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Report on Senate no. 897, electronic surveillance

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STATE OF NEW JERSEY

REPORT ON SENATE NO. 897

ELECTRONIC SURVEILLANCE

By The

SENATE COMMITTEE ON LAW,
PUBLIC SAFETY AND DEFENSE

JOSEPH C. WOODCOCK, JR.
Chairman

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SENATE COMMITTEE ON LAW, PUBLIC SAFETY AND DEFENSE

LETTER OF TRANSMITTAL

October 29, 1968

To: *The Honorable Members of the Senate of the State of New Jersey*

At the request and direction of the President of the Senate, Edwin B. Forsythe, this Committee held public hearings on September 16, 17 and 18, 1968, regarding several crime control bills, including Senate No. 897, concerned with barring all electronic surveillance except under limited circumstances by law enforcement officers acting only under the authority of specific court orders.

The Committee is privileged to submit this Report with respect to electronic surveillance, the subject matter of Senate No. 897.

Seven members of the Committee approve the within Report and recommend consideration by the 1968 Legislature of appropriate implementing legislation. The members approving the Report are: Senators Garrett W. Hagedorn, Frank C. Italiano, Hugh A. Kelly, Frank J. Sciro, John L. White, Joseph C. Woodcock, Jr., and subject to his Statement set forth on page 6 of the Report, Sido L. Ridolfi. The members who disapprove the Report are: Senators Frederick H. Hauser and Milton A. Waldor.

Respectfully submitted,

JOSEPH C. WOODCOCK, JR.,
Chairman.

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REPORT OF THE COMMITTEE

History

For several decades there has been mounting concern and controversy in New Jersey and throughout the Nation about the increasing effectiveness of electronic devices to invade personal privacy.

Simultaneously there has been mounting concern and controversy about the cancerous growth of organized crime and of official corruption in government, both of which exact an enormous toll from our democratic form of government. And all too often the open and free nature of our society was abused for criminal purposes.

These legitimate concerns between privacy and public justice had not been reconciled.

Citizens justly wanted their personal privacy held inviolate. Anything less was considered intolerable in a society built upon the protections of individual freedom. Sensible men were not about to destroy civil liberties.

Law enforcement officials repeatedly warned they were unable to obtain adequate and essential evidence of crime without the right to engage in some form of lawfully authorized electronic surveillance. If criminals used telephones to plan or commit crimes, then law enforcement officials needed the right to intercept those conversations.

As court decisions, legal speculation, arguments of all sorts, continued and hardened over the years, a sense of hopelessness at making the essential reconciliation began to pervade discussion of the subject. The issue became packed in the dilemma. Pressures increased with revelations of the scope, resources, power, and evil of current organized crime, fearsome realities to many, many citizens.

Moreover, the interstate nature of telephone systems meant that federal jurisdiction was beyond doubt needed in order that the individual actions of any one State could be valid only if part of a valid National plan. There was no such plan and, indeed, only confusion surrounded interpretation of Section 605 of the Federal Communication Act of 1934, passed without thought or

discussion of its applicability to wiretapping, and yet constantly argued to be an absolute ban.

Since the 1930's, New York State had authorized, first, legal interception of telephone conversations, and then "bugging", that is, electronic listening by a device other than a telephone ("electronic surveillance" is a general term embracing both types of action). Only five or six states had similar authorizing acts. Repeated legal attacks were made on the New York law but it was consistently upheld or the United States Supreme Court turned away direct constitutional attacks or attempts to use Section 605 to strike it down.

Large numbers of lawyers and commentators expressed legal opinions to the effect that the entire process of court authorized electronic surveillance was flatly unconstitutional. Official reports, books and articles on the subject would fill a room.

The key turn of events, as one might expect when uncertainty as to constitutionality underlay most arguments, was the United States Supreme Court's decision in *Berger* v. *New York,* 388 U. S. 41 (1967). A direct and unescapable challenge to the New York law was made in that case since criminal conviction was substantially based upon evidence gained from court authorized surveillance under that law. The majority opinion is reproduced in Appendix 6.

Berger struck down the New York law on procedural grounds, holding the system did not adequately meet several constitutional standards. But the significance of the decision is in the implicit acceptance by the Court of any electronic surveillance statute which would meet the several standards discussed in the majority opinion. Vague uncertainties and random opinions of unconstitutionality were ended. Constitutional standards for the first time were, in effect, authoritatively enunciated by the Court. The right to privacy protections afforded by the Fourth Amendment were made applicable to electronic surveillance through a search warrant analogy.

Thus all electronic surveillance was not banned, although there can be no doubt only a tightly controlled system that gives detailed attention to procedure can pass muster. Rules prohibiting unlawful and unreasonable search and seizure are controlling. But the way was opened.

Berger was followed six months later by *Katz* v. *United States*, 389 U. S. 347 (1967), dealing with a Federal prosecution involving different although related issues.

On the essential question, however, the *Katz* decision reaffirmed the *Berger* decision. In 1968 New York enacted procedural amendments to its statute dictated by *Berger* and *Katz*.

Several months prior to the *Berger* decision, an overwhelming majority of the President's Commission on Law Enforcement and Administration of Justice voted to recommend that Congress clarify the law on this subject so as to allow court controlled wiretapping and bugging, see Appendix 3.

Congress received these and many other "messages". Intensive study of the entire subject resulted in final passage of Title III of the "Omnibus Crime Control and Safe Streets Act of 1968", Public Law 90-351, 82 Stat. 197 (1968), authorizing electronic surveillance under tightly controlled conditions for both Federal law enforcement agencies and state and local officials if their state shall have enacted a specific enabling act conforming with enunciated standards based on those laid down by *Berger*. Indeed, Title III goes further than *Berger* by way of protections, see Appendix 4.

Senate No. 897, referred to this Committee for study, public hearing, and report by the President of the Senate, had been drafted in accordance with current developments as known in the Spring of 1968 but without knowledge of the specific provisions of Title III. Apparently Senator Forsythe, the sponsor of Senate No. 897, thought it desirable to have a bill introduced, printed, and available for study and public comment, as best as could be drafted at that time. We believe those were sound decisions. Necessarily, this was difficult since Congressional and Presidential action were then uncertain.

Nevertheless, while we found S 897 conformed with essential national standards as then understood and anticipated, we believe it should be revised in light of final Congressional action, our public hearings, and further study and reflection.

In addition to the many witnesses who testified in favor of State electronic surveillance legislation before the Joint Legislative Committee on Crime and the System of Criminal Justice in New Jersey last Spring, witnesses of national and State prominence testified at our public hearings on all the key issues inherent in the bill before the Committee. We strongly commend to the

members of the Legislature the testimony and proceedings of the public hearings held by our Committee, since they fully support the findings which follow. They are also supported by the Report issued, and extensive public hearings held, earlier this year, by the Special Joint Legislative Committee to Study Crime and the System of Criminal Justice in New Jersey, of which Senate President Forsythe, was Chairman. That Special Joint Committee's recommendation on this subject is reproduced as Appendix 2.

It is our belief, therefore, that the enormously complicated legal problems heretofore barring any action by this Legislature to authorize court controlled electronic surveillance have now been clarified so that the Legislature may act if it chooses to do so, and we so report. Massachusetts, by chapter 738 of the Acts of 1968, effective October 18, 1968, has enacted legislation similar to that proposed in Appendix 1.

FINDINGS

1. It is essential New Jersey ban absolutely and make illegal all forms of electronic surveillance invading individual privacy, except as specifically authorized by statute; the proposed bill, annexed as Appendix 1, meets that requirement.

2. New Jersey has serious problems of organized crime and official corruption by all accounts presented to the Forsythe Committee during its March and April, 1968, hearings and our hearings on three days, September 16, 17 and 18, 1968, by our Committee. These conditions, described in sworn testimony by many witnesses, are intolerable and the Legislature should take all possible, responsible measures to end them. No witness testified to the contrary.

3. The principal difficulty confronting our law enforcement officials in attempting to attack these problems is an inability to obtain legally admissible evidence of quality, reliability and significance. When properly used, electronic surveillance can play a vital role in that connection. All witnesses who testified on this subject agreed with this finding.

4. We believe the competing values of privacy for each individual and justice for all our citizens can be reconciled. The United States Supreme Court, a matchless protector of civil liberties, and the Congress, have set forth the guidelines for this reconciliation; despite adequate advance notice of our public hearings, only one

witness appeared to testify to the contrary. That witness, Mr. Joel Jacobson, expressed personal opposition to S 897 and any form of electronic surveillance as a matter of principle. The Committee believes it is extremely significant that he was the single witness communicating in any way with this Committee in opposition to S 897 or any bill attempting to make this reconciliation. The Committee has not received a single letter in opposition on this subject.

Only several years ago, such a result could hardly have been anticipated, and it reflects a sharp clarification of public opinion. We interpret this result as meaning (a) the public at large and informed persons, including specialists, believe the essential reconciliation has been made in a reasonable manner, and (b) the crime control needs for empowering our officials to act are so great that New Jersey should enact electronic surveillance legislation. Recognizing that any authorized electronic surveillance involves a degree of invasion of individual rights and to assure a re-examination of the operation of this act including an evaluation by the Legislature of its impact on individual rights, we find the initial enactment of legislation on this subject should be for a period of five years.

5. The proposed "New Jersey Wiretapping and Electronic Surveillance Control Act" contains the essential reconciliation between individual privacy and public justice, conforms to legal requirements, and is vital to meet important needs of New Jersey to fight organized crime and official corruption. It is simultaneously strictly limited to prevent abuses but broad enough to allow official action under tight court supervision and control. The Appendices to this Report contain a full discussion of relevant considerations and legal materials.

Recommendation

The Senate Committee on Law, Public Safety and Defense believes enactment of electronic surveillance legislation is important to the public interest and recommends to the Senate immediate passage of a revision of S 897 to meet the Federal standards and safeguards incorporated in Title III of the *Omnibus Crime Control and Safe Streets Act of 1968* and features developed from testimony presented to the Committee at its public hearings. A draft of a bill, submitted to the Committee by Senate President Edwin B. Forsythe, designed to meet these recommendations is submitted herewith as Appendix 1.

STATEMENT BY SENATOR SIDO L. RIDOLFI

Attorney General Arthur J. Sills, in his testimony concerning S 897 before the Senate Committee on Law, Public Safety and Defense, made several recommendations. Included among them were that: (1) An order should be required to overhear a private conversation, even though the conversation might be held in a public place, so long as the parties to the conversation intended it to be private and the circumstances were such as to justify their expectations; (2) The list of crimes for which electronic surveillance could be had be restricted to those crimes regarded as falling within the category of organized crime; (3) Lawful electronic surveillance could only be conducted under prior judicial authorization; (4) Notice of electronic surveillance must be given not only to those whose conversations were actually overheard, but also to those named in the surveillance order; (5) The State should have the right to appeal suppression orders; (6) Standing to move to suppress should be restricted to those whose conversations were intercepted and those against whom an electronic surveillance order was directed; (7) Only county prosecutors, with the approval of the Attorney General, and the Attorney General should be permitted to apply for electronic surveillance orders; and (8) The State Police should be the only law enforcement agency authorized to conduct electronic surveillance pursuant to court order.

