WIRETAPPING

Since the November meeting of the Commission, I have reviewed more carefully the record of the hearings before (i) the Committee on the Judiciary of the United States Senate in 1962, entitled "Wiretapping - the Attorney General's Program" (referred to below as "1962 hearings"); and (ii) the Subcommittee on Constitutional Rights of the Committee of the Judiciary in 1961, entitled "Wiretapping and Eavesdropping Legislation" (referred to below as the "1961 hearings").

Scope of this Memorandum

There have been other hearings on this subject which I have not examined. I am informed, however, that the evidence at the 1961 and 1962 hearings is comprehensive as to wiretapping, and I know of no significant new evidence.

Accordingly, this memorandum will be limited to those hearings, and for the most part will be confined to selected verbatim excerpts of the testimony by proponents of the Department of Justice's position with respect to wiretapping. As this testimony related primarily to wiretapping, (and not to
other means of electronic surveillance), this memorandum will likewise be so limited.*

There was, in addition to testimony supporting wiretapping, a substantial number of witnesses who opposed it in any form and under any conditions.** Some of these (like Edward Bennett Williams) make eloquent arguments against it. But my reading of the testimony satisfies me that the concern expressed by opponents is supported neither by experience nor empirical data. The overwhelming weight of hard facts is to the contrary.

The excerpts quoted below are severely limited and selective in the interest of conserving space. I have not attempted to present a complete picture of the views of any witnesses. It can be said, in general, that each witness emphasized the importance of safeguards and limitations, and most witnesses favored prior court orders rather than permitting wiretapping upon the authority of law enforcement officials. There was widespread agreement that all unauthorized wiretapping should be forbidden with appropriate sanctions. It was agreed by many of these witnesses that court-controlled

*My view is that the principles involved apply generally to so-called "bugging" as well as to wiretapping.

**The adverse testimony is not included in this memo.
wiretapping, with all other wire surveillance proscribed, would afford greater protection to the right of privacy of innocent citizens than either the present chaotic situation or an absolute ban against all wiretapping.

The Importance of Wiretap Evidence

The 1962 hearings were upon the "Attorney General's recommendation for legislation in regard to wiretapping", namely, S. 2813 and similar bills pending before the Judiciary Committee. Set forth below are excerpts from the testimony of some of the witnesses favoring the Department of Justice legislation:

Attorney General Kennedy (1962 Hearings, pp. 11-46)

The Attorney General was the first witness in the 1962 hearings. His testimony covered 35 pages. In testifying as to the need, he said:

"A new law (permitting wiretapping) is urgently needed . . . to prosecute more effectively certain major crimes."

(p. 11)

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". . . organized criminal syndicates engaged in racketeering activities involving millions of illicit dollars do a major part of their business over 'the network of telephones in the United
States'. The very fact that the telephone exists has made law enforcement more difficult. It permits criminals to conspire and carry out their activities without ever getting together, and therefore, without giving the police the opportunity to use other techniques of investigation." (p. 12)

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"I can name three areas now, Senator, where we have very strong information, one in the South, one in the East and one in the West, where major political leaders and figures in those communities are being corrupted, and are on the payroll of some of our bigtime gangsters and racketeers, and we cannot do anything about it.

"Now, if legislation like this is passed, we could move in on these areas.

"This would give us a very strong weapon.

"I think we could make a major inroad in the bigtime gangsters and racketeers and hoodlums in the United States, if we had the help and assistance of this kind of legislation.

"I think we could make a big step forward in the field of bringing to justice by prosecution those involved in espionage and treason in the United States." (p. 28)

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"Organized crime . . . is much stronger now than it was 20 years ago. It is much more powerful in the United States economically and politically than when Senator Kefauver made his investigation 10 years ago. . . . And it is growing." (p. 28)
"Senator Keating. You are aware that there have been a number of major gambling and narcotics cases in New York which have had to be dismissed, and there are hundreds of other cases pending in New York which cannot be prosecuted because of this present wiretapping muddle?

"Attorney General Kennedy. I am aware of that, and I am also aware that the problem in New York, which is potentially so serious, has been kept reasonably under control, largely because of the fact that Mr. Hogan, Mr. Silver, and the other district attorneys as well as the police have been permitted to use wiretapping in a limited fashion.

"Many of their biggest cases, I would think almost a majority of the major cases in the New York City area, where this is a particular problem, have come to fruition because of wiretapping.

"If wiretapping did not exist and it is not permitted, I think that the situation in New York is going to get even more serious than it is at the present time, and even drastic."

Francis Biddle, former Attorney General* (1962 hearings, pp. 289-303)

"Wiretapping is not only useful in most criminal cases but indispensable in covering what is loosely called organized crime." (p. 291)

* * * *

*At the time of his testimony, Mr. Biddle was Chairman of the National Committee of the American Civil Liberties Union. He noted that the Union's view is different from his own.
"At present in the area of organized crime, law enforcement is crippled because interceptions are forbidden. . . ." (p. 292)

In speaking of the harm done to juveniles by "drug peddling", Mr. Biddle said:

"When it comes to a choice between protecting schoolchildren from narcotics and protecting the public who use public telephones from having their conversations occasionally overheard by law enforcement officials, I prefer to protect the children." (p. 292)

In speaking about the British and Canadian experience, Mr. Biddle said:

"The British and, I believe, the Canadian governments permit wiretaps . . . The British public is as insistent on protecting individual rights as we are, perhaps even more so. . . . Yet, . . . they give their officials great power, and if these powers are misused they demand appropriate action.

"I once asked my friend, the late Lord Birkett, who was the English alternate at the Nuremberg trial where I was the American member, and who had been the leading barrister in his day and a very active criminal lawyer, who was later on the court of appeals, whether wiretapping by the police was permitted. He answered that, of course it was, nobody had questioned the impropriety of wiretapping. " (p. 295)

In reply to a question whether specific cases were lost by the Department of Justice when Mr. Biddle was Attorney
General because of the inadmissibility of wiretap evidence, Mr. Biddle replied:

"I think there probably were three or four, as many as three or four cases which were lost as a result - maybe more - but I am almost certain that one would find three, four, five cases that we lost as a result of the inadmissibility of wiretapping. Judith Coplon was an outstanding example. That was an espionage case, as I remember.

"Senator Hruska. General Biddle, Frank Hogan, and Mr. Silver both testified that they had to dismiss literally hundreds of cases because of inadmissibility of wiretap evidence.

"Mr. Biddle. I was only speaking of the cases in my career." (p. 299)

Mr. Biddle in defending tapping even of public telephones testified as follows:

"Now, that is balanced against the desirability of people having their phones tapped who have to use public telephones, and one reason we have got to tap them is that the crook, of course, knows that his telephone will be tapped, so he uses the public phone. But I don't - just to me it is inconceivable with the two values. Democracy is after all the balance of values.

"Now, to me it is inconceivable that the value of people's privacy being interfered with and public telephones is comparable to our protection against this vicious and constantly growing and corrupt organization that is getting into the lower grades and children are caught in the narcotic thing with peddlers around the
schools, in the athletics of young boys, in taking examinations. That never occurred surely 20, 25 years ago. The thing is spreading. It has brought new fields to conquer and I feel very strongly about it." (p. 300)

Mr. Biddle concluded his testimony by stating that "freedom and democracy" are endangered when "the government and your police (are not given) . . . enough power to cope with their problems." (p. 302)

Judge Ferdinand Pecora (1962 Hearing, p. 303-310)*

"Of course wiretapping is dirty business. Any invasion of one's privacy of itself is dirty business. Gentlemen, I don't think anybody will deny that crime is a much dirtier business. The advantages that professional criminals obtain over enforcement officers through the use of the telephone in planning their conspiracies and in consummating their crimes are tremendous. These advantages in keeping ahead of the law cannot, in my opinion, be overcome except by giving law enforcement authorities the right, under judicial supervision, to tap private telephone wires where, upon affidavit, it is shown that there is probable cause to believe that the tapping of the wire will yield evidences, either of preparation for the commission of crime, or of its actual commission.

*Judge Pecora served as a member of the Securities and Exchange Commission and on the Supreme Court of New York for many years, resigning in 1950 to run for Mayor of New York as the candidate of the Democratic and Liberal Parties.
"To permit those who cynically flout the law, to use the telephone to enable them to accomplish their criminal purposes, and to prevent the law enforcement authorities from making use of the same facility to apprehend the wrong-doers, is as unreasonable as to limit our enforcement authorities to using the automobile to overtake criminals who use the jet plane as a means of escape." (p. 308)

"I think our judiciary can be depended upon not to issue such orders improvidently, nor to grant them without probable cause." (He then went on to testify as to the restraint exercised in New York in the use of wiretapping). (p. 308)

Frank S. Hogan, District Attorney New York County (1962 Hearing, pp. 172-194)

"Telephonic interception, pursuant to court order, is the single most valuable weapon in law enforcement's fight against organized crime." (p. 173)

* * * *

"The judicially supervised system under which we operate has worked. It has served efficiently to protect the rights, liberties, property and general welfare of the law-abiding members of our community. It has permitted us to undertake major investigations of organized crime. Without it, and I confine myself to top figures of the underworld, my own office could not have convicted Charles 'Lucky' Luciano, Jimmy Hines, Louis 'Lepke' Buchalter, Jacob 'Currah' Shapiro, Joseph 'Socks' Lanza, George Scalise, Frank Erickson, John 'Dio' Dioguardi, and Frank Carbo. Joseph 'Adonis' Doto, was tried in New Jersey, was convicted and deported on
evidence supplied by our office and obtained by assiduously following leads secured through wiretapping.

"Over the years committees, commissions and individuals have investigated intensively our use of this constitutionally authorized privilege. There has been no evidence produced that law enforcement officials have abused the privilege. Quite the contrary. There is agreement that we have used this investigative weapon fairly, sparingly, and with the most selective discrimination.

"But, for several years now, we have been deprived of the opportunity to investigate organized crime. We have been paralyzed by the uncertainty and confusion generated by judicial decisions." (p. 173, 174)

In speaking of the limitation on the use of wiretap evidence imposed by the Benanti decision in 1957, and the resulting confusion, Mr. Hogan said:

"An imperative need exists to dispel this confusion. We in local law enforcement need clarification and we need it badly." (p. 174)

The Attorney General's bill (S. 2813), as then introduced, would permit interception by state law only in the crimes of "murder, kidnapping, extortion, bribery or dealing with narcotic drugs or marijuana." Mr. Hogan strongly urged addition of at least two other categories, namely, "larceny, where the telephone is an essential instrument of crime, and gambling". "Wiretap evidence is probably the indispensable
weapon in any attempt to deal with fake charity racketeers who operate multiphone boiler rooms . . . We have a great number of such cases and continue to get them." (p. 176)

* * * *

"Syndicated gambling enterprises, although widespread and likely to be interstate, are based upon operations that are essentially local . . . Wiretaps enabled us to break up an intricate conspiracy involving a ring of crooked policy operators . . . they were gangsters, not just gamblers." (p. 176).

"Gambling of this size is big business and interception of telephone calls was the only way we could reach this three-state mob." (p. 176)

In commenting upon testimony to the effect that wire-tapping really isn't needed by law enforcement, Mr. Hogan said:

"I am always amazed to read testimony from alleged experts to the effect that wire-tapping is of little or no value to law enforcement. Our files in New York County are loaded with evidence which should satisfy the most skeptical of critics." (p. 178)

Mr. Hogan then went on to say that "without wiretaps, we never could have convicted" a number of notorious gangsters and racketeers whom he named. (p. 178, 179).

"Wiretaps have been invaluable in exposing racketeering in certain union welfare funds."
In testifying as to the effect of the Benanti decision in New York, Mr. Hogan quoted his earlier testimony as follows:

"Under present conditions, law enforcement in New York is virtually crippled in the area of organized crime. Cases, the disposition of which would contribute materially to the welfare of our community, will have to be dismissed for lack of prosecution, because we are unable to use evidence obtained through court-ordered interceptions * * *

"In addition to cases, there are a number of major investigations that we are now conducting that will collapse due to the restrictions presently placed on the use of intercepted information * * *" (pp. 178, 179)

Mr. Hogan then testified that his earlier prediction as to being forced to dismiss cases had proved to be "no idle prediction":

"Not only have investigations collapsed, but we have been obliged to dismiss a number of cases because of our inability to divulge the contents of court-ordered wiretaps." (p. 179)

In speaking of the dismissal of seven defendants characterized by Mr. Hogan as "major figures in the importation and sale of heroin.", he said:

"Without the use of wiretaps in the courtroom, their guilt could not be established. The most diligent police work could not duplicate the evidence that we had obtained through the use of interceptions (authorized under New York law but inadmissible under the cloud of Benanti)." (p. 179)
Anthony P. Savarese, Jr., Chairman New York Joint Legislative Committee on Privacy of Communications (1962 Hearings, pp. 78-83)

Mr. Savarese was introduced by Senator Keating as an expert in the field, having chaired the New York Wiretap Committee as well as the Joint Committee on Privacy of the New York State Legislature. Mr. Savarese endorsed the Department of Justice bill as follows:

"As chairman of New York's Joint Legislative Committee on Privacy of Communications, I have often had occasion in recent years to assert, as emphatically as possible, the urgent need for Congress to enact legislation such as you have before you today. Only 11 months ago I appeared before Senator Ervin's subcommittee in support of Senator Keating's eavesdropping bill. I then went into some detail on the disastrous effect of the Supreme Court's Benanti decision and the need of correcting it. I believe such discussion may be unnecessary today. The distinguished sponsorship of the present bill suggests that this committee may be more interested in its specific effectiveness than in the necessity of it. So I shall limit this discussion to two points.

"This bill accepts the principle adopted by New York in its constitutional amendment of 1938, that wiretapping may be used, by law enforcement officers, on reasonable grounds, under the authority of a court order. That was the first substantial control on this virtually universal police practice, but of course New York did not invent the procedure. That stems directly from the fourth amendment in our Bill"
of Rights. Certainly in the 18th century unreasonable search and seizure were just as dirty business as wiretapping has been called in our modern times. But the libertarians who framed the fourth amendment were practical men who recognized that the security of the home must sometimes yield to the necessities of public security and they provided that warrants might issue. That is what this bill does in modern times and I commend it." (p. 79)

Herbert J. Miller, Jr., Assistant Attorney General in Charge of the Criminal Division, Department of Justice, (1961 Hearings, pp. 351-372)

Mr. Miller stated that he was expressing "the views of the Department of Justice on legislation currently the subject of these hearings" (namely, several bills authorizing wiretapping pursuant to court order, but forbidding it otherwise). (p. 351)

After recognizing that "perhaps no single issue generates more emotional outbursts and stronger views than wiretapping", Mr. Miller said:

"I deem it of utmost importance that legislation be enacted authorizing interception and disclosure of telephone conversations with strict and enforceable safeguards, protection the normal rights of privacy." (p. 352)
"... It is a strange anomaly which allows spies and professional criminals to profit from science by carrying on espionage and racketeering through conversations which would be impossible without modern communications, while it forbids the Government, even after proof of probable cause, to obtain and use evidence ... and bring them to justice." (p. 353)

In supporting the need for clarifying the right of states to wiretap (in addition to a federal statute), Mr. Miller said:

"The existing state of inconsistency and confusion is intolerable in the case of State law enforcement officials. I believe that interstate communications should be protected against interception and disclosure by State police and investigators no less than Federal officials, but that the State authorities have equal need for a procedure by which exceptions can be made in special cases.

"Insofar as S. 1495 would permit wiretapping by State officials, the bill lists certain crimes in the solution of which tapping would be permissible. Because of the varying State statutes, the problems of definition, and the delicate relationship between the Federal and State Governments, it is believed that there would be substantial enforcement problems in connection with that portion of S. 1495 which permits wiretapping by State officials only for certain enumerated crimes. It is the position of the Department of Justice that S. 1086 is preferable, insofar as it allows a State to authorize wiretapping for whatever crimes it desires, thus leaving the States their traditional area of law enforcement subject only to the very important safeguard that wiretapping must be accomplished pursuant to a court order and upon a showing of probable cause." (p. 357)
In supporting the right of law enforcement to wiretap, Mr. O'Connor emphasized the "intolerable" situation in New York resulting from court decisions interpreting §605 of the Federal Communications Act. He said:

"We have many, many prosecutions that are pending right now in which we have devoted not only days, but weeks and months, and I think frankly we have in many cases done years of investigation where we have presented the fruits of our investigation to a grand jury, where we have received valid indictments. Those indictments have been sustained against attack on motions to dismiss and now, because of the wiretap situation, we are uncertain as to the legality of the prosecution. For example, in the county of Monroe where the city of Rochester is located, the district attorney recently dismissed 22 cases pending on his criminal calendar because the evidence in those cases had been gathered through wiretaps.

"Mr. Silver has in excess of 200 cases pending in the county of Kings. I have at least 10 to 15 pending in Queens, and Frank Hogan will testify tomorrow to the number he has pending in New York County, in which part, at least, of the evidence was uncovered through legal wiretaps.

"Now, these are the cases involving serious crime. I don't subscribe to the tendency in some quarters to sweep under the rug cases involving gambling. I feel very strongly that gambling is a very integral part of organized crime."
"These cases involve not only gambling: they involve in my county, for example, criminal abortion. It is my opinion we will never be able to prosecute cases involving this crime without assistance of wiretapping.

"If we are to slough these cases off and not prosecute them because we can’t secure the necessary evidence, I think it is going to put a dent in the moral fabric of our community."

"We have a situation here where we are concerned on the one side with the rights of individuals as opposed to the rights of society. I think there is a danger in any choice, but the test should be this. The protection for individual rights cannot be disproportionate to the loss of protection for our society." (p. 327, 328)


The New York Commission of Investigation, chaired by Mr. Sarachan, was described as a "crime commission".

"For more than 20 years, law enforcement officers of New York State availed themselves of the benefits of wiretapping laws under the careful scrutiny of State courts. However, the decision of the U. S. Supreme Court as we know, in Benanti v. United States and other Federal court rulings have created a serious situation in law enforcement in my State as District Attorneys Silver and O'Connor have told you." (p. 335)

* * * *
"Hundreds of cases - many of them very serious cases - are awaiting action by Congress to amend the Federal Communications Act and to bring to an end this intolerable situation." (p. 336)

* * * *

"Not to be permitted to procure wiretap evidence under the careful restrictions of our State laws would undoubtedly greatly hamper the effectiveness of our work." (p. 336)

Mr. Sarachan reported on public hearings conducted by the New York Commission in 1960. He said "all witnesses" stressed that "under present conditions, the protection of our citizens, especially in the field of organized crime and public corruption, is being seriously curtailed . . ." (p. 336)

He emphasized that "law enforcement officials must have the right to intercept telephone messages, with proper judicial restraints sufficient to safeguard personal liberties, if they are to cope with the leaders of organized crime." (p. 336)

No Evidence of Abuse of Private Rights

There is deep and understandable concern that legalized wiretapping would not be confined to criminals but would invade the privacy of innocent persons. But it must be remembered that no one is suggesting uncontrolled wiretapping.
Indeed, the type of legislation under consideration would significantly minimize - rather than enlarge - the abuse of private rights through wire interceptions. This expectation is confirmed by the nearly 30 years of experience in New York State.

Francis Biddle:

"There is no responsible evidence against the successful operation of taps" and there is "very responsible evidence" to the contrary. (1962 Hearings, pp. 299-300)

The evidence as to the experience in New York "does not show abuse by the District Attorney or by the police". (p. 291).

Judge Ferdinand Pecora:

In testifying as to his own experience with wiretap orders on the bench in New York from 1938 to 1950, Judge Pecora described the procedure and the care with which the law was administered. He said: "These orders were not signed by the Justices of the Supreme Court in any haphazard way or as a matter of form. . . . I think there is very definite assurance that the District Attorney does not lightly go into court seeking permission to tap private telephone wires."
After saying that the Attorney General's bill (then before the Committee) provided appropriate "safeguards against an abuse of the rights," Judge Pecora said:

"I don't think that orders permitting such wiretaps would be made the subject of abuse anymore than has been through the century and a half of the history of our courts the issuing of search warrants. I think our judiciary can be depended upon not to issue such orders improvidently, nor to grant them without probable cause. . . . They haven't done it in the State of New York - where permission for wiretapping has existed under constitutional authority since 1938." (1962 Hearings, p. 308)

Frank S. Hogan

In his testimony in 1961 and again in 1962, Mr. Hogan documented the extent to which wiretapping had actually been used in his office. He testified:

"Over the years committees, commissions and individuals have investigated intensively our use of this constitutionally authorized privilege. There has been no evidence produced that law enforcement officials have abused the privilege. Quite the contrary, there is agreement that we have used this investigative weapon fairly, sparingly, and with the most selective discrimination." (1962 Hearings, p. 173)

* * * *
"The Chairman of that New York State Legislative Commission, after two years of digging, stated in writing as a conclusion that no single abuse could be attributed to a law enforcement officer in New York State." (1962 Hearings, p. 188)

Frank O'Connor:

"We have never received a complaint from a civilian that private rights have been invaded by illegal wiretapping. If there was anything like the number of illegal wiretaps banded around in this room yesterday, we certainly would have received many, many complaints."

"Senator Keating: You have never had a complaint?"

"Mr. O'Connor: No." (1961 Hearing, p. 329)

* * * *

There appears to be no factual evidence contradicting the testimony that the right to wiretap in New York, pursuant to court order, has been abused. There is a good deal of general testimony, with the usual hypothetical cases (as to bedroom conversations, talks between lawyer and client, etc.), but I have seen no evidence to support the view that court controlled surveillance would in fact abuse private rights in any significant way.
Perhaps the leading attempt to prove the contrary has been made by Samuel Dash, a Philadelphia lawyer who has published a good deal of undocumented argument against wiretapping. Former Attorney General Biddle, also a Philadelphia lawyer, characterized Mr. Dash's writing as follows:

"I don't think Dash's evidence means a thing; I think it is so loose, it is all guesswork."

(1962 Hearings, p. 299)

Position of the Bar Association in New York

No exhaustive examination has been made of the positions taken by the bar associations in New York. I have, however, examined the testimony in the 1961 and 1962 Judiciary Committee hearings, as well as several of the reports of the various committees. In summary, and although there has been vigorous dissent, I believe it is fair to say that the New York State Bar Association, the New York County Lawyers Association (through its Board of Directors), and the Federal Legislation Committee of the Association of the Bar of the City of New York all have favored legislation permitting wiretapping, subject to court order and appropriate safeguards.*

*The views of the organized bar in New York seem particularly relevant as that state has had the greatest experience with this problem.
Whitney North Seymour, Jr. testifying as Chairman of the Committee on Civil Rights of the New York County Lawyers Association, supported Attorney General Kennedy's bill in 1962. Mr. Seymour made the point that civil rights would be "much better protected" by the enactment of this type of legislation than "if no wiretapping should be permitted." He said:

"Yet, speaking for our own committees, our zeal in protecting those civil rights has taken, I think, the proper practical turn of viewing that civil rights will be much better protected by the enactment of legislation such as that which is being considered than by taking a head-in-sand approach that no wiretapping should be permitted. We think, in fact, that that approach has, in part, contributed to the general state of confusion which we think is actually injuring civil rights in our own community and possibly at large in others."

(1962 Hearings, p. 362)

The New York County Lawyers Association report on the Attorney General's bill:

"We are conscious of the duty of the bar to guard the civil rights of all citizens as zealously as possible. We are persuaded, however, that a workable and enforceable wiretapping law which permits limited interception under rigid controls, and attaches strong sanctions against unauthorized interception, will tend in the long run to provide a more genuine protection to civil rights generally than a continuation of the present situation
of confusion and unenforceability."* (1962 Hearings, p. 419)

Edwin L. Gasperini, Chairman of the Committee on Federal Legislation of the Association of the Bar of the City of New York, presented the report of his committee in support of Attorney General Kennedy's bill (S. 2813).

In reviewing policy considerations, and after acknowledging the antipathy to the concept of wiretapping, the Committee spoke out in favor of the "civil rights" of the "victims" of criminals - a point of view which seems rarely to be expressed. The report stated:

"But we believe that we must also recognize the dangers of unchecked crime. The victims of criminals are, in a very real sense, deprived of civil rights. Law enforcement is not simply an affair between the criminal and the police. Government owes its citizens a duty to possess and exercise the power to enforce the laws. The less effective are the operations of our law enforcement agencies, the more we all tend to become the victims of crime." (1962 Hearings, p. 331)

*Mr. Seymour testified that there was a sharp division in his Committee on Civil Rights, with the report being approved by a margin of only one vote. He testified, however, that the report was "subsequently adopted by the Committee on Federal Legislation and approved by our Board of Directors. That means that our report has run the gamut of at least 93 committee members, and under our by-laws the Board of Directors can speak for our membership of 10,000." (1962 Hearings, p. 362)
The final conclusion of the Committee was stated as follows:

"Our review of S. 2813 convinces us that it is a well-drafted bill, that it removes the anomalies and ambiguities of the present law, that its general approach to the problem is sound in banning all private wiretapping and permitting carefully delimited wiretapping for purposes of law enforcement and national security and that Congress should enact legislation closely approximating this bill." (1962 Hearings, p. 337)

The Committee on Legislation of the Association of the Bar of the City of New York again considered wiretapping in its 1966 report on the McClellan bill (S. 2189). The Committee reaffirmed "its previous position that wiretapping should be permitted under adequate safeguards and in limited situations." See Vol. 5, Bulletin No. 2 of the Association of the Bar of the City of New York, June 1966.*

*The Committee on Bill of Rights of the Association of the Bar of the City of New York, also by a divided vote, has consistently opposed wiretapping. See 1962, Hearings, p. 348. It appears from the 1962 hearings, however, that Mr. Gasperini was authorized to submit the report of his Committee on Federal Legislation as representing "the views of the Association."
OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1967

APRIL 29, 1968.—Ordered to be printed

Mr. McClellan, from the Committee on the Judiciary,

REPORT
Submitted the following together with
MINORITY, INDIVIDUAL, AND ADDITIONAL VIEWS
[To accompany S. 917]

The Committee on the Judiciary, to which was referred the bill (S. 917) to assist State and local governments in reducing the incidence of crime, to increase the effectiveness, fairness, and coordination of law enforcement and criminal justice systems at all levels of government, and for other purposes, having considered the same, reports favorably thereon, with an amendment in the nature of a substitute, and recommends that the bill, as amended, do pass.

AMENDMENT
Strike out all after the enacting clause and insert in lieu thereof the following:

That this Act may be cited as the "Omnibus Crime Control and Safe Streets Act of 1967".

TITLE I—LAW ENFORCEMENT ASSISTANCE

DECLARATIONS AND PURPOSE
Congress finds that the high incidence of crime in the United States threatens the peace, security, and general welfare of the Nation and its citizens. To prevent crime and to insure the greater safety of the people, law enforcement efforts must be better coordinated, intensified, and made more effective at all levels of government.

Congress finds further that crime is essentially a local problem that must be dealt with by State and local governments if it is to be controlled effectively.
in Edinburgh. If they are 'exiled' to Sheriffdoms they make regular visits 'home,' are kept in touch with all news by the Dean's yearly letter and often retire to Edinburgh and are once more fully absorbed in the community. If they continue in practice they can be seen in their daily progress up the Mound to 'P.H.'

Retiring from law practice in the United States has been frequently described as a terrible crisis for the individual. He is completely cut off from all occupation in his life's work. This is not true in Scotland. In the solicitor's practice old partners are kept on, even if they no longer do a full day's work or control as much of the office business as before. This pattern is even more obvious in the case of the advocate. He remains, as far as his physical powers permit, a full member of the professional and social community from his call to the Bar until his death and there is a full complement of his brethren at his obsequies.

FOOTNOTES

6 Contributors to the Advocates' Widows Fund (i.e. all those who have been admitted whatever their present function) numbered 283 in 1966. Of these 19 appear to live overseas and 20 in England (including 5 members of the Lord Advocate's staff in London). 57 advocates live outside Edinburgh (of whom the great majority are Sheriffs or full time law teachers). Of 58 Sheriffs-substitute 51 are advocates and 7 solicitors (whose profession in Scotland numbers about 3,000). Approximately 100 judges of all grades in office and retired (from House of Lords to Sheriff Court) are members of the Faculty. There are approximately 130 members of the Faculty living in Edinburgh of whom some 110 are in practice.
7 Even so Faculty patronage has been criticized recently, from outside the group—see correspondence 'Scotsman' 11th and 18th August, 1967.

"Privacy and Freedom”—A Review*

By Harry Kalvin, Jr.
Professor of Law, University of Chicago

In an essay entitled Privacy and Power which he contributed a year or two ago to a collection of essays on contemporary political science, the sociologist, Edward Shils, himself a long time, deeply concerned student of privacy in modern life, observed testily: "Political scientists, who, more than sociologists and economists are the heirs of the oldest traditions of reflection and analysis of man's social life, have not been greatly concerned with privacy . . . Political scientists . . . might prefer one form of public life to another, but very few of them have anything to say on behalf of privacy." Among the many impressive aspects of Alan Westin's Privacy and Freedom is the circumstance that by profession he is a political scientist. He has had a great deal to say on behalf of privacy, and indeed he has been so steadfast and generous in his concern for privacy that even in Professor Shils' eyes he must have by now single-handedly made amends for his whole profession.1

This fall at the University of Chicago, Professor Shils joined me and two law school colleagues, Walter Blum and Gerhard Casper, in a seminar on privacy. We used Privacy and Freedom as a core source for the seminar and it held up very well indeed under the critical scrutiny of the law student. The book has thus survived what might be called the seminar test.

It is an achievement first of all because it is a book. Privacy is a curiously diffuse, subtle topic, difficult to survey, to bound, or to pull together. And it is one of its many paradoxes that despite its high place as a value in Western culture, there has been no tradition of systematic writing about it—not in political science, not in ethics, not in philosophy, and, for that

1 Perhaps the explanation resides in the fact that he is also trained as a lawyer and is a member of the District of Columbia Bar.
matter, not in law. To have woven together the varied strands of privacy into a coherent literate and substantial book is a genuine feat. Mr. Westin has given us our first book on privacy.

Moreover, Mr. Westin has pursued his topic with indefatigable energy and with a most catholic taste and has brought together, in a well organized form, the widest range of references to privacy. He has provided the indispensable book for any one who wishes to reflect on privacy in the contemporary world.

There is the intriguing question of the genre to which the book belongs. It appears at a time when the law world has its first tastes of a literature of empirical inquiry—a new kind of law book. Yet while it deals with a topic relevant to law and its 400 pages are occupied primarily with data other than cases or statutes, Westin's study does readily fit with Skolnick's study of the police, Carlin's study of the bar, Rosenberg's study of pre-trial, Conard's study of auto accidents or our own study of the American jury. It discusses law, it has a view about the possible role of law here, but it is somehow not a law book. Westin borrows with ease from sociology, anthropology, electronics, political theory, opinion polls, yesterdays headlines, Congressional hearings, Supreme Court decisions. The mix is an effective one and the book among other things offers a model for broadly based discussion of public issues. It is worth noting, too, that the book appears to have achieved something of a popular success, an unusual thing for a serious, non-sensational study.

Privacy and Freedom is an achievement also of the organized bar. The book is the direct fruit of the work of the notable special committee on science and law of The Association of the Bar of the City of New York, headed by Oscar Ruebhausen, which began its inquiries in 1959. It is a special tribute to the bar that its committee gave such durable, enthusiastic, and thoughtful support to the venture.

Mr. Westin's book is serious and substantial enough to merit the compliment of criticism. I have three points on which the book leaves me troubled and less enthusiastic. I should preface them by saying that I have learned that reactions to privacy are a pretty subjective business, that the point at which one man will become indignant will not disturb another, and that my personal threshold of indignation is, judging from the reactions of our seminar, higher than that of many.

My first complaint is a small aesthetic one. It sees one of Mr. Westin's strengths as a weakness for this particular topic. The point comes to nothing more than that for my tastes privacy is so elusive and paradoxical a topic that it is not altogether congenial to the sound balanced treatment Mr. Westin accords it. He is too commonsensical about it all.

My second point goes to the relationship of privacy to autonomy or freedom. Do we value privacy only because it is useful to the strategy of protecting personal freedom or do we value it for its own sake independently of the practical consequences that intrusions into privacy may entail? Does privacy, absent a concern with freedom, reduce to a trivial quaint grievance? My deep personal hunch is that the topic is really freedom and that calling it privacy tends to obscure matters. In Griswold, for example, is the grievance really the one the Supreme Court selected, namely, the predicted intrusions by police into the bedroom in the effort to enforce the law? Or is the grievance the law's effort to limit man's freedom to decide whether and when he will breed children? Mr. Westin's analysis does not wrestle sufficiently with the privacy-freedom overlap, and he is, I think, too willing to claim for the domain of privacy values which belong to freedom.

My third point goes to the organization of the book and is a complaint not so much about Mr. Westin's handling as about the topic itself. Ostensibly the book falls evenly into four parts which have such headings as New Tools for Invading Privacy or Policy Choices for the 1970's. My impression, however, is that there are four unequal parts. There is a survey of what anthropology, animal psychology sociology, etc., have to tell us about the human need for privacy; there is a survey of American law as it touches privacy; there are a series of policy recommendations for restoring what Westin calls the balance between privacy and disclosure and surveillance. The handling of these three units occupies
roughly 135 pages or about one-third of the book. It is the other two-thirds, however, that pose the problem for the book, and, I suggest, for the topic. They are devoted to a report on the new technologies of electronic surveillance, psychological surveillance, and computer collation of data and then to five case studies of recent public controversies over privacy. The controversies stem from use of the new technology, and include: wiretaps and their ultra modern variants, polygraphs, personality tests, subliminal stimuli, and computers and data banks.

The very terms used tell their own story. They are the polysyllables from the world of science. In centering on these items Westin is arguing his major thesis: the technology of science has suddenly in the past decade vastly augmented man's power to invade man's privacy and has upset the balance between privacy and disclosure. The theme has an exciting ring. Science has brought us closer to 1984 than the calendar would indicate.

The material is fascinating and I cannot but be grateful to Mr. Westin for collecting it. I am left, however, with a difficulty that neither Mr. Westin nor our seminar solved for me. I take it Mr. Westin has given us an authoritative inventory of where the problems of privacy are in our society today. If, for the sake of argument, we put to one side for the moment the familiar problem of wire-tapping and its modern progeny, we are left as the core concerns with the computer, the subliminal stimulus, the polygraph, and the personality test. My difficulty is twofold: I am somewhat puzzled as to the grievance in each instance, and moreover insofar as there is a grievance I have difficulty in seeing its connection to what I would have understood as privacy. To be as blunt as possible, I am not fully persuaded that these core problems are serious problems and I am less persuaded that they concern privacy. The upshot is that there is a gap which Westin cannot close between the fascinating psychological and anthropological nuances of privacy which occupy the first part of the book and the sense of privacy that can be said to be infringed by, for example, the polygraph or subliminal advertising.

Let me conclude these meandering reflections with a point on behalf of Westin's approach. There is no doubt that it helps today to couch a grievance in the language of privacy. The rhetoric of privacy is highly effective at the moment. Mr. Westin was probably wise after all in keeping his eye on the way people talk about privacy, on the chief occasions in which public debate has appealed to privacy as its symbol. And in any event, we can all readily agree it is good to live in a society in which the rhetoric of privacy has so strong a pull.

It is a sign of how rapidly things move these days in the law that the Westin book appeared too early to catch Time Inc. v. Hill, Berger v. New York, or Katz v. United States. The first case puts a large constitutional obstacle in the path of the tort of invasion of privacy. The other two cases are the latest chapters on the Fourth Amendment and electronic surveillance, and Mr. Westin can now point with pride to his prophecy that Olmstead would be overruled. Perhaps the most tantalizing point in them—a point which would have given Mr. Westin a puzzle to brood over—is the difference in viewpoint, a difference which is now fully visible, between the two liberty-loving justices toward privacy. Mr. Justice Douglas is its ardent champion; Mr. Justice Black can see little to it.

Mr. Westin and the Special Committee on Science and Law of The Association of the Bar have done a public service in providing the learning and the stimulus of Privacy and Freedom.

—1 It is worth noting that, although he reviews the law on it briefly, Mr. Westin does not treat as a case study the problems of the press and privacy which gave rise to the classic Warren and Brandeis article and the tort of invasion of privacy. There is an echo of somewhat the same split between liberal heroes in Olmstead. While it was the occasion for Justice Brandeis's great statement on privacy, Justice Holmes was moved to file a separate opinion based not on privacy but on the ignobility of police violating the law.
for themselves, I am certain it is the proper place to hear us. In dismissing those cases, and the conclusions I have drawn are proper.

Drawing from those cases, I do not feel it wise public policy to leave so critical an issue to the discretion of the courts, particularly as they are ex parte proceedings.

Mr. President, we are dealing in a new field here, and our right to do so, under titles IV and II of the constitutional Bill of Rights, is not subject to discussion. But in a few minutes, in an hour, or probably at most in 2 hours, the search is completed.

But here we have an instrument of surveillance whereby we tap the man's words as we buy his house for a 30-day period, and then we can re-survey for another 30-day period, and then for still another 30-day period.

Mr. President, this is altogether unreasonable, too much too long a time. I think cutting down the 30 days to 1 day, and then forcing the prosecutor to go on the spot, and giving him 5 days and then why he needs another 7 days, is far too unreasonable.

I am certain the Supreme Court would agree with this, as I draw upon Berger case and the amendment of my amendment. I yield back the remainder of my time.

Mr. LONI of Missouri. Mr. President, in substance, the Senate's action on titles II and III of this bill. I have had to consider carefully what position to take on the bill as a whole. In my opinion both titles are clearly unconstitutional. Further, neither of course has any real effect on reducing street crime and it is doubtful that either will have any real effect on organized crime. New York's permitted courts wiretapping for a quarter of a century prior to the Berger case, but a look at the crime situation in New York proves that wiretapping is not a solution and it is not and is not a very effective tool.

Despite titles II and III, however, I feel it vital that action be taken on title I which does hold out hope for helping solve our serious crime problem. Therefore, I support its final passage.

It is my hope that in the conference with the House that titles II and III will be eliminated. If they are not and they should become law the severability clause with regard to these titles and IV will when the courts strike down titles II and III relative to confessions and electronic snooping.

Mr. DIKSN. Mr. President, I call up my amendment No. 718.

Mr. HART. Mr. President, would the Senator from Illinois before calling up his amendment—which would control our time—permit me a couple of minutes to express tocolleagues on one section of the bill. Mr. President, I ask unanimous consent, without losing my right to the floor, that the distinguished Senator from Montana (Mr. Hart) have 5 minutes in which to explain the matter he wishes to discuss and not limit him in any time.

The PRESIDENT OF THE SENATE. The time allotted to the Senator from Montana is extended for 5 minutes without being charged any time.

Mr. MCLELLAN. Mr. President, I ask unanimous consent that the statement that the President does not have constitutional power to put a tap on an organization that is advocating the withholding of income tax payments—to cite a current, though as yet a small, movement—I would feel more at ease. But if, in fact, we are here saying that so long as the President thinks it an activity that constitutes clear and present danger to the structure or existence of the Government.

That was my opinion. I do not think it is an activity that constitutes clear and present danger to the structure or existence of the Government.

If that is the case, section 25119 grants unlimited tapping and bugging authority to the President. And that there will be brought to the Senate, and the House, and the country, that do not come within our traditional notions of national security.

Is my reading of that a fair one? Is my concern a valid one? If it is, why do we not agree to knock out the last sentence?

Mr. MCLELLAN. Mr. President, that language is language that was approved and, in fact, drafted by the administration, the Justice Department. I have not challenged it. I was perfectly willing to recognize the power of the President in this area. If he felt there was an organization—which I believe black, white, or mixed, whatever the name and under whatever guise—that was plotting to overthrow the government, I would think we would want him to have that power.

The President, however, what we have done here is to prescribe with the spirt of permitting the President to take such action as he deems proper where the Government is threatened, I cannot find any barrier in the Constitution from looking at it, myself.

Mr. HART. Mr. President, some people can take comfort, I think, in the language of section 25119, and especially the statement that the President is indeed limited by the Constitution in the exercise of the national security power. This is why I think it is much better to use this exchange.

We notice that this petition runs this way:

Nothing contained in this chapter ... shall be deemed to limit the constitutional power of the President to do whatever he deems to be in the area of stopping any other clear and present danger to the structure or existence of the Government.

If we agree that the President does not have constitutional power to put a tap on an organization that is advocating the withholding of income tax payments—to cite a current, though as yet a small, movement—I would feel more at ease. But if, in fact, we are here saying that so long as the President thinks it an activity that constitutes clear and present danger to the structure or existence of the Government.

The PRESIDENT OF THE SENATE. The time allotted to the Senator from Michigan is extended for 5 minutes without being charged any time.

Mr. MCLELLAN. Mr. President, I ask unanimous consent that the amendment which was approved by the Senate from Michigan have the additional 5 minutes without being charged any time.

The PRESIDENT OF THE SENATE. Without objection, it is so ordered.

Mr. HOLLAND. Will the Senate yield?

Mr. HART. Yield.
Mr. HOLLAND. Mr. President, I think the limits of the Senates power, as far as that power is expressed here, are clear. The Senate does not have the power to declare war, as that is the power reserved to the Congress. The Senate's power is limited to the making of laws, which are subject to the President's veto. Therefore, the Senate cannot override the President's decision without the consent of the President. This is an important point to consider when discussing the Constitution, as it sets the boundaries of the Senate's power.

Mr. MCCLELLAN. Mr. President, I appreciate your clarification. However, I believe that the Senate has the power to remove the President from office if he violates the Constitution. This is a crucial power that the Senate holds, and it should not be taken away.

Mr. HART. Mr. President, I do not believe that the Senate has the power to remove the President from office. This power belongs to the House of Representatives and the Senate can only act as a check on the President's actions.

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