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FOREIGN INTELLIGENCE SURVEILLANCE ACT

HEARINGS

BEFORE THE

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

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

NINETY-FIFTH CONGRESS

SECOND SESSION

ON

H.R. 7308

FOREIGN INTELLIGENCE SURVEILLANCE ACT

JUNE 22, 28, AND 29, 1978

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FOREIGN INTELLIGENCE SURVEILLANCE ACT

THURSDAY, JUNE 22, 1978

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

The subcommittee met, pursuant to notice, at 9:02 a.m., in room 2237, Rayburn House Office Building, the Honorable Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Drinan, Ertel and Railsback.

Also present: Representatives Mazzoli and McClory.

Staff present: Bruce A. Lehman, counsel; Timothy A. Boggs, professional staff member; and Joseph V. Wolfe, associate counsel.

Mr. KASTENMEIER. The committee will come to order.

The Subcommittee on Courts, Civil Liberties and the Administration of Justice began studying the issue of foreign intelligence wiretapping over 4 years ago, in April 1974, when we held hearings on several bills, including a proposal to require a court order prior to any interception of oral or wire communications in foreign intelligence cases.

At that time, Assistant Attorney General Henry Petersen, speaking for the administration, stated to the subcommittee, "Let me be very brief. We oppose these bills. That is it." During the subsequent 2-year period, Mr. Petersen and his successors, as well as intervening Attorneys General, consistently opposed the concept of legislation imposing judicial restraints on foreign intelligence wiretapping.

However, in 1976, President Ford announced a change in policy. He indicated a willingness to work with Congress to develop a system of court supervision of foreign intelligence wiretapping. In response to his invitation for congressional input, Congressman Railsback and I wrote to the President offering our cooperation and included draft language we had developed as a substitute for H.R. 141, an earlier bill that I had sponsored on this issue.

Although the President acknowledged our letter, neither he nor Attorney General Levi responded substantively to our draft language. Indeed, the Attorney General did not consult with us, although he surely did with the Senate, prior to preparation of a final draft bill which was introduced by Chairman Rodino as H.R. 12750, the Foreign Intelligence Surveillance Act of 1976.

An identical bill, S. 3197, was introduced in the Senate. While H.R. 12750 and S. 3197 represented a distinct departure from the

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former administration's long-held opposition to any statutory controls on foreign intelligence wiretapping, they were considerably more limited in scope than bills which earlier had been considered by our subcommittee.

A broad coalition of civil liberties groups, in fact, argued that the bill simply constituted a disguised method of legitimizing the questionable practices which had in the past been represented by warrantless wiretapping. These groups, led by the American Civil Liberties Union, pointed out that the bill did not require a showing of probable cause, did not permit judicial evaluation of the facts supporting a wiretap application, and failed to eliminate many exceptions to the warrant requirement.

Although I shared many of the reservations of the organized civil liberties community, I agreed to cosponsor H.R. 12750 to be used as a vehicle in the 94th Congress after personal requests by the President and Attorney General to do so.

The subcommittee was unable to mark up a measure during the 94th Congress primarily because the Senate, with which the administration had originally collaborated, failed to act.

However, we did consider the matter extensively in a series of hearings and briefing sessions. Three days of hearings were held specifically on the administration bill. In addition, we considered the question of foreign intelligence wiretapping in the broader context of general hearings on the surveillance practices of Federal agencies.

Also, we met informally with former Attorney General Nicholas Katzenbach to discuss his administration of the foreign intelligence surveillance system and we received an executive session briefing on classified information from both the National Security Agency and the Department of Justice.

With the convening of the 95th Congress, work began again in the Senate to fashion a statute which would meet the needs of the Nation's intelligence community while at the same time assuring individual Americans and foreign visitors that their rights under our Constitution would be protected.

Meanwhile, in the House, a new Permanent Select Committee on Intelligence was created for the sole purpose of focusing on the legislative and oversight responsibilities necessary to assure the effective and ethical operation of our Nation's intelligence system. That committee and its Subcommittee on Legislation immediately began consideration of H.R. 7308 and related bills, including my own, on the subject of foreign intelligence surveillance.

The Subcommittee on Legislation conducted eight hearings and markup sessions, followed by additional markup before the full Intelligence Committee. Indeed, two members of the Judiciary Committee, the gentleman from Illinois, Mr. McClory, and the gentleman from Kentucky, Mr. Mazzoli, were members of that committee and are.

So this morning our subcommittee convenes for the fourth set of hearings during the current Congress on the issue of foreign intelligence surveillance. It is the intention of the committee to complete hearings shortly, hopefully next week, and immediately dispose of the issue as far as the subcommittee is concerned. It will not be our

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intention to hold up an opportunity for legislation to move forward in this area.

It is a great pleasure to welcome as our first witness the Attorney General of the United States, the Honorable Griffin B. Bell.

TESTIMONY OF HON. GRIFFIN B. BELL, ATTORNEY GENERAL OF THE UNITED STATES, ACCOMPANIED BY FREDERICK BARON, SPECIAL ASSISTANT TO THE ATTORNEY GENERAL, AND B. NEWAL SQUYRES, ATTORNEY, OFFICE OF LEGAL COUNSEL

Attorney General BELL. Thank you, Mr. Chairman and members of the committee.

This is the fourth time that I have testified publicly in support of the Foreign Intelligence Surveillance Act and I am pleased to be here on behalf of the administration and, in particular, the intelligence community, in support of H.R. 7308.

As reported, this legislation would authorize the use of electronic surveillance within the United States to obtain foreign intelligence and counterintelligence, including international terrorism, information. The bill provides for such surveillance through a procedure of court approval for most targets or Attorney General approval for surveillance that would not involve communications of U.S. persons.

This bill is one of the most important measures before Congress this year. As you know, foreign intelligence electronic surveillance in the United States has been conducted by our Government for many years without explicit statutory authorization or regulation.

While these surveillance techniques are extremely useful in gathering intelligence information, they also intrude upon the privacy of their subjects. Thus, their use raises a difficult problem, that of finding the proper balance between the vital need of this country to protect its security by collecting foreign intelligence information, and the equally important need to protect the civil liberties of persons in the United States.

Only in the last few years has this problem received the public attention that it deserves. The executive branch has in the past dealt with this problem in particular cases without the guidance of a public law that authorizes proper actions, prohibits the improper, and draws a clear line between the two.

Nor have the few court decisions in this area delineated, with anything approaching the precision of this legislation, the scope of the executive's authority to gather foreign intelligence in the United States. This bill changes that situation. I am convinced that H.R. 7308 strikes a proper and reasonable balance between the vital interest at stake.

Virtually all functions of our Government are subject to exacting scrutiny by means of legislative oversight, judicial review, press comment, and ultimately, citizen control in the voting booth.

On the other hand, clandestine intelligence activities, by their very nature, must be conducted by the executive branch with a degree of secrecy that insulates them from the full scope of these review mechanisms. Such secrecy in intelligence operations is essential if we are to preserve our society, with all its freedoms, from foreign enemies.

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I believe this bill provides the necessary degree of secrecy while permitting enough review of executive actions by the courts and Congress to safeguard the rights of Americans.

We are all aware that there have been abuses of electronic surveillance in the past. Strict internal measures taken by this administration and the previous one are designed to prevent their recurrence. But no matter how effective these measures are—and I believe they are indeed effective—there is no substitute for legislation that specifies under what circumstances and under what restrictions electronic surveillance for foreign intelligence purposes may be conducted.

Although you are probably aware of the process this bill has undergone, I want to stress this because it illustrates how the legislative process should work. A long and careful process has produced the excellent piece of legislation before you.

The basic concept of this bill was developed by Attorney General Levi during the Ford administration. That bill, S. 3197, was reported favorably by the Senate Judiciary and Intelligence Committees but was not acted upon before the session ended. This subcommittee likewise conducted hearings on that bill, H.R. 12750.

H.R. 7308 and its counterpart, S. 1566, were built on this foundation by the new administration through extensive consultation between members of the executive branch representing all the affected agencies and a substantial number of interested members of the legislative branch.

The bipartisan cooperation among executive and legislative officials that began during the drafting and introduction stages of this bill has continued during its subsequent consideration by the Congress.

On April 20, 1978, after another round of hearings in two committees, S. 1566 was passed by the Senate in a vote of 95 to 1. Senators Kennedy and Thurmond of the Senate Judiciary Committee and Senators Garn and Bayh of the Senate Intelligence Committees worked together to obtain this overwhelming vote of approval.

This process continued during the 6 months the bill was under consideration by the House Intelligence Committee. The bill was amended there to accommodate concerns raised by members of the committee. As a result of carefully considering the views of all those involved and narrowly tailoring amendments to meet the expressed concerns, the product of that committee's extensive work is legislation that is even more carefully balanced than before and that, in my opinion, should be able to garner wide bipartisan support in the House.

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

In addition, I appeared along with Admiral Turner, Admiral Inman, and Director Webster before the House Intelligence Committee in closed session. We discussed frankly and in great detail certain issues that had been raised during the course of that com-

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mittee's consideration of the bill. The result is the bill now before you.

H.R. 7308, as amended, creates a special court in Washington, D.C., of Federal judges designated by the Chief Justice and a Special Court of Appeals also designated by the Chief Justice.

The bill requires a prior judicial warrant for all electronic surveillance for foreign intelligence purposes in the United States in which there is a possibility that a communication of a U.S. person might be intercepted. Certain types of surveillance may only cover communications exclusively between or among what are commonly referred to as "official" foreign powers—foreign governments, factions of foreign nations, and entities openly acknowledged to be controlled by a foreign government—H.R. 7308 101(a) (1), (2), and (3).

The House bill would require only Attorney General approval for this type of surveillance. Emergency surveillance would be permitted without a warrant in limited circumstances, but a warrant would have to be obtained within 24 hours of the initiation of the surveillance.

Surveillance solely for the purpose of testing equipment, training personnel, or "sweeps" to discover unlawful electronic surveillance are authorized without a warrant under strict controls to insure that no information concerning U.S. persons is improperly used, retained, or disseminated.

The bill authorizes the Attorney General to make applications to the special court for a court order approving the use of electronic surveillance. Approval of an application under the bill would require a finding by a judge that the target of the surveillance is either a "foreign power" or an "agent of a foreign power," terms which are defined in the bill, and that the facilities or places at which the surveillance is directed are being used or are about to be used by a foreign power or agent of a foreign power.

A "foreign power" may include a foreign government, a faction of a foreign government, a group engaged in international terrorism, a foreign-based political organization, or an entity directed and controlled by a foreign government or governments.

An "agent of a foreign power" includes nonresident aliens who act in the United States as officers, members, or employees of foreign powers or who act on behalf of foreign powers which engage in clandestine intelligence activities in the United States contrary to the interests of this country.

No U.S. person is considered as the "agent of a foreign power" unless he engages in certain activities on behalf of a foreign power which involve or may involve criminal acts.

This is the so-called criminal standard contained in the pertinent definition of "agent of a foreign power" (H.R. 7308 101(b)(2)) the requirement that before a U.S. person could be surveilled, there must exist some nexus between the activities forming the basis for the surveillance and a violation of the criminal law.

This provision has its greatest impact on the FBI. The Bureau is convinced, and I agree, that this definition has strengthened the bill, in terms of protecting the national security while preserving the rights of U.S. persons. We believe this definition is an improvement over H.R. 7308 as introduced because it delineates with great-

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er precision, without necessarily narrowing, the circumstances and standards under which surveillance may be authorized.

The bill provides for safeguards, termed "minimization procedures," to limit the acquisition, retention and dissemination of information regarding U.S. persons that does not relate to the purposes for which surveillance was authorized.

Moreover, in order to establish that the information sought by surveillance is indeed "foreign intelligence information," a warrant may be issued only if a certification to that affect is made by the Assistant to the President for National Security Affairs or a similar official. That certification is reviewable by the court under the familiar and limited "clearly erroneous" standard only if the target of surveillance is a U.S. person.

Because of differences in the types of targets that might be subjected to electronic surveillance, the bill creates essentially two different types of warrants. A special warrant requiring disclosure of less sensitive information to the judge and allowing surveillance for up to 1 year is available if the target of the surveillance is an official foreign power. A more detailed warrant application is required for targeting U.S. citizens and permanent resident aliens.

The court could approve electronic surveillance for foreign intelligence purposes for a period of 90 days or, in the case of surveillance of a foreign government, faction, or entity openly controlled by a foreign government, for a period of up to 1 year. Any extension of the surveillance beyond that period would require reapplication to the court and new findings as required for the original order.

H.R. 7308 requires annual reports to the Administrative Office of the U.S. Courts and to the Congress of statistics regarding applications and orders for electronic surveillance. The Attorney General is also required, on a seminannual basis, to inform fully the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence concerning all electronic surveillance under the bill. Nothing in the bill restricts the authority of those committees to obtain further information related to their congressional oversight responsibilities.

In closing, I cannot stress too much the importance of the enactment of this legislation. If enacted, the bill would stand as a significant monument to our national commitment to democratic control of intelligence functions and would spur completion of charter legislation.

As President Carter noted when he announced this bill:

> One of the most difficult tasks in a free society like our own is the correlation between adequate intelligence to guarantee our Nation's security on the one hand, and the preservation of basic human rights on the other.

It is a very delicate balance to strike, but one which is necessary in our society. In my view, this bill strikes the proper balance. It sacrifices neither our security nor our civil liberties, and assures that the dedicated and patriotic men and women who service this country in intelligence positions will have the affirmation of Congress that their activities are lawful.

I urge this subcommittee to support this bill and speed it toward enactment.

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[The prepared statements of Hon. Griffin Bell, Attorney General of the United States before the Senate Judiciary Committee, June 13, 1977 follows:]

PREPARED STATEMENT OF HON. GRIFFIN B. BELL, ATTORNEY GENERAL OF THE UNITED STATES

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

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

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

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

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

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

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

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

Approval of a warrant application under this bill would require a finding by the judge that the target of the surveillance is a "foreign power" or an "agent of a foreign power." These terms, defined in the bill, ensure that no United States citizen or permanent resident alien may be targeted for electronic surveillance unless a judge finds probable cause to believe either that he is engaged in clandes-

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tine intelligence, sabotage, or terrorist activities for or on behalf of a foreign power in violation of the law, or that, pursuant to the direction of a foreign intelligence service, he is collecting or transmitting in a clandestine manner information or material likely to harm the security of the United States. The judge would be required to find that the facilities or place at which the electronic surveillance is to be directed are being used or are about to be used by a foreign power or an agent of a foreign power.

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

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

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

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

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

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

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

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

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

Third, in the bill last year judges were never allowed to look behind the executive certification that the information sought was foreign intelligence information, that the purpose of the surveillance was to obtain such information, and that such information could not reasonably be obtained by normal investigative techniques. In this bill, when United States persons are the target of the surveillance the judge is required to determine that the above certifications are not clearly erroneous. While the clearly erroneous standard is not the same as a probable cause standard, it is the same basis of review which courts ordinarily apply to review of administrative action by executive officials, which administrative action may also directly and substantially impinge on the rights of Americans. We believe it is not unreasonable that where high executive officials with expertise in this area have certified to such facts, some degree of deference by the court is appropriate. This is especially so

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because the judges will be called upon to consider highly sophisticated matters of national defense, foreign affairs, and counterintelligence. The wide difference between such issues and the questions normally addressed by judges in warrant proceedings, conducted ex parte without an adversary hearing, is a major reason for adopting a standard other than probable cause.

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

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

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

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

As a principle this is a worthy goal, but it is important to keep certain factors in mind. First, this principle is not constitutionally required; there are numerous searches which the Supreme Court has found constitutional both with and without a warrant where there is no probable cause to believe a crime has been committed. These range from administrative searches and custom searches to stop-and-frisks and airport searches. In the case of *United States* v. *United States District Court* the Supreme Court indicated that the probable cause standard of the Fourth Amendment in intelligence searches did not necessarily mean probable cause to believe that a crime had been committed. Thus, it is our considered belief that the standard in Subparagraph (iii) is constitutional. Second, even though we might desire that the activities described in Subparagraph (iii) be made criminal, I believe that, depending upon the facts, it is possible that the activity described therein would not be held to be a violation of any current federal criminal statute. On the other hand, when a United States person furtively, clandestinely collects or transmits information or material to a foreign intelligence service pursuant to the direction of a foreign intelligence service and where the circumstances surrounding this activity indicate that the transmission of the material or information would be harmful to our security or that the failure of the government to be able to monitor such activity would be harmful to the security of the United States, then I believe that whether or not that activity is today a violation of our criminal statutes, the government has a duty to monitor that activity to safeguard the security and welfare of the nation. Third, there is a certain danger in extending the criminal law, the purpose of which is to prosecute, convict and normally incarcerate the perpetrator, merely to satisfy the principle that electronic surveillance should not be undertaken absent a criminal violation.

The Department of Justice is undertaking at this time to review the espionage laws for the purpose of making them comprehensive in the areas in which prosecution is warranted and generally to rationalize this area of the law. This undertaking

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is quite difficult, as illustrated by the fact that the controversial espionage provisions of the former S. 1 were the result of just such an undertaking. I can only assure you today that we will do our utmost to draft revised espionage laws in such a way that the non-criminal standard might be repealed.

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

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

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

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

PREPARED STATEMENT BY HON. GRIFFIN B. BELL, ATTORNEY GENERAL OF THE UNITED STATES BEFORE THE SENATE SELECT COMMITTEE ON INTELLIGENCE, JULY 19, 1977

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

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

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

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

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

While I am not prepared to go into great detail over these problems here, some of which could only be discussed in Executive session, I can say that many of the problems arise out of the fact that overseas there is a fair degree of cooperation between our Government and the police and intelligence services of other nations, and surveillances undertaken are not exclusively for our purposes. The level of cooperation in surveillances, moreover, can span the entire spectrum from situations where we effectively can control all aspects of the surveillance to situations where we have virtually no control. Restrictions or limitations on such surveillances could result in the loss of cooperation. These cooperative ventures would require adjustments of one form or another in all aspects of S. 1566, if it were to be used as the vehicle for reaching overseas surveillances. It will not be a simple matter to apply to electronic surveillance abroad the provisions of S. 1566 relating to the standards for approval, the information to be given to the judge, and the limitations in the order itself.

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

In dealing with these problems one must keep in mind that overseas the foreign intelligence need for electronic surveillance is probably more critical than within the United States. The conditions under which our personnel must operate can include clandestine activities in hostile areas and often involves activities where our

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ability to engage in electronic surveillance at all is extremely fragile, because it must be covertly conducted in territory not under our control.

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

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

PREPARED STATEMENT OF GRIFFIN B. BELL, ATTORNEY GENERAL BEFORE THE HOUSE OF REPRESENTATIVES, PERMANENT SELECT COMMITTEE ON INTELLIGENCE, SUBCOMMITTEE ON LEGISLATION, JANUARY 10, 1978

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

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

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

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

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

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

I am particularly gratified by this Committee's prompt consideration of the legislation, exemplified by today's hearings. The debate is further enhanced by three other bills also before the Committee. I recognize the serious thought that has gone into all of these proposals—H.R. 5632, introduced by Representative Kastenmeier;

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H.R. 5794, introduced by Representative Railsback; and H.R. 9745, introduced by Representative McClory. While the Administration remains committed to H.R. 7308 as the best way to resolve the sensitive and difficult issues raised by foreign intelligence electronic surveillance, we have all benefited from the hard work of these Congressmen.

For the Committee's information and assistance, I am submitting copies of my testimony before the Senate Judiciary and Intelligence Committees. These statements discuss in greater detail some of the issues I am touching on here. I would particularly call your attention to the improvements in this bill over a similar measure introduced in the last Congress. First, the current bill recognizes no inherent power of the President to conduct electronic surveillance. Second, a prior judicial warrant is now required for all targeting of Americans in the United States for electronic surveillance of their international communications. Third, judicial review authority in the warrant procedure is strengthened. I would like now to review briefly the major features of H.R. 7308.

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

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

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

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

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

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

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

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Mr. KASTENMEIER. Thank you, Mr. Attorney General.

I might indicate that I know that you have to go to the White House and we will be reasonably brief this morning. Your job is a difficult one. I want to express my personal appreciation to you for your services in that job.

Attorney General BELL. Thank you.

Mr. KASTENMEIER. During several years of debate on this legislation, the Department of Justice has maintained, consistently, that although the Supreme Court has never actually ruled on the article 2 powers of the President, it granted him the authority to conduct electronic surveillance for national security purposes without court warrant.

H.R. 7308, as reported by the Intelligence Committee, permits limited surveillance without warrant, but the report of the committee also states:

> The authority of the President to authorize electronic surveillance without a court order is a limited class of surveillance covered by subsection A of this section and does not derive from his powers under article 2 of the Constitution but rather the legislation itself.

In your support for the committee's work product, do you endorse this statement in this area? Does the President intend to act only pursuant to the authority granted by this legislation should it become law?

Attorney General BELL. He made that pledge and we agreed to take out the provision in the bill in the last Congress. The President was not waiving his inherent power. We took that out in the Senate. The President has agreed to go only by the statute.

Mr. KASTENMEIER. Then you have no quarrel with the committee's report language?

Attorney General BELL. I don't. I don't think it is carefully stated. Perhaps you could read it again. Let me just read it. I think that is a correct statement after we get the legislation.

Mr. KASTENMEIER. I am glad to have that assurance because that has been a problem in the country for some time.

Attorney General BELL. It was a bone of contention in the last Congress, one we immediately had to face when we got to the Senate.

Mr. KASTENMEIER. On this topic, section 102 of the House bill, as reported by the Intelligence Committee, permits two types of surveillance of communications without warrants. First, that which is solely between foreign powers of specific types, and, second, that which is aimed at the acquisition of "technical intelligence from property or premises under the open and exclusive control of a foreign power."

To the extent that you are able, will you discuss the effect of this provision? What is meant by technical intelligence?

Attorney General BELL. Mr. Chairman, this is Mr. McClory's amendment. He can very well explain it to the committee in closed session. We fought this out for some hours in the closed session in the Intelligence Committee. I would defer to him to tell the committee about it. I don't think we ought to discuss it in open session.

Mr. KASTENMEIER. Yes, I added "to the extent that you are able." I realize that there may be aspects that you might not want to

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publicly disclose. But to the extent that anybody can talk about it publicly would you please explain.

Attorney General BELL. I can do a little better than I have done.

Mr. KASTENMEIER. We will also ask Mr. McClory as well.

Attorney General BELL. On page 5 of this statement I said the bill required a broad judicial warrant for all electronic surveillance for foreign intelligence purposes in the United States in which there is a possibility that a communication of a U.S. person might be intercepted. The provision you refer to is beyond that.

I went on to say certain types of surveillance may only cover communications exclusively between or among what are commonly referred to as official foreign powers. These are the intelligence communications of all foreign powers, governments, factions of foreign powers, and entities acknowledged to be controlled by a foreign power.

I think that this is one agency that would be engaged in that more than any other. Beyond that, I expect Congressman McClory ought to tell you.

Mr. KASTENMEIER. Thank you. We will ask for your amplification of this subsequently by letter. I don't know that it will be necessary for us to go into closed session.

Mr. DRINAN. Would the chairman yield?

Mr. KASTENMEIER. Yes.

Mr. DRINAN. Would the Attorney General approve or disapprove the McClory amendment? That makes the Senate bill substantially different. Is the Justice Department in favor of it or against it?

Attorney General BELL. I was against it all along.

Mr. DRINAN. That is good. I thank you very much. I yield back to the chairman.

Mr. KASTENMEIER. Mr. Attorney General, are the intelligence agencies satisifed they will be able to secure sufficient intelligence information even though under this bill they will be restricted by the so-called criminal standard with respect to U.S. persons, and is there support for the legislation within the intelligence community?

Attorney General BELL. The President appointed me as the chairman of the intelligence community for the purpose of this bill. We had a unanimous view until we got into the session that we have been talking about where Mr. McClory put his amendment on. At that time, one of the groups in the intelligence community took the position that the McClory amendment was fair and reasonable and broke away from the rest of us.

But the bill generally has the unanimous support of the intelligence community. We think that under the bill we can secure sufficient intelligence to safeguard the Nation, and we think that it will enhance our intelligence apparatus because we will have the additional safeguard of the courts. Because of that, the American public will have added confidence in what we are doing.

As you noted, there has never been any definitive Supreme Court decision on some of these questions. We have been floundering in the lower courts doing the best we can and have been doing that for, I guess, about 40 years.

Mr. KASTENMEIER. This committee has also other responsibilities, including the courts. I am concerned about the provisions within

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this bill that the staffing of the special court created by the legislation is to be funded by executive branch sources. I am surprised.

I am wondering, can't we have a process to be developed to provide clerical and legal assistance from the judicial branch? Aren't there any separation of power problems here? Why should the executive branch be responsible for supporting special courts?

Attorney General BELL. I agree with the chairman. I think that is a problem. My people here are telling me it is not, but it really is. I don't think the Justice Department ought to be financing the court system. I think what the language means is not clear.

I think it means that whatever has to be done by way of procedures or making systems secure and that sort of thing, we will furnish the money for. But we are not going to pay any judges or travel expense of judges or court personnel. It may be that could be clarified to some extent.

We have to put safes in judges' offices, clerical personnel, give them security clearances, and, of course, we will pay that. I think that is what is contemplated.

Actually, I don't foresee that there will be any additional expense for the courts except maybe some travel expense.

Mr. KASTENMEIER. I appreciate your comments, Mr. Attorney General. I am going to yield now to the gentleman from Massachusetts.

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

Mr. Attorney General, I am afraid I have to go on opposing this bill. I sympathize with you that you have testified four times on its behalf. I have testified seven times against it. Ideologically, I think this is contrary to the fourth amendment, and if it does pass the Congress, I will join in a suit to set it aside as unconstitutional.

I suppose at this point in time my best strategy would be to point out the aberrations in this bill, the things which in my judgment are wrong, not as to the major assumptions, because I suppose the administration has crossed the bridge on that, but let me point out the all-purpose loophole in S. 1566. It is on page 5.

In that, foreign intelligence information is defined if one drops down to 2, as "any information relating to the successful conduct of the foreign affairs of the United States."

Now the pretense is made that somehow this gets up to probable cause of crime and that is not so. That is all that is needed. If the State Department or the CIA or FBI wants foreign intelligence information and all they have to say is that this relates to the successful conduct of the foreign affairs of the United States, period, they don't even have to say that it relates to the national defense or the security of the Nation.

Attorney General BELL. This is not counterintelligence we are talking about. It is partially foreign intelligence. I don't have any trouble with that. That is what foreign intelligence is, to find out what other people are doing and find out how to conduct our own affairs in light of what others are doing.

Mr. DRINAN. So it just means that anything they think——

Attorney General BELL. It doesn't have anything to do with American citizens. It is in our dealings with foreign countries.

Mr. DRINAN. But they don't have to allege that this is necessary or helpful to the national defense or security of the Nation. All

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they have to say is if we want to conduct our foreign affairs successfully, we are going to get this information.

Attorney General BELL. I think there is nothing wrong with that myself. If I were President, I would still want to know what is going on in other countries. I would like to know what the weather is like, what the crop reports were. All that has to do with foreign affairs.

Mr. DRINAN. My point is that there is no standard, that anything the CIA wants to know they just say it is necessary for the foreign affairs of this country and they go forward.

On another point on page 18, the custodian has to help out the CIA for a break-in or a burglary. The landlord or the custodian "shall do what he is told, shall furnish forthwith any and all information or technical assistance."

This is requiring him to do an affirmative act to break in to install the equipment. A lot of people would be opposed to this.

Do you think at least we should have a conscience clause exempting those who think this is wrong? We have that in the abortion statutes that no one is required to collaborate on an abortion.

Attorney General BELL. I would not object to that if you didn't apply it to corporations. I never thought corporations had much conscience anyway.

Mr. DRINAN. But this is the custodian.

Attorney General BELL. Are you talking about a corporation, a business, or some poor citizen walking down the street? I don't mind a citizen saying, I don't want to do it out of conscience, but that is really not asking so much for some citizen. I would not want you to exempt some large company.

Mr. DRINAN. But you would go along with the idea that we should have a conscience clause so the landlord and custodian will not be required to do what the CIA tells him about it and then shut up about it, don't even tell his wife.

Attorney General BELL. This is not the CIA. It is the——

Mr. DRINAN. Well, same thing—right?

Attorney General BELL. I would be hard put to say that I would not agree to a conscience clause excepting for an individual. I never thought about that.

Mr. DRINAN. That is good.

Now if he does go forward, the next paragraph says he has to be paid the prevailing rate. I don't know of any prevailing rates for burglaries or break-ins. But that is the type of thing we are opening up in this bill, Mr. Attorney General.

As you know, I feel very strongly on this thing. I think it is outrageous to require an American citizen to follow the orders of the FBI, and if he does so, he gets the prevailing rate.

I am glad to hear you are against the McClory amendment. That is very consoling. But let's go to the essence of this whole campaign by the CIA and FBI over many years to get this bill. It has been a very aggressive campaign. They want this desperately. Mr. Edward Levi came to me on two or three occasions privately and personally and begged me to help get this thing through.

The strategy may or may not be working. The bill is no less obnoxious to me now than it was in the beginning.

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The key question is this: What is so terrible about just using 2516 of the code of the 1968 act which is the authorization for wiretaps to get any information related to espionage, sabotage, treason, and riots. The case has not been made out to me that this is defective and inadequate and that if they utilize this section of the 1968 act, then it seems to me no judge is going to refuse them a warrant. They just never do, and the case has not been made.

Would you want to comment on that rather large question?

Attorney General BELL. I will take the last statement first.

Judges certainly do turn down wiretap requests. They are very careful about issuing wiretap orders under title III. They oftentimes restrict what is sought. So there is a safeguard by having judges.

Second, this bill is infinitely better than the present system where there is no safeguard at all, where the power is vested exclusively in the Executive, there is no safeguards from the Congress or the courts.

Even under Congressman McClory's amendment, he safeguards the system by a statute. He just cuts out the court in that one area.

Mr. DRINAN. Except that is the argument that everyone uses, that it is better than the present system. The present system is an abomination. The intelligence communities know they are in very shaky circumstances. I have never seen evidence over 5 years now that the 2516 is inadequate. It seems to me that the Department of Justice has to make the case that they had suspicious circumstances about the Romanian Embassy or the PLO and some judge denied us a warrant.

Attorney General BELL. Then I would appeal. If I lost that, we would not do it.

Mr. DRINAN. But back to the key question, though, why is that so inadequate?

Attorney General BELL. Well, one inadequacy under title III, we have to give notice within a reasonable time to the targets. I would not want to give the targets notice. I would call that a nonintelligence system.

Mr. DRINAN. Do you think, Judge, that there is a reasonable chance that if this passes and it goes to court, do you think ultimately the U.S. Supreme Court would say it violates the fourth amendment?

Attorney General BELL. I do not.

Mr. DRINAN. There is a case to say that.

Attorney General BELL. We have a case going up now from the eastern district of Virginia, the *Humphrey* case.

Mr. DRINAN. I am familiar with that case. But that is a different set of circumstances. That doesn't have a statute. If we put this statute through, could they argue that this fundamentally violates the fourth amendment, that this is getting warrants without a shadow or probable cause of crime, that this lacks any of the specificity required in the fourth amendment? In any event, that is the ultimate question. I appreciate your position on it.

Contrary to what the chairman of this subcommittee said, I want this subcommittee to mark up. I want the full Judiciary Committee to have its say and the chairman of the full Judiciary Committee

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now is insisting that we have half the time on the floor, if it gets to that point, and that we have the appropriate number of conferees.

One last point: In the bill, would you also feel that not merely should the Intelligence Committees have oversight, but that both the House and Senate Judiciary Committees should have oversight?

Attorney General BELL. Well, you have oversight now, otherwise we would not be here this morning.

Mr. DRINAN. But in the bill it is specifically provided that the Attorney General shall fully inform the House and Senate Committees on Intelligence. It says nothing about Judiciary.

Attorney General BELL. That is on the operations. We could probably work out something on that. We have this secure system in the Intelligence Committees. That is why we have it limited to them.

Mr. MCCLORY. Would the gentleman yield?

Mr. DRINAN. My time has expired. I would be glad to yield.

Mr. MCCLORY. I thank the gentleman. I know we are under certain time restrictions here.

I would like to ask a couple of questions that sort of persist with me as far as this legislation is concerned.

I realize that the interests you are trying to secure are the interests of the Americans who are incidentally targeted but who nevertheless get involved.

I know that you have already told us that under existing guidelines there have been no abuses with respect to Americans in that regard. As a result I am wondering, first of all, whether by translating those guidelines into statutory form, which I have endeavored to do in the legislation that I presented, we wouldn't be providing the same adequate protection for Americans as now exists under the guidelines?

Then following that concern my question is the adequacy of the protection for you, Mr. Attorney General, and those who serve under you, the FBI agents. I am confident that we don't want to subject yourself and those agents to continuing liability. If there is some magic protection which is provided by a court order, then, I would want to rethink my position on this.

But isn't it true that if you and the agents follow the procedure which is set forth under the guidelines you would be afforded the same protection as under a warrant procedure?

In other words, you could call it an administrative warrant in my opinion, but nevertheless we call it a certificate under the present law.

Then I suppose the third part of this sequence, which is found in both of the bills, is that we want to provide protection to those who serve and who perform in accordance with the guidelines or the statutory form or the court order or whatever it is, against individual liability when they are following their instructions and are complying with what the Congress or the executive has established.

Those are the questions I have been considering. I would like to know whether or not there is not equal protection under the measure that I have presented?

Attorney General BELL. I guess the best answer that I can give you is that we have held to what you say now except it is not in

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statutory form. We have guidelines. I am sued and the FBI agents are sued constantly. I think if we had a judicial warrant, we would have fewer suits because it would appear to most lawyers that a suit would be frivolous.

If a judge ordered and authorized it by court order, I think that would be the end of suing business as far as I am concerned. I don't think it will be the end if we just have a statute, even though we have statutory guidelines.

Another thing, I think, it would be too bad to enact the guidelines in the statute because experience sometimes shows that you need to change the guidelines, and if you get too much specificity, you are sort of hamstrung.

But, basically, my difference with you has been all along that you think that you don't really gain anything by putting the courts into the system and I think you do. But I think not only do you gain protection, but you also gain public confidence in the system.

Mr. McCLORY. Could I ask a question which relates to something that occurred between the time you and I were together before and that is: Do you feel more or less protection because of your experience before Judge Griesa and the appeal that you had to take from his order than you would if the same authority were being exercised by someone in the executive branch?

Attorney General BELL. I don't know that I am getting any protection from Judge Griesa, but if I had a warrant authorizing certain things, I don't know how you would work informals into that, but I would have some protection against them. About the best protection I could have is if I could ever appeal.

Mr. McCLORY. Thank you very much.

Mr. KASTENMEIER. I appreciate the gentleman's questions. Actually, while I suppose, technically, members of other subcommittees are authorized to sit with the committee, normally they would not participate. However, there being no objection, of course, Mr. McClory was recognized, and if Mr. Mazzoli, the gentleman from Kentucky, has any questions he would like to ask, he may do so.

Mr. MAZZOLI. Thank you.

The gentleman from Illinois and I have a basic difference of opinion with respect to the bill. The gentleman in his very influential way, and I think diligent fashion, has persuaded the Intelligence Committee that in two relatively limited areas there should be no previous judicial warrant before a foreign intelligence wiretap is permitted or an electronic surveillance is permitted.

I have filed dissenting views to the committee's opinion because I think there should be an across-the-board warrant which was the shape of the bill that you, Judge Bell, had recommended to our committee.

At the same time, I think that the committee's product, the Intelligence Committee's product, that was before the Committee on the Judiciary is an infinite improvement on the situation which we have today.

I believe the gentleman from Wisconsin, our chairman, has invited me to testify next week at one of the hearings at which I will make more definite my feelings, but I would, just to make the record clear, Judge Bell, are you still persuaded that the warrant procedure which was originally suggested and which is incorporat-

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ed into the committee bill would not impede the collection of necessary foreign intelligence information nor would it in some unwitting fashion provide excessive leaks or unduly jeopardize national security because of leaked information?

Attorney General BELL. I remain of that view.

Mr. MAZZOLI. I thank you.

I thank you, Mr. Chairman.

Mr. KASTENMEIER. Could you give us a candid analysis, Judge Bell, and I ask this question out of the reservations expressed by the gentleman from Massachusetts, what activities or what sort of surveillance would this bill authorize which is not presently authorized by law?

Attorney General BELL. None.

Mr. KASTENMEIER. Or permitted by law?

Attorney General BELL. Well, permitted by the Constitution and what we think the law is, none. But we are having some problem in the community in getting cooperation.

That section the gentleman from Massachusetts referred to where we enact cooperation is very necessary. The reason for it is because we are having so many suits now. If we have any participation whatever in some of these activities, you are sued in a civil suit and you have to spend a lot of money defending yourself. That is why we are not getting as much cooperation as we need.

But to answer your question, there would be nothing new. We are doing all these things now, but we would have statutory imprimatur and we would have a warrant.

Mr. KASTENMEIER. In other words, as far as the intelligence community is concerned, its interest is in putting to rest the questions about reach of authority and having to depend on the Constitution?

Attorney General BELL. Right. That is the intelligence community's sole interest because presumably they are going to gather and collect intelligence like they are doing now. But I have a great worry the American people are not certain what our system is. They don't care to know what it is. They want us to have a strong intelligence system, but they want to be certain we are doing it under the law. We don't know for sure what the law is now. I think I know, but even I could not be certain in all areas.

So I think this is the time for Congress to pass a law. That is in my view a two-step procedure, it is not only a law but to bring in the warrants from the courts.

Congressman McClory's view is don't go as far as the courts, but he thinks we ought to have a statute, no doubt about that.

Mr. KASTENMEIER. I am sure that as far as Mr. Drinan and others are concerned this will not necessarily put to rest all questions about the statute. There will be questions in terms of various accords and treaties, notwithstanding whether certain practices may be authorized by the statute but violate other agreements or accords. Is that not true?

Attorney General BELL. Right. His argument is that the statute might be unconstitutional because it violates the fourth amendment. If that is true, we would be back where we are now. No courts have said we can't do what we do. In fact, some approve of

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what we do. It just has not gotten to the Supreme Court. I think it will get there.

But the bottom line is that this is an added protection for the American citizen. It is an added protection or safeguard for our country because it makes the law clear that we can gather and collect intelligence, engage in intelligence activities. I don't see anyone loses in it. It is all gain, to me.

Mr. KASTENMEIER. Thank you, Mr. Attorney General. The committee appreciates your appearance here today and your help.

Attorney General BELL. Thank you for all of your help also.

Mr. KASTENMEIER. The Chair would now like to call a very distinguished colleague of the full committee and from the Intelligence Committee, Hon. Robert McClory. My colleague is very considerably interested in this subject and has a great deal of knowledge about it. I would like to greet him and indeed at the same time I would like to greet a distinguished American, William Colby, who served the country well as Director of the Central Intelligence Agency. It is very kind of you to come this morning to testify on the subcommittee. I will greet you both.

Bob, you may go first.

TESTIMONY OF HON. ROBERT McCLORY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. MCCLORY. Thank you very much. I do have a brief statement which I will try to proceed through rapidly.

Let me state at the outset that I am grateful, Mr. Chairman, indeed, that you have authorized hearings to take place today and next Wednesday and Thursday on the subject of the pending Foreign Intelligence Surveillance Act of 1978.

The measures dealing with this subject, which originally were referred to the Judiciary Committee and subsequently referred to the Permanent Select Committee on Intelligence, raise serious constitutional questions which are within the special province of the Judiciary Committee.

In addition, I am reminded that hearings were held by this subcommittee on this same subject about 3 years ago. I might say many of the measures considered then were quite different from the measure you have before you.

It is entirely appropriate that the Judiciary Committee and the members of this subcommittee should have a special role in the development of legislation affecting foreign intelligence surveillance and should insist upon retaining jurisdiction of this legislation. We would be abdicating our responsibility by failing to exercise our jurisdiction over this legislation. For many years this committee has had jurisdiction over intelligence issues. It would not be wise, in my opinion, to jeopardize this jurisdiction because a few members of the subcommittee have decided, for whatever reason, not to review a matter of this importance. Moreover, this legislation not only raises serious constitutional questions but would have a substantial effect on the structure of the Federal courts since it would establish a new special court for the first time.

Finally, the Department of Justice authorization would be required to cover the cost for this elaborate procedure. Accordingly, I

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urge the chairman and members of this subcommittee to follow the long-standing procedure of the House and assume its rightful prerogative to markup for full committee consideration of this most important legislation.

Also, while sharply critical of the measure, which has been recommended by the Intelligence Committee and which is now pending before this subcommittee, let me add that I am in strong support of appropriate legislation dealing with the subject of foreign intelligence surveillance.

As the author of H.R. 9745, I would impose strict statutory controls over the exercise of electronic surveillance of foreign intelligence. Indeed, in the measure which I introduced, the President's authority would be more sharply restricted and the responsibility and accountability of the executive branch in the exercise of such foreign intelligence surveillance would be more stringent than in the measure which the Intelligence Committee recommended.

The principal difference between the position which I have taken and that adopted by a majority of the members of the Intelligence Committee is simply this: The Intelligence Committee majority recommends that all three branches of government—executive, legislative, and judicial—should be involved in the authority to engage in foreign intelligence surveillance. I take the position that this responsibility is vested in the President and in the executive branch of government with a further duty imposed upon the Congress to oversee the fulfillment of these responsibilities by the executive branch.

The Supreme Court of the United States in the *Keith* case and three courts of appeals have recognized the distinction between domestic surveillance and foreign intelligence surveillance. These courts have acknowledged approvingly the exemption from title III of the Omnibus Crime Control Act of 1968 of the President's control of foreign intelligence. With the possible exception of the *Zweibon* case from the District of Columbia Court of Appeals, which involved domestic intelligence, I can ascertain no existing case authority for vesting Federal courts with jurisdiction to authorize or refuse to authorize—foreign intelligence gathering activities. There is no court authority for vesting the judicial branch with foreign intelligence jurisdiction or for depriving the executive branch of control of foreign intelligence activities.

The measures pending before this committee relate solely to foreign intelligence gathering and provide for targeting foreign powers and agents of foreign powers.

In establishing a warrant procedure with regard to foreign powers and agents of foreign powers, a device has been invented for establishing a special court to gather in secret and to receive a minimum of information upon which a warrant would issue to permit electronic surveillance of foreign intelligence.

This special court and the newly devised warrant procedure establish new constitutional and legal concepts which are unprecedented in the American judicial system. The development of this concept was perhaps understandable in 1975 and 1976 in which they were not considering a special court but the district court.

Of course, that reaction related to abuses that occurred during Watergate and the entire period of 30 years since the CIA was

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established back in 1947 during which the Congress took no oversight of the entire intelligence community.

I should add that there is no evidence either in the House or Senate Judiciary or Intelligence Committee hearings indicating any abuses of foreign intelligence electronic surveillance since the time that President Ford issued Executive Order 11905 establishing guidelines for the conduct of such intelligence activities or during the subsequent period following the issuance of a similar executive order by President Jimmy Carter.

It is my view that it is entirely appropriate to transform those guidelines which have served to eliminate any intelligence abuses into statutory form to assure that such protection of American citizens' rights will be continued.

However, to establish detailed guidelines to control the executive branch, then to authorize extensive oversight by the House and Senate Intelligence Committees, and on top of this to establish an entirely new court directed to develop a new body of secret law is an example of overkill and overreaction, which the Congress should reject. It is plain to see that such a complex procedure—involving, as I have said, all three branches of the Federal Government—could serve to frustrate essential intelligence gathering upon which our national survival may well depend. Moreover, to involve the Judiciary in this process, it seems to me, is overkill.

The principal arguments which appear to support the measures recommended by a majority of the intelligence committee are these: First, that American citizens may have their privacy accidentally or incidentally invaded while foreign agents of foreign powers are being targeted for intelligence gathering purposes.

However, minimization procedures which would be in effect under the measure I introduced would require the elimination and destruction of such information about American citizens which may be received. Such minimization procedures are required by existing guidelines and are required by the legislation which I introduced as well as by the bill which the majority of the Intelligence Committee has recommended. That should not mean, however, that a court is required to pass upon such minimization procedures.

Second, the argument is made by the Attorney General and others that the entry of a court order would provide him as well as the intelligence agents who carry out electronic surveillance protection against damage actions which might be initiated because of unlawful intelligence gathering activities.

I think the agents who operate pursuant to statutory law are going to be protected whether there is a court order or not if there is a certificate issued by the Attorney General. This is in the legislation which I introduced.

I might say that on the constitutional issue the evidence indicates that the President has the inherent authority under article 2 of the Constitution to conduct foreign intelligence operations. There is nothing to the contrary to sway me on that. To enact a statute which deprives the President of constitutional authority is a very questionable step. I don't think the President can renounce any constitutional authority that he has and vest that authority in another branch of the Government.

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Mr. KASTENMEIER. In that respect, you agree with the gentleman from Massachusetts who also has constitutional problems with this legislation?

Mr. MCCLORY. I think Father Drinan has constitutional problems of another kind and in another direction, yet they are serious constitutional questions, which we should consider.

We should not be in a hurry to make a grievous mistake. Instead, we should proceed as the Constitution directs that we should proceed by continuing to vest in the President the primary responsibility and accountability for our national security, including the gathering of foreign intelligence information upon which our national security depends.

Following this route, let us adopt the concept of my bill instead of the hazards and uncertainty of a special court as required in H.R. 7308.

Thank you, Mr. Chairman.

[The prepared statement of Hon. Robert McClory follows:]

PREPARED STATEMENT OF HON. ROBERT MCCLORY

Mr. Chairman, let me state at the outset that I am grateful, indeed, that you have authorized hearings to take place today and next Wednesday and Thursday on the subject of the pending Foreign Intelligence Surveillance Act of 1978. The measures dealing with this subject, which originally were referred to the Judiciary Committee and subsequently referrred to the Permanent Select Committee on Intelligence raise serious constitutional questions which are within the special province of the Judiciary Committee. In addition, I am reminded that hearings were held by this subcommittee on this same subject about three years ago.

It is entirely appropriate that the Judiciary Committee and the members of this subcommittee should have a special role in the development of legislation affecting foreign intelligence surveillance and should insist upon retaining jurisdiction of this legislation. We would be abdicating our responsibility by failing to exercise our jurisdiction over this legislation. For many years this committee has had jurisdiction over intelligence issues. It would not be wise, in my opinion, to jeopardize this jurisdiction because a few members of the subcommittee have decided, for whatever reason, not to review a matter of this importance. Moreover, this legislation not only raises serious constitutional questions but would have a substantial effect on the structure of the Federal courts. Finally, the Department of Justice authorization would be required to cover the cost for this elaborate procedure. Accordingly, I urge the chairman and members of this subcommittee to follow the long-standing procedure of the House and assume its rightful prerogative to markup for full committee consideration of this most important legislation.

Also, while sharply critical of the measure which has been recommended by the Intelligence Committee and which is now pending before this subcommittee, let me add that I am in strong support of appropriate legislation dealing with the subject of foreign intelligence surveillance. As the author of H.R. 9745, I would impose strict statutory controls over the exercise of electronic surveillance of foreign intelligence. Indeed, in the measure which I introduced, the President's authority would be more sharply restricted and the responsibility and accountability of the executive branch in the exercise of such foreign intelligence surveillance would be more stringent than in the measure which the Intelligence Committee recommended.

The principal difference between the position which I have taken and that adopted by a majority of the members of the Intelligence Committee is simply this: The Intelligence Committee majority recommends that all three branches of Government (executive, legislative and judicial) should be involved in the authority to engage in foreign intelligence surveillance. I take the position that this responsibility is vested in the President and in the executive branch of government with a further duty imposed upon the congress to oversee the fulfillment of these responsibilities by the executive branch.

The Supreme Court of the United States in the *Keith* case and three courts of appeals have recognized the distinction between domestic surveillance and foreign intelligence surveillance. These courts have acknowledged approvingly the exemption from title III of the Omnibus Crime Control Act of 1968 of the President's control of foreign intelligence. With the possible exception of the *Zweibon* case from

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the D.C. Court of Appeals, which involved domestic intelligence, I can ascertain no existing case authority for vesting Federal courts with jurisdiction to authorize—or to refuse to authorize—Foreign intelligence gathering activities.

The measures pending before this committee relate solely to foreign intelligence gathering and provide for targeting foreign powers and agents of foreign powers.

In establishing a warrant procedure with regard to foreign powers and agents of foreign powers, a device has been invented for establishing a special court to gather in secret and to receive a minimum of information upon which a warrant would issue to permit electronic surveillance of foreign intelligence. this special court and the newly devised warrant procedure establish new constitutional and legal concepts which are unprecedented in the American judicial system.

The development of this concept was perhaps understandable in 1975 and 1976 following the investigations by the temporary intelligence committees established in the Congress—and following the abuses which were associated with the so-called Watergate period. However, it should be pointed out that the Congress had failed to undertake its job of oversight of the intelligence agencies for virtually the entire period between 1947 when the CIA was established and 1975 when the temporary intelligence committees were etablished. I should add that there is no evidence either in the House or Senate Judiciary or Intelligence Committee hearings indicating any abuses of foreign intelligence electronic surveillance since the time that President Ford issued Executive Order 11905 establishing guidelines for the conduct of such intelligence activities or during the subsequent period following the issuance of a similar executive order by President Jimmy Carter.

It is my view that it is entirely appropriate to transform those guidelines which have served to eliminate any intelligence abuses into statutory form to assure that such protection of American citizens' rights will be continued. However, to establish detailed guidelines to control the executive branch, then to authorize extensive oversight by the House and Senate Intelligence Committees and on top of this to establish an entirely new court directed to develop a new body of secret law is an example of overkill and over-reaction, which the Congress should reject. It is plain to see that such a complex procedure—involving, as I have said, all three branches of the Federal Government—could serve to frustrate essential intelligence gathering upon which our national survival may well depend.

The principal arguments which appear to support the measures recommended by a majority of the Intelligence Committee are these:

First, that American citizens may have their privacy accidentally or incidentally invaded while foreign agents of foreign powers are being targeted for intelligence gathering purposes. However, minimization procedures require the elimination and destruction of such information about American citizens which may be received. Such minimization procedures are required by existing guidelines and are required by the legislation which I introduced as well as by the bill which the majority of the Intelligence Committee has recommended. That should not mean, however, that a court is required to pass upon such minimization procedures.

Second, the argument is made by the Attorney General and others that the entry of a court order would provide him as well as the intelligence agents who carry out electronic surveillance protection against damage actions which might be initiated because of unlawful intelligence gathering activities. Frankly, I fail to see how such an argument can be persuasive. Indeed, the argument suggests that if fourth amendment or other constitutional rights are abused or denied, the existence of an order entered by a special court on the basis of extremely limited facts and pursuant to a secret record, the Attorney General or others in the executive branch or acting in its behalf could excuse or justify their actions by referring to the special court order.

I am opposed to any such "cop out" whereby wrongdoing in the executive branch might be excused by virtue of such a court order. The courts themselves have long recognized that there is no role for the judiciary in the scheme of foreign intelligence. Just last year, the ninth circuit declared that "foreign security wiretaps are a recognized exception to the general warrant requirement (of the fourth amendment)", *U.S.* v. *Buck,* 548 F. 2d 871, (9th Cir. 1977) by using the courts under the premise that abuses of the past should not reoccur, senior executive branch officials will be given the opportunity to evade responsibility for their actions. Shifting from the President to the judiciary the responsibility to authorize foreign intelligence electronic surveillance would make the courts a vehicle for the Executive to escape accountability. For example, should an intelligence agency employ electronic surveillance for an improper purpose, a warrant, if issued by the special court, would, in effect, sanction the electronic surveillance and at the same time might permit

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those to whom the warrant was issued to escape liability for their improper conduct. None of us wish to see the courts used for this purpose.

In this respect, it should be emphasized that the issuance of a certificate by the Attorney General pursuant to the stringent requirements of my substitute bill—including the limitations on those foreign entities which may be targeted—and requirements for "minimization"—should afford protection to the Attorney General and to the agents in the executive branch to an even greater extent than any court-ordered warrants issued in secret on the basis of the barest factual presentation to a special court.

Furthermore, my substitute bill contains provisions for protecting executive branch officials against liability for the performance of their duties in compliance with the terms and provisions of this legislation.

Finally, it would be intolerable for courts without the relative information or experience to review and perhaps nullify the executive's desired action regarding properly held secret information. Foreign intelligence information must be retained solely within the co-equal political departments of our government—the executive and legislative branches.

Mr. Chairman, let us not be in a hurry to make a grievous mistake. Let us, instead, proceed as the Constitution directs that we should proceed—by continuing to vest in the President the primary responsibility and accountability—for our national security, including the gathering of foreign intelligence information upon which our national security depends. In following this route, let us adopt the concept of my bill, H.R. 9745, instead of the hazards and uncertainties of a special court—as required in H.R. 7308.

Mr. KASTENMEIER. Thank you, Mr. McClory.

I have just a question or two, and I would like to yield to our other witness. I assume we will have other members here shortly since there is a quorum call. They will make the quorum and appear here.

Do you not agree with the Attorney General, and indeed the intelligence community, that a very considerable question exists as to what a proper—what is improper as a result of the *Keith* case? That is to say, do you not understand why a statute is so direly wanted by the administration, this one and the past administration?

Mr. MCCLORY. I think the *Keith* case indicates about as directly as it could that constitutionally the courts have no role with regard to foreign intelligence gathering activities. Additionally the court indicated that Congress could speak to this issue by providing guidelines or providing statutory form for the manner in which foreign intelligence should be gathered and include accountability to the Congress through its oversight.

I think that approach is entirely appropriate, yes.

Mr. KASTENMEIER. In terms of wiretapping and other forms of surveillance for activities, let's say, which are authorized under title III for crimes and for which warrants are sought, do you think there that it would be unnecessary to involve the judiciary in that type of activity as well? Could we not have a statute based on the premise that you suggest in your bill, namely, have it exclusively an Executive function?

Mr. MCCLORY. No, I find no fault with the warrant requirement in title III. That is domestic surveillance which is not in the foreign affairs-national security field. It also for the most part involves a criminal standard. I think that a warrant should precede an investigation with regard to the commission of a crime in the domestic area.

So I would say that if there is any inclination to require a warrant, for instance, with regard to U.S. persons, then there is no

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need for a special court. Instead one would go to the district court in the same way that we do under the title III warrant request. I believe this is the position Director Colby supports.

Mr. KASTENMEIER. So you don't object to the court being involved?

Mr. MCCLORY. I object to the court being involved with regard to foreign intelligence surveillance gathering in general, yes. I think that where a U.S. person is being targeted and there is an allegation that a crime has been committed or is about to be committed, that this might be an appropriate standard for requiring a warrant with regard to a U.S. person.

However, in that respect, I would reiterate that there is no need for a special court. I might say that during the past 2 years, and you will find this in the testimony of the Select Committee on Intelligence—that either no U.S. person or only one has been the subject of foreign intelligence surveillance during the past 2 or 3 years.

So to set up an elaborate court system to take care of one case would seem to be overkill of the most grievous type. Let's do it through the district court.

Mr. KASTENMEIER. Well, how many cases will be pursued at a given time is as mutable, I suppose, as the guidelines of the Attorney General are. They could be changed overnight, depending on what the situation is.

One of the difficulties apparently is the lack of clarity as to what authorization exists today; perhaps the reason for what you describe is inactivity.

Mr. MCCLORY. No, Mr. Chairman. The specifications right now are very clearly set forth. The guidelines that control the gathering of foreign intelligence are very restrictive, very severe, and fairly elaborate.

Mr. KASTENMEIER. Are you talking about the guidelines of the Attorney General?

Mr. MCCLORY. I am talking about Executive Order 11905. I don't remember the number of Jimmy Carter's, but it is also very elaborate. So there are very severe restrictions with regard to the gathering of foreign intelligence now.

Mr. KASTENMEIER. You feel no law is necessary at all?

Mr. MCCLORY. It is possible that you would not need anything more than the Executive order, yes. Since there is no violation, there is no real reason to translate the guidelines into statutory form. But I think it would be appropriate to put the Executive order into a statute, and maybe elaborate on the guidelines even more in statutory form. I do not believe it is necessary to establish a whole special court procedure which gets very, very involved.

Mr. KASTENMEIER. You are offering your bill only if the Congress insists on having a bill.

Mr. MCCLORY. I am suggesting that as a substitute, yes.

Mr. KASTENMEIER. Mr. McClory, can you spell out a little bit what this amendment was that was adopted, to the extent that you are able to do so in open testimony, referring to technical information?

Mr. MCCLORY. Surely.

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Let me say, Mr. Chairman, there were two important amendments that I offered.

One amendment would have required a warrant only with regard to U.S. persons, that is U.S. citizens, and those living permanently in this country. That failed on a 6-to-6 tie vote, so you can see how much sentiment there was on requiring a warrant only with regard to U.S. persons.

The second amendment, which I offered and which was accepted by the committee, would not require a warrant with regard to electronic surveillance gathering where foreign powers are involved.

In other words, communications between foreign powers, for instance, the Soviet Embassy and Moscow or the Yugoslav Embassy and Belgrade or whatever, are omitted from the bill now. They may be handled by the Executive. I believe we did have a closed session on the issue in the Intelligence Committee. I would just suggest that the last issue of U.S. News & World Report might shed some peripheral light on this subject.

Mr. KASTENMEIER. Then you are talking about NSA's materials; is that correct?

Mr. MCCLORY. Yes, NSA involves the type of electronic surveillance or listening in on communications between foreign powers where there is no U.S. person at all. I suppose that if two foreigners are talking to each other, or two foreign spies are talking to each other, it is possible that some American could be mentioned. However, that situation would involve the exercise, then, of minimization procedures which we want to retain for just such a situation.

Mr. KASTENMEIER. I thank our colleague. I now yield to the gentleman from Kentucky.

Mr. MAZZOLI. I thank the chairman. It is always good to work with the gentleman from Illinois, who makes a very persuasive case.

I would like to clear up one thing. The gentleman suggested the 6-to-6 tie vote by which his proposed amendment was defeated, I think the gentleman would have to agree that this is an extremely complicated bill and many members of our full committee had not had a complete briefing at the time some of those votes were taken. There were some discussions thereafter where I think the distance between the gentleman's amendments' success would have widened perhaps more than that.

Mr. MCCLORY. Let me say that there appeared to be undue pressures applied to one member who had agreed with me that he wanted to support the amendment. So I was really surprised when the amendment didn't carry with a 7-to-5 vote and instead ended up with a 6-to-6 tie vote.

I think the true sentiments of the committee were in favor of that amendent, Mr. Mazzoli.

Mr. MAZZOLI. I would have to respectfully differ with my friend on that particular issue. The record is replete, Mr. Chairman, in our committee of the difference between the gentleman and myself with regard to the philosophy here.

I tend to agree that a warrant procedure is safer; it is secure; it does give, as Judge Bell has said, assurance to the American people

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that, in the event a foreign intelligence electronic surveillance is undertaken, it will have been done so only upon the agreement of a judge, a sane, sensible arbiter of facts, who is talented in figuring out what the law means, and assigning facts against this background, will have agreed that that surveillance must go forward and the minimization procedures are in place.

So it would probably not be worthy at this point to devote much more time to our difference of opinion.

Mr. McCLORY. Could I just say that I don't think the courts have any expertise in this area at all and it would be a terrible mistake to involve the courts in it. They are unacquainted with foreign intelligence surveillance. If they do get overzealous and decide they want a lot more information than the applicants want to give them, then they really endanger the intelligence community.

Mr. MAZZOLI. I think what the gentleman has said, both his words and actions, are in a sense a statement of lack of confidence in the Federal courts themselves.

Mr. McCLORY. Right, in this area.

Mr. MAZZOLI. In their wisdom and also in their ability to keep confidences. I just don't share the gentleman's feeling that way. I think they have enough wisdom to handle these cases. You and I have heard some things at our executive sessions and I feel, though I have never had any background in intelligence, that I got a pretty good grasp of things and would be able to tell basically when a surveillance should go forward.

As far as keeping confidences, I think Federal judges are constantly exposed to information with respect to copyright violations, with respect to market manipulations, which is very sensitive, and if it were to be released, would cause economic and political problems. As a group, the judges have not been any looser or slackjawed than any other group.

I would like to devote a little time to one aspect which I think is very important. That is, what will be the procedure at this point. The gentleman urges the Judiciary Committee to proceed with great care to devote full time to hearings and markups and examination of the bill for apparently two reasons: One, for fear of losing jurisdiction, and, second, because of the nature of the importance of the material.

Let me just ask the gentleman this: Would the gentleman believe that the rule which will be issued in order to hear this matter on the floor will be an open rule and therefore the gentleman's positions and argument could be made on the floor without any inhibition and without any limitation?

Mr. McCLORY. I would think for one thing that the Judiciary Committee ought to consider whether it wants to offer any amendments to the bill. Then when the subject ultimately comes to the floor, I think it should come under an open rule with authority and time assigned to the Judicary Committee, Mr. Railsback and Mr. Kastenmeier, to be authorized to debate the bill as well as Mr. Murphy, the chairman of our Legislative Subcommittee, and myself as the ranking member on the subcommittee.

Mr. MAZZOLI. The gentleman feels that that type of procedure would still not provide sufficient time for healthy and lively debate on the issues and would therefore still require that the committee

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have very detailed and painstaking review at this stage. Is that the gentleman's feeling?

Mr. McCLORY. I think because of the constitutional questions involved and because this is a complete innovation, it would be a very serious mistake for the Judiciary Committee to abdicate its jurisdiction.

Mr. MAZZOLI. The fact is that the committee is having hearings so I would not characterize it as abdication if it were to have 3 days of hearings, a vote taken to report the bill and then to leave to the floor the opportunity for the presentation of amendments and the argument on the basis of the details.

Mr. McCLORY. I would think that if Mr. Railsback wants to offer an amendment or Mr. Drinan, or other members of the subcommittee, they ought to be considered. Then the bill should proceed to the full committee in whatever form it is in when it leaves the subcommittee.

I really think that to cut corners and to just sidetrack the Judiciary Committee is not a wise way to proceed. At the same time, I certainly want to cooperate, in supporting speedy movement of the bill. But I also want to have reasonable, considerate, and deliberative action.

Mr. MAZZOLI. I thank the gentleman. I thank the chairman.

Mr. KASTENMEIER. The gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. I think I will wait for Director Colby to testify and then ask questions of my colleague from Illinois.

Mr. KASTENMEIER. Does the gentleman from Pennsylvania have any questions of Mr. McClory?

Mr. ERTEL. I have no questions. Thank you very much.

Mr. KASTENMEIER. Then we will be very pleased to hear from you, Mr. Colby.

TESTIMONY OF WILLIAM E. COLBY, FORMER DIRECTOR, CENTRAL INTELLIGENCE AGENCY

Mr. COLBY. Thank you, Mr. Chairman, for this opportunity to comment on this bill. I have only a few comments, but I was delighted to accept the invitation of Congressman Robert McClory to join with him in expressing concern about some of its provisions. Mr. McClory was a tower of strength during the period I was Director of Central Intelligence.

As a preliminary, I would express my support for the requirement of a warrant for electronic surveillance of American citizens in this country. I think this is a reasonable action to take and will insure that any such surveillances be undertaken only in proper cases.

I also express my pleasure that no attempt is made to export the rules we apply to our citizens in this country to our intelligence work abroad, so that decisions on the wisdom and extent of such activities are left to the responsible executive authorities and the effective supervison of the Permanent Select Committees on Intelligence of the Congress. We cannot apply judicial machinery to every action of our intelligence services in the world of very different cultures and standards abroad.

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My first major reservation on this bill is to express my concern at its apparent focus on the protection of our country against agents of foreign powers endeavoring to operate here.

Important as this defensive effort is, I believe that intelligence has an equally important function of collecting positive information through the fortuitous presence here of foreigners. The principal responsibility of our intelligence services is to learn and understand the political, strategic, economic, and sociological forces, factions, and dynamics in the world around us.

In those countries in which these subjects are held closely in a police state environment, clandestine efforts involving risk and difficulty are necessary to obtain them. Good as our scholarship and our technology is, there are some matters which are not visible on the photograph or published in foreign versions of Aviation Week. But large numbers of citizens of such nations visit the United States and have information of this type in their minds.

To the extent that these can be gained or shared with us openly, we should, of course, do so during such visits, and I encourage a maximum exchange of information and people for this purpose. To the extent, however, that these secrets are not available openly, I believe it only wise and prudent to endeavor to obtain such information from them clandestinely here in America rather than going abroad to search for it.

The present bill, through its definitions, would exclude a substantial number of such individuals from this coverage. In the Intelligence Committee's report on this matter, it is made clear that this omission is deliberate, as noted on page 34:

> The definition excludes persons who serve as officers or employees or are member of a foreign power in their home country but do not act in that capacity in the United States * * *. It is not intended to encompass such foreign visitors as professors, lecturers, exchange students, performers or athletes * * *. The term "member" means an active knowing member of the group or organization which is a foreign power. It does not include mere sympathizers, fellow travelers, or persons may have merely attended meetings of the group or organization.

Mr. Chairman, this provision would not only leave out of any possible coverage individuals such as those listed, but presumably would also exclude a member of a foreign government who visited the United States on holiday, whatever his responsibilities and knowledge at home. It would also exclude important officials of private enterprises in foreign countries, however important the activities of such enterprises might be to the United States.

I certainly do not mean to imply that every friendly tourist or businessmen should fear electronic surveillance in the United States if this provision were changed, since information about free and open countries can be collected through perfectly normal inquiry and assembly of publications, involving no clandestine effort whatsoever. Thus, the clandestine technique would only be needed with respect to countries in which such material is held in secret.

I also question the need for a special court and the degree of detailed decisionmaking and reporting to it. A special court is not necessary, as regular District judges should be able to issue warrants for electronic surveillances as for searches and seizures. A special court would be more symbolic than active.

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Second, I believe the involvement of a judge in the degree of detail required by the bill is neither necessary nor appropriate. The specifics of the minimization procedures, a detailed description of the information sought and the type of activities to be surveilled all seem to involve the judge in much more complex decisionmaking than is either required to protect against abuse or necessary to insure judicial control.

In summary, Mr. Chairman, I take a position with respect to this bill similar to that of the new charter currently being considered by the Senate Committee on Intelligence, S. 2525.

I warmly welcome the issuance of a new charter for intelligence activities replacing the vague and ambiguous ones of the past, and expressing our new American consensus as to the proper activities and limits of American intelligence.

In the process, however, we need not and should not try to dot every "i" and cross every "t". The results of the investigations into intelligence indicate that the basis for the missteps and misdeeds of the past lay in a different consensus about intelligence, one which believed that its operations were outside the normal controls of government.

With the new committees in the Congress and a clear public charter, we do not need to overcomplicate the structure and delineate every fine line in this difficult field. The bill before you today, I believe, goes too far in this direction, however admirable its motives and however much I agree with its main thrust.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. Thank you very much, Mr. Colby.

Mr. MCCLORY. Mr. Chairman, I would just like to express my appreciation for Director Colby appearing here today. I did recommend his appearance to the committee and I know that the committee welcomes him.

Having served on the Intelligence Committee, the temporary Intelligence Committee before, I want to say how fully cooperative Mr. Colby was with us and with the Congress. He has in addition done an admirable job in recommending changes and improvements in the intelligence community in his book "Honorable Men" which is a very fine volume.

Among those in the intelligence community, I cannot think of a more honorable man than the Director sitting here with me at the table today.

Mr. KASTENMEIER. Mr. McClory, the committee is indebted to you for persuading us to have Mr. Colby with us today.

Mr. Colby, I have a couple of questions. You indicated in your statement that you object to those provisions which prohibit electronic monitoring of persons who are officers or employees of a foreign power but are merely unofficial visitors to the United States.

However, in section 101(b) it apparently specifically excludes from this the casual visitor exemption, persons who act in behalf of a foreign power which engages in clandestine activities contrary to the interests of the United States.

This would, for example, exclude citizens of nations such as the Soviet Union from protections of the bill.

Don't you think this responds effectively to your objections?

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Mr. COLBY. Not necessarily. I can think of a number of countries, Mr. Chairman, which I don't know that we have any hard evidence that they are involved in clandestine intelligence activities in this country and yet they are of considerable importance to our situation in that part of the world.

I would not like to name specifics, if you don't mind, because I think it is unnecessarily noisy when you do name such specifics, but I think there are certain countries of that nature.

Mr. KASTENMEIER. Your statement generally raises basically two criticisms of the bill, 7308. Generally your statement is supportive of the need for legislation. On balance, do you think H.R. 7308 is a good bill?

Mr. COLBY. I think with these suggested changes that it is; yes. I think the requirement for a warrant for American citizens is appropriate and is a way of reassuring our people after the amount of publicity we have had indicating some abuses in the past.

I think, however, that it is not necessary to reassure the foreigners who live here. I really don't feel that we owe them that degree of reassurance and I don't think they are all that surprised that they may have been subject to some surveillance in the past. Most foreigners from the kind of countries I am talking about are quite familiar with that procedure at home and don't find it too surprising if it would be used against them here.

The second thing, as I indicate, I really question is the need for a whole special court machinery. I think that is more than is necessary to meet the problem. Since this is a statute describing who can be covered and who could not, that when you leave out people such as I mentioned, there is absolutely no basis for getting a warrant. Even if you required a warrant here for foreigners, you could not get a warrant out of a judge to cover somebody of this nature. I think that could potentially be a very serious problem.

Mr. KASTENMEIER. I take it you are in general agreement with present leadership in the intelligence community with respect to their general support for legislation of this type?

Mr. COLBY. Absolutely, Mr. Chairman; yes. I think it is essential to have a new charter.

Mr. KASTENMEIER. I understand. I myself have not followed the provision for a new special court. Apparently this was a device to avoid the problems of forum shopping and whether certain judges only in the District of Columbia or judges throughout the country might be used and to what extent we would appoint them, et cetera.

I assume that was the purpose of the special court, to avoid other problems connected with this.

Mr. COLBY. I think that could easily be resolved by the regular supervision of the select committees in the Senate and the House. If that became a problem, I am sure they would focus on it immediately and indicate their disapproval of it.

Mr. KASTENMEIER. I yield to the gentleman from Illinois.

Mr. RAILSBACK. I want to begin by commending Congressman McClory for his dedication to his belief that the bill that was reported out by the Intelligence Committee may cause serious damage to the national interests of our country. I also want to thank Director Colby for taking his time to come here and testify.

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I think many of us do not want to put the United States at a serious disadvantage with other countries that may be in an adversary position with us. I am not asking for any specific examples except maybe a hypothetical, as to the evidence of surveillance of U.S. citizens that may go abroad to foreign countries.

In other words, do we have a substantial body of evidence that U.S. citizens when they travel, say, to the Soviet Union, are surveilled?

Mr. COLBY. We certainly do. We have a long list of incidents with our diplomats, and most recently, a few weeks ago, putting an electronic surveillance into the Embassy premises. You will recall the bug that was in the Great Seal of the United States over the Ambassador's desk some years ago, that we displayed in the United Nations. I think there is a whole footlocker of those gadgets we pulled out of the walls of the Embassy.

The normal tourist is probably not exposed to much because they go in such numbers that they can't cover everyone. But believe me, one of particular importance, it is very simple for these countries to set up some surveillance of their activities and their conversations.

Mr. RAILSBACK. Let me ask you about the particular provisions of the bill which I think cause both you and Mr. McClory some concern. I might add they kind of bother me a little bit, too.

In the report beginning with the first paragraph on page 35 there is reference to language in the bill that deals with circumstances where there may be a systematic carrying on of intelligence-gathering activities.

It says:

> In the light of these two legitimate concerns, the committee has adopted the current provision which does not require a showing that the individual foreign visitor is himself currently engaged in clandestine intelligence activities, but rather that the circumstances of his presence here indicate that he may be engaged in such activities which are contrary to this nation's interest.

Now I think some people would say that is an effort to permit us to cover certain people where those particular circumstances exist, but then they go on and state in the report:

> In addition, it must be shown that he is acting for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the U.S. It is intended that the government show the foreign power has demonstrated some pattern or practice of engaging in clandestine intelligence activities in the U.S. contrary to the interests of the U.S.

Now how restrictive do you think that language is and what problems would that requirement cause as far as you are concerned?

Mr. COLBY. I think the fundamental approach that this language represents is that we are protecting ourselves against the activities of somebody acting in the United States. Now that is a perfectly legitimate function, don't get me wrong, and we should protect ourselves. But I think it leaves out the totally different dimension that we are also interested in, home country decisionmaking, and how those countries operate and how the political factions work there and who is connected with who and who is apt to be successor to the present government.

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When people with this kind of background come over here, even if they are going to Disneyland, they can have a considerable knowledge to that effect. In their side remarks and in their conversations with their colleagues and communications homeward they can be communicating information which, putting those bits of pieces together, can give us a unique view of what is happening in some foreign country. It has nothing to do with protecting us in the narrow sense of that man doing something here, but it has a great deal to do in protecting us by understanding another country's politics.

Mr. RAILSBACK. You are saying then, that it is a general intelligence-gathering activity that our country has found very useful in the past?

Mr. COLBY. We go to great effort to recruit foreigners in those countries to pass to us secretly, at great risk and danger, information of this sort so that we can understand the dynamics of those countries. Otherwise, we are flying blind.

Mr. RAILSBACK. If that is true and we obtain their voluntary acquiescence, then why do we need to surveil them?

Mr. COLBY. It is a lot easier to do it here than there and a lot less dangerous to our officers to do it here than there.

Mr. RAILSBACK. I thought you said we developed some general intelligence-gathering capability by obtaining a voluntary compliance or acquiescence?

Mr. COLBY. To some extent we can get this by international exchange programs. For that reason, I favor exchange programs. I favor maximum exchange. I am less concerned about the protection in this country. I think we can protect ourselves against abuse of exchange programs. But I am also very deeply interested in the positive information they can bring and exchange openly with us. If they exchange it openly, there is no reason for surveilling them, obviously.

Mr. RAILSBACK. If you do favor some kind of surveillance of people like visiting professors or lecturers, and you mentioned even government employees from a foreign country that may be over here on vacation, what kind of monitoring could you support of those kinds of individuals and their activities if you are not going to support a warrant?

Mr. COLBY. I think the regular supervision of the select committees. If this became abusive, if you had cases which really can't be justified or if you were trying to get a vacuum cleaner to work, then certainly the select committees would cut it back.

But if they know this category of activities is going on, once every few months they can ask for a report, what kind of people are you covering.

Mr. RAILSBACK. So you would require reporting to the Congress?

Mr. COLBY. Yes, no problems.

Mr. KASTENMEIER. May I interrupt to ask Mr. Colby, would you be willing to remain because we are in the middle of a vote on the House floor and that was the second bell. I would like to encourage all members present to return, if they will.

Accordingly, the subcommittee will recess for 10 minutes.

[A brief recess was taken.]

Mr. KASTENMEIER. The subcommittee will be in order.

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When we were interrupted by a vote, the gentleman from Illinois was questioning.

Mr. McCLORY. Could I respond to the gentleman's question? Part of the question related to U.S. citizens being surveilled and I don't know whether he included in that U.S. citizens being surveilled in this country by foreign powers or not. But I can say that the evidence is overwhelming that Americans are being extensively surveilled by foreign powers in this country. I think the debate on this bill in the Senate indicated that there are thousands of Americans being surveilled by the Soviets electronically at a time when we might have one foreign individual being surveilled by the United States.

Mr. RAILSBACK. I take it it is your belief that there are many American citizens abroad who are surveilled when they go into a foreign country.

Mr. COLBY. Exactly. I have had the personal experience myself of detecting that. I might say right now that I know many of us have been trying to determine just exactly what these microwave operations are that are affecting Americans in the U.S. Embassy; I don't think we know. It undoubtedly is some kind of a listening or electronic surveillance device that we don't know exactly what it consists of or how it operates, but it undoubtedly is extensive and very sophisticated.

Mr. RAILSBACK. May I ask either one of you, and if you choose not to answer, I will understand, but how extensive was or has been our surveillance of these people that may be excluded from the coverage of the bill?

In other words, in the past have we, as a matter of policy, covered a foreign visitor when he comes to this country on vacation.

Mr. COLBY. I would rather not answer in precise terms, Mr. Railsback, but I think what I am looking at is all possible sources of information that are important to our country. This is potentially a source of information important to our country.

I would hate to see us close the door. It depends to some extent on what information we can get from other means as to whether we are driven to this effort or not.

I don't think you will find that every friendly foreign tourist or businessman will be covered, not by a long shot. It wouldn't be of that scale.

Mr. KASTENMEIER. On this point would you yield?

Mr. RAILSBACK. Yes.

Mr. KASTENMEIER. It is my understanding, that the Justice Department presently does not authorize any surveillance by the administration of a foreign employee if that individual is not acting in his official capacity as an official in this country, as a visitor.

They in fact concede to them fourth amendment protection in a sense. So there is presently no surveillance of such persons. However, under the bill there are exceptions, the exceptions being that if the other government engages in such activities, then they could. So, as a matter of fact, the enactment of H.R. 7308 would broaden what is the practice under present interpretation of the law.

Do you agree?

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Mr. COLBY. I am not aware of that. If it broadens that from what we are doing now, I am all for it. I believe in the importance of collecting positive information. I have found it heavily pointed in terms of the counterintelligence function. I think this other area, when we send people to work abroad with great danger and difficulty in some areas, I just think we ought to do something here easily rather than asking our officers to go and to undertake great danger in order to try to get what amounts to the same information.

Therefore, if we don't do much now, maybe we ought to be doing a little more. That would be my position.

Mr. KASTENMEIER. I guess my second question as a followup if the gentleman will further yield, obviously that was not the interpretation of the law while you served as Director of the CIA.

Mr. COLBY. I don't recall such a provision. I don't recall it. I don't know.

Mr. KASTENMEIER. It is not that which is more useful to do, but a question of the conscientious interpretation of law as set down by the Supreme Court.

Mr. COLBY. I know a visitor here has constitutional rights. Certainly he has some. In this area we are talking about foreign intelligence information. The function of this bill will be to clarify an ambiguous area. I think I would like to have the matter clarified in the widest possible way, vis-a-vis foreigners, not Americans.

Mr. RAILSBACK. I have no further questions, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from Massachusetts? Mr. Drinan?

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

Mr. Colby, I am sorry I had to be about another duty while you were testifying. I appreciate your sentiment.

As I take it, you would opt for no law at all and you would say that the present situation is much better than any other proposed law?

Mr. COLBY. No, I do not say that Father Drinan. I say I express my support for the requirement of a warrant for the electronic surveillance of American citizens in this country.

Mr. DRINAN. But you don't want any court involved?

Mr. COLBY. A warrant obviously has to come from a court.

Mr. DRINAN. I am reading from page 4.

Mr. COLBY. I say not a special court. I said the ordinary district judge could provide the warrants.

Mr. DRINAN. Therefore, should it be a probable cause of crime?

Mr. COLBY. No. I don't think you can get positive intelligence on a probable cause for crime. I can think of many aspects of foreign intelligence that doesn't involve a crime in this country.

Mr. DRINAN. Would you fear that there be some almost inevitable leaks if 400 Federal judges had possession of this information?

Mr. COLBY. I doubt 400 or 500 would get all the information. Any judge would get one limited area presumably in order to give that warrant. This is the area that I think is subject to supervision by the select committees of the Senate and the House, that if this did not work, if there were some improper activity going on, they would note it and put a stop to it.

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Mr. DRINAN. You indicate here that you are not particularly worried about citizens of this country who are abroad. That is the way I read page 1. There is a gentleman here who represents the Democrats abroad. I think he is concerned, as I am concerned, that 1 million or 2 million American citizens abroad will not have the protection of the act whose passage you recommend.

Mr. COLBY. Well, American citizens abroad don't have the protection of this act against the operations of a very large number of other governments.

Mr. DRINAN. Just because they are in Russia and may be subjected to electronic surveillance there, that doesn't mean that we should allow our government to do that same thing when these people are in Germany or Romania.

Mr. COLBY. I also think going abroad for an American citizen means leaving the shores of the United States and assuming a different situation. He knows he is in a different circumstance at that time. If we wanted to limit a requirement of a warrant to an American citizen abroad deliberately targeted, in other words, Mr. American Citizen goes to some place and before you deliberately target him for surveillance, I would not have a problem with an ordinary warrant for him.

But I do think we would unnecessarily restrict ourselves if we say there is no way of getting any information on an American and we should not get any information on an American if he is abroad. If one makes a telephone call from "Omsk to Tomsk," and he happens to use the phone we are listening to, I think it is difficult to say we should not be collecting on that link. We have minimization procedures which are in the bill.

Mr. DRINAN. But they will not apply to citizens abroad?

Mr. COLBY. Yes, they would. Minimization procedures do apply to Americans.

Mr. DRINAN. Existing law?

Mr. COLBY. No, the procedures used by the intelligence community, referred to in the bill. These efforts are to sweep out of our collection of material abroad the unnecessary coverage of Americans and there are provisions to do that today and have been for a number of years.

Mr. DRINAN. Mr. Colby, what would happen to the intelligence operations of this country if in due course the Supreme Court said that all of this warrantless tapping is wrong, that only probable cause of crime actually can justify under the Constitution a tap? What would be the effects upon the intelligence community and the intelligence gathering in specific now?

Mr. COLBY. Well, if you applied that to every foreigner in this country, then we would be substantially hurt.

Mr. DRINAN. Hurt in what sense?

Mr. COLBY. Hurt in our ignorance of things that we have learned.

Mr. DRINAN. OK, you pick up a lot of information and it is delectable and the State Department alleges that it is useful, but this is at the cost of a massive invasion of the privacy of foreigners and some Americans.

Now, you say that it is valuable but somehow the country got along without doing this until the last few years. I have never heard the case where the existing wiretap law is insufficient.

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Mr. COLBY. I would hate to have been barred from having a tap on the Japanese Embassy in 1941 as that kind of a provision would bar.

Mr. DRINAN. You could have that if you had probable cause of crime.

Mr. COLBY. That is no crime. It is an international relationship unless you call a war a crime.

Mr. DRINAN. It didn't prevent Pearl Harbor.

Mr. COLBY. It did not, and I would hate to lose the capability of learning about their planning.

Mr. DRINAN. You know the reservations about a lot of people who feel the fourth amendment rights of people have deteriorated and the feeling of a lot of other people that this is a departure in the foreign and domestic policy of this country.

How do you refute or respond to the very serious misgivings that, and frankly, I have been one of the reasons for delaying the passage of this bill, and that other people have the most serious misgivings since this is a total departure from the fourth amendment. How do you respond to that?

Mr. COLBY. I don't think it is a departure from what the courts have authorized in the past and the ambiguities that are in the present court decisions about wiretapping of foreigners.

I don't think that has been, that this requirement of allowing the wiretapping of foreigners and requiring a warrant for all Americans, this is a very substantial movement toward the protection of Americans, not against them and this is an additional protection. It has not been in existence up to now.

Mr. DRINAN. And the Attorney General came back to the same thing, that we are doing it indiscriminately now and perhaps 100 organizations are being wiretapped now without any statute. You are saying what is proposed is better than the present, but I am against the present.

Mr. COLBY. I am saying I am trying to seek a reasonable compromise between a situation in which there are no rules and in which the consensus of Americans believes there should not have been any rules about intelligence in the last 30 years—that is what people thought and that is what the Congress thought at that time—and a situation in which we bind ourselves so tightly that we can't know what we ought to know about the dangerous world around us.

I think there is a compromise which is to give the American citizens the protection, but not to extend that to every foreigner in the world.

Mr. DRINAN. But, sir, you are making all the assumptions that no one in the intelligence community to my satisfaction at least, has explained or justified; there is a dangerous world all around us; they are out to get us and they are our enemies and this is the key thing. There are no ordinary ways by which we can collect adequate information.

You are saying this is the only way and this is a massive invasion of the privacy of foreigners. This is the extreme way. This is probably a violation of the fourth amendment against our own Constitution. Aren't there more ordinary, more reasonable ways? I

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have not heard the case that all of them have been exhausted. The FBI and intelligence community started years ago wiretapping.

I have no evidence this is the only way. I have no evidence as to how important this is. This probably is in violation of the Vienna Convention that says that all diplomatic houses and offices here should be immune or unviolable.

So all of those reasons come forward. I say we are now being asked to justify something that has never been justified by the intelligence community as indispensable and necessary.

Mr. COLBY. The intelligence community has presumably justified this to the select committee of the House and the Senate who are entitled to know the information about what has been done in the past and do know it.

Mr. DRINAN. Mr. Chairman, therefore, if we are going to make a sensible judgment on this, I would suggest we go into executive session and hear what has been told to the Intelligence Committee.

Mr. COLBY. I would urge that that not be done. I think it is important that the Congress set up a responsible way of supervising intelligence activities under the Constitution, but in a way which does not reveal the details of our activities to every Congressman.

In 1776 the Committee on Secret Correspondence said there are too many Members of Congress to keep secrets. I think again a reasonable compromise is to appoint a small group of representative Members of each House to know the secrets and make sure they are properly managed, but it does not require that every committee be allowed to know the secrets.

The present statute requires that eight committees of the Congress be briefed on any activities that the CIA undertakes other than pure intelligence-gathering abroad. Every new thing I briefed those eight committees on during 1 year leaked.

I think that is not a way to keep secrets. I think one committee with the responsibility to know the secrets and to keep them is the way to do it.

Mr. DRINAN. Sir, all I am saying is that if the House Judiciary Committee has concurrent jurisdiction over this matter as we do, if, according to the chairman, we are going to insist upon having equal time on the floor and have appropriate number of conferees, then no rational judgment can come out unless we are privy in executive session to the secrets that you shared with the House Intelligence Committee.

Otherwise it is impossible to make any judgment because you cannot answer openly the key question that I raised.

Mr. MCCLORY. I don't think he testified before the House Intelligence Committee on this legislation, did you?

Mr. COLBY. No.

Mr. DRINAN. I mean on the necessity for having a continuation of the wiretaps as the only way by which they can get the intelligence they need. I am suggesting that less drastic, less extremist ways might well be available.

Mr. MCCLORY. I understood you to say you wanted the same testimony as Director Colby had given to the House Intelligence Committee. Director Colby did not provide testimony to the House Intelligence Committee either in open or closed session.

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Mr. COLBY. I think we were referring to the information provided by the intelligence community, not by me in this particular bill or this particular hearing. I think though that you must put some reliance on the good faith and diligence of the members of the committee appointed to do this supervisory job over the intelligence community.

But, indeed, I fully understand your position, Father, that you are being asked to vote for something without knowing the details. But the way to solve that is to delegate the decision as to whether there is a valid basis to the people who are appointed. It is the only way in which we can have the constitutional system of review by the Congress and still not expose the secrets.

Mr. MCCLORY. That may be so down the line, but at this moment in time the leadership has in fact given to this subcommittee and to the House Judiciary Committee the same power that they had in the Senate to go forward.

Well, I appreciate your testimony. Once again I am sorry that I was absent, but I don't know how all of this is going to be resolved and I have never felt this strongly in my 7½ years in Congress as I do about this bill.

I think it is just wrong to go forward and invalidate everything the intelligence community has done. Furthermore, this bill doesn't even apply to all the microwave intelligence-gathering that is being done and will be done even more. That is expressly excluded and we, by implication, are affirming the right of the executive branch and the CIA to use microwaves for anything that is not electronic surveillance.

I have further reservations about validating that by implication in the bill.

Mr. RAILSBACK. If you will yield, where you and I differ is on the necessity of some statutory guidelines. It is my belief that except for maybe self-imposed restraint by the executive branch, they can do almost anything they want to do and we don't even know about it. I think that this bill at least provides a mechanism for congressional review and not only that, it sets forth some guidelines to enable the executive branch to know exactly what it is we think they are required to do.

Mr. DRINAN. If the gentleman would yield, this gives us no opportunity whatsoever, however, to judge the efficacy and the indispensabilities of what we are doing. They are utilizing the most drastic, most extreme, most probable unconstitutional means that can exist, namely, the intrusion by electronic surveillance into the privacy of foreigners and some Americans.

I say, why don't they demonstrate that less intrusive measures have been tried and failed? They have never demonstrated that they have tried ordinary means. They have always gone for the maximum invasion of the lives of others.

That is the point that I insist upon that I cannot act intelligently unless I have some knowledge as to why they chose years ago the most invasive method.

Mr. RAILSBACK. I remember in the Watergate hearings learning about 14 taps that were even conducted of American citizens by the White House under the guise of national security. If we don't have some legislation, and in the absence of voluntary restraint, I am

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not sure that the Executive is not inhibited or prohibited from doing what was done.

I think we are trying to prohibit some activities that we believe have been extreme and by the same token we are trying to set forth some guidelines to guide the executive branch. As you know, I don't agree with my colleague from Illinois in all respects, but I think that he would agree at least that we want to provide some direction. I would hope that you would agree that we ought to at least provide some direction to the Executive. There is no direction.

Mr. DRINAN. Sir, if the gentleman would yield, I concur completely, we want to give direction. All they say is that the only thing that we can utilize to get foreign intelligence is this intrusive thing of electronic wiretapping. They are not asking for permission to do anything else. They say this is the only thing that we need. We are using it now and we want to take out the status of everybody who is involved in this thing and get this funny warrant, this quasi-warrant and everything then is beyond our scope.

We will never be able to see, even the Intelligence Committee probably will not be able to review the efficacy of the warrant and so on.

One way by which if this bill is going to pass, we could put in a sunset provision that after 3 or 4 years it goes out of existence. Then we will rethink it and the intelligence community has the duty to demonstrate that the wiretaps they placed were indispensable to foreign intelligence. I don't think they are.

Mr. COLBY. Father Drinan, may I contest one point, that we don't try the other means? There is a great center of scholarship out in Langley which was developed precisely to try the other means, to read the open journals and listen to foreign broadcasts, and talk to people who have been to these countries.

We use every possible means to gather information on the open- and up-and-up basis. We only go to the expensive, difficult, dangerous work of clandestine work when there is no other way.

We have spent hundreds of millions of dollars developing fantastic technology so that we can know about things which are visible on a photograph and visible from electronic devices. We have indeed used many, many other means and our knowledge of the world around us has changed enormously as a result.

There are some things, particularly in the political, economic, and strategic fields, that are not visible on a photograph, that are not produced in foreign broadcasts and foreign technical journals, that are in the minds of people in these countries. Through their comments, through their admissions, we can learn some very important features of life in those countries.

Mr. DRINAN. But, Mr. Colby, that standard is not incorporated in the bill that passed the Senate because in the bill that passed the Senate all that the CIA has to demonstrate to the court to get this quasi warrant is that the information that they are seeking is "necessary" or that the information "relates to the successful conduct of the foreign affairs of the United States."

They do not have to demonstrate that this is the last resort.

Mr. COLBY. They must demonstrate it to the select committees of the House and Senate each year in the authorization bill and to the Appropriations Committee in the approriations bills. They are

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very conscious of the fact that they are supervised in the amount of activity they use in different fields. Obviously they are under restraints to use the simplest forms of getting information where those can be used.

Mr. DRINAN. Would you agree to the insertion of a provision under the definition of foreign intelligence information that that shall be information which relates to something which the intelligence community cannot obtain by any other method?

Mr. COLBY. I would hate to have to prove that whole case and to review all the other potential ways of collecting intelligence before every judge each time one goes before him for a warrant. No, I would not agree with that.

Mr. MAZZOLI. Would the gentleman yield?

On page 45 of the bill, if you will read 7(c), part of the certification which has to be brought to the attention of the special court is that such information cannot reasonably be obtained by normal investigative techniques. So in one sense, and I am not sure it goes to the heart of your problem, but in one sense the Agency has to make a case that this kind of electronic intercept is really the only way that this information can be obtained.

Mr. DRINAN. I commend the gentleman because his committee included that. I was reading from the Senate-passed bill which does not include that. I think we should take that provision you cited and put it up front in the foreign intelligence information and say that the wiretap may be authorized only when the foreign intelligence information that is sought is unavailable to the intelligence community by any other means.

Mr. COLBY. I would respectfully suggest that it not be quite as absolute, that you ask for an affidavit by a responsible officer that says that is his decision rather than litigate the entire problem whether some agent over in the middle of Asia could possibly give you that information.

I don't think that would be useful litigation in front of a judge when asking for a warrant.

Mr. ERTEL. If we were to litigate that particular item, to say it is not available by any other reasonable means, that means that you have to prove a negative. How many weeks would it take on each surveillance you would want to institute?

Mr. COLBY. That is exactly my concern. These are targets of opportunity, these particular kinds of targets. It is very difficult to prove they could not be obtained somewhere else.

Mr. MCCLORY. I have looked at S.1566 which is the Senate-passed bill and has the identical language to which my colleague from Kentucky made reference as the basis for the issuance of a certificate; that is, it has to be shown that the information is not reasonably obtainable through ordinary means. May I just add this?

Mr. DRINAN. Would the gentleman yield?

I want to correct a bit of what I said.

In the Senate-passed bill, they have later on a provision that the affidavit or certification must state that such information cannot reasonably be obtained by normal investigative methods or techniques.

I would change that to "cannot possibly be obtained."

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Mr. McCLORY. That is also in the substitute bill that I have offered. Let me just say further that as I tried to indicate, I am in support of translating the existing guidelines and practices into positive legislation.

The differences are rather small in a way and the question which both Director Colby and I were raising is whether or not you want to set up this mechanism of a special court.

Let me also point out that there is something additional here and that is for the first time we are imposing penalties on those who would violate the guidelines and the strictures that we would lay down. So if the executive branch should depart from the statutory language, they would be subject to penalties under the legislation, both in the bill that I have offered, and in the one that the majority of the committee offered.

It seems clear that there are some positive improvements, which in a sense are in full compliance with the very detailed and very educated recommendations that Mr. Colby has made in his book and in his testimony before the committee. I am sure that we can provide for some substantial improvements while we consider this extremely important legislation.

Mr. DRINAN. Thank you, Mr. Chairman. I am certain that my 5 minutes have expired.

Mr. KASTENMEIER. At least 10 minutes ago, I am sure. We are not observing the 5-minute rule actually.

The gentleman from Pennsylvania, Mr. Ertel?

Mr. ERTEL. Thank you, Mr. Chairman.

I appreciate your testimony, Mr. McClory and Mr. Colby. I am not aware of all the implications of the intelligence community so I am sort of like a naive individual in this area. But I do have a couple of questions about the special court. I wondered what your views might be on that.

But it seems to me if you have a special court which is sitting in Washington, we know who those judges would be because it would be a court order. We know the location of that court. I assume the reason for the special court is for secrecy itself.

Does not the provision of having a special court, and maybe having one or two judges who sit on that court in and of itself provide information as to what is taking place if you are making application to that court at times? Could there not be some sort of utilization of that information?

Mr. COLBY. There certainly would be a centralization of the information that would not necessarily otherwise be centralized. If you did use the ordinary district judges, I think you would not necessarily have the same centralization of the records and of the history of it outside the executive branch where the requests obviously originate.

Mr. ERTEL. If I were someone trying to find out what the counterintelligence people in this country were doing, I certainly would want to have somebody watching exactly what that court was doing, who was attending that court, and when, whereas if I had it spread over the entire Nation, I would think the ability of some foreign power to collect that kind of information would be dissipated a great deal.

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I am sure they are not going to have somebody sitting on every district court in the United States. Would you agree?

Mr. COLBY. I do agree. That is one of the principles of operating an intelligence agency. You do spread out and compartmentalize the information so that the operational information is not totally available in one place.

I think this House, of course, had the somewhat dismaying experience of finding a bug under one of the tables in one of the committee rooms. Obviously, that would be a target for such a technical device. Anything used in that nature, if that is where these discussions are going to be going on, it would be a very high target for somebody to try to put a bug in.

Mr. MCCLORY. I would like to make a comment about the special court. This special court would be an unprecedented institution in our judicial system which would operate in secret and which would develop a whole body of secret law which apparently would be retained indefinitely because there is no indication that it would ever be put in the public domain. It undoubtedly would require some clearance of bailiffs and clerks. In other words, we would be subjecting the judiciary to the kinds of controls that they have never been subjected to before.

Mr. ERTEL. If I may interrupt, this would be the first time the United States has ever sanctioned the star chamber.

Mr. MCCLORY. That is true. There are two principal reasons for this. It is argued that it would provide protection to the Attorney General and persons who carry out this electronic surveillance because there would be some magic in a court order.

But my argument is that if the court order is issued on the basis of lack of information or misinformation or misinterpretation or whatever, then the court order is not worth anything. There is no protection at all.

Mr. ERTEL. What challenges are there to that court? If the Director of the CIA comes in and files a false affidavit, there is absolutely no way that anyone in this whole Nation will ever check on that. It will be done in a star chamber. It could be perjured testimony and we have the imprimatur of a court authorizing it.

Mr. MCCLORY. The court is only entitled to very limited information, such as who is being targeted and the type of electronic surveillance being used, and the fact that there are minimization procedures.

Mr. MAZZOLI. If the gentleman would yield for a moment, this is very interesting. Of course, it goes to the heart of the problem of the gentleman from Pennsylvania.

First of all, this is not a star chamber. A star chamber in the regular use of the term, and I think in the technical, legal term, is a group that meets and has total, absolute plenary power over somebody and there is no right of appeal or oversight.

In our situation, as the gentleman from Illinois well knows, all the information is available to the two Intelligence Committees. There will be periodic reports which will be sent into the committee in addition to being able to look at the information. There are, as you know, two separate special reports, one is a district court, one is a court of appeals, to hear further appeals from actions.

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There is a provision in the bill dealing with the rights of aggrieved persons, the person illegally targeted. There is provision made to sanction those agents, field agents, who exceed the authority and go beyond the warrant.

So I would say that, while the gentleman is correct in that this is an unsual procedure, I think it is not correct to say that this is a star chamber.

I would respectfully differ with my friend in saying that the court would have limited information. They would have the whole panoply of information.

Mr. McCLORY. I don't know whether you can limit the court. The bill undertakes to limit the court, but I don't know of a court that is ever limited in this manner. They just go wherever they want to, I think.

But the other point I was going to make, and I think the basis for the court being involved, is the question of accountability. The court would retain a permanent record and there would be a record of the accountability. But I don't see why you can't provide the record of accountability without involving the court in the process.

Mr. ERTEL. What good is a record of accountability to no one?

Mr. McCLORY. If the court revealed information, I don't know what you could do to the court.

Mr. ERTEL. How is an aggrieved citizen who has a wiretap authorized under this, he never knows the wiretap is authorized, he has no way of knowing it. He has no knowledge. He has no way to attack or challenge it. Certainly there is going to be no appeal to that Special Court of Appeals except by the Government. Who else would appeal from the special court.

Now that Special Court of Appeals, it seems to me, is only the Government's court of appeals, not anybody else.

Mr. McCLORY. There is a whole novel section in the bill which was added. It is a very extensive section which would involve the aggrieved person if prosecution occurred later and the intelligence community wanted to use some of the information. Then the aggrieved person might become involved in a hearing and that likewise becomes very complicated because you would have to have that hearing in secret and I think there is a provision that counsel, if he had clearance, he would be made privy to this information. I do not recall the details of it.

Mr. MAZZOLI. I think that part was taken out.

Mr. McCLORY. Did we take that out? But the question suggests a problem which is extremely difficult to deal with.

Mr. ERTEL. Mr. McClory, could you explain to me who is going to take an appeal to the Special Court of Appeals other than the Government?

Mr. McCLORY. I doubt there would be anyone. In other words, the decisionmaking as to whether or not you have electronic surveillance is being transferred by this legislation, by the committee, from the executive branch to the judicial branch.

If the judicial branch decides you are not going to have electronic surveillance, no matter how important the national security question is involved, you are not going to have it. You can appeal, but if

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the Special Court of Appeals turns you down, you are prohibited from conducting electronic surveillance.

The Cnstitution under article 2 vests the interests of our country under the executive branch and I don't think you can constitutionally transfer it to the judicial branch.

Mr. ERTEL. I don't follow your last statement, Mr. McClory. We can't transfer?

Mr. MCCLORY. You cannot transfer the constitutional responsibility and authority and I would say accountability of the executive.

Mr. ERTEL. Then why are we setting up the special court in that instance? If in your view you cannot do that, then why are we setting up the special court?

Mr. MCCLORY. I think the special court is a great mistake. My substitute bill does not provide for any special court proceeding. That is why I am urging on this committee that whatever you recommend, you include elimination of the special court. If you want to provide for a warrant procedure with regard for American citizens, do it in the same way we have done it in title III, go to the district court.

Mr. ERTEL. I think my concerns are a bit different than yours, but they may wind up with the same conclusion.

Thank you very much.

Mr. KASTENMEIER. The gentleman from Kentucky.

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

It is good again to see you, Mr. Colby, and again to join my friend, Bob McClory.

Mr. Colby, Father Drinan brought up the question of U.S. citizens who are living abroad and whether or not this bill provides any protection for them.

I think it ought to be pointed out that on page 51 the committee's report recognizes at this point, and I am reading from the report:

> The committee merely recognizes at this point that such overseas surveillance activities are not covered by this bill. In any case, the requirements of the 4th Amendment would, of course, continue to apply to this type of communications intelligence activities.

So in the cases cited, in the case of *Berlen Democratic Club* v. *Rumsfeld*, as a proposition for the fact that the fourth amendment would still apply to U.S. citizens living abroad—furthermore, I would say to my friend from Massachusetts that there is a charter bill which is in the making, a charter for the intelligence community, which I think can legitimately deal with this—I think that there are avenues to protect the American citizens living abroad outside the purview of this bill.

Mr. Colby, I would like to ask you a question. On page 4 of your statement you suggest that you are concerned about the setup of a special court. In your second full paragraph you mention:

> I believe the involvement of a judge in the degree of detail required by this bill is neither necessary or appropriate.

Are you concerned in any fashion in your critique here with the possibility of leaks or security risks as a result of propounding this information to the judge?

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Mr. COLBY. I don't consider that a major factor; no, Mr. Mazzoli. Obviously, every additional person you tell something to is an additional risk, but I do not consider confiding in a judge an additional security factor of any great magnitude.

My objection is that it is just not necessary. This kind of detail, I doubt, is necessary.

Mr. MAZZOLI. Even as to an American citizen?

Mr. COLBY. As an American citizen I would say you ought to be able to convince the judge that you have a good reason for it and what you are going to do is reasonable, but you don't have to go into massive detail.

Mr. MAZZOLI. You support a warrant issued through the regular court procedures?

Mr. COLBY. Yes.

Mr. MAZZOLI. The idea being if you are not worried about the risk of disclosure or leaks, that that kind of security can be maintained across the 50 States?

Mr. COLBY. Yes. You normally would not go into that detail if it were not necessary, and that you are really putting onto the judge more than he should be asked to rule on and more than is necessary for him to rule on.

Mr. MAZZOLI. Is that a veiled way to say the judges might not be competent or adequate?

Mr. COLBY. I am not saying that. I think it would be largely a bureaucratic exercise and long justifications and affidavits and sort of boilerplate eventually.

Mr. MAZZOLI. But you say a regular district judge would not be susceptible to the problems of a special judge?

Mr. COLBY. I think with a regular district judge, you ought to go about it the same way. Give him a reasonable idea of what is needed and answer his questions so he is satisfied that you are operating within the proper limit. I don't think requiring a vast amount of detail is going to substantially advance that process.

Mr. MAZZOLI. Then your position is that the warrant need not have as its foundation or to support it the detailed information which our committee bill calls for?

Mr. COLBY. Right. It seems to me that is not really necessary. If the judge has doubts about it, certainly you should have to respond to him. But I think an overdetail in the applications is liable to, if anything, lead you astray. The judge is not going to spend his real judgment on the main question but instead get into all the details.

Mr. MAZZOLI. If the gentleman will bear with me, I have a hard time following that thread. It seems to me, from my standpoint, if you suggest in your case, and you do, as to American citizens, that a judicial warrant is appropriate, then it would appear to me that the special court set up with a few judges, with secure quarters, with personnel trained in maintaining secrecy—and, of course, our bill provides the use of even executive branch personnel to do some of the ministerial functions, cleared people to minimize the risk—it would seem to me that would be all in the entire procedure.

So it boils down to basically how much detailed information you feel the judge ought to have or needs and I feel the judge ought to have or needs.

Let me proceed to another point.

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Mr. COLBY. If I may use one additional point as to how often do you expect to use this, I don't think you really are going to have enough business to keep a special court occupied every day of the week. I think that is one of the factors, is it really necessary to have that kind of a special court. I don't think you will be running around getting that kind of a warrant all the time.

Mr. MAZZOLI. The committee was faced with a dilemma there. Our initial position was to have fewer in number and basically to be appointed by the Chief Justice of the United States. That became a problem because it could be an old boy network being put together.

We thought that this spreading it over the 10 circuits and making sure that if there is geographical representation, you don't get a whole bunch of people who may have had some background in the intelligence community, but to make the ultimate issuance of a warrant based upon a much more objective scrutiny perhaps than it would be if we let the Chief Justice himself, on his own, apply it.

Mr. MCCLORY. Can I point out that Mr. Colby is referring to a warrant limited to U.S. persons and there has only been one such case in the last 2 years. So it seems to me to be a terrible overreaction to set up a special court to take care of one case every 2 years.

Mr. MAZZOLI. Let me go on to the next point.

You say as to non-U.S. persons, you don't feel the need for a warrant is made. You suggest particularly with the idea of just generally obtaining intelligence information, without targeting it to a crime about to be committed or with even a specific problem that we may face in international policy, just a general obtaining of information from which to put together this mosaic that we call intelligence estimates.

On page 35 of the committee report there is language which I wonder if you, Mr. Colby, would refer to in the second full paragraph. This is talking about visitors to the United States, people who come in.

The phrase "acts for or on behalf of a foreign power" is here intended to require the Government to show a nexus between the individual and the foreign power that suggests that the person is likely to do the bidding of a foreign power.

For example, "visitors from totalitarian countries, visitors to the United States under the auspices or sponsorship of their government would satisfy the standard."

This would mean there would be enough showing to have the judge issue a warrant for electronic surveillance of that person.

I wonder if you could inform the committee just for a few moments on the specific nature of people that would not already fit within the sweep of the bill and the coverage of the bill who might have information that would be reasonably necessary to fit this picture together.

Mr. COLBY. That particular provision, Mr. Mazzoli, says that a person who acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interest of the United States, when the circumstances indicate that, he may engage in such activities within the United States.

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Again, that is a counterintelligence kind of an orientation. It is not aimed at the collection of that mosaic that I am talking about. It is a defensive orientation that indicates that he may do something clandestinely in this country. I would think there are countries that really it is very hard to prove that they engage in clandestine activities in the United States or that he is apt to do so.

Mr. MAZZOLI. If I understand correctly, what we are saying is that he must come from a country which itself engages in clandestine activities against our interest, but he or she would not have to be part of that activity?

Mr. COLBY. He doesn't have to be part of it, but it has to be circumstances indicating that he may engage in them.

Mr. MAZZOLI. For instance, you know the Soviet trawler, the seamen on the Soviet trawler, you know.

Mr. COLBY. He certainly fits the clandestine activities. I would accept that for a Soviet, certainly. That would include a Soviet. But there are other countries that make decisions quietly.

Mr. DRINAN. Isn't it broad enough so that virtually every Soviet Jew in this country could be put under electronic surveillance, that he may be engaged in? I have spoken to FBI officials that say, yes, they cast a suspicion over some Soviet Jews. They do go and inquire about them.

This definition is so broad it seems to me that a person in the intelligence community could say, we want to do intelligence or electronic surveillance over Mr. and Mrs. So and So, Soviet Jews, who came here a month ago.

Mr. COLBY. We agree on our dislike for the phrase from opposite ends, Father. I think that is true. Your definition does fit. It comes from a country which engages in clandestine activities and potentially he might be a false defector. He might be a false lead here. So he might engage.

Mr. MAZZOLI. It also says the person has to be likely at the bidding of the foreign power. I think few Soviet Jews, if I understand the plight herein, would be in that position.

One last question, Mr. Colby. You are familiar with the provisions we have put in in the back with respect to the liability of field agents, the subsequent liability for actions which they took.

What would be your feeling about the additional security, the additional protection, to these agents by reason of having a warrant which is in hand, in the file, from a judge from a special court as a protection against the situation involving in your case a non-U.S. person? Do you think that an advantage of our bill for the field agent, the FBI person or CIA person, is an argument in behalf of the Intelligence Committee's approach?

Mr. COLBY. Against a possible private suit by a foreigner?

Mr. MAZZOLI. Yes. Not a foreigner. I think there is some question as to whether or not they have standing, but a U.S. person, a U.S. citizen, filing against the agent?

Mr. COLBY. I think your provisions are warranted. I am delighted to see the thing so defined so that if an officer undertakes an activity and properly decided at the time, I think that would apply either under your legislation or under a warrant.

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Mr. MAZZOLI. Would it apply to your situation as you envision it for non-U.S. persons where there would be no court order and no warrant?

Mr. COLBY. I think if he met the standards here, the kind of standards that I am suggesting, that there be some official affidavit that this information is important to our country.

Mr. MAZZOLI. But if I understand correctly, you were saying you don't like the specificity of our bill so your idea of an affidavit upon which a regular court order would issue would be less definite than ours.

Mr. COLBY. Maybe, but I think it would cover the fact that a responsible officer made an affidavit that there was a need for this activity and the judge then gave him a warrant. I think that would protect the individual who went out and followed the warrant and didn't exceed its limits.

Mr. MAZZOLI. Thank you, Mr. Chairman.

Thank you, Mr. Colby.

Mr. KASTENMEIER. Does the gentleman from Illinois have any other questions?

Mr. RAILSBACK. Mr. Director, could I direct your attention to page 32 of the Intelligence Committee bill and specifically subsection 2 which apparently establishes two different standards relating to people that could be American citizens.

One of them relates to clandestine intelligence gathering and requires that it be done on behalf of a foreign power, which activity is involved or may involve a violation of the criminal statutes of the United States. Now that is one standard which seems to me to be fairly loose, to say the least.

Then you get into the second, subsection B, which relates to any other clandestine intelligence activities which activities involve or are about to involve a violation of the criminal statutes of the United States.

I am curious if you think that second section imposes any kind of a hardship as far as our ability to gather foreign intelligence material under it?

Mr. COLBY. "Are about to" seems rather a high standard. I think if you had language "or reasonably believed likely to" or something of that nature, you would have a standard that you could apply there. But the standard of "knowingly engages in an activity or about to", that means you could only move at the very last moment.

Mr. RAILSBACK. That is a tougher requirement obviously than with respect to intelligence gathering.

Now in the report on page 41 there is a section dealing with other clandestine intelligence activities. It is intended to refer not only to foreign powers engaged in spying in the United States to obtain information but to covert actions by intelligence services of foreign powers that are intended to harm the Nation's security, affect the course of our Government, or the course of public opinion or the activities of individuals.

Such activities may include political action, that is, recruiting, bribery, or influencing of public officials to act in favor of the foreign power, disguised propaganda, harassment, intimidation or

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even assassination of individuals who oppose the foreign power. Such activity can obviously undermine our democratic institutions.

I don't think that section has been drafted very well, for certainly it was not clear to me that "any other clandestine intelligence activities," meant all those activities that they spell out in the report.

What are some of the activities that you think could be effectively covered and would you recommend that more difficult standard of "involve or about to involve" a violation of the criminal statutes?

Mr. COLBY. I think the committee report does outline the kinds of activities involved, action against our laws to affect legislation, to act without registration as required in certain of the statutes, even to go on to some of the more extreme actions which have taken place in this country through others other than in an intelligence collection itself.

I think this is a broad phrase here which is used to cover all of this kind of thing. You have to look at the legislative history to see what it is really referring to.

I think we had the same problem when we wrote the Presidential Executive orders referring to special activities.

Mr. RAILSBACK. Let me ask you this: Do you think that that more stringent standard would impose any kind of a difficult hardship on our intelligence-gathering capability?

Mr. COLBY. I think they are about to. This refers to any person, of course. This problem here, this is an American, in other words, who is involved in this?

Mr. RAILSBACK. It could be an American, right?

Mr. COLBY. The question I think they are probably conscious of is that some of these actions might appear to be ambiguous as to whether they are doing it for a foreigner or doing it as an expression of their own feelings and rights and that is why the higher standard is imposed according to the committee language.

I think "or are reasonably believed to be" or something like that rather than "are about to," an absolute standard like that.

I think we would want to protect ourselves as much against illegal covert activity by a foreign intelligence service as against intelligence collection.

Mr. RAILSBACK. You have really answered my question. Thank you.

Mr. KASTENMEIER. I have one last question and I will address it to Mr. Colby. How can we judge the utility and the necessity of intelligence information and particularly intelligence information derived by the methods we were talking about here?

Now, obviously, as a person who strongly believes in his mission, you would be expected and you do indeed defend the intelligence gathering as necessary to the security of this country.

Who would be in the best position to, not as a partisan, in that connection, to judge the usefulness of intelligence derived by wiretapping or other electronic techniques other than a member of the intelligence community? Let's say, would you agree that a Secretary of State, the national security adviser, what class of persons would know enough about your operation and would be users of the intelligence so that they would be in a good position to ulti-

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mately judge the necessity both of the intelligence and resorting to certain techniques to require that intelligence and could share that wisdom with us?

Mr. COLBY. I think the senior levels of the executive branch certainly are primary users of intelligence. But frequently they deal in general summaries and assessments and don't know the precise basis for every little thing. But they have staffs who do participate in creating those summaries and can find out how much of that comes from one source and how much from another.

Second, I think an independent judgment can be made by the members of the select committees. They have an idea of how much energy and appropriation is being put into this kind of activity and they have every way of finding out what the results are, are the results good, or are the results kind of marginal.

The Senate committee made a little criticism of an operation I had approved on one of these kinds of operations. After looking at it and critiquing it, I have to accept their judgment. I am glad to say we cut it off after 3 months, too.

But, nonetheless, they criticized whether we should have done it, the Marianas thing. I think this is an independent judgment which they say they did not think it was worthwhile in that case. I accept that judgment. I think that is appropriate as an independent way of reviewing these things.

Mr. KASTENMEIER. The reason I asked is, of course, you pose a hypothetical, if we have the advance information of Pearl Harbor or some other catastrophe, how useful that would be to our national security. In answer to the gentleman from Massachusetts, but how difficult it is for us to make the value judgment between measuring certain constitutional protections against certain proscribed necessities.

In years past, we had witnesses both from the State Department and the Justice Department. Dean Rusk expressed some reservations about the high necessity of relying on wiretapping, although one could ask whether Dean Rusk, even though he got summaries, knew how the intelligence was derived. He probably did not.

I think probably even with the select committees, they may not really be able to follow the activities closely enough to assess what ultimate value intelligence amounts to. They may not know precisely how you derive it or to what extent it is obtained from any particular method. They may know in terms of certain cases. They may be familiar with a case or more in which maybe the case can be made that it was highly useful in that particular instance. That is why I asked you selectively what sort of persons would be in a position to judge the work of our intelligence community in terms of some ultimate public policy.

Mr. COLBY. I frankly would have to say that the best place to rely on that are the select committees. They do approach it independently. They are not involved in the operations. They are not defending the operations. They are concerned with the risk. They are concerned with the expenses. They are concerned with what value comes out of this amount of energy or they are concerned with the embarrassment that can be created. Obviously, clandestine operations can create embarrasment and they have. But I think they can make a judgment.

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The professional is inclined to say that he would hate to close up a potential source, particularly by law, and then not be able to open it up when it might become particularly useful. He might not use it year after year, but to have it barred from him as against what might arise 5 or 10 years from now, the coverage of some particular source who fortuitously was of enormous value and then suddenly to run smack into a statutory prohibition, I think that is my concern.

I think the more general judgment that you are asking for can be made by the committees saying how much good do we get out of this kind of operation and let's conduct a little inquiry into it and put some investigators on it and prove out whether this stuff has been useful, valuable, or vital. Then you can make a judgment whether you are willing to close it off even.

Mr. KASTENMEIER. Actually, that response is a very favorable one for the House Committee on Intelligence because in a sense it suggests that their judgment in arriving at their version of H.R. 7308 has a balance of all those considerations.

Mr. COLBY. That coincides with my impression, I must confess, but obviously I speak as a partisan, as you know.

Mr. KASTENMEIER. I appreciate your appearance and the appearance of our colleague, Mr. McClory, today. You have been very helpful to the committee in its deliberations.

I should announce that the next hearing on this issue will be Wednesday, June 28, 9 a.m. Witnesses will be Senator Edward Kennedy and the gentleman from Kentucky, Mr. Mazzoli.

Thank you very much. The hearing today is now recessed.

[Whereupon, at 12:07 p.m. the subcommittee recessed, to reconvene Wednesday, June 28, 1978, at 9 a.m.]

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FOREIGN INTELLIGENCE SURVEILLANCE ACT

WEDNESDAY, JUNE 28, 1978

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

The subcommittee met, pursuant to notice, at 10 a.m., in room 2141, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Danielson, Drinan, Santini, Ertel, Railsback, and Butler.

Also present: Mazzoli and McClory.

Staff present: Bruce A. Lehman, counsel; Timothy A. Boggs, professional staff member; and Joseph V. Wolfe, associate counsel.

Mr. KASTENMEIER. The committee will come to order.

This morning we begin our second day of hearings on H.R. 7308, the Foreign Intelligence Surveillance Act of 1978, and related bills.

Due to an unexpected change in scheduling on the Senate floor, Senator Edward Kennedy, who has been announced as our first witness at 9 o'clock this morning, will not be able to appear until later in the morning.

The committee is very pleased to welcome our friend and colleague as our first witness this morning, the chairman of our sister committee, the House Intelligence Committee, Subcommittee on Legislation, Hon. Morgan Murphy.

Before we commence, it appears we have a vote on the floor so, accordingly, we will recess for 10 minutes and we will all return here and then we can hear from Mr. Murphy.

[A short recess was taken.]

Mr. KASTENMEIER. The subcommittee will come to order.

When we were interrupted because of the vote we were about ready to hear from our first witness this morning, our friend and colleague, chairman of the Subcommittee on Legislation of the House Intelligence Committee, Hon. Morgan F. Murphy.

TESTIMONY OF HON. MORGAN F. MURPHY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. MURPHY. Mr. Chairman and members of the subcommittee, I am pleased to appear before you today to testify in favor of H.R. 7308 as reported by the House Intelligence Committee.

As introduced, H.R. 7308 was supported by the administration and, loyally, if not enthusiastically, supported by the intelligence community.

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The bill was opposed by civil liberties groups. Our committee worked hard on the bill, involving in discussion both civil liberties groups and officials of the intelligence community.

The result is a better bill from the perspectives of both civil libertarians and intelligence officials. It is a good bill, albeit a very complex and confusing one, because it assures that the abuses of the past cannot be repeated, while at the same time preserving and, in certain respects, improving, the necessary collection of foreign intelligence important to this Nation's security.

This is not to say that it is a bill about which men may not differ. Some believe on the basis of moral principle that electronic surveillance simply is wrong and can never be justified, except perhaps if it were essential to the continued existence of our country.

Others believe, again on the basis of moral principle, that judges should never be involved in the approval process for foreign intelligence electronic surveillances. Obviously, the bill is not responsive to either of these positions.

Rather, the majority of the House Intelligence Committee was convinced on the one hand that the electronic surveillances which would be regulated by H.R. 7308 can be, and often are, important to the national security.

On the other hand, the majority of the committee was equally convinced that these important surveillances could be conducted in a manner which would fully protect the legitimate privacy rights of Americans. The bill, as reported by the committee, I believe, authorizes and facilitates those important surveillances, while protecting the rights of those involved, and prohibits those illegitimate surveillances which were the abuses of the past.

Where views are as diverse as they are with respect to this subject area, it is impossible to have a "perfect" bill, if there even is such a thing as a perfect bill. This bill has been subject to searching scrutiny, however; it has, with its predecessor from the Ford administration, been the subject of hearings on seven different occasions over 3 years, of five different markups and five committee reports.

Each additional step has resulted in improvements in the eyes of all concerned but, in all due respect, the point of diminishing returns has now been reached. Perhaps the greatest threat to the national security and civil liberties is delay. Delay is not likely to improve the bill as much as it is likely to defeat it entirely.

In the course of your hearings, you will have to decide whether this subcommittee or the full Judiciary Committee should take this bill up fully with the delay that this would entail.

Listen to the civil libertarians with respect to civil liberties concerns. Listen to the administration and the intelligence community with respect to national security concerns, and decide if both their concerns have not been met. But I caution you against herrings of whatever stripe that may be raised.

A red, white, and blue herring that has been raised is a so-called threat to the national security. No intelligence community witness before the House Intelligence Committee suggested that H.R. 7308, as introduced or as reported, threatened the national security.

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No intelligence community witness has expressed any reservation about the bill, as reported, impeding legitimate intelligence collection. No intelligence community witness suggested that the bill's procedures would threaten whatever speed is necessary for foreign intelligence surveillance.

Only two witnesses expressed a reservation concerning risks of disclosure with respect to the bill as introduced. Those witnesses were Admiral Murphy of the Defense Department and Admiral Inman of NSA. Today, both Admirals Murphy and Inman support H.R. 7308, as reported, without reservation.

I would like to enter into the record their letters to Chairman Boland.

Mr. KASTENMEIER. Without objection, those two letters will be received and made a part of the record.

[The letters follow:]

THE UNDER SECRETARY OF DEFENSE,
Washington, D.C., June 28, 1978.

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

DEAR CHAIRMAN BOLAND: When I appeared before the Legislation Subcommittee of your Committee, I testified that the Department of Defense supported H.R. 7308, as introduced. I also expressed our reservations about particular provisions which, in my view, posed risks to security which were not outweighed by the potential benefits to civil liberties that might be provided by those provisions.

In the course of your Committee's consideration of H.R. 7308 changes were made not only to the provisions I mentioned in my testimony but also to others. These changes minimize risks to security and effect important improvements in the system under which the Department of Defense would be required to operate. I have reviewed the bill reported by your Committee and wholeheartedly support its passage. The bill would directly facilitate certain-intelligence activities of the Department of Defense while at the same time protecting the privacy rights of United States citizens.

Sincerely,

DANIEL J. MURPHY,
Admiral, USN (Ret.), Deputy.

NATIONAL SECURITY AGENCY,
CENTRAL SECURITY SERVICE,
Fort George G. Meade, Md., June 19, 1978.

Serial: N0731.

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

DEAR MR. CHAIRMAN: It has come to my attention that the House Judiciary Committee is proposing to hold hearings on H.R. 7308, the Foreign Intelligence Surveillance Act. Since my most recent testimony before your Committee on this matter was in closed session, I am concerned lest there be any misunderstanding in the Congress of my position on the legislation.

I would like to confirm that I support passage of the bill as reported by your Committee wholeheartedly and without any reservation whatsoever. In particular, the bill fully meets the security concerns of the National Security Agency while at the same time significantly improving the legal framework for the conduct of the intelligence activities covered by the bill. I would be happy to see the legislation promptly adopted by the Congress in the form reported by your Committee.

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I have set forth my views on this matter in a letter to Congressman McClory, a copy of which is inclosed for your information.

Sincerely,

B. R. INMAN,
Vice Admiral, U.S. Navy,
Director, NSA/Chief, CSS.

Mr. MURPHY. It is alleged that reams of classified material will be given to large numbers of judges and court personnel. This is nonsense. An application is made to one judge, not many, and the bill explicitly allows for executive branch personnel to serve as any necessary court support.

Another herring that is dragged across the trail is that judges are unequipped to make subtle political and operational decisions necessary in the foreign intelligence field. The bill recognizes this fact full well and does not allow judges to make such decisions.

Much of the bill's complexity arises from the need to specify exactly what the judges' duties and powers are under the bill. Those duties and powers are of the same nature as currently exercised under the law regulating law enforcement surveillances; that is, applying facts to a statutory standard.

The vehicle that keeps judges from second-guessing the Executive's political judgments is the certification which must accompany each application for a warrant. That certification must be signed by a high executive branch official with responsibility for intelligence or foreign affairs matters.

It will contain statements by that official, that the object and the purpose of the surveillance is to obtain a particular type of "foreign intelligence" as defined, that this foreign intelligence cannot be otherwise obtained and it will provide the basis for the official's belief that such information will result from the surveillance. Such a certification can only be questioned if these statements are clearly erroneous on their face.

The so-called "criminal standard" is also a herring to the extent that anyone suggests that it will impede legitimate intelligence collection. The presence of the criminal standard does not mean that the purpose of the surveillance is prosecution, or only to gather evidence of a crime, and there is certainly no limitation in the bill that would so restrict such surveillances.

Nor was the so-called criminal standard adopted because of any belief that the Constitution required it. Rather, it was adopted as a matter of policy and principle, that this Government should not target electronic surveillance against individual Americans absent probable cause to believe that they at least may be involved in a violation of law.

If this principle had any negative impact on the collection of necessary intelligence, a debate over this criminal standard might be called for, but the Director of the FBI has indicated in the strongest possible terms that the criminal standard in H.R. 7308, as reported, will not, I repeat, will not, impede the FBI's intelligence collection by means of electronic surveillance.

Finally, it has been suggested that congressional oversight is a more proper check on the executive than a judicial warrant. But, it is clear to me, at least, that congressional committees are simply not equipped to conduct oversight of the day-to-day operation of electronic surveillance, and it is also clear to me that the executive

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will not provide us the information to do the job even if we were in a position to do it.

Such uncertain, after-the-fact oversight is no substitute for prior approval of these surveillances.

The benefits of H.R. 7308, as reported, and its improvements over current practice both from national security and civil liberty viewpoints are substantial.

Given these benefits and improvements, I would merely ask you to allow this bill to go to the floor as soon as possible.

In the past few days there have been articles in the press alleging that H.R. 7308 would require the telephone company to become involved in electronic surveillance to a far greater degree than it ever has.

AT&T will probably address this issue.

I know that I speak for the House Intelligence Committee when I say that it is not the intent of the committee to require any different type of assistance from the telephone company under H.R. 7308 than is currently authorized under existing law, that is, chapter 119 of title XVIII, U.S. Code.

Under both H.R. 7308 and chapter 119, the assistance which may be required is: "Information, facilities, or technical assistance."

Because H.R. 7308 involves electronic surveillance, a defying term of very broad scope encompassing more than the interception of wire and oral communication, it is possible that the assistance rendered under H.R. 7308 would not always be identical to that which has been provided under chapter 119.

However, the assistance would be of the same nature and would not involve the telephone company in those horrible activities which have been suggested in the press.

That is my statement, Mr. Chairman, my formal statement.

Mr. KASTENMEIER. The committee thanks you very much for a very helpful statement, and I would like to compliment you personally on your statement. I think particularly the context in which you open the statement indicating the difficulties of ever achieving a perfect bill were appropriate, and well understood at least by this member.

I have a series of questions, but I will ask only two and then yield to my colleagues.

I should point out that the gentleman from Illinois, Mr. Murphy, also has duties which will take him to the Rules Committee, so we will not try to prolong his appearance, but I am sure that nonetheless the witness will be pleased to answer any and all questions.

I note also this morning that the gentleman from Illinois, Mr. McClory, and the gentleman from Kentucky, Mr. Mazzoli, are present, and while the rules do not grant the right for them to ask questions of the witness, I would propose that if there is no objection from any member of the committee that they also be permitted to ask questions of the witness.

I hear no objection.

A column by William Safire in Monday's New York Times criticises section 105(f) of the bill which authorizes warrantless eavesdropping for the purpose of testing electronic surveillance and training intelligence personnel.

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Mr. Safire calls this exception, "A loophole wide enough to drive a truckload of plumbers through."

Could you describe for us your subcommittee's rationale for this exception and if you care to respond to Mr. Safire's criticism?

We will insert Mr. Safire's column in the record at this point.

[The column follows:]

LONG EAR OF THE LAW

(By William Safire)

WASHINGTON.—Now that the Carter Justice Department has won its argument in the Supreme Court and can rummage through your home and mine without having to show wrongdoing, a new assault on personal privacy is underway: a plot to give Congressional sanction to warrantless wiretapping, and to turn the telephone company into an arm of the law.

In 1940, F.D.R. claimed the right to tap telephones on "national security" grounds without a court order; as we have seen, that power can be abused. To prevent Presidents from listening in to political opponents in the guise of protecting national security, the new Foreign Intelligence Surveillance Act has been proposed.

Predictably, opponents of warrantless wiretapping cheered; the act seems to require a court warrant before tapping can begin. But nobody is reading the fine print, which adds up to the most sweeping authorization for the increase and abuse of wiretapping and bugging in our history.

First, the bill introduced by House Judiciary Chairman Peter Rodina—HR 7308—slips in an "exception" that makes a mockery of the purported purpose of the bill: it authorizes the President and Attorney General to tap without a court order provided the Executive Branch reports the action to the House and Senate Intelligence Committees. Thus, the check on abuse is not judicial, but Congressional—and Democratic committee chairmen tend not to complain about abuses by Democratic Presidents.

Next, Mr. Rodino's way of protecting us against future abuses of power authorizes "officers, employees or agents of the United States . . . in the normal course of their official duties" to test the wiretapping equipment and to train wiretappers on unsuspecting people—without a court order. This is a loophole wide enough to drive a truckload of plumbers through, and the excuse, if caught, would be "sorry, just testing."

Finally, the Rodino bill—and the Kennedy-Bayh companion bill in the Senate, S-1566—turns the American Telephone and Telegraph Comnpany, a private company, into an active participant in both court-ordered and unwarranted tapping.

Currently, the telephone company provides the government only with "line access information"—that is, it will point out which wires in the central terminal are on the target phone, and will rent the government a private line from that point to the lawmen's recording equipment. Nothing else.

But under the proposed new law, the phone company and the target's landlord must provide "any and all information, facilities, or technical assistance necessary to accomplish the electronic surveillance in such a manner as will protect its secrecy."

That means—for the first time—the phone company, and not the government, would be installing the taps and making the recordings on its equipment. Since that would be much easier to accomplish, it would surely spawn an increase in tapping.

That also means—for the first time—the phone company would be called upon to install "pen registers" which decode the dialing tones, send them to a computer, and can trace the source of incoming calls. Thus, if you should dial the Soviet Embassy by mistake, the F.B.I. will know the call came from your telephone; that suspicious item would go into your file.

Mr. Rodino's bill would require the phone company to design wiretapping equipment, and train personnel in its use; open its central offices to lawmen; and provide uniforms, tools, identification cards and trucks to the government—all of which it properly now refuses to do. Under the proposed law, the company could be required to create false trouble on the line to facilitate entry; then, phone company employees could be asked to place new, microscopic transmitters in target premises. Landlords would be required to secretly cooperate.

That certainly does away with the need for easy-to-catch "plumbers" and "black bag" jobbers. It also would turn the Bell System into the Griffin Bell System,

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undermining whatever faith the customers of the phone company might have in that carrier's integrity.

Conservatives like to assist law enforcement, and to curtail espionage; we do not like to make it harder for "our side." But this natural inclination to help the law must be out-weighed by a responsibility to protect the law-abiding individual from the power of government to intrude. And this bill would turn every telephone instrument in every home into a suspected household spy.

Huey Long once said that if fascism ever came to America, it would come in Democratic form; in this bill, Big Brother is on the way, and he is cloaked in the mantle of civil liberties.

The irony is rich on the personal level, too: Here we have Democrat Peter Rodino (once embarassed by an F.B.I. wiretap of a New Jersey racketeer who claimed to have politician Rodino in his pocket) putting his name on a bill giving emergency authority over espionage wiretaps to a Senate intelligence committee chaired by Democrat Birch Bayh, who last week was revealed to be the longtime close friend of—and recipient of thousands of dollars of entertainment from—Korean Congress-corruptor Tongsun Park.

U.S. HOUSE OF REPRESENTATIVES,
PERMANENT SELECT COMMITTEE ON INTELLIGENCE,
Washington, D.C., June 27, 1978.

NEW YORK TIMES CO.,
229 West 43d Street,
New York, N.Y.

TO THE EDITOR:

The Op-Ed article by William Safire, of June 26, 1978, regarding the proposed Foreign Intelligence Surveillance Act contained a number of inaccuracies which unfortunately cloud the legitimate issues involved.

Mr. Safire wrote that H.R. 7308 authorizes electronic surveillance without a court order "provided the Executive Branch reports the action to the House and Senate Intelligence Committees." It is unclear to what Mr. Safire refers because H.R. 7308 does not contain such an authorization. Generally, H.R. 7308 requires a prior judicial warrant to authorize a surveillance for foreign intelligence. Perhaps he refers inaccurately to the "emergency" exception to the warrant requirement. Such emergency surveillances cannot run longer than 24 hours, must be presented to a court within 24 hours, and if the application is denied, all information obtained in the interim must be destroyed and not further used. Such "emergency" warrantless surveillances are not unique to H.R. 7308; there is a similar emergency exception to the statute governing law enforcement electronic surveillances, which, for 10 years, has not been the subject of abuse.

Or perhaps he refers, also inaccurately, to an exception to the warrant requirement added to the bill by the House Intelligence Committee. This exception can only be utilized where a surveillance is solely directed at official foreign government installations and, even then, only where it is solely directed at certain restricted activities. In fact, these surveillances do not intercept Americans. If any of these warrantless surveillances should ever in the future intercept an American, the bill requires that all the contents of the communication must be destroyed and not used or disseminated for any purpose, unless a warrant is first obtained. Violations of these restrictions are explicitly made a criminal violation. Hence, the check on abuse arises directly out of the statute. No prior judicial review is involved, because there would be little, if anything, for a judge to review with respect to the rights of Americans.

Mr. Safire also notes there is an exception to the warrant requirement for the testing of surveillance equipment and the training of personnel. He fails to note, however, the strict limitations on this exception. Such surveillances may not be targeted against anyone, and any communications intercepted cannot be disseminated and must be destroyed. This limited exception to the bill's warrant requirement is necessary because it is necessary to test in the United States extremely sophisticated equipment and to train personnel in its use before the equipment and personnel are sent overseas. Absent this exception, this necessary testing and training would be prohibited.

Finally, Mr. Safire suggests that H.R. 7308 and its companion measure in the Senate, S. 1566, would radically change the relationship between the Government and the telephone companies with respect to wiretaps by requiring the companies to provide "all information, facilities, or technical assistance necessary to accomplish the electronic surveillance." This language, however, changes nothing. For eight

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years section 2518(4) of title 18, United States Code, has similarly provided in law enforcement surveillances that "a communication common carrier, landlord, custodian, or other person shall furnish the [Government] forthwith *all information, facilities, and technical assistance necessary to accomplish the interception.*" There is no evidence that this authority has been misused by the Government, and it is a matter of record that this authority has not been used to have the phone company install taps, make recordings, install "pen registers" (which, incidentally, do not trace incoming calls but outgoing calls, contrary to Mr. Safire's statement), design wiretapping equipment, train personnel in its use, open its central offices to lawmen, or any of the other activities which Mr. Safire suggests H.R. 7308 authorizes.

While H.R. 7308 raises important and controversial issues that should be fully considered, issues upon which we as members of the House Intelligence Committee do not see eye-to-eye, we believe that Mr. Safire's article serves no one's interests because it ignores the real issues and raises spurious ones in their place.

Sincerely,

MORGAN F. MURPHY,
Member of Congress.

ROBERT MCCLORY,
Member of Congress.

Mr. MURPHY. Well, both Mr. McClory and myself, as Chairman of the subcommittee, wrote a response to Mr. Safire's article in the paper. I would say that Mr. Safire has missed by a wide mark the intent of this bill. I don't think he gave it careful reading.

This is not a simple bill, Mr. Chairman and my fellow colleagues, this is a bill that in talking to the Senators that shepherded it through the Senate had taken many, many years and many, many hearings. But, to get to your specific question, I just remarked in my last few remarks that this bill requires nothing more than is already required of the telephone or common carriers under chapter 19 of title XVIII. They cannot target the testing just against anyone; it's a random testing which they are required to do now, and they have to destroy any and all information they pick up as a result of the testing.

Mr. KASTENMEIER. You don't think it's possible for this section to be abused by the agencies?

Mr. MURPHY. No, I don't, Mr. Chairman. In addition, I think the telephone company would feel much more secure, as I know the FBI agents and CIA agents will feel, with this legislation.

In other words, when there is a warrant application and a warrant signed by a judge and attested to by a member of the executive branch that has Senate confirmation attached to his position, when that warrant is issued, you have the executive, the high executives of the executive branch signing on, you have a judge looking at it under very concise language as to what he can do and what he cannot do.

Then you are going to have these agents going out into the field under color of title that this action has been approved at the highest level of the executive branch, has been approved by a Federal judge, and you won't have the hesitancy that you have now, according to testimony by Director Webster of the FBI, Director Turner of the CIA, and Director Inman of the NSA, you will not have the hesitancy that now exists in those three services, when you have these agents going out and collecting what they have termed is needed intelligence that is going uncollected today because of the uncertainty that clouds these agents' actions.

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They are being sued throughout the United States, not only they, but the Attorney General and the telephone company.

Mr. KASTENMEIER. Another question I have is, you indicated in your statement that two witnesses, Admiral Murphy and Admiral Inman, expressed reservations, but now, according to letters you have presented the committee, they support the bill without reservation.

What changes were made in the bill or why did they alter their views?

Mr. MURPHY. It was Mr. McClory's amendment 9, I believe, that addressed itself to this particular type of information that the NSA told us about in closed, secret session, that they direct against foreign embassies. It is the type of information that scarcely ever an American is ever involved in. In fact, they think of no instances where an American is involved or would come in to be wiretapped or electronically surveyed.

They were not dead set against it; they had some reservations about it. What we did then in the committee was we took secret testimony, and in the commmittee approved Mr. McClory's amendment No. 9 that took this particular segment of intelligence that the NSA was gathering and said that we would not require a warrant.

Once this was deleted both Admiral Murphy and Admiral Inman enthusiastically supported this legislation, with no reservations whatsoever now as the bill was reported out of your committee.

Mr. KASTENMEIER. Thank you.

I have a number of other questions but due to the fact we have a number of members here this morning I am going to yield to my colleagues.

Mr. MURPHY. I might say that amendment was a concern for national security information that they felt they might be encumbered in obtaining if they had to go through the warrant application. They had a little bit of a reservation about it. This committee bent over in respecting the national security reservation and we amended it, and now enthusiastically both admirals support this legislation.

Mr. KASTENMEIER. Was that amendment adopted in the full committee?

Mr. MURPHY. In the full committee.

Mr. KASTENMEIER. I now would like to yield to the gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. Mr. Chairman, I simply want to express my gratitude to my colleague from Illinois for making every effort to assist me in understanding the bill.

As you have said, it's a very complicated bill. Some of the fears that I initially had have been allayed by explanations given to me by your staff and by other people.

I think maybe the issue that confronts us is whether by reason of the strong feelings of some of the members of this committee, on some of the provisions of the bill, we ought not to try and have our own legislative imput.

Although I may not share many if these feelings, I think they are very germanely held. I know that the gentleman feels that this

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issue has been kicked around long enough and that we ought to get moving on this legislation.

I just want to generally commend you for cooperating with us.

Mr. MURPHY. In answer to the gentleman, I will make a comment on the gentleman's observations. At the beginning of this year this committee was called down along with its Senate counterpart to the White House where the President of the United States asked us to conduct hearings and get this legislation out. He said it was a priority of his administration.

I also want to give credit to the Ford administration and Attorney General Levi where the seed for this legislation was first planted, and both of those gentlemen are enthusiastically in support of this legislation.

I want to give credit to Attorney General Levi, who is a fellow Chicagoan, who is the one that gave the initial start to this legislation. But the President said this is one of the priority pieces of legislation in his administration, and all of the members of the select committee in the House and Senate were down to that hearing.

He said he himself had to study this bill and read it over 8 to 10 times before he fully understood it and appreciate what it entailed. He said he thought it was a blending of legitimate intelligence community concerns and the protection of American citizens under the Bill of Rights.

Mr. RAILSBACK. I want to thank the gentleman.

Mr. KASTENMEIER. The gentleman from Illinois, Mr. Murphy, is correct in terms of Mr. Levi's contribution. He was our first witness in early 1976 when we took up this question in this subcommittee, without at that time producing or moving forward with a bill.

The gentleman from Illinois, Mr. Railsback, suggests on the question of what this committee ought to do, if anything I am pleased to announce that tomorrow, at the conclusion of our hearing we will make a determination of what should be done.

If the determination should be in favor of markup, we will not, however attempt to mark up the bill tomorrow.

The gentleman from Virginia, Mr. Butler, I know will not be here. However for any action the subcommittee may take, of course, the gentleman's proxy can be voted. If the decision should be made to attempt to mark up the bill, we will have to delay that until we return from recess.

I now would like to recognize the gentleman from Massachusetts, Father Drinan.

Mr. DRINAN. Thank you, Mr. Chairman, Congressman Murphy, and I appreciate all of the work you and your colleagues have done.

But I am certain you are familiar with my position, since I testified before your committee.

I don't know where to begin, because the steamroller is going to have the House Judiciary Committee finess the whole thing and just forget about it and let it go on the theory that, well, some weakening amendments might be inserted, even if some strengthening amendments might.

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In any event, let me take up one point that is very relevant this morning and leave aside, at least for the moment, my fundamental objections to what I consider as a new departure in American jurisprudence and a fundamental error.

But you indicated, Mr. Murphy, that the telephone company has nothing to be afraid of, and yet I have read very carefully Mr. Caming's testimony.

He is coming here, and he says this, that this sweeping and disturbingly ambiguous language here and, in fact, it gives the courts no guidance with respect to defining the role the telephone company, is to be directed to play in effectuating the wiretap.

The fact is you say this does nothing more than the 1968 act that compels the telephone company under certain circumstances, but I am not entirely certain that is correct, because this bill will force the telephone company to comply in ways that were not legally required before.

In any event, even if your proposition is substantially correct I think it is a fundamental error, and that the telephone company lost 5 to 14 in the U.S. Supreme Court last December. But, in a concurring opinion this is what the Supreme Court, four Judges said, or five, about the grant of authority that you are conferring on the Attorney General and/or the courts in this bill, that it: "Provides a sweeping grant of authority entirely without precedent in our Nation's history." It goes back into the fourth amendment and shows that the Writs of Assistance in the Colonies were the thing that triggered the Revolution, among other causes, and that this is going back to the Writs of Assistance.

Could you allay somehow Mr. Caming's disquietude and that disquietude as shared by other people in the telephone company as they communicated with me yesterday?

Mr. MURPHY. Mr. Drinan, the assistance which may be required "is information, facilities or technical assistance", and it ends there. Although the intelligence methods have improved since the chapter 119 of title XVIII was written, there are different ways of extracting intelligence, different types of electronic surveillance. Basically, the information facilities and technical assistance is all that is required from the telephone company.

Now, I want to say that the telephone company, if they had their druthers or their way, prefer not to be involved in this whatsoever.

Mr. DRINAN. Like I do, and like a lot of Americans. The least you could have is a conscience clause, you should not compel people who think this is morally wrong to break in contrary to the wishes and without the knowledge of the people in this House. Why don't you have a conscience clause and say we are not going to compel something that is so fundamentally wrong to so many Americans?

That is one of the things I would like to insert, if we can get markup here. That is one of the reasons why I feel strongly the House Judiciary Committee should not abdicate or abandon its fundamental role, just as the Senate Judiciary had a role.

Mr. MURPHY. I agree with the gentleman in that he has a strong viewpoint and his views are certainly entitled to be given a tremendous amount of weight. A lot of people feel the same way as the gentleman.

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On the one hand, this legislation is a balancing of this country's legitimate security needs, national security needs, as opposed to the rights of Americans to be secure from any invasion, whether it's breaking in, listening, pen registers or what have you, whatever the art or science is, and we had to balance these issues and, naturally, we in the House Select Committee on Intelligence are not trying to, by bringing in legislation, close out inputs from the Judiciary Committee or any other committee.

We propose to go to the floor when and if that takes place, with an open rule, where the gentleman can certainly get up and expound his views and offer amendments.

Mr. DRINAN. I appreciate that. But it's all over if we finess, if we don't have the votes here for markup, then it's all over, and you can get it on the floor, but with the House, Senate, with the Senate Intelligence Committee saying we had all of this in secret session, there is no hope.

I mean, it's all over if tomorrow we don't have a vote here.

Mr. MURPHY. I would like to say to the gentleman and to the committee that the Supreme Court has not yet heard this issue. I think there is a case pending now that the Supreme Court will undoubtedly hear, *Truong-Humphrey* case, and it's my opinion from a close reading of the *Keith* case that the Supreme Court is about to legislate in this field.

I hear constantly on the floor and throughout my travels in this country about the Supreme Court is always legislating by judicial decision. This is the House's opportunity to legislate.

It's our responsibility to legislate in this field. There are important Constitutional questions that have remained unanswered throughout this land with regard to surveillance of American citizens, permanent resident aliens, and foreign visitors. I would like to see the House exercise its will along with the Senate, as it has already done.

I think the vote was 95 to 1 in approving this bill. I would like to see the House exercise its free will on the floor in open discussion and open amendments to come to a conclusion and consensus with regard to these important questions because, if we don't, as sure as we are sitting here today, the Supreme Court is going to, by judicial decision, legislate in this field, and none of us may like the interest or balancing of interests that comes down from this tribunal.

Mr. DRINAN. The Tonkin Gulf was decided 95 to 1. You say here, Mr. Murphy, and this is the key question——

Mr. MURPHY. I would say to the gentleman it was never debated like this piece of legislation. Had it been debated like this piece of legislation, had the experts been called in from both the civil libertarian side of the field and military and national security side of the field, we might not have made that error.

Mr. DRINAN. You say on page 2, and here is your major premise, that you say that the electronic surveillance that would be regulated by this bill can be and often are important to the national security.

I am pushing for a criminal standard even for foreigners in that I have no evidence whatsoever that that would be deleterious to national security. You people in secret session may have some, but

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I am being asked to judge on something where they have never presented evidence to me that this is essential to the national security.

In fact, the bill does not say that. It just says they can get this if it's interesting to them or if they say it's necessary for the successful conduct of the foreign policy of this country.

That is the statute, and I have been down the road and heard Ed Levi and they simply do not have the basic answers to all of the questions, and I and others will litigate this as unconstitutional if, in fact, it passes.

I hope eventually some Supreme Court is going to say that the American Government cannot do this to people, even though they are foreigners. You just cannot go and wiretap them. This is contrary to all that is the basic expectation. Even a visitor coming to these shores now will know he can be subject to surveillance and the intelligence community says, well, he exhausted all other remedies first, but they don't and they won't and they are not really required to buy this bill.

So, you see my position, and all I can say is I would like to make some improvements.

Now, coming back to the specific of the telephone company, would you recognize we should, in fact, alter or modify the bill that your committee reported out, if, in fact, we want to meet the legitimate fears and apprehensions of the telephone company?

Mr. MURPHY. I would say to the gentleman that certainly you are entitled to take a close look and come to any conclusion that your philosophy and your viewpoints dictate. But we have looked at this, we have heard testimony from the telephone company, we have heard testimony from the intelligence agencies and the intelligence agencies feel they need the cooperation of the telephone company.

In fact, Mr. Drinan, the intelligence agencies have stated to us that there is important national security information that is not being gotten today by the agencies that need it because of the telephone company or the common carriers' position on this.

So again we come back, and I respect the gentleman's point of view, maybe the Supreme Court will say the United States ought not to be involved in any of this stuff, that is for them to say. But in the meantime, the Church committee and the Pike committee pointed out passive abuses by the executive branch of Government.

This legislation addressed those passive abuses with the hope that the American citizens and permanent resident aliens and foreign visitors will not be indiscriminately wiretapped or electronically surveilled when they come to this country because, if we give that away, then we give away our whole existence and the reason we are here, and also our Constitution.

But this is a balancing of interest and it is not an easy balancing act.

Mr. DRINAN. OK. I guess I don't concede the interests of the intelligence community, that they keep insisting this is the only way. They have other ways, they have microwave, they have pen registers, and none of that is regulated by the bill before us.

I am certain my 5 minutes has expired.

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Mr. MURPHY. I would say that is exactly what is under this legislation. All of that is going to be regulated by this bill.

Mr. DRINAN. Not pen registers.

Mr. MURPHY. Pen registers, microwave, and more sophisticated items than that. With the one exception that the NSA had some question about, and that I can't go into in open session, but it's a small part of it with no American citizens involved.

Mr. DRINAN. Thank you.

Mr. KASTENMEIER. The Chair announces to the committee there is an ongoing vote on the House floor and the second bells have just rung.

We clearly have not finished with our witness, Mr. Murphy so, again, we will recess for 10 minutes and return to continue this testimony.

We stand in recess for 10 minutes.

[A short recess was taken.]

Mr. KASTENMEIER. The committee will come to order.

When we recessed for the last vote, the gentleman from Massachusetts, Mr. Drinan, was in the process of completing his testimony.

Mr. DRINAN. No. I yield back any time I may have.

Mr. KASTENMEIER. All right. Accordingly, the Chair now recognizes the gentleman from Virginia, Mr. Butler.

Mr. BUTLER. Thank you, Mr. Chairman.

I do appreciate the effort that the witness and his committee have made in regard to this legislation.

I would just say first, Mr. Chairman, in order that maybe there may be no misunderstanding, I feel like this subcommittee has a responsibility to review this legislation as we would any other.

Over the years this subcommittee, before my presence, had developed an extensive knowledge in this area, and I think now to abdicate the responsibility would be a serious mistake.

I put my views on the record so that you will be aware how I feel about it when we take this matter up tomorrow with reference to how the committee will proceed.

Now, turning to the witness, you allege on the first page of your statement, that this legislation assures that abuses of the past cannot be repeated, I am not asking you to recite those abuses again, but I would like to know the extent to which your committee, in preparing this legislation, made a determination as to whether the abuses of the past are, in fact, being repeated or not?

Mr. MURPHY. Of course, Mr. Butler, the abuses we refer to have all been documented in the Church report, the Pike committee report of which I served as a member, and in the Rockefeller Commission report. Whether or not those abuses are continuing I would candidly say no, that the CIA Director, the FBI Director, and NSA Director have been most cooperative with our committee, the House Select Committee on Intelligence.

I have seen a great degree of cooperation and information that we never got when I was a member of the Pike committee, is now being made available.

Now, as to the type of information we get and the timeliness of that information, that is another question. Just the physical restraints of serving on other committees and the committee's time,

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we could not obviously look at every proposed wiretap day in and day out.

So I would think that when the rights of Americans, especially the rights under the fourth amendment are involved, the need for the judicial warrant application is an additional safeguard to those Americans that their liberties are being observed.

Mr. BUTLER. But it would be a fair statement that based on the revelations of the various investigations and legislative investigations, the response of the intelligence community has been one of cooperation and that if these abuses are continuing at the present time it would come as a surprise to you.

Mr. MURPHY. I would say that would be a correct statement and assessment, an assessment of my view at this time.

Of course, when a national emergency or some reasons might exist in some person's mind that they need not come to Congress and want to act on their own, there is no prohibition against it now other than their own executive committee orders and restraints within the executive committee. And, of course, we hope that they are looking to the past abuses and have tried to collect them, and I think they are making an honest effort.

This is not to say in the future, after this climate of the times have changed and people begin to relax, that maybe some executive branch, elected in later years, won't go back to the abuses we experienced in the past.

This is a safeguard. We have a commitment as legislators to the American public to see that abuses of the past are corrected, and we try to insure as best we can they don't occur again, and this is the purpose of this legislation, it is a balancing of interests.

Mr. BUTLER. I appreciate that a great deal.

What I am trying to determine is whether there is any immediate urgency about really getting this thing done with a weak sort of attitude. I just feel that based on what you have said here that the better part of legislative judgment is to proceed cautiously.

Mr. MURPHY. I would say this to the gentleman, and be as precise as I can, the need for this legislation lies more in the national security field at this point in time, in my humble estimation, than it does in the civil libertarian end of it. We have been told in closed session that there is valuable foreign information that is going unchecked and undiscovered, and that we need to get going to pick up this information.

Mr. BUTLER. You are suggesting that what the intelligence community is doing is overreacting to the absence of protection that this bill provides?

Mr. MURPHY. Yes. I think that there has been that, not only in the intelligence community, but in the law enforcement community. I think there has been an absence of cooperation between agencies. I think the cases of legitimate law enforcement surveillances are all going by the boards because of the hesitancy on the part of these agencies to move boldly into this field.

Mr. DRINAN. Would the gentleman from Virginia yield for a moment?

Mr. Butler One moment.

Mr. DRINAN. Mr. Murphy, the intelligence communities can, by Executive order, do virtually everything in the bill. If they want to

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clean up their act, they can do that, and they can be responsive to you and to the Senate Intelligence Committee, and I am certain they will be sustained.

They can put through everything except actually going to the Federal judge. They can set up a bureau where all of these standards have to be followed; they could have the minimization.

Thank you for yielding.

Mr. MURPHY. I would like to answer that question, if I may, Mr. Butler.

Mr. BUTLER. Certainly.

Mr. MURPHY. I would say to the gentleman from Massachusetts I think that possibly they do do it. But they have testified there is a hesitancy on the part of the agents and the directors of these agencies to move in these fields because the law is so unclear and, as a result, they are not as aggressive as they possibly should be.

Mr. KASTENMEIER. The Chair must interrupt at this point to announce to members there is another recorded vote on ordering a second by the majority to consider the first suspension.

Mr. BUTLER. Mr. Chairman, I yield back the balance of my time.

Mr. KASTENMEIER. I thank the gentleman.

As stated, it is the practice of the committee to recess for votes, and I regret whatever it is that is causing this rash of unnecessary votes on the House floor, but we will recess for 10 minutes.

[A short recess was taken.]

Mr. KASTENMEIER. The committee will come to order.

I believe neither the gentleman from Pennsylvania, Mr. Ertel or the gentleman from Nevada, Mr. Santini, are here. I, accordingly, would like to now yield to the gentleman from Illinois, Mr. McClory, if he has any questions.

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

I appreciate the privilege of sitting in on this subcommittee meeting and being afforded the privilege of questioning, which is consistent, with the traditions of the committee.

I appreciate, too, the testimony of my distinguished colleague, Mr. Murphy. I have endeavored to work with Mr. Murphy and the other members of the Intelligence Committee to produce legislation which would regulate the subject of foreign intelligence surveillance. While we have differences of opinion, as Mr. Murphy indicated, we joined in protesting a misrepresentation of our work in an article by William Safire in the New York Times, I am hopeful we can arrive at legislation which is compatible with our national security interests while at the same time protective of the individual civil rights of Americans.

Mr. Murphy, you contend that there are no intelligence witnesses who expressed reservations about the bill either as reported or pending. However, General Stillwell, who is the head, of the Retired Intelligence Officers Committee, testified just last week, before the Senate Intelligence Committee, with regard to the so-called charter legislation which has a whole section which tends to embody this subject of foreign intelligence surveillance, and objected vigorously to those provisions.

Are you aware of General Stillwell's testimony?

Mr. MURPHY. I don't think he testified before a committee, did he?

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Mr. McCLORY. Before the Senate Intelligence Committee, I believe.

Mr. MURPHY. But that is on charter legislation. I don't think he is aware of what is contained in this bill. If he is, he has not testified or requested to testify before us.

Mr. McCLORY. Let me just state that General Stillwell did testify, precisely against this subject of foreign intelligence surveillance.

Mr. RAILSBACK. Would the gentleman yield?

Mr. McCLORY. Yes.

Mr. RAILSBACK. I received a call from General Stillwell indicating his opposition to the committee bill.

Mr. McCLORY. Yes; thank you.

Mr. MURPHY. The gentleman has never contacted this Member nor any members of my staff.

Mr. McCLORY. Mr. Warner, who was formerly general counsel to the CIA, raised questions about the legislation also. We have talked about witnesses both in open and in executive session, and thus let me dispute your statement categorically and state very definitely that two witnesses in executive session objected to this legislation.

I won't go any further than to state that this is a fact.

Mr. MURPHY. Would the gentleman yield at that point?

For the committee, if I may have the chairman's permission, I would like to read Mr. Inman's letter to Chairman Bolling of the committee.

Mr. McCLORY. I am not questioning Admiral Inman's letter as I was not talking about Admiral Inman.

However, let me just ask you this about Admiral Inman. Admiral Inman did object to the court involvement insofar as his NSA operation is concerned, and you and other members of the Intelligence Committee saw fit to exempt that operation from the court involvement or the warrant procedure.

Isn't that correct?

Mr. MURPHY. He had some reservation and we corrected the reservation, but there were no Americans involved in the particular type of intelligence gathering activities he was concerned about.

Mr. McCLORY. But you supported an exemption of his operation?

Mr. MURPHY. I did.

Mr. McCLORY. Notwithstanding the fact you originally recommended a so-called across-the-board warrant requirement?

Mr. MURPHY. I did it in a spirit that I thought was going to bring our committee together and get this legislation out.

Mr. McCLORY. You did it in the spirit of national security and protecting individuals rights, too, I am sure.

Mr. MURPHY. I was not as concerned as Admiral Inman was concerned about it, and he would have supported the bill with or without that amendment. I felt a lot more comfortable with it.

Mr. McCLORY. Are you aware that William Colby, former Director of the CIA, testified before this committee last week objecting to this measure, except to the extent that he would favor a warrant procedure with regard to U.S. citizens?

Mr. MURPHY. I know he testified here. I was under the impression that his testimony was in favor of the bill. I talked to him afterward.

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Mr. MAZZOLI. Mr. Chairman, would the gentleman yield momentarily on that point?

I appreciate the comments, and it is true Mr. Colby did have some concerns about the bill. But I think it's like looking at a glass half full of water. Is it half full or half empty?

I believe Mr. Colby's position was he favored the bill, with some modification, rather than that he opposed it, except for. So I think maybe if we were to look back over his transcript, he probably was really more in favor. So, on that basis, I think we can fairly say he did support it, but he had some criticism also of it.

Mr. KASTENMEIER. That is the Chair's recollection of the testimony.

Mr. MCCLORY. Let me just point this out. Mr. Murphy offered an amendment, so-called amendment No. 2 which reflected the position of Mr. Colby, and would have provided a warrant requirement only with regard to U.S. persons. That is, U.S. citizens, and those who are lawfully here.

It was my feeling, and it was the feeling of other members of the committee, that this protected the fourth amendment rights of Americans.

Isn't it true that that amendment lost in the committee on a 6 to 6 vote?

Mr. MURPHY. I would say the gentleman is correct in his recollection of the vote. But I think that was prior to the amendment.

Mr. MCCLORY. Prior to No. 9?

Mr. MURPHY. No. 9, and I think had the vote been taken after No. 9 was adopted the vote could have very well been quite different.

Mr. MCCLORY. Just one other question, and that is, you mention in your testimony that no intelligence community witness suggested that the bill's procedure would threaten whatever speed is necessary in foreign intelligence operations.

Now, regarding speed, if the proper officials applied to the special court for a warrant and the application was not under the emergency 24-hour procedure, and the court turns them down for one reason or another, there is an opportunity to go to a Special Court of Appeals that is created by the bill.

Don't you feel that this appeals process involves the element of speed and by the same token wouldn't it deprive the intelligence community of intelligence that otherwise they would be able to gather during this period? Is there any authority in the special court in this bill to grant any emergency interim order?

I don't find any.

Mr. MURPHY. No; there is no interim order, but the court of appeals, which is the court to which a lower court's negative response to a warrant application would be appealed, is right here in Washington, D.C., and I would imagine without any difficulty at all they could commence hearings the very next day.

Now, you talk about speed, when we talk about intelligence gathering apparatus, you just don't go on out and put a wiretap, pen register, electronic surveillance, or movie camera overnight. This is going to take time, it is going to take movement of agents, it is going to take a logistical support by cooperating carriers and agents, and I would suggest that I can see no barriers.

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Justice Bell testified to this. There would be no barrier to a speedy appeal.

Mr. McCLORY. But, if they had done all of that and went to the court and didn't get approval, then interference with the speedy gathering of intelligence would result.

Mr. MURPHY. That reminds me of a story of a ship captain who was asked all of the time what do you do in hurricane winds of 100 miles an hour, and he said, I would break out more sail. And he said, what would you do with 200-mile-an-hour winds, and he said, I would break out more sails.

Finally, the fellow asked him a question, "Where are you getting all of the sail?" And he said, "The same place you are getting all of that wind."

It's just a question, you can come in, for instance, but I think the bill covers all of the aspects of this.

Mr. McCLORY. Do you have any indications whether amendment No. 9 which was adopted by our Intelligence Committee would be acquiesced in by the Senate Intelligence Committee?

Mr. MURPHY. I would hope so, Mr. McClory. I cannot speak for that committee. I know the gentleman from Illinois, my colleague, Mr. McClory, offered that amendment in good faith and, quite truthfully I was concerned about Admiral Inman's reservation with regard to that particular intelligence activity where no Americans are involved, and I would suggest to the gentleman that the Senate would go along with it.

It is not a frivolous amendment. It is an amendment well thought out, and I think we can make an argument for it.

Mr. McCLORY. Thank you, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from Kentucky, Mr. Mazzoli.

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

It looks like the bells have rung, and so I will keep my statements very brief.

I would like to thank the Chairman for permitting us, my colleague, Mr. McClory, and myself, to sit in.

You have been very helpful and extremely courteous, and we thank you and your staff.

I would like to ask my distinguished friend from Illinois and my chairman of the Subcommittee on Intelligence if he might direct some few remarks to the question which has been raised earlier on the fears of overreaching of communication company employees, the worries that might be spoken to later this morning with regard to enlisting them in the cause of installing surreptitiously these devices, and what have you, and, if the gentleman would address it to the respective oversight, and what opportunities are set up in the bill for the oversight by our Intelligence Committee and our completion in the Senate as to the actual implementation of this act.

Mr. MURPHY. First of all, let me say to the gentleman that as far as the telephone company or common carrier is concerned, I still stand by my statement that they will not have anything more to do and, in fact, they have released a press release today that the telephone company has never engaged in wiretapping.

What they will do, as I understand it, is point out a particular line on a proper showing of a warrant signed by a Federal judge

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under article III of the Omnibus Crime Act, which they do not, and they point to a line they may rent the FBI, who is concerned with counterintelligence and law enforcement taps, the right to use that line.

But none of their personnel are engaged in this. There is no breaking and entering by A.T. & T. personnel.

Mr. MAZZOLI. Under title III?

Mr. MURPHY. Under title III; it would be the same with regard to the national security surveillance.

Now, the committee will get a list every 6 months—the House Select Committee and the Senate Select Committee—from the FBI, and I say the FBI because they do the counterintelligence work for the national security agencies within the borders of the United States.

We will get a 6-month review of the number of applications and those approved, and then we can go into how they were carried out, what cooperation was required on the part of the common carrier, and by this we will be able to exercise oversight as to these applications of warrant.

If we find that there are some abuses taking place, if we find that there are some seepages of information concerning a mere chance, then we can either correct this legislation, bring in the agencies, tighten up their requirements within those agencies, and generally supervise this piece of legislation and oversight. So I think there is going to be ample protection.

Mr. MAZZOLI. For the very people the gentleman from Massachusetts had talked to.

Mr. MURPHY. That is right.

Mr. MAZZOLI. In fact, those who might, as a matter of conscience, feel it is immoral to be included—if the conscience clause is not added in markup or on the floor—the gentleman has said I think quite accurately there are oversight opportunities in the measure before the committee that would enable us to shine a light on that kind of behavior.

I would ask my chairman another question or ask for his comments on it, and the gentleman from Illinois, Mr. McClory, has suggested that there are objections to the bill from General Stillwell.

There were some variations in opposition from Mr. Colby, but the one thread that runs through most of the opposition comes, I believe, from former members of the intelligence community, and maybe the gentleman can help us with respect to whether or not the drafting of the bill was done in connection with and in conjunction with the active members and active people in the intelligence activity.

Mr. MURPHY. I would say, as to General Stillwell's opposition, the intelligence apparatus in the community has changed since he has been involved in it, and the people that are currently executing and practicing the art of the trade all have had input into this.

In fact, we have gone out, and members of the committee that have availed themselves of it have gone out, and seen the operation. We have seen the ways they collect intelligence and, I might say to the committee, it's a very sophisticated state of the art today.

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So this legislation is based on that sophistication and the state of the art.

Mr. MAZZOLI. The comments were solicited, I presume, from members of the active intelligence community.

Mr. MURPHY. No question, that is right, and all of the directors of the agencies concerned have had input into this.

Mr. MAZZOLI. Mr. Chairman, thank you.

I have one final comment and that is the gentleman from Kentucky was opposed to making provision for the McClory amendment. I felt that there should be the across-the-board warrant, and that was my vote in the committee.

But, I join with my chairman, the gentleman from Illinois, Mr. Murphy, in saying that we believe that this is a vast improvement on the current state of the art, that it provides for warrants in the vast majority of the cases, and that if I might make an entreaty to the members of the subcommittee who have to make a judgment on this, I would hope they would not unnecessarily cause delay in the further implementation and further working upon this bill, because I do think it's a good bill.

I yield back the balance of my time, Mr. Chairman.

Mr. KASTENMEIER. I thank the gentleman from Kentucky.

This is unusual, is sort of a deja vu, as far as three members of the Intelligence Committee, particularly the Intelligence Committee, Subcommittee on Legislation conducting a colloquy or dialog on legislation they have just treated. However, I think it's very helpful for the balance of us and for the record.

I personally appreciate the very great patience expressed by the gentleman from Illinois, Mr. Murphy, while attempting to reach accommodation. It has been through his own perseverance at least in the House, that the measure has gotten this far, and to that end I want to compliment him.

Mr. MURPHY. Thank you, Mr. Chairman.

Mr. KASTENMEIER. We have another vote on now. Again, we are going to have to recess for about 10 minutes.

The distinguished Senator from Massachusetts is here and ready to testify on our return.

If there are no more questions——

Mr. MURPHY. I would just say one comment again to the committee as a whole, that this legislation has really been worked over, especially in the Senate and in the House, and I am just afraid that the Supreme Court is about to speak in this area, and they will set down the guidelines, and we will again pass an opportunity as legislators of this great Nation to pass legislation as we have seen fit, instead of responding to a Supreme Court opinion that will set down the guidelines on the intelligence community.

Mr. KASTENMEIER. I have other questions I would ask of the gentleman from Illinois, the witness but, in view of the time and his own other obligations, we will pursue them at another time.

Mr. MURPHY. Thank you, Mr. Chairman.

Mr. KASTENMEIER. The committee will stand recessed for 10 minutes.

[A short recess was taken.]

Mr. KASTENMEIER. The committee will be in order.

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Next, it is a very personal honor and privilege for me to greet our next witness, the distinguished Senator from Massachusetts, Senator Edward M. Kennedy, who has labored long and hard on this issue, and has tried to bring some sense of reason to the compelling problem.

I know, as far as Senator Kennedy is concerned, his other responsibilities on the Senate floor and otherwise make it difficult for him to be a witness here this morning, so we are doubly appreciative to have him here. I know he has an obligation, a speech at the Kennedy Center, later this afternoon. So, with that in mind, we will try to keep his appearance brief.

We are very pleased to greet you, Senator Kennedy, and you may proceed as you wish.

TESTIMONY OF HON. EDWARD M. KENNEDY, A SENATOR IN THE CONGRESS FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. Thank you very much, Mr. Chairman.

I want to commend you, Mr. Chairman, and the other members of the committee for the time and effort they have spent on this particular measure, Congressman Murphy and the intelligence community, for the work they have done on the similar measure.

I had the chance to spend a couple of hours with Congressman Murphy earlier this year on the same legislation and reviewed, in very considerable detail, this legislation and responded as best I could to members of that committee on different measures, and I welcome the chance of being with you here today.

Mr. Chairman, I probably don't have to do so, but I will just mention briefly the work, the interest that our Judiciary Committee has had in the whole area of wiretap legislation.

We started hearings back in 1972 just shortly after the Keith decision. I participated on warrantless wiretap. We had joint hearings with the Administrative Practices Committee and Constitutional Rights Committee on this in 1974, and we had joint committee meetings with the Foreign Relations Committee as the abuses began to take place during the period of the previous administration in 1975, then we had the extensive hearings of the Criminal Law Subcommittee in 1976 and 1977.

There have been a number of pieces of legislation which have related to this issue of warrantless wiretapping going back to Senator Irvin, 1973, Senator Mathias and myself in 1973 and 1974, and in 1975, as a result of those hearings with myself and Senator Phil Hart of Michigan, Senator Muskie, and then, in the more recent times, Senator Mathias and Senator Nelson and others.

So, this issue of how to deal with wiretapping and the warrantless wiretapping has been a matter which has been of very considerable concern to our committee over a long period of time.

I must say we have had the division in our committee, which perhaps is reflected to some extent by the membership of this committee, where there are those members who are completely and wholeheartedly opposed to any wiretap legislation to those that feel they are opposed to any restrictions on the intelligence agencies because they feel it threatens our national security.

We have heard similar expressions in our own committee over a long period of time. So what we have tried to do in the legislation

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which we passed 95 to 1 was to create a balance between the various groups. Some continue to argue that the legislation is regressive and does not provide protection for civil liberties. Others maintain it goes too far and will inhibit the work of our intelligence agencies. I disagree on both counts.

Our legislation can hardly be labeled regressive, which for the first time places strict statutory controls on foreign intelligence electronic surveillance. Its judicial warrant and executive certification procedures guarantee the type of external and internal controls I and others have long advocated.

We would not have the situation which took place over the period of time where the 26 different wiretaps, virtually no accountability in terms of internally or externally on the abuses which have taken place in the past. Now, we will be able to get that kind of certification; there is going to be a name of an executive office on any of these requests we have in terms of internal and external controls in terms of the special court.

Criminal standard has been established and it is found in both the House and Senate bills. The detail, and I would say I think the members of this committee are very familiar with the enormous amount of work that had been done, and Senator Bayh, of course, was extremely helpful in the fashioning of that criminal standard, and we worked with the members of the Civil Liberties Union and others in the fashioning of it, and I think we worked out a proposal which I think provides the kind of standard which is essential.

But nonetheless, that took a great deal of effort and I think it meets the concerns, the principal concerns of those most bothered by the civil liberty issues.

The detail minimization procedures are spelled out and, despite my own reservations about a few provisions, the provisions which have been included in the House bill with regard to foreign powers and the different standards that are used on foreigners from the legislation which we eventually passed and was introduced last year, was actually supported by General Levi.

I must say, as I have said earlier and as I mentioned in my opening statement, the very broad support we have had in terms of bipartisan support in the fashioning of this legislation, the work of General Levi was extraordinarily helpful, as of General Bell, and we have had strong bipartisan support.

But that was a feature that was different in our legislation. The time frame was different between the 1 year and the 90 days, even in terms of foreign embassies. Small items, but at least they were areas I had some concern about.

But I am more concerned, Mr. Chairman, leaving the American people with no legislative protection whatsoever in this area, and I think that is really the basic and fundamental issue which is before us today.

Nor will H.R. 7308 undercut the effectiveness of our intelligence agencies. Many of those who are suspicious of the warrant and certification procedures prefer the old way of doing business, electronic surveillance by Presidential fiat. But, they ignore the fact that the legislation has built-in safeguards to preserve the flexibility and secrecy of our intelligence effort.

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The notice requirements is very limited, as is the power of the court, to examine the validity of the certification in cases involving embassies and certain entities controlled by foreign governments; the requirements of what must go in the warrant application are similarly limited; special courts have been established to handle all applications, emergency provisions allow for limited use of warrantless wiretaps, H.R. 7308 is inapplicable to most overseas and National Security Agency surveillance.

Now, that is an area Senator Bayh and the Intelligence Committee in the Senate is working on at the present time. But we will have to wait for recommendations.

Mr. Chairman, this legislation was not fashioned to please either the intelligence community or the civil liberties groups. Rather, this legislation is designed to strike a balance, a careful balance, that will protect the security of the United States without infringing on the civil liberties and rights of the American people.

I believe the time has at least arrived when Congress and the executive together can fill one of the last remaining loopholes in the laws governing wiretapping in the United States.

One would view this bill for what it is, a major effort by the Congress, long overdue, to place foreign intelligence electronic surveillance under the rule of law.

This bill achieves that goal, and I urge its enactment.

Mr. Chairman, I would ask that the more complete statement be included in the record.

What I tried to do in the intelligence community is go through the bill itself in some detail. I won't take the time of the committee today in terms of who was covered, what is covered, when it is covered, and how it is covered.

I reviewed in some detail the probable cause standards and the other changes in the inherent power which I think is enormously significant. I think it is enormously significant between what was in title III, what was recommended, and I think in this way it is an important improvement over the bill of last year.

But General Levi, as he indicated he felt with regard to the previous administration, they would rely on the legislation and committed the previous administration to that. But he was less definite in terms of how to deal with the issue of inherent power.

I think we have made more progress in terms of establishing the role of the Congress in this area, in eliminating the inherent power. I think that is a very substantial improvement in terms of safeguarding the American people.

But, as I say, I would be glad to review. I would say I am concerned about the changes. I mentioned that briefly in my statement about the expansion on the foreign embassies or powers. I think you get into a situation of some practical problems, I think that have probably been reviewed by other members before the committee, that if there is a call by an American citizen do we expect them to turn it off and then turn it back on?

I think we are better off with following the provisions for a warrant in each of the cases, but I know that judgment has been made here. I would be interested in reviewing that.

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I personally believe the bill ought to be passed and accepted even with those provisions. But, I have been troubled by that particular issue.

As I say, I go into the further analysis of the bill in terms of its provisions, and I stand at the will of the committee at this time.

Mr. KASTENMEIER. Without objection, your statement in its entirety will be accepted for the record.

[The prepared statement of Hon. Edward M. Kennedy follows:]

STATEMENT OF HON. EDWARD M. KENNEDY

I want to thank you, Mr. Chairman, and members of the Subcommittee, for this opportunity to address you on a matter of vital concern to all of us—the subject of foreign intelligence electronic surveillance. H.R. 7308—like its companion bill S. 1566 which recently passed the Senate—evidences a new congressional determination to place our Nation's intelligence agencies under statutory control. The abuses of recent history sanctioned in the name of national security and documented in detail by the Church Committee highlight the need for this legislation. I wholeheartedly endorse this bill and offer you my support.

H.R. 7308—like S. 1566—benefits from broad bipartisan support. It has been endorsed and supported not only by this Administration, but by the Ford Administration as well. Both Attorney General Bell, Attorney General Levi, F.B.I. Directors Kelly and Webster, and C.I.A. Director Turner have been most cooperative and helpful in the drafting of this legislation. The bill constitutes a major step forward in bringing needed safeguards to the unregulated area of foreign intelligence surveillance. H.R. 7308 is designed to strike a balance—a carefully drafted balance—between the protection of national security and the protection of our human liberties and rights. It is a recognition, long overdue, that the rule of law must prevail in the area of foreign intelligence surveillance.

No one has to tell you, Mr. Chairman, of the dismal record of the Congress in failing to deal with the issue of electronic surveillance. For the past six years I have joined with others in the Senate in an unsuccessful effort to place some meaningful statutory restrictions on the so-called inherent power of the Executive to engage in such surveillance. Legislation has been introduced by Senator Mathias, Senator Nelson, the late Senator Phil Hart and myself. Until last year such legislation was never even reported out of the Judiciary Committee. S. 3197 drafted last year—with the help of Attorney General Levi—was overwhelmingly approved by both the Senate Judiciary Committee and the Senate Intelligence Committee but, unfortunately, time ran out before the full Senate of House could act. The sad fact is, Mr. Chairman, that despite over six years of effort, Congress has yet to enact a statute controlling foreign intelligence electronic surveillance.

H.R. 7308, however, achieves a major breakthrough in the long debate. It is the culmination of past efforts and present hopes. This legislation would, for the first time, substitute carefully prescribed accountability and oversight for the arbitrariness of the past. The bill would require that most foreign intelligence electronic surveillance be subject to a judicial warrant requirement based on probable cause. For an American citizen to be surveilled, there must be probable cause that he is an agent of a foreign power engaging in sabotage, terrorism or clandestine intelligence activities. Thus the courts, not the executive, ultimately rule on whether the surveillance should occur, a named executive branch official—such as the Secretary of Defense—certify in writing and under oath that such surveillance is necessary to obtain foreign intelligence information.

These statutory provisions are the very heart of the legislation. They provide the type of accountability which has heretofore not existed. H.R. 7308 would for the first time expressly limit whatever inherent power the Executive may have to engage in surveillance in the United States. In so doing, the bill ends a decade of debate over the meaning and scope of the "inherent power" disclaimer clause currently found in Title III. Until last year there had never been a willingness on the part of the Executive to limit any inherent power which may exist.

H.R. 7308 would also provide civil and criminal sanctions to those who violate its provisions. It requires that all extraneous information—unrelated to the purposes of the surveillance—be minimized. And it mandates that before any information obtained can be used at a subsequent criminal trial, the trial court must again find that all statutory wiretap procedures have been met. The defendant must also be given access to portions of the material to be introduced as evidence.

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But, as important as any individual provision in the bill is the fact that, at long last, legislation placing foreign intelligence electronic surveillance under legal controls has an excellent chance of becoming law. On April 20, the Senate overwhelmingly approved S. 1566 by a vote of 95 to 1 and sent it to the House Intelligence Committee. On June 8 that Committee favorably reported the bill, as amended. I remain confident that the full House will act promptly this year, that a House-Senate conference will resolve differences among the bills, and that the President will sign the bill into law.

I am aware of the concerns expressed by some about various provisions of the bill. I and others in the Congress have shared these very concerns over the years. But if the Congress is at last prepared to act in this sensitive and controversial area, it is incumbent that differences be resolved, that opposing views be reconciled. It is this bipartisan spirit which highlighted the recent Senate vote on S. 1566; it is this attitude which underscored the House Intelligence Committee deliberations; and it is this approach which hopefully will continue in this subcommittee.

I continue to have certain reservations with the legislation. For example, H.R. 7308—unlike the Senate bill—exempts certain narrowly defined "foreign powers" from the warrant requirements. (§ 102, p. 39) I would prefer the broader language of the Senate bill, which mandates that a judicial warrant be secured in all cases involving "foreign powers", as defined in the bills. But this is certainly not sufficient reason to oppose the legislation. The fact is, that today there is no judicial warrant procedure at all; individuals and foreign powers alike are subject to Executive branch warrantless wiretaps; and neither the courts nor the Congress have any statutory oversight responsibility whatsoever. H.R. 7308 would provide important new statutory protections where none exist today.

A delicate balance has been struck with the drafting of H.R. 7308. Yet some continue to argue that the legislation is regressive and does not provide sufficient protection for civil liberties; others maintain that it goes too far and will inhibit the work of our intelligence agencies. I disagree on both counts.

Legislation can hardly be labeled regressive which for the first time places strict statutory controls on foreign intelligence electronic surveillance: the judicial warrant and executive certification procedures guarantee the type of external and internal controls which I and others have long advocated; a criminal standard is now found in both the House and Senate bills; and detailed minimization procedures are spelled out. Despite my own reservations with a few provisions of the bill, I remain even more uncomfortable leaving the American people with no legislative protections whatsoever in this area.

Nor will H.R. 7308 undercut the effectiveness of our intelligence agencies. Many of those who are suspicious of the warrant and certification procedures prefer the old way of doing business—electronic surveillance by presidential fiat. But they ignore the fact that the legislation has built-in safeguards to preserve the flexibility and secrecy of our intelligence effort: the notice requirement is very limited, as is the power of the court to examine the validity of the certification in cases involving embassies and certain entities controlled by foreign governments; the requirements of what must go in the warrant application are similarly limited; special courts have been established to handle all applications—emergency provisions allow for limited use of warrantless wiretaps; and H.R. 7308 is inapplicable to most overseas and National Security Agency surveillance. This legislation was not fashioned to please either the intelligence community or civil liberties groups. Rather, this legislation is designed to strike a balance, a careful balance that will protect the security of the United States without infringing on the civil liberties and rights of the American people. I believe the time has at last arrived when Congress and the Executive together can fill one of the last remaining loopholes in the laws governing wiretapping in the United States. One would view this bill for what it is, major effort by the Congress, long overdue, to place foreign intelligence electronic surveillance under the rule of law.

This bill achieves that goal, and I urge its enactment.

Mr. KASTENMEIER. I would like to compliment the Senator on his statement.

We have been in the middle of a series of votes and the Senator has another obligation, and with that in mind I will ask members of the committee to limit their questions to perhaps two questions each, if you think it is possible, so we can complete the hearings.

I would like to yield first to those members who have not previously had an opportunity to question the witnesses.

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I yield first to the gentleman from Nevada, Mr. Santini.

Mr. SANTINI. Thank you, Mr. Chairman.

I am one of those undecided members at this point, Senator, because of the fact that I feel, on the one hand, we have an obligation in the subcommittee to meet our individual legislative responsibilities and, on the other, I have been beseeched by several individuals whose judgment and reputation I respect that to do so would impede or derail any possibility of legislative action this year.

The first question that I would like to address to you relates to some question and answer exchange that we engaged in earlier with Congressman Murphy. It was his contention that there was a need to clear the constitutional air with regard to our intelligence community's entitlements to conduct such wiretap activities.

I would appreciate any thoughts or response that you might have, Senator, on Congressman Murphy's statement, in that regard.

Senator KENNEDY. I heard the latter part of his testimony.

I think that, of course, clearly this is an area that is left open as a result of the *Keith* decision. The part of the Congressman's statement that I did hear is that there is the possibility of the Supreme Court in the *Humphrey* case making decisions on it. Clearly from the *Keith* decision, the Supreme Court was inviting the attention of the Congress and inviting them to state a public policy issue and question in terms of the foreign surveillance.

Clearly they dealt with the domestic, and I think this is really an appropriate response. I would just say I think it is an appropriate response based upon a Supreme Court invitation. I think it is a most clearly appropriate response to deal with the abuses of the recent past. But I don't know.

A third point I would say is with regard to the intelligence community, as I am sure you have heard here, both Admiral Turner and Judge Webster, Director Webster, were basically in support.

I know NSA has been talking to members of the committee and other members of the committee on different matters. But I think you have had access and will obviously in terms of those that have security responsibilities, but I do think this represents a consensus in terms of the security agencies and, clearly, I think it is essential we pass it.

Mr. SANTINI. The essential, pragmatic point, if I might use this as subject B rather than question 2, essential pragmatic point, Congressman Murphy was offering to the committee in this context was that our intelligence information gathering capacity from foreign sources located in the United States of America, has been emasculated because of an internal sense of not knowing how or which way to move in terms of this exercise.

Has it been your experience as you have considered the testimony and the reports in connection with this issue that there is a sense of indecision or inaction on the part of our intelligence community because they don't have clear constitutional guidance here?

Senator KENNEDY. I think the members of the intelligence community ought to respond to that, and that is the best evidence.

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My sense, and it's only based on the working relationship with the administration, with the general, we did have testimony from the intelligence community, and they did indicate support for the legislation, but I don't know what is behind these kinds of comments.

I would invite your own. But I was satisfied that they could live within the confines. I think your question is, is the intelligence effort really compromised by the fact there is not a clear definition of what the law is or what the ability of the intelligence community is.

I don't think in a perceptible way, Congressman, but I don't think it is being hindered, and I would dare say that the action that was taken by the House in dealing with that issue ought to relieve any kind of concern that the intelligence community would have, and the amendment you have taken, as I say, I have my own concerns about it, but we could certainly deal with those issues in the conference.

I am sure that we would hear from the members of the intelligence community in any kind of conference, but I can just give you both what General Bell indicated, both informally in the working relationship, and I can indicate what the representatives of the intelligence community said before our committee.

To the extent it has this chilling effect of things they did do or didn't do, I don't think I can give you a really helpful answer on that. I wish I could, but I don't really think I can. My instinct would be it has not, but I don't know. You might get another answer not before a committee.

Mr. SANTINI. My second question, the issue has been raised that if we adopt the legislative precedent we are inviting future considerations of much more in the way of expansive legislative action in this arena.

For a specific example, that a similar procedure would be imposed for wiretapping on American citizens in foreign locations. Or in the extreme, that it would be inviting for the purpose of obtaining the warrant precedent, would be required in order to do any foreign intelligence gathering of any sort outside of the United States if it involved wiretapping activity.

I would appreciate your thoughts on that.

Senator KENNEDY. First of all, I would hope this measure would be judged on its own merits and not sort of those under the tent, if we take this one, does this mean we may consider something else down the road, and that may be harmful to the intelligence gathering; therefore, we should not do this one.

Senator Bayh exhibited great interest in this area, primary interest in protecting individual American rights overseas, and that is the basis. He has reviewed that.

Initially he asked us to hold back on this legislation until we could work those particular procedures out. It seems to me and the other co-sponsors of the broad range, the consensus obviously was reflected in the Senate vote that we ought to move ahead in this limited area.

I think there are important issues for the protection of Americans overseas. I don't come here today with suggestions on how to deal with them, but I welcome the fact some people are thinking

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about them and how they can be protected. But I hope we can judge this measure on the narrow basis and purpose for which it was directed and particularly now.

I have been around long enough to know these issues are timely issues and, if they fail to move at a particular time, in many instances they become lost. So I think this ought to be judged really on the basis of where it is at the present time.

Mr. SANTINI. Thank you, Senator.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from California, Mr. Danielson.

Mr. DANIELSON. Thank you, Mr. Chairman.

I thank the Senator for appearing and giving us the benefit of his views. Not having been able to attend much of the session today, I yield back my time.

Senator KENNEDY. Thank you. Nice to see you, Congressman.

Mr. KASTENMEIER. The gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. Mr. Chairman, I am not going to ask any questions of Senator Kennedy.

I do, however, want to express my gratitude to Senator Kennedy because I remember very well when Attorney General Levi had a group of us down to the White House and at that time he publicly expressed his thanks to you.

I think many of us on our side ought to be aware that you were just as supportive of the legislation when it was a Republican iniative as you are now, and I for one appreciate that.

Senator KENNEDY. Fine; thank you very much, Congressman.

Mr. KASTENMEIER. The gentleman from Massachusetts, Mr. Drinan.

Mr. DRINAN. Thank you, Mr. Chairman.

Thank you, Senator Kennedy, and may I first state that I stand in admiration of your work going back over 6 years. But I am afraid I come out differently on this in that it may be the 11th hour, but my mind goes back to the *Olmstead* decision where the Supreme Court 5 to 4 said wiretapping was correct, and I believe persistently that the dissent was correct, and Holmes and Brandeis were not in error when they said this is dirty business.

This is my fundamental philosophical position, and I think it is shared by ACLU and many other people that all wiretapping is inherently unreasonable and it violates the fourth amendment in and of itself.

So, I think I feel obliged to take this lonely stand that the *Olmstead* decision was a self-inflicted wound and that it was enlarged by the criminal standard adopted in 1968 before I got to the Congress.

So my position is how can I prevent further erosion, and I guess it comes down to this:

That the intelligence community has been telling us they cannot get this information by other means and, in the Senate bill on page 13, the person seeking this quasi warrant has to demonstrate that such information cannot reasonably be obtained by normal investigative techniques.

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I personally am not persuaded they have exhausted all of the normal investigative techniques, so I am not persuaded we should go forward.

So my position, Senator, is that I think you have put your finger on it to say if this fails to move in the 95th Congress, it may fail. I for one can't lament that. I see the necessity of some rule, some law, but I guess my question comes to this: Why can't the intelligence community do this themselves by Executive order? They can do everything except go to a Federal court; they can regulate themselves, they can make available exactly what they are doing to the intelligence communities, they can take all of the precautions in your bill and the Senate bill.

Wouldn't this be preferable, and why have they not done this? If they are sincere about this, they can put through the minimization; they can put through all types of things just by their own regulation. So that is where I come out and it's not very satisfactory at this point in the game.

But that is the purest view, that the country made a fundamental mistake in allowing wiretapping in the beginning.

Senator KENNEDY. Congressman, I am aware of your views. I voted against the wiretapping in the 1968 act, filed dissenting views and voted with Sentor Phil Hart and debated that issue.

The question is today whether we are going to continue. You can say, well, will the intelligence community do this or that or whether we should wait for another year in terms of trying to prohibit wiretapping.

I think that is raising false expectations, and I think it's very unrealistic. It's certainly unrealistic with regard to the Senate Judiciary Committee, and I admire you for being willing to spin at windmills but I think that is what we are talking about.

I don't think it has any practical sense in terms of what the realistic alternatives are. And the test I think is whether you are going to be able to see some important additional protections and accountability in terms of the recent history and in terms of the future.

I think before we are going to find out, both someone within the Administration who has been approved with the advice and consent of the Senate and the Judiciary Committee, and we, on each and every occasion, there have been extensive reviews in that consent process about the views on wiretapping. There is the accountability in terms of reporting to the intelligence community on the House amendment, and it will carry so in the future.

But, if we follow your logic, Congressman, we are not dealing with the abuses which we have seen in the recent past; you are not getting the accountability internally or externally and I find that unacceptable and I find it unpersuasive.

When you see the division expressed in this committee itself, we have an equal kind of division in terms of the Senate and Judiciary Committee, and I would say in terms of the floor of the U.S. Senate and it's one that has seen that position advanced by different Members of the Senate for 6 years and we were completely stopped from getting anywhere out of the committee, I think it's a failure to deal with an important public policy question.

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Mr. DRINAN. I am sorry to bring up windmills again, but I feel that a section of your bill on page 18 is really going back to the Writs of Assistance and where England told the people that they have to collaborate in carrying out the warrants that the royal flunkies would issue, where the landlord and custodian and contractor are compelled under this law to collaborate in technical assistance and so on with the court, with the FBI.

I have a lot of difficulty with that. Would you suggest any compromise or change or improvement in that particular language or section?

Senator KENNEDY. What, in particular, is that with regard to the telephone company?

Mr. DRINAN. Yes.

Senator KENNEDY. The telephone company is basically a restatement of current law. I know Mr. Safire has had great fun with that particular provision, but it's basically a restatement of the current law.

I am sure we can deal with and look back and try and sort of alter or change or vary that. We could but basically that is 18 U.S.C. 2518, and it effectively is a restatement of the current law precisely.

Mr. DRINAN. Maybe existing law is wrong, Senator.

Senator KENNEDY. That is fine, you are back to windmills; you are right on it. If you want to try and sort of alter or change, I would certainly be willing to consider anything in the Congress on it, but what we have tried to do is take that aspect of it to restate the current law and to, with regards to this provision, in terms of 18, and that is 2518.

Now, there are a lot of things in current law I would like to change and alter, but I think that you are talking about the establishing of a criminal standard, you are establishing internal and external controls, and you have not got that, Congressman, by defeating this bill.

You are making available to the American people the possibility of serious abuse. I don't think we would have it, hopefully, in terms of this administration, but we are failing to deal with it. But if you can alter and change that, I would certainly be willing to consider that in conference, but that is where it came from.

Mr. DRINAN. Thank you very much, Senator. I am sure my time has expired.

Mr. KASTENMEIER. I would like to yield at least for a question to the gentleman from Illinois, Mr. McClory.

Mr. MCCLORY. Thank you, Mr. Chairman.

I have two questions: One, I think we can agree that under article II of the Constitution the President authorizes foreign intelligence and electronic surveillance. Both President Ford and now President Carter, have issued guidelines pursuant to article II of the Constitution.

Now, in your debate in the Senate you described the bill, and you say:

> The bill will require that all foreign intelligence electronic surveillance in the United States as well as some overseas interceptions, be subject to judicial warrant requirement based on probable cause. It is the courts, not the Executive, that would ultimately rule on whether this event should occur.

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My first question is, is it possible for Congress to transfer by legislation a constitutional responsibility of the Executive under article II and vest that authority in the courts, since you say that the courts will be making the decision as to whether or not there will be foreign intelligence surveillance occurring or not?

Senator KENNEDY. Congressman, I think the constitutional basis, of course, goes back to Keith, and in the representations that have been made by the administration in terms of speaking for the Executive and their feelings on those particular provisions in terms of the constitutionality.

We had an opportunity to talk in a limited way in the Murphy committee on this issue, and my view is unchanged from then to now and I think with regards to the constitutionality, I think this part has been both supported by the two administrations, two different Attorney Generals and in terms of the constitutional authority that has been represented here.

I am not troubled by that.

Mr. MCCLORY. My second question is this——

Senator KENNEDY. I would like to put in the particular references of the Supreme Court comments on this particular matter, and put them in at the appropriate place.

Mr. MCCLORY. My second question is in the debate you referred to the three well-known cases of abuses Joseph Kraft, Martin Luther King, Jr., and Morton Halperin, and then you mentioned the general subject of the NSA. Now, these all occurred, I guess, within the last 4 to 6 years.

Is there anything that came up in the course of the hearings in the Senate, either in the Intelligence Committee or Judiciary Committee that suggests to you there are some ongoing abuses or there have been some abuses occurring which we now have to correct, or are we talking about correcting abuses that occurred during the Watergate period and before?

Senator KENNEDY. Those were tragic enough, I would think, to justify this legislation. We had not heard particular testimony of particular abuses in the most recent years. I think there are some legitimate questions in the *Humphrey* case that was an abuse or nonabuse. That will be decided by the Supreme Court.

Mr. MCCLORY. Those are my two questions, Mr. Chairman. Thank you.

Mr. KASTENMEIER. I yield to the gentleman from Kentucky, Mr. Mazzoli.

Mr. MAZZOLI. Does the gentleman from Nevada wish to ask a question?

Mr. SANTINI. No. I asked my second question.

Mr. MAZZOLI. If I may I would just like to comment.

I appreciate the gentleman's testimony, and I appreciate cooperating with you with regard to the antitrust legislation. I guess tomorrow we will join in sponsoring a bill in behalf of the Law Enforcement Assistance Administration.

Senator KENNEDY. I think the date has been put over, Congressman, until the 11th or 13th, but I will look forward to it. We didn't do any better on the appropriations on our side yesterday than you did here.

Mr. KASTENMEIER. The gentleman from Kentucky, Mr. Mazzoli.

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Mr. MAZZOLI. Thank you very much.

I would like to join my colleagues in welcoming you, Senator Kennedy, to the committee, and to commend you on your statement.

I would like to ask your observations on the point that you alluded to in the Safire story in the Times this week, and statements which will come up regarding telephone company involvement and landlords.

I would like to hear your general observations and then, Senator, whether or not you think the opportunities at oversight which the two committees now have might obviate the kind of extraordinary use of this power which the gentleman from Massachusetts, Father Drinan, talked to earlier today.

Senator KENNEDY. The three provisions, I guess, in the Safire, one dealt with the amendment that has been put in in terms of the House committee, which I would have reservations about.

As I said, I don't think it's a sufficient measure to defeat the bill.

Second, was with regard to the telephone and, as I indicated, basically it is what is in existing law. We can dispute those, but 1825.18, gives a similar kind of authority and, basically, this tracks that. I think there may be changes or alterations, and I would certainly welcome whatever should come from the committee.

Again, I don't think that is a matter that ought to hold back or defer action.

The third dealt with the testing. The changes that we made, of course, in it, and made very clear in the legislation, is it has not been targeted on an individual, but not a prohibition on it, and I think it would be very important that we insist that those provisions ought to be upheld. That was clarified in rather careful detail, I think, in both our committee report, I think it was Senator Abourezk who had an amendment, and we altered and changed the legislation from what was actually introduced and made it very specific and quite clear.

But I think if there is any kind of hesitancy, I think the general consensus in our committee was obviously in the areas of the testing that they cannot and should not target in terms of the individual.

I think we have made that as clear as we thought possible to make. Maybe there are other kinds of suggestions and we would certainly welcome them.

Mr. MAZZOLI. The gentleman from Massachusetts, Mr. Drinan, had earlier today talked in terms of conscience clause which could be, in his judgment, possibly worked into the bill providing that the telephone company employees, landlords, or others could, if they find the practice of wiretapping immoral or so against their principle, could basically exempt themselves and then let what happen happen, and I wonder if the Senator might address that.

Senator KENNEDY. I don't have any objection to that.

Mr. MAZZOLI. Let me also say one thing and then I guess I am finished, Mr. Chairman.

Has it been the Senator's observation, as it has been mine, that if you write a bill that pleases neither major side of the argument that you probably have written the best possible bill?

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Senator KENNEDY. That is always dangerous because both sides call you a sell-out, either a statesman or a sell-out. It depends upon who is saying it. I do, in a very serious way, I think that is an enormously complex issue and we are talking about issues of extraordinary importance. I don't know two issues which are probably more important. One in terms of the protection of individual rights and liberties, and the other the security of the Nation, and those are probably as sensitive to Members of Congress who are charged to uphold the Constitution as any issues that we are going to deal with.

So this matter should be looked at, and it should not be because you have been able to weave through the eye of a needle in terms of legislation that both sides can swallow hard and accept and then commend itself necessarily to the membership, but I do think accountability is an important aspect in dealing with this issue.

I think we have established that as an important element of it, both internal and external, and I think the probable cause features in terms of the crime is a very, very important protection in terms of individual rights and liberties which would not be included and guarantees which would not be established unless we pass this legislation.

Mr. MAZZOLI. I thank the Senator, and I join him in suggesting I wish our subcommittee had not provided that third opening. I would have preferred we had gone more across the board, but I join him in suggesting this is the best thing we can come up with and is a vast improvement over the current state of the art.

Mr. Chairman, thank you very much, and I yield back my time.

Mr. KASTENMEIER. On behalf of the committee, Senator Kennedy, I wish to express our gratitude. We are very pleased to have had you here today, in what I am sure we mutually consider a good cause.

Thank you very much.

Senator KENNEDY. Thank you very much.

Mr. KASTENMEIER. The Chair would like to call next Mr. William Caming, representing the American Telephone & Telegraph Co.

Mr. Caming is an attorney in the general departments of the company and has special responsibilities from a legal standpoint in matters referring to security of privacy as it affects the Bell System.

We are very pleased to have Mr. Caming here to comment on the bill as he sees it as one of those who would be affected by the bill directly. Mr. Caming?

TESTIMONY OF H. W. CAMING, ATTORNEY, AMERICAN TELEPHONE & TELEGRAPH CO.

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

Mr. KASTENMEIER. We appreciate your patience in waiting here all morning for the other witnesses to be heard and all of the interruptions.

I hope we are past the time when we are going to be interrupted again, and I should say you have been an effective witness in the past before this subcommittee. So we are happy to greet you again.

Mr. CAMING. Thank you, kindly.

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I might say I listened with some pleasure to the remarks of Mr. Morgan and Senator Kennedy on the issues I am testifying on.

I had, also, as I think you are aware, testified before the Subcommittee on Legislation of the House Permanent Select Committee prior to the incorporation of the amendments which appear in the June 8 version.

I have attached for the committee's consideration a copy of my January 18 statement.

[The prepared statement of Mr. Caming before the Committee on Intelligence follows:]

STATEMENT OF H. W. WILLIAM CAMING, ATTORNEY, AMERICAN TELEPHONE & TELEGRAPH CO., JANUARY 18, 1978

I am H. W. William Caming, Attorney in the General Departments of American Telephone and Telegraph Co. My areas of primary responsibility have since 1965 included, from a legal standpoint, oversight of matters pertaining to corporate security and privacy as they affect the Bell System.

I wish to thank the subcommittee for the opportunity to present the views of the Bell System on privacy of communications and delineate the policies we pursue to preserve such privacy. I shall also review our policies and experience with respect to electronic surveillance, principally in the areas of national security and court-ordered wiretapping by properly authorized law enforcement authorities. I have previously testified on these subjects in executive session before the House Select Committee on Intelligence on December 2, 1975.

I

SAFEGUARDING PRIVACY OF COMMUNICATIONS

At the outset, I wish to stress the singular importance the Bell System has always placed upon preserving the privacy of telephone communications. Such privacy is a basic concept in our business. We believe our customers have an inherent right to feel that they can use the telephone with the same degree of privacy they enjoy when talking face to face. Any undermining of this confidence would seriously impair the usefulness and value of telephone communications. Thus, all Bell System operating practices and service offerings fully recognize the imperativeness of protecting such privacy.

Over the years, the Bell System has repeatedly endorsed legislation that would make wiretapping as such illegal. In 1966 and again in 1967, for example, we testified to this effect before the Senate Subcommittee on Administrative Practice and Procedure during its consideration of the Federal Omnibus Crime Control and Safe Streets Bill. We said we strongly opposed any invasion of the privacy of communications by illegal wiretapping and accordingly welcomed Federal and State legislation which would strengthen such privacy.

This is still our position, one which we have reiterated in recent years before the Federal Communications Commission and in appearances before various subcommittees of the Congress and other governmental bodies.[1]

During our Congressional testimony, we have recognized that national security and organized racketeering are matters of grave concern to the government and to all of us as responsible citizens. The extent to which privacy of communications should yield, and where the line between privacy, police powers, and the requirements of national security should be drawn in the public interest, are matters of national public policy, to be determined by the Congress upon a proper balancing of the individual and societal considerations.

From the time our business began more than 100 years ago, the American public has understood that their telephone service was being personally furnished by

[1] We have appeared, among others, before the Subcommittee on Cummunications of the House Interstate and Foreign Commerce Committee on June 22, 1977; The House Select Committee on Intelligence on December 2, 1975; the House Subcommittee on Government Information and Individual Rights on October 23, 1975 and its predecessor Subcommittee on Foreign Operations and Government Information on June 11, 1974; the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice on April 26, 1974 and again on February 18, 1975; the Privacy Protection Study Commission on February 12, 1976; and the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance on June 27, 1975.

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switchboard operators, telephone installers and central office repair workers who, in the performance of their duties of completing calls, installing phones and maintaining equipment, must of necessity have access to customers' lines to carry out their normal job functions. We have always recognized this and have worked hard and effectively to prevent unwarranted intrusions on customers' telephone conversations. We are confident that we have done and are doing an excellent job in preserving privacy in telephone communication.

The advance of our telephone technology has in itself produced an increasing measure to protection for telephone users. Today, the vast majority of calls are dialed by the customer, without the assistance of an operator. This has greatly minimized the opportunities for intrusions on privacy. In addition, more than 90 percent of our customers now have one-party telephone service. Automatic message accounting, direct inward dialing to PBX extensions, automatic testing equipment, and the extension of direct distance dialing to person-to-person, collect and credit card calls and to long distance calls from coin box telephones further contribute to telephone privacy.

Bell System service offerings always reflect, as a fundamental consideration, a searching assessment of their impact upon privacy. Existing operating policies and practices are carefully reexamined on an ongoing basis to the same effect, and necessary revisions are made to properly reflect changing circumstances. Beyond this, all Bell System Companies conduct a vigorous program to ensure every reasonable precaution is taken to preserve privacy of communications through physical protection of telephone plant and thorough instruction of employees.

Our employees are selected, trained, and supervised with care. They are regularly reminded that, as a basic condition of employment, they must strictly adhere to Company rules and applicable laws against unauthorized interception or disclosure of customers' conversations. All employees are required to read a booklet describing in unmistakable terms what is expected of them in the area of secrecy of communications. Violations can lead, and indeed have led, to discharge.

Any allegation of illegal activity leveled against any of our employees—or any evidence thereof, whether uncovered in our day-to-day operations or brought to our attention by any outside source—is promptly and thoroughly investigated and, if the facts so warrant, appropriate disciplinary and prosecutory action is taken. Additionally, it is longstanding Bell System policy to cooperate fully with law enforcement authorities and other duly authorized government agencies in their investigations of alleged or suspected illegal activity by our employees.

In regard to our operating plant, all of our premises housing central offices, equipment and wiring, and the plant records of our facilities, including those serving each customer, are at all times kept locked or supervised by responsible management personnel, to deny unauthorized persons access thereto or specific knowledge thereof. We also have some 100,000 people whose daily work assignments are in the outside plant. They are constantly alert for unauthorized connections or indications that telephone terminals or equipment have been tampered with. Telephone cables are protected against intrusion. They are fully sealed and generally filled with gas; any break in the cable sheath reduces the gas pressure and activates an alarm.

With these measures and many others, we maintain security at a high level. We are, of course, concerned that as a result of technological developments, clandestine electronic monitoring of telephone lines by outsiders can be done today in a much more sophisticated manner than has been heretofore possible. Devices, for example, can pick up conversations without being physically connected to telephone lines. These devices must, however, generally be in close proximity to a telephone line, and our personnel in their day-to-day work assignments are alert for signs of this type of wiretapping too. Every indication of irregularity is promptly and thoroughly investigated.

It may help place matters in perspective if we mention the magnitude of telephone calling that occurs in this country in a single year. During the calendar year 1976, for example, there were approximately 155 million telephones (including extensions) in use in the United States, from which more than 200 billion calls were completed.

Our concern for the privacy of our customers is reflected too in the thoroughness with which we investigate any suspicious circumstances and all customer complaints that their lines are being wiretapped. Our Companies follow generally similar operating procedures when an employee discovers a wiretap or eavesdropping device on a telephone line. Each Company has established ground rules for the small number of these situations that occur, which take into consideration any local statutory requirements. Most frequently, when our people find improper wiring at a

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terminal, it is the result either of a record error or failure on the part of our personnel to remove the wires associated with a disconnected telephone. Each of these cases is, however, carefully checked. In those few instances where there is evidence of wiretapping, the employee discovering it is required to inform his supervisor immediately, and a thorough investigation is undertaken in every such case by competent security and plant forces.

In a small number of cases, a customer suspects a wiretap and asks for our assistance. Usually, these requests arise because the customer hears what are to him suspicious noises on his line. Hearing fragments of another conversation due to a defective cable, or clicking noises due to loose connections, or other plant troubles are on occasion mistaken for wiretapping. Each Company has established procedures for handling such requests. Generally, the first step is to have our plant maintenance personnel test the customer's line from the central office. In most instances, these tests will disclose a plant trouble condition. In each such case, the trouble is promptly corrected and the customer informed there was no wiretap.

In cases where no trouble is detected through testing the customer's line, a thorough physical inspection for evidence of a wiretap is made by trained personnel at the customer's premises and at all other locations where his circuitry might be exposed to a wiretap. If no evidence of a wiretap is found, the customer is so informed. Where evidence of a wiretap is found, the practice generally is to report to law enforcement authorities any device found in the course of the Company inspection, for the purposes of determining whether the device was lawful and of affording law enforcement an opportunity to investigate if the tap was unlawful. The existence of the device is also reported to the customer requesting the check, generally irrespective of whether it was lawful or unlawful. The customer is told that "a device" has been found on his line, without our characterizing it as lawful or unlawful (to ensure that the presence of a lawfully placed device is not inadvertently revealed) should the customer have any questions, he is referred without further comment to law enforcement.

New Jersey Bell however, as a matter of policy, informs a customer requesting a wiretap check that only the presence of an unauthorized device will be disclosed. Minnesota by statute similarly limits disclosure to unlawful devices. Should a customer in Minnesota or New Jersey inquire about the presence of a lawful device, it is the Company practice to inform him that applicable Federal and State laws require any judge authorizing or approving a court-ordered interception to notify the affected customer within 90 days after interception ceases (or at a later date, if disclosure is postponed upon a good cause showing by law enforcement).

All Bell System Companies report the existence of an unlawful device to the customer requesting the check, as well as to law enforcement, and the latter is provided an opportunity to investigate for a reasonable period, generally 24–48 hours, prior to removal of the wiretap.

We might point out that unless the wiretap effort is amateurish, a person whose line is being tapped will not hear anything unusual, because of the sophisticated devices employed. As we previously said, most of the complaints originate because the customer hears an odd noise, static, clicking, or other unusual manifestations. As far as our experience discloses, these usually turn out to be difficulties in transmission or other plant irregularities.

It is noteworthy that from 1967 onward the total number of wiretap and eavesdrop devices of all types, including both lawful and unlawful, found by telephone employees on Bell System lines (a universe of some 123 million telephones in 1976, for example) has averaged less than 17 per month—less than one a month for each of the twenty-four Associated Operating Companies of the Bell System. In our opinion, the criminal sanctions imposed by Title III of the Federal Omnibus Crime Control and Safe Streets Act of 1968 (for the unuthorized interception or disclosure or use of wire or oral communications, or the manufacture, distribution, possession, or advertising of intercepting devices), coupled with attendant publicity, appear to have contributed significantly to safeguarding telephone privacy.

II

LIMITED COOPERATION WITH LAW ENFORCEMENT

In the area of court-ordered wiretapping, it is the policy of the Bell System to cooperate with duly authorized law enforcement authorities in their execution of lawful interceptions by providing limited assistance as necessary for law enforcement to effectuate the particular wiretap. The assistance furnished generally takes the form of providing line access information, upon presentation of a court order valid on its face, as to the cable and pair designations and multiple appearances of

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the terminals of the specific telephone lines approved for interception in the court order.

The term "cable and pair" denotes the pair of wires serving the telephone line in question, and the cable (carried on poles, or in conduit, or buried in the earth) in which the pair reposes. A "terminal" is the distribution point to which a number of individual pairs of wires from the cable are connected, to provide service in that immediate area. A terminal may in a residential area be on aerial cable suspended from telephone poles or on a low, above-ground pedestal, or be found in terminal boxes or connecting strips in the basement, hall, or room of an office building or apartment house.

The pair of wires of each telephone serviced from a particular terminal are interconnected at that terminal with a specific pair of wires from the cable, so that a continuous path of communication is established between the customer's premises and the telephone company's central office. The terminals vary in size, depending upon the needs of the particular location. To provide optimum flexibility in usage of telephone equipment, the same pair of wires may appear in parallel in a number of terminals, so that the pair can be used to service a nearby location if its use is not required at a particular point. Thus, the term "multiple appearance" denotes the locations where the same pair of wires appears in more than one terminal on the electrical path between the central office and the customer's premises.

In the instance of law enforcement authorities of the Federal government (and of those States[2] enacting specific enabling legislation in conformity with the amendments, effective February 1, 1971, to § 2518(4) of Title III of the Federal Omnibus Crime Control Act), the court order may "direct" the telephone company to provide limited assistance in the form of the "information, facilities, and technical assistance" necessary to accomplish the wiretap unobtrusively and with a minimum disruption of service. Upon the receipt of such a directive in a court order valid on its face, our cooperation will usually take the form of furnishing a private line channel from terminal to terminal (i.e., a channel from a terminal which also services the telephone line under investigation to a terminal servicing the listening post location designated by law enforcement). Additionally, the above-mentioned line access information will be furnished for the specific telephone lines judicially approved for interception.

Over the years the Bell System has, however, repeatedly declined to provide assistance in the form of a private line channel to Federal authorities acting under Federal court orders, issued by a District Judge or United States Magistrate, authorizing the use of a pen register or Touch-Tone® dial impulse decoder in the course of a criminal investigation. These orders are not issued pursuant to Title III of the Federal Omnibus Crime Control Act. They are generally characterized as "electronic search warrants" and are usually issued under Rule 41(b), the search and seizure provision of the Federal Rules of Criminal Procedure (18 U.S.C.).

It had been the consistent Bell System position that in the absence of express Congressional mandate, we were not obliged to cooperate by furnishing such assistance in a pen register case and that the Federal courts possessed neither inherent nor statutory authority to so direct in a non-Title III court order. These orders were extensively litigated before the U.S. Circuit Courts of Appeals. The U.S. Supreme Court finally resolved the question in favor of the Government in a closely divided (5–4) decision rendered on December 7, 1977 in *United States* v. *New York Telephone Company*. The Majority ruled that the search warrant provisions of Rule 41(b) could be extended to intangibles, in particular the electrical dail impulses recorded by a pen register. The Majority further held that the Federal All Writs Act empowered Federal courts to direct the telephone company to cooperate to the extent of providing a private line channel.

The Bell System has also cosistently contended that in the absence of statutory mandate, we are not obliged to engage in line identification (i.e., trace the source) of incoming calls to a telephone line lawfully intercepted by law enforcement authorities under court order. This issue has not yet been finally resolved.

In national security electronic surveillance cases, assistance in the form of private line channels and line access information has on occasion been furnished by Bell System Companies to Federal authorities. This assistance is only rendered to the Federal Bureau of Investigation and then only upon specific written request of the Attorney General of the United States or of the Director of the Federal Bureau of Investigation (upon the specific written authorization of the Attorney General to make such request) to the local telephone company for such facilities, as a necessary

[2] As of this writing, the District of Columbia and the following twelve states have enacted enabling legislation: Arizona, Colorado, Connecticut, Delaware, Georgia, Maryland, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico and Virginia.

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investigative technique under the Presidential power to protect the national security against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities, in connection with an investigation of organizations or individuals suspected to be agents of or acting in collaboration with a foreign power. For reasons of security, we are not informed in such cases of the specific nature of the national security matter under investigation.

These "national security request letters" are currently the subject of litigation. In a suit initiated by the Justice Department, Judge Oliver Gasch of the Federal District Court in the District of Columbia enjoined the Bell System from responding to a June 22, 1976 subpoena issued by the House Subcommittee on Oversight and Investigations which sought these letters. The case is now before the U.S. Circuit Court of Appeals for the District of Columbia Circuit, the appeal having been filed by the Subcommittee's Chairman, Mr. Moss, on its behalf. All three Branches of the Government have expressly recognized that the role of the Bell System in this controversy is that of a stakeholder.

In cooperating in court—ordered and national security cases, we endeavor to provide the very minimum assistance necessary to effectuate the particular wiretap, whether of voice or non-voice communications. Under no circumstances do we do any of the ensuing monitoring or recording; that, in our opinion, is the exclusive province of the appropriate law enforcement officers. Nor do we furnish them with any terminal equipment to be used in connection with their wiretap, such as pen registers, Touch Tone® dial impulse decoders, headsets, or tape recorders. Nor do we design or build wiretap or eavesdrop devices for law enforcement authorities, or allow them to enter our central offices. Furthermore, our telephone companies do not train law enforcement personnel in the general methods of wiretapping and eavesdropping, nor do we provide telephone company employee identification cards, uniforms or tools, or telephone company trucks.

III

PROPOSED LEGISLATION

As we have previously stated, we believe that the extent to which privacy of communications should yeild, and where the line between privacy and the requirements of national security should be drawn in the public interest are matters of national public policy, to be determined by the Congress upon a proper balancing of the individual and societal considerations bearing on the question. Within this frame of reference and without endorsement of any particular approach, we would like to offer the folowing comments concerning the "Foreign Intelligence Surveillance Act of 1977" legislation which is the subject of this hearing—H.R. 5632, 5794, 7308 and 9745—for the Subcommittee's consideration in the event that it determines that any such legislation should be reported out favorably.

Comment No. 1

In 1971, Congress added the so-called directive provision to chapter 119 of Title III of the Federal Omnibus Crime Control Act. Section 2518(4) of 18 U.S.C. was amended, effective February 1, 1971, to include a provision empowering a court, upon request of the law enforcement applicant, to direct, among other persons, a communication common carrier to furnish "forthwith all information, facilities and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference" to the services being accorded to the person whose communication are to be intercepted.

Since then, it has been customary for Federal law enforcement authorities to have such a "directive" provision included in each title III court order. In each instance, the local Bell telephone company has cooperated by providing the necessary, previously-described assistance (generally in the form of a private line channel and line access information), which has enabled law enforcement to effectuate the particular wiretap. It should be emphasized that our cooperation is of limited character, consonant with our traditional role as a communication common carrier.

Two of the pending Bills contian a similar "directive" provision with respect to chapter 120 foreign intelligence court orders [3] but with one notable point of departure. Instead of requiring the telephone company, as under existing law, to furnish "all information, facilities and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference" to service, the court is empowered to direct the telephone company to furnish "any and all infor-

[3] H.R. 5794 (§ 2525(b)(2)(ii) on p. 18) and H.R. 7308 (§ 2525(b)(2)(B) on p. 17).

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mation, facilities, or technical assistance, necessary to accomplish the electronic surveillance in such manner as will protect its secrecy and produce a minimum of interference with the services [being provided to] that target of electronic surveillance."

The term "to accomplish the electronic surveillance in such manner as will protect its secrecy" is of such sweeping and disturbingly ambiguous character as to give the courts no guidance with respect to defining the role that the telephone company is to be directed to play in effectuating the wiretap. It creates not only an uncertain by also a dual standard: one for court-ordered wiretaps under chapter 119 and another for those issued under chapter 120—although both must be fully concealed from detection.

At the very least, such a dual standard will prove administratively confusing and burdensome to telephone company personnel. But more significantly, the language "in such manner as will protect its secrecy" raises serious question as to what our precise role is to be. We are of the opinion that our statutory role under the Federal Omnibus Crime Control Act (to accomplish the interception "unobtrusively" and with minimum interference to service) and our longstanding like role in national security cases is the proper one. This is a standard to which we have adhered over the years, and one which has enabled law enforcement to successfully effectuate its wiretaps. It would not be in the public interest to expand it, particularly in so sweeping, vague and ill-defined a fashion.

Accordingly, we respectfully recommend that if a chapter 120 "directive" provision is to be included in any legislation favorably reported out, it include the "directive" language contained in the existing provisions of chapter 119's § 2518(4).

Comment No. 2

Three of the Bills contain conformatory amendments to § 2511(2)(ii) of chapter 119, requiring the telephone company—before providing any information, facilities or technical assistance in the case of an "emergeny" interception without court order (pursuant to the applicable provisions of chapter 119 or 120)—to receive a certification under oath from an investigative or law enforcement officer that applicable statutory requirements have been met.[4]

The terms of the certification are not, however, set forth nor is it specified who is to administer the oath or even whether such oath must be in writing. In this connection, it is to be noted that in the instance of an application for a chapter 120 court order, the requirements for a certification by an appropriate official of the Executive Branch are set forth with considerable specificity (see, for example, § 2524(a)(7)(A) through (F) of H.R. 7308 on Page 13 thereof).

In view of the unquestionable importance of such certification when an interception is to take place in an emergency without prior court order and the statutory admonition that the telephone company acts at its peril ("any violation of this subsection * * * shall render" the telephone company liable for § 2520 civil damages), it is respectfully recommended that the "emergency" certification requirements be specifically enumerated in the statute. Such specification will remove any question as to what properly must be contained in the certification which, as mentioned above, is a precondition to the rendering of any "emergency" assistance by the telephone company to law enforcement.

Comment No. 3

Two of the Bills declare that it shall not be unlawful for a Federal official to conduct electronic surveillance, without a court order, for the sole purpose of (i) limited testing of the capability of electronic equipment to intercept communications or (ii) to detect, as a counterintelligence measure, electronic surveillance equipment being used unlawfully.[5] A third Bill confines itself to the second alternative—the detection of unlawful use of electronic surveillance equipment.[6]

Presumably, such testing and detection efforts are to take place without the use of any information, facilities or technical assistance from a communication common carrier. If, however, any information, facilities, or technical assistance is to be required from a telephone company to enable a Federal official to conduct electronic surveillances for the purpose of testing equipment or detecting unauthorized equipment, we believe such cooperation should only be extended pursuant to a court order expressly directing the telephone company to provide such information, facilities or technical assistance. We, accordingly, recommend that a "directive" provision similar in language to that contained in § 2518(4) of chapter 119 be included if

[4] H.R. 5794 (§ 3(b)(2)(2) on p. 27); H.R. 7308 (§ 4(b)(2)(2) on p. 26); and H.R. 9745 (§ 4(b)(2)(2) on p. 19).

[5] H.R. 5794 (§ 3(c)(3) on p. 28) and H.R. 7308 (§ 4(c)(3) on p. 27).

[6] H.R. 9745 (§ 4(c)(2) on p. 20).

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any telephone company cooperation is to be required under the circumstances described in this Comment.

Parenthetically, as we mentioned earlier in this Statement, each Bell telephone company has established procedures for fulfilling any customer request that its lines be carefully checked for suspected illegal wiretapping.

IV

CONCLUSION

In conclusion, we wish to express our appreciation for the opportunity to present our views on the Foreign Intelligence Surveillance Act legislation now pending before the Subcommittee and to reafirm the Bell System's dedication to the proposition that the public is entitled to telephone communications free from unwarranted intrusion.

Bell System policies and procedures in the areas herein under discussion strike, we believe, a proper balance. The Associated Operating Companies of the Bell System have worked diligently and, we believe, successfully over the years to carry out their responsibilites to provide this nation with reliable universal service, while taking every reasonable measure to promote privacy and confidentiality and at the same time conform to our obligations under the law. Permit me to assure you that we shall continue to do so.

I shall be pleased to answer any questions the Subcommittee may have.

Mr. CAMING. We stress therein, and I will not belabor the point, the singular importance that the Bell System has always placed upon preserving the privacy of telephone communications and describe the measures taken to safeguard such privacy.

Turning directly to the areas of consideration, in the area of court ordered wiretapping, it has been the policy of the Bell System to cooperate with duly authorized law enforcement authorities in their execution of lawful interceptions by providing limited assistance as necessary for law enforcement to effectuate the particular wiretap.

Over the years that important responsibility has been satisfactorily discharged.

In general, court orders usually direct us to provide limited assistance as necessary to appreciate the wiretap unobtrusively and with minimum disruption of service and, as mentioned in previous testimony this morning, our cooperation usually takes the form of providing a private line channel from terminal to terminal, that is from the terminal servicing the telephone line under investigation to that servicing the licensing post designated by law enforcement.

Additional line access information to permit law enforcement to identify the targeted line is provided.

In national security electronic surveillance cases, assistance in the form of private line channels and line access information has been furnished by Bell System companies to Federal authorities.

I might point out we have not been opposed to such cooperation over the year, fully recognizing the necessity to provide certain limited cooperation inasmuch as the major communications common carrier, a great portion of the Nation's telecommunications network constitute our faciities.

But, importantly, this assistance has only been rendered in national security matters to the Federal Bureau of Investigation, and then only upon specific written request personally executed by the Attorney General or the Director of the FBI. That investigation was a foreign intelligence investigation in connection with investigation of organizations or individuals suspected to be agents of or collaborators of a foreign power.

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Mr. KASTENMEIER. Mr. Caming, I want to make sure I have your testimony clearly in mind. This is the practice pursuant to title III, and you are not describing the practice engaged in by the company prior to the adoption of that statute; is that correct?

Mr. CAMING. No; I am describing two practices. When I mentioned court ordered wiretaping, Mr. Kastenmeier, I was describing our title III practice. We proceed there only when directed by a court in general on the license I have mentioned.

Now, the national security references are not the title III, but procedures we have observed prior to mid-1969 upon oral assurances subsequently by use of a standard will and should the committee so desire I will be very glad to furnish a form of it.

Mr. KASTENMEIER. The question I am asking is for historical purposes. In other words, for purposes of this, we are talking about practices followed pursuant to title III and/or at that period in time relevent to national security cases.

Mr. CAMING. In the case national security, we are talking about practices that are outside of title III.

Mr. KASTENMEIER. Exactly. And you are talking about the way you have responded in the last 10 years, more or less at the same time as the Omnibus Crime Control Act was adopted. In other words, the company reviewed its policies and practices with respect to cooperating with various agencies of the Federal Government, whether within or without title III's application; is that correct?

Mr. CAMING. That is correct, and the reason, as I mentioned, is the necessity for us to afford a certain minimum amount of assistance if in many cases some electronic surveillances are to be effectuated.

I did want to stress, however, we have only dealt to date with the Federal Bureau of Investigation. We have not had any dealings directly in this area with intelligence agencies with respect to interceptions. We do not, of course, know the nature of the matter under investigation and, accordingly, we do not know in a particular case where the FBI is acting upon its own behalf or on behalf of some other agency.

But we, in cooperating in both the court ordered title III area and national security cases believe that our proper role as a carrier is to provide the minimum assistance necessary to effectuate the particular wiretap. Under no circumstances do we do the ensuing monitoring or recording. That we believe is the exclusive province of the appropriate law enforcement officials.

Nor do we furnish them with any terminal equipment, nor design or build wiretap or eavesdrop devices for law enforcement, nor do we allow them to enter and operate from our central offices, nor do we train them in the general methods of wiretapping, nor do we provide telephone company employee identification cards, uniforms, or tools or telephone company trucks.

This is not an imaginary shopping list or litany. I might say that over the years we have been asked from time to time to engage in such activities and we have uniformly, as a matter of policy, declined to do so.

Mr. KASTENMEIER. Is this true, Mr. Caming, with respect to the period of time prior to 1968?

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Mr. CAMING. In general, it is. Prior to 1968 the assistance we rendered in national security matters was identical to that we have rendered since then. The letter was merely to provide a written indicia of what had been the policy over the years.

Up to then the sensitivity of the information had impelled the Government and the Bell System to feel that there should be no paper trail, and it was our understanding that the so-called letter reposed with the Attorney General or the Director of the FBI.

When events occurred in 1968 and shortly before in the sensitivity to concerns of privacy, we then believed that that understanding should also repose in our files and be fully safeguarded, and that was the genesis of the national security letter which was agreed to mutually.

Now, we have long recognized that national security and the fight against organized crime are matters of grave concern not only to the Government but to us as responsible citizens.

We believe, however, that the extent to which privacy should yield and where the line should be drawn between privacy on the one hand and the requirements of national security as mentioned by Senator Kennedy should be drawn in the public interest, that these are matters of grave national public policy for the Congress to determine upon a proper balancing of the various considerations, and a decision which, as in the instance of title III, we will abide by.

I want to reiterate there has been no course of conduct by the Bell System of refusing to cooperate under title III as was alluded to.

Now, within this frame of reference and without endorsement of any particular substantive approach on the contents of the bill, we had made the following four comments which are included in my statement.

The first, which was much discussed this morning, was a question of attempting to clarify the change in language from that of title III to the language carefully selected and tailored in this bill, and the Senate version.

In the main, we had been concerned that the language previously permitted a court, as I mentioned on the top of page 7, to require us, after proper findings within the structures of title III, to provide information, facilities, and technical assistance necessary to accomplish the interception unobtrusively, and we have done so carefully.

But, under the present legislation, the special court is empowered to direct the telephone company to provide such assistance in a manner necessary to provide any and all information, facilities, or technical assistance necessary to accomplish the electronic surveillance in such manner as will protect its secrecy.

This term was of such sweeping and disturbingly ambiguous character as to what was to be embraced by protecting secrecy as to provide, in our opinion, the courts with no guidance as to the role the telephone company was to play in assisting law enforcement to effectuate its wiretappings.

In fact, too, we have the problem posed that we are now creating a dual standard, although supposedly both types of investigations are to be fully concealed from detection—one for court-ordered

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wiretaps under existing law, and another for those issued under the proposed chapter 120.

At the very least, such a dual standard is confusing and burdensome from an administrative point. But, more significantly, it raised in our minds serious questions as to what our precise role is to be and what a court might construe the difference in language to mean.

We have been concerned too that a court could, in the absence of a definitive expression of congressional intent from both Houses of the Congress, possibly interpret the proposed language empowering the court to order a common carrier to engage in the types of activities that, as I previously mentioned, we do not perform in the course of providing information, facilities, and technical assistance.

We are of the opinion that our statutory role over the past 7 years and under the Crime Control Act to accomplish the interception unobtrusively—and our long-standing identical role in national security cases—was the proper standing and one that permitted law enforcement and the intelligence agencies to carry out their assigned task.

It would not, in the public interest, which was our concern, serve any purpose to expand our role, particularly into a sweeping, vague, and ill-defined fashion.

We, therefore, hopefully recommend that the House will appropriately express on the record its crystal clear intent, as voiced by Mr. Morgan, that the court-directed provision is to be treated in a manner identical with that of title III.

This is emphasized in the Senate report, which stated that the nature and scope of such assistance by the telephone company, and I quote, "is intended to be identical to that which may be directed under section 2518(4)(e) of chapter 119."

Senator Kennedy, I think, echoed that.

We had further recommended that, since the language is to be identical in concept with that of title III, that it might be more appropriate to use the identical standard of unobtrusively, rather than the vague and ambiguous standard that has been selected.

Mr. KASTENMEIER. On that point, Mr. Caming, it would seem to me that, with reference to the type of assistance you may be called upon to provide, the word "unobtrusive," as it appears in title III, seems much more ambiguous and less artful than the explicit phrase "to accomplish the electronic surveillance in such manner as will protect its secrecy," as used in H.R. 7308.

Is your objection, then, to their language basically that it is new and hence have uncertain consequences, or do you expect that you will be called upon to assist in duties you may not wish to perform?

Mr. CAMING. I think, Mr. Kastenmeier, you have focused correctly on our concerns. The term "unobtrusively" has had 7 years of experience before the courts and in our entire relationship with Government, so that it has a fixed concept.

The new term is vague, is broader in one aspect as to what measures other than the direct ensuring that the line is put up in a way that there will be no detection. This might require many overt acts.

For example, we never permit our telephone company employees to accompany any law enforcement official to the site of a tap. And

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it is that, unless it is clear that our role is to be identical, that some court in the future might more broadly construe it at the request of the applicant.

Mr. KASTENMEIER. Your request then, as I take it, is first, you would like some language change, possibly back to that which is under title III, or you prefer that the House, either by report or by colloquy on the House floor, make it clear that what is intended is—as the Senate indicated in its report—to be identical to that which may be directed under section 2518, subsection (4)(e) of chapter 119; is that correct?

Mr. CAMING. That is correct.

The reason for our concern, in part, the House report of the Select Committee on Intelligence used the term "generally are parallel," which, as you can see, is not quite the same as "identical."

Because of time constraints, I will try to move along as quickly as possible.

We were concerned with the new section 102(a), which we had not previously had the opportunity to comment on, because of its recent adoption. This provision, as you know, empowers the Attorney General to authorize electronic surveillance without a court order under certain restrictive circumstances if he certifies that the target is solely against a foreign power and statutorily prescribed miminization procedures are met.

We do have, however, a provision that the Attorney General, not the courts, may direct the common carrier to furnish the assistance we have described.

Now, granting such directive authority to the Attorney General is without precedent, to our knowledge. In discussing our comment, No. 1, we set forth our concerns of even having the courts vested with such authority. We note that the Senate did not take this course and has no such directive provision vested in the Attorney General. Any such directive vests with the courts under title III, under the Senate version.

We strongly endorse this approach, because we believe it is contrary to the public interest to place such directive authority in the hands of a member of the executive branch, especially one who is responsible for authorizing and overseeing the implementation of a surveillance.

Third, the certification that is to be provided as a precondition before the telephone company could provide information, facilities or technical assistance, is, and it must either receive a court order or written certification from an investigative or law enforcement officer, specially designated under existing law to be major interceptions prior to seeking court approval, or a written certification from the Attorney General that no warrant is required, and all of the statutory requirements have been met, and that certain specified assistance is required.

The present system and scope of the certification by the Attorney General or other officers are not, however, set forth in that particular provision. It is to be noted that the existence of an application for a chapter 120 court order the requirements for certification by an appropriate executive branch official are set forth with considerable specificity.

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In the like provision in the Senate version, the Senate provided that certification shall be limited to emergency interceptions which are initiated in advance of court approval, which approval must be promptly sought within 48 or 24 hours thereafter.

No situations other than emergency interceptions fall within the purview of S. 1566's certification procedures, and it is respectfully recommended that the emergency requirements be adopted in lieu of the foregoing certification procedures currently in H.R. 7308.

Last, there is a provision which has been discussed that it shall not be unlawful for any Federal official to conduct an electronic surveillance without a court order for the sole purposes of limited testing the capability of the equipment, counterintelligence detection or training intelligence personnel in the use of electronic surveillance equipment.

We make no comment as to the substantive necessity for such a provision. If, however, any assistance is to be required to enable a Federal official to conduct such surveillances, we believe such cooperation should only be extended pursuant to a court order that expressly directs the telephone company to so assist.

We, accordingly, would recommend that a court directive provision similar in language to that contained in 2518(4)(f) of existing title III be included if any telephone company cooperation is to be required under the circumstances described in this comment.

In conclusion, I would just like to express our appreciation for the opportunity on such short notice to present our views on the Foreign Intelligence Surveillance Act. And to reaffirm the Bell System's dedication to the proposition that the public is entitled to telephone communications free from unwarranted intrusion.

I will be pleased to answer any questions that you may have.

[The prepared statement of Mr. Caming follows:]

STATEMENT OF H. W. WILLIAM CAMING, ATTORNEY, AMERICAN TELEPHONE & TELEGRAPH CO., JUNE 28, 1978

I am H. W. William Caming, Attorney in the General Departments of American Telephone and Telegraph Company. My areas of primary responsibility have since 1965 included, from a legal standpoint, oversight of matters pertaining to corporate security and privacy as they affect the Bell System.

I wish to thank the Subcommittee for the opportunity to comment in behalf of the Bell System upon H.R. 7308, "Foreign Intelligence Surveillance Act of 1978," as amended June 8, 1978 and favorably reported out by the House Permanent Select Committee on Intelligence. As you are aware, on April 20, 1978, the United States Senate passed S. 1566, its version of the Foreign Intelligence Surveillance Act, which differs in certain respects from H.R. 7308.

On January 18, 1978, I testified before the Subcommittee on Legislation of the House Permanent Select Committee on Intelligence on H.R. 7308, prior to incorporation of a number of amendments which appear in the June 8, 1978 version. I commented too on three companion bills which were then also before that Subcommittee, H.R. 5632, 5794 and 9745. Attached for your Subcommittee's information is a copy of my January 18, 1978 Statement.

Therein, we stress the singular importance the Bell System has always placed upon preserving the privacy of telephone communications and describe the measures taken to safeguard such privacy. We believe our customers have an inherent right to feel that they can use the telephone with the same degree of privacy they enjoy when talking face to face. Any undermining of this confidence would seriously impair the usefulness and value of telephone communications. Thus, all Bell System operating practices and service offerings fully recognize the imperativeness of protecting such privacy.

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In recent years, we have reiterated our position on privacy before the Federal Communications Commission and in appearances before various subcommittees of the Congress, including this Subcommittee, and other governmental bodies.[1]

I

LIMITED COOPERATION WITH LAW ENFORCEMENT

In the area of court-ordered wiretapping, it has been the policy of the Bell System to cooperate with duly authorized law enforcement authorities in their execution of lawful interceptions by providing limited assistance as necessary for law enforcement to effectuate the particular wiretap.

In the instance of law enforcement authorities of the Federal government (and of those States which have enacted specific enabling legislation), the court order under § 2518(4)(e) of Title III of the Federal Omnibus Crime Control Act may "direct" the telephone company to provide limited assistance in the form of information, facilities, and technical assistance necessary to accomplish the wiretap unobtrusively and with a minimum disruption of service.

Upon the receipt of such a directive in a court order valid on its face, our cooperation will usually take the form of furnishing a private line channel from terminal to terminal (i.e., a channel from a terminal which also services the telephone line under investigation to a terminal servicing the listening post location designated by law enforcement). Additionally, line access information (as to the cable and pair designations and multiple appearances of the terminals) will be furnished for the specific telephone lines judicially approved for interception.

In "national security" electronic surveillance cases, assistance in the form of private line channels and line access information has been furnished by Bell System Companies to Federal authorities. This assistance is only rendered to the Federal Bureau of Investigation and then only upon specific written request of the Attorney General of the United States or of the Director of the Federal Bureau of Investigation (upon the specific written authorization of the Attorney General to make such request) to the local telephone company for such facilities, as a necessary investigative technique under the Presidential power to protect the national security against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities, in connection with an investigation of organizations or individuals suspected to be agents of or acting in collaboration with a foreign power. For reasons of security, we are not informed in such cases of the specific nature of the national security matter under investigation.

In cooperating in court-ordered and national security cases we believe that our proper role, as a communication common carrier, is to provide the minimum assistance necessary to effectuate the particular wiretap, whether of voice or non-voice communications. Under no circumstances do we do any of the ensuing monitoring or recording; that, in our opinion, is the exclusive province of the appropriate law enforcement officers.

Nor do we furnish them with any terminal equipment to be used in connection with their wiretap, such as pen registers, Touch-tone® dial impulse decoders, headsets, or tape recorders.

Nor do we design or build wiretap or eavesdrop devices for law enforcement authorities.

Nor do we allow them to enter our central offices.

Nor do we train law enforcement personnel in the general methods of wiretapping and eavesdropping.

Nor do we provide telephone company employee identification cards, uniforms or tools, or telephone company trucks.

[1] We have appeared, among others, before the Subcommittee on Legislation of the House Permanent Select Committee on Intelligence on January 18, 1978; the Subcommittee on Communications of the House Interstate and Foreign Commerce committee on June 22, 1977; the House Select Committee on Intelligence on December 2, 1975; the House Subcommittee on Government Information and Individual Rights on October 23, 1975 and its predecessor Subcommittee on Foreign Operations and Government Information on June 11, 1974; the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice on April 26, 1974 and again on February 18, 1975; the Privacy Protection Study Commission on February 12, 1976; and the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance on June 27, 1975.

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II

PROPOSED LEGISLATION

We have long recognized and repeatedly testified that national security and organized racketeering are matters of grave concern to the government and to all of us as responsible citizens. We believe that the extent to which privacy of communications should yield, and where the line between privacy and the requirements of national security should be drawn in the public interest, are matters of national public policy, to be determined by the Congress upon a proper balancing of the individual and societal considerations bearing on the question.

Within this frame of reference and without endorsement of any particular approach, we would like to offer for the Subcommittee's consideration the following comments concerning the "Foreign Intelligence Surveillance Act of 1978" legislation which is the subject of this hearing.

Comment No. 1

In 1971, Congress added the so-called directive provision to chapter 119 of Title III of the Federal Omnibus Crime Control Act. Section 2518(4)(e) of 18 U.S.C. was amended, effective February 1, 1971, to include a provision empowering a court, upon the request of the law enforcement applicant, to direct, among other persons, a communication common carrier to furnish "forthwith all information, facilities and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference" to the services being accorded to the person whose communications are to be intercepted.

Since then, it has been customary for law enforcement authorities to have such a "directive" provision included in each Title III court order. In each instance, the local Bell telephone company has cooperated by providing, pursuant to the court's directive, the necessary, previously-described assistance (generally in the form of a private line channel and line access information). Such assistance has enabled law enforcement to effectuate the particular wiretap. It should be emphasized that our cooperation is of limited character, consonant with our traditional role as a communication common carrier.

H.R. 7308 contains a similar "directive" provision with respect to chapter 120 foreign intelligence court orders * * * but with one significant point of departure. Instead of requiring the telephone company, as under existing law, to furnish "all information, facilities and technical assistance necessary to accomplish the interception *unobtrusively* and with a minimum of interference" to service,[2] the Special Court is empowered under the proposed legislation to direct the telephone company to furnish "any and all information, facilities, or technical assistance, necessary *to accomplish the electronic surveillance in such manner as will protect its secrecy* and produce a minimum of interference" to service.[3] [Emphasis added.]

Virtually identical language appears in the version of the Act passed by the Senate.[4]

The term, "to accomplish the electronic surveillance in such manner as will protect its secrecy," is of such sweeping and disturbingly ambiguous character as to give the courts no guidance with respect to defining the role that the telephone company is to be directed to play in assisting law enforcement effectuate the particular wiretap. It creates not only an uncertain but also a dual standard: One for court-ordered wiretaps under existing chapter 119, and another for those issued under the proposed chapter 120, although both must be fully concealed from detection.

At the very least, such a dual standard will prove administratively confusing and burdensome to telephone company personnel. But more significantly, the language "in such manner as will protect its secrecy" raises serious question as to what our precise role is to be.

We are gravely concerned that a court could, in the absence of a definitive expression of Congressional intent, possibly interpret the proposed language as empowering the court to order a communication common carrier to engage in the types of activity that, as previously mentioned, we do not perform in the course of providing information, facilities and technical assistance. We are of the opinion that our statutory role for the past seven years under the Federal Omnibus Crime Control Act (to accomplish the interception "unobtrusively" and with minimum interference to service) and our longstanding like role in national security cases are

[2] Section 2518(4)(o) of 18 U.S.C.

[3] H.R. 7308 (§ 105(b)(2)(B) on p. 50).

[4] S. 1566 (§ 2525(b)(2)(B) on p. 21) merely adds a "contractor" to the group of persons—communication common carrier, landlord, custodian, or other specified person—that may be directed to furnish information, facilities or technical assistance.

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the proper ones. This is a standard to which we have adhered over the years, and one which has enabled law enforcement to successfully effectuate its wiretaps. It would not be in the public interest to expand it, particularly in so sweeping, vague and ill-defined a fashion.

We, therefore, respectfully recommend that the House appropriately express on the record its clear intent that this court "directive" language be interpreted in a manner identical to that adopted by the Senate, when the latter stated in the following language that the role of the telephone company should not be expended beyond existing law:

"* * * [A] court order obtained under chapter 120 may direct an officer, employee or agent of a communication common carrier to provide certain assistance to the Government agents implementing the order. The nature and scope of such assistance *is intended to be identical to that which may be directed under section 2518(4)(e) of chapter 119.*"[5] [Emphasis added.]

We further recommend that the chapter 120 court "directive" provision be revised to contain language identical with that in the existing "directive" provision of chapter 119's § 2518(4)(e).

Comment No. 2

Among the amendments to H.R. 7308 since we testifed thereon in January last was the recent adoption by the House Permanent Select Committee on Intelligence of Section 102(a). This provision empowers the Attorney General to authorize electronic surveillance without a court order for periods of up to one year to acquire foreign intelligence information, if the Attorney General certifies that such surveillance is directed solely against a foreign power and statutorily-prescribed minimization procedures are met. Unless exigent circumstances do not permit, in each instance the proposed minimization procedures are to be reported to the House and Senate Select Committees on Intelligence at least 30 days prior to their inception.

Section 102(a) further provides in subdivision (3) thereof that the Attorney General may direct a communication common carrier to furnish "all information, facilities, or technical assistance necessary to accomplish the electronic surveillance in such a manner as will protect its secrecy and provide a minimum of interference" with service.[6] Granting such "directive" authority to the Attorney General, rather than to the courts, is without precedent.

In discussing Comment No. 1, we set forth the reasons underlying our grave concern for vesting such "directive" power even in the courts, unless Congress clearly states that the chapter 120 assistance to be rendered by a communication common carrier is to be identical with its obligations under existing law. As we noted, the Senate has taken such a course in S. 1566.

Of equal importance, S. 1566 grants no "directive" authority over the telephone company to the Attorney General. We strongly endorse this approach. We believe it is wholly contrary to the public interest to place such "directive" authority, of sweeping and disturbingly ambiguous character, in the hands of a member of the Executive Branch, especially one who is responsible for authorizing and overseeing the implementation of chapter 120 electronic surveillances.

Comment No. 3

H.R. 7308 contains conformatory amendments to § 2511(2)(a)(ii) of chapter 119, requiring the telephone company—before providing any information, facilities or technical assistance (pursuant to the applicable provisions of chapter 119 or 120)—to receive a court order, or a written certification either from (i) an investigative or law enforcement officer specially designated under § 2518(7) of chapter 119 (to make "emergency" interceptions prior to obtaining court approval), or, (ii) from the Attorney General, that "no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required."[7]

The precise terms and scope of the certification by the Attorney General (or other, specially designated officer) are not, however, set forth. In this connection, it is to be noted that in the instance of an application for a chapter 120 court order, the requirements for a certification by an appropriate official of the Executive Branch are set forth with considerable specificity.[8]

In the like provision in S. 1566, the Senate provided in the following language that certification shall be limited to emergency interceptions which are initiated in

[5] Senate Report No. 95-701 of the Senate Select Committee on Intelligence, dated March 14, 1978, on p. 69.
[6] H.R. 7308 (§ 102(a)(3)(A) on p. 40).
[7] H.R. 7308 (§ 201(a) on p. 65).
[8] H.R. 7308 (§ 104(a)(7) on p. 45).

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advance of court approval, which approval must be promptly sought—within 48 hours (chapter 119) or 24 hours (chapter 120) thereafter:

"(2) in the case of an emergency interception or electronic surveillance as provided for in section 2518(7) of this chapter or section 2525(d) of chapter 120, a certification under oath by the investigative or law enforcement officer that the applicable statutory requirements have been met." [9]

No situations other than emergency interceptions fall within the purview of S. 1566's certification procedures.

It is respectfully recommended that the "emergency" certification requirements contained in S. 1566 be adopted in lieu of the foregoing, vaguely defined certification procedures currently in H.R. 7308. Such specification will remove any question as to what properly must be contained in the certification, which is one of the preconditions to the rendering of assistance by the telephone company to law enforcement.

Comment No. 4

H.R. 7308 declares that it shall not be unlawful for a Federal official to conduct electronic surveillance, without a court order, for the sole purpose of (i) limited testing of the capability of electronic equipment to intercept communications, (ii) to detect, as a counterintelligence measure, electronic surveillance equipment being used unlawfully, or (iii) to train intelligence personnel in the use of electronic surveillance equipment.[10]

Presumably, such testing and detection efforts are to take place without the use of any information, facilities or technical assistance from a communication common carrier. If, however, any information, facilities, or technical assistance is to be required from a telephone company to enable a Federal official to conduct electronic surveillances for the purpose of testing equipment, training personnel, or detecting unauthorized equipment, we believe such cooperation should only be extended pursuant to a court order expressly directing the telephone company to provide such information, facilities or technical assistance. We, accordingly, recommend that a court "directive" provision similar in language to that contained in § 2518(4) of chapter 119 be included if any telephone company cooperation is to be required under the circumstances described in this Comment.

Parenthetically, as mentioned in the attached Statement of January 18, 1978, each Bell telephone company has established procedures for fulfilling any customer request that its lines be carefully checked for suspected illegal wiretapping.

III

CONCLUSION

In conclusion, we wish to express our appreciation for the opportunity to present our views on the Foreign Intelligence Surveillance Act legislation now pending before the Subcommittee and to reaffirm the Bell System's dedication to the proposition that the public is entitled to telephone communications free from unwarranted intrusion.

I shall be pleased to answer any questions the Subcommittee may have.

Mr. KASTENMEIER. Thank you, Mr. Caming, for a well-informed presentation.

I think I have only one question and that is on the last point. There is nothing in the bill which says that a common carrier will be required to furnish assistance in training, it merely suggests it will not be unlawful for a Federal official to conduct for the purpose of testing, et cetera; is that not correct?

Mr. CAMING. That is true, although as you read the report that accompanies this bill, H.R. 95-283 of June 8, it states there in that among the certifications that may be given to the telephone company by the Attorney General is one for assistance in this area.

So it is apparently contemplated by the intelligence agencies that we will be asked to cooperate in this area, and we feel inasmuch as it is a broad area of sweeping character that it is the type of responsibility that we can best handle when done pursuant to a

[9] S. 1566 (§ 4(b)(2)(2) on p. 35).
[10] H.R. 7308 (§ 105(f) on p. 53-55).

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court directive which definitively defines the structures under which we are to operate, and that was our thought.

Mr. KASTENMEIER. I appreciate your testimony this morning, and it has been, I think, very useful and you have represented your company well in this regard.

I thank you very much, Mr. Caming.

This concludes hearings this morning. We will have hearings at 9:30 tomorrow morning, which will include the subject under discussion, the subject of foreign intelligence surveillance.

Until tomorrow morning at 9:30, the subcommittee stands adjourned.

[Whereupon, at 1:20 p.m., the Subcommittee on Courts, Civil Liberties, and the Administration of Justice adjourned.]

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FOREIGN INTELLIGENCE SURVEILLANCE ACT

THURSDAY, JUNE 29, 1978

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

The subcommittee met, pursuant to notice, at 9:50 a.m., in room 2141, Rayburn House Office Building, the Honorable Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Danielson, Drinan, Santini, Ertel, and Railsback.

Also present: Representatives Mazzoli and McClory.

Staff present: Bruce A. Lehman, counsel; Timothy A. Boggs, professional staff member; Thomas E. Mooney and Joseph V. Wolfe, associate counsel; and Audrey Marcus, clerk.

Mr. KASTENMEIER. The subcommittee will come to order.

This morning the subcommittee convenes for the final day of hearings on H.R. 7308, the Foreign Intelligence Surveillance Act and related bills.

Immediately following the hearing we will convene for the purpose of discussing possible subcommittee disposition of this legislation.

At this time it is a pleasure for me to welcome our colleague from Kentucky, who has devoted so much time to this project.

I hope his time and efforts have not been wasted, and it's a pleasure to greet the Honorable Romano L. Mazzoli.

TESTIMONY OF HON. ROMANO L. MAZZOLI, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF KENTUCKY

Mr. MAZZOLI. Thank you very much, Mr. Chairman and members of your distinguished subcommittee.

I am honored to appear before you, my colleagues on the Judiciary Committee today to voice my support for H.R. 7308, the Foreign Intelligence Surveillance Act of 1978.

As you know, I am also a member of the House Permanent Select Committee on Intelligence and its Subcommittee on Legislation which is ably chaired by the distinguished gentleman from Illinois, Mr. Murphy, who appeared before the subcommittee yesterday. Our subcommittee produced H.R. 7308.

So I have spent many hours studying the measure now before your subcommittee.

As reported by the Intelligence Committee, H.R. 7308, except in two narrowly defined circumstances, neither of which is likely to

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involve U.S. persons, would require a judicial warrant for all electronic surveillance conducted in the United States for foreign intelligence purposes.

Under H.R. 7308, surveillance could be undertaken only to collect foreign intelligence information and could be targeted only against foreign powers or agents of a foreign power. Both "foreign power" and "agent of a foreign power" are terms carefully defined in the bill.

A U.S. person, a term also carefully defined in H.R. 7308, can be considered an agent of a foreign power only if he engages in certain activities on behalf of a foreign power which involves or may involve criminal acts.

To further protect U.S. persons, the bill requires procedures to be approved by the judge to minimize the acquisition, retention, and dissemination of information about a U.S. person which is collected as a result of foreign intelligence surveillances.

H.R. 7308 establishes a national policy that a judicial warrant authorizing foreign intelligence electronic surveillance is the proper means to insure that the rights of all persons involved are protected while, at the same time, legitimate foreign intelligence activities are not impeded.

Over the years, foreign intelligence electronic surveillances have been conducted at the discretion of executive branch officials. As this committee is all too well aware, this arrangement has not prevented serious abuse from occurring.

It has been argued that all of this, though unfortunate and indefensible, is now past history. It is further argued that the current guidelines imposed by former Attorney General Levi and refined by current Attorney General Bell effectively preclude any recurrence of past abuses.

So, the argument goes, there is no need to establish a procedure calling for issuance of judicial warrants before foreign intelligence electronic surveillance can take place.

The short answer here, Mr. Chairman and members of the committee, in behalf of the warrant approach is that administrations come, and administrations go. Guidelines are written, and they are revoked. The Department of Justice may not always be led by men and women of character and integrity who are dedicated to the preservation of fourth amendment rights.

The American people, for good reason, have over the years been skeptical about the commitment of the executive branch of Government to honor their individual liberties and personal rights. By contrast, the people have demonstrated a strong faith in the ability and willingness of the judicial branch to protect these cherished rights.

Mr. KASTENMEIER. If the gentleman will yield, I think you make a good point on that. I recall that when we considered newsmen's privilege we had the same problem. It was noted that the Attorney General had established guidelines and yet, as far as the news gathering communitiy was concerned, they felt that they could not rely on an Attorney General's guidelines, which are as mutable from one day to the next, from one Attorney General to the next. But they are not, as are the laws placed in statutes, for everyone to see and to obey.

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Mr. MAZZOLI. That is true. A very good point, Mr. Chairman.

I might say in our efforts and our committee's efforts to write a law controlling foreign intelligence surveillance we are not showing lack of faith or lack of confidence in the current administration. We are not criticizing the past administrations.

We are simply recognizing a pure fact of life, and that is that people come and people go, and each brings a little different approach to the problem and if we have some immutable laws and if we have some unchanging regulations to which all administrations can refer, it seems to me we have made a giant leap toward that day when the proper kind of protection is given the individual rights, and at the same time the proper balance is given to the clear needs to gather foreign intelligence information.

Mr. Chairman, others have argued against the warrant requirement saying it would lead to a wholesale intrusion of the judiciary into the day-to-day operation of the intelligence agencies.

With all due respect, this is simply not the case.

As H.R. 7308 and the committee report accompanying it make abundantly clear, the judges of the special court established to hear applications for foreign intelligence electronic surveillance warrants will be engaged in a traditional judicial function. Examining a set of facts against a statutory framework and then deciding whether the law allows or disallows the action sought. No special expertise in intelligence matters is expected or required of the special court.

Furthermore, no lawful intelligence activities will be interfered with or ensnarled in redtape or endangered by leaks under H.R. 7308.

Under H.R. 7308 individual intelligence agents will know to the letter what is required of them. They will know that what they do pursuant to a warrant is lawful. And they will be protected in the future against criminal prosecutions and civil suits arising from the surveillance as long as they do not exceed their lawful authority.

Another frequently voiced objection to H.R. 7308 and its warrant provision is that it poses harm to the national security.

The harm, it is argued, could occur in two ways: Intelligence activities could be impeded because of redtape and court delays and the court procedures established under H.R. 7308 could result in the unintentional disclosure of sensitive intelligence information.

The House Intelligence Committee subjected both of these concerns to lengthy and detailed inquiry.

The committee concluded on the basis of testimony of members of the intelligence community that H.R. 7308 will not impede or unduly complicate foreign intelligence gathering.

Some questions were raised by intelligence officials as to the possible risk of disclosure by the judge to whom an application for a warrant has been made. Those questions, however, were limited to a particular class of very sensitive surveillances. These surveillances, which will not involve Americans have, under H.R. 7308, as reported, been exempted from the warrant requirement.

Nonetheless, where warrants are required, it cannot be denied that a judge will be involved in the approval process where now he is not. Does this mean there is an additional risk?

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First, at the warrant application stage of the process several executive branch personnel will already know about the proposed applications. By exposing one additional person to this the judge to this sensitive information does not constitute mathematically or in any security sense the broadening of the risk of exposure.

Second, judges are constantly exposed to sensitive and volatile information. They have not, as a class, abused the trust placed in them, nor in any way shown themselves unworthy to handle sensitive intelligence information.

Also, the bill directs the special court to adopt security procedures in consultation with the Attorney General and the Director of Central Intelligence. The bill also makes clear that such procedures may include the use of executive branch personnel—who are already cleared to handle secret material—to perform clerical duties for the court. This would minimize further the number of those who come into contact with sensitive material.

Also, it is contemplated that sensitive intelligence material will be stored for the court in facilities maintained by cleared executive branch personnel.

In summary, Mr. Chairman, H.R. 7308 is good legislation.

It protects the constitutional rights of American citizens and the legitimate rights of all individuals. It does not obstruct or impede necessary foreign intelligence collection activities. It will enhance the effectiveness of the intelligence field agent who, in most cases, will have a court order to guide his actions.

It should restore the public's confidence in the intelligence community since no U.S. person can be subjected to foreign intelligence electronic surveillance unless a judge has previously found probable cause that the individual is involved, or may be involved, in a criminal activity.

Admittedly, H.R. 7308 is a compromise bill. Any legislation that can bring together two administrations of differing political philosophies, three congressional committees, the intelligence community and most of its critics must be the product of compromise and adjustment. Thus, not every provision will be supported with equal vigor by each interested party.

As my supplemental views to the committee report note, I voted against the amendment advanced by our colleague from Illinois, Mr. McClory, which exempted certain intelligence activities from the judicial warrant process.

I remain convinced of the necessity for an across-the-board warrant in foreign intelligence electronic surveillance. But, I am equally convinced that H.R. 7308, as reported, deserves this committee's strong support.

In closing, Mr. Chairman, let me quote briefly two strong supporters of the judicial warrant procedure for authorizing foreign intelligence electronic surveillance.

Senator Birch Bayh, chairman of the Senate Intelligence Committee, said on the Senate floor when H.R. 7308's counterpart, S. 1566, was adopted by a vote of 95 to 1:

> The bill before the Senate today * * * is the first major intelligence reform measure to be considered by the Congress. It will bring an end to the practice of electronic surveillance by the executive branch without a court order in the United States. It establishes standards for issuing court orders that reconcile the interests

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of personal privacy and national security in a way that is fully consistent with the fundamental principles of the Fourth Amendment and due process of law."

Last, Mr. Chairman, Senator Jake Garn was quoted on the same occasion:

Some have wondered what a conservative Senator such as myself was doing co-sponsoring what they thought was a liberal bill. The answer is quite simple.

This is not a liberal bill. This is not a conservative bill. It is neither a Democratic nor a Republican bill. The tasks of balancing cherished constitutional liberties with increasingly threatened national security needs is too important to be left to partisanship.

Any procedure which gains the enthusiastic support of two Senators so different in political philosophy must be a sound and reasonable procedure.

Thank you very much.

Mr. KASTENMEIER. I compliment you on your statement. I know while your statement was not long you have spent many hours working on this legislation.

I have just one question now and then I would like to yield to the gentleman from California.

What if we find after we enact this into law that it's a great mistake?

Suppose we find that there are leaks for the courts?

Suppose we find the courts, in fact, are not exercising any independent discretion in terms of reviewing these applications and that in the whole system abuses continue?

Won't it be very difficult to disengage from this once adopted by statute or otherwise?

Mr. MAZZOLI. Mr. Chairman, that is a very good question, and I would answer it perhaps twofold.

One is, with due respect, I don't think that would happen. I believe this process has been tested and proven and examined so carefully that I don't think it will come apart. If it should there is no doubt undoing anything is very difficult.

It's a lot harder to undo than to do, but I think we have the opportunity in the process of congressional oversight, which is provided for in H.R. 7308, to anticipate and to keep track of on a current basis the development and experience of this bill, so we will not reach an Armageddon and we will not reach the point of absolute disaster; we will not reach the point where our Nation has become vulnerable to attack or to internal subversion before this committee.

The Committee on Intelligence will have some idea of what is happening and, therefore, can move as, if you will, the eyes and ears of the Congress to demand there be changes made, either adherence to the law or else that there be some effort made by the Congress to rewrite the law.

So while I share your concern and I think it's a concern we have with any bill we pass in the Congress. But this one, I believe, has been tested to the point that these dangers are hypothetical only, and if they should prove true in practice we can stem them and nip them, I believe, in the bud.

Mr. KASTENMEIER. I yield to the gentleman from Illinois, Mr. Railsback.

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Mr. RAILSBACK. I thank you, Mr. Chairman, and I apologize for being late.

As the gentleman knows, I have always had a very high regard for him. I have had a chance to glance at his statement, but I see we have a vote on, so I will not ask any questions at this time.

Mr. MAZZOLI. I thank the gentleman from Illinois. He has been very helpful in the entire production of this because he and the chairman, the gentleman from Wisconsin, Mr. Kastenmeier, have been active in this field, if I might say, long before it became fashionable to be active, and I thank him for his leadership.

Mr. KASTENMEIER. The gentleman from Massachusetts.

Mr. DRINAN. Mr. Chairman, I do have two or three questions. Should we defer until after the vote?

Mr. KASTENMEIER. We can do that. I think we might as well. I give you the option.

Mr. MAZZOLI. I will be willing to come back.

Mr. KASTENMEIER. We will come back and the gentleman from Massachusetts will be recognized.

Accordingly, with a vote on the House floor, the subcommittee will recess for 10 minutes.

[A short recess was taken.]

Mr. KASTENMEIER. The subcommittee will be in order.

When we recessed, Mr. Mazzoli, the witness, had opened himself up to questions, and I would now like to recognize the gentleman from California, Mr. Danielson.

Mr. DANIELSON. Thank you, Mr. Chairman, and thank you, Ron, for your very great contribution to this bill.

I know you have been working extremely hard on it because as a member of my own subcommittee we deem it a rare privilege when you are able to attend.

Mr. MAZZOLI. I try to help my chairman when I can.

Mr. DANIELSON. I am not happy with this bill. I am not saying I am necessarily satisfied, either, but I am fearful that what we have come to is probably the best of several unsavory solutions to a problem.

I personally consider the problem to be a real one. I am not one of those who feels we do not need to have foreign intelligence gathering. I think it's critical that we do, and we might be very careful that we don't inflict permanent, maybe mortal damage on ourselves by naively assuming we have no enemies in this world.

I would like to ask you a few questions.

Why do you feel that we should have judges passing on these warrants?

Mr. MAZZOLI. Mr. Chairman, I suggest in my statement that I am for that, probably for two reasons:

One is I believe the judges have a credibility which I believe transcends the credibility of the other two branches of Government and I believe for the sake of insuring the American people, as the chairman has said, that necessary foreign intelligence gathering activities is being done under the basic supervision and with the previous warrant of the judicial branch of Government.

I think they will accept that better.

Second, Mr. Chairman, we examine all matters and methods and alternatives to the current situation, which is to leave the execu-

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tive branch of Government untrampled, unfettered with virtually no guidelines continue with its role of intelligence gathering.

We felt that the alternatives which were available to that, once the judgment had been made, and I am satisfied in my own heart that some alternatives needed to be made, that the only feasible alternative was the use of the Federal courts.

Mr. DANIELSON. I would like to respond. You mentioned one of the options or alternatives being to let the executive branch go untrampled and unfettered, and what not. Why not have the executive branch go trampled and fettered and with guidelines?

Mr. MAZZOLI. The gentleman from Illinois, Mr. McClory, has suggested some proposals in that direction, and the committee considered those very carefully and felt that——

Mr. DANIELSON. I would like to move along because my 5 minutes will run.

Mr. MAZZOLI. Certainly.

Mr. DANIELSON. I concede that the public has a great faith in our judicial branch, and rightfully they should have. I have another concern, though. I am very anxious that they should continue to have great faith in our judicial branch.

I am not so sure, in fact, I believe that faith and credibility is not based upon some inherent quality in judges, many of whom are selected from the executive branch or from the legislative branch, or from a nongovernmental activity.

I think perhaps that credibility and respect differs from the fact that we have not permitted our judges and they themselves have refused to conduct executions through the political thicket, and to become involved in the very delicate and difficult executive and legislative functions that are a part of every government.

I gravely fear that if our judges are going to trample through this political thicket making tough decisions on executive policy matters that their roles may be snagged and torn in those brambles and perhaps instead of retaining a judicial branch which enjoys high respect and credibility we may find that they will lose a good deal of that which makes them so valuable today.

The Constitution calls for our judicial branch to resolve cases and controversies. Implicitly but necessarily it provides they should not become involved in the prior examination of matters which may ultimately come before them. So when I contemplate judges and a special court, for heavens sake, which may be full time session, though they may have to pass on four or five warrants a year, I have doubts. I just hope we are not doing the wrong thing.

Likewise in a court you normally have an adversary proceeding, and the court does exercise a judicial function of hearing both sides, hearing all of the facts brought out as well as possible, through adversary proceedings, and then make a decision.

Who is the counter-advocate when the Executive comes before the court to ask for this warrant? Is the court itself to play the role of advocate? Who is coming in for the Soviet Union to decide whether or not this alleged espionage agent should be surveilled?

I respectfully submit we have none.

So the judge is going to have been both a decisionmaker plus, whether you like it or not, an advocate, and I just wonder if that is a good thing.

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Maybe it is a rhetorical question, but I am trying to illustrate why I am not entirely happy with this bill.

Last, very respectfully, because you are one damn good Congressman——

Mr. MAZZOLI. Thank you.

Mr. DANIELSON. I know, because I have been working with you, but I chide you on your final argument.

You say we have Senator Bayh, a renowned liberal, saying this is a good bill, and we have Senator Garn, a renowned conservative saying this is a good bill. Then, from that you conclude, "Any procedure which gains the enthusiastic support of two Senators so different in political philosophies must be a sound and reasonable procedure."

Now, I know you don't really mean that. Nothing in the field of logic could ever give you that conclusion. You are going to find before this debate is over that there are some knowledgeable liberals who are against wiretapping and surveillance of any kind and they are against this bill.

You may hear that this morning, and you are going to find some acknowledged conservatives who are very much against this bill, and you may hear that this morning.

Could you then conclude that any procedure which gains the enthusiastic, criticism of two Senators or two persons so different in political philosphy must be a sound, or a soft and reasonable or unreasonable procedure?

Mr. MAZZOLI. Mr. Chairman, that is exacty why I love to come to your subcommittee, because you always have these incisive observations on the world and what makes it tick and what keeps it from ticking, and I accept that observation of the fact I have a lapse in hyperbole here.

Let me suggest two things: One is, I come from Kentucky, and we are supposed to be a somewhat unsophisticated State and we have to sort of get into this.

Mr. DANIELSON. That is a myth.

Mr. MAZZOLI. I think that is a myth too. We sometimes have to paint with broad strokes and I think I have done so in the last part of my statement.

Second, and more seriously, Senator Garn was not just an occasional speaker. He was not just drawn from the conservative ranks. He is a member of the Senate Intelligence Committee, along with Senator Bayh, who worked hard in producing the bill, so he would be one whose viewpoint would carry with it a little extra weight.

Mr. DANIELSON. Sir, lest there is any possibility that my comment detracts at all from either of these two gentlemen, let me make it clear, to coin a phrase, let me make it crystal clear, that that was not intended.

Mr. MAZZOLI. I certainly accept that.

Mr. DANIELSON. I yield back my time.

Mr. MAZZOLI. Thank you, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from Massachusetts, Mr. Drinan.

Mr. DRINAN Thank you, Mr. Chairman.

Mr. Mazzoli, you make the familiar argument this will increase accountability, but it seems to me it will diminish accountability

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because the moment that the judges have it everything is secret, and it seems to me this statute has the effect of immunizing everyone.

Let me give you a scenario and ask for your response.

Let us assume that the CIA or the FBI asks or requests, submits a request to do surveillance on certain Soviet Jews who have been recently admitted from Russia. The lower Federal judge denies the request, the CIA appeals, and the appeal is granted, and suddenly this came out and there is a huge outcry that these aliens are under surveillance when they are refugees from religious persecution.

There is no way in which your committee can summon any Federal judge or reach any of the secret decisions that have been made.

How, therefore, is accountability increased?

Mr. MAZZOLI. If the gentleman from Massachusetts would yield, I believe that under the terms of the bill there is oversight on the part of the Intelligence Committees of the House and Senate and so there is, indeed, an opportunity for us to look at that information and find out to what extent verified and detailed information was available to that judge and, if we find that the judges in a routine way are overreaching themselves, if the Government is trimming any corners or cutting any corners on its statements of application to the court for the warrant, then we can step in.

Now, I fully agree with you there is a great incumbency here on the two Intelligence Committees and if we fail to do our job, if we fail to be serious and resolute about it——

Mr. DRINAN. You cannot step in. In no way are you going to step in and say to a Federal judge that we demand to see the memo, the secret, top secret memo that you wrote denying this application and, in no way will you get the CCA or the Supreme Court Justices to give their evidence.

There will be a huge outcry and that is one of the many things that have not been thought through in this proposal, that this makes immune, to repeat, this statute immunizes the Executive, it immunizes the Federal judiciary and there is no way by which you can have oversight.

Mr. MAZZOLI. The gentleman brings up a point that, of course, the Committee on Intelligence went into very carefully in trying to get oversight opportunities of just exactly the information that is going to be available to the Federal judges upon which they make their judgment about the issuance or nonissuance of a warrant and, with due respect for my friend and classmate in the Congress, I do believe we would have access to that information.

My answer to that question of the Chairman earlier, if we find there has been some effort to freeze us out, if there has been some effort on the part of the judges to act en camera and in a purely star chamber fashion, then I have no question about what this gentleman from Kentucky, if I am still on the committee, would do, and I think what the committee under the leadership of Chairman Bolling would do, and that is to sound off.

Mr. DRINAN. It's not the personnel on the committee; it's the effect that under American history no Federal judge has been subpenaed to come before some oversight committee of the Con-

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gress. It's just impossible. If you want to change that, then there is nothing in the law that will give you the power to do that.

Now, on the second point, as the gentleman knows, in 1960 the U.S. Supreme Court said categorically in the *Abel* case that aliens, even aliens engaged in espionage, are entitled to full fourth amendment protection.

Does this bill reverse the *Abel* decision?

Mr. MAZZOLI. It does not reverse the *Abel* decision. If the gentleman would yield further, the bill, as a matter of fact, does establish a warrant procedure for non-U.S. persons, aliens, and residential aliens, foreign visitors to the country.

There has to be warrants in all of those cases before those individuals can be surveilled by electronic devices and that, of course, is a recognition by this committee against, I might say, some fairly persuasive arguments or at least strong arguments to the contrary.

It's a recognition by this committee that the fourth amendment does have breadth to cover non-American citizens, and those being visitors and aliens.

Mr. DRINAN. But the bill does not, contrary to the *Abel* case, the bill denies the full protection of the fourth amendment to aliens in this country.

Mr. MAZZOLI. Let me assure the gentleman I am not a constitutional lawyer, and I am not sure of the holding in *Abel.* If the holding in *Abel* does make distinct the exact application of the fourth amendment, what it does hold for the purpose of nonresident persons or aliens, then I will have to examine that. But it seems to me that the bill which is before your committee does recognize that aliens, non-Americans, have rights under the fourth amendment.

Now, there is——

Mr. DRINAN. If the gentleman will yield, let me clarify *Abel.*

Mr. MAZZOLI. Please tell me.

Mr. DRINAN. This is what the ACLU will say later this morning.

"This legislation declares open surveillance warfare on all foreign visitors in this country." And they state that way back in 1896 in *Wong* v. *United States* it said that the people who are protected by the fourth amendment were held in that case to include all persons within the territorial jurisdiction of the United States and, as a result of the bill that you are recommending today, for the first time says in American jurisprudence that the full fourth amendment protection shall be denied to aliens.

There is no Supreme Court ruling that so holds.

Mr. MAZZOLI. The fourth amendment, it seems to me, has been recognized by our bill, because we still have to have a warrant, a person who is not an American still has to have a warrant issued before that individual can be surveilled by electronic devices under our bill, and it seems to me that is a recognition of the fourth amendment.

Now, there may be some legal jurisprudence expert who can argue about what the reach of the fourth amendment is and what it entails, but it seems to me if our committee had not ordered there be warrants for the wiretapping of foreign visitors, then we

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could have perhaps been truncating somehow the application of fourth amendment rights to visitors. But we are not.

We say you have to have a warrant and I think that is pretty clear evidence of where our committee has been.

Mr. DRINAN. The ACLU goes on to state that what is being proposed is lacking in constitutional support and is contrary to international law.

Mr. MAZZOLI. I will be here to listen to what the ACLU says this morning. I would probably, after listening to them, respectfully differ from that conclusion.

Mr. DRINAN. I thank the gentleman. I am certain my time has expired, and I commend him for his diligence in this area.

Mr. MAZZOLI. Thank you.

Mr. KASTENMEIER. The gentleman from Nevada, Mr. Santini.

Mr. SANTINI. I suppose I feel that certain lawyer's compulsion to join in the rhetorical exercise in the guise of questions and answers to express my sentiments with regard to the merits and demerits of the legislation and future prospect of it.

At the outset, I was most enthusiastically awaiting the opportunity to participate in the legislative exercise because it would afford me to graduate from the ground level of abysmal ignorance into the rarified air of moderate ignorance on the subject of wiretapping and our Government's involvement in this arena.

I share with the gentleman from California some of the reservations or concerns. But it does seem to me that to the best of our ability, although it contradicts a legislative precedent or two, we should endeavor to legislate in a real world and hypothetical, esoteric exercising of the best of all possible lands I think bear certain consideration, because we happen to live in one that probably comes as close to that qualification as any I know.

It does seem to me that on both sides of the spectrum of analysis of this issue there is a bit of contradiction implicit in the directions that the argumentation pursues.

On the one hand, we have the sincere and intense voice of the civil libertarian protesting any form of legislative sanction to wiretap. That is one point of view variably advocated on this committee and certainly espoused by national organizations as well.

But there seems to me to be an inherent self-defeating inconsistency in pursuing that line of reasoning in the context of the present legislation. I don't know how sufficient or adequate the oversight of the Congress with respect to the judiciary and the exercise of its judgment on issuance of warrants is going to be in the context of the warrants we are contemplating here, but I damn well know it's going to be several steps ahead of where we are at under the present circumstances of wiretap exercise in this country with respect to the potential recipients and benefits of such wiretaps.

We have ziltch, we have zero, we have nothing now. Now, perhaps the oversight proposed in the legislation will be somewhat impaired by both the top secret nature of the endeavor and the vague and constitutionally undefined parameters of incursion an oversight committee into an exercise of judicial judgment that has yet to be resolved.

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But it certainly seems to me to be a measured step forward to pursue the line as suggested by the gentleman from Kentucky.

Now, on the other side of those who view with some concern and some alarm the advent of competing philosophical, political, economic forces in either our Nation or in the international sphere would like to have in place an effective instrument of rebuttal, rejoinder, and contention with those forces, competitive forces. It seems to me to allow the status quo to drift along in its present direction is to invite at least some modest impairment of the successful exercise of that investigative prerogative.

I pursued a line of inquiry both with the Senator from Massachusetts and with Mr. McClory yesterday and Congressman Morgan, on whether or not this confused state of constitutional and legal and practiced indecision is in any way impairing the exercise of effective investigatory process or power by CIA, FBI, other agencies concerned.

Senator Kennedy declined to respond and suggested that it would be appropriate to pursue this inquiry with representatives of or those knowledgeable with investigative activities of our Government.

I accepted that invitation, and yesterday afternoon did sit down and speak with those who have had access and communication about the investigation problems confronting these agencies in our country today, and they said unquestionably there has been a chilling, a stifling and frustrating and impeding consequence of this indecision, this constitutional confusion or, as the gentleman from California characterized it, this thicket.

That, in fact, for example, a non-foreign agent who had served in that capacity in two foreign nations and was presently located in the United States of America could not be pursued by way of wiretap pursuit of information or communication processes in which he engaged because it was not felt that he met the minimum threshhold of the evidentiary test sufficient to authorize, and the Attorney General felt compelled to forestall any further investigatory inquiry with regard to that particular gentleman's activities in this Nation.

Now, something has got to be done to sort of get us off both this constitutional dilemma and off this pragmatic confusion and inaction.

I agree with the gentleman from California that this is not the best of all perhaps legislative worlds and in the ideal I think he and I together could fashion protection, given sufficient time and intellect, both of which we may be short of at this time.

So I have come down in the final analysis on accepting a procedural reality that, if we are to proceed to exhaust in this subcommittee and then in our full committee all of the exceptional argumentational and debate potential that only the Committee on Judiciary can contribute to this legislative process because it is comprised of so many vocal participants in the U.S. Congress, that we will never get a bill out of this Congress and that argument ultimately has persuaded me, based on past history, the precedent suggests that this legislation has pursued an onerous and tedious course, and we do not yet have any legislative response to a very real problem.

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If we want to ensure that the 95th Congress will duplicate the record of nonperformance of previous Congresses in this realm, we can pursue either extreme course of legislative response, but it seems to me that at this juncture we are left with the alternative of either having nothing, doing nothing, going nowhere and enjoying the cerebral and rhetorical opportunities that this legislation is going to offer, or we can act and act responsibly.

Mr. RAILSBACK. Would the gentleman yield?

Mr. SANTINI. On this legislation, I would be happy to yield to the gentleman.

Mr. RAILSBACK. I know exactly the point the gentleman is making.

I am wondering if perhaps we could not consider letting judiciary consider the bill, but under some kind of agreed time limit.

I have not discussed this with anybody, including the chairman. I am aware of the fact that there may be some attempts to obstruct the will of the majority. But, at the same time, are we not fullfilling our responsibility if we don't give the members of the Judiciary Committee, the full committee, an opportunity to consider the bill and provide their input?

Mr. SANTINI. I think the gentleman poses an excellent question, and I invite the chairman's consideration. My preliminary response would be that we have reserved in terms of conference one-half of the time for judiciary input and participation. We do reserve our prerogatives on the House floor and the floor representatives to continue active and ongoing participation in the legislation.

It is not the perfect response to the gentleman's question. It seems it offers some salutary opportunity for us to make or play a meaningful role in the drafting of this legislative product.

Mr. RAILSBACK. If the gentleman would yield, this may be something we can take up after we conclude our hearings, as I think it's something that ought to be considered.

Mr. KASTENMEIER. The Chair would say amen to that point. The purpose of the hearing this morning is not really for that purpose.

Mr. MAZZOLI. Mr. Chairman, could I address then just very briefly for a few seconds my friend from Nevada, Mr. Santini?

I appreciate your statement; it is eloquent and I think very much on target.

The one thing I would say, however, is what has been cash-registered in the past as spinning at windmills, or what could be called a quixotic adventure. I don't really think it is.

I think it's really important that there be statements made like the ones by the gentleman from Massachusetts and the gentleman from California because it does tend to make legislative history; it does tend to make those who come off after us look at what we meant by this law, and give them some guidance in the narrowest or breadth of the coverage to be done, so I don't think this is really a sort of wheel-spinning exercise in futility.

But, I could not agree with you more, and I think it was again eloquently stated, we have to be about our business.

Mr. SANTINI. And the gentleman has done his business very well.

Mr. MAZZOLI. Thank you very much.

Mr. SANTINI. Thank you, Mr. Chairman.

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Mr. KASTENMEIER. The gentleman from Nevada has completed his questions?

Mr. SANTINI. I think so.

Mr. KASTENMEIER. The Chair would now like to yield to the gentleman from Pennsylvania.

Mr. ERTEL. Thank you, Mr. Chairman.

I do not intend to make historical statements nor do I have a fixed opinion as to the merit or demerit of this legislation at the present time.

I do have a couple of questions that have concerned me somewhat. It does not bother me too much there is not an adversary proceeding for the warrant because under the obtaining of any search warrant in the United States it is not an adversary proceeding; it is an ex parte proceeding.

However, after the warrant has been issued and a search has been made, whether it be a search electronically or any other way, there is an opportunity for somebody to contest that warrant because he has notice of it, he has public knowledge of it.

But, afterwards, there is the opportunity to go back and to examine the merits or demerits of the issuance of that warrant and to challenge it and its propriety.

Under this legislation, as I read it, even if an American citizen is involved, there is no ability for anyone to test the validity of that warrant, nor is there the ability of anybody to put forward information which would contest the factual assertions in the affidavits to get that warrant.

How does a judge then make any determination? Does he just read the application, say, well, the application is sufficient, assuming the facts to be true, and since they are under oath they are true, if given for this purpose, and issue the warrant?

Mr. DANIELSON. Would the gentleman yield?

Mr. ERTEL. If I may in just a moment, please, and then after it's over and the person has been surveilled or the search warrant has been issued, the harm has been done, but there is no way to correct it if it's been, number one, falsified under oath, or, two, that there was no probable cause in any event.

If you would respond, and then I will yield to the gentleman from California.

Mr. DANIELSON. I thank the gentleman for yielding.

This is behind one of my several concerns. As a practical matter, and I have caused a rather large number of warrants to be issued at one time or another in my life, that is precisely what happens.

The magistrate, you never go to the judge, I think only once in my life I had to go to a judge for a warrant, normally the Commissioner, the magistrate examines the affidavit or affidavits, the application for the purpose of determining that if true they conform to the basic requirements, if they conform the warrant issues.

I really don't know what a court can do that is any different unless a hearing is held. I share the concern and I can attest that that is precisely how warrants are issued. The magistrate examines the papers upon which the warrant is based to determine if they are sufficient as though on demurrer, if everything alleged is true.

I thank the gentleman for yielding.

Mr. ERTEL. Thank you.

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I wonder, Mr. Mazzoli, what kind of control do we have over a renegade, whether it be Attorney General or anybody else in the chain who would be asking for this warrant. Obviously, the Attorney General is going to rely on the information from below, and if that is false information, how do we ever contest that?

I realize there is another side to this issue; it has to be secret; that disclosure would be probably against the national interest, but how about the instances where it's an American citizen?

Mr. MAZZOLI. The gentleman brings up another very interesting point and, in fact, our Intelligence Committee had to wrestle with it, and what we decided was under current law, if the individual later determines he or she has been surveilled, then there are opportunities under title XVIII to bring these matters to the court.

Furthermore, under our bill, 7308, there is a section for aggrieved persons.

Mr. ERTEL. May I interrupt? What if the person determines later he has been surveilled? Let's assume we have a pretty good intelligence division of the United States, or intelligence department, and if they did their job they will never know they were surveilled and, certainly, therefore, that is not a remedy.

I hope they would not know it until they were notifed by a court proceeding which they are under the wiretap law of the United States, as I understand it.

Mr. MAZZOLI. I believe there are opportunities under the current law to inquire of the Government if they have been surveilled and, if they have been, that information has to be divulged. But, once again, what we are dealing with here is a very unusual subject matter.

This is different than the warrants currently available under the criminal laws because the subject matter is sensitive, the subject matter has international implications, political as well as military and so, accordingly, we had to craft and the other body had to craft a procedure which deals with this unique situation, permitting under some circumstances the availability to the individual, the aggrieved party of a procedure, a process to bring to the attention of the courts the fact that the attorney general may have acted on erroneous information or may have in the cast the gentleman talks about a renegade Attorney General who acted in some kind of capriciousness.

But, basically, we had to concern ourselves with the fact that with these procedures, warrants, swearing to the oaths, the fact that the Attorney General would not on his own be able to do anything, they would have to get the court's attention and permission first, that that would obviate most of the situations of erroneous information and fallacious information upon which these individuals could buttress their action.

Mr. ERTEL. That, I guess, leads me to my next question, which is, why do we ever have a court at all if, in fact, we can have a warrant issued based upon a certification, which is basically affidavits and there is no provision, as under existing law, within the United States, to contest that, even after the fact of the search or the intelligence or the electronic eavesdropping.

Why then do we even get the court involved in the first matter if really the court is going to rely on affidavits from the Attorney

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General? He is going to say it is sufficient, assuming all of the facts are true. If they are going to rely on that, let's face it, I have been a prosecutor, and I am going to be very careful about drawing that, and I am going to be sure it meets the standard of being sufficient.

Now, if that is true, then why do we even have the court involved at all because there is no contest, there is no report back to the court, there is no provision for the person who was surveilled to come back to court and contest the validity of it in any kind of way, so I don't understand why we even have the court putting its stamp of approval or is it just a sham we are exercising for the American people's satisfaction?

Mr. MAZZOLI. Let me assure the gentleman it is certainly no sham. I don't think a sham venture would have passed through the Intelligence Committee, the Judiciary Committee on the Senate side, through the floor action.

Mr. ERTEL. Maybe I used the wrong word. Not sham, but false sense of security.

Mr. MAZZOLI. I know, sending out maybe false signals to the American people, and I don't really think so, and say that the state of the art today is a very much ex parte type procedure, while what the committee's bill provides is a modified ex parte proceeding in some cases.

Again, it is a great step, and to me it is a great advance over the current state of the art.

Furthermore, as the gentleman points out, I think the Attorney General will, as the U.S. attorneys are today, be very hesitant to come into court and lay false information or untested, unverified information before that judge in order to obtain a warrant for surveillance of one sort or another.

I think that the very fact you have to come into court——

Mr. ERTEL. If I may, Mr. Mazzoli, I think we are all going to miss our vote, and maybe if I can defer.

Mr. KASTENMEIER. I will interrupt to say there is a vote on.

It is on resolving in the committee of the whole, and we will recess for 10 minutes.

[A short recess was taken.]

Mr. KASTENMEIER. The committee will come to order.

The Chair would like to seriously say that regardless of the time it takes it is entirely appropriate, indeed valuable, for members of the subcommittee to express themselves with respect to the legislation at hand or the procedures attending it.

It is a matter of record that we are speaking for, and for the benefit of, our colleagues, and for the benefit of history. Indeed, comments, if anything, should be urged.

I would like to now yield again to the gentleman from Pennsylvania, Mr. Ertel, to finish his questioning of the witness.

Mr. ERTEL. Thank you, Mr. Chairman.

Mr. Mazzoli, I cut you off. If you remember where you were, I would appreciate it if you would complete your answer.

Mr. MAZZOLI. I am not really sure that I can quite remember where I was. After the interposition of a vote on the floor, I lost track of it.

Mr. ERTEL. We were talking basically about the ability to challenge that a warrant was issued, a normal procedure under crimi-

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nal law in America, that there is always the ability to come back and look at the warrant to determine the validity of it, and some sort of proceeding subsequent, because there is a disclosure, if the person who has been surveilled desires to do so.

And I understand that the secrecy aspect—maybe I can rephrase or add a section.

Did you ever consider in the Intelligence Committee the fact that after a warrant has been issued to allow electronic surveillance of an American citizen, that a substantial period of time could elapse if nothing came to fruition and then advise that particular American citizen that he had been surveilled and let him then know where he was surveilled, and it could be an extended period of time. But at least it would be a safeguard. Was that considered?

Mr. MAZZOLI. I can't recall that it was in those terms. I think in the bill, itself, there is a limit on how long a surveillance can continue.

A 90-day period is provided except under unusual circumstances, so these have to be reauthorized, which means that they will be reexamined by the judges, and there will be a further need for the Attorney General to come in and assure the court that the information is as it was earlier, or any changes would have to be updated.

So that there is not the opportunity of just an ongoing affair, once the warrant is granted, then they could set up their listening posts and keep on going. There will be reauthorization, which I think is very important, but I can't at this point—though I could yield to counsel if they have a recollection. My recollection is that we did not debate at length at least the opportunity of periodically advising the target. That is, of course, the whole idea of foreign intelligence gathering, is not to gather for the purpose of a criminal prosecution but to gather for the purpose of developing foreign policy, developing military responses, and so not really are the cases quite opposite between the criminal law and the need of foreign intelligence.

Mr. DRINAN. Would the gentleman yield for a point of clarification?

Mr. ERTEL. I yield.

Mr. DRINAN. Did I understand, Mr. Mazzoli, that you said, as everyone knows, under title III of the 1968 act notice is given to any person who has been surveilled, and he knows after the fact that he was under this electronic surveillance. Do I understand you to say that the House Intelligence Committee never even considered the possibility of granting that right to the American citizens under this bill?

Mr. MAZZOLI. I didn't say that. But I will say I don't recall any extended debate on that point.

Mr. DRINAN. I thank the gentleman for yielding.

Mr. ERTEL. Thank you.

If I can just turn to one other area.

Mr. MAZZOLI. May I rejoin at this point by saying we have not talked this morning at any particular length about minimization, which is written into the bill, the fact that the judge would have to have before him procedures recommended by the Attorney General and then approved by the court to minimize the acquisition, the

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retention and later the dissemination of the information, so, in a sense, because that has to be periodically reauthorized, periodically the judge has to re-examine the proposition of how much is needed, what do you collect, how do you keep it and what should be released, or what should you keep for your purposes? So, in a sense, that is a kind of activity which does represent rights of the target by reason of these periodic reauthorizations.

Mr. ERTEL. I did want to turn to a different area, but you raised an issue that now we have the judge becoming the foreign policy expert, saying when you minimize and what you do and what is needed and what is necessary.

Is a court equipped to make that kind of judgment?

Mr. MAZZOLI. We talked about that quite a bit. In my statement, as you might recall, I suggest that there is nothing really unique about this situation with regard to the judges. This is a typical judicial function. They examine a series of facts against a framework and decide whether or not the action should go forward.

Mr. ERTEL. But if I may interrupt, they usually determine a set of facts against a base from which they have some knowledge—law experience. I am not sure judges have experience in the foreign intelligence collection. Second, you know you are talking about a very expert field, and they are getting a one-sided presentation.

When you start saying that these are safeguards, I really question that. Then it becomes the question, is the judge becoming a captive of the intelligence community, or if he starts to react to them, then do we have another problem? I am wondering if they really have the judicial expertise.

The judge has expertise in some regards, and I sometimes think we make judges much more expert than they are in many fields.

Mr. MAZZOLI. Right. Part of the reason that the committee set up a special court, as it did with judges from the 11 circuits of the country, is to be sure that there is not a tendency to have one or two people become, in a sense, an extension of the intelligence community. There would still be a rotation of these people, and there would be some new fresh thought.

As to whether or not the judges usually have a storehouse of knowledge or some kind of a wisdom about a subject matter, I would imagine there are some Federal judges who come face-to-face with some product warranty case dealing with tetrachloride or some chemical formula; they have to study the situation——

Mr. ERTEL. May I interrupt you? I happen to work in those types of cases. We did have some place to go. We had libraries; we had ability to draw that knowledge from somewhere. Where do you draw it in the foreign intelligence gathering? There are no set references.

Mr. MAZZOLI. Let me suggest two things: One is in my year on the House Intelligence Committee, I bring no background to that task in the sense of having been in intelligence gathering, of having been in any type of law enforcement which would cause me to come in contact with the technology of gathering. And yet I think I have made a contribution to the committee, and I believe that when questions have been posed to the committee for some sort of judgment, I believe my judgment has been appropriate.

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So I would think that judges who are more knowledgeable than I on how to adjudicate differences and how to measure against a statutory framework would probably be certainly as well equipped and probably better than I am.

I really, in all candor, don't share the gentleman's concern about whether or not these judges either will become a captive of the intelligence agencies or will have so little knowledge of the subject matter that they could jeopardize national security and unwillingness to issue warrants for intelligence propositions.

I think that their batting average will be about the same as it would be in an antitrust case or some product liability case involving some chemical, or some type of medical malpractice case, where they have to turn to experts.

Certainly there have been enough books written about intelligence which are unclassified and enough books and movies on the cloak-and-dagger side of it; there has been enough written about the new technology of it, the sort of sophisticated approach intelligence has taken. The Pike committee in the Congress has issued reports that are available; the Church committee has issued reports available; the Rockefeller Commission had a report available, all of which the judges, if they wish to do some general reading, would have available to them to give them some background as far as the terminology is concerned.

But I just don't share the gentleman's concern that you have to have some preexisting sensitivity or preexisting expertise in intelligence to fulfill the function which H.R. 7308 sets to the judges.

Mr. ERTEL. I appreciate your comments, and I am not certain I agree with them, but that is what makes a ballgame, I guess.

I would yield back my time.

I might point out when you talk about all the knowledge being available, I remember the intelligence community when we had to vote on the appropriation, and I had to sit in a sealed room to read the amount of money which was being appropriated. I got through that, and I am not sure I know any more than when I first went up there, and I am not sure the judges are any better equipped than I am.

Mr. MAZZOLI. I thank the gentleman.

Mr. ERTEL. I yield back the balance of my time.

Mr. KASTENMEIER. Does the gentleman from Illinois have any questions? If so, I would like to caution the gentleman, that we need to reach our next witness, Mr. Bork, shortly. He has other appointments.

Mr. MCCLORY. If not for the time constraints I otherwise would have had a number of important questions, Mr. Chairman. However, I feel that the real top expert that this committee or the Intelligence Committee has had the opportunity to hear from is present as a witness this morning in the person of Prof. Bob Bork, and so I am extremely anxious that we get the benefit of his testimony.

It is something that neither the House committees nor the Senate committees have had the opportunity to receive, even though we tried to obtain Professor Bork's testimony on the Intelligence Committee. So I am pleased he is at long last here.

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Mr. MAZZOLI. If the gentleman would yield, I would like to correct the record for those who were not available. He was not prevented except by "Mr. Winter," by the snows of February, from attending. If memory serves me further, he was actually present before the committee at a later time.

Mr. MCCLORY. We were not able to include him as a witness.

Mr. MAZZOLI. In other words, he was not prevented. There was nothing on the part of the Intelligence Committee we did not want to hear from Professor Bork.

Mr. MCCLORY. I have been anxious to get this legislation moving, and therefore I did not insist upon him coming back again. Although at the time we had the opportunity to receive his testimony, the only agreement we could get out of the chairman of the committee was that we would have a briefing.

Mr. KASTENMEIER. Does the gentleman from Illinois have any questions to ask the gentleman from Kentucky?

Mr. MCCLORY. The question I have is this: The report shows that the Justice Department is operating constitutionally now in that it is the President's authority over national security and foreign affairs through which the Justice Department exercises its present authority, which is embodied in the executive guidelines. The question I have is whether the President's constitutional duty and his responsibility under the Constitution, can be transferred by legislation from the executive to the judicial branch? And I think it requires a yes or no answer. That would be my only question.

Mr. MAZZOLI. It would be hard to say yes or no. First, there has been a change in the last several years in the attitude toward foreign intelligence information gathering, and I would think that the Carter administration has benefited from the errors of the past, but I would also like to suggest that the case that was just across the river in the Alexandria Federal courts involving the Humphrey-Troung matter, it seems to me that the court there held that some part of that information which was being gathered under Executive orders was being gathered improperly and unconstitutionally.,

So in certain situations even today I cannot assure the gentleman from Illinois that there is not a gathering of information which is against the law. I can only say that our bill, which certainly bears the imprint of the gentleman from Illinois in some respects, is a vast improvement on the current situation.

Mr. KASTENMEIER. Any further questions?

Along the lines of the questioning of the gentleman from Illinois, there has been some discussion as to the value, the real value, of foreign intelligence to foreign policy decisionmakers. In fact, I think it was Dean Rusk who once appeared before this subcommittee who questioned, at least in the ultimate, the value of this. But we understand your subcommittee has, in fact, explored several instances where you feel this intelligence has been of great value, overriding value. Are you able to describe in any of those instances the nature of this information?

Mr. MAZZOLI. Let me suggest to the gentleman that it is true that there might be a difference of opinion as to whether or not foreign intelligence gathering is important and should proceed. I clearly come up on the side of the proposition that it is vital, and it

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should go forward, and that, however, it should be preceded to the extent possible by a judicial warrant. That is my difference.

As far as the specifics on the committee are concerned, we have weekly briefings that do inform us of activity really across the world, and I think the intelligence community is becoming more and more willing to share its knowledge with us. The intelligence community is more and more aware of the fact that it is a new day, and they cannot act on their own, keeping their own counsel; they have to bring in the Congress, and through the Congress the Nation with them.

Most recently, the situation involving the invasion of Shaba Province in Zaire was the matter that involved quite a few intelligence briefings——

Mr. DRINAN. Would the chairman yield?

Mr. KASTENMEIER. Yes.

Mr. DRINAN. I think the question he would want to ask, and I, is what is the real value of foreign intelligence obtained through the electronic surveillance, when all other methods have failed?

Can you cite instances where this was the only and exclusive method they would have been able to get this foreign intelligence that had value?

Mr. MAZZOLI. I can't answer the question.

Mr. DRINAN. That is the key question.

Mr. MAZZOLI. I can't answer it in specifics. I would invite the gentleman to talk with the committee staff.

Mr. DRINAN. I have. They have no instances, either.

Mr. KASTENMEIER. I appreciate the gentleman from Massachusetts clarifying the question. I meant to modify it with electronic surveillance derived foreign intelligence information.

My last question is, section 108 of the bill requires semiannually reporting concerning all electronic surveillance under this title by the Attorney General to the Select Committee on Intelligence.

Do you know of any reasons why the Judiciary Committee shouldn't be included in this reporting provision?

Mr. MAZZOLI. Mr. Chairman, as a member of the Judiciary Committee, myself, I guess I am probably not exactly an objective observer, because, as a personal matter, I wouldn't have any great fears about our Judiciary Committee having some opportunity to receive these periodic reports.

Let me say that the reason it is not incorporated in the bill is the fact that the intelligence community makes a very strong case that unnecessarily proliferating the documentation and the material which is secret and sensitive, automatically increases mathematically the opportunity for leaks and disclosures that are unintended, and that the effort that we made was a compromise. The intelligence community would have preferred no reporting. Many of us would have preferred wider reporting, and we had to settle on what is a dissemination of the information, what provides for the edification of the entire Congress, a committee to which members can come for information, but it doesn't at the same time extend unnecessarily the development of this information for any secrecy reasons.

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Mr. KASTENMEIER. I appreciate the gentleman's answer, because he is a member of both committees and is in a peculiar position to be able to answer the question.

Mr. DRINAN. Would the gentleman yield? Somehow the Senate Judiciary Committee is, in fact, included, and if they are going to do oversight and presumably modify or improve the law, then the House Judiciary Committee would have to concur in their judgment, and yet the House Judiciary Committee is completely sliced out of the bill which defeats the very purpose of the oversight.

Mr. MAZZOLI. If the gentleman would yield, the fact that we are here today is an indication that the House Judiciary Committee's jurisdiction has not been in any way——

Mr. DRINAN. It is completely excluded from oversight. If this bill as it was prepared by the House Intelligence Committee becomes law, the House Judiciary Committee has zero oversight, zero, whereas the Senate Judiciary Committee is coequal in oversight with the Senate Intelligence Committee.

Mr. KASTENMEIER. I am not sure the gentleman from Massachusetts is correct that the Senate Judiciary Committee has any oversight function under this bill or even the Senate bill.

Mr. RAILSBACK. Could I ask a parliamentary inquiry?

Mr. KASTENMEIER. The gentleman will state it.

Mr. RAILSBACK. Although we have been interrupted by some votes, I am wondering how long we are going to be able to continue, since we have been with Mr. Mazzoli for so long.

Mr. KASTENMEIER. We have not completed our questioning. Every member has had an opportunity to question our colleague.

Mr. MAZZOLI. I would only like to suggest that the gentleman from Massachusetts read section 108 on page 63. I don't see in there the Senate Judiciary Committee listed as a congressional overseer.

Mr. DRINAN. I thank you for your point.

Mr. MAZZOLI. I thank you very much, Mr. Chairman, and your distinguished subcommittee. It has been a pleasure.

Mr. KASTENMEIER. The fact you have been a witness so long attests to your value to this committee, and we are grateful to you for coming this morning.

Next, the Chair would like to call the very distinguished former Solicitor General of the United States, Mr. Robert H. Bork, who even last night was seen on television giving cogent comments on the *Bakke* decision, but this morning is with us on a different subject.

Mr. Bork?

TESTIMONY OF ROBERT BORK, FORMER SOLICITOR GENERAL OF THE UNITED STATES

Mr. BORK. Thank you, Mr. Chairman, and members of the subcommittee. I am pleased to be here to discuss the Foreign Intelligence Surveillance Act of 1978 with you, H.R. 7308, and I think the impulse behind it is an understandable one, given the abuses in the past. But I believe that the plan of bringing the judiciary, a warrant requirement, and a criminal violation standard into the field of foreign intelligence is really a thoroughly bad idea and almost certainly unconstitutional as well.

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My five propositions that I would like to advance briefly are, first, that the bill meets no needs, since existing protections of constitutional freedoms are as good as this law would be.

Second, the proposed law would damage, perhaps severely, our foreign intelligence capacity at a time when it needs to be strengthened.

Third, the proposed law would damage the Federal judiciary;

Fourth, the law would weaken Congress oversight function and make the intelligence community less accountable, and

Fifth, the law is very probably a violation of both Articles II and III of the Constitution.

What we tend to forget in discussions of measures like H.R. 7308 is that past abuses were uncovered and rectified, without a law like this, by processes of investigation and law already in existence. The possibility of future abuses has been greatly lessened because of that exposure. We have established a new set of expectations about the intelligence agencies, a new tradition, about how we want our intelligence agencies to behave, and they have changed. It ought to be remembered that we now call abuses actions which a few years ago we wanted our agencies to take. Moral standards have changed, and, as a result, the conduct of the agencies has been greatly altered. This suggests that our intelligence agencies, by and large, behave as the American people expect and want them to.

But there is much more protection for constitutional freedoms than that. In response to this problem, Attorney General Edward Levi promulgated detailed regulations governing foreign intelligence electronic surveillance. I chaired the committee that prepared drafts for his consideration. These regulations state the cause necessary to initiate or continue a surveillance, locate responsibility in named officers, require reconsideration at periodic intervals, minimize surveillance to what is actually required by the cause stated, require that less intrusive means be used, if possible, and closely limit the persons who may have access to the information developed and the use they may make of that information.

As I understand it, those regulations, or ones very like them, remain in force, and it is impossible to imagine a President and an Attorney General who would be so foolhardy as to materially weaken their provisions. Furthermore, it is also true that there will be oversight by the Congress about the enforcement of such regulations, so I don't think we need to worry about future administrations just changing them without anybody in Congress knowing about them.

Given the time constraints, I may skip some of what I have written here, and I ask that the entire statement be put in the record.

Mr. KASTENMEIER. Without objection, your entire statement will be received and made a part of the record.

[The prepared statement of Mr. Bork follows:]

STATEMENT OF ROBERT H. BORK TO THE HOUSE JUDICIARY SUBCOMMITTEE ON COURTS AND CIVIL LIBERTIES

Mr. Chairman, I am pleased to be here at the invitation of the Subcommittee to discuss certain constitutional and policy questions in connection with H.R. 7308, the proposed Foreign Intelligence Surveillance Act of 1978.

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The impulse behind H.R. 7308 is an understandable one. Given past intelligence abuses, it is natural to consider legislation. But I believe that the plan of bringing the judiciary, a warrant requirement, and a criminal violation standard into the field of foreign intelligence is, when analyzed, a thoroughly bad idea, and almost certainly unconstitutional as well.

I will urge upon you, briefly, five propositions:

(1) The bill meets no need since existing protections of constitutional freedoms are as good as this law would be;

(2) The proposed law would damage, perhaps severely, our foreign intelligence capacity at a time when it needs to be strengthened;

(3) The proposed law would damage the federal judiciary;

(4) The law would weaken Congress' oversight function and make the intelligence community less accountable; and

(5) The law is very probably a violation of both Articles II and III of the Constitution.

EXISTING PROTECTIONS OF CONSTITUTIONAL RIGHTS ARE AS STRONG AS THIS LAW WOULD BE

What is forgotten in discussions of measures like H.R. 7308 is that past abuses were uncovered and rectified, without a law like this, by processes of investigation and law already in existence. The possibility of future abuses has been greatly lessened because of that exposure. We have established a new set of expectations, a new tradition, about how we want our intelligence agencies to behave. It ought to be remembered that we now call abuses actions which a few years ago we wanted our agencies to take. Moral standards have changed, and, as a result, the conduct of the agencies has been greatly altered. This suggests that our intelligence agencies, by and large, behave as the American people expect and want them to.

But there is much more protection for constitutional freedoms than that. In response to this problem, Attorney General Edward Levi promulgated detailed regulations governing foreign intelligence electronic surveillance. I chaired the committee that prepared drafts for his consideration. These regulations state the cause necessary to initiate or continue a surveillance, locate responsibility in named officers, require reconsideration at periodic intervals, minimize surveillance to what is actually required by the cause stated, require that less intrusive means be used if possible, and closely limit the persons who may have access to the information developed and the use they make of that information.

As I understand it, those regulations, or ones very like them, remain in force, and it is impossible to imagine a President and an Attorney General who would be so foolhardy as to materially weaken their provisions.

These executive branch regulations are so sensitive to Fourth Amendment protections against unreasonable searches and seizures, and to First Amendment protections against inhibitions of free speech, as the bill before you is. The regulations are also likely to be as effective. The intelligence officer or Attorney General reckless enough to ignore those regulations and thus subject himself to criminal liability would be reckless enough to bypass the warrant requirements of the proposed statute.

THE PROPOSED LAW WOULD DAMAGE OUR FOREIGN INTELLIGENCE CAPABILITY

This law would almost certainly increase unauthorized and damaging disclosures of sensitive information and secret technologies because it would greatly widen the circle of people with access to it. In some cases, as many as thirteen judges, their clerks, and secretaries would share the knowledge. If judicial opinions—required only when warrants are denied—are circulated, or if the judges consult one another in an effort to produce a more or less uniform body of rulings, a minimum of 26 judges and support personnel will have top-secret information. Leaks are inevitable. Security problems have in the past arisen with federal courts, and now this bill would for the first time give foreign intelligence agencies reason to concentrate on our judicial system.

Disclosures of secret information are not merely intelligence calamities; they may create foreign relations debacles as well. Electronic surveillance is know to exist by everyone in the diplomatic community, but public disclosure of it or of particular pieces of information may be hard to ignore, just as Khrushchev could ignore the U-2, until it was shot down.

Problems such as these may lead the intelligence agencies not to seek electronic surveillance in cases where our national security indicates they should.

Most troublesome in this respect is the role to be created for the judiciary. There are and there can be no judicial criteria for making decisions about the needs of foreign intelligence. Judges would be asked to play a role that is essentially manage-

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rial. We might as well put a sitting judge in charge of all intelligence activities to make sure that no constiutional right is abridged.

Under this proposed law the judges could behave in one of two ways, neither of them satisfactory. The judge, who has no expertise in the complex field of foreign intelligence, might defer to the expertise of the intelligence community, in which case he would provide no constitutional protection but would be merely a symbol, a false reassurance to the public. To provide real protection, and also to take account of the circumstances upon which the application of constitutional guarantees depend, the judge would have to be drawn deep into the foreign intelligence operation. He would have to know about available technologies, alternative means of gathering the information sought, the relevance and importance of the information in the total intelligence picture, and what the client agencies intend to do with the intelligence.

Doubtless, different judges would behave differently. Some would defer to the intelligence community and the Attorney General, thus providing little more than new opportunities for the compromise of the information. Others would plunge eagerly into intelligence work and begin to run the operation.

No one should underestimate the strength of the tendency displayed by the judiciary in recent years to take over both legislative and executive functions. Judge Wright's plurality opinion in the *Zweibon* case, though it did not command a majority of the en banc Court of Appeals for the District of Columbia, explicitly argued for a foreign intelligence warrant requirement on the ground that judges possess the analytical ability and sensitivity of foreign affairs necessary to evaluate recommendations for electronic surveillance. He said a federal judge with lifetime tenure could presumably develop an expertise in the field of foreign affairs.

We should not ask or allow judges to decide foreign affairs and foreign intelligence questions for us in the guise of passing on warrant applications. There could be no clearer case of what is coming to be known as "judicial imperialism", and this bill invites just that. It will be bad for foreign intelligence, for national security, for the judiciary, and for the preservation of our constitutional arrangements.

This law is also seriously defective in that it requires for the surveillance of a United States person a determination that his intelligence activities on behalf of a foreign power "involve or may involve a violation of the criminal statutes of the United States." If a United States person is knowingly engaging in clandestine intelligence activities on behalf of a foreign power that person ought to be under surveillance whether or not there is reason to think a crime may be committed. It is important to know who is working undercover for foreign governments and to know what networks exist.

The criminal violation requirement either hampers essential intelligence work or else is another example of symbolism without substance because it will be interpreted to mean that if the work is clandestine there is always a chance that a crime will be committed. One of these alternatives is true, and both are bad.

THE PROPOSED LAW WOULD DAMAGE THE FEDERAL JUDICIARY

I have already mentioned an important injury to the federal judiciary that would flow from this law: Thrusting them into the management of intelligence matters, which is a statement by Congress to the judiciary, and one that some judges are eager to hear, that the federal courts are conpetent to run more and more of this country's business under the guise of interpreting the Constitution.

Related to that concern is the very troubling element of judicial secrecy. Because it reverses our entire tradition, it is difficult to think of secret decisions as "law." The assertion that this bill would ensure that foreign intelligence electronic surveillance is conducted according to "the rule of law" is, therefore, seriously misleading. The bill pretends to create a real set of courts that will bring "law" to an area of discretion. In reality, it would set apart a group of judges who must operate largely in the dark and create rules known only to themselves. Whatever that may be, it debases an important idea to call it the rule of law. It is more like the uninformed, unknown, and uncontrolled exercise of discretion. The insertion of a judge into foreign intelligence does not solve all problems, and only those who confuse the "cult of the robe" with the rule of law could imagine that it does.

Finally, this law would present judges with an impossible legal and moral dilemma. Suppose that the Supreme Court splits, say, five to four, in granting a warrant. If the dissenting Justices are convinced that the decision and others it presages deny the basic constitutional rights of Americans, what are those Justices to do? Should they confine themselves to writing a dissent that will be classified top secret and stored in a locked vault? Must they remain stoically silent about what they believe to be the secret destruction of rights they are sworn to uphold? Should they

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publish a full opinion and damage national security? Or should they perhaps state publicly from the bench that constitutional freedoms are being destroyed but they are not at the moment at liberty to explain what they are talking about?

This bill would give the dissenting judge or Justice anywhere in the special court system a choice between behavior that is dishonorable or fatuous. That is an intolerable moral and constitutional position in which to place judges. It cannot but damage the morale and the virtue of the federal judiciary.

THE LAW WOULD SERIOUSLY WEAKEN CONGRESS' OVERSIGHT FUNCTION AND MAKE THE INTELLIGENCE AGENCIES LESS ACCOUNTABLE

The law seems certain to diminish the responsibility and accountability of the Executive Branch. To take a not improbable case, if even one judge proves excessively tolerant, the government can go to him in all doubtful, or even improper cases. Since there is no adverse party to appeal the grant of a warrant, the "rule of law" will turn out to be the temper of one district judge, unknown to the other judges and the Supreme Court.

But suppose it is merely true that some of the judges do not want to become full-time experts on foreign intelligence and foreign relations and, for that reason, defer to the superior knowledge and expertise of the intelligence community. What can Congress do if it comes to think the surveillance power it granted is being abused? Can the House Permanent Select Committee on Intelligence or the House Judiciary Subcommittee on Courts and Civil Liberties summon before it for explanation the judges, perhaps including some members of the Supreme Court, who approved the warrants? I should think certainly not. Can we expect successful criminal or civil actions against the Executive Branch personnel who, following statutory procedures, obtained warrants from the judges? That, too, seems impossible.

This statute has the effect of immunizing everyone, and sooner or later that fact will be taken advantage of. It would not be the first time a regulatory scheme turned out to benefit the regulated rather than the public.

THE STATUTE WOULD PROBABLY VIOLATE ARTICLES II AND III OF THE CONSTITUTION

Presidential power to conduct foreign intelligence arises under the President's Article II powers as commander in chief and as the officer of government primarily responsible for foreign affairs. The power to conduct warrantless electronic surveillance for foreign intelligence purposes has been asserted by every President at least since Franklin Roosevelt. The only two courts of appeals to pass upon that claim have upheld it.

This is not to say that Congress has no role to play with respect to the war power or the power over foreign affairs, including foreign intelligence. It is to say that, as in the exercise of the war power, Congress' constitutional role is largely confined to the major issues, issues such as whether or not to declare war and how large the armed forces shall be. Congress makes the large decisions; it may not dictate the President's tactics in an area where he legitimately leads.

This bill does just that, prescribing numerous details of the conduct of foreign intelligence surveillance, imposing the warrant requirement and intruding the judiciary into the process of foreign affairs and national security, and forcing upon the President the wholly inapposite requirement that a federal criminal law be about to be violated before he may defend the nation's interests. This President may be willing to accept such an invasion of the office's power, but future presidents should not. Nevertheless, this law, unconstitutional and unwise as it is, will prove a serious embarrassment to them, and they may find it politically unwise to challenge it. If so, a grave disservice will have been done the nation.

Article III, the judiciary article of the Constitution, is violated because in the application for a foreign intelligence warrant there is no "case" of "controversy" to give the federal court jurisdiction. The government attorney appears in a secret session before a special judge. There is nobody present to oppose the issuance of the warrant. Warrants obtained for purposes of criminal prosecution do not have this defect because they are expected to become known and the subject of litigation. The criminal law standard inserted in this bill does not meet the "case" or "controversy" requirement—not if we really intend to conduct foreign intelligence—because it is a subterfuge. Foreign intelligence must often be done in cases where, whether or not there is a violation of the federal criminal code, no prosecution is intended and there will never be litigation over the warrant's validity.

The problem cannot be solved by making these special courts into Article I courts. Not only are these Article III judges, but a writ if certiorari lies to the Supreme Court of the United States, and I do not suppose anyone proposes to have the Supreme Court sit as an Article I court.

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Nor is there a solution in providing a government attorney to oppose the warrant, some sort of devil's advocate. Such a lawyer is not a representative of a party who is not even informed that he is in court, is not informed he has a lawyer, and will never find those things out. That is a toy "case" or "controversy", not a real one.

For all of these reasons, I believe H.R. 7308 to be a thoroughly misguided venture, adding no protections but doing substantial damage to vital interests. I would prefer no legislation, but if there must be legislation, Congressman McClory's substitute bill is infinitely preferable to this.

Mr. BORK. Thank you, Mr. Chairman.

I think that the intelligence agent who engaged in electronic surveillance without complying with those regulations would expose himself to criminal liability. If he is that reckless, he would be reckless enough also to defy this bill when it became law, and, for that reason, among others, I think the regulation is as effective a protection as the law would be.

With respect to damage to our foreign intelligence capability, it seems to me that this law would almost certainly damage that by increasing the amount of leaks due to the increase in the number of people with access to this information. In some cases, as many as 13 judges, as well as support personnel, would have access to the knowledge. If there is a desire to have uniform behavior among these judges, I suppose they would meet from time to time and discuss the standards they use in these cases, which would mean that a minimum of 26 judges and the support personnel would have access to the information. I think leaks under those circumstances are inevitable.

Now, it has been said that judges handle these matters terribly well. I think, in fact, we have had security problems with the judges in the past.

This is not in my written statement, but a response to Congressman Mazzoli's remark: I remember in the brief time I was in the Department of Justice, a judge announced from the bench that a particular foreign embassy was being, and he named it, wiretapped. A top secret file in the *Pentagon Papers* case was lost by the judges. I once submitted a top secret affidavit on sensitive technology to be received by a judge en camera. He printed it in his opinion.

So I don't think it is entirely accurate to say judges have displayed marvelous security in this area.

It must be remembered that for the first time this bill would give foreign intelligence agencies an incentive to our judges and the support personnel to find out this information.

Now, that is not merely the intelligence calamity; it can be a foreign relations debacle as well. Everybody knows in the diplomatic community that electronic surveillance exists, but it may be hard to ignore it if it becomes public—that it exists, or particular items become public, just as Khrushchev could ignore the U-2 until it was shot down.

Problems such as these may lead the intelligence agencies not to seek electronic surveillance in cases where our national security indicates they should. I am also concerned about the role created for the judge in this bill. There really are no judicial criteria for making decisions about foreign intelligence and the judge, dubious about what was put before him, will ask for more information, and he will be in the business of making decisions. The judge can

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behave in one of two ways, and I suppose various judges will choose various ways, but neither of those ways is satisfactory.

The judge who has no expertise in this complex field of foreign intelligence might defer to the expertise of the intelligence community, in which case he would provide no real constitutional protection but would be merely a symbol of false reassurance to the public. To provide real protection and also take account of the circumstances upon which the application of constitutional guarantees always depend, the judge would have to be drawn deep into the foreign intelligence operation. He would have to know about available technologies, alternative means of gathering the information sought, the relevance and importance of the information in the total intelligence picture, and what the client agencies intend to do with the intelligence. Different judges would behave differently, and to those who say the judge's role is limited, I think the answer is in that case his presence is a false reassurance. But I don't think anybody should underestimate the strength of the tendency displaced by the judiciary in recent years to take over both legislative and executive functions. In my statement I mention the *Zweibon* case, and though it did not command a majority of the en banc Court of Appeals for the District of Columbia, it explicitly argued for a foreign intelligence warrant requirement on the ground that judges possess the analytical ability and sensitivity of foreign affairs necessary to evaluate recommendations for electronic surveillance. He said a Federal judge with lifetime tenure could presumably develop an expertise in the field of foreign affairs.

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The criminal violation requirement either hampers essential intelligence work or else is another example of symbolism without substance because it will be interpreted to mean that if the work is clandestine, there is always a chance that a crime will be committed. One of these alternatives is true, and both are bad.

The law also would damage the Federal judiciary. I have mentioned one way that is true by thrusting them into management positions, and I am also concerned about the element of judicial secrecy which seems to reverse our entire tradition, and I find it hard to think of secret decisions as law in any real sense. For that reason, I think that this assertion that this bill would make sure that foreign intelligence electronic surveillance is conducted ac-

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Now, as to Congress oversight function, I think this law diminishes the responsibility and accountability of the executive branch. If even one judge proves excessively tolerant, the Government can go to him in all doubtful, or even improper, cases. Since there is no adverse party to appeal the grant of a warrant, the rule of law will turn out to be the temper of one district judge in the system and unknown to the other judges and the Supreme Court.

But suppose it is merely true that some of the judges do not want to become full-time experts on foreign intelligence and foreign relations and, for that reason, defer to the superior knowledge and expertise of the intelligence community. What can Congress do if it comes to think the surveillance power it granted is being abused? Can the House Permanent Select Committee on Intelligence or the House Judiciary Subcommittee on Courts and Civil Liberties summon before it for explanation to the judges, perhaps including some Members of the Supreme Court, who approved the warrants? I should think certainly not. Can we expect successful criminal or civil actions against the executive branch personnel who, following statutory procedures, obtained warrants from the judges? That, too, seems impossible.

This statute has the effect of immunizing everyone, and sooner or later that fact will be taken advantage of. It would not be the first time a regulatory scheme turned out to benefit the regulated rather than the public.

Finally, as to the constitutionality of the bill: Presidential power to conduct foreign intelligence at all arises under the President's

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article II powers as Commander in Chief and as the officer of Government primarily responsible for foreign affairs. The power to conduct warrantless electronic surveillance for foreign intelligence purposes has been asserted by every President at least since Franklin Roosevelt. Although I say here the only two courts of appeals to pass upon that claim have upheld it, it is actually three that passed on it and have upheld a Presidential claim.

This is not to say Congress has no role to play with respect to the war power or the power over foreign affairs, including foreign intelligence. It is to say that, as in the exercise of the war power, Congress' constitutional role is largely confined to the major issues, issues such as whether or not to declare war and how large the armed forces shall be, Congress makes the large decisions; it may not dictate the President's tactics in an area where he legitimately leads.

This bill does that kind of thing in the foreign intelligence field, prescribing numerous details of the conduct of foreign intelligence surveillance, imposing the warrant requirement and intruding the judiciary into the process of foreign affairs and national security, and forcing upon the President the wholly inapposite requirement that a Federal criminal law be about to be violated before he may defend the Nation's interests. This President may be willing to accept such an invasion of the office's powers, but future Presidents should not. Nevertheless, this law, if it is unconstitutional, as I think it is, and unwise, as I think it is, it will prove a serious embarrassment to them, and they may find it politically unwise to challenge it. If so, a grave disservice will have been done the Nation.

Article III, the judiciary article of the Constitution, is violated because in the application for a foreign intelligence warrant, there is no case of controversy to give the Federal court jurisdiction. The Government attorney appears in a secret session before a special judge. There is nobody present to oppose the issuance of the warrant. Warrants obtained for purposes of criminal prosecution do not have this defect because they are expected to become known and the subject of litigation. The criminal law standard inserted in this bill does not meet the case or controversy requirement—not if we really intend to conduct foreign intelligence—because it is a subterfuge. Foreign intelligence must often be done in cases where, whether or not there is a violation of the Federal criminal code, no prosecution is intended and there will never be litigation over the warrant's validity.

The problem cannot be solved by making these special courts into article I courts. Not only are these article III judges, but a writ of certiorari lies to the Supreme Court of the United States, and I do not suppose anyone proposes to have the Supreme Court sit as an article I court.

Nor is there a solution in providing a Government attorney to oppose the warrant, some sort of "devil's advocate." Such a lawyer is not a representative of a party who is not even informed that he is in court, is not informed he has a lawyer, and will never find those things out. That is a toy case or controversy, not a real one.

For all of these reasons, I believe H.R. 7308 to be a thoroughly misguided venture, adding no protections but doing substantial

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damage to vital interests. Because I think we have a situation which is adequate now, but if there must be legislation, I think Congressman McClory's substitute bill is infinitely preferable to this.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. Thank you, Mr. Bork. I think as far as witnesses before this committee, you stand alone in your views. I think you did once before.

Mr. BORK. It has happened before, Mr. Chairman.

Mr. KASTENMEIER. I am interested in one thing. You point out that you worked with Attorney General Ed Levi in promulgating detailed regulations and governing foreign intelligence electronic surveillance. You must have thought he was out of his mind when he actually spawned the legislation before us today.

Mr. BORK. I don't think I put it in quite those terms, but I did say to him at one point due to the hierarchial nature of the Department of Justice, I thought I had won the argument, but lost the decision. He claimed he won both.

Mr. KASTENMEIER. You must have been in on the decision-making at the time the legislation was sent down to us by the administration, by Mr. Levi and the President. They made a remarkably compelling urgent case, that is, they stated their case with great urgency at the time.

What do you think led Mr. Levi and others to feel the great urgency for legislation somewhat in the nature of the legislation before us?

Mr. BORK. One of the factors, I am sure, was something alluded to this morning, and that is the climate in which the exercise of this power was under attack. I think there was a feeling that the intelligence community and the Attorney General and the President needed protection from the attack. And I think they do need some form of protection from the attack, but that can be given to them in a variety of ways, one by stopping attacking them and just using an oversight function, or bypassing a bill like Congressman McClory's, which tells the executive branch how to behave but does not introduce judges in warrant.

I can see why the intelligence community and the Attorney General would like a bill like this. It takes a lot of heat off them. I think there must be other ways to take unjustified heat off him. This bill takes all the heat off them. I think it immunizes them, even from misconduct.

Mr. KASTENMEIER. You indicate in your view that the proposed law would damage, perhaps severely, our foreign intelligence capacity at a time when it needs to be strengthened. If that is the case, why does the intelligence community, itself, the past community and the present one, support the legislation?

Mr. BORK. I don't think, Mr. Chairman, that it is entirely true that all the former members of the intelligence community support this bill.

Mr. KASTENMEIER. I don't say all members of the intelligence community, but I am talking about the official spokesmen. In this case presently, as I understand it, Judge Webster, Director of the FBI, Admiral Inman of NSA and Admiral Turner, the Director of the CIA, and even Mr. Colby, as a free citizen, came at Mr.

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McClory's insistence and said he supported warrants for U.S. citizens. When targets were U.S. citizens, he supported the legislation. He had two major misgivings about the legislation before us, H.R. 7308. He thought the construction of the forum was wrong, that it should be the district courts, and that the protection essentially ought to be for U.S. citizens. He would take another area of individuals out of the coverage of it, but other than that, he supported the other essentials of this legislation. So I am led to believe by and large the intelligence community, present and past, supports the major issues.

Mr. McCLORY. Would the Chairman yield?

Mr. KASTENMEIER. I think the gentleman from Illinois, to whom I will now yield, has suggested that there is a General Stillwell, who perhaps does still not agree with this, but there may be such a person indeed.

The gentleman from Illinois.

Mr. McCLORY. I didn't know the Chairman was going to allude to me. It is true General Stillwell, who is the president of the retired intelligence officers, is strongly opposed to this bill, and I can state, too, that by and large there are currently people operating in the intelligence field who strongly oppose this.

But the reason I asked you to yield, Mr. Chairman, was that Admiral Inman, who is one of the leaders in charge of an intelligence-gathering activity, originally expressed opposition to the committee bill. The Intelligence Committee then adopted an amendment with, I guess, two adverse votes; to eliminate and exempt from the warrant requirement his entire NSA operation. So I think that should be clarified in posing the question to the witness. That was all.

Mr. BORK. I should say I have had conversations with intelligence people who are very much opposed. I would suppose a leader of the intelligence agency might feel that things are so uncertain now that it would be better off with this bill than with the restrictions of the executive branch, and I think that is because perhaps the executive branch is over-reacting in being more severe than need be.

Mr. KASTENMEIER. We have really two administrations, however—it isn't just this administration, but also the past administration, who supported a somewhat similar approach. The Attorney Generals of both those administrations, the Presidents, both Mr. Ford and now Mr. Carter, whether reluctantly or otherwise, they have apparently lined up the principal figures in the intelligence community—I am talking about the directors, themselves, rather than other subordinates—so from their judgment presumably this law would not damage their foreign intelligence capacity.

But, of course, one can differ with that view, I suppose.

I would like to yield to the gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. Mr. Bork, I want to thank you for appearing, and would like to ask you this: Of past abuses which I think go back several years, and I am sure include more than those of the Nixon administration, I remember 14 wire taps of U.S. citizens that came to light and provoked quite a furor.

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Are you not worried at all about a future President that may, decide that he is not bound by any regulations or guidelines promulgated in the area of foreign intelligence because of the executive's inherent power in the area?

Mr. BORK. Well, I think, Mr. Railsback, that if we have a President who wants to misuse electronic surveillance and decides to ignore his own regulations, and have it done, and to lie to the oversight committees of Congress, the possibility of that being done, it seems to me, is equal under the regulation and the law.

If he really wants to go outside the law, he can do it under either case. I am also dubious about his ability to do it, because we now have a bureaucracy which having been burned badly, the intelligence bureaucracy, I think is not about to carry out orders of that sort from a President.

Mr. RAILSBACK. I guess what I am worried about is a President that believes that he does have the inherent power in this area and such belief leads to recurrences of some of the past abuses. You are saying that the possibility of this happening is very remote because there are so many more people actively involved in foreign intelligence operations.

Mr. BORK. More than that. You are talking about a rogue President. He can be a rogue President if this bill is law or not.

Mr. RAILSBACK. The difference is, if this legislation is passed, then you actually have a clear-cut expression by the Congress, the lawmaking body. You have presumably a law with sanctions. I think it is arguable whether we have a right to effect inherent executive power in this area, if there is such inherent power, this is something that is going to have to be subsequently determined.

Just one other comment about the concerns that you express about the judiciary. I think that the architects of the current approach, and even the Levi approach which was a little bit different, feel that by having courts involved, there may be that additional buffer which could protect from abuse. You are saying, that the judiciary may not be any protection at all; it may be kind of a facade.

But I am inclined to think that the fact that there is a requirement that a judge be involved arguably does afford a little stronger protection from abuse. What is your feeling about that?

Mr. BORK. As the bill is drafted, the judge is not on the face of it given much to do, except receive certifications and decide whether, on the face of those certifications, they are clearly erroneous. That is no protection, I don't think.

Mr. RAILSBACK. Yes, in addition there has to be probable cause that certain things are happening before the order will be issued.

Mr. BORK. You mean the finding about whether the person is likely to be a foreign agent, and so forth?

Mr. RAILSBACK. Yes.

Mr. BORK. Yes, but I think that is very little protection. As a matter of fact, the intelligence agencies don't now, and no Attorney General does, authorize these things unless it is quite clear you are dealing with a foreign agent.

In addition to that, I am somewhat worried about some judges who will, as they have in other areas, taken over school systems and run them, or taken our hospitals and run them, taken over

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mental homes and run them, under the name of the Constitution, who may take this as an opportunity to take over parts of the intelligence community and run them.

Mr. RAILSBACK. I am a little concerned about the use of what has been referred to as a criminal standard. The report from the Intelligence Committee indicates their belief that by engaging in clandestine intelligence-gathering activities there is likely to be a violation of one or more criminal statutes. The committee then refers in the report to the title 18 espionage laws; the foreign agent registration, and then to another section which, when you check it out, relates to the divulgence of primarily nuclear information. Even the title 18 espionage statute, as I read it quickly, relates primarily to defense information.

In other words, you have one that relates to defense, and one that relates primarily to nuclear information. I am just wondering if there is not a glaring loophole of foreign intelligence activity that may be very detrimental to the United States, which is not covered. Even though the report language says that the bill is meant to cover this, that doesn't mean anything. I am wondering if we really have covered the various activities that can be detrimental to the United States.

Mr. BORK. I don't think you have covered the various kinds of activities. It is quite possible to have an agent in place who is gathering information which is not classified. Now there may be no criminal violation or no particular expectation of one at the moment. But it seems to me that if there is reason to believe that person is an agent of a foreign intelligence agency, we ought to keep in touch with him and have surveillance of him, because he is engaged in clandestine intelligence activity, which we should know about for future purposes.

This bill, I think, would say you can't engage in electronic surveillance, and the Senate bill says you can't surveil him anyway; you can't even open a file, even though you have reason to believe he may be quite dangerous to you one day.

Mr. RAILSBACK. In fairness to the people that drafted the committee report, I think they would also argue, however, that the mere failure of an agent to register is a criminal violation. So they are going to say you don't need to have any of these other activities as long as he has failed to report to the Secretary of State.

Mr. BORK. If that is the case, then I think the criminal law violation standard in the statute is a piece of symbolism.

Mr. RAILSBACK. That is what bothers me.

Mr. BORK. I think it misleads the public to think there is something more there than is there.

Mr. KASTENMEIER. The gentleman from California, Mr. Danielson.

Mr. DANIELSON. Thank you, Mr. Chairman. I am not going to ask many questions of Mr. Bork. Very substantially I am in agreement with you, and you have articulated many of my feelings far better than I can.

My grave concern here is that we are bringing the judicial branch in to perform an executive function with no showing of any tangible benefit to be gained, and I think with the terrible danger

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of both harming the judiciary and impeding our foreign intelligence gathering.

Thank you for the articulation of what has been bothering me, and I yield back my time.

Mr. BORK. Thank you.

Mr. KASTENMEIER. The gentleman from Massachusetts, Mr. Drinan.

Mr. DRINAN. Thank you, Mr. Chairman. Professor Bork, I congratulate you on this statement, and we have not had it put this clearly before in any of our meetings.

I wonder if you would elaborate a bit on your point that this violates the case or controversy clause. Would you know of any scholars who would feel that the foreign intelligence warrant would come within the case of the controversy provision?

Mr. BORK. I think there are some, Mr. Drinan. I recall a discussion in the faculty lounge in which people said it would. I think you would get a disagreement on that point. I recall one professor, whom I won't name, because he didn't know he was speaking for the public record when he spoke with me, who said that if judges can naturalize aliens, the case is in controversy; therefore, there is enough cause for controversy here. I don't happen to believe that. But you can get an argument either way.

Mr. DRINAN. His role there, it seems to me, is strictly ministerial. He is not naturalizing them but gratifying a pronouncement.

In any event, do you feel that the overreaction, as you put it well, is now lessening? We had a witness here yesterday who said if this doesn't pass the 95th Congress, it will never pass. Do you feel that the hysteria is declining, that the guidelines are now subject to the congressional oversight, and do you feel that the momentum that some people have, some intelligence people, some people in the administration, do you think the momentum will fade away?

Mr. BORK. The momentum for the bill?

Mr. DRINAN. The momentum to pass this bill, giving the courts jurisdiction.

Mr. BORK. I really don't have much political knowledge, and I can't speak to the momentum. I am not in town any more. But I hope the momentum is dying away to pass this bill.

Mr. DRINAN. Thank you. I commend you particularly for pointing out the real delusions involved in the bill. As you say on page 6, "The bill pretends to create a real set of courts that will bring 'law' to an area of discretion," but it doesn't. And you say later on that this is a "toy 'case' or 'controversy'."

I commend you on your statement, and I thank you for your appearance here, and I yield back the balance of my time.

Mr. BORK. Thank you, Mr. Drinan.

Mr. KASTENMEIER. The gentleman from Massachusetts disappoints me.

The gentleman from Nevada, Mr. Santini.

Mr. SANTINI. Thank you, Mr. Chairman.

Mr. Bork, do I correctly summarize your posture as one in opposition to any form of legislative sanction of wiretapping in any circumstance?

Mr. BORK. I think not, Mr. Santini. If by that you mean do I have an objection to title III of the Omnibus Crime Control and Safe

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Streets Act, no. I have no doubt that certain kinds of wiretapping ought not to be legal and ought to be punishable.

Mr. SANTINI. Do you believe any form of sanction or constraint should be created for wiretapping activites by the FBI or the CIA?

Mr. BORK. I had thought, perhaps wrongly, I had thought that if the FBI acted outside the Presidential authorization in the foreign intelligence field it would then be subject—since it would have no authorization from the President—it would then be subject to the sanction of title III of the omnibus crime control bill. Therefore, as I recall, criminal and civil sanctions, I think they are in place.

Mr. SANTINI. Do you support the imposition of sanctions or constraints on the exercise of wiretapping authority by the CIA or the FBI?

Mr. BORK. Oh, yes. I think the executive guidelines which do impose constraints and its exceedings of these guidelines does subject the agency to sanctions. I think that is quite valuable. I would have no desire to see the executive branch guidelines taken away. I think they are a valuable protection.

Mr. SANTINI. Then do I correctly summarize your position as one that says essentially this? You do support some form of constraints or sanction on the exercise of search warrant or wiretapping authority by the FBI or the CIA. But is it your belief that the existing executive constraints are sufficient to meet your concern in this area?

Mr. BORK. Executive constraints plus oversight by Congress I think are sufficient to meet my concerns, plus the possibility of prosecution and civil suits under existing law.

Mr. SANTINI. So, if you were satisfied that the existing executive constraints were insufficient to provide a meaningful restraint, deterrent from abuse of the wiretapping authority of CIA or FBI, you would then be receptive to some form of legislative attention to the issue?

Mr. BORK. I think legislative attention to the issue in the sense it depends on what reason they are deficient. If they are deficient because they are badly drawn, then I think some legislative attention resulting in their being better drawn is fine. If you mean that they are deficient inherently so there can be no worthwhile executive guidelines I would like, that is a position I don't hold and don't understand.

Is that what you are suggesting, no guidelines could be good enough?

Mr. SANTINI. No, I am not suggesting that.

Mr. BORK. If it's a question of being badly drawn so they don't protect enough, then I think Congress and the President might well discuss just how far Presidential power does exist and persuade the President to withdraw to the area where it does exist and where it is proper.

Mr. SANTINI. What is necessary in order to change an executive guideline?

Mr. BORK. When I was in the Department of Justice the Attorney General had a delegation from the President which spelled things out. Now, within that delegation he promulgated his own regulations. He could change his own regulations at any time so

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long as he stayed within the President's delegated power. But he had to stay within them, and they are pretty tightly drawn.

Mr. SANTINI. That being true, Mr. Bork, is it not then possible within a 24-hour period of time, given a certain state of emergency that might compel this action or certain state of arbitrary turn of mind that would initiate this action, that you could have an Attorney General who simply would eradicate any of the present Executive constraints presently existing by wiretapping authority by CIA or FBI.

Mr. BORK. I certainly could not eliminate the limitations in the President's delegation. He could eradicate his own regulations within that area, but he is always confined by the President. But, in addition, Mr. Santini, he would have to explain that I assume to an oversight committee of Congress, and I would not greatly care to be the Attorney General who just eradicated the regulation and did improper things and have to explain that to the Senate and the House.

Mr. SANTINI. Mr. Bork, I wish we were all that sensitized in terms of individual liberties in a given circumstance.

It does seem to me that if you concede, as you must under the existing authority of the Attorney General, the possibility of wiping out essentially some of the basic constraints that are excluded now and have precluded for the last 3 years with the exception of any Humphrey kind of wiretap activity with regard to U.S. citizens by these agencies domestically, assume an emergency of sweeping proportions, a war, a national crisis of substantial degree, or to suggest an immediate, some sort of immediate kind of heightened intelligence activity, if you had that kind of climate existent the Attorney General in 24 hours time wipes out any existing constraints in terms of their internal practices.

Very little I think in the way of redemptive action would be taken by a Senate or House oversight committee in that circumstance, because the same climate of compulsion that existed with regard to persuading the Attorney General to change the rules would also perhaps persuade a majority of either the Senate or House Members concerned that this action was appropriate.

Mr. BORK. Mr. Santini, excuse me. That raises two problems: One is, under this law or this bill the Attorney General in that climate could go ahead and take the action even in variation of the bill and then go to the Congress, which, by the circumstances you postulate would be in the same mood he was. So he would get, in effect, he would be able to do it even under that law.

The second thing is I am somewhat worried. If you tell me there is a circumstance where the President and the Congress both think it ought to be done, and I don't know that I am too happy with a bill that tells me it cannot be done. Maybe they are right, it has to be done.

Mr. SANTINI. It is a bill at least that would pose a very substantial legal barrier to irrational or spontaneous kinds of conduct, and it is a bill that perhaps would be far more meaningful in terms of a barrier to circumvent in order to violate it than any internal executive mechanism that is supposed to accomplish that end but can be wiped out in 24 hours time.

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It would seem to me, Mr. Bork, that having a law in place at least would compel some more deliberation, some more objective evaluation than simply having the possibility for spontaneous vacuum to be created by abberation of existing executive order.

Mr. BORK. There is not a vacuum, Mr. Santini. He still has to come to the oversight committee.

Mr. SANTINI. Four, five, or six years ago that vacuum could be restored.

Mr. BORK. If we postulate a President who wishes to misbehave and Congress who wishes not to control him in any way, I don't think any law is going to do us much good.

Mr. SANTINI. We had that very real situation in the very immediate past.

Mr. BORK. And that situation——

Mr. SANTINI. It seems to me the virtue of law is it constrains our House of Representatives, our President, our Nation.

Mr. BORK. Let me say further than that that is right. We had that situation and it turns out the law has been applied to that. We have lawsuits. We have prosecutions. So that it is not as if a President or an Attorney General could do this recklessly. Congress, for some reason, does not care about it, when it learns of it. Even so, there is on the books now law which provides sanctions, and any Attorney General who does not remember that he will be followed by another Attorney General who may decide to prosecute him is a very shortsighted and foolish Attorney General.

Mr. SANTINI. Thank you for your observations, Mr. Bork.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from Pennsylvania, Mr. Ertel.

I caution members before we proceed that we have a vote on. I don't know whether the witness can stay.

Mr. BORK. Could I come back after lunch?

Mr. KASTENMEIER. Yes, you certainly may, and I think, Mr. Ertel, do you want to proceed at this point or do you want to proceed with the witness?

Mr. ERTEL. Be glad to do whatever the chairman desires.

Mr. KASTENMEIER. In view of the fact there is only a minute or two left before we have to run over for the vote I think we will postpone any further questioning until you return after lunch.

In any event, the committee will reconvene in 10 minutes to hear Mr. Shattuck and others, and Mr. Bork will return perhaps at 1:30 this afternoon.

Mr. BORK. Certainly. Can we make it 2 o'clock?

Mr. KASTENMEIER. Yes; 2 o'clock will be fine.

We will arrange it that way.

Until that point, the committee will stand in recess.

[A short recess was taken.]

Mr. KASTENMEIER. The committee will come to order.

I am very pleased to greet our last panel of witnesses today, each distinguished in his own right.

We have Mr. Jerry Berman, legislative counsel for the Washington Office of the American Civil Liberties Union, and also with us is John Shattuck, director of the Washington Office of the ACLU, and also accompanying the two of them, Mr. Morton Halperin, who is director for the center of national security studies. Mr. Shattuck

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and Mr. Halperin I note have been with us before; I don't know about Mr. Berman.

Welcome to the committee, gentlemen.

TESTIMONY OF JOHN SHATTUCK, DIRECTOR, AMERICAN CIVIL LIBERTIES UNION; MORTON HALPERIN, DIRECTOR, CENTER OF NATIONAL SECURITY STUDIES; JERRY BERMAN, LEGISLATIVE COUNSEL, WASHINGTON OFFICE, AMERICAN CIVIL LIBERTIES UNION

Mr. KASTENMEIER. You may proceed as you wish.

There is a joint statement we have received from Messers. Berman and Shattuck and a separate statement of Mr. Halperin. If you wish, you may proceed from those and in any event they will be received and made a part of the record.

[The prepared statement of Mr. Berman, Mr. Shattuck, and Mr. Halperin follows:]

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

Mr. Chairman, we welcome the opportunity to testify before this Subcommittee on legislation to prohibit the longstanding and much abused executive branch practice of conducting warrantless electronic surveillances for foreign intelligence purposes.

H.R. 7308, the House version of S. 1566, which passed the Senate on April 24th by a vote of 95-1, involves matters of vital concern to the American Civil Liberties Union, a nationwide nonpartisan organization devoted to protecting individual rights and liberties guaranteed by the Constitution.

This legislation was introduced three years ago (S. 3197) in direct response to the revelations of massive abuse of Fourth Amendment rights of individuals committed by U.S. intelligence agencies in the name of national security. With the exclusive and unchecked power to employ taps and bugs for foreign intelligence purposes, the FBI and CIA, and later the National Security Agency, frequently and often indiscriminately targeted individuals and groups, as the Church Committee pointed out, "engaged in no criminal activity and who posed no genuine threat to the national security." Often ignoring their own internal procedures or expanding them at will, intelligence agencies, at the direction of administrations of both parties, targeted newsmen, businessmen, members of Congress, present and former employees, civil rights leaders, and numerous groups engaged in lawful political activity. Private and often intimate fruits of those surveillances were disseminated widely and in many cases used for political and other imroper purposes.

We restate the findings of the Church Committee Final Report to right the balance of discussion before this Committee and to emphasize what must be the paramount concern of the Congress: Does this legislation afford increased protection for the Fourth Amendment rights of "the people"? Testimony before this Committee that "national security" takes precedence and that judicial warrants and other procedures outlined in the legislation unduly interfere with the prerogatives of the executive branch ignores this record of abuse. Moreover it ignores the central conclusion of the Church Committee that unchecked executive discretion led to abuse in the past and threatens its recurrence in the future.

Addressing this paramount concern today, it is our considered opinion that S. 1566 as finally amended by the Senate, and H.R. 7308, as amended by the House Intelligence Committee constitute a modest advancement over present practice and law in the national security wiretap area. This by no means constitutes an endorsement of the legislation, since the basic policy of the ACLU is general opposition to all wiretapping as fundamentally incompatible with the Fourth Amendment. In this regard we share the views of Congressman Robert Drinan so eloquently stated by him over the course of these deliberations.

However, this does represent different testimony from that given by the ACLU in the more than ten times we have appeared before House and Senate committees considering earlier versions of H.R. 7308. Each time we have measured the legislation against existing Fourth Amendment law and found it deficient. In each of those appearances, we stated that we will work to defeat any legislation which in the name of reform would have the effect of expanding or ratifying current wiretap

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abuses. At the same time we have repeatedly urged the Congress to revamp the legislation so that it would in fact impose new restrictions on current practice.

In recent months some of those restrictions have at last been incorporated in the legislation so that it minimally improves on current law. We refer of course to the criminal standard amendment for U.S. persons, the improved minimization procedures, and the improved structuring of the Special Court functions. While we are by no means satisfied with the bill—it is far too permissive in many of its provisions—we are even less sanguine about current law and it is in this context that we must view the bill.

Before turning to the details of H.R. 7308, it is important to place this bill in perspective by viewing its provisions against the background of the severe erosion of traditional Fourth Amendment values by recent Supreme Court decisions and executive branch policies.

ELECTRONIC SURVEILLANCE AND THE FOURTH AMENDMENT

The ACLU opposes electronic surveillance as an investigative technique because it is the most intrusive and inherently unreasonable form of search and seizure. Even when taps and bugs are used against a person suspected of engaging in criminal activity, it offends the Fourth Amendment because they necessarily result in a "general search" of all private conversations, incriminating or not, which occur over the period of the surveillance. The surveillance technology itself severely impedes any kind of effective control, such as a conventional search warrant which authorizes the seizure of tangible evidence, "particularly describes" the thing to be seized, and gives notice to the subject of the search except under narrowly defined "exigent circumstances." Cf. *Osborn* v. *United States,* 385 U.S. 323, 329–30 (1966).

The technology of electronic surveillance makes the search and seizure of telephone conversations infinitely more intrusive than the physical search of a home or a person, even when a tap is conducted pursuant to a court order. Statistics released by the Administrative Office of the U.S. Courts, for example, show that the average court-ordered federal wiretap in 1976 involved the interception of 1,038 separate conversations between 58 persons over a period of three weeks. These statistics demonstrate dramatically that even in the case of a criminal investigation, a wiretap search inevitably has a dragnet effect which strains the Fourth Amendment to the breaking point. Bugs, of course, are almost illimitable since they pick up everything in a room.

Electronic surveillance, therefore, is the prime example of Justice Brandeis' foreboding in *Olmstead* v. *United States,* 277 U.S. 438, 473 (1928) that "discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet." Even where circumscribed within the confines of a criminal investigation, wiretapping represents an intense and extensive invasion of private speech and thought with almost no parallel. Wiretap and other electronic surveillance devices intrude so deeply and so grossly that they discourage people from speaking freely, and, as Justice Brennan has warned, if such devices proliferate widely, we may find ourselves in a society where the only sure way to guard one's privacy "is to keep one's mouth shut on all occasions." *Lopez* v. *United States,* 373 U.S. 427, 450 (1963).

CURRENT LAW GOVERNING NATIONAL SECURITY SURVEILLANCE

If the technology of electronic surveillance severely strains the fourth amendment, the current practice of national security surveillance shatters it. Here there are virtually no restrictions under current law, in contrast to the statutory restrictions imposed in criminal investigative taps by Title III of the Omnibus Crime Control and Safe Streets Act (18 U.S.C. §§ 2510–20).

Today, as in the past, national security wiretapping, bugging, and even television surveillance are conducted by the Executive under a claim of "inherent power." In January of this year, President carter issued Executive Order 12036 to govern "United States Intelligence Activities." Under the Order, the President may authorize foreign intelligence electronic surveillance and the Attorney General may authorize a particular surveillance, if he has "probable cause" to believe that a person is an "agent of a foreign power." The Order does not require the Attorney General to obtain a judicial warrant. It does not require him to find probable cause or reasonable suspicion of crime. It does not define "agent of a foreign power."

While the exercise of inherent power to conduct warrantless national security electronic surveillance has led to widespread abuse as we have already detailed, the Supreme Court has not held it unconstitutional. In *United States* v. *United States District Court,* 407 U.S. 297 (1972), commonly known as the *Keith* case, the Supreme Court held warrantless "domestic security" surveillance unconstitutional but offered

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no opinion on whether national security surveillances involving "agents of a foreign power" would require a warrant. Since *Keith,* two circuit courts of appeal have held that the President may tap foreign powers or their agents without a warrant and that this practice does not violate the Fourth Amendment. *United States* v. *Brown,* 484 F. 2d 418 (5th Cir. 1973); *United States* v. *Butenko,* 494 F. 2d 593 (3rd Cir. 1974) (en banc) cert. denied, 419 U.S. 881 (1974). On the other hand, the Court of Appeals for the District of Columbia in a domestic security case with some foreign connections intimated that a warrant is required in all national security cases. The judges held that "a warrant must be obtained before a wiretap is installed on a domestic organization that is neither the agent of nor acting in collaboration with a foreign power, even if the surveillance is installed under presidential directive in the name of foreign intelligence gathering for protection of the national security." *Zweibon* v. *Mitchell,* 516 F. 2d 594 (D.C. Cir. 1975), cert. denied, 425 U.S. 944 (1976). Going further, the court opinion indicated that "an analysis of the policies implicated by foreign security surveillance indicated that absent exigent curcumstances, all warrantless electronic surveillance is unreasonable and therefore unconstitutional."

The significant point, however, is that even if the Supreme Court were to affirm the reasoning in *Zweibon* in some future case, and require a warrant for all foreign intelligence cases not involving foreign agents (by no means certain), it is highly unlikely to go beyond the warrant requirements it spelled out in *Keith.* There, the Court, in striking down warrantless domestic security surveillance, indicated that Congress could draft a constitutionally acceptable statute for these cases with no foreign connections that specified a warrant procedure different from the probable cause requirement in criminal cases.

"Different standards may be compatible with the fourth amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens. For the warrant application may vary according to the government interest to be enforced and the nature of citizen rights deserving protection * * *. It may be that Congress, for example, would judge that the application and affidavit showing probable cause need not follow the exact requirements of section 2518 (of title 18) but should allege other circumstances more appropriate to domestic security cases; that the request for prior court authorization could, in sensitive cases, be made to any number of a specially designated court * * *; and that the time and reporting requirements need not be so strict, as those in Section 2518." 407 U.S. 297, 323 (1972).

Most likely, if the Court is prepared to have lower standards for domestic security cases, it probably would settle for lower standards in cases involving foreign intelligence concerns, and the lowest standard of all in cases involving foreign powers and their agents. In any event, it appears unlikely that the court would require a criminal standard, since, as we have learned from the recent *Stanford Daily* case, 46, L.W. 4546 (May 31, 1978), searches of "mere evidence" directed at persons not even suspected of crime have already been sanctioned by the Court. Moreover, in foreign security cases, not even a judicial warrant may be required. This may be the ultimate precedent set by the Court if it hears an appeal in *United States* v. *Humphrey* (Crim. no. 78–A, E.D. Va.), the Vietnamese Spy case.

In this context, H.R. 7308, as amended, must be considered an improvement over present law and practice, regardless of its many imperfections from the point of view of traditional Fourth Amendment values.

H.R. 7308: A MODEST IMPROVEMENT OVER CURRENT LAW

First, H.R. 7308 requires an across-the-board warrant for all national security surveillances in the United States in which a United States person may be a party to the conversations. While we oppose the amendment by the House Intelligence Committee which excluded certain communications exclusively among foreign powers from the warrant requirement, we support the Committee's determination to subject all United States communications to a statutory procedure. We also applaud its rejection of certain amendments designed to remove embassy and other foreign power taps from the warrant requirement.

The warrant requirement even for embassies resolves the uncertainty of present law as to whether a warrant is required by the Constitution and improves the law in two significant respects. For once and for all it puts to rest the executive's power to conduct foreign intelligence surveillance under a claim of "inherent power" in the United States and provides a check on unregulated executive discretion. Moreover, it provides the means to check abuses documented by the Church Committee.

Unrestricted foreign power taps have a long record of abuse. The executive branch has targeted embassies both to gather political intelligence on citizens and to keep track of Americans who contact foreign officials for political purposes. For

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example, in 1968, Lyndon Johnson ordered the FBI to gather information on relationships between prominent Republicans and the South Vietnamese. The FBI did so by way of a tap on the South Vietnamese embassy. Similarly, between 1964 and 1966, the FBI transmitted extensive summaries of contacts between Senators, Congressmen, and other political figures and foreign governments gathered from embassy tap logs to the White House for political intelligence purposes. After the 1968 election, the Nixon Administration continued this practice.

While the warrant for foreign powers is not a criminal standard, H.R. 7308 requires officials to certify under oath to a Special Court judge that the purpose of the tap is to gather relevant and necessary foreign intelligence information and not political intelligence. Moreover, the Special Court must impose and can review "minimization procedures" designed to prevent dissemination of irrelevant information gathered about Americans from these surveillances.

Certainly the question of whether the tap is for legitimate purposes presents a "case or controversy" which the courts may entertain. As for substituting Congressional oversight for judicial review, it must be pointed out that oversight can only review these taps after the fact, when the damage may already be done. Futhermore, Congressional committees may not have the ncessary impartiality and insulation from political considerations that lead to *political* abuse of intelligence activities. Finally, the judicial warrant does not render oversight meaningless since the Intelligence and Judiciary Committees may also execise review over these activities.

Second, H.R. 7308 improves on present law by requiring the government to meet a criminal standard before it can target U.S. persons for foreign intelligence purposes. In essence, the legislation imposes the standard (and perhaps even a higher standard) recommended by the Supreme Court for domestic security cases in foreign security cases. While it is not the standard we have recommended, since we concur with the Church Committee recommendation that no Americans should be wiretapped without a showing of probable cause of crime (the standard in H.R. 5632, Representative Kastenmeier's bill), the bill comes close to meeting this standard because of recent amendments supported by the Administration.

In effect, there are four criminal standards in the bill. As set forth in section 101(b)(2), each defines an "agent of a foreign power" for purposes of surveillance. One standard relates to "clandestine intelligence gathering activities" or espionage; another covers "other clandestine intelligence activities"; a third, "sabotage or terrorism"; and a fourth encompasses "conspiracies" in the above specified conduct. Each standard requires the government to establish probable cause of activity engaged in by a person knowingly on behalf of a foreign power. In every instance except for clandestine intelligence gathering activities, there must also be probable cause of a crime.

While "clandestine intelligence gathering activities" only require reasonable suspicion of criminal conduct (e.g. "involve or may involve a violation of law"), the Report makes clear that the activities do not encompass lawful political activity, but only traditional spycraft. Moreover, the provision replaces the non-criminal standard heretofore in the bill which required no evidence of criminal activity.

As for "other clandestine intelligence activities," recent amendments make it clear that probable cause of such activities cannot be established by suspected technical violations of the Foreign Agents Registration Act, since the activities must be "pursuant to the direction of an intelligence service or network." This is arguably stricter than a traditional probable cause of crime standard premised on violations of this vague criminal statute. Similarly, the terrorism standard requires probable cause of a criminal activity. Although the legislation does not define the vague term "clandestine intelligence activities," a proviso in the bill states that no person may be targeted as an agent of a foreign power who is engaged in lawful First Amendment activity.

Furthermore, the government must establish to the judge that the purpose of the tap is to gather foreign intelligence information and that less intrusive means will not suffice to gather the information. While the judge may only review under a "clearly erroneous" standard, he or she may at least probe to some extent the legitimacy and necessity of the surveillance.

Contrary to the view of some witnesses before this Committee, we do not believe this constitutes judicial interference in national security matters beyond judicial expertise. Judges must of necessity involve themselves in "national security" matters in reviewing wiretaps in espionage prosecutions, in making discovery rulings in cases involving national security concerns, in reviewing classified documents sought under the Freedom of Information Act, and in other instances. Furthermore, the judges here are being asked to do what judges traditionally do: apply a standard to determine whether a search warrant should issue based on sufficient information to

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render a competent decision. (Are the witnesses in this regard prepared to argue that the Congressional oversight committees have more expertise or competency to judge whether standards are being applied and followed?)

Third, H.R. 7308 improves on present law by requiring minimization of the acquisition, retention, and dissemination of information gathered from national security electronic surveillances.

If electronic surveillance is to be authorized, procedures to minimize its scope are of critical importance. We have already stated our view that such minimization is almost impossible to accomplish, at least with respect to acquisition of information from electronic surveillances. However, it is clearly impossible without strict legislative standards. As this Committee knows, the Supreme Court has recently demonstrated the inadequacy of the minimization requirements imposed by Title III, by holding that even where the government makes no effort to minimize the surveillance, an objective test can be applied after the fact to judge whether the conversations might have been acquired under a reasonable effort. *Scott* v. *United States,* — U.S. — (1978).

Here again, H.R. 7308 modestly improves on the unsatisfactory state of current law. Under the House bill, the Attorney General is required to develop minimization procedures for consideration by the judge in the application procedure. We view this as establishing in law a requirement that minimization be considered before rather than after the fact and a Congressional statement that the *Scott* decision is not public policy.

Equally important, particularly in the national security surveillance area, the law requires the development and implementation of minimization procedures for the dissemination and retention of information. Where "positive intelligence" is being sought (e.g. embassy taps), innocent persons are bound to be overheard. It is critical that those conversations not be retained or disseminated so as to identify those persons unless it is absolutely necessary to understand the information meeting the definition of foreign intelligence information.

In this regard the House bill makes it possible for the judge to confront the problem. Except in very limited foreign power surveillances, critical information such as the location of the surveillance, the type of communications or activities being subjected to surveillance, the nature of the surveillance, including whether multiple devices are being used, must be disclosed to the judge. This permits closer judicial scrutiny of minimization procedures proposed by the government and makes it possible for reasonable procedures to be developed and implemented.

Finally, the bill puts teeth into this requirement, by making it illegal for government officials intentionally to ignore minimization procedures, a prohibition that is essential where dissemination of information is involved. The political abuses of foreign electronic surveillances must not be allowed to happen again.

Fourth, H.R. 7308 improves the structuring of the Special Court functions over the Senate version of the bill.

On first impression, we were highly dubious of the Special Court that would be established by this legislation. At this juncture, we still have serious reservations about how it will function with all of the trappings of secrecy, security, and centralization that will surround its workings. However, we do not believe that it is a "star chamber" or necessarily a "rubber stamp" of the executive. Moreover, there are some functions the court can perform to protect civil liberties which any district judge ruling on these matters could not. Let us be specific.

First, as we all know under the Title III experience, wiretap warrants are rarely if ever denied. While there may be some truth to the argument that the government only presents valid warrants to the court out of a concern for being denied an application, it is also true that many judges bend over backwards to support law enforcement. With national security concerns involved, judicial deference to the government will likely be greater unless some special process is developed. The Special Court is such a process, since it will make a number of judges familiar enough with these matters so that they may not act as a rubber stamp.

While the Court will be aware of its "national security" obligations, the bill also imposes more civil liberties responsibilities than does Title III. The Special Court is on notice that abuse of power is a reason for its existence; that standards must be applied carefully to avoid instrusion on privacy and lawful political activity; and that minimization procedures are one of its critical functions. Then, over its shoulder, sits the Congressional oversight committees. In other words, the Special Court may cut both ways—as it should.

The concern that the Special Court would be a rubber stamp owed primarily to the fact that the Senate bill gave the responsibility for naming the judges to the Chief Justice of the United States and only from judges in Washington, D.C. In

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response to this concern, the House bill expands the number of judges, including judges from around the country, and involves the chief judges of the circuits in the nominating process.

We believe that a Special Court is required to effectively develop and administer the bill's minimization procedures. If judges are randomly involved in the authorization process, there will be no way to develop rational minimization procedures for different types of surveillances, using different kinds of technology. More important, there will be no way to implement and enforce rational rules regarding the dissemination of information. One judge may contradict another or be unable to set aside what another judge has set in motion. If the government is permitted to "forum shop" at the outset of implementing this bill absent a special court, the overall intent and procedures of the legislation could be upset.

Finally, a word about the ex parte nature of the hearings on warrant applications. We, of course, would prefer an adversary hearing on each application before a surveillance is ordered. We have not prevailed on this point, but emphasize that this makes it incumbent on the Congressional oversight committees to do their job in judging the work of the Special Court. If the government seeks to use the fruits of a surveillance in any proceeding, the House bill permits the Court to conduct an adversary hearing to determine whether the application did in fact meet the standards in the legislation.

A MAJOR DRAWBACK IN THE LEGISLATION

In our testimony today, we have stressed areas where the bill improves on present law—areas where there has been give and take between national security and civil liberties concerns. In one area, however, there has been no give and take.

As Congressmen Drinan has pointed out along with us on numerous occasions, this legislation declares open surveillance warfare on all foreign officials and foreign visitors in this country. First, H.R. 7308 goes beyond the Senate bill by permitting electronic surveillance of any officer, employee, or member of a foreign power. Simply because of their status, the government is permitted to invade the privacy of these persons, regardless of their country, or their obedience to the laws of the United States. This would include, for example, all employees of Air France, the Prime Minister of England, or a member of any foreign political party on an official visit.

Second, the bill permits counterintelligence taps and bugs to be targeted under a non-criminal standard against foreign visitors, including students, professors, and many relatives and friends of U.S. citizens.

We point out that the Fourth Amendment refers not to the rights of citizens or residents, but to the "right of the people" to be free from unreasonable searches and seizures. Just as the term "person" in the Fifth Amendment has long been held to be "broad enough to include any and every human being within the jurisdiction of the republic," *Wong* v. *United States,* 183 U.S. 228, 242 (1896), the "people" who are protected by the Fourth Amendment have been held to include all persons within the territorial jurisdiction of the United States. More than fifty years ago, for example, the Supreme Court established that an alien could invoke the exclusionary rule in a deportation proceeding. *United States ex rel. Bilokumsky* v. *Tod,* 263 U.S. 149 (1923).

The extension of full Fourth Amendment protection to foreign nationals has been recognized by lower courts, e.g. *In re Weinstein,* 271 F. 5 (S.D. N.Y. 1920), aff'd 271 F. 673 (2nd Cir. 1920) (Learned Hand, J.) and was noted by the Supreme Court in *Abel* v. *United States,* 362 U.S. 217 (1960). *Abel* involved a joint investigation by the FBI and Immigration officials of a suspected Russian spy. A search was made of the suspect's hotel room at the time of his administrative arrest preliminary to deportation, with FBI conducting a subsequent search on its own. These searches turned up not only proof of Abel's alienage and illegal entry into the United States, but of espionage (coded messages and microfilms), and the government brought an espionage prosecution and obtained a conviction. Abel appealed on the ground that the evidence on which he was convicted was the fruit of an illegal search, and therefore should have been excluded. The Supreme Court affirmed the conviction by finding that the search had been incidental to a valid deportation arrest and was therefore legal itself. But the important point is that it was assumed by the majority (and stressed by the dissenters) that aliens—even those who had entered this country illegally and who were engaged in espionage—were entitled to full Fourth Amendment protection.

Although a deportation arrest like the one conducted in *Abel* may be based on less than probable cause, an alien who is investigated for purposes other than deportation is fully protected by the Fourth Amendment. As the Seventh Circuit

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Court of Appeals recently stated, plenary Congressional powers to deport aliens "cannot be interpreted so broadly as to limit the Fourth Amendment rigths of those present in the United States." *Illinois Migrant Council* v. *Pilloid,* 54 F. 2d 1062 (7th Cir. 1976). By the same token, the border searches of automobiles for illegal aliens on less than probable cause, see e.g. *United States* v. *Martinez-Fuerte,* 96 S. Ct. 3074 (1976), cannot be taken to permit sweeping and intrusive non-criminal surveillance of foreign visitors anywhere in the United States. See *Alameida-Sanchez* v. *United States,* 413 U.S. 266 (1973).

Even the argument that foreign power embassies and employees—as distinguished from a larger class of foreign visitors—can be subjected to broad surveillance is lacking in constitutional support and contrary to international law. There is little basis in Supreme Court case law for a distinction between types of foreigners lawfully in the United States. Moreover the federal courts have long recognized the duty imposed by international law to "protect the residence of an ambassador or minister against invasion as well as any other act tending to disturb the peace and dignity of the mission or the members of the mission." *Frend* v. *United States,* 100 F. 2d 691 (D.C. Cir. 1938), cert. denied, 306 U.S. 640 (1939). This obligation is more than a general principle of international law. The Vienna Convention on Diplomatic Relations, signed by the President and ratified by the Senate in 1974 expressly provides in Article 22 that: "(1) The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission. . . . (3) The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution."

The Constitution expressly directs the President to carry out the laws and treaty obligations of the United States. Neither the Constitution nor the Vienna Conference Treaty will support the broad surveillance of foreigners which H.R. 7308 would permit.

Even the government, in arguing that foreigners are not protected by the Constitution (a most interesting position taken by the Office of Legal Counsel of the Justice Department), has limited that conclusion to foreigners having "diplomatic immunity." But H.R. 7308 applies to all foreign officials, employees, and members, not all of whom have such immunity.

Even if compelling governmental interests permit the government to make distinctions or establish different standards for foreign visitors, the government has not made a showing which supports the foreign visitor standard in the bill. The evidence presented by the Administration to support a lower standard for foreign visitors is that Soviet bloc visitors present a serious danger to national security because of the likelihood that they will engage in clandestine intelligence activities. Yet the standard in the bill is not drawn so that only bloc countries and persons who may act on their behalf are subjected to a lower standard. Instead, the government may target any visitor who "may" engage in undefined "clandestine intelligence activities" on behalf of any country which engages in "clandestine intelligence activities contrary to the interests of the United States." That is not a definition which calls to mind only the Soviet Bloc, which the FBI worries about, but literally any country in the world.

CONCLUSIONS AND RECOMMENDATIONS

Of course this is not our only objection to this legislation. As we have said, the ACLU is opposed to all wiretapping. This bill authorizes wiretapping and other electronic surveillance for foreign intelligence purposes. We object to the departure from a strict probable cause standard. We object to the non-criminal standard and sweeping coverage applied to foreigners. We object to the non-adversary proceeding by which warrants are considered and approved. We are troubled by the fact that electronic surveillance abroad is not covered, even though the government promises that this critical issue will be addressed in other legislation.

Yet, to state a cliche, we find ourselves between "a rock and a hard place." For all of its faults this legislation is better than current law, for with every decision in this area the Supreme Court further erodes traditional Fourth Amendment values. This bill does put to rest the doctrine of inherent power and will curtail some of the kinds of abuses committed in the past, and which could be committed in the future under the rule of changeable executive orders.

It is our recommendation that this bill go to the floor. It has been reviewed exhaustively by three Committees of the 95th Congress, and has developed from considerably weaker proposals that have been considered by earlier Congresses. Certainly it should not be weakened, for in that case we will work actively to defeat it. But in the wake of Watergate, and the revelations of massive intelligence agency

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abuses, we cannot believe that this Committee, or the House, will turn the effort to reform the intelligence community into a vote of approval and authorization of these dangerous activities.

This bill was introduced as part of an effort to reform the agencies. Whether or not it passes, and in what form, is a significant test of whether the Congress has the resolve to bring our intelligence agencies under the rule of law and their activities in line with constitutional principles.

We trust the resolve is there.

STATEMENT OF MORTON H. HALPERIN, DIRECTOR OF THE CENTER FOR NATIONAL SECURITY STUDIES, JOINTLY SPONSORED BY THE ACLU FOUNDATION AND THE FUND FOR PEACE

Mr. Chairman, I appreciate the opportunity to testify before this Committee.

Having testified with considerable vigor before this Committee and a number of others over the past several years about the inadequacy of earlier versions of this bill and the need to defeat the bill if it was not substantially amended, I have no hesitation in saying to this Committee that the bill which now is before you is a substantial improvement over current law. I urge you not to take any steps which will prevent the bill from being enacted this year. In my judgment, the bill has been amended as far as it is reasonable to expect.

THE NEED FOR LEGISLATION

The need to legislate in this area to check on abused discretion by the Executive Branch is clearer today than when this legislation was first introduced. The action of the Carter Administration in the Humphrey-Truong case and the finding of a District Court judge that at least part of that surveillance was illegal and unconstitutional, suggests the dangers of leaving activities in this area to the unchecked power of the Executive Branch. Moreover, the Executive Order issued by President Carter authorizes the Attorney General to conduct such surveillance whenever he finds the individual is an "agent of a foreign power." The Executive Order does not define that phrase nor is it in any way linked to criminal conduct. This is a far less specific standard than contained in this legislation. Whatever one may think about the constitutionality of such warrantless surveillances, the fact remains that they are being conducted and will be conducted under that standard unless this legislation is passed.

My own view is that all electronic surveillance violates the Fourth Amendment in that it is inherently a general search. Nonetheless, until Congress is prepared to abolish electronic surveillance, efforts to regulate the activities of the Executive Branch and to require a warrant seem to me to be imperative.

The major controversy, as this Committee is aware, over the previous versions of this bill, has to do with whether American citizens could be the subject of surveillance if they are not suspected of criminal activity. This bill does provide that American citizens can only be subjected to electronic surveillance if the government believes their conduct is, or will be in some way, illegal. In most cases, it provides for probable cause of criminal activity. Thus, the government can conduct electronic surveillance of United States persons suspected of terror, sabatoge or, as it is called in the bill, "other clandestine intelligence activities," only if there is probable cause that their actions violate the criminal laws.

It is only in the case of what is called clandestine intelligence gathering that there is some deviation from this standard. I would, of course, prefer to have a provision requiring probable cause of criminal activity. However, the bill as now drafted requires probable cause that the person is engaged in clandestine intelligence gathering. This is defined very clearly in the Committee report as involving classic kinds of espionage activity. In addition, a judge must find that the activity involves, or will involve, a violation of the criminal law. It is very difficult for me to believe that a judge who found probable cause to believe that a person was engaged in "clandestine intelligence activities" would not also find that the person was engaged in activity which constituted a violation of the criminal law. Thus, I think the deviation from a probable cause standard for United States persons is extraordinarily narrow.

Moreover, in my view, the standards in this bill would prevent most, if not all, of the abuses that have come to light.

THE CASE FOR WARRANTS

I want now to address myself to the proposal put forward by the minority on the House Intelligence Committee that warrants should either not be required at all or limited to United States persons.

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We don't know if the Supreme Court would require warrants for wiretaps of United States persons who are agents of a foreign power or of foreign powers or foreign visitors. The court left that open in the *Keith* case and it has declined several opportunities since then to review the issue. Several Courts of Appeal have endorsed warrantless surveillances where the purpose was "solely to gather foreign intelligence" and the plurality of the Zweibon court has suggested that such warrantless surveillances are unconstitutional.

In my view, the appropriate question to ask to determine whether the constitution requires warrants in some cases is the one that the Supreme Court has traditionally asked about proposed exceptions to the warrant requirement and which the Zweibon court applied. That question is whether an exception to the warrant requirement is necessary to carry out the purpose of the surveillance. The Supreme Court has consistently held that even in non-criminal cases, such as those involving OSHA inspections, a warrant is required unless there is a showing that requiring the warrant would threaten the purposes of the surveillance. Despite the claims of the minority in the House Intelligence Committee Report, no such showing has been made nor do I think it can be made.

Requiring warrants under the scheme of HR7308 is said to jeopordize the "speed and security" which is necessary to effectively conduct national security and electronic surveillances and lead to the possibility of "delay and disclosure." The procedure set out in the bill will, of course, do neither. The bill permits warrantless surveillances in emergency situations when there is not time to get a warrant from a federal judge. Moreover, such judges will be sitting constantly in the District of Columbia and it is extremely unlikely that a judge could be reached and found to make a decision in time to meet the requirements of the emergency provision. As far as disclosure is concerned, the record of the judiciary in keeping secrets is extremely good as compared to that of both the executive and the legislative branch.

The other possible risk of delay would occur if a District Court judge denied a surveillance requiring a resort to the appeal procedures. However, this argument contradicts the suggestion that the courts will simply rubber stamp executive branch requests. In my view, neither is likely. The bill provides that the courts do not have discretion to deny a warrant if all the conditions are met. In the case of an embassy surveillance, for example, the government will simply have to show for the judge's satisfaction that the target is a foreign embassy. The judge will also have to determine that the procedural requirements of the surveillance have been followed and that the appropriate minimization procedures are in effect. There appears to be extremely little likelihood of any delay in such situations.

The one case where there may be difficulty involves situations in which the government needs to prove to a court's satisfaction that an individual is an agent of a foreign power under the definitions of the bill whether the person be a foreign visitor or a United States person. In such cases it is appropriate, in my view, that there be a scrutiny by the judiciary branch. The purpose of the Fourth Amendment is precisely to ensure that persons would not be subject to unreasonable searches and seizures. The warrant requirement would ensure that a neutral magistrate and not those agents charged with tracking down enemies of the state would determine whether a surveillance was justified. One must recall that the Attorney General is responsible to the President to conduct counterintelligence investigations and that, hence, he cannot perform the function of the neutral magistrate.

We are also told that it is inappropriate for the courts to intervene in these surveillances because the constitution provides that foreign policy questions should be left to the political branches of the government. However, the courts have consistently held that the only foreign policy questions which are left to the political branches are those which concern the conduct of our relations with foreign countries. They have been quick to point out that where the action of the government, which may be labeled foreign policy or national defense, impinges upon constitutionally protected rights the courts have an obligation and a duty to intervene to ensure that those rights are adequately protected.

I would have thought that the *Abel* case (*Abel* v. *U.S.*, 362 U.S. 217 (1960)) deals definitively with the ability and the obligation of the court to intervene when consititutional rights are at stake and also to establish without question that foreign visitors to the United States have such Fourth Amendment rights. The Supreme Court was unanimous in the case of a Soviet KGB agent, illegally in the United States with false papers, in holding that Abel was protected by the Fourth Amendment. The court also had no difficulty finding that it had the right to decide whether the search which was conducted was constitutionally valid.

Much is made of the notion that this bill will lead to the creation of "secret law" star chamber proceedings. However, all search warrants are issued on an ex parte

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basis in a secret proceeding. It is no answer to say that in criminal cases such warrants may be subject to a later adversary process. The possibility of such adversary process occurring, arises out of the exclusionary rule which is clearly not, as the courts have presented it, a requirement that flows direclty from the ex parte search warrant. That is to say, no court has held that the exclusionary rule is required in order to provide for an adversary testing of an ex parte search warrant. Rather, the rule has arisen out of the belief that it is the only way to get police officers to obey the Fourth Amendment.

Those advocating no warrants, or those limited to certain cases, have suggested that the Attorney General will take more care when he alone can decide. I doubt very much that it works that way. The Attorney General is an extremely busy man and when pressed by his staff or other agencies for an electronic surveillance order, he is likely not to review the evidence as carefully as he might and simply to sign the authorization when there appears to be a plausible case. When the full story of the Truong-Humphrey surveillance is told, I believe it will reveal such a pattern. When, on the other hand, the Attorney General needs to go to court and needs to institute an affidavit, I believe that the care that he and others take will be much greater. Moreover, the fact that a warrant is issued will not eliminate the possibility of later court review of the propriety of the action. The courts often do review search warrants on the basis of a much fuller record in an adversary proceeding then was present before the judge who issued the warrant.

Finally, on this issue, let me say a word about the question of abuses. The Church Committee Report shows clearly that taps on foreign embassies have given rise to extensive abuses. When Presidents Johnson and Nixon asked for information about the anti-war views and activities of senators and congresspersons, the FBI prepared a summary of contacts between American legislators and foreign officials through accidental overhears on embassy wiretaps. The first such list was sixty-seven pages long and covered the period from July 1, 1965 through March 17, 1966. The second summary was prepared two months later and additional materials were sent bi-weekly to the White House under the Johnson and then Nixon Administration (see Church Committee Report, Vol. 3, pp. 313–314.)

We also know of one case in which a foreign embassy was tapped specifically for the purpose of learning about the political and other activities of an American citizen. The Johnson Administration conducted surveillance of Anna Chenault, a prominent Republican leader, by installing taps on the South Vietnamese Embassy prior to the 1968 election. The purpose was to discover whether or not Mrs. Chenault was conveying certain advice to the Vietnamese government. Whatever one thinks of the propriety of what Mrs. Chenault was engaged in, the incidents shows that embassy taps can be used for the purpose of conducting surveillance of American citizens.

The need, therefore, is to provide judicial supervision of such surveillance to ensure that they do not violate the constitutional rights of United States persons.

Unfortunately, it is not the case that there have been no abuses in the last several years. The District Court judge in the Humphrey-Truong case that McClory quotes so extensively found that a substantial part of the surveillances were illegal and unconstitutional because they were conducted after the major purpose of the surveillance had become criminal. Even to reach the judgement that much of the surveillance was legal, the court was required to retreat from the standards set by the Courts of Appeal cases which had suggested that the purpose of the surveillance must be "solely" for foreign intelligence purposes. Judge Bryan substituted a "predominant" standard. Moreover, in my judgement, the criteria laid out in the Carter Executive Order permitting the surveillance of United States persons with no evidence of criminal activity, simply when the Attorney General finds that they may be agents of a foreign power without any definition of that phrase, is in itself an abuse of the rights of an American citizen.

The House Intelligence Committee has eliminated the warrant requirements for one very special class of surveillances in which there is no probability that Americans will be overheard or communicated. I regret that this is done and hope that in the Conference Committee this deviation from the bill as proposed and passed by the Senate, will be rejected. Nonetheless, I would urge the House to move forward with enactment of this legislation.

Mr. Chairman, I recognize that the bill raises serious constitutional, legal and political questions and that it would be quite natural for this Committee to want to undertake the most searching examination of its provisions. In other circumstances, I would be urging you to do so. However, in view of the scrutiny that the bill has received in previous sessions from this Committee and the attention that has been given to it in painstaking detail by two committees of the Senate and one of the

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House, and in view of the lateness of the day, I would urge this Committee to permit the House to consider this legislation.

Mr. SHATTUCK. Thank you very much.

Mr. Chairman, as you have observed, we do have a joint statement and, in view of the great importance of the issues before the subcommittee, Mr. Berman and I will be going in some detail into the items in that statement, but I think we would welcome questions during the course of our presentation.

I think in order to make sure nothing is uncovered we would like to try to go through the statement, not necessarily reading it, but summarizing it.

We do welcome the opportunity to testify on an issue of very great importance to the American Civil Liberties Union as well as the American people in general.

The legislation before you is intended, and I think it's important to bear in mind at the outset of our statement, is intended to prohibit the long standing danger and dangerous practices of engaging in warrantless so-called national security wiretaps completely outside of the Constitution and generally outside of the fourth amendment.

In the last few years we have learned about a staggering number of violations of civil liberties conducted by our intelligence agencies. These activities, I think it's also very important to bear in mind, have had no party label. They have been engaged in equally by Democrat administrations and Republican administrations.

Mr. KASTENMEIER. I am interested in your assertion along those lines because I had planned to ask a question as a result of Mr. McClory's question, about what abuses do we know of in the last few years? If there have been no abuses, there is no perceived need for any action.

Then, it is thought, we can rely on the discretion of the executive branch. Possibly the *Humphrey* case constitutes an abuse, but what other case do we know about in which there may have been a tap against, for example, an American citizen?

Mr. SHATTUCK. I think what is more important with respect to the current situation is precisely what the Carter administration has authorized in its Executive order which, in essence, would regularize the warrantless wiretapping procedures that were followed and often regarded as abuses in connection with other administrations.

In that connection I think the lack of any definition of what is a foreign agent, the lack of any reporting or oversight with respect to the way in which that order is to be conducted, the lack of any so-called criminal standard and, finally, the assertion of a broad inherent power to conduct warrantless national security wiretaps.

So I think we are talking here about a generic problem which should not be labeled abuses so much as it is an ongoing and long-standing history of warrantless national security wiretaps which are being carried on, at least in authorization form, by the Carter administration as they were by previous administrations.

Mr. BERMAN. May I add to that I think it's the assertion that inherent powers is still the President's prerogative to conduct these wiretaps under Executive order which, of course, as pointed out this morning, can be changed at any time.

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We live in a time of relative social calm in this country. There is no perceived internal security threat from an antiwar movement or civil rights movement. We don't have social turmoil in this country. But, if our history is any indication, we may return to those times again. I mean, there are many issues that divide this country and we just don't want to leave this realm of executive discretion where national security can be broadened to include the social protests to the future and return to those abuses.

This is an administration of honorable men, we have had dishonorable men in charge of the executive branch in our recent past, and we have also had honorable men stretching the claims of national security. So we are trying to view this legislation as laying down rules for the future.

Mr. KASTENMEIER. In terms of inherent right, what is your reaction to the agreement of the Attorney General that if, indeed, this legislation were to pass that they, the executive branch, would be bound to it, that it would not claim an extra Constitutional authority, that all wiretapping would be controlled by this statute, and there would not be any national security power to conduct wiretapping outside of that controlled by or permitted by the statute itself.

Mr. BERMAN. We think that is an important concession, and we think even without that concession, however, Congress has concurrent jurisdiction in this area to regulate the exercise of those functions of the executive branch, so that we are pleased with that statement.

I am sure that it's also true that maybe some future President will challenge that, but the Congress will have also stated its policy, that it has preempted the field, at least for surveillance of the United States. Of course, abroad we will still be operating under inherent power until other legislation is passed.

Mr. HALPERIN. Could I just add a word?

In view of the constant references to these three court of appeals decisions, I think it's worth getting on the record that none of these courts considered the question of whether the Congress could legislate to deal with the President's alleged inherent power.

They simply asked the question and dealt with the question that, given the absence of legislation, were warrantless surveillances constitutional or not?

There is no court that has ever held that the Congress does not have this power to deal with warrantless wiretaps and, indeed, the Supreme Court of the United States has never held any statute of Congress unconstitutional on the grounds it interfered with the President's power as Commander in Chief or as the chief agent of foreign policy, so that would be an extraordinary departure for the courts to hold this legislation unconstitutional or hold that the President is not required to act within its limitations.

Mr. KASTENMEIER. Thank you.

Mr. SHATTUCK. Mr. Chairman, let me continue with an attempt to summarize a rather lengthy statement.

The legislation before you, as you know, has a very long and troubled history.

We have appeared, I think Mr. Halperin and I, as you observed, Mr. Chairman, more than 10 times over the last 4 or 5 years to testify on earlier versions of H.R. 7308 and earlier bills, and each

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time we have measured the proposals that were before this committee and other committees against current law and against our desire to change current law to reduce the amount of wiretapping based on the American Civil Liberty's flat opposition to all wiretapping.

Each time in these earlier bills we have found that they did not satisfy the standard and they did not advance our purposes in reducing the amount of wiretapping and bringing wiretaps in the national security area under control.

The key question for us has always been, does the legislation increase or diminish the protection of the fourth amendment rights based on the way—and I think this is a very important consideration—based on the way those rights are interpreted by the courts. Today I think we are able to say for the first time that the bill before us is a modest improvement in some areas over current law.

We do not endorse it and we oppose several of its features, but we regard a number of its features as very important advances.

Let me particularly identify at the outset, though, one feature which we opposed, and that is the outrageous treatment of foreigners which, as Congressman Drinan has pointed out, as we have pointed out in all of our previous testimony, is an insult to the U.S. commitment to human rights in this country and abroad.

But there are two reasons why in many areas of the bill the bill is a modest improvement over current law.

First, it has been amended in important ways in recent months so that it now includes for the first time a criminal standard for U.S. persons, improved minimization procedures, improved oversight and judicial review, and a clear and hopefully final repudiation of any inherent power doctrine.

Second and equally important, while the bill has improved, current law has gotten worse, considerably worse, and the fourth amendment has been severely eroded in ways that I will explain and which the statement goes into in great deal, in a minute.

Now, in saying H.R. 7308 is an improvement over current law and practice we reject the position expressed by Mr. Bork and by other witnesses before this committee and some of the members of the committee that the whole field of national security wiretapping should be left to the discretion of the Executive.

That is precisely what led to the massive violations of civil liberties in the first place that brought this legislation into being, and it's precisely that trap which I think if Congress falls into we will find in the next crisis, as Mr. Berman has pointed out, massive violations of civil liberties on the same scale as we have seen in the past.

We also reject the view that uncertainty in the law is somehow better than clear standards, and again I point out that it is vagueness and uncertainty in the law which led to the intelligence abuses that gave birth to this bill.

What then is the current law?

The ACLU, as I pointed out, starts from the premise that the whole technology of wiretapping, that it has been legalized by the courts in the past, is at war with the fourth amendment.

A wiretap, as Mr. Drinan I think has pointed out repeatedly and as we have pointed out in our testimony, is as close to a general

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search as you can come, all conversations are seized and even for restricted criminal wiretaps the amount of seizure of conversation is staggering, as reported regularly by the Administrative Office of the U.S. Courts.

For this reason we are against all wiretapping, but we are also in favor of legislation that would, or we do not object to the legislation, which would reduce the amount of wiretapping that goes on.

Current practice in this area, as I pointed out, is governed by the Executive order of the Carter administration, which virtually creates a broad area of warrantless foreign intelligence surveillance and authorizes many of the things that were going on in the gray areas in the past.

On the other hand, the Supreme Court has never held that warrantless foreign intelligence wiretapping is unconstitutional. The *Keith* case involved domestic security surveillance. Two court of appeals decisions after *Keith* have upheld warrantless foreign security surveillance, and the one case that goes beyond *Keith* and recognizes warrant for at least some foreign intelligence surveillance does not reach the question of foreign agent surveillance, which is what this bill is all about.

But even if the Supreme Court were to extend *Keith* to all national security wiretaps, the Court has already said in *Keith* it would permit a watered down, probably considerably more watered down, standard nonprobable cause warrant procedure than we see in this bill.

As for a criminal standard, the recent press search decision, the *Stanford Daily* case, I think, places an enormous and disturbing hole in the fourth amendment by upholding searches of innocent third parties not suspected of any crime, and the standard in this bill is considerably better than the standard set out in that decision.

So I think it is not an overstatement to say that the fourth amendment is substantially in ruins in this area. I think Mr. Bork and the position he was espousing would virtually abolish the fourth amendment in this area, and what this bill would do in some parts, in any event, is to attempt to resuscitate the tremendous erosion of law.

I would like to turn to Mr. Berman to explain in some more detail about the bill.

Mr. BERMAN. I think it is important for us to look at a few of the most critical areas where we think this is an improvement over current law. There has been much discussion by other witnesses from the administration, from the Senate, from the House Intelligence Committee, about the delicate balance of this legislation between different perspective national security and civil liberties

Each of the points I want to discuss, four in number and one which Mr. Halperin will cover in more detail, are critical from our perspective in that we have stated and we will state again that if any of these are weakened by committee action or floor action in the House we will vigorously oppose this legislation and live to fight another day.

The first, of course, is the across-the-board warrant requirement, judicial warrant requirement for all national security surveillances

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in the United States in which a U.S. person may be a party to the conversation.

We oppose the amendment by the House Intelligence Committee which excluded certain communications exclusively among the foreign powers from the warrant requirement, even though they do not involve Americans as parties to the conversation.

But, beyond that, we hold to the fact that the warrant requirement does cover every communication which an American may be a party and regulates the exception under statutory procedure which allows our two points to remain.

One is that the warrant requirement, even for embassies, resolves the uncertainty of present law as to whether a warrant is required by the Constitution and improves the law in two significant respects.

For once and for all it puts to rest the Executive power to conduct foreign intelligence surveillance under a claim of inherent power in the United States and provides an across-the-board check on unregulated Executive discretion.

Mr. Halperin will discuss the further importance of keeping embassies within the warrant requirement. But, in terms of the cross-the-board warrant requirement and judicial review, we want to address the fact, the more broad question.

Certainly, the question of whether the tap is for legitimate purposes presents a "case of controversy" which the courts may entertain. There are adverse interests involved between national security and privacy and fourth amendment rights.

As for substituting congressional oversight for judicial review, as suggested by H.R. 7305, Mr. McClory's bill and by Mr. Bork, it must be pointed out that oversight can only review these taps after the fact, when the damage may already be done.

Furthermore, congressional committees may not have the necessary impartiality and insulation from political considerations that lead to political abuse of intelligence activities and violations of rights.

Even though we may have two congressional oversight committees, it is not hard to imagine what happens in a time of crisis, again when law and order and national security considerations are causing public turmoil and Congressmen who do face election may be swayed by majority passions or even executive maneuvering and pressure.

It is for this reason we do protect individual liberties by opposing an independent judicial, and individual liberties are involved in national security surveillances.

The most important change in recent months has been the attendant to a criminal standard for the wiretapping and electronic surveillance of U.S. persons.

In essence, the legislation imposes the standard, and perhaps even a higher standard recommended by the Supreme Court for domestic security cases in foreign security cases.

While it is not the standard we have recommended, since we concur with the Church committee recommendation that no Americans should be wiretapped without a showing of probable cause of crime, the standard in H.R. 5632, Representative Kastenmeier's bill, the bill comes close to meeting this standard because of recent

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amendments supported by the administration and the intelligence community.

Each of the four criminal standards in this legislation requires the Government to establish probable cause of activity engaged in by or persons knowingly on behalf of a foreign power. In every instance except for clandestine intelligence gathering activities there must also be probably cause of a crime.

While clandestine intelligence gathering activities only require reasonable suspicion of criminal conduct—for example, "involve or may involve a violation of law"—the House report makes clear that the activities do not encompass lawful political activity, but only traditional spycraft.

For us, that is an important principle that Americans and citizens of the United States protected by the Constitution have a reasonable expectation of privacy which extends to the fact that as long as they are not engaged in wrongdoing in violation of the criminal laws of the United States.

It also affects first amendment rights because in this whole area of clandestine intelligence activity it is easy to skirt over into first amendment and robust political activity in this country and we believe that surveillance has a chilling effect on those rights and we ought to protect it. The criminal standard is designed to do that.

Of critical importance we remind you all through the hearing before the previous committees the Justice Department, in attempting to defend a noncriminal standard, came up with every hypothetical they could possibly think of to say that they needed a non-criminal standard and, essentially, they could not support any of them, and came around and agreed to the criminal standard saying that we would be able to do our job within this principle.

I think that is important, especially Congressman Railsback's concern about it that they have said they could live with this, and I think it's important for the American people.

A third improvement in the bill is requiring minimization, retention and dissemination of information gathered from national security electronic surveillance. We have argued that wiretapping, electronic surveillance, constitutes a general search, that minimization is almost impossible to accomplish on the front end in terms of acquisition of information.

However, it is clearly impossible unless there is an attempt made, and reasonable and legitimate attempts by the Government, to minimize conversations and innocent conversations. The Supreme Court has recently knocked the props out of the minimization requirements in title II by saying that the Government, even when it does not try to minimize, the holding that they can apply after the fact test to see whether minimization would have been reasonable, that just destroys minimization under title III.

Here again, because of Supreme Court decisions, H.R. 7308 makes modest improvements on the unsatisfactory state of current law. Under the House bill the Attorney General is required to develop administrative procedures for the consideration by the judge of the application procedure.

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We view this as establishing in law a requirement that minimization be considered before rather than after the fact, and congressional statement that the *Scott* decision is not public policy.

Finally, H.R. 7308 improves the structuring of the special court functions over the Senate version of the bill. On first impression, we were highly dubious of the special court that would be established by this legislation. At this juncture, we still have serious reservations about how it will function with all of the trappings of secrecy, security, and centralization that will surround its workings.

However, we do not believe that it is a star chamber or necessarily a rubber stamp of the executive. Moreover, there are some functions the court can perform to protect civil liberties which any district judge ruling on these matters could not. Let us be specific: First, as we all know under the Title III experience, wiretap warrants are rarely if ever denied. While there may be some truth to the argument that the Government only presents valid warrants to the court out of a concern for being denied an application, it is also true that many judges bend over backwards to support law enforcement.

With national security concerns involved, judicial deference to the Government will likely be greater unless some special process is developed. The special court is such a process, since it will make a number of judges familiar enough with these matters so that they may not act as a rubberstamp.

While the Court will be aware of its national security obligations, the bill also imposes more civil liberties responsibilities than does title III. The special court is on notice that abuse of power is a reason for its existence; that standards must be applied carefully to avoid intrusion on privacy and lawful political activity; and that minimization procedures are one of the critical functions.

We believe a special court is required to effectively develop and administer the bill's minimization procedures. If judges are randomly involved in the authorization process, there will be no way to develop rational minimization procedures for different types of surveillances, using different kinds of technology.

More important, there will be no way to implement and enforce rational rules regarding the dissemination of information. One judge may contradict another or be unable to set aside what another judge has set in motion. If the Government is permitted to "forum shop" at the outset of implementing this bill absent a special court, the overall intent and procedures of the legislation could be upset.

These are the bottom line reasons why we think this constitutes an improvement over law. It does not as we said before constitute a wholehearted endorsement of this legislation.

As we have said, ACLU is opposed to all wiretapping. This bill authorizes wiretapping and other electronic surveillance for foreign intelligence purposes. We object to the departure from a strict probable cause standard. We object to the noncriminal standard and sweeping coverage applied to foreigners.

We object to the nonadversary proceeding by which warrants are considered and approved. We are troubled by the fact that electronic surveillance abroad is not covered, even though the Government

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promises that this critical issue will be addressed in other legislation and perhaps the intelligence community does too.

Yet, to state a cliche, we find ourselves between "a rock and a hard place." For all of its faults this legislation is better than current law, for with every decision in this area the Supreme Court further erodes traditional fourth amendment values. This bill does put to rest the doctrine of inherent power and will curtail some of the kinds of abuses committed in the past, and which could be committed in the future under the rule of changeable Executive orders.

It is our recommendation that this bill go to the floor. It has been reviewed exhaustively by three committees of the 95th Congress, and has developed from considerably weaker proposals that have been considered by earlier Congresses.

Certainly it should not be weakened, for in that case we will work actively to defeat it. But, in the wake of Watergate and the massive intelligence agency abuses, we cannot believe that this committee, or the House, will turn the effort to reform the intelligence community into a vote of approval and authorization of these dangerous activities.

This bill was introduced as part of an effort to reform the agencies. Whether or not it passes, and in what form, is a significant test of whether the Congress has the resolve to bring our intelligence agencies under the rule of law and their activities in line with constitutional principles.

We trust the resolve is there.

Mr. KASTENMEIER. Thank you, Mr. Berman.

Mr. Halperin?

Mr. HALPERIN. Mr. Chairman, let me try to summarize some of the points in my statement in a restructured form by dealing with basically three questions.

First: What is existing protection and is it good enough?

Second: Is there an appropriate role for the courts in this bill?

Third: Does the record of abuses justify and require this surveillance including surveillance of embassies?

As far as existing protection insofar as we know about them, they are contained in the Executive order issued by President Carter and that says simply that any U.S. person can be wiretapped if the Attorney General finds that that person is an agent of a foreign power, period.

I don't consider that adequate protection at all. It says nothing about any restrictions on wiretapping foreign visitors or foreign embassies.

Now, Mr. Bork talked a great deal this morning about regulations which he said had been promulgated when he was in the Justice Department. "Promulgated" is a peculiar word for secret regulations. Those regulations are not public. What they have to say about any additional restrictions put on by the Attorney General remain a secret, and I find myself not terribly comforted by a set of regulations issued in secret by the Justice Department and not made public and which we are nevertheless told are adequate protection.

I don't see how the Congress or public can be expected to accept the assurance that secret regulations are sufficient.

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Moreover, we are told by Mr. Bork they are as detailed and as tight as what is in the current bill. If that is the case, I cannot understand what the last 3 years of negotiations have been about, because the regulations in the bill or the criteria in the bill, as Mr. Levi initially proposed it, were very, very general and contained none of the restrictions, the links to criminal standards, the definition of clandestine intelligence, as it appears in the bill, and so on, that we now have.

I find it very difficult to believe it will have gone through 3 years of negotiation just to end up where the regulations always were. In fact, I suspect that the regulations are much more general in the current bill, and they permit wiretapping of American citizens and foreign visitors much less precise and exact than those contained in the legislation.

Moreover, it is the position of the Justice Department, and Mr. Carter, that Justice Department regulations can be ignored anytime the President orders an action, a position with which Mr. Bork had some experience in a prior administration.

This administration has taken the position explicitly as it relates to wiretap regulations and an appeal was filed in the court of appeals within the last 2 months that Justice Department regulations need not be filed if the President personally orders a wiretap.

That means that if this President or a future President wants to order electronic surveillance, he need not amend the Executive order, the departmental regulation; he simply needs to order the wiretap and then in the view of this Justice Department it becomes a legal and constitutional electronic surveillance. I don't find any protection at all in that.

Moreover, the notion there are criminal and civil penalties for violation of the Justice Department regulation is, with all due respect to the former Solicitor General, simply wrong. The only restrictions come for violations of the Constitution or violation of title III. There are no criminal penalties, no civil penalties for violations of the Justice Department regulations. That is not only, again, the position that this Justice Department is arguing, but I have never seen any argument on the other side. I don't understand the assertion there are criminal and civil penalties for violation of secret Justice Department regulations.

Mr. KASTENMEIER. I assume, Mr. Halperin, if you will permit me to interrupt, what Mr. Bork assumes is that if they are outside the President's authorization, that they constitute wiretaps that are unauthorized and would have had to have a warrant under title III; otherwise, they constitute a violation, and that they could be proceeded against in that way.

Mr. HALPERIN. I would be interested to know whether Mr. Bork took that position when he was in the Justice Department. It is certainly not the position of the current Justice Department.

Second, on the question of the role of the court and whether the courts are performing a function here they can properly perform, I would suggest that the principal function that the court is performing here is the function that the fourth amendment intended them to perform, namely, provide the scrutiny of a neutral magistrate for decisions that any person can make. They didn't require secrets or expertise, but the essence of the fourth amendment was to say

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that these judgments will be made by somebody not involved in wanting to gather the information, that some person who doesn't have a responsibility which leads him to want to gather the information will take a second look and say, have you met the criteria that has been laid out.

If you look at the bill, it seems to me there are two critical judgments that the magistrate has to make. One is whether the person fits the criteria of an agent of a foreign power as is defined in the bill. That is not a technical judgment that requires expertise on foreign policy or national defense or intelligence. It has to do with whether a person is doing the things that each one of the definitions suggest. Whether a person is acting pursuant to the direction of a foreign power, whether the person is engaged in clandestine intelligence-gathering, whether there may be a violation or about to be a violation of the criminal law, all of those are exactly the same decisions the judges make when they decide to grant search warrants or decide to grant electronic surveillance warrants for investigations of espionage, sabotage or terrorism, or other crimes of this kind.

There is not any expertise of a technical crime, and I think it is a judgment the judges can make and indeed they will make.

The second thing that the judges have to do is decide whether the minimization procedures are correct. Again, the problem is not expertise but a neutral magistrate. Let me give an illustration that this committee is familiar with. When the full House Judiciary Committee looked at the 17 Kissinger White House wiretaps, it concluded that was abuse of discretion which was included in its decision to recommend impeachment of Richard Nixon.

The Justice Department of Mr. Carter, Griffin Bell, has looked at those same wiretaps and said any reasonable man could see they were for the purpose of investigating leaks, were not for political gathering purposes, and would not in any way abuse. The difference between those two has nothing to do with the superior knowledge of foreign policy matters of the Justice Department over this committee; it has to do with the question of one's responsibility about gathering information, or one can take a neutral detached perspective.

The question of being sure these taps are not used to gather information for political purposes, or to gather personal information, is again not a technical matter, but it is not a matter that I think anybody should be willing to leave to the Justice Department, which has other duties and other responsibilities and has shown in this administration and previous administrations that it doesn't know an abuse when it sees it.

Finally, it seems to me that the Justice Department does proceed with more care when it has to sign an affidavit and go before a magistrate. If you look at the casualness with which the Attorney General reached the conclusion that Mr. Troung was an agent of a foreign power, I think that illustrates the degree to which things do change, and people also might be sobered when they have to sign affidavits which go before a magistrate.

Finally, let me review briefly the record of abuses. I think it is clear that embassy wiretaps have been used to abuse the rights of American citizens. Both President Johnson and President Nixon

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got information about the political views and political activities of Members of Congress, which was gathered from FBI embassy wiretaps. And we know President Johnson ordered surveillance of the South Vietnamese Embassy in order to learn what American citizens were saying to officials of that embassy. The record of abuse is there, and I think that makes it clear that embassy wiretaps must be covered by the warrant as well.

Moreover, to say that we don't know anything about current abuses and then we have a district court judge finding that the wiretaps and surveillance of Troung and Humphrey were an abuse, a violation of their constitutional rights, suppressing the evidence obtained from them after a certain period of time, we are told that is only one, and what other ones do we know about. It is clear we learned about these only painstakingly and usually several years after the fact, and the fact we only know of one abuse of this administration after a year and a half in office, after a period in which everybody recognizes that people are treading more carefully, because the danger of abuse is not something I take much confidence from, and it seems to me again there is an underlying need for congressional regulation in this area.

Moreover, this administration issued an Executive order which, in my view, is an abuse of the fourth amendment by the broad sweep of the power it claims to wiretap on American citizens, and we are left, therefore, if we do not legislate in this area, with the likelihood that in the future we will learn about more abuses of this administration and future administrations.

Let me, therefore, join my colleagues in concluding by urging that this committee permit the House to act, permit the Congress to act, so that we get legislation which does establish standards, which says once and for all what an abuse is and which provides procedures which I think are much more likely to prevent abuses in the future.

Thank you.

Mr. KASTENMEIER. Thank you, Mr. Halperin.

Thank you all for very commendable presentations. You have covered your material very well. I regret the entire committee wasn't present.

I have several questions before yielding to Mr. Drinan.

How do you assess the difference between this bill and the bill as finally produced by the Senate.

Of course, the McClory amendment has been adopted. There have been several other changes. How do you balance those?

I know what your view is, of course, on the amendment adopted in the full House Intelligence Committee offered by Mr. McClory, but what other changes were made, and how do you react comparatively to the two bills?

Mr. BERMAN. Comparatively, we think that there was a step backward, of course, with the change in the across-the-board warrant requirement. However, the criminal standard remains pretty much the same because of the floor amendment in the Senate. But we think that the House bill, on the whole, improves in some respects on the Senate bill.

For example, complaining, as we do, about the standard for foreign visitors, the standard in the House bill is tighter and

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stricter than the Senate bill by an inch, but it is stricter. In the Senate bill a person only had to be acting on behalf of a country engaged in clandestine intelligence activity. The House bill makes it clear those activities have to be in the United States. The report makes it clear that it is just not any clandestine intelligence activity, but an intelligence activity.

There is more protection for foreign visitors in the House bill, and it gives a visitor a civil cause of action for violating his rights under that section where the Senate bill refused to do that. A foreign visitor can be violated under the Senate bill and not have any protection or civil remedy.

This bill is technical and complex, but they change the definition of U.S. persons to include certain associations which are sometimes defined as foreign powers, but which could be made up of U.S. persons, an entity directed and controlled by a foreign government. They included those in the definition of U.S. person which is very important, because in the electronic surveillance section, it talks about intentionally targeting U.S. persons. You cannot intentionally target certain communications, but you can intentionally target non-U.S. persons, and that section refers to the international communications between terminals in this country and abroad which is NSA surveillance, which was much abused in the Operation Minaret, exposed by the Church committee.

This makes it clear—that definition of U.S. person—NSA would be banned from that surveillance.

The House bill improves on the minimization requirements, because they have redrafted the minimization requirements to require much more disclosure to a judge. It is going to be difficult to minimize unless a judge has more knowledge about the types of surveillance involved, how many bugs, the locations, and so on, so that these mixes which are possible under this bill of different kinds of surveillances can be sorted out in terms of designing minimization procedures.

We often talk about electronic surveillance as wiretap. This bill talks about electronic surveillance very broadly.

Fourth, there is improvement in the special court, particularly in the functioning of the special court. Under the Senate bill it was simply all the judges were appointed by the Supreme Court Justice, Chief Justice, and under the House version the chief justice of the district courts have a say in the nominating procedure so you can get more diversity and more judges from across the country and maybe a wider diversity of opinion than from any Chief Justice nominating all the judges to this court.

So there are improvements in the bill, and we think, on the whole, the House bill is slightly better. It is another reason why we are not for any weakening of this bill. Because of the politics of consequence, it would be a disaster to go with a weaker bill.

Mr. DRINAN. Mr. Chairman, I have a few words for these people. I don't want to bring them back needlessly. I want to commend their concern——

Mr. KASTENMEIER. I yield to the gentleman from Massachusetts at this point.

Mr. DRINAN. First of all, I want to say it is very painful to have to disagree with some people and in all candor it is painful to

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disagree particularly with Mr. Halperin because he was victimized for 21 months by the abuses you people are seeking to correct. It is my feeling the ACLU should have opposed all wiretapping from the beginning and said we are not going to compromise at any point. However, the politics of the ACLU has gone forward, and ultimately I regret that I am still opposed to the whole thing and I keep asking myself why can I differ with Mr. Shattuck and Mr. Berman and Mr. Halperin, and I hope it is a lover's quarrel, but it is very fundamental with me.

I think somehow that I have to give some justification for it, and I think we are institutionalizing this cold war mentality, that we have a xenophobia that the 20 million visitors who come to our shores will be under a cloud, and that the bill assumes this type of intelligence is going to go on. I think it is an aberration in American life. And if we wait, the CIA and the FBI are going to say we are not going to do that to people unless a crime is involved, and I have a feeling that the Congress is being nuzzled into something as ill-advised as the Smith Act in 1950.

That is my position, and I want to thank the witnesses and say I stand in admiration for what they have done and all the testimony, and particularly Mr. Halperin for the guidance he has given, and I feel time will cure these things, but if we institutionalize it, we are inviting future diplomats, future career people in the CIA and FBI to go in and it seems that we in the Congress are expecting they won't do this; we are praising them, saying this is a normal function of American intelligence, and I don't want to go that far.

Mr. BERMAN. Congressman Drinan, they have said in an Executive order issued in January that that is their current practice. The current practice is to go in and break in, and Congress silence on this for 40 years and going on now into this Congress, and maybe the next Congress, and the Congress after, is by implication, you are estopped to say you are not authorizing and engaging and ratifying these practices. You are leaving it wholly outside the law.

This legislation is by no means perfect. We share your principal position against wiretapping. But we certainly can challenge parts of this legislation in the courts if it is being applied wrong. You talked so much about congressional oversight committees this morning, if the congressional oversight committees see abuses being committed by the judges, or the system, they can blow the whistle, and we can have this legislation changed. It is the same thing we are doing in cooperating on the *Zurcher* decision.

But it does curtail some abuses of a system which is authorized, and this is an improvement over current law. There will be no abolition of all wiretapping in the near foreseeable future, and we are going to have to live to fight another day, and we cannot understand why you will not join us in that fact.

Mr. KASTENMEIER. Nor can I, as a matter of fact.

Thank you, gentlemen. I am sorry, I would have you stay, but I think that it is not necessary to detain you.

The committee will have a few more questions, of our second witness, Mr. Bork, and after that, go into a session devoted to taking up the bill.

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Mr. HALPERIN. Mr. Berman and I will be here. If any of your colleagues do have questions, and you want to give them a chance, we will be delighted.

Mr. KASTENMEIER. I will make that offer, and I am deeply grateful to all three of you for your contribution. I am sorry you were unable to convince the gentleman from Massachusetts, and others, as a matter of fact, on the committee. But, nonetheless, your work is very much appreciated, at least by the Chairman of this committee.

The committee will stand in recess for 20 minutes.

[Brief recess.]

Mr. KASTENMEIER. The committee will come to order. We again have with us Mr. Bork, we were interrupted as he was testifying.

Mr. Ertel was asking questions of Mr. Bork.

TESTIMONY OF ROBERT BORK—RESUMED

Mr. ERTEL. Thank you. I thought Mr. McClory was coming in. He wanted to question Mr. Bork.

It is nice to see you, Mr. Bork. You don't remember me, but I was a student of yours the first year you were at Yale Law School. I was your student at the same time I was Charlie Rice's student, and that was the experience I had, having the two of you in the same semester.

Mr. BORK. Let me assure you, Congressman, I have improved since then.

Mr. ERTEL. I was wondering if you had improved or I had, because at that time I don't think we agreed with each other on very much, and today I agree with more of your statement than I disagree with, and also I find it encouraging to be up here asking the questions rather than being down there and having questions from you which I couldn't answer.

Frankly, I do appreciate your statement, and there are a couple of questions I had, and they are not major. I found myself in agreement with many things you had indicated.

There seems to be a feeling here that if we do not have this bill to the floor, there will be no legislation whatever, that the bill will get tied up in the Judiciary Committee, and, as a result, will die a slow and painful death.

I take it your position is you would rather see us put it in the Judiciary Committee and let it die a slow and painful death rather than put it on the floor for a vote by the House. Am I correct?

Mr. BORK. I expressed no opinion on your procedural arrangements. But I would like to see it die a death, slow, painful, rapid.

Mr. ERTEL. I understand that. On page 8 of your prepared statement, you made the statement, "The power to conduct warrantless electronic surveillance for foreign intelligence purposes has been asserted by every President at least since Franklin Roosevelt," and you indicated this was under the constitutional article II. But are you saying to us that there is no judicial review of the power of the Presidency to conduct warrantless electronic surveillance at all to determine, in fact, what the judicial base is for the warrant or the warrantless search.

For instance, the President may abuse that power. Do we have judicial review of the President?

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Mr. BORK. I think so, Congressman. I think because the President, I believe, in my opinion, has a range of constitutional power, does not mean that a court may not ask whether he has stayed within that constitutional power or gone outside it. For example, the *Keith* case, United States against U.S. District Court, I am sure would have come out the same way if the President had asserted a foreign affairs power and the court said I don't see the foreign affairs power—no.

Mr. ERTEL. Then the President's factual base has to undergo judicial review and would not the court then be in the same position it is in issuing a warrant, having to examine the underlying factual base for the warrantless search and aren't we back into the same dilemma we are in the bill, itself?

Mr. BORK. I don't think so, Congressman. In the first place, if the President's exercise of his power is challenged in the court under the circumstances you postulate, it would be an open proceeding, and you would have a party on each side, and the court, it is true, would be saying something about the scope of the President's power based upon the facts given. But it would be doing so after the fact and not managing the foreign intelligence enterprise before the fact. As I say, it always seems to me to make all the difference in the world that there is an adversary party in court with a real case when that comes up.

I should say, too, not to be disingenuous about it, if these things are well managed, there will be many fewer occasions for the courts to get involved under those circumstances than there would be if you give them every warrant in advance.

Mr. ERTEL. Well, I understand what you are saying, but there is this advanced approval. But still they are deciding almost the same questions; they are deciding the scope of the search; they are deciding whether the search was valid; they have an adversary proceeding.

I appreciate that distinction, but if they come in first to a court and get a warrant, isn't that the same as going to any court for a warrant?

Mr. BORK. I don't think so, Congressman. I guess I am not expressing myself terribly well; but it seems to me the difference between the President having to go to court anytime he wants to make a move that has any illegal—possible illegal difficulty in it, and getting advance approval, which really puts the court in the position of a manager, or the President taking his action, seizing the steel companies and litigating it afterward, in that sense.

If I may back up, this seems to me entirely analagous or closely analagous to the proposal made at the constitutional convention that the judges sit on. I think it was called the Commission of Review or Committee of Review, to judge legislation as soon as it was passed by Congress, and they rejected that and decided the proper role for a judge was to wait until legislation had been enacted, actual cases had arisen, somebody had been hurt, and an adversary process could begin.

I think what you are doing here is putting a judge in the position of being a Commissioner of Review before things go into effect. There is no case of controversy, nothing that has happened yet.

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You put him in a managerial, legislative role there. Here you are putting him in a managerial, executive role.

Mr. ERTEL. Are we not alredy doing that with the court system, not necessarily a judge, a magistrate may issue a warrant when they apply for a search warrant?

Mr. BORK. Well, I think not, because at least there you have—you are gong to have, litigation. He issues the warrant and a search is made, and then you have a challenge.

Mr. ERTEL. You may not have litigation, nothing may be found?

Mr. BORK. That is true, but you know, if it is the kind of search which the person being searched is aware of, I suppose—well, I guess I probably would have trouble with a damage action at that point.

Mr. ERTEL. I think—I was a prosecutor—and I would say two-thirds of the cases we never could have litigated on the warrant. They may have assumed—checked the warrant and assumed it was correct; they may have made the judgment that the issuance of warrants was based upon probable cause, and they never litigated.

Mr. BORK. That is right. I would not say, yes, a defense attorney necessarily always litigates in a warranty milieu and see it is not an issue he is going to win, but there is an adversary inspection of the warrant.

Mr. ERTEL. That is the only distinction here, the fact the person being served or has eavesdropped has no notice at any time afterward, is that the only distinction you see?

Mr. BORK. No, I don't think that is what I am confining myself to, and I am not articulating too well, two different perspectives of what the judiciary is for; and I raise the Committee of Re-review—if that is the right name; I may have it wrong—now, because it was thought wrong to put judges right at the end of the legislative process and have them repeat the legislative process as judges before letting the law go into effect.

I suggest that you are making the same kind of a distinction which, in my view, would be a mistake by putting the judge right next to the Executive and they work together in deciding about what executive actions are proper beforehand, rather than judging them afterward.

Mr. ERTEL. If I may interrupt at that point, I understand what you are saying is, there is an advisory opinion before the effectuation of the law?

Mr. BORK. It is more than just advisory opinion objection; it is an objection to judges getting into the management of government.

Mr. ERTEL. Don't we have that—that is what I am trying to suggest—don't we have that with a search warrant now?

Mr. BORK. I don't think so.

Mr. ERTEL. You can distinguish between the issuance of a search warrant at the time a police officer or FBI officer goes in and makes the application upon written affidavits, and the magistrate inspects that to see if, within the four corners of the affidavit, there is probable cause, and issues a warrant to search X's home, can you distinguish between that procedure and the procedure here where the Attorney General certifies and gives a factual basis for a search with electronic means or the wiretapping?

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Mr. BORK. I think the distinction we were discussing was an important one; that is, the magistrate issuing a search warrant in a criminal investigation knows that search warrant is going to be scrutinized in an adversary process. This judge knows it is not going to be scrutinized in an adversary process and, in fact, what he is doing in issuing the search warrant is participating in the management decision about the foreign electronic surveillance for foreign intelligence purposes.

And there is a bill in the Senate now—S. 2525—which wants to put judges in the position of approving of all kinds of surveillances, electronic and otherwise, any kind of surveillance, physical surveillance, anything, and it is true that constitutional rights can be endangered by executive action. Every time the Executive acts, there is a possibility of a constitutional right in some way being infringed.

You could put judges in the White House, and have them approve of every executive action in advance. That seems to be not the best way to run an executive branch or run the judiciary. I suppose that is the essence of what I am saying.

Mr. ERTEL. I just want to see if you can draw any distinction other than what I have been envisioning, and I don't see much distinction in your position and what I have been saying. Maybe there is not any. Maybe we are saying different terms.

Mr. BORK. Well, I am not sure.

Mr. ERTEL. Thank you very much, Professor Bork. I appreciate what you have said. I guess we will take everything you had to say into consideration when we have to make a decision in a couple of hours. Thank you.

Mr. BORK. Thank you.

Mr. KASTENMEIER. The gentleman from Illinois, Mr. McClory.

Mr. MCCLORY. Thank you very much, Professor Bork. I have the strong feeling that you have shed more light, and shared more expertise and more knowledge with respect to this extremely complex and unprecedented subject than any of the other witnesses that I have listened to here or in the Intelligence Committee. In addition you brought an objectivity and detachment which, is extremely valuable to us.

As a followup on the questions that were being addressed to you by my colleague from Pennsylvania, I would like to call attention to the fact that most of the authority which would be exercised under this legislation would have little or no relationship to any criminal activity, since intelligence, electronic surveillance, and this includes virtually every kind of surveillance, such as television, radio, microwave, and wiretaps are for information-gathering. So, from the standpoint of this being comparable to a search warrant, it is that a search warrant presumes the investigation of the commission of a crime.

I notice in the Senate debate that Senator Kennedy calls attention to the fact that there is a criminal standard involved in the bill, and Senator Thurmond says he is supporting the bill because there is no criminal standard. It appears that they have the language that is used crafted in such a way that it means one thing to one person and it means something else to another person.

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The question that I have gets down to this: Is there any precedent for this type of a novel warrant procedure? Is there any precedent for this type of a special court, and for this kind of development of a body of secret law? Is this not all a new concept, a new innovation in our judicial and our political system?

Mr. BORK. I think it is, Congressman McClory. I don't know of any history of secret courts adjudicating constitutional rights of Americans without the Americans even knowing that the adjudication is taking place.

Mr. MCCLORY. Well, we have taken occasion to exempt communications between foreign powers, but there continues to be communications as far as foreign powers where others are concerned or between foreign agents one with the other, or foreign powers and foreign agents.

Is there any justification for not exempting that type of electronic surveillance if we are exempting communications between foreign powers?

Mr. BORK. I think the answer to your question, Congressman, I cannot see a justifiction for not exempting it.

May I return a moment to a prior remark you made, which relates to what Mr. Railsback and I were discussing this morning, and that is, this criminal law standard?

It is true, for example, we know that the Soviets for a variety of reasons monitor commercial activities in this country. They are involved in certain markets, and they monitor American firms in their commercial activities. These are not defense secrets. They want this information for commercial reasons.

I take it that would not be the commission of a crime, except insofar as it violates title III of the omnibus crime control bill, and we know the Soviets are violating that massively. But I take it this gathering of information might not be a crime and yet this bill seems to say we cannot keep on top of what they are doing in gathering information in those circumstances. I find that odd.

Mr. MCCLORY. Until we apply for and secure a court warrant, which, of course, the court would have the perfect right to deny.

Mr. BORK. I think it should deny it if nobody can find a crime anywhere that seems to be involved. I mean, should deny it under this bill, not in a perfect world.

Mr. MCCLORY. I would try to confine it just to two questions: The Attorney General has stated both he and the FBI would somehow be protected. He called attention to the fact that he is very fearful about seeing these certificates now under the title III provisions and that somehow this judicial procedure would give him protection, and as a result he would be able to conduct foreign intelligence surveillance more freely.

If it is wrong, and the court enters an order, is that going to provide the Attorney General or the FBI agents or anyone else with any protection that they don't already have if the certificate that is issued is validly issued, and the guidelines are complied with?

Mr. BORK. I think it provides—that is part of my point—I think that this makes the Attorney General and the President and the intelligence community less accountable, because I think now they think a long time before they issue authorizations for warrantless

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surveillance and I think they should think a long time. They won't have to think so much under this bill because they can just go in and ask for the warrant, and if they get it there is nothing that can be done to them.

Mr. McCLORY. During the time you were in the Department of Justice and following the issuance of the Executive order, were there any abuses which came to your attention which would suggest the need for this kind of legislation which would involve all three branches of Government?

Mr. BORK. We didn't see any during the time we were in office. There were things from the past that kept coming up to be dealt with.

Mr. McCLORY. Thank you very much.

Mr. KASTENMEIER. Thank you, Mr. Bork, for your testimony today. We appreciate it, and appreciate your coming back after lunch.

Mr. BORK. Thank you, Mr. Chairman.

Mr. KASTENMEIER. This concludes the testimony before the committee. The committee will meet in 10 minutes in markup session. The committee until that time stands in recess.

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FOREIGN INTELLIGENCE SURVEILLANCE ACT

THURSDAY, JUNE 29, 1978

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

The subcommittee proceeded into markup at 3:05 p.m., in room 2141, Rayburn House Office Building, the Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Danielson, Drinan, Santini, Ertel, and Railsback.

Also present: Bruce A. Lehman, counsel; Timothy A. Boggs, professional staff member; Thomas E. Mooney and Joseph V. Wolfe, associate counsel; and Audrey Marcus, clerk.

Mr. KASTENMEIER. The committee will come to order. We have everybody present who can be present. Mr. Butler cannot be here. I think Mr. Santini also does not plan to be here.

It is not my intention to take up very much time, but I do think members deserve at least a statement from me.

We have had hearings now, very extensive hearings on top of the ones we had 2 years ago, and I realize that the legislation before us, as you must realize, causes almost everybody to have some reservations.

On the other hand, we do have, I think you will agree, a compelling need to do something, to move forward, and that the time constraints of this particular Congress require that we do something at this time.

We have a situation, where most of the witnesses agree, some reluctantly, that the legislation before us meets the minimum needs of the intelligence community, of the Justice Department of this administration, presumably as it had the last administration. Also as far as those various people who have spoken in behalf of civil liberties, I believe I can restate their feelings that the bill before us, Mr. Rodino's bill, is about as good as can be achieved. In several areas they believe it is better than the present law as stated by the court, or likely to be stated by the court. Both the intelligence and civil liberties communities agree that some certainty is desirable. Uncertainty is not desirable.

To the extent that this legislation states the statutory certainty with respect to obligations and requirements, it is a step forward, imperfect—as we all will agree—as it is.

So that this bill may go forward to the House I will offer a motion to table this bill.

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Now, I would urge your support for the motion even though you may not agree entirely with the bill and may oppose the bill. If you vote for the motion to table, the bill will presumably go to the floor, if a rule is granted the Intelligence Committee. We will have an opportunity to fully participate as Judiciary Committee members. We can support the bill; we can oppose the bill; and we can amend it. I do not know what rule would be granted, if granted. I assume it would be an open rule.

We have raised a number of questions here which theoretically could produce amendments with respect to the court and with respect to ATT's interest in minor changes in the language. Across a wide spectrum there are possibily some changes that might be suggested in terms of floor amendments.

I do not conscientiously believe that we, as seven individuals, nor the full committee on Judiciary, can reconcile legislatively this issue before we adjourn in the some weeks ahead of us. I dislike saying this; but I believe that, regretably it is true.

Our rights as a committee will be protected. We will be represented in the debate on the floor; we will be represented in the conference. I think any other course of action really plays in the hands of nonconstructive politics.

For as much as many of us would like to improve this bill through our own committee process, quite candidly I don't believe we are able to do so.

I am going to offer the motion, and call for a vote on it. I will be happy to yield to——

Mr. RAILSBACK. Is it a nondebatable motion? If it is nondebatable, then I would ask the chairman if we might each be permitted to give our views and let the chips fall.

Mr. KASTENMEIER. All right. Before I offer the motion, I yield to the gentleman.

Mr. RAILSBACK. I will be very brief and simply point out that we did have a series of hearings on a bill that was quite similar to the bill that we are considering today. We spent a lot of time on it. A lot of members of the Judiciary Committee, including members that are not on this subcommittee, obviously have very strong feelings, and personally I kind of think what we are doing is if we do defer to the Intelligence Committee, it seems to me to be kind of an abdication—I do think we have a responsibility, and I think we can serve a valuable purpose, and, in that connection, I am going to oppose your motion, but, in that connection, I also am aware of what I think is the validity of some of the suggestions that have been made that if we leave it to the Judiciary Committee, we may never have a bill.

That is not certainly what I want, and I have talked to Bob McClory, and that is not what Bob McClory wants, and I think we are not talking about any kind of obstructionist tactics at all, but what we want is to have an opportunity to exercise what we believe to be our responsibility.

Second, it may very well be if all of us agreed that we were not going to be obstructionists, that we were going to try to be constructive, I would personally work for and support a reasonable time limit or a timeframe within which we either agree or at least vote a bill up or down.

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But I think to differ entirely, I think that is a mistake. I really do, and I think we would be abdicating our responsibility.

Mr. ERTEL. Would you yield?

Mr. RAILSBACK. Yes.

Mr. ERTEL. How would you propose to work for a time limit, since we don't set a rule in the full committee, and we are only 7, out of how many on the full committee, 34.

Mr. RAILSBACK. I realize that. I am inclined to think that Chairman Rodino—I received a call from Chairman Rodino, who is concerned about the time problems. I feel very certain that under his leadership and with some support from the minority, and I would be willing to support, I think, under Chairman Rodino's leadership with some kind of timeframe set forth to really try to prevent it, if there are any obstructionist tactics, but I am saying I am willing to support that. It is not my intent to kill a bill I might very well end up supporting. It is not too different from the Levi bill I did support. I would think I might very well be generally—I will say I will generally be supportive of the idea, probably more supportive, yes, maybe than you. That is why I think we are making a mistake if we don't have input. I think the Judiciary Committee should have input.

Mr. DRINAN. If the gentleman will yield, I think we could take a rational deadline of August 1, August 10, and say that the subcommittee furthermore will discharge our obligations by July 20, just dates, and then if the full committee has not acted, then it is automatically discharged; it gives all of those people the opportunity, and they will be in a somewhat awkward position if this does pass, and there are bad consequences, or, during the passage, why wasn't the judiciary involved? They will say late Thursday afternoon, before we were going home, some subcommittee deprived us of the right to act on this and have their input.

Mr. KASTENMEIER. I don't see why the gentleman should say that. The gentleman is totally opposed to this bill and any other bill on this subject. That is what he stated before. His desire is to filibuster the bill to death.

Mr. DRINAN. I wouldn't do that.

Mr. KASTENMEIER. It is not inconsistent with the tactics.

Mr. DRINAN. I have no tactics. I will comment on the vote when the time comes. I think the people in the full Judiciary Committee have some type of right to that.

Mr. KASTENMEIER. They have no more right, I must say, than people in the full committee have to take up the issue of abortion or anything else tomorrow, as people at the table can tell you.

Mr. DRINAN. Except its concurrent jurisdiction, and we are deciding that at this level.

Mr. KASTENMEIER. There are many key issues the full committee doesn't treat. This is not unusual or exceptional in that regard.

Mr. ERTEL. If the chairman will yield, there was a question raised about a report. Will there be an opportunity for——

Mr. KASTENMEIER. Yes, I would suggest if this bill is tabled, that we issue a committee print in which we state our views. If you want to devote them to objections to the procedure, that is appropriate, including any recommendations for changes or amend-

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ments. Such a committee print, if the majority agrees, shall be written and printed.

Mr. ERTEL. Would that be included as part of the tabling motion?

Mr. KASTENMEIER. Yes, I would offer that as part of the tabling motion.

It may well be that we will have several or as many as five, six, or seven points of view expressed in the committee print. Some of them will presumably go to reservations about the bill, weaknesses seen in the bill, or even amendments that one might offer.

Mr. DRINAN. Mr. Chairman, if we make points in that committee print, would we be sort of guaranteed from the Rules Committee that we could, in fact, bring up amendments along the line, for example, of improving minimization? Would there be some guarantee that would not be precluded?

Mr. ERTEL. Would you not be entitled to preference on the floor as a member of the committee?

Mr. KASTENMEIER. Yes, each member here would have a right as a member of the subcommittee equal to that of the Intelligence Committee, as bill managers, to offer amendments.

I am informed that Mr. Boland would like to ask for a 3-hour modified open rule, half to be handled by the Judiciary Committee. Amendments to be offered must be printed in the record; and, of course, if amendments offered are from the members of this subcommittee, such individuals would have precedence in recognition.

Mr. SANTINI. Mr. Chairman?

Mr. KASTENMEIER. Yes.

Mr. SANTINI. I would like to speak in the informal sense that we have established here with regard to the merits of the tabling motion, although we can't speak officially of tabling motions because procedurally you are not entitled to do that.

I was particularly captivated, at least temporarily, by Mr. Railsback's suggestion of a rational deadline, because it did seem to me that we had a very juicy topic matter here I would enjoy chewing on with some gusto, and enthusiasm, if not enlightenment. I was kind of excited with the opportunity or prospect. But in a colloquial sense to the gentleman, I don't know how we structure a rational deadline. I know my very good friend and seatmate from Massachusetts has suggested that he would come and listen and vote. Rarely have I seen him as a passive observer in the legislative scene. Most typically, he is an aggressive advocate in every sense of the word for his cause, and I think he would be joined by two, three, or four more members of our parent committee, that would similarly get involved, and up to their elbows in every vigorous fashion they knew how to advocate their position or perspective on this bill.

I think the net result and consequence is that we would not have a legislative product. I think that is the more reasonable projection, than the possibility of structuring some kind of rational deadline, although that is not impossible, certainly. We are not a body that lives by rational deadlines, I would interject. But we struggle and strive in that direction. Perhaps it would be possible here.

I think we are offered the option of no bill, or adopting the proposed motion to table, and I truly see that as an alternative choice in that context.

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Mr. RAILSBACK. Would you yield?

Mr. SANTINI. I plan to support it, and yes, I yield.

Mr. RAILSBACK. In the light of what Bob Drinan has said today, and what I am reporting Bob McClory told me, and in the light of my position, the fact that Chairman Rodino feels very strongly about the need for a bill, I cannot imagine that after a reasonable period of amendment we couldn't do what is done all the time on the floor of the House, and that is limit debate if we had to. In other words, I am saying I would support that. I would support it.

I think that I get the feeling everybody is concerned about the charges of obstructionism. I don't think anybody wants to obstruct.

Mr. SANTINI. Reclaiming whatever informal time I have left, I think, however, the charge can be fairly laid at the feet of our subcommittee and full committee in the event that bill did not pass, and I see that charge as a far more devastating and telling blow to the reputation of this committee than the fact we have deferred active involvement in the legislative process on this to the House floor and the conference committee, and again I tilt in the balance in the other direction from the gentleman, but I respect his views very much.

Mr. KASTENMEIER. If the gentleman will yield further, as far as I know it is really Mr. McClory who has taken the issue to heart and would like to see this before the full committee so that he will have a second opportunity to amend it. He has had a first opportunity in the Intelligence Coimmittee, ironically. He has had a number of amendments he has offered—one or two, I guess, have been adopted—so in that sense I really don't think a compelling case has been made that it must go to the full committee.

I agree with the gentleman from Nevada. I think we would have no bill at all if we took it to full committee. And I think that each of you appreciates how badly split this subcommittee is on this issue. I must quite honestly say I can see no legislative product that is likely to eventuate. I think, more effectively, and taking as much time as we want, and we can inform ourselves to the extent we have time to inform ourselves and participate on the floor. We don't, on the other hand, have time for the delays involved in trying to fully legislate in this subcommittee and full committee.

If there are no further comments——

Mr. ERTEL. Just for a moment, if I may, I want to make my position somewhat clearer. I am not sure I have formulated it well. I probably will vote against this bill on the floor. I have some serious reservations about it. However, I think it is incumbent on us to give the Congress the opportunity to vote on it, and I agree with Mr. Santini, and the Chairman. If we send this to the full committee, that, in all probability, will never reach the floor in this legislative session, and so I am prepared to vote for the tabling motion: but that doesn't mean I support this bill.

I have some serious reservations about what it does, implications to the judiciary, implications to the special court, and even to the intelligence community, itself.

So I am prepared to vote to table the bill. I don't particularly like the idea of moving outside the normal legislative process, and I think this is an exception. I am willing to go along on that so it gets to the floor.

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If I might respond to Mr. Railsback, he talked about limitation in time; I am going to have the very interesting opportunity to vote on that limitation of time on July 11 or 10, when we vote on the extension of the ERA. So the time limits, even though we believe they should apply, sometimes get extended and not because of any one particular member, just becuase of facts of the sitation.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. Thank you.

If there is no further discussion, the Chair will call up the bill, H.R. 7308. Without objection, the bill will be considered as read, and I will offer the motion to table the bill, H.R. 7308, and, in connection therewith, provide that there be a committee print reflecting the views of this subcommittee with respect thereto.

All in favor of the motion, please say aye. Opposed, no.

Mr. RAILSBACK. Could I ask for a record vote?

Mr. KASTENMEIER. Will Counsel call the names?

Mr. LEHMAN. Mr. Danielson?

Mr. DANIELSON. Aye.

Mr. LEHMAN. Mr. Drinan?

Mr. DRINAN. No.

Mr. LEHMAN. Mr. Santini?

Mr. SANTINI. Aye.

Mr. LEHMAN. Mr. Ertel?

Mr. ERTEL. Aye.

Mr. LEHMAN. Mr. Railsback?

Mr. RAILSBACK. No.

Mr. LEHMAN. Mr. Butler?

Mr. RAILSBACK. No, by proxy.

Mr. LEHMAN. Mr. Kastenmeier?

Mr. KASTENMEIER. Aye.

Mr. LEHMAN. The vote, Mr. Chairman, is four ayes and three noes.

Mr. DRINAN. One point of information, Mr. Chairman. Will the members of the full committee be invited to contribute to that special print, if they have thoughts, or can they be invited to see it?

There is something in there that is confusing.

Mr. KASTENMEIER. We will abide by the rule in connection with that. Personally I would think if we invited, in addition to our own seven views, a number of others, it may get to be a very long report or print.

Mr. LEHMAN. The rule, Mr. Chairman, rule 8 of the House Judiciary Committee rules, provides that:

> No report of the committee or a subcommittee shall be published unless all members of the committee or subcommittee issuing the report shall have been apprised of such report and be given the opportunity to give notice of intention to file supplemental, additional or dissenting views as part of the report.

So under the committee rules, every member has an opportunity.

Mr. KASTENMEIER. This is a committee print.

Mr. LEHMAN. That is right.

Mr. DANIELSON. Subcommittee print or committee print?

Mr. LEHMAN. Either one.

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Mr. DANIELSON. If it is a subcommittee print, as I understood the rule, the members of the subcommittee would have the right.

Mr. LEHMAN. This will be a subcommittee document, but it will be a committee print.

Mr. KASTENMEIER. Let me answer: we will follow the rule in connection with it. If members of the full committee are entitled to have their views printed, they shall be printed.

Mr. ERTEL. What will the time limit be, since we are leaving on recess at this point?

Mr. KASTENMEIER. I would say the week we come back is July 10. The Monday of the next week would be July 17.

July 17, without objection.

Mr. DANIELSON. We have 9 weeks left in this session.

Mr. KASTENMEIER. That is all. Believe me, if this bill gets through at all, I think it is still uphill.

The subcommittee will stand adjourned.

[Whereupon, at 3:30 p.m., the subcommittee adjourned, to reconvene upon the call of the Chair.]

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