I am pleased to note that the proposed bill which is appended to the committee's report adopts all of the above recommendations of the Attorney General except recommendations (7) and (8), which are of utmost importance.

Applications for orders permitting electronic surveillance should be under the immediate jurisdiction of the Attorney General for several obvious reasons; as an example, legitimately interested concerns such as a telephone company, should be required to contact only one source to determine whether a wiretap is properly authorized.

Moreover, I particularly regret the inclusion of the State Commission of Investigation among those authorized to apply for an electronic surveillance order. This is not permitted by Title III of the *Omnibus Crime Control and Safe Streets Act of 1968*—(see specifically 18 U. S. C. A. § 2516(2) as reprinted on page 38 in Appendix 4).

I strongly feel that the Legislature may properly entrust the Division of State Police with exclusive authorization to conduct electronic surveillance. While there are many professional and competent police organizations throughout the state, their resources are such that it is doubtful that they will be able to expend the funds necessary to purchase the highly sophisticated and expensive electronic surveillance equipment on the market today; and many such police departments have not developed the technical capability to execute surveillance orders. The New Jersey State Police have the resources, in competence, equipment and reputation, to discharge this responsibility.

In summation, I approve the proposed bill to the extent it reflects the extensive modifications to S 897 as recommended by the Attorney General in his testimony before the Committee. However, I must withhold approval of the entire bill so long as it fails to include recommendations (7) and (8) above. If the bill as introduced should be changed to include those two features I would approve it.

APPENDICES

APPENDIX 1

"NEW JERSEY WIRETAPPING AND ELECTRONIC SURVEILLANCE CONTROL ACT",

as proposed for enactment by the 1968 Legislature.

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.

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

1. This act shall be known and may be cited as the "New Jersey Wiretapping and Electronic Surveillance Control Act."

2. As used in this act:

a. "Wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by wire, cable or other like connection between the point of origin and the point of reception furnished or operated by a telephone, telegraph or radio company for hire as a common carrier;

b. "Oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

c. "Intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device;

d. "Intercepting device" means any device or apparatus that can be used to intercept a wire or oral communication other than

(1) Any telephone or telegraph instrument, equipment or facility, or any component thereof, furnished to the subscriber or used by a communication common carrier in the ordinary course of its business and being used by the subscriber or used in the ordinary course of its business; or being used by a communication

common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties; or

(2) A hearing aid or similar device being used to correct subnormal hearing to not better than normal;

e. "Person" means that term as defined in R. S. 1:1-2 and includes any officer or employee of the State or of a political subdivision thereof;

f. "Investigative or law enforcement officer" means any officer of the State of New Jersey or of a political subdivision thereof who is empowered by law to conduct investigations of, or to make arrests for, any offense enumerated in section 8 of this act and any attorney authorized by law to prosecute or participate in the prosecution of any such offense;

g. "Contents," when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

h. "Court of competent jurisdiction" means the Superior Court;

i. "Judge," when referring to a judge authorized to receive applications for, and to enter, orders authorizing interceptions of wire or oral communications, means one of the several judges of the Superior Court to be designated from time to time by the Chief Justice of the Supreme Court to receive applications for, and to enter, orders authorizing interceptions of wire or oral communications pursuant to this act;

j. "Communication common carrier" means any person engaged as a common carrier for hire, in intrastate, interstate or foreign communication by wire or radio or in intrastate, interstate or foreign radio transmission of energy; but a person engaged in radio broadcasting shall not, while so engaged, be deemed a common carrier;

k. "Aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

3. Except as otherwise specifically provided in this act, any person who:

a. Willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire or oral communication; or

b. Willfully discloses or endeavors to disclose to any other person the contents of any wire or oral communication, or evidence derived therefrom, knowing or having reason to know

that the information was obtained through the interception of a wire or oral communication; or

c. Willfully uses or endeavors to use the contents of any wire or oral communication, or evidence derived therefrom, knowing or having reason to know, that the information was obtained through the interception of a wire or oral communication;

shall be guilty of a misdemeanor and shall be fined not more than $10,000.00 or imprisoned not more than 5 years, or both. Subsections b and c of this section shall not apply to the contents of any wire or oral communication, or evidence derived therefrom, that has become common knowledge or public information.

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 communication 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 intercepted 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 committing any other injurious act.

5. Except as otherwise specifically provided in section 6 of this act, any person who:

a. Willfully possesses an intercepting device, the design of which renders it primarily useful for the purpose of the surreptitious interception of a wire or oral communication;

b. Willfully sells an intercepting device, the design of which renders it primarily useful for the purpose of the surreptitious interception of a wire or oral communication;

c. Willfully distributes an intercepting device, the design of which renders it primarily useful for the purpose of the surreptitious interception of a wire or oral communication;

d. Willfully manufactures or assembles an intercepting device, the design of which renders it primarily useful for the purpose of the surreptitious interception of a wire or oral communication; or

e. Willfully places in any newspaper, magazine, handbill, or other publication any advertisement of any intercepting device, the design of which renders it primarily useful for the purpose of the surreptitious interception of a wire or oral communication or of any intercepting device where such advertisement promotes the use of such device for the purpose of the surreptitious interception of a wire or oral communication;

shall be guilty of a misdemeanor and shall be fined not more than $10,000.00 or imprisoned not more than 5 years, or both.

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

a. A communication common carrier or an officer, agent or employee of, or a person under contract with a communication common carrier, in the usual course of the communication common carrier's business; or

b. A person under contract with the United States, a state or a political subdivision thereof, or an officer, agent, or employee of a state or a political subdivision thereof;

to possess, sell, distribute, manufacture or assemble, or advertise any intercepting device, while acting in furtherance of the appropriate activities of the United States, a state or a political subdivision thereof or a communication common carrier.

7. Any intercepting device possessed, used, sent, distributed, manufactured, or assembled in violation of this act is hereby declared to be a nuisance and may be seized and forfeited to the State.

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, loan sharking, dealing in narcotic drugs, marijuana or other dangerous drugs, arson, burglary, embezzlement, forgery, receiving stolen property, escape,

alteration of motor vehicle identification numbers or larceny punishable by imprisonment for more than one year, or any conspiracy to commit any of the foregoing offenses or which may provide evidence aiding in the apprehension of the perpetrator of any of the foregoing offenses.

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;

(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 communication 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.

10. Upon consideration of an application, the judge may enter an ex parte order, as requested or as modified, authorizing the interception of a wire or oral communication, if the court determines on the basis of the facts submitted by the applicant that there is or was probable cause for belief that:

a. The person whose communication is to be intercepted is engaging or was engaged 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 this act;

b. Particular communications concerning such offense may be obtained through such interception;

c. Normal investigative procedures with respect to such 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. The facilities from which, or the place where, the wire or oral communications are to be intercepted, are or have been used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by, such individual; and

e. The investigative or law enforcement officers or agency to be authorized to intercept the wire or oral communication are qualified by training and experience to execute the interception sought.

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 provide 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, an attorney-at-law, or practicing clergyman, 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. 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.

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. In no case shall an order entered under this section authorize the interception of wire or oral communications for any period exceeding 30 days. Extensions or renewals of such an order may be granted for periods of not more than 30 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.

13. Whenever, upon informal application by an authorized applicant, a judge determines there are grounds upon which an order could be issued pursuant to this act, and that an emergency situation exists with respect to the investigation of conspiratorial

activities of organized crime, related to an offense designated in section 8 of this act, dictating authorization for immediate interception of wire or oral communication before an application for an order could with due diligence be submitted to him and acted upon, the judge may grant verbal approval for such interception without an order, conditioned upon the filing with him, within 48 hours thereafter, of an application for an order which, if granted, shall recite the verbal approval and be retroactive to the time of such verbal approval. Such interception shall immediately terminate when the communication sought is obtained or when the application for an order is denied. In the event no application for an order is made, the content of any wire or oral communication intercepted shall be treated as having been obtained in violation of this act.

In the event no application is made or an application made pursuant to this section is denied, the court shall require the wire, tape or other recording of the intercepted communication to be delivered to, and sealed by, the court and such evidence shall be retained by the court in accordance with section 14 and the same shall not be used or disclosed in any legal proceeding except in a civil action brought by an aggrieved person pursuant to section 24 or as otherwise authorized by court order. Failure to effect delivery of any such wire, tape or other recording shall be punishable as contempt by the court directing such delivery. Evidence of verbal authorization to intercept an oral or wire communication shall be a defense to any charge against the investigating or law enforcement officer for engaging in unlawful interception.

14. Any wire or oral communication intercepted in accordance with this act shall, if practicable, be recorded by tape, wire or other comparable method. The recording shall be done in such a way as will protect it from editing or other alteration. Immediately upon the expiration of the order or extensions or renewals thereof, the tapes, wires or other recordings shall be transferred to the judge issuing the order and sealed under his direction. Custody of the tapes, wires or other recordings shall be maintained wherever the court directs. They shall not be destroyed except upon an order of such court and in any event shall be kept for 10 years. Duplicate tapes, wires or other recordings may be made for disclosure or use pursuant to subsection a of section 17 of this act. The presence of the seal provided by this section, or a satisfactory explanation for its absence, shall be a prerequisite for the disclosure of the contents of any wire or oral communication, or evidence derived therefrom, under subsection b of section 17 of this act.

15. Applications made and orders granted pursuant to this act and supporting papers shall be sealed by the court and shall be held in custody as the court shall direct and shall not be destroyed except on order of the court and in any event shall be kept for 10 years. They may be disclosed only upon a showing of good cause before a court of competent jurisdiction.

Any violation of the provisions of this section may be punished as contempt of the issuing or denying court.

16. Within a reasonable time but not later than 90 days after the termination of the period of the order or of extensions or renewals thereof, or the date of the denial of an order applied for under section 13, the issuing or denying judge shall cause to be served on the person named in the order or application, and such other parties to the intercepted communications as the judge may in his discretion determine to be in the interest of justice, an inventory which shall include:

a. Notice of the entry of the order or the application for an order denied under section 13;

b. The date of the entry of the order or the denial of an order applied for under section 13;

c. The period of authorized or disapproved interception; and

d. The fact that during the period wire or oral communications were or were not intercepted.

The court, upon the filing of a motion, may in its discretion make available to such person or his attorney for inspection such portions of the intercepted communications, applications and orders as the court determines to be in the interest of justice. On an ex parte showing of good cause to the court the serving of the inventory required by this section may be postponed.

17. a. Any investigative or law enforcement officer 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 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 communication 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.

18. When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsection a of section 17. Such contents and any evidence derived therefrom may be used under subsection b of section 17 when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this act. Such application shall be made as soon as practicable.

19. Except as specifically authorized pursuant to this act any person who uses or discloses the existence of an order authorizing interception of a wire or oral communication or the contents of, or information concerning, an intercepted wire or oral communication or evidence derived therefrom, is guilty of a misdemeanor.

