ORGANIZED CRIME - CHALLENGE TO A FREE SOCIETY

In a message announcing the creation of the National Crime Commission in 1965,* the President said: "Crime has become a malignant enemy in America's midst".

The Shameful Facts

In this, and in subsequent addresses the President has emphasized the now familiar - and shameful - facts. There has never been a time when there were more serious crimes against persons and property. Crime is increasing several times faster than population growth. Juvenile crime is a national disgrace, with nearly 50% of all arrests involving youths 18 years of age and under.

More than two and three-quarter million serious crimes were reported in 1966, and this startling figure is grossly

*The Commission's legal name is "National Commission on Law Enforcement and the Administration of Justice".
understated because for every crime which makes the record books there are two or more which remain unreported.

The statistics of crime only become meaningful in terms of people. The President has said that "crime - the fact of crime and the fear of crime - marks the life of every American". There are the victims who suffer injury, loss of property, and even death. There is also the staggering economic loss to our nation.

Perhaps the most degrading effect of mounting crime is the fear which it generates. Citizens are afraid to walk the streets at night. Our public parks are often deserted. It has been said, without too much exaggeration, that fear of crime is turning us into a nation of captives "imprisoned behind chained doors, double locks and barred windows".

It is paradoxical indeed that these conditions exist in America today. We enjoy more prosperity, more productivity, more education and more progress in science and technology - than at any other time in all history. Nor are we concerned only with material things. There is
more genuine concern by man for his fellow man, more
determined efforts to wipe out poverty and disease,
and far more progress in minimizing discrimination and
injustice - than at any other time in all history.

Yet, despite this unprecedented material progress
and the equally unprecedented humanizing of our attitudes
toward less fortunate people, the crime rate continues to
spiral upward. At the same time, there is a disquieting
eroding of respect for law and due process.

This, in capsule summary, is the situation which
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task assigned, of determining causes and proposing solu-
tions, was obviously impossible in any absolute sense.
There is no more complex problem confronting mankind, and
it is by no means unique to our country.

The Commission's Report

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for a period of 18 months. A massive report was submitted to the President in February 1967. The Report makes some 200 specific recommendations - steps which could lead to a safer and more just society. They relate to basic changes in the operations of police, the courts and our system of corrections. They deal with juvenile delinquency.* They call for far greater anti-crime effort by government at all levels and all citizens.

But this is hardly the occasion to discuss detailed recommendations. Rather, it seems more useful to consider a specific major problem. The greatest crime challenge to our free society is organized crime. I thought it might be of special interest to this distinguished group to consider this particular challenge.

Organized Crime

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*The recommendation for Youth Service Bureaus is one hopeful result of this study.
of organized crime, what it is, and what it does. The term evokes, for the average person of our generation, an image of gang warfare (largely in Chicago) and perhaps of Al Capone being sent to jail for income tax violation because the law was too bumbling to convict him of murder and extortion.

The difficulty is that organized crime is largely invisible. The Commission described it as:

"An organized society that 'operates outside of the control of the American people and their government. It involves thousands of criminals, working within structures as complex as those of any large corporation, subject to (private) laws more rigidly enforced than those of legitimate governments. Its actions are not impulsive, but rather the result of intricate conspiracies, carried on over many years and aimed at gaining control over whole fields of activity in order to amass huge profits."

The objectives of organized crime are power and money. The base of its activity is the supplying of illegal goods and services - gambling, narcotics, loan sharking, prostitution and other forms of vice. Of these,
gambling is the most pervasive and the most profitable. It ranges from lotteries (such as the numbers racket), off track betting, and organized betting on sporting events, to illegal gambling casinos. In the large cities of our country, few gambling operators are independent of organized crime groups.

