It is principally necessary where we are up against organized crime. Since the prohibition era, criminals have organized along lines of businesses which they use, as they did in the Cincinnati/^{numbers}swindle, with which you are familiar. Telephones were used in that case; there was a net between New York, Newark, and Cincinnati, rigging the Treasury

results in Cincinnati. We have had cases where we have had information, good information that something is going on; we know the character of it, but we don't have the evidence to present in court. Wiretapping can be used in two different ways: (1) to tell you when and where a certain person will be in the commission of a crime, so you can apprehend him in the act, and the second purpose of the wire tap is to use that evidence in court to corroborate other evidence. And, by the way, I might say that I don't think that wire tap evidence alone should ever be used as a basis for guilt. In all cases, like a confession, I think it should be corroborated.

SENATOR FOX: In what manner?

MR. MORSS: By some other evidence. Now, in State v. Cooper, in 10 N.J., it was held that a confession itself was not sufficient evidence but there must be other evidence, as there was in the Cooper case, to corroborate the confession, and I think very stringent requirements should be placed upon it as a foundation before its admission in evidence, even to the point where there should be a hearing in private, and the defense attorney should have an opportunity to hear the recording in the presence of the Judge and hear his objections before anybody else hears it.

SENATOR FOX: Let me ask you this, Mr. Prosecutor: I think, from actual experience, we know that the utilization of wiretapping, even by law enforcement agencies, is subject to abuse, and that has been indicated and manifested in certain jurisdictions.

MR. MORSS: Sir, a scapel in the hands of a doctor is subject to abuse, a baseball bat in the hands of a baseball player is subject to abuse, a gun in the hands of a police officer is subject to abuse, anything in the hands of a human being is subject to abuse.

SENATOR FOX: That's quite true. Let me follow up my question on that: Do you have any thoughts, and I think this Committee would like to hear them - do you have any thoughts with respect to the procedural aspects?--I mean, if you are going to legalize it, in order to protect the rights of the individual, the private individual, which I know that you believe in and this Committee believes in, and I think that is one of the things that troubles us.

MR. MORSS: Well, sir, I would be glad to answer your question. The Chairman of your Committee the other day expressed the thought that the Committee was not authorized to entertain any such suggestions and was not interested in-

THE CHAIRMAN: I was just going to say that the Committee's purpose in setting up, Senator-- I think it was clearly charged by the Legislature with determining if the present statutes might be considered a statutory prohibition against any wire tapping in the State of New Jersey, whether that prohibition was broad enough to embrace new devices, and if it needed to be strengthened because, if you recall the debate on the floor that accompanied the passage of the resolution, it was often said by those who opposed the appropriation that there

were no instances of wiretapping in New Jersey, that it was illegal, and therefore, without evidence, all we should do was examine whether the statute was broad enough to encompass the new means of eavesdropping , etc., so that a debate or a discussion as to whether or not wiretapping should be legalized, I don't think under the intent and the language is a charge of this Committee, particularly. I think we can have that discussion, certainly when we have debates pertaining to any legislation this Committee might recommend on the floor. In the passage of it, the debate will probably largely turn about whether or not wire tapping should be legal.

SENATOR FOX: Well, Mr. Chairman, I am perfectly willing to concede what you say but I don't think that we should be narrowed or precluded from going into an aspect or the scope of this Committee should be narrowed by any remarks that were made in connection with the course of the debate, because I think that this is perhaps one of the most important aspects of the investigation to be conducted by any committee, and it is my conception, and I certainly desire to follow it out, that the rights of a private individual and the average citizen, I think both you and I agree, are sacred and I think it behooves us to inquire from a man of the type of Prosecutor Morss to get his views on this thing, and I think it would be of assistance to us.

THE CHAIRMAN: Well, if the Senator has that interest and wants to pursue it, I have no objection. My feeling was that in the course of these hearings, it would be endless, or could be, with each witness discussing whether

or not wiretapping should be legalized. That is a philosophical discussion that has been raised for many years and New Jersey, in my opinion, in its existent statute said it should not be, and this Committee is charged with finding out if that statutory prohibition is adequate, and if we, with every witness, go into the discussion of the philosophical aspects - that is a decision which only the entire Legislature can make. It is true that the recommendations of this Committee would probably have some influence with them, but under the charge that we were given-- that was my only point. It was not to limit your discussion with any one witness. My comment to Prosecutor Morss the other day was that we were dealing with specifics and the law as it is now written, and the pros and cons of whether wiretapping should be legalized, would open up a wide forum of discussion and philosophical argument, and so forth, that would get us off the track of what our current prime mission is. Now, I just pass that in observation. I would not, certainly, as Chairman, object to any questions that any of us have that go into the broader aspects of this thing. I was just trying to narrow it for the purpose of that moment.

SENATOR FOX: Well, with your indulgence, Mr. Chairman, I will be very brief, because I think this goes further than a mere philosophical discussion. I think it goes to the legal aspect of it, and I won't take up much time.

MR. MORSS: May I have the question again, please?

SENATOR FOX: Well, let me put it to you this way: Number 1, have you given any thought or any consideration with respect to any legal protection to be afforded the

private individual?

MR. MORSS: Yes.

SENATOR FOX: If you have, I would like to have it.

MR. MORSS: The best example I know of, I think was a bill that was tentatively prepared by the Attorney General's Office, with the assistance of all the Prosecutors of this State. That bill, essentially, provided that the Attorney General or a County Prosecutor, upon information of the commission of a crime, could make application to an Assignment Judge of the State to obtain an order to wire tap. I do think that there are certain other safeguards that could be added to the act. One, as I said, is a screening process by the Assignment Judge, if there is a recording, and also the requirement that wiretap evidence alone shall not be sufficient to sustain any conviction.

Senator, you have been a law enforcement officer, and I am quite sure you have experienced some of the frustrations that all of us experience when we know something is going on but we can't get the evidence to prove it. It generally happens in crimes related to gambling, abortion, prostitution, and narcotics. It can happen in homicide cases; it can happen very well in fraud cases, shakedown cases, and I believe, and I have heard the Prosecutors of this State for many years-- I have been in the office now for ten years and a half, and I have attended meetings conducted by former Attorney General Parsons and Attorney General Richman, and on all occasions, when the subject has come up, the Prosecutors have been in unanimous agreement, as I recall, that

they cannot effectively enforce the laws of this State without the right to wire tap. I don't think there is a single one of them who wants that right without some check on it in the form of judicial supervision.

THE CHAIRMAN: According to your testimony, they have the right to wire tap.

MR. MORSS: We have the right to tap, I believe, under certain circumstances. We don't have the right to use that evidence, Senator.

THE CHAIRMAN: Well, thank you very much, Mr. Prosecutor.

ASSEMBLYMAN CUNDARI: One question, sir. Mr. Prosecutor, I would just like to ask you this one question: If a member of your Prosecutor's staff utilizes wiretapping without your consent, would you condone such an act, let's say, in the case where they are attempting to detect something in a bookmaking offense? Would you condone such an action?

MR. MORSS: It would depend upon the circumstances and the particular facts of the case. As a matter of fact, I will say this: It has been contrary to my desire that anybody subordinate to me take the responsibility for wire tapping.. I feel that is a decision that I should make and it should be my sole responsibility.

ASSEMBLYMAN CUNDARI: All right. Then you wouldn't condone such an action. One other question: Would you feel that such an action by one of your Prosecutor's Detectives or any member of your staff would be a legal action?

MR. MORSS: Yes, it would be a legal action.

THE CHAIRMAN: Thank you, Prosecutor.

Now, the Attorney General has been asked by the Committee if he would appear before the Committee to give us his opinion of the New Jersey statute pertaining to the point raised by Prosecutor Morss.

Would you raise your right hand, please, General?

ATTORNEY GENERAL GROVER C. RICHMAN: I was asked to appear here to give my views, not as a witness. I think when the Attorney General is asked to give his views, he doesn't want to give them under oath. Why would you want them under oath?

THE CHAIRMAN: I can't hear you.

MR. RICHMAN: Why would you want them under oath? I was asked to come here and give my views.

THE CHAIRMAN: Well, because there might be a number of questions that follow, such as with Prosecutor Morss, that relate to--

MR. RICHMAN: Well, I don't have any objection to raising my right hand and being sworn, but it is contrary to my understanding of your invitation. I am perfectly willing to do it.

THE CHAIRMAN: Well, I asked you to appear just as I did Prosecutor Morss - would you be able to do it voluntarily? Prosecutor Morss isn't here under subpoena either. I will ask the Committee, because my invitation to you was, would you appear and give us a memorandum of your views on this observation, because it is a pretty vital matter, I think. I didn't clarify the particular point as to whether it would

be under oath or not.

MR. RICHMAN: I am perfectly willing. My only feeling about it is this: You served one subpoena on me in the past, subpoena duces tecum, which I declined to honor.

THE CHAIRMAN: Well, it was by mutual agreement. Your subpoena was withdrawn and you voluntarily appeared. Right?

MR. RICHMAN: I appeared. That's right.

THE CHAIRMAN: Well, just let me ask the Committee how they feel about this.

ASSEMBLYMAN CUNDARI: Have you any reluctance to being sworn?

MR. RICHMAN: I don't expect to tell anything but the truth. I have no real reluctance, except that I rather resent being invited to come here and give my views and then be treated as a witness under oath. But I am perfectly willing to be sworn, if you want to do it.

THE CHAIRMAN: Well, I will be guided by the Committee, because I don't want to have you feel personal resentment--

MR. RICHMAN: Oh, I never feel personal resentment.

THE CHAIRMAN: -- or that this has an impact on any feelings you might have toward a subpoena that the Committee might issue. I don't want this to be coloring that particular situation if it should ever arise.

MR. RICHMAN: It is entirely up to the Committee, whatever you want.

SENATOR FOX: Well, Mr. Chairman, I think this is much ado about nothing. What I am interested in is getting this testimony on the record and reading it to see what he has

to say.

ASSEMBLYMAN CUNDARI: I am interested also in having it on the record, and since it is a matter of record and the Attorney General has no reluctance other than the question of perhaps a lack of protocol, I think if the Attorney General refuses to be sworn, then I think we should take it on a voluntary basis. I will leave it up to the Committee.

SENATOR FOX: I will leave it up to the Committee.

THE CHAIRMAN: Well, that leaves it up to yours truly. In view of the fact that you feel the invitation did not imply being sworn in, and it is all to be a matter of record anyway, I presume it would have the same validity, we can forgo the oath so far as I am concerned.

MR. RICHMAN: All right, Senator. You have requested me to come here and give my views on the meaning of N.J.S. 2A:146-1, which is the section that commences with the words, "Any person who willfully and maliciously cuts, breaks, taps," etc. Now, Prosecutor Morss, as I understand it, on July 18 reported that on a few occasions in his county he had ordered wires taps in order to disclose information on bookmaking operations. He defends his conduct by saying that he did not willfully and maliciously tap wires, that he was in the process of detecting crime, and acting within the powers vested in him as a county prosecutor. We have done a considerable amount of research, not only in the past but since you called me, Senator, in this matter. No court in this State has

interpreted this particular statute in any reported decisions or, as a matter of fact, so far as I know, in any decision. I have, however, reached certain conclusions. First, I think we have to interpret the terms "willful and malicious." I think we have to also consider those responsibilities that are imposed on prosecutors. Now, the term "wilfully" has been interpreted as the doing of something intentionally with a corrupt intent, without good faith, in disregard of law, and knowing something to be false. "Malice" connotes the intentional doing of a wrongful act without probable cause and without any justification or excuse. It implies an act done with bad intent, with an evil mind, and in the spirit of malicious revenge. The terms "willful and malicious" have been construed to be almost synonymous, and I must also point out to you that the language in this statute is in the conjunctive and not in the disjunctive, so that both of these terms must be proven - not one or the other.

SENATOR FOX: Excuse me, Mr. Attorney General. That is exactly what I want to ask you. You used the term "almost synonymous."

MR. RICHMAN: That's right.

SENATOR FOX: Is it not a fact that legally, although you used the term "almost synonymous," they have been designated as separate qualities and must of necessity be proven in a major crime.

MR. RICHMAN: That's right. I think you're right, Senator.

Now, whether or not a person acted willfully and maliciously in tapping wires is in my opinion within the sole province of a grand jury and, in turn, a petit jury, to consider, if an indictment is returned in the light of the surrounding facts, whether or not the statute has been violated.

Now, considering the actions of Prosecutor Morss - what are his duties and responsibilities? It has been said in this State that each prosecutor shall be vested with the same powers and be subject to the same penalties that would be vested within his county as the Attorney General shall by law be vested with or subject to, and he shall use all reasonable and lawful diligence for the detection, arrest, indictment and conviction of offenses against the law. Now, this statute prohibits willful and malicious wire tapping. At the same time, it is the duty of the Prosecutor to use all reasonable and lawful diligence to detect crime, so that you have to draw the line between malicious and willful wire tapping on one hand, and a diligent amount of zealousness on the part of a prosecutor to do something that, if willful and malicious, is prohibited as a crime.

Now, the Chief Justice in the Winne case, in talking about the prosecutor, said this: "Such discretion must be exercised in accordance with established principles of law fairly, wisely, and with skill and risk. It includes the right to choose a course of action or nonaction, chosen not willfully or in bad faith but chosen with regard to what is right under the circumstances."

I first learned of Prosecutor Morss' activity during the course of an investigation into the police department of the City of Elizabeth. One of my Deputy Attorneys General was assigned to assist him in that investigation.

THE CHAIRMAN: What date was that?

MR. RICHMAN: That was sometime in the spring of 1955. As soon as I learned of that, I suggested to the Prosecutor that, in view of the statute, all of those matters should be presented to the Union County Grand Jury and, as I understand it, and I am so informed by my Deputy who assisted the Prosecutor, all of those matters of which I was made aware, with regard to wiretapping, were presented to the Union County Grand Jury, which did not see fit to indict.

Now, wiretapping, per se, has not been regarded as a violation of the 4th Amendment of the United States Constitution. It is true that the federal government has uncertain limitations against this activity. Now, this particular statute we are talking about is a criminal statute and must, of course, be interpreted strictly, and, since there is no prohibition, constitutional prohibition-- I am not talking about statutory prohibition-- against this type of activity, it is up to the jury system, under the statutory standards, to determine in each instance whether such a person was right or wrong.

Now, I do not condone the use of wiretapping--

SENATOR FOX: Excuse me, Mr. Richman, if I may ask a question. When you use the term "constitutional," you are applying that both to federal and state. Is that correct?

MR. RICHMAN: That's right.

ASSEMBLYMAN CUNDARI: Before your last statement, Mr. Attorney General-- I am a little confused on the words you used in connection with the grand jury. Am I to understand that in each of the three cases when Mr. Morss utilized these wiretapping services, he went to the Grand Jury and received permission to do so first?

MR. RICHMAN: No. You misunderstand me. What I said was that, as soon as I learned that Prosecutor Morss-- Let me say this now, before I overlook it. Prosecutor Morss in my opinion is an able and conscientious and a zealous prosecutor.

THE CHAIRMAN: May I say parenthetically, I don't think anybody on the Committee disagrees with you on that point. There is no personal implication respecting Prosecutor Morss in this hearing. He was just the first law enforcement officer, the first county prosecutor, to come before the Committee and say he considers it legal.

MR. RICHMAN: I said, Mr. Assemblyman, that in view of the statutory prohibition that existed, in view of the fact that the Prosecutor had apparently tapped wires, that all of the instances that were brought to my attention were subsequently presented to the Grand Jury, when the grand jury could have indicted or could not have indicted. They apparently chose not to indict.

THE CHAIRMAN: Apropos of your statement just before you started to explain your personal feelings about wire tapping, the nubbin of your interpretation under the state

law is that-- would this be a fair summary, or would you elucidate, that any law enforcement officer can now tap wires and the only check on that would be if he was brought before a grand jury for the same and the grand jury indicted him? Under your interpretation of the law, that is the only existing restraint on wiretapping and that any law enforcement officer on any level can do what the Prosecutor did; namely, order or conduct wiretapping in pursuit of his duty and the only time it would be a crime is if the grand jury so found.

MR. RICHMAN: That is the same situation as with every crime that exists in the State.

THE CHAIRMAN: In other words, is that a fair summary?

MR. RICHMAN: No, it isn't a fair summary. The inferences are not fair. What I say and the logical inference is this: that whoever, in this State, taps wires subjects himself to criminal prosecution, no matter who he may be, law enforcement officer or otherwise. Under this statute, he subjects himself to criminal prosecution.

Now, it is for that reason, Senator, that I do not condone and have not authorized wiretapping by any state agent or any state law enforcement officer, nor have I condoned, nor has the Governor condoned, any wiretapping by a county prosecutor or anyone on any level, because I do not think it is in the interest of law enforcement for law enforcement officers to commit acts which subject them to criminal prosecution. And I think the ultimate determination, of course, of whether or not they have committed a criminal act is for the grand jury and, of course,

ultimately, the petit jury.

ASSEMBLYMAN CUNDARI: Mr. Attorney General, if a prosecutor of a county serves a subpoena or a warrant upon an individual, you would not in that case say he subjects himself to criminal prosecution, would you?

MR. RICHMAN: Not unless, in the exercise of that, he had done some criminal act.

ASSEMBLYMAN CUNDARI: Without going into a criminal act, there is positively permission in the statute allowing him to serve warrants, and so forth.

MR. RICHMAN: That's right.

ASSEMBLYMAN CUNDARI: Then, would you say, by the mere fact that he does any wiretapping of any aspect whatsoever, he subjects himself to criminal prosecution, which in itself the act does not require.

MR. RICHMAN: That does not necessarily follow. Whether or not he has committed a crime depends on whether or not he is convicted.

THE CHAIRMAN: Well, when this was drawn to your attention, as the Attorney General, did you do anything about it personally, in terms of considering it a criminal act, or "putting up" to determine if it was a criminal act?

MR. RICHMAN: I suggested, and my suggestion was followed out, that the matters be presented to the Grand Jury.

THE CHAIRMAN: They were presented to the grand jury in this specific instance as to whether or not a criminal act

had been committed.

MR. RICHMAN: The ones of which I was aware were presented to the grand jury.

THE CHAIRMAN: On the basis that the grand jury was to decide if these were criminal acts, these particular wire tapings?

MR. RICHMAN: To decide whether or not anyone should be indicted in connection with these particular acts.

ASSEMBLYMAN CUNDARI: When you felt it was a borderline incident as to whether or not he had done right or wrong--

MR. RICHMAN: I felt it was not for me to say but that it was for the grand jury to say.

THE CHAIRMAN: I'm just a layman and not a lawyer, as you well know. For the purposes of a layman's interpretation, what it would mean, it seems to me, is that anybody can wire tap, any law enforcement officer can wire tap, but in so doing he is subject to a criminal prosecution, wherein the grand jury could determine if a crime had been committed.

MR. RICHMAN: That is just as true, Senator, as if I were looking through, as a law enforcement officer,-- looking through your window and saw evidence which was not in itself evidence of a crime, and broke into your house and took that evidence, I would be guilty of breaking and entering, but I would be getting evidence, and I might use that evidence to obtain conviction of a criminal, then it would be up to the grand jury to say whether or not they wanted to indict me .

THE CHAIRMAN: Well, I don't know all the other ramifications. All I know is that on wiretapping, then, based on what you have explained to this Committee to date, the only deterrence then is that a law enforcement officer who does tap wires has not, by virtue of that fact, violated a statute; he has opened himself to criminal prosecution for the jury to decide if any crime had been committed, but he is not violating a law, per se, by wiretapping; in other words, only the grand jury can say he has violated the law, and that would depend entirely on their interpretation of the meaning of "willfully and maliciously."

MR. RICHMAN: Only a grand jury can say whether or not anyone should be indicted for any criminal offense.

ASSEMBLYMAN CUNDARI: Can you explain to me the difference, Mr. Attorney General, between a prosecutor having no criminal liability as the result of the proper serving of a warrant and having a possible criminal liability as the result of the proper use of wiretapping?

MR. RICHMAN: Well, of course, I don't concede that a law enforcement officer could not be criminally prosecuted for serving a warrant. It would depend upon how he served it.

ASSEMBLYMAN CUNDARI: I say, if he properly utilized the serving of a warrant, it is conceivable he would not be criminally prosecuted?

MR. RICHMAN: But there is no statute condemning the service of a warrant. There is a statute that condemns wiretapping under certain circumstances.

SENATOR FORBES: So in your definition of the words "willfully and maliciously,"/you ^{do} concede that any well-intentioned law enforcement officer who taps wires in the pursuit of his duties has done so willfully and maliciously?

MR. RICHMAN: Do I concede that he has done it willfully and maliciously?

THE CHAIRMAN: Yes, do you concede - not conceive.

MR. RICHMAN: Do I concede that he has done it willfully and maliciously?

THE CHAIRMAN: Yes. In other words, how could a law enforcement officer who uses wiretapping under this interpretation-- what possible crime could he be guilty of unless it were for abuse? In other words, to track down bookies or to track down gamblers in the pursuit of his constitutional responsibility, he uses wiretapping, do you personally conceive of any grand jury indicting him for having done something willful or malicious, as you defined those words?

MR. RICHMAN: I can't anticipate what any grand jury might do. It isn't my function to anticipate what a grand jury would do.

THE CHAIRMAN: You wrote me a letter in March of 1955, in which you said that you consider the present statutory provisions on wiretapping-- "I consider these statutory prohibitions to be adequate."

MR. RICHMAN: I do. I considered them to be adequate then and I consider them to be adequate now, and for these reasons: Here you have a situation where, if you delete

the words "malicious and willful" from this statute, you will place every law enforcement officer in this State - and I am only talking about wiretapping by law enforcement officers; I hold no brief whatsoever for private wiretapping; I don't think it even requires discussion -- you will place every law enforcement officer in this State in a strait jacket and, as Mr. Hoover once said, in talking about the FBI's tapping wires: "I dare say the most violent critic of the FBI would urge the use of wiretapping technique if his child were kidnaped and held hostage." Now, that's why I say, Senator, this is a step that is workable. Put these law enforcement officers in a strait jacket and you will hinder their activities, so that even in the most flagrant case, where you yourself would be quite willing to tap a wire, they will be committing an indictable offense if they do so.

THE CHAIRMAN: In short, - I presume you have more to your statement--

MR. RICHMAN: No, that's all I have to say.

THE CHAIRMAN: Have you ever explained to this Committee or to me in our various discussions of this that you consider that prosecutors and other law enforcement officers can wire tap and that the only preventive is the possibility of a criminal indictment against them? I mean, have you ever expounded this point of view to this Committee?

MR. RICHMAN: You asked me a question, Senator, in your letter, which I took it that you meant what you said. In your letter you said this: Well, as I recall your question, you said to me: Do you consider the present

statutory provisions adequate? My answer was, "I am of the opinion that they are adequate," for the very reasons that I have expressed here today, although I did not at that time elaborate on them. You said simply this: "Are you satisfied that the present New Jersey statutes against wiretapping are adequate?" At no time, did you or any member of this Committee ask me whether or not, under any circumstances, a law enforcement officer could tap a wire.

THE CHAIRMAN: Well, my recollection is this, or the intent of my question--

MR. RICHMAN: Do you want to see the letter?

THE CHAIRMAN: No. I presume you read it right. You can't read into it intent, presumably, but I didn't phrase it very well then. I should have asked you if under any circumstances you consider it is legal in New Jersey. Now, you say also in your reply to that letter about two and a half years ago: "I have discussed the necessity of legalized wiretapping," and so forth, "with the Prosecutors of the 21 counties." Why do you think it needs to be legalized if under certain circumstances it is legal, when it is not willful or malicious?

MR. RICHMAN: Senator, you invited me here today to give my views on this particular statute. Now, if we are going to go into a full field discussion of what should be done about wiretapping, I think that far exceeds your request of me today.

THE CHAIRMAN: Let me refer to the testimony you gave to the Committee at a closed hearing on this subject. I will read from the transcript now: "As to wiretapping as such, that is, the interception of communications, I have no information, as I have previously informed Senator Forbes. I certainly condemn, and to my knowledge neither the State Police nor any other state officer has engaged in such practice in the State of New Jersey during my administration. I recently communicated.." and so forth. Then further on, in answer to this question from Assemblyman Cundari, you said, or this is Mr. Cundari's question to you: "You said as far as the State Police and your office was concerned-- have you any knowledge of any prosecutor's office or sheriff's office or municipal office which has attempted to use wiretapping in your own law enforcement?" Attorney General Richman's reply: "I would prefer not to answer that question at this time. I might say, in declining to answer at this time, what information I have is microscopic and it involves practically only one situation, which is, to my way of thinking, not important, and you probably know about it, as I have discussed it with you."

Now, I presume that must be this particular reference.

MR. RICHMAN: I would think so.

THE CHAIRMAN: And you don't consider, or you consider that was microscopic and not important that a county prosecutor had been using wiretapping to carry out his--

MR. RICHMAN: In view of the fact that it had been presented to a grand jury and no action was taken. The

matter was closed.

THE CHAIRMAN: And you didn't think that that knowledge, or that interpretation, was the very thing that this Committee was concerned with? In other words, wouldn't it be fair to say, without trying to be unfair or technical, that this Committee, probably not with the proper approach, in view of what has developed here and your interpretation of the law and Prosecutor Morss',-- that you never drew the attention of this Committee that, in your opinion, wiretapping was legal in New Jersey under certain circumstances?

MR. RICHMAN: I haven't said that wiretapping isn't legal in New Jersey. I have said that whoever taps wires subjects themselves to criminal prosecution.

ASSEMBLYMAN CUNDARI: In answer to this question, Mr. Attorney General, where you said it involves practically only one situation which is not important, by "one situation" do you mean the three different situations which occurred in Union County?

MR. RICHMAN: I was referring, I assume at that time, to the situation that had been brought to my attention in Union County - ,whether it was one, two or three, I don't recall.

ASSEMBLYMAN CUNDARI: At this time, you feel that that is the only county that you have knowledge of that has ever involved itself in wiretapping?

MR. RICHMAN: That is the only one I know of.

ASSEMBLYMAN CUNDARI: That is the only one you know of.

I have only one question to ask of you, which has nothing to do too much with Union County: Do you have any

knowledge of any department in the executive branch of the State Government that uses tape recorders during a conference, a public hearing, or at any other time, without the consent or knowledge of the persons who attend the hearing?

MR. RICHMAN: I was asked to come here today to give my views on this particular statute, and I think I have done that.

ASSEMBLYMAN CUNDARI: I know, Mr. Attorney General. I said that this was aside from the particular purpose for which you were asked, and I asked if you wouldn't volunteer information at this time. I do remember quite distinctly asking you on another occasion whether or not your office has utilized any wiretapping services and you said that you had no previous information either in the State Police or otherwise. Now, I would just like to go along with that at this time and ask you if there are any occasions in the executive branch of the government where tape recorders have been used without the knowledge of the persons?

MR. RICHMAN: I would prefer not to answer that question at this time, not because I have any doubts about answering it but because that would require me to investigate a good many agencies over which I have no control, and I wouldn't want to make a blanket statement at this time.

ASSEMBLYMAN CUNDARI: Well, I am not asking you to answer, sir, subject to investigation; I just wanted to know if possibly you knew at this time, without going into any investigation, and would probably disclose one way or the other whether or not there has been any such recording made.

MR. RICHMAN: Well, I will say this, Mr. Assemblyman: If, when I appear at the secret hearings of this Committee, and I am now appearing at a public hearing, I am going to be asked these questions and repeatedly called back and forth, I don't think it is fair either to me or to the State to continually harp on and ask me things that I am brought here not to answer, that I am not supposed to be involved in at this particular time. If you want to call me in the proper way and make an extensive investigation along these lines, I will be perfectly willing to appear voluntarily; I will again, of course, refuse to submit any information which might interfere with any criminal investigation or any other investigation, past or present, or any information that might hinder the operation of any law enforcement agency under my control or not under my control.

THE CHAIRMAN: Well, may I just make this observation, Mr. Attorney General, again with a laymanlike summary: The Prosecutor of Union says that he has tapped wires three times. When you were so advised of that you said that you advised him to draw that to the attention of the grand jury.

MR. RICHMAN: I advised my deputy to present it to the grand jury.

THE CHAIRMAN: That it should be presented to the grand jury for the purpose of their consideration as to whether it was indictable as a criminal act.

MR. RICHMAN: That's right.

THE CHAIRMAN: Now, in effect, what you said here today, and I ask for your comments on it because it's the nubbin

of the matter: Heretofore, in all of our many discussions, which have been pleasant and voluntary, on the subject of wire-tapping, we exchanged our views and feelings. You never suggested, to me certainly and there is nothing to indicate the suggestion to this Committee, that wiretapping could be undertaken in this State on a legal-- well, not a legal basis, but on a basis where they are subject to indictment if the wiretapping is willful or malicious. Now, it would seem to me that if that is the situation in law, as a practical matter, a law enforcement officer could order a wire tap in connection with his duties and that no jury, number one, he isn't likely to be indicted, and number two, no grand jury or no group of people would consider probably that it was wilful and malicious, his tapping of wires, in the pursuit of his duties. Just common sense would indicate that it isn't willful or malicious, if that technical legal interpretation stands, when it is in connection with the carrying out of his duties. So, in effect, we have no prohibition against wire tapping in this State by law enforcement officers.

MR. RICHMAN: Well, that's your conclusion, Senator. It certainly isn't mine. The very existence of this statute is the reason why we have not condoned or authorized wire tapping because, as I said to you before, I think it is an effective prohibition against law enforcement officers in the sense that no law enforcement officer should commit an act which would subject him to criminal prosecution. In that sense, I think it is an effective deterrent.

THE CHAIRMAN: But in this instance it was done, and it was not a deterrent, was it?

MR. RICHMAN: Apparently Prosecutor Morss was willing to take that risk.

SENATOR FOX: Well, Mr. Attorney General, let me ask you a question which, if I am correct, I think may boil this thing down: You have indicated first of all that you concede the statute to be adequate. Is that correct?

MR. RICHMAN: Yes.

SENATOR FOX: And you feel that in the wording of the statute it acts, or should act, as a prohibition against law enforcement officers because there is the possibility, if not the probability, of them being subject to criminal ^{and} indictment/prosecution. Is that correct?

MR. RICHMAN: That is correct.

SENATOR FOX: All right. Now, let me ask you this question: You don't mean that if better legal safeguards can be provided, both for private individuals and law enforcement officers, you would be opposed to any such legislation? Is that correct?

MR. RICHMAN: Not necessarily, at all. I am very fearful of simply deleting the words "willful and malicious," because I think then you will, as I said before, put law enforcement officials in a strait jacket.

SENATOR FOX: Now, wait a minute. Let me finish my question.

MR. RICHMAN: Excuse me.

SENATOR FOX: You don't mean by that, and I am not talking about removing the words "willful and malicious," but conceding that those words were kept in the statute, and I think I might agree with you-- I might disagree with you, I don't know without further study-- but conceding that those words might remain in the statute, you would not be opposed, or would you be opposed, to legislation of a regulatory nature that would protect private individuals in their rights and place the utilization of wiretapping in the hands of law enforcement agencies under proper direction, or proper regulatory authority, such as we have in other states? Do I make myself clear to you?

MR. RICHMAN: Perfectly. I would certainly go along with the first part. I would certainly have no objection and would not oppose legislation that would make more secure private individuals in their rights, but I am not so sure of the second part of your question, because that involves the whole philosophical discussion of wiretapping. As I take your statement to mean, you are leading up to some sort of authorized or legalized wiretapping by law enforcement officials under certain safeguards.

SENATOR FOX: That's right, such as the application to a Supreme Court Justice or a Superior Court Judge, with the factual situation set forth - such as you have in New York.

MR. RICHMAN: Well, for a long time, Senator, I have been like this (indicating) so far as this problem is concerned. On the one hand, I can see the extreme need for it in certain areas of criminal law enforcement. On

the other hand, I can see the abuses that could arise, and I can see the very great balancing effect that exists in this whole situation and, frankly, I am, as I say, just about like this (indicating) on the problem today.

THE CHAIRMAN: In other words, you are not personally or, in fact, as Attorney General convinced that wiretapping should be regulated?

MR. RICHMAN: And authorized. Not at this point. I am not. I am not convinced the other way either. I can see both sides of this problem. And, as you know, Senator, it has great ramifications on both sides. I mean, there is a good case for both sides, but it's just the old question of whether or not you want to sacrifice, or perhaps sacrifice, some of our so-called civil liberties, so that we can have better law enforcement, or do you want to have bad spots in law enforcement so that you can have a better protection of civil liberties.

SENATOR FOX: May I ask you this, just for my own information, too. It's quite possible, is it not - I mean, that the unbridled utilization of wiretapping by law enforcement authorities, in the light of the present statute, may and in some jurisdictions has led to evils; isn't that so?

MR. RICHMAN: It has in some jurisdictions, and in some jurisdictions it has led to a lot of good. Take, for example, the recent situation in Philadelphia, where there is no control over wiretapping, where by the mere publication of the theories of wire tap, they were able to break up the racketeering influence in certain unions in the city of

Philadelphia - by the mere publication of the wiretapping. It has done good and it has done bad. Somewhere along the line there must be a middle ground, but I will be very frank to confess I have not in my own mind found it yet.

SENATOR FOX: Well, that's one of the things that concerns me.

ASSEMBLYMAN CUNDARI: Leaving the philosophical viewpoint on wiretapping, may I ask you, Mr. Attorney General, if, for instance, a Beauty Culture Control Inspector or Barber Inspector were to utilize wiretapping-- I know he is subject to criminal prosecution-- if, upon being the subject of criminal prosecution, it was found that he did so in the proper exercise of his duties, would you say that that was proper so far as he was concerned, being a law enforcement agent?

MR. RICHMAN: It would not be for me to say whether or not it was proper. It would be for the grand jury to say whether or not he had done it willfully and maliciously.

ASSEMBLYMAN CUNDARI: Well, then, you admit that under the present statute, barber inspectors could utilize wire-tapping?

MR. RICHMAN: He would be subject to criminal prosecution.

ASSEMBLYMAN CUNDARI: But he could utilize it?

MR. RICHMAN: Subject to criminal prosecution.

ASSEMBLYMAN CUNDARI: The same thing with a Tenement House Inspector or a Game Warden, the same thing with a Police Chief of a municipality, the Police Director, or

anyone else. So, therefore, it is your opinion, isn't it, sir, that almost any law enforcement agency in the State, regardless of what command he may employ, is able to utilize wiretapping, subject to a criminal prosecution?

MR. RICHMAN: He is able to break and enter, subject to criminal prosecution; he is able to steal, subject to a criminal prosecution.

ASSEMBLYMAN CUNDARI: If I were to produce for you, Mr. Attorney General, evidence that some department of the executive branch of the government is utilizing wire recording without the consent or without the knowledge of the person, would you plead surprise?

MR. RICHMAN: Would I be surprised?

ASSEMBLYMAN CUNDARI: Would you plead surprise?

MR. RICHMAN: I am never surprised.

ASSEMBLYMAN CUNDARI: You wouldn't be surprised to know that was occurring?

MR. RICHMAN: I have gotten past the point, Mr. Assemblyman, of being surprised about anything.

THE CHAIRMAN: Well, tell me something else: Would you, as Attorney General, if wiretapping is drawn to your attention, by law enforcement officers as well as private individuals-- if instances of wiretapping are drawn to your attention, would your department prosecute?

MR. RICHMAN: My department prosecute?

THE CHAIRMAN: Yes.

MR. RICHMAN: No. It would go through the regular channels of criminal prosecution.

THE CHAIRMAN: Well, now, for instance, if a prosecutor himself uses wiretapping, the only one then who could possibly prosecute him, or bring about a criminal indictment for it - you would not do it - would be a private individual.

MR. RICHMAN: You have a very broad statement there, Senator.

THE CHAIRMAN: In the case of a prosecutor.

MR. RICHMAN: Where a person who is charged with the enforcement of the law is the person who is also charged with the presentation to the grand jury, then, certainly, I would have to intercede to undertake the prosecution, just as I instructed my deputy to see to it that these matters were presented to the Union County Grand Jury.

THE CHAIRMAN: All right. Well, suppose it was drawn to your attention that either a private individual, a branch of government, which was not a law enforcement agency, or a branch of law enforcement, had engaged in wiretapping, would you see to it, or through channels see to it, that an indictment-- or at least that it was presented to the grand jury? Would you criminally prosecute?

MR. RICHMAN: Whenever any matter, Senator, that looked like a crime has been committed, wire tapping or anything else, comes to my attention, it is referred to the appropriate prosecuting authorities by me, unless he for some reason is disqualified from prosecuting.

THE CHAIRMAN: In short, any instances by anybody of wire tapping which, as you say, is subject to criminal prosecution/^{which} are drawn to your attention on any level of law enforcement, government, or a private individual, you

would draw it to the attention of the appropriate prosecuting arm of government for the purposes of prosecuting?

MR. RICHMAN: Investigating and prosecuting.

THE CHAIRMAN: Investigating and prosecuting.

MR. RICHMAN: That's right.

ASSEMBLY CUNDARI: If one of your Deputy Attorneys General did so, in violation, who would prosecute in that case?

MR. RICHMAN: I would assume the Prosecutor of the County.

ASSEMBLYMAN CUNDARI: In which it was committed?

MR. RICHMAN: Yes.

THE CHAIRMAN: Well, that, to me, helps clarify the situation in that you would spark, if you will, the investigation and prosecution of any instance of wire tapping drawn to your attention.

MR. RICHMAN: I would refer it to the proper authorities.

THE CHAIRMAN: Well, when you say refer it, I presume you wouldn't just refer it and then forget it. Suppose they did nothing with it?

MR. RICHMAN: We have a system of checks, Senator--

THE CHAIRMAN: In other words, you wouldn't simply refer it - you are not going to let it die after you have referred it and let that be the end of it, if no action was taken and nothing was done?

MR. RICHMAN: If, after a proper investigation, that prosecuting authority could demonstrate to me that nothing had happened, of course, I wouldn't--

THE CHAIRMAN: Oh, well, if nothing had happened. But if the wire tap had happened--

MR. RICHMAN: And if there was justification presented that the wire tap had happened, of course we would follow it through.

THE CHAIRMAN: So it's a fact that if the fact of wire tapping is established, then you would see to it that, through proper channels, it was presented to the grand jury?

MR. RICHMAN: That's right--

THE CHAIRMAN: -- for possible indictment.

MR. RICHMAN: That's right.

THE CHAIRMAN: Well, that, I think, does clarify, at least in my mind, what seemed to be the open book that had been opened here this morning earlier.

MR. KERBY: Mr. Richman, has the Attorney General's Office ever expressed an opinion with respect to this statute before today?

MR. RICHMAN: No.

MR. KERBY: No written opinion has ever been rendered even by a prior Attorney General's Office, so far as you know?

MR. RICHMAN: So far as I know. The records are not too adequate for more than four or five years back. So far as I know, there hasn't been any.

THE CHAIRMAN: Then, so far as you know, has any law enforcement officer brought this point out that, in their opinion, the opinion expressed by Prosecutor Morss is a canon to this statute; as long as it isn't willful and malicious, they can tap wires?

MR. RICHMAN: There is a difference between Prosecutor Morss' view and mine. As I see it, Prosecutor Morss says

they can, if they have probable cause, and he drops it there, as I understand it. I think, as a matter of policy and because of the existence of the statute, no law enforcement officer should tap wires.

SENATOR FOX: Well, in other words, do you concede to the theory that the basic conception of your thought, as I gather it, is that if information is brought to your attention that there has been wire tapping, irrespective of the differentiation between the philosophy of you and Prosecutor Morss, that nevertheless that should be submitted to the grand inquest and that you conceive it your duty to have your deputy attorney general so present it and order him to present it?

MR. RICHMAN: Where the prosecuting authority might be involved.

SENATOR FOX: Yes. Well, naturally, where the prosecuting authority might be involved.

MR. RICHMAN: That's right.

MR. KERBY: Have other prosecutors of the State ever expressed Prosecutor Morss' opinion to you?

MR. RICHMAN: No, not that I can recall.

MR. KERBY: In other words, his interpretation is unique as far as you have discussed it with the other prosecutors?

MR. RICHMAN: Well, I don't recall ever having discussed this point with the other Prosecutors. I never have discussed it, as a matter of fact, with Prosecutor Morss except, I think, after this occasion arose.

THE CHAIRMAN: What do you mean by "this occasion"?

MR. RICHMAN: His appearance, or projected appearance, before your Committee.

MR. KERBY: Wire tapping has been discussed at meetings with all the prosecutors and the philosophy--

MR. RICHMAN: The philosophy of wire tapping has been discussed.

MR. KERBY: But never the question of is it legal or illegal under the statute?

MR. RICHMAN: I don't recall having discussed that.

MR. KERBY: That was not discussed.

MR. RICHMAN: But I think the majority of the prosecutors would adhere to my views that the mere existence of this statute is a sufficient deterrent to eliminate wire tapping on their part.

MR. KERBY: I conceive, under your view, three citizens, A, B, and C - A could go and tap a telephone call from B to C with no malicious purpose whatsoever, just as a joke or for fun. Under that statute I can't conceive that there again he would possibly be convicted of a misdemeanor.

MR. RICHMAN: Well, you are talking about an entirely different problem. I don't agree with you. I think the problem that Prosecutor Morss raised was a problem of probable cause which was necessarily related to his responsibility. You have none of those elements in the example that you cite.

MR. KERBY: I know. I concede that. But even so, is this statute sufficient to prohibit that, or maybe you don't care

to prohibit that - tapping for fun or for a whim?

SENATOR FOX: I would like to have that answered, Mr. Attorney General, Mr. Kerby's question. As a matter of fact, it was one of the things I was discussing with somebody on the way down on the train this morning. Let's assume - maybe it's far fetched, but nevertheless as a practical illustration of what he means; let's say that a nineteen or a twenty-year-old youth, and some of them have considerable mechanical ability, put a tap on the wire of his girl friend. That's exactly one of the things that I was discussing. Frankly, it's definitely willful, no question about it. He did it of his own volition. Whether or not it's malicious is another question and, very frankly, I don't concede that under our statute at the present time he could be indicted nor could he be convicted. I think if he were convicted, the conviction would have to be set aside. Is that what you have in mind, Mr. Kerby?

MR. KERBY: Exactly.

MR. RICHMAN: I don't go that far with you. I think the determination of criminal intent in that area and that criminal intent embraces both of these words, of course-- the question of criminal intent would be one for the jury, both grand and petit, and I do not think a conviction would be set aside. But in that whole area, let's not become too technical. You know, as a former Prosecutor, that for example, if another nineteen-year old, whom you knew, took your automobile without your permission and drove it ten miles somewhere and you knew nothing about it, he would be

guilty of stealing that automobile.

SENATOR FOX: That's right.

MR. RICHMAN: He wouldn't be indicted and you know very well he wouldn't be indicted, because no grand jury would indict him because they would find out you are all friends together, no harm had been done, and they wouldn't indict him. And that happens in hundreds of criminal cases, and you know it.

SENATOR FOX: Well, you are talking about the practical aspects of the thing. I am looking at it, and I think Mr. Kerby is, too, from the strict legal aspect.

MR. RICHMAN: I think that if such a person were indicted and were convicted, the conviction would stand - in my opinion.

SENATOR FOX: I disagree with you.

THE CHAIRMAN: You did comment, Mr. Attorney General, freely on this question as a practical matter. You stated that as a practical matter no grand jury would indict.

MR. RICHMAN: That's right.

THE CHAIRMAN: Well, now, as a practical matter, can you conceive of a grand jury indicting a prosecutor or a responsible law enforcement officer who has ordered wires tapped for the purposes of carrying out his duties in connection with a criminal? But as a practical matter, they would indict him for doing something willful and malicious, if your definition of those terms as interpreted by the courts, and so forth, exists. How could any grand jury accept as willful and malicious that act, as a practical matter, when it is in the line of duty?

MR. RICHMAN: Well, I don't know what a grand jury would do.

THE CHAIRMAN: You just stated what you thought they would do on the other thing.

MR. RICHMAN: I thought they would do that. I think it is not too likely that they would indict in the circumstances you relate, but that isn't the point.

THE CHAIRMAN: You don't think it is likely that they would indict-

MR. RICHMAN: But that isn't the point, Senator. That isn't the point. Still the^{criminal}/prosecution hangs over the head of the law enforcement officer and if you think it's an easy thing for a law enforcement officer to be presented for anything to a grand jury, you are very wrong about that. You may think, for sure, that you are not going to be indicted when it is presented but you are not quite sure that you are not going to be indicted.

THE CHAIRMAN: But in your opinion, as a practical matter, a grand jury would not indict a responsible law enforcement officer.

MR. RICHMAN: A grand jury consists of 23 different people. I don't know what any 12 of them are going to agree to.

THE CHAIRMAN: Well, we will grant that. But you are quite firm about what they wouldn't agree to on the other.

MR. RICHMAN: I think they probably wouldn't do that.

THE CHAIRMAN: That they probably would not indict-

MR. RICHMAN: They probably would not.

THE CHAIRMAN: They probably wouldn't indict a law enforcement officer who used wire tap to establish--

MR. RICHMAN: I don't know. It would depend wholly on the circumstances in the case.

THE CHAIRMAN: You said a moment ago you did--

MR. RICHMAN: It would depend wholly on the circumstances in the case.

THE CHAIRMAN: Well, in this instance, where it is to detect crime and where, in the case of Prosecutor Morss, apparently at least in two instances, it was a help in bringing about--

MR. RICHMAN: And the grand jury did not indict.

THE CHAIRMAN: Right. And do you think, as a practical matter, any grand jury would indict a responsible law enforcement officer as having done something that was willful and malicious, subject to the strict legal definition of that combined term? How could he possibly be willful and malicious if he is doing something in the line of duty?

MR. RICHMAN: I don't know whether they would or not. I can't anticipate--

THE CHAIRMAN: Well, of course, we don't know, as a matter of fact.

MR. RICHMAN: I do know this, that if you go the other way and bar wire tapping, whether willful or malicious or not, and merely make it a crime prohibited without the necessary requisite intent, you are running a great risk.

THE CHAIRMAN: Of what?

MR. RICHMAN: Of having situations arise - take this kidnaping where--

THE CHAIRMAN: Which is a federal violation.

MR. RICHMAN: And also a state violation.

THE CHAIRMAN: Naturally, but--

MR. RICHMAN: And you are going to tie the hands of law enforcement officials to an extent that I don't think is justified.

THE CHAIRMAN: Well, what you mean then is-- again, this could be totally wrong, and the question has never been clarified before in public. I think the majority of the Legislature and the public has been under the impression, and that impression has been buttressed by the repeated discussions of law enforcement officials that wire tapping should be legalized, that any wire tapping now is illegal in the State of New Jersey, and, that being so, the words "willful and malicious" constitute a loophole under which law enforcement officials may wire tap, subject to indictment and proof that it wasn't willful and malicious, and if you removed those words the intent of the statute would exist, because I think this is the first time that that statute has been invoked since 1937. If the words "willful and malicious" provide what I would call a loophole, in short, if you take them out, the prohibition is complete and there is no loophole.

MR. RICHMAN: That's right.

THE CHAIRMAN: And you feel that they shouldn't be taken out because the loophole should exist so that, under certain circumstances, law enforcement officers can wire tap. Is that what you mean?

MR. RICHMAN: Well, I don't think their hands should

be tied and I don't think they should be put in a strait jacket.

THE CHAIRMAN: But you think they should be able to wire tap, in short?

MR. RICHMAN: No, I do not. I didn't say that.

THE CHAIRMAN: Well, that their hands shouldn't be tied pertaining to wire tapping.

MR. RICHMAN: I didn't say that.

THE CHAIRMAN: Well, what did you say?

MR. RICHMAN: I said their hands should not be tied so far as law enforcement generally is concerned, and by that I mean just this: This, I say to you, is an adequate deterrent, an adequate prohibition, because it holds over the head of every law enforcement officer the possibility or probability of indictment, and I say that that is a sufficient prohibition, and that if you go further than that, you will so completely tie their hands that you may have situations, desperate situations, where wire tapping is utterly essential, such as in kidnaping and the area of security, that you would then have them helpless in those very desperate situations.

THE CHAIRMAN: Well, in both those instances, under federal statute, they do wire tap, don't they? I mean, they are able to wire tap - kidnaping and the security of the State, the federal government has that power, has it not?

MR. RICHMAN: Well, there is a good bit of thinking over the country, as evidenced in the Smith case, that the

law of the state security is equivalent to the national security.

MR. CUNDARI: Then the federal law prevails.

MR. RICHMAN: At the moment, under the Smith case, under a reasonable interpretation of the Smith statute, the anti-sedition statute, the federal law does prevail, but there is a great deal of thinking that that should not be so.

THE CHAIRMAN: But apparently the federal government, the FBI - I don't know the point of law - has the power to wire tap. In both instances, they promptly become involved.

MR. RICHMAN: I would not venture to say what power the FBI has or what the FBI does.

THE CHAIRMAN: Well, I really didn't mean to ask you that in that trend. But the use of wire tapping in the two desperate instances that you have outlined, where the federal law enforcement authorities are involved, they seem to exercise that right and there doesn't seem to be any public outcry against their exercising all means of gaining security of this nature. Now, what it boils down to - again we are back, I think, to the heart of the matter - is, if we took out the words "willful and malicious," there would be no loophole and the prohibition would be complete and unequivocal. But if we take those out, you feel it would not be good because, then, law enforcement officers under certain desperate circumstances could not wire tap. Now, they can under certain desperate conditions.

MR. RICHMAN: For the primary reason that I think the present statute is, I think, a sufficient deterrent.

THE CHAIRMAN: But it is not a prohibition.

MR. RICHMAN: It makes him subject to criminal prosecution.

THE CHAIRMAN: Which apparently is not sufficient.

MR. RICHMAN: But I think it is a sufficient deterrent, and that is the reason that we do not wire tap in the State. I think it is a quite adequate deterrent.

THE CHAIRMAN: Do you think after the publicity and the embellishment of this point of view, where a prosecutor has done it and where it was presented to a grand jury, that there now might be more of it?

MR. RICHMAN: I think there would be probably less of it, for this reason: No law enforcement officer, in my opinion, and I say this with deference to Prosecutor Morss who was willing to take the risk-- no law enforcement officer should commit any act which would subject him to criminal prosecution except for--

ASSEMBLYMAN CUNDARI: Even in the case of kidnaping, would you so state?

MR. RICHMAN: That's where you have to balance the equity.

ASSEMBLY CUNDARI: When you say there should be less wire tapping, since you are aware of only three instances in the State, do you feel that there should be even less than three instances in the State since 1930, or wouldn't that be true? Is that correct, sir?

MR. RICHMAN: I think that is rather non sequitur.

ASSEMBLYMAN CUNDARI: I would just like to make one statement, sir. You have been very courteous in answering

all the questions except one. The question I propounded to you, evidently you don't feel inclined to answer today, because, I presume, it may be because it is an open hearing. Would you feel so inclined to answer that question voluntarily at a closed hearing?

MR. RICHMAN: Are you talking about tape recording?

ASSEMBLYMAN CUNDARI: Yes, by any branch of the executive department.

MR. RICHMAN: Yes, if you give me sufficient time to look into it. I mean, that's a large order.

ASSEMBLYMAN CUNDARI: My question was not whether or not subject to investigation you could so determine. My question was, have you any knowledge at this time, and if you have knowledge you have it now, whether or not there had been such tape recording used in hearings of any type by any branch of the executive department of government.

MR. RICHMAN: I would prefer not to answer that.

ASSEMBLYMAN CUNDARI: Then you would rather have it at a closed hearing?

MR. RICHMAN: No, I would always rather answer at a public hearing. That doesn't make any difference to me whether it is closed or public. I just don't think I am in a position to answer that question today. I much prefer public hearings.

THE CHAIRMAN: If that question were submitted, and we agreed on a private hearing at a future date, would you be willing to answer it?

MR. RICHMAN: Yes.

ASSEMBLYMAN CUNDARI: The question that you don't desire to answer, sir, is one--

MR. RICHMAN: There is no statutory prohibition against the sort of thing that you are talking about at all at the present time.

ASSEMBLYMAN CUNDARI: I understand but this Committee is set up primarily--

MR. RICHMAN: I know that.

ASSEMBLYMAN CUNDARI: -- not only for wire tapping but all of the other gadgets and instruments which invade private--

MR. RICHMAN: Well, you see it has other considerations. If there are areas in the State where that is done, it might very seriously affect their operation and their efficiency, if it were publicly known that they did do that.

ASSEMBLYMAN CUNDARI: That is exactly what I mean.

MR. RICHMAN: And, therefore, I might be reluctant to answer that question in either a private or a public hearing, because I have no control over what you do with the evidence that you collect in a private hearing. It might be public an hour later.

THE CHAIRMAN: Have you any further questions of the Attorney General, Senator Fox?

SENATOR FOX: No.

ASSEMBLYMAN CUNDARI: I have nothing further,

THE CHAIRMAN: Well, I want to thank you very much, Mr. Attorney General.

MR. MORSS: May I make a request of the Committee?

THE CHAIRMAN: Sure.

MR. MORSS: I was invited here this morning and, after my arrival, I was served with a subpoena returnable tomorrow at twelve o'clock. Tomorrow happens to be criminal court day in Union County, and I feel that it is my duty to be there. Aside from that, I believe the subpoena is illegal and exceeding the jurisdiction of the Committee, and I think I should have a fair opportunity to study the matter and, if my present opinion is correct, to test it in the courts. And, certainly, this does not give me a fair opportunity to do so under the existing circumstances.

(Discussion among members of
Committee off the record)

THE CHAIRMAN: Mr. Prosecutor, the Committee feels that your request is a reasonable one and we will adjourn the subpoena until Friday. Will that be all right?

MR. MORSS: Yes, fine. The same time Friday, and the same place?

THE CHAIRMAN: Yes. Well, then, the Committee will stand adjourned. We want to express our thanks to Prosecutor Morss and to the Attorney General, both of whom are here voluntarily. We appreciate the information that you have given us here.

(HEARING CONCLUDED)