20. The contents of any wire or oral communication intercepted in accordance with the provisions of this act, or evidence derived therefrom, shall not be disclosed in any trial, hearing, or proceeding before any court of this State unless not less than 10 days before the trial, hearing, or proceeding the parties to the action have been served with a copy of the order and accompanying application under which the interception was authorized.

The service of inventory, order, and application required by this section may be waived by the court where it finds that the service is not practicable and that the parties will not be prejudiced by the failure to make the service.

21. Any aggrieved person in any trial, hearing, or proceeding in or before any court or other authority of this State may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that:

a. The communication was unlawfully intercepted;

b. The order of authorization is insufficient on its face;

c. The interception was not made in conformity with the order of authorization.

The motion shall be made at least 10 days before the trial, hearing, or proceeding unless there was no opportunity to make the

motion or the moving party was not aware of the grounds for the motion. The court, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication, or evidence derived therefrom, as the court determines to be in the interests of justice. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall not be received in evidence in the trial, hearing or proceeding.

In addition to any other right to appeal, the State shall have the right to appeal from an order granting a motion to suppress if the official to whom the order authorizing the intercept was granted shall certify to the court that the appeal is not taken for purposes of delay. The appeal shall be taken within the time specified by the Rules of Court and shall be diligently prosecuted.

22. Within 30 days after the expiration of an order or an extension or renewal thereof entered under this act or the denial of an order confirming verbal approval of interception, the issuing or denying judge shall make a report to the Administrative Director of the courts stating that:

a. An order, extension or renewal was applied for;

b. The kind of order applied for;

c. The order was granted as applied for, was modified, or was denied;

d. The period of the interceptions authorized by the order, and the number and duration of any extensions or renewals of the order;

e. The offense specified in the order, or extension or renewal of an order;

f. The identity of the person authorizing the application and of the investigative or law enforcement officer and agency for whom it was made; and

g. The character of the facilities from which or the place where the communications were to be intercepted.

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 shall annually report to the Governor and the Legislature on such aspects of the operation of this act as he deems appropriate including any recommendations he may care to make as to legislative changes or improvements to effectuate the purposes of this act and to assure and protect individual rights.

24. Any person whose wire or oral communication is intercepted, disclosed or used in violation of this act shall have a civil cause of action against any person who intercepts, discloses or uses or procures any other person to intercept, disclose or use, such communication; and shall be entitled to recover from any such person:

a. Actual damages, but not less than liquidated damages computed at the rate of $100.00 a day for each day of violation, or $1,000.00, whichever is higher;

b. Punitive damages; and

c. A reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order authorizing the interception shall constitute a complete defense to an action brought under this section.

25. If any section, subsection or portion or provision of any section or sections of this act or the application thereof by or to any person or circumstances is declared invalid, the remainder of the section or sections or subsection of this act and the application thereof by or to other persons or circumstances shall not be affected thereby.

26. Section 2A:146–1 of the New Jersey Statutes is repealed.

27. This act shall take effect January 1, 1969, and remain in effect until December 31, 1974.

STATEMENT

This bill is in substitution of Senate Bill No. 897 introduced by Senator Edwin Forsythe in June to implement Recommendation No. 7 of the Joint Legislative Committee to Study Crime and the System of Criminal Justice in New Jersey (see page 12 of the April 12, 1968 Report of the Joint Committee). A redraft of Senate Bill No. 897 was dictated by enactment by the Congress, on June 19, 1968, of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (P. L. 90–351) which contains precise limitations on

the content of any State statute on wiretapping and electronic surveillance some of which were injected into the Federal legislation after Senate Bill No. 897 had been prepared.

This bill is designed to meet the Federal requirements and to conform to the Federal act in terminology, style and format which will have obvious advantages in its future application and construction. The bill also incorporates, to a major extent, provisions of a draft of a model state statute prepared, subsequent to enactment of the Federal law, by Professor G. Robert Blakey, a member of the faculty of the Law School of Notre Dame University, and supplied to the Senate Committee on Law, Public Safety and Defense in connection with his testimony before that committee at a public hearing held September 16, 1968.

In preparation of this bill every effort has been made to provide a useful tool to combat organized crime and corruption but to permit its use only where normal, vigorous investigative methods fail or cannot safely be used. It is also designed to protect individual rights and liberties by prescribing rigid controls of use of wire taps or electronic surveillance under court permission and supervision. In one respect the bill provides more strict control than required of Federal law enforcement agencies in that it prohibits any wiretapping or electronic surveillance even in emergent situations without prior court approval.

APPENDIX 2

RECOMMENDATION 7. ELECTRONIC EAVESDROPPING,

Report of the Special Joint Legislative Committee to Study Crime and the System of Criminal Justice In New Jersey, April 22, 1968.

"We recommend:

* * *

7. ELECTRONIC EAVESDROPPING

Protection of everyone's liberties is a primary objective of any civilized system of administering criminal justice. We deeply believe that New Jersey should offer that protection. It is an unfortunate fact of our existence today, however, that organized crime is widespread in our State and there also exists official corruption. The rights of vast numbers of our citizens are thereby diminished. It is a further unfortunate fact of our existence today that significant evidence of such criminal activity, on a regular basis, cannot be obtained without the use of electronic eavesdropping. The experience of the most informed officials in and out of this State attests to that conclusion. Many so testified before the Committee.

If a serious and responsible fight is to be mounted against organized crime and official corruption, then electronic eavesdropping must be utilized for that purpose. We recommend such a bill.

Let no one misunderstand our recommendation to this effect. We do not believe electronic eavesdropping should be used widely or on a miscellaneous basis or as a lazy substitute for other types of intelligent and vigorous investigation. To the contrary, we recommend that electronic eavesdropping be permitted only where there is no other probable way to obtain evidence of these serious crimes; it would be confined to restrictive situations, under tight court control, pursuant to standards which have received implicit approval from the courts in the past year, including the United States Supreme Court.

At present, Section 605 of the Federal Communications Act presents obstacles to a state developing an independent electronic eavesdropping policy. That section is now under active consideration by the Congress for amendment under a bill which would establish national standards by which states could authorize electronic eavesdropping. Final drafting of any New Jersey bill, therefore, must await passage by the Congress of those standards; of course, any subsequent bill would have to conform in all necessary respects.

APPENDIX 3

DISCUSSION ON WIRETAPPING AND EAVESDROPPING,

The President's Commission on Law Enforcement and Administration of Justice (February 1967), pages 201-203.

In connection with the problems of securing evidence against organized crime, the Commission considered issues relating to electronic surveillance, including wiretapping and "bugging"—the secret installation of mechanical devices at specific locations to receive and transmit conversations.

Significance to Law Enforcement

The great majority of law enforcement officials believe that the evidence necessary to bring criminal sanctions to bear consistently on the higher echelons of organized crime will not be obtained without the aid of electronic surveillance techniques. They maintain these techniques are indispensable to develop adequate strategic intelligence concerning organized crime, to set up specific investigations, to develop witnesses, to corroborate their testimony, and to serve as substitutes for them—each a necessary step in the evidence-gathering process in organized crime investigations and prosecutions.

As previously noted, the organizational structure and operational methods employed by organized crime have created unique problems for law enforcement. High-ranking organized crime figures are protected by layers of insulation from direct participation in criminal acts, and a rigid code of discipline inhibits the development of informants against them. A soldier in a family can complete his entire crime career without ever associating directly with his boss. Thus, he is unable, even if willing, to link the boss directly to any criminal activity in which he may have engaged for their mutual benefit. Agents and employees of an organized crime family, even when granted immunity from prosecution, cannot implicate the highest level figures, since frequently they have neither spoken to, nor even seen them.

Members of the underworld, who have legitimate reason to fear that their meetings might be bugged or their telephones tapped, have continued to meet and to make relatively free use of the telephone—for communication is essential to the operation of any business enterprise. In legitimate business this is accomplished with written and oral exchanges. In organized crime enterprises, however, the possibility of loss or seizure of an incriminating document demands a minimum of written communication. Because of the varied character of organized criminal enterprises, the large numbers of persons employed in them, and frequently the distances separating elements of the organization, the telephone remains an essential vehicle for communication. While discussions of business matters are held on a face-to-face basis whenever possible, they are never conducted in the presence of strangers. Thus, the content of these conversations, including the planning of new illegal activity, and transmission of policy decisions or operating instructions for existing enterprises, cannot be detected. The extreme scrutiny to which potential members are subjected and the necessity for them to engage in criminal activity have precluded law enforcement infiltration of organized crime groups.

District Attorney Frank S. Hogan, whose New York County office has been acknowledged for over 27 years as one of the country's most outstanding, has testified that electronic surveillance is:

> the single most valuable weapon in law enforcement's fight against organized crime . . . It has permitted us to undertake major investigations of organized crime. Without it, and I confine myself to top figures in the underworld, my own office could not have convicted Charles "Lucky" Luciano, Jimmy Hines, Louis "Lepke" Buchalter, Jacob "Gurrah" Shapiro, Joseph "Socks" Lanza, George Scalise, Frank Erickson, John "Dio" Dioguardi, and Frank Carbo . . . .

Over the years New York has faced one of the Nation's most aggravated organized crime problems. Only in New York have law enforcement officials achieved some level of continuous success in bringing prosecutions against organized crime. For over 20 years, New York has authorized wiretapping on court order. Since 1957, bugging has been similarly authorized. Wiretapping was the mainstay of the New York attack against organized crime until Federal court decisions intervened. Recently chief reliance in some offices has been placed on bugging, where the information is to be used in court. Law enforcement officials believe that the successes

achieved in some parts of the State are attributable primarily to a combination of dedicated and competent personnel and adequate legal tools; and that the failure to do more in New York has resulted primarily from the failure to commit additional resources of time and men. The debilitating effect of corruption, political influence, and incompetence, underscored by the New York State Commission of Investigation, must also be noted.

In New York at one time, Court supervision of law enforcement's use of electronic surveillance was sometimes perfunctory, but the picture has changed substantially under the impact of pretrial adversary hearings on motions to suppress electronically seized evidence. Fifteen years ago there was evidence of abuse by low-rank policemen. Legislative and administrative controls, however, have apparently been successful in curtailing its incidence.

The Threat to Privacy

In a democratic society privacy of communication is essential if citizens are to think and act creatively and constructively. Fear or suspicion that one's speech is being monitored by a stranger, even without the reality of such activity, can have a seriously inhibiting effect upon the willingness to voice critical and constructive ideas. When dissent from the popular view is discouraged, intellectual controversy is smothered, the process for testing new concepts and ideas is hindered and desirable change is slowed. External restraints, of which electronic surveillance is but one possibility, are thus repugnant to citizens of such a society.

Today, in addition to some law enforcement agents, numerous private persons are utilizing these techniques. They are employed to acquire evidence for domestic relations cases, to carry on industrial espionage and counterespionage, to assist in preparing for civil litigation, and for personnel investigations, among others. Technological advances have produced remarkably sophisticated devices, of which the electronic cocktail olive is illustrative, and continuing price reductions have expanded their markets. Nor has man's ingenuity in the development of surveillance equipment been exhausted with the design and manufacture of electronic devices for wiretapping or for eavesdropping within buildings or vehicles. Parabolic microphones that pick up conversations held in the open at distances of hundreds of feet are available commercially, and some progress has been made toward utilizing the laser beam to pick up conversations within a room by focusing upon the glass

of a convenient window. Progress in microminiaturizing electronic components has resulted in the production of equipment of extremely small size. Because it can detect what is said anywhere—not just on the telephone—bugging presents especially serious threats to privacy.

Detection of surveillance devices is difficult, particularly where an installation is accomplished by a skilled agent. Isolated instances where equipment is discovered in operation therefore do not adequately reflect the volume of such activity; the effectiveness of electronic surveillance depends in part upon investigators who do not discuss their activities. The current confusion over the legality of electronic surveillance compounds the assessment problem since many agents feel their conduct may be held unlawful and are unwilling to report their activities. It is presently impossible to estimate with any accuracy the volume of electronic surveillance conducted today. The Commission is impressed, however, with the opinions of knowledgeable persons that the incidence of electronic surveillance is already substantial and increasing at a rapid rate.

Present Law and Practice

In 1928 the U. S. Supreme Court decided that evidence obtained by wiretapping a defendant's telephone at a point outside the defendant's premises was admissible in a Federal criminal prosecution. The Court found no unconstitutional search and seizure under the Fourth Amendment. Enactment of Section 605 of the Federal Communications Act in 1934 precluded interception and disclosure of wire communications. The Department of Justice has interpreted this section to permit interception so long as no disclosure of the content outside the Department is made. Thus, wiretapping may presently be conducted by a Federal agent, but the results may not be used in court. When police officers wiretap and disclose the information obtained, in accordance with State procedure, they are in violation of Federal law.

Law enforcement experience with bugging has been much more recent and more limited than the use of the traditional wiretap. The legal situation with respect to bugging is also different. The regulation of the national telephone communication network falls within recognized national powers, while legislation attempting to authorize the placing of electronic equipment even under a warrant system would break new and uncharted ground. At the present time there is no Federal legislation explicitly dealing with bugging.

Since the decision of the Supreme Court in *Silverman* v. *United States*, 365 U.S. 505 (1961), use of bugging equipment that involves an unauthorized physical entry into a constitutionally protected private area violates the Fourth Amendment, and evidence thus obtained is inadmissible. If eavesdropping is unaccompanied by such a trespass, or if the communication is recorded with the consent of one of the parties, no such prohibition applies.

The confusion that his arisen inhibits cooperation between State and Federal law enforcement agencies because of the fear that information secured in one investigation will legally pollute another. For example, in New York City prosecutors refuse to divulge the contents of wire communications intercepted pursuant to State court orders because of the Federal proscription but do utilize evidence obtained by bugging pursuant to court order. In other sections of New York State, however, prosecutors continue to introduce both wiretapping and eavesdropping evidence at trial.

Despite the clear Federal prohibition against disclosure of wiretap information no Federal prosecutions of State officers have been undertaken, although prosecutions of State officers under State laws have occurred.

One of the most serious consequences of the present state of the law is that private parties and some law enforcement officers are invading the privacy of many citizens without control from the courts and reasonable legislative standards. While the Federal prohibition is a partial deterrent against divulgence, it has no effect on interception, and the lack of prosecutive action against violators has substantially reduced respect for the law.

The present status of the law with respect to wiretapping and bugging is intolerable. It serves the interests neither of privacy nor of law enforcement. One way or the other, the present controversy with respect to electronic surveillance must be resolved.

The Commission recommends:

Congress should enact legislation dealing specifically with wiretapping and bugging.

All members of the Commission agree on the difficulty of striking the balance between law enforcement benefits from the use of electronic surveillance and the threat to privacy its use may entail. Further, striking this balance presents important constitutional questions now pending before the U. S. Supreme Court in

People v. *Berger*, and any congressional action should await the outcome of that case.

All members of the Commission believe that if authority to employ these techniques is granted it must be granted only with stringent limitations. One form of detailed regulatory statute that has been suggested to the Commission is outlined in the appendix to the Commission's organized crime task force volume. All private use of electronic surveillance should be placed under rigid control, or it should be outlawed.

A majority of the members of the Commission believe that legislation should be enacted granting carefully circumscribed authority for electronic surveillance to law enforcement officers to the extent it may be consistent with the decision of the Supreme Court in *People* v. *Berger*, and, further, that the availability of such specific authority would significantly reduce the incentive for, and the incidence of, improper electronic surveillance.

The other members of the Commission have serious doubts about the desirability of such authority and believe that without the kind of searching inquiry that would result from further congressional consideration of electronic surveillance, particularly of the problems of bugging, there is insufficient basis to strike this balance against the interests of privacy.

Matters affecting the national security not involving criminal prosecution are outside the Commission's mandate, and nothing in this discussion is intended to affect the existing powers to protect that interest.

APPENDIX 4

TITLE III OF THE
Omnibus Crime Control and Safe Streets Act of 1968,
signed by the President on June 19, 1968
P. L. 90-351, 82 Stat. 197).

TITLE III—WIRETAPPING AND ELECTRONIC SURVEILLANCE

FINDINGS

Sec. 801. On the basis of its own investigations and of published studies, the Congress makes the following findings:

(a) Wire communications are normally conducted through the use of facilities which form part of an interstate network. The same facilities are used for interstate and intrastate communications. There has been extensive wiretapping carried on without legal sanctions, and without the consent of any of the parties to the conversation. Electronic, mechanical, and other intercepting devices are being used to overhear oral conversations made in private, without the consent of any of the parties to such communications. The contents of these communications and evidence derived therefrom are being used by public and private parties as evidence in court and administrative proceedings, and by persons whose activities affect interstate commerce. The possession, manufacture, distribution, advertising, and use of these devices are facilitated by interstate commerce.

(b) In order to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of interstate commerce, it is necessary for Congress to define on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized, to prohibit any unauthorized interception of such communications, and the use of the contents thereof in evidence in courts and administrative proceedings.

(c) Organized criminals make extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice.

(d) To safeguard the privacy of innocent persons, the interception of wire or oral communications where none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court. Interception of wire and oral communications should further be limited to certain major types of offenses and specific categories of

crime with assurances that the interception is justified and that the information obtained thereby will not be misused.

Sec. 802. Part I of title 18, United States Code, is amended by adding at the end of the following new chapter:

"Chapter 119. WIRE INTERCEPTION AND INTERCEPTION OF ORAL COMMUNICATIONS

"Sec.

"§ 2510. Definitions

"As used in this chapter—

"(1) 'wire communication' means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;

"(2) 'oral communication' means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

"(3) 'State' means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

"(4) 'intercept' means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

"(5) 'electronic, mechanical, or other device' means any device or apparatus which can be used to intercept a wire or oral communication other than—

"(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in

the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

"(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

"(6) 'person' means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

"(7) 'Investigative or law enforcement officer' means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

"(8) 'contents', when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

"(9) 'Judge of competent jurisdiction' means—

"(a) a judge of a United States district court or a United States court of appeals; and

"(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications;

"(10) 'communication common carrier' shall have the same meaning which is given the term 'common carrier' by section 153(h) of title 47 of the United States Code; and

"(11) 'aggrieved person' means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

"§ 2511. Interception and disclosure of wire or oral communications prohibited

"(1) Except as otherwise specifically provided in this chapter any person who—

"(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

"(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

"(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

"(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

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

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

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

"(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

"(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"(2) (a) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: *Provided*, That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

"(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

"(c) It shall not be unlawful under this chapter for a person 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.

"(d) It shall not be unlawful under this chapter for 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 where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

"(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

"§ 2512. Manufacture, distribution, possession, and advertising of wire or oral communication intercepting devices prohibited

"(1) Except as otherwise specifically provided in this chapter, any person who willfully—

"(a) sends through the mail, or sends or carries in interstate or foreign commerce, any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications;

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

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

"(i) any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications; or

"(ii) any other electronic, mechanical, or other device, where such advertisement promotes the use of such device

for the purpose of the surreptitious interception of wire or oral communications,

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

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"(2) It shall not be unlawful under this section for—

"(a) a communications common carrier or an officer, agent, or employee of, or a person under contract with, a communications common carrier, in the normal course of the communications common carrier's business, or

"(b) an officer, agent, or employee of, or a person under contract with, the United States, a State, or a political subdivision thereof, in the normal course of the activities of the United States, a State, or a political subdivision thereof, to send through the mail, send or carry in interstate or foreign commerce, or manufacture, assemble, possess, or sell any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications.

"§ 2513. Confiscation of wire or oral communication intercepting devices

"Any electronic, mechanical, or other device used, sent, carried, manufactured, assembled, possessed, sold, or advertised in violation of section 2511 or section 2512 of this chapter may be seized and forfeited to the United States. All provisions of law relating to (1) the seizure, summary and judicial forfeiture, and condemnation of vessels, vehicles, merchandise, and baggage for violations of the customs laws contained in title 19 of the United States Code, (2) the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from the sale thereof, (3) the remission or mitigation of such forfeiture, (4) the compromise of claims, and (5) the award of compensation to informers in respect of such forfeitures, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions of this section; except that such duties as are imposed upon the collector of customs or any other person with respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the provisions of the customs laws contained in title 19 of the United States Code shall be performed with respect to seizure and forfeiture of electronic, mechanical, or other intercepting devices under this section by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General.

"§ 2514. Immunity of witnesses

"Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other

evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of this chapter or any of the offenses enumerated in section 2516, or any conspiracy to violate this chapter or any of the offenses enumerated in section 2516 is necessary to the public interest, such United States attorney, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. No such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except in a proceeding described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.

"§ 2515. Prohibition of use as evidence of intercepted wire or oral communications

"Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

"§ 2516. Authorization for interception of wire or oral communications

"(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

"(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relat-

ing to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

"(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

"(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), or sections 2314 and 2315 (interstate transportation of stolen property);

"(d) any offense involving counterfeiting punishable under sections 471, 472, or 473 of this title;

"(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

"(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

"(g) any conspiracy to commit any of the foregoing offenses.

"(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

"§ 2517. Authorization for disclosure and use of intercepted wire or oral communications

"(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

"(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

"(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any criminal proceeding in any court of the United States or of any State or in any Federal or State grand jury proceeding.

"(4) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

"(5) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

"§ 2518. Procedure for interception of wire or oral communications

"(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

"(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

"(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular

offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

"(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

"(d) a statement of the period of time for which the interception is required to be maintained. If the nature 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 description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

"(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

"(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

"(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

"(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

"(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

"(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

"(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

"(d) there is probable cause for belief that 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, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

"(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

"(a) the identity of the person, if known, whose communications are to be intercepted;

"(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

"(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

"(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

"(e) 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.

"(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

"(6) Whenever an order authorizing interception is entered pursuant to this chapter, 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 judge may require.

"(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

"(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before

an order authorizing such interception can with due diligence be obtained, and

"(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

"(8) (a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

"(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

"(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

"(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7) (b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge

may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

"(1) the fact of the entry of the order or the application;

"(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

"(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

"(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

"(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

"(i) the communication was unlawfully intercepted;

"(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

"(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial

of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

"§ 2519. Reports concerning intercepted wire or oral communications

"(1) Within thirty days after the expiration of an order (or each extension thereof) entered under section 2518, or the denial of an order approving an interception, the issuing or denying judge shall report to the Administrative Office of the United States Courts—

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

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

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

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

"(e) the offense specified in the order or application, or extension of an order;

"(f) the identity of the applying investigative or law enforcement officer and agency making the application and the person authorizing the application; and

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

"(2) In January of each year the Attorney General, an Assistant Attorney General specially designated by the Attorney General, or the principal prosecuting attorney of a State, or the principal prosecuting attorney for any political subdivision of a State, shall report to the Administrative Office of the United States Courts—

"(a) the information required by paragraphs (a) through (g) of subsection (1) of this section with respect to each application for an order or extension made during the preceding calendar year;

"(b) a general description of the interceptions made under such order or extension, including (i) the approximate nature and frequency of incriminating communications intercepted, (ii) the approximate nature and frequency of other communications intercepted, (iii) the approximate number of persons whose communications were intercepted, and (iv) the approximate nature, amount, and cost of the manpower and other resources used in the interceptions;

"(c) the number of arrests resulting from interceptions made under such order or extension, and the offenses for which arrests were made;

"(d) the number of trials resulting from such interceptions;

"(e) the number of motions to suppress made with respect to such interceptions, and the number granted or denied;

"(f) the number of convictions resulting from such interceptions and the offenses for which the convictions were obtained

and a general assessment of the importance of the interceptions; and

"(g) the information required by paragraphs (b) through (f) of this subsection with respect to orders or extensions obtained in a preceding calendar year.

"(3) In April of each year the Director of the Administrative Office of the United States Courts shall transmit to the Congress a full and complete report concerning the number of applications for orders authorizing or approving the interception of wire or oral communications and the number of orders and extensions granted or denied during the preceding calendar year. Such report shall include a summary and analysis of the data required to be filed with the Administrative Office by subsections (1) and (2) of this section. The Director of the Administrative Office of the United States Courts is authorized to issue binding regulations dealing with the content and form of the reports required to be filed by subsections (1) and (2) of this section.

"§ 2520. Recovery of civil damages authorized

"Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person—

"(a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;

"(b) punitive damages; and

"(c) a reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order or on the provisions of section 2518(7) of this chapter shall constitute a complete defense to any civil or criminal action brought under this chapter."

APPENDIX 5

PUBLIC HEARING ON ELECTRONIC SURVEILLANCE
Witnesses.

The following is a list of witnesses who testified on the subject of electronic surveillance at the public hearings held September 16, 17 and 18, 1968, listed in the order of their appearance:

EDWIN B. FORSYTHE, *President of the Senate*

G. ROBERT BLAKEY, *Professor of Law, Notre Dame Law School*

RALPH SALERNO, New York, N. Y., Former Consultant to the President's Commission on Law Enforcement and Administration of Justice

LEO KAPLOWITZ, *Prosecutor,* Union County

GUY W. CALISSI, *Prosecutor,* Bergen County

HENRY S. RUTH, JR., *Associate Professor of Law,* University of Pennsylvania

JOEL R. JACOBSON, *Director of Community Affairs,* United Automobile Workers, Region 9

COLONEL DAVID B. KELLY, *Superintendent,* New Jersey State Police

ARTHUR J. SILLS, *The Attorney General,* State of New Jersey

FRANK S. HOGAN, *District Attorney of New York County,* New York, filed with the Committee a copy of his Statement before the United States Senate Subcommittee on Criminal Laws and Procedures, July 12, 1967, advocating legislation to permit electronic surveillance (see pages 192-218, Appendix to transcript of Public Hearings held September 16-18, 1968).

APPENDIX 6

MAJORITY OPINION, UNITED STATES SUPREME COURT,

Berger v. *New York*, 388 U. S. 41 (1967).

SUPREME COURT OF THE UNITED STATES

No. 615.—OCTOBER TERM, 1966.

Ralph Berger, Petitioner, *v.* State of New York.	On Writ of Certiorari to the Court of Appeals of New York.

[June 12, 1967.]

MR. JUSTICE CLARK delivered the opinion of the Court.

This writ tests the validity of New York's permissive eavesdrop statute, N. Y. Code Crim. Proc. § 813–a,[1]

[1] "§ 813–a. Ex parte order for eavesdropping

"An ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same, and, in the event of the denial

under the Fourth, Fifth, Ninth, and Fourteenth Amendments. The claim is that the statute sets up a system of surveillance which involves trespassory intrusions into private, constitutionally protected premises, authorizes "general searches" for "mere evidence," [2] and is an invasion of the privilege against self-incrimination. The trial court upheld the statute, the Appellate Division affirmed without opinion, 25 A. D. 2d 718, and the Court of Appeals did likewise by a divided vote. 18 N. Y. 2d 638. We granted certiorari, 385 U. S. 967 (1966). We have concluded that the language of New York's statute is too broad in its sweep resulting in a trespassory intrusion into a constitutionally protected area and is, therefore, violative of the Fourth and Fourteenth Amendments. This disposition obviates the necessity for any discussion of the other points raised.

I.

Berger, the petitioner, was convicted on two counts of conspiracy to bribe the Chairman of the New York State Liquor Authority. The case arose out of the complaint of one Ralph Pansini to the District Attorney's Office that agents of the State Liquor Authority had entered his bar and grill and without cause seized his books and records. Pansini asserted that the raid was in reprisal for his failure to pay a bribe for a liquor license. Numerous complaints had been filed with the District Attorney's Office charging the payment of bribes by applicants for liquor licenses. On the direction of that office, Pansini, while equipped with a minifon recording device, inter-

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of an application for such an order, a true copy of the papers upon which the application was based shall in like manner be retained by the judge or justice denying the same. As amended L. 1958, c. 676, eff. July 1, 1958."

[2] This contention is disposed of in *Warden, Maryland Penitentiary v. Hayden, ante,* p. —, adversely to petitioner's assertion here.

viewed an employee of the Authority. The employee advised Pansini that the price for a license was $10,000 and suggested that he contact attorney Harry Neyer. Neyer subsequently told Pansini that he worked with the Authority employee before and that the latter was aware of the going rate on liquor licenses downtown.

On the basis of this evidence an eavesdrop order was obtained from a Justice of the State Supreme Court, as provided by § 813–a. The order permitted the installation, for a period of 60 days, of a recording device in Neyer's office. On the basis of leads obtained from this eavesdrop a second order permitting the installation, for a like period, of a recording device in the office of one Harry Steinman was obtained. After some two weeks of eavesdropping a conspiracy was uncovered involving the issuance of liquor licenses for the Playboy and Tenement Clubs, both of New York City. Petitioner was indicted as "a go-between" for the principal conspirators, who though not named in the indictment were disclosed in a bill of particulars. Relevant portions of the recordings were received in evidence at the trial and were played to the jury, all over the objection of the petitioner. The parties have stipulated that the District Attorney "had no information upon which to proceed to present a case to the Grand Jury, or on the basis of which to prosecute" the petitioner except by the use of the eavesdrop evidence.

II.

Eavesdropping is an ancient practice which at common law was condemned as a nuisance. IV Blackstone, Commentaries § 168. In those days the eavesdropper listened by naked ear under the eaves of houses or their windows, or beyond their walls seeking after private discourse. The awkwardness and undignified manner of this method as well as its susceptibility to abuse was immediately recognized. Electricity, however, provided

a better vehicle and with the advent of the telegraph surreptitious interception of messages began. As early as 1862 California found it necessary to prohibit the practice by statute. Statutes of California 1862, p. 288, CCLX 12. During the Civil War General J. E. B. Stuart is reputed to have had his own eavesdropper along with him in the field whose job it was to intercept military communications of the opposing forces. Subsequently newspapers reportedly raided one another's news gathering lines to save energy, time, and money. Racing news was likewise intercepted and flashed to bettors before the official result arrived.

The telephone brought on a new and more modern eavesdropper know as the "wiretapper." Interception was made by a connection with a telephone line. This activity has been with us for three-quarters of a century. Like its cousins, wiretapping proved to be a commercial as well as a police technique. Illinois outlawed it in 1895 and in 1905 California extended its telegraph interception prohibition to the telephone. Some 50 years ago a New York legislative committee found that police, in cooperation with the telephone company, had been tapping telephone lines in New York despite an Act passed in 1895 prohibiting it. During prohibition days wiretaps were the principal source of information relied upon by the police as the basis for prosecutions. In 1934 the Congress outlawed the interception without authorization, and the divulging or publishing of the contents of wiretaps by passing § 605 of the Communications Act of 1934.[3] New York, in 1938, declared by constitutional amendment that "[t]he right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated," but permitted by *ex parte* order of the Supreme Court of the State the

[3] 48 Stat. 1103, 47 U. S. C. § 605.

interception of communications on a showing of "reasonable ground to believe that evidence of crime" might be obtained. McKinney Const. Art. I, § 12.

Sophisticated electronic devices have now been developed (commonly know as "bugging") which are capable of eavesdropping on anyone in most any given situation. They are to be distinguished from "wiretapping" which is confined to the interception of telegraphic and telephonic communications. Miniature in size—no larger than a postage stamp (⅜" x ⅜" x ⅛")—these gadgets pick up whispers within a room and broadcast them half a block away to a receiver. It is said that certain types of electronic rays beamed at walls or glass windows are capable of catching voice vibrations as they are bounced off the latter. Since 1940 eavesdropping has become a big business. Manufacturing concerns offer complete detection systems which autotmatically record voices under most any conditions by remote control. A microphone concealed in a book, a lamp, or other unsuspecting place in a room, or made into a fountain pen, tie clasp, lapel button, or cuff link increases the range of these powerful wireless transmitters to a half mile. Receivers pick up the transmission with interference-free reception on a special wave frequency. And, of late, a combination mirror transmitter has been developed which permits not only sight but voice transmission up to 300 feet. Likewise, parabolic microphones, which can overhear conversations without being placed within the premises monitored, have been developed. See Westin, Science, Privacy and Freedom, 66 Col. L. Rev. 1003, 1005–1010.

As science developed these detection techniques, lawmakers, sensing the resulting invasion of individual privacy, have provided some statutory protection for the public. Seven States, California, Illinois, Maryland, Massachusetts, Nevada, New York, and Oregon, prohibit surreptitious eavesdropping by mechanical or electronic

device.[4] However, all, save Illinois, permit official court-ordered eavesdropping. Some 36 States prohibit wiretapping.[5] But of these, 27 permit "authorized" interception of some type. Federal law, as we have seen, prohibits interception and divulging or publishing of the content of wiretaps without exception.[6] In sum, it is fair to say that wiretapping on the whole is outlawed,

[4] Cal. Pen. Code § 653h–j; Ill. Rev. Stat. c. 38, §§ 14.1–7 (1963); Md. Ann. Code, Art. 27, § 125A (1957); Mass. Ann. Laws, c. 272, § 99 (Supp. 1964); Nev. Rev. Stat. § 200.650 (1963); N. Y. Pen. Law § 738; Ore. Rev. Stat. § 165.540 (1)(c) (Supp. 1963).

[5] Ala. Code, Tit. 48, § 414 (1958); Alaska Stat. § 42.20.100 (1962); Ark. Stat. Ann. § 73–1810 (1957); Cal. Pen. Code § 640; Colo. Rev. Stat. § 40–4–17 (1963); Conn. Gen. Stat. Rev. § 53–140 (1958); Del. Code Ann., Tit. 11, § 757 (Supp. 1964); Fla. Stat. Ann. § 822.10 (1965); Hawaii Rev. Laws § 309 A–1 (Supp. 1963); Idaho Code Ann. §§ 18–6704, 6705 (1947); Ill. Rev. Stat. c. 134, § 16 (1963); Iowa Code § 716.8 (1962); Ky. Rev. Stat. § 433.430 (1963); La. Rev. Stat. § 14:322 (1950); Md. Ann. Code, Art. 35, §§ 92, 93 (1957); Mass. Ann. Laws, c. 272, § 99 (Supp. 1964); Mich. Stat. Ann. § 28.808 (1954); Mont. Rev. Codes Ann. § 94–3203 (Supp. 1965); Neb. Rev. Stat. § 86–328 (1958); Nev. Rev. Stat. §§ 200.620, 200.630 (1963); N. J. Stat. Ann. § 2A:146–1 (1953); N. M. Stat. Ann. § 40A–12–1 (1964); N. J. Pen. Law § 738; N. C. Gen. Stat. § 14–155 (1953); N. D. Cent. Code § 8–1—07 (1959); Ohio Rev. Code Ann. § 4931.28 (p. 1953); Okla. Stat., Tit. 21, § 1757 (1961); Ore. Rev. Stat. § 165.540 (1) (1963); Pa. Stat. Ann., Tit. 15, § 2443 (1958); R. I. Gen. Laws Ann. § 11–35–12 (1956); S. D. Code § 13.4519 (1939); Tenn. Code Ann. § 65–2117 (1955); Utah Code Ann. § 76–48–11 (1953); Va. Code Ann. § 18.1–156 (Supp. 1960); Wis. Stat. § 134.39 (1963); Wyo. Stat. Ann. § 37–259 (157).

[6] A recent Federal Communications Commission Regulation, 31 Fed. Reg. 3397, —— C. F. R. ——, prohibits the use of "a device required to be licensed by section 301 of the Communications Act" for the purpose of eavesdropping. This regulation, however, exempts use under "lawful authority" by police officers and the sanctions are limited to loss of license and the imposition of a fine. The memorandum accompanying the regulation stated: "What constitutes a crime under State law reflecting a State policy applicable to eavesdropping is, of course, unaffected by our rules."

except for permissive use by law enforcement officials in some States; while electronic eavesdropping is—save for seven States—permitted both officially and privately. And, in six of the seven States electronic eavesdropping ("bugging") is permissible on court order.

III.

The law, though jealous of individual privacy, has not kept pace with these advances in scientific knowledge. This is not to say that individual privacy has been relegated to a second-class position for it has been held since Lord Camden's day that intrusions into it are "subversive of all of the comforts of society." *Entick* v. *Carrington,* 19 How. St. Tr. 1029 (1765). And the Founders so decided a quarter of a century later when they declared in the Fourth Amendment that the people had a right "to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures. . . ." Indeed, that right, they wrote, "shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Almost a century thereafter this Court took specific and lengthy notice of *Entick* v. *Carrington, supra,* finding that its holding was "undoubtedly familiar . . . [and] in the minds of those who framed the Fourth Amendment . . . ." *Boyd* v. *United States,* 116 U. S. 616, 626–627 (1886). And after quoting from Lord Camden's opinion at some length, Mr. Justice Bradley characterized it thusly:

> "The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case . . . they apply to all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life." At 630.

Boyd held unconstitutional an Act of the Congress authorizing a court of the United States to require a defendant in a revenue case to produce in court his private books, invoices, and papers or else the allegations of the Government were to be taken as confessed. The Court found that "the essence of the offense . . . [was] the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment." *Ibid.* The Act—the Court found—violated the Fourth Amendment in that it authorized a general search contrary to the Amendment's guarantee.

The Amendment, however, carried no criminal sanction and the federal statutes not affording one, the Court in 1914 formulated and pronounced the federal exclusionary rule in *Weeks* v. *United States,* 232 U. S. 383 (1914). Prohibiting the use in federal courts of any evidence seized in violation of the Amendment, the Court held:

> "The effect of the Fourth Amendment is to put the courts of the United States . . . under limitations and restraints as to the exercise of such power . . . and to forever secure the people . . . against all unreasonable searches and seizures under guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all. . . . The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which the people of all conditions have a right to appeal for the maintenance of such fundamental rights." At 391–392.

IV.

The Court was faced with its first wiretap case in 1928, *Olmstead* v. *United States,* 277 U. S. 438. There

the interception of Olmstead's telephone line was accomplished without entry upon his premises and was, therefore, found not to be proscribed by the Fourth Amendment. The basis of the decision was that the Constitution did not forbid the obtaining of evidence by wiretapping unless it involved actual unlawful entry into the house. Statements in the opinion that "a conversation passing over a telephone wire" cannot be said to come within the Fourth Amendment's enumeration of "persons, houses, papers, and effects" have been negated by our subsequent cases as hereinafter noted. They found "conversation" was within the Fourth Amendment's protections, and that the use of electronic devices to capture it was a "search" within the meaning of the Amendment, and we so hold. In any event, Congress soon thereafter, and some say in answer to *Olmstead,* specifically prohibited the interception without authorization and the divulging or publishing of the contents of telephonic communications. And the *Nardone* cases, 302 U. S. 379 (1937) and 308 U. S. 338 (1939), extended the exclusionary rule to wiretap evidence offered in federal prosecutions.

The first "bugging" case reached the Court in 1942 in *Goldman* v. *United States.* 316 U. S. 129. There the Court found that the use of a detectaphone placed against an office wall in order to hear private conversations in the office next door did not violate the Fourth Amendment because there was no physical trespass in connection with the relevant interception. And in *On Lee* v. *United States,* 343 U. S. 747 (1952), we found that since "no trespass was committed" a conversation between Lee and a federal agent, occurring in the former's laundry and electronically recorded, was not condemned by the Fourth Amendment. Thereafter in *Silverman* v. *United States,* 365 U. S. 505 (1961), the Court found "that the eavesdropping was accomplished by means of

an unauthorized physical penetration into the premises occupied by the petitioners." At 509. A spike a foot long with a microphone attached to it was inserted under a baseboard into a party wall until it made contact with the heating duct that ran through the entire house occupied by Silverman, making a perfect sounding board through which the conversations in question were overheard. Significantly, the Court held that its decision did "not turn upon the technicality of a trespass upon a party wall as a matter of local law. It is based upon the reality of an actual intrusion into a constitutionally protected area." At 512.

In *Wong Sun* v. *United States,* 371 U. S. 471 (1963), the Court for the first time specifically held that verbal evidence may be the fruit of official illegality under the Fourth Amendment along with the more common tangible fruits of unwarranted intrusion. It used these words:

> "The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion. It follows from our holding in *Silverman* v. *United States,* 365 U. S. 505, that the Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of 'papers and effects.' " At 485.

And in *Lopez* v. *United States,* 373 U. S. 427 (1963), the Court confirmed that it had "in the past sustained instances of 'electronic eavesdropping' against constitutional challenge, when devices have been used to enable government agents to overhear conversations which would have been beyond the reach of the human ear . . . . It has been insisted only that the electronic device not be planted by an unlawful physical invasion of a constitutionally protected area." At 438–439. In this case a recording of a conversation between a federal

agent and the petitioner in which the latter offered the agent a bribe was admitted in evidence. Rather than "eavesdropping" the Court found that the recording "was used only to obtain the most reliable evidence possible of a conversation in which the Government's own agent was a participant and which that agent was fully entitled to disclose." At 439.

V.

It is now well settled that "the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth" Amendment. *Mapp* v. *Ohio*, 367 U. S. 643, 655 (1961). "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society." *Wolf* v. *Colorado*, 338 U. S. 25, 27 (1949). And its "fundamental protections . . . are guaranteed . . . against invasion by the States." *Stanford* v. *Texas*, 379 U. S. 476, 481 (1965). This right has most recently received enunciation in *Camara* v. *Municipal Court*, *ante*, p. —. "The basic purpose of this amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." At —. Likewise the Court has decided that while "the standards of reasonableness" required under the Fourth Amendment are the same under the Fourteenth, they "are not susceptible of Procrustean application. . . ." *Ker* v. *California*, 374 U. S. 23, 33 (1963). We said there that "the reasonableness of a search is . . . [to be determined] by the trial court from the facts and circumstances of the case and in the light of the 'fundamental criteria' laid down by the Fourth Amendment and in opinions of this Court applying that Amendment." *Ibid.*

We, therefore, turn to New York's statute to determine the basis of the search and seizure authorized by it upon the order of a state supreme court justice, a county judge or general sessions judge of New York County. Section 813-a authorizes the issuance of an "ex parte order for eavesdropping" upon "oath or affirmation of a district attorney, or of the attorney general or of an officer above the rank of sergeant of any police department of the state or any political subdivision thereof . . . ." The oath must state "that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof, and . . . identifying the particular telephone number or telegraph line involved." The judge "may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application." The order must specify the duration of the eavesdrop—not exceeding two months unless extended—and "[a]ny such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein."

While New York's statute satisfies the Fourth Amendment's requirement that a neutral and detached authority be interposed between the police and the public, *Johnson* v. *United States*, 333 U. S. 10, 14 (1948), the broad sweep of the statute is immediately observable. It permits the issuance of the order, or warrant for eavesdropping, upon the oath of the attorney general, the district attorney or any police officer above the rank of sergeant stating that "there is reasonable ground to believe that evidence of crime may be thus obtained . . . ." Such a requirement raises a serious

probable cause question under the Fourth Amendment. Under it warrants may only issue "but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Probable cause under the Fourth Amendment exists where the facts and circumstances within the affiant's knowledge, and of which he has reasonably trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed. *Carroll* v. *United States,* 267 U. S. 132, 162 (1925); *Husty* v. *United States,* 282 U. S. 694, 700–701 (1931); *Brinegar* v. *United States,* 338 U. S. 160, 175–176 (1949).

It is said, however, by the petitioner, and the State agrees, that the "reasonable ground" requirement of § 813–a "is undisputedly equivalent to the probable cause requirement of the Fourth Amendment." This is indicated by *People* v. *Grossman,* 45 Misc. 2d 557, 257 N. Y. S. 2d 266, reversed on other grounds, 27 A. D. 572. Also see *People* v. *Beshamy,* 43 Misc. 2d 521, 252 N. Y. S. 2d 110. While we have found no case on the point by New York's highest court, we need not pursue the question further because we have concluded that the statute is deficient on its face in other respects. Since petitioner clearly has standing to challenge the statute, being indisputably affected by it, we need not consider either the sufficiency of the affidavits upon which the eavesdrop orders were based, or the standing of petitioner to attack the search and seizure made thereunder.

The Fourth Amendment commands that a warrant issue not only upon probable cause supported by oath or affirmation, but also "particularly describing the place to be searched, and the persons or things to be seized." New York's statute lacks this particularization. It merely says that a warrant may issue on reasonable ground to believe that evidence of crime may be obtained

by the eavesdrop. It lays down no requirement for particularity in the warrant as to what specific crime has been or is being committed, nor "the place to be searched," or "the persons or things to be seized" as specifically required by the Fourth Amendment. The need for particularity and evidence of reliability in the showing required when judicial authorization of a search is sought is especially great in the case of eavesdropping. By its very nature eavesdropping involves an intrusion on privavy that is broad in scope. As was said in *Osborn* v. *United States*, 385 U. S. 323 (1966), the "indiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth and Fifth Amendments," and imposes "a heavier responsibility on this Court in its supervision of the fairness of procedures . . . ." At 329, n. 7. There, two judges acting jointly authorized the installation of a device on the person of a prospective witness to record conversations between him and an attorney for a defendant then on trial in the United States District Court. The judicial authorization was based on an affidavit of the witness setting out in detail previous conversations between the witness and the attorney concerning the bribery of jurors in the case. The recording device was, as the Court said, authorized "under the most precise and discriminate circumstances, circumstances which fully met the 'requirement of particularity'" of the Fourth Amendment. The Court was asked to exclude the evidence of the recording of the conversations seized pursuant to the order on constitutional grounds, *Weeks* v. *United States, supra,* or in the exercise of supervisory power, *McNabb* v. *United States,* 318 U. S. 332 (1943). The Court refused to do both finding that the recording, although an invasion of the privacy protected by the Fourth Amendment, was admissible because of the authorization of the judges, based upon "a detailed

factual affidavit alleging the commission of a specific criminal offense directly and immediately affecting the administration of justice . . . for the narrow and particularized purpose of ascertaining the truth of the affidavit's allegations." At 330. The invasion was lawful because there was sufficient proof to obtain a search warrant to make the search for the limited purpose outlined in the order of the judges. Through these "precise and discriminate" procedures the order authorizing the use of the electronic device afforded similar protections to those that are present in the use of conventional warrants authorizing the seizure of tangible evidence. Among other safeguards, the order described the type of conversation sought with particularity, thus indicating the specific objective of the Government in entering the constitutionally protected area and the limitations placed upon the officer executing the warrant. Under it the officer could not search unauthorized areas; likewise, once the property sought, and for which the order was issued, was found the officer could not use the order as a passkey to further search. In addition, the order authorized one limited intrusion rather than a series or a continuous surveillance. And, we note that a new order was issued when the officer sought to resume the search and probable cause was shown for the succeeding one. Moreover, the order was executed by the officer with dispatch, not over a prolonged and extended period. In this manner no greater invasion of privacy was permitted than was necessary under the circumstances. Finally the officer was required to and did make a return on the order showing how it was executed and what was seized. Through these strict precautions the danger of an unlawful search and seizure was minimized.

On the contrary, New York's statute lays down no such "precise and discriminate" requirements. Indeed, it authorizes the "indiscriminate use" of electronic

devices as specifically condemned in *Osborne*. "The proceeding by search warrant is a drastic one," *Sgro* v. *United States*, 287 U. S. 206, 210 (1932), and must be carefully circumscribed so as to prevent unauthorized invasions of "the sanctity of a man's home and the privacies of life." *Boyd* v. *United States, supra*, at 630. New York's broadside authorization rather than being "carefully circumscribed" so as to prevent unauthorized invasions of privacy actually permits general searches by electronic devices, the truly offensive character of which was first condemned in *Entick* v. *Carrington, supra*, and which were then known as "general warrants." The use of the latter was a motivating factor behind the Declaration of Independence. In view of the many cases commenting on the practice it is sufficient here to point out that under these "general warrants" customs officials were given blanket authority to conduct general searches for goods imported to the Colonies in violation of the tax laws of the Crown. The Fourth Amendment's requirement that a warrant "particularly describ[e] the place to be searched, and the persons or things to be seized," repudiated these general warrants and "makes general searches . . . impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron* v. *United States*, 275 U. S. 192, 196 (1927); *Stanford* v. *Texas, supra*.

We believe the statute here is equally offensive. First, as we have mentioned, eavesdropping is authorized without requiring belief that any particular offense has been or is being committed; nor that the property sought, the conversations, be particularly described. The purpose of the probable cause requirement of the Fourth Amendment to keep the state out of constitutionally protected areas until it has reason to believe that a

specific crime has been or is being committed is thereby wholly aborted. Likewise the statute's failure to describe with particularity the conversations sought gives the officer a roving commission to seize any and all conversations. It is true that the statute requires the naming of "the person or persons whose communications, conversations or discussions are to be overheard or recorded . . . ." But this does no more than identify the person whose constitutionally protected area is to be invaded rather than "particularly describing" the communications, conversations, or discussions to be seized. As with general warrants this leaves too much to the discretion of the officer executing the order. Secondly, authorization of eavesdropping for a two-month period is the equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause. Prompt execution is also avoided. During such a long and continuous (24 hours a day) period the conversations of any and all persons coming into the area covered by the device will be seized indiscriminately and without regard to their connection to the crime under investigation. Moreover, the statute permits, as was done here, extensions of the original two-month period—presumedly for two months each—on a mere showing that such extension is "in the public interest." Apparently the original grounds on which the eavesdrop order was initially issued also form the basis of the renewal. This we believe insufficient without a showing of present probable cause for the continuance of the eavesdrop. Third, the statute places no termination date on the eavesdrop once the conversation sought is seized. This is left entirely in the discretion of the officer. Finally, the statute's procedure, necessarily because its success depends on secrecy, has no requirement for notice as do conventional warrants, nor does it overcome this defect by requiring some showing of special facts.

On the contrary, it permits unconsented entry without any showing of exigent circumstances. Such a showing of exigency, in order to avoid notice, would appear more important in eavesdropping, with its inherent dangers, than that required when conventional procedures of search and seizure are utilized. Nor does the statute provide for a return on the warrant thereby leaving full discretion in the officer as to the use of seized conversations of innocent as well as guilty parties. In short, the statutes blanket grant of permission to eavesdrop is without adequate judicial supervision or protective procedures.

VI.

It is said with fervor that electronic eavesdropping is a most important technique of law enforcement and that outlawing it will severely cripple crime detection. The monumental report of the President's Crime Commission entitled "The Challenge of Crime in a Free Society" informs us that the majority of law enforcement officials say that this is especially true in the detection of organized crime. As the Commission reports, there can be no question about the serious proportions of professional criminal activity in this country. However, we have found no empirical statistics on the use of electronic devices (bugging) in the fight against organized crime. Indeed, there are even figures available in the wiretap category which indicate to the contrary. See, Dash, Schwartz, and Knowlton, The Eavesdroppers (1959), District Attorney Silver's Poll, 105, 117–119. Also see Semerjian, Proposals on Wiretapping in Light of Recent Senate Hearings, 35 B. U. L. Rev. 217, 229. As the Commission points out, "[w]iretapping was the mainstay of the New York attack against organized crime until Federal court decisions intervened. Recently chief reliance in some offices has been placed on bugging, where the information is to be used in court. Law enforcement

officials believe that the successes achieved in some parts of the State are attributable to a combination of dedicated and competent personnel and adequate legal tools; and that the failure to do more in New York has resulted primarily from the failure to commit additional resources of time and men," rather than electronic devices. At 201–202. Moreover, Brooklyn's District Attorney Silver's poll of the State of New York indicates that during the 12-year period (1942–1954) duly authorized wiretaps in bribery and corruption cases constituted only a small percentage of the whole. It indicates that this category only involved 10% of the total wiretaps. The overwhelming majority were in the categories of larceny, extortion, coercion, and blackmail, accounting for almost 50%. Organized gambling was about 11%. Statistics are not available on subsequent years. Dash, *supra*, p. 40.

An often repeated statement of District Attorney Hogan of New York County was made at a hearing before the Senate Judiciary Committee at which he advocated the amendment of the Federal Communications Act of 1934, *supra*, so as to permit "telephonic interception" of conversations. As he testified, "Federal statutory law [the 1934 Act] has been interpreted in such a way as to bar us from divulging wiretap evidence, even in the courtroom in the course of criminal prosecution." Mr. Hogan then said that "without it [wiretaps] my own office could not have convicted . . . top figures in the underworld." He then named nine persons his office had convicted and one on whom he had furnished "leads" secured from wiretaps to the authorities of New Jersey. Evidence secured from wiretaps, as Mr. Hogan said, was not admissible in "criminal prosecutions." He was advocating that the Congress adopt a measure that would make it admissible; Hearings on S. 2813 and S. 1495, before the Committee on

the Judiciary of the United States Senate, 87th Cong., 2d Sess., pp. 173, 174 (1962). The President's Crime Commission also emphasizes in its report the need for wiretapping in the investigation of organized crime because of the telephone's "relatively free use" by those engaged in the business and the difficulty of infiltrating their organizations. P. 201. The Congress, though long importuned, has not amended the 1934 Act to permit it.

We are also advised by the Solicitor General of the United States that the Federal Government has abandoned the use of electronic eavesdropping for "prosecutorial purposes." See Supplemental Memorandum, *Schipani* v. *United States,* No. 504, October Term, 1966, 385 U. S. 372. See also *Black* v. *United States,* 385 U. S. 26 (1967); *O'Brien* v. *United States,* 386 U. S. 345 (1967); *Hoffa* v. *United States,* 387 U. S. — (1967); *Markis* v. *United States, ante,* p. —; *Moretti* v. *United States, ante,* p. —. Despite these actions of the Federal Government there has been no failure of law enforcement in that field.

As THE CHIEF JUSTICE said in concurring in *Lopez* v. *United States, supra,* "the fantastic advances in the field of electronic communication constitute a great danger to the privacy of the individual; that indiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth and Fifth Amendments. . . ." At 441.

In any event we cannot forgive the requirements of the Fourth Amendment in the name of law enforcement. This is no formality that we require today but a fundamental rule that has long been recognized as basic to the privacy of every home in America. While "[t]he requirements of the Fourth Amendment are not inflexible, or obtusely unyielding to the legitimate needs of law enforcement," *Lopez* v. *United States, supra,* at 464, dissenting opinion of BRENNAN, J., it is not asking too

much that officers be required to comply with the basic command of the Fourth Amendment before the innermost secrets of one's home or office are invaded. Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices. Some may claim that without the use of such devices crime detection in certain areas may suffer some delays since eavesdropping is quicker, easier, and more certain. However, techniques and practices may well be developed that will operate just as speedily and certain—and what is more important—without attending illegality.

It is said that neither a warrant nor a statute authorizing eavesdropping can be drawn so as to meet the Fourth Amendment's requirements. If that be true then the "fruits" of eavesdropping devices are barred under the Amendment. On the other hand this Court has in the past, under specific conditions and circumstances, sustained the use of eavesdropping devices. See *Goldman* v. *United States, supra; On Lee* v. *United States, supra; Lopez* v. *United States, supra;* and *Osborn* v. *United States, supra.* In the latter case the eavesdropping device was permitted where the "commission of a specific offense" was charged, its use was "under the most precise and discriminating circumstances" and the effective administration of justice in a federal court was at stake. The States are under no greater restrictions. The Fourth Amendment does not make the "precincts of the home or office . . . sanctuaries where the law can never reach." DOUGLAS, J., dissenting in *Warden, Maryland Penitentiary* v. *Hayden, supra,* but it does prescribe a constitutional standard that must be met before official invasion is permissible. Our concern with the statute here is whether its language permits a trespassory invasion of the home, by general warrant, contrary to the command of the Fourth Amendment. As it is written, we believe that it does.

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 615.—October Term, 1966.

Ralph Berger, Petitioner, *v.* State of New York.	On Writ of Certiorari to the Court of Appeals of New York.

[June 12, 1967.]

Mr. Justice Douglas, concurring.

I join the opinion of the Court because at long last it overrules *sub silentio Olmstead* v. *United States,* 277 U. S. 438, and its offspring and brings wiretapping and other electronic eavesdropping fully within the purview of the Fourth Amendment. I also join the opinion because it condemns electric surveillance, for its similarity to the general warrants out of which our Revolution sprang and allows a discreet surveillance only on a showing of "probable cause." These safeguards are minimal if we are to live under a regime of wiretapping and other electronic surveillance.

Yet there persists my overriding objection to electronic surveillance, *viz,* that it is a search for "mere evidence" which, as I have maintained on other occasions (*Osborn* v. *United States,* 385 U. S. 323, 349–354), is a violation of the Fourth and Fifth Amendments, no matter the nicety and precision with which a warrant may be drawn, a proposition that I developed in detail in my dissent in *Warden* v. *Hayden,* —— U. S. ——, decided only the other day.

A discreet selective wiretap or electric "bugging" is of course not rummaging around, collecting everything in the particular time and space zone. But even though it is limited in time, it is the greatest of all invasions of privacy. It places a government agent in the bedroom, in the business conference, in the social hour, in the

lawyer's office—everywhere and anywhere a "bug" can be placed.

If a statute were to authorize placing a policeman in every home or office where it was shown that there was probable cause to believe that evidence of crime would be obtained, there is little doubt that it would be struck down as a bald invasion of privacy, far worse than the general warrants prohibited by the Fourth Amendment. I can see no difference between such a statute and one authorizing electronic surveillance, which, in effect, places an invisible policeman in the home. If anything, the latter is more offensive because the homeowner is completely unaware of the invasion of privacy.

The traditional wiretap or electronic eavesdropping device constitutes a dragnet, sweeping in all conversations within its scope—without regard to the participants or the nature of the conversations. It intrudes upon the privacy of those not even suspected of crime and intercepts the most intimate of conversations. Thus, in the *Coplon* case (*United States* v. *Coplon*, 91 F. Supp. 867, rev'd, 191 F. 2d 749) wiretaps of the defendant's home and office telephones recorded conversations between the defendant and her mother, a quarrel between a husband and wife who had no connection with the case, and conferences between the defendant and her attorney, concerning the preparation of briefs, testimony of government witnesses, selection of jurors and trial strategy. Westin, The Wire Tapping Problem: An Analysis and a Legislative Proposal, 52 Col. L. Rev. 165, 170–171 (1952); Barth, The Loyalty of Free Men 173 (1951). It is also reported that the FBI incidentally learned about an affair, totally unrelated to espionage, between the defendant and a Justice Department attorney. Barth, *supra,* at 173. While tapping one telephone, police recorded conversations involving, at the other end, The Julliard School of Music, Brooklyn Law School,

Consolidated Radio Artists, Western Union, Mercantile Commercial Bank, several restaurants, a real estate company, a drug store, many attorneys, an importer, a dry cleaning establishment, a number of taverns, a garage, and the Prudential Insurance Company. Westin, *supra,* at 188, n. 112. These cases are but a few of many demonstrating the sweeping nature of electronic total surveillance as we know it today.

It is, of course, possible for a statute to provide that wiretap or electronic eavesdrop evidence is admissible only in a prosecution for the crime to which the showing of probable cause related. See Nev. Rev. Stat. § 200.680 (1963). But such a limitation would not alter the fact that the order authorizes a general search. Whether or not the evidence obtained is used at a trial for another crime, the privacy of the individual has been infringed by the interception of all of his conversations. And, even though the information is not introduced as evidence, it can and probably will be used as leads and background information. Again, a statute could provide that evidence developed from eavesdrop information could not be used at trial. Cf. *Silverhorne Lumber Co., Inc.* v. *United States,* 251 U. S. 385, 392; *Nardone* v. *United States,* 308 U. S. 338; *Silverman* v. *United States,* 365 U. S. 505. But, under a regime of total surveillance, where a multitude of conversations are recorded, it would be very difficult to show which aspects of the information had been used as investigative information.

As my Brother WHITE says in his dissent, this same vice inheres in any search for tangible evidence such as invoices, letters, diaries, and the like. "In searching for seizable matters, the police must necessarily see or hear, and comprehend, items which do not relate to the purpose of the search." That is precisely why the Fourth Amendment made any such rummaging around uncon-

stitutional, even though supported by a formally adequate warrant. That underwrites my dissent in *Hayden.*

With all respect, my Brother BLACK misses the point of the Fourth Amendment. It does not make every search constitutional provided there is a warrant that is technically adequate. The history of the Fourth Amendment, as I have shown in my dissent in the *Hayden* case, makes it plain that any search in the precincts of the home for personal items that are lawfully possessed and not articles of a crime is "unreasonable." That is the essence of the "mere evidence" rule that long obtained until overruled by *Hayden.*

The words that a man says consciously on a radio are public property. But I do not see how government using surreptitious methods can put a person on the radio and use his words to convict him. Under our regime a man stands mute if he chooses, or talks if he chooses. The test is whether he acts voluntarily. That is the essence of the face of privacy protected by the "mere evidence" rule. For the Fourth Amendment and the Fifth come into play when the accused is "the unwilling source of the evidence" (*Gouled* v. *United States,* 255 U. S. 298, 306), there being no difference "whether he be obliged to supply evidence against himself or whether such evidence be obtained by an illegal search of his premises and a seizure of his private papers." *Ibid.*

That is the essence of my dissent in *Hayden.* In short, I do not see how any electronic surveillance that collects evidence or provides leads to evidence is or can be constitutional under the Fourth and Fifth Amendments. We could amend the Constitution and so provide—a step that would take us closer to the ideological group we profess to despise. Until the amending process ushers us into that kind of totalitarian regime, I would adhere to the protection of privacy which the Fourth Amendment, fashioned in Congress and submitted to the people,

was designed to afford the individual. And unlike my Brother BLACK, I would adhere to *Mapp* v. *Ohio*, 367 U. S. 643, and apply the exclusionary rule in state as well as federal trials—a rule fashioned out of the Fourth Amendment and constituting a high constitutional barricade against the intrusion of Big Brother into the lives of all of us.

SUPREME COURT OF THE UNITED STATES

No. 615.—October Term, 1966.

Ralph Berger, Petitioner, *v.* State of New York.	On Writ of Certiorari to the Court of Appeals of New York.

[June 12, 1967.]

Mr. Justice Stewart, concurring in the result.

I fully agree with Mr. Justice Black, Mr. Justice Harlan, and Mr. Justice White, that this New York law is entirely constitutional. In short, I think that "electronic eavesdropping, *as such,* or as it is permitted by this statute, is not an unreasonable search and seizure." [1] The statute contains many provisions more stringent than the Fourth Amendment generally requires, as Mr. Justice Black has so forcefully pointed out. And the petitioner himself has told us that the law's "reasonable grounds" requirement "is undisputably equivalent to the probable cause requirement of the Fourth Amendment." This is confirmed by decisions of the New York courts. *People* v. *Cohen,* 42 Misc. 2d 403; *People* v. *Beshany,* 43 Misc. 2d 521, 252 N. Y. S. 2d 110; *People* v. *Grossman,* 45 Misc. 2d 557, 257 N. Y. S. 2d 266. Of course, a state court's construction of a state statute is binding upon us.

In order to hold this statute unconstitutional, therefore, we would have to either rewrite the statute or rewrite the Constitution. I can only conclude that the Court today seems to have rewritten both.

The issue before us, as Mr. Justice White says, is "whether *this* search complied with Fourth Amendment standards." For me that issue is an extremely close one

[1] Dissenting opinion of Mr. Justice Harlan, *post,* p. —

in the circumstances of this case. It certainly cannot be resolved by incantation of ritual phrases like "general warrant." Its resolution involves "the unavoidable task in any search and seizure case: was the particular search and seizure reasonable or not?" [2]

I would hold that the affidavits on which the judicial order issued in this case did not constitute a showing of probable cause adequate to justify the authorizing order. The need for particularity and evidence of reliability in the showing required when judicial authorization is sought for the kind of electronic eavesdropping involved in this case is especially great. The standard of reasonableness embodied in the Fourth Amendment demands that the showing of justification match the degree of intrusion. By its very nature electronic eavesdropping for a 60-day period, even of a specified office, involves a broad invasion of a constitutionally protected area. Only the most precise and rigorous standard of probable cause should justify an intrusion of this sort. I think the affidavits presented to the judge who authorized the electronic surveillance of the Steinman office failed to meet such a standard.

So far as the record shows, the only basis for the Steinman order consisted of two affidavits. One of them contained factual allegations supported only by bare, unexplained references to "evidence" in the district attorney's office and "evidence" obtained by the Neyer eavesdrop. No underlying facts were presented on the basis of which the judge could evaluate these general allegations. The second affidavit was no more than a statement of another assistant district attorney that he had read his associate's affidavit and was satisfied on that basis alone that proper grounds were presented for the issuance of an authorizing order.

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[2] See dissenting opinion of MR. JUSTICE BLACK, *post*, p. —.

This might be enough to satisfy the standards of the Fourth Amendment for a conventional search or arrest. Cf. *Aguilar* v. *Texas*, 378 U. S. 108, 116 (dissenting opinion). But I think it was constitutionally insufficient to constitute probable cause to justify an intrusion of the scope and duration that was permitted in this case.

Accordingly, I would reverse the judgment.

Dissenting opinions were rendered by Mr. Justice Black, Mr. Justice Harlan and Mr. Justice White.