No one knows the total take from illicit gambling. The best estimates available to the Commission indicated an annual profit of perhaps $6 to $7 billion per year. This illegal, non-taxed income is greater than the combined net profit last year of AT&T, General Motors and Standard Oil of New Jersey* - the three largest corporate giants in this country.**

The importation and distribution of narcotics, chiefly heroin, is the second most important activity of organized crime. The estimated annual profit is some $350

*AT&T, $1,987,943,000; General Motors, $1,793,391,691; Standard Oil of New Jersey, $1,090,944,000.

million. This enterprise is organized much like a legitimate importing, wholesaling and retail business. The heroin, originating chiefly in Turkey, is moved through several levels between the importer and the street peddler. The markup has no parallel in legitimate business. Ten kilos of opium, purchased from a Turkish farmer at $350, will be processed into heroin and retailed in New York for $225,000 or more. This cost to the addict, usually an unemployed slum dweller, makes it almost necessary that he steal regularly to support his addiction. The disastrous effect of drugs on those who become addicted is well understood. There is far less understanding of the extent to which drug traffic promotes other crimes.

The third major activity of organized crime is loan sharking. Operating through an elaborate structure, large sums of cash are filtered down to street level loan sharks who deal directly with borrowers. Interest rates vary widely, with 20% a week not being unusual. The loan shark is more interested in perpetuating interest payments than in collecting principal. Force and threats of
force of the most brutal kind, are customarily used - both to collect interest and to prevent borrowers from reporting to the police.

In all of these illicit operations the "customers" - in reality the victims - are the people least able to afford criminal exploitation. They are the poor, the uneducated and the culturally deprived; in the great cities, where organized crime flourishes, the victims come largely from the ghettos. Their number is legion.

But organized crime's expanding activities are not limited to illicit goods and services. To an increasing extent, and with the profits from these activities, organized crime is infiltrating legitimate businesses and unions. In some cities, it dominates juke box and vending machine distribution. Its ventures range from laundries, restaurants and bars to funeral homes and cemeteries. Through the use of force and intimidation, monopolies in the service or the product are frequently established and maintained.

The full extent of this penetration of legitimate business is not known. But it is national in scope and
increasing steadily, with some nationwide manufacturing and service industries already believed to be under racketeering control.*

The basic core of organized crime in this country consists of 24 groups, operating as criminal cartels. Originally known as the Mafia, they are now called La Cosa Nostra. The 24 groups are loosely controlled at the top by a national body of overseers. J. Edgar Hoover describes the organization as follows:

"La Cosa Nostra is the largest organization of the criminal underworld in this country. . . . They have committed almost every crime under the sun. . . .

"La Cosa Nostra is a criminal fraternity whose membership is Italian either by birth or national origin. It has been found to control major racket activities in many of our larger metropolitan areas. . . . It operates on a nationwide basis. . . , and until recently it carried on its activities with almost complete secrecy. It functions as a criminal cartel, adhering to its own body of 'law and justice'.

*Nor have the unions escaped the grasping hand of organized crime. Control of labor provides unique opportunities for stealing union funds, extorting money by threat of labor strife, and providing pension and welfare funds to finance business ventures.
"The twenty four groups, each known as a 'family' vary in size from as many as 700, to as few as 20. Each group is tightly organized and carefully structured - to assure loyalty, discipline and efficiency, and particularly to protect the upper echelons from the law."

At least two aspects of organized crime characterize it as a unique form of criminal activity. The first is systematic corruption - usually by bribery of police and public officials.

The second is rigid discipline, maintained through the position of "enforcer". It is his indelicate duty to maintain undeviating loyalty by the maiming and killing of recalcitrant or disloyal members.

The efficiency of these professional enforcers is such that even the federal government, in organized crime prosecutions, can protect witnesses only by almost total confinement. Indeed, it has been necessary - to protect witnesses from this retribution - to change their physical appearances, change their names, and even to remove them from the country. Incredible as it seems, this is a measure of the impotence of our law enforcement.
Why Organized Crime Lives Above the Law

Why is it that we are so helpless in the face of such arrogance and criminality? This question received the most careful attention by the Commission. We found a number of reasons:

1. Lack of Resources. Effective investigation and prosecution of organized crime require heavy commitments of time and resources by experienced manpower. The necessary commitment of resources has simply not been made - by the federal government or any state or local government.

2. Lack of Coordination. Organized crime is national in scope. Our system of law enforcement is essentially local. The FBI makes a valiant effort to encourage - it cannot command - cooperation and coordination. But its resources are too thin, and the local response is often uninformed - and sometimes already corrupted.

3. Absence of Strategic Intelligence. Fighting organized crime is a form of warfare - against an enormously rich and well disciplined enemy. Police intelligence is
usually tactical, being directed toward a specific prosecution. The greater need is for true strategic intelligence on the capabilities, intentions and vulnerability of organized crime groups.

4. **Failure to Impose Adequate Sanctions.** The penalties imposed by law and the courts are usually inadequate to deter this type of crime. One difficulty is that the leaders are seldom brought to court. This causes judges, perhaps understandably, to be reluctant to impose stiff sentences on the underlings. Bookies, for example, are rarely jailed. In my view, a far stern form of justice must be meted out - whether the guilty defendant is a lowly bookie or a syndicate head.

5. **Lack of Public and Political Commitment.** Much of the urban public wants the services provided by organized crime. This tends to blunt the sort of demand, by an outraged public, which would assure more effective law enforcement. Moreover, there is frequently the corrosive effect of bribery and corruption which reaches into government itself.
6. **Difficulty in Obtaining Evidence.** I have saved until last the single most important reason why organized crime flourishes beyond the reach of the law. This is the difficulty of obtaining evidence, admissible in court, for conviction of its leaders. There is no secret as to the identity of many of these leaders. Their names are known to the police, the press and often to the public. They live in luxury, are often influential in their communities, and even become the subject of admiration—especially by the young and witless. They are living proof that crime does pay in America.

Yet, these known robber barons of the mid-20th Century are rarely brought to justice because our system of law handicaps itself. These handicaps take many forms. Some are rooted in our Bill of Rights, as construed and enlarged by the courts.
The Need for Electronic Surveillance

This morning I shall speak only of one of these limitations: namely, that which effectively prevents the use against these criminals of modern scientific methods of detection. I refer, of course, to wiretapping and bugging.

Organized crime, astutely taking advantage of our self-imposed restraints, operates largely through unwritten communications - word of mouth and the telephone. Records so familiar to legitimate business are never maintained. Massive gambling operations, in particular, are conducted nationwide through telephonic communications.

Under present federal law, we have the insensible anomaly of permitting wiretapping, provided the information obtained is not publicly used - in court or elsewhere. There is no federal law with respect to bugging. State laws vary widely - both as to wiretapping and bugging - with doubt still existing whether federal law preempts the field. In sum, the present legislative situation is - as the Commission found - intolerable.
Congress is currently debating a new federal law. There are, broadly, three positions: (i) electronic surveillance by law enforcement should be permitted, and the product used in evidence, without restraint other than constitutional limitations; (ii) such surveillance should be denied to law enforcement entirely, except only in espionage cases; or (iii) it should be allowed against major crime, upon court order and subject to carefully defined limitations.

We rightly cherish the privacy of citizens in their conversations. Indeed, unless substantial privacy exists the very fundamentals of free speech are threatened. Unrestrained wiretapping would be bad enough, but bugging is an even more repulsive form of intrusion. Progress in electronics permits conversations to be bugged at distances of hundreds of feet and through the most minaturized and ingenious devices. Certainly, no serious thought should be given to granting an unlimited right to eavesdrop.

At the other end of the spectrum of this argument, the view is strongly held that privacy is too dear a right
to be entrusted even to judicial discretion, and that the
only solution is absolute prohibition - under any and all
circumstances - of the use of wiretapping or bugging to
combat crime.

The middle ground, of court controlled electronic
surveillance, seems far wiser to me than either of the
foregoing extremes. This is a middle course which has
proved successful in New York for some twenty years. It
is the position advocated for many years, until recently,
by the Department of Justice.*

The essence of this middle ground is to allow
electronic surveillance by law enforcement in its investiga-
tion of major crime, but only pursuant to prior order of
a judge upon a proper showing of need and probable cause
by a responsible law enforcement official.**Legislation

*See testimony before various committees of Congress; see

**There should also be carefully defined limitations as
to place, duration, ultimate disclosure and reporting.
to this effect should also outlaw, with appropriate penalties, all private and unauthorized use of such surveillance.

In my judgment, this middle course, would protect and preserve privacy more effectively than would legislation which denies to law enforcement all use of these modern techniques of crime detection. The absolute prohibition would simply not be obeyed, as the need for this type of evidence in certain categories of crime is so compelling that surveillance would be accomplished surreptitiously.

There are some who argue that this need of law enforcement has not in fact been demonstrated. One wonders what level of demonstration is required. The overwhelming majority of law enforcement officials believe that this type of evidence is indispensable to reach the higher echelons of organized crime.

The most experienced district attorney in the United States in this field, Frank Hogan of New York, has testified that electronic surveillance is "the single most valuable weapon in law enforcement's fight against organized crime. Mr. Hogan has further testified under oath that without wiretapping,
then permitted by New York law, his office could never have convicted Luciano, Jimmy Hines, Shapiro and other hoodlums.*

As the Crime Commission found: "Only in New York have law enforcement officials achieved some level of continuous success in bringing prosecutions against organized crime." This was possible because New York permitted court-authorized wiretapping until federal court decisions clouded the legality of this procedure.

A majority of the members of the President's Commission were convinced of the necessity of this type of evidence if law enforcement is to have any reasonable chance of confronting organized crime successfully.

Nor must we rely solely on American experience.

A Privy Council study in Great Britain concluded that it

*Responsible law enforcement experts who have testified in favor of federal legislation allowing controlled wiretapping include the following: Francis Biddle, Ferdinand Pecora, Robert F. Kennedy, Anthony P. Savarese, Jr. (Chairman, New York Joint Legislative Committee on Privacy of Communications), Herbert J. Miller, Jr., Judge J. Edward Lumbard, Frank O'Connor and numerous others. Support for such legislation has also come from the Association of the Bar of the City of New York and the New York County Lawyers Association.
would be neither wise nor prudent "to deprive the police of this necessary weapon."*

Indeed, I know of no other nation which imposes the type of limitations on law enforcement now being advocated in our country.

The Balance of Values

It is true, of course, that no other nation has a Bill of Rights as revered as ours, and no other nation provides so elaborately for the rights of persons suspected or accused of crime. Indeed, a case is now pending before the United States Supreme Court in which the constitutionality of the New York electronics surveillance law is at issue. Congressional action obviously should await and be governed by the outcome of this case.

But whatever the outcome may be, the fundamental issue will remain. How should we, in a free society, balance - to the greatest good of all - the interest of privacy against the needs of law enforcement. The balance actually is between the possibility of some limited intrusion on the privacy of a few innocent people as weighted against the urgent need for more effective means of dealing with the most sinister type of crime.

The middle course, tried and tested in New York, seems to be the sensible answer. This course will result, it is true, in the interception of conversations by some innocent people - despite all of the safeguards. But is not this a small price to pay to protect our people and our institutions from this type of predatory criminal activity.

Or, putting it different, is it really either necessary or socially desirable for the most powerful nation in the world to so shackle itself that cartels of organized criminals are free to prey upon millions of decent citizens and to make a mockery of the rule of law?
It seems to me that the answer is crystal clear, and that appropriate remedial action is long overdue.
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.

It is the purpose of this title to (1) encourage States and units of general local government to prepare and adopt comprehensive plans based upon their evaluation of State and local problems of law enforcement; (2) authorize grants to States and units of local government in order to improve and strengthen law enforcement; and (3) encourage research and development directed toward the improvement of law enforcement and the development of new methods for the prevention and reduction of crime and the detection and apprehension of criminals.

Part A—Law Enforcement Assistance Administration

Sec. 101. (a) There is hereby established within the Department of Justice, under the general authority of the Attorney General, a Law Enforcement Assistance Administration (hereafter referred to in this title as "Administration").

(b) The Administration shall be composed of an Administrator of Law Enforcement Assistance and two Associate Administrators of Law Enforcement Assistance, who shall be appointed by the President, by and with the advice and consent of the Senate. No more than two members of the Administration shall be the same political party, and members shall be appointed with due regard to their fitness, knowledge, and experience to perform the functions, powers, and duties vested in the Administration by this title.

(c) It shall be the duty of the Administration to exercise all of the functions, powers, and duties created and established by this title, except as otherwise provided.

Part B—Planning Grants

Sec. 201. It is the purpose of this part to encourage States and units of general local government to prepare and adopt comprehensive law enforcement plans based upon their evaluation of State and local problems of law enforcement.
Sec. 202. The Administration shall make grants to the States for the establishment and operation of State law enforcement planning agencies (hereinafter referred to in this title as "State planning agencies") for the purpose of establishing comprehensive State plans required under section 303 of this title. Any State may make application to the Administration for such grants within six months of the date of enactment of this Act.

Sec. 203. (a) A grant made under this part to a State shall be utilized by the State to establish and maintain a State planning agency such agency shall be designated by the State and shall be subject to the jurisdiction of the State planning agency, and shall be representative of law enforcement agencies of the State and of the units of general local government within the State.

(b) The State planning agency shall—

(1) develop, in accordance with part C, a comprehensive state-wide plan for the improvement of law enforcement throughout the State;

(2) define, develop, and correlate programs and projects for the State and the units of general local government in the State or combinations of States or units for improvement in law enforcement; and

(3) establish priorities for the improvement in law enforcement throughout the State.

(c) The State planning agency shall make such arrangements that such agency deems necessary to provide that at least 40 per centum of all Federal funds granted to such agency under this part for any fiscal year will be available to units of general local government or combinations of such units to enable such units and combinations of such units to participate in the formulation of the comprehensive State plan required under this part. Any portion of such funds received by any State for any fiscal year not required for the purpose set forth in the preceding sentence shall be available for expenditure by such State agency from time to time to improve police capabilities, public safety and during such year the Administration may fix, for the development by it of the State plan required under this part.

Sec. 204. A Federal grant authorized under this part shall not exceed 90 per centum of the expenses of the establishment and operation of the State planning agency, including the preparation, development, and revision of plans required by part C. Where Federal grants under this part are made directly to units of general local government as authorized by section 205, the grant shall not exceed 50 per centum of the expenses of the expenses of local planning, including the preparation, development, and revision of plans required by part C. A Federal grant authorized under this part for a fiscal year shall be allocated by the Administration among the States for use therein by the State planning agency or units of general local government, as the case may be. The Administration shall allocate no more than one-third of any grant made under this part to States having populations of $100,000 each to the States; and it shall then allocate the remainder of such funds available among the States according to their relative populations.

PART C—GRANTS FOR LAW ENFORCEMENT PURPOSES

Sec. 201. (a) It is the purpose of this part to encourage States and units of general local government to carry out programs and projects to improve and strengthen law enforcement.

(b) The Administration is authorized to make grants to States having comprehensive State plans approved by it under this part, for—

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(1) Public protection, including the development, demonstration, evaluation, implementation, and purchase of methods, devices, facilities, and equipment designed to improve and strengthen law enforcement and reduce crime in public and private places.

(2) The recruiting of law enforcement personnel and the training of personnel in law enforcement.

(3) Public education relating to crime prevention and encouraging respect for law and order, including education in schools and programs to enhance understanding of and cooperation with law enforcement agencies.

(4) Construction of buildings or other physical facilities which would fulfill or implement the purposes of this section.

(5) The organization, education, and training of special law enforcement units to combat organized crime and to establish and develop State organized crime prevention councils, the recruiting and training of special investigative and protective personnel, and the development of systems for collecting, storing, and disseminating information relating to the control of organized crime.

(6) The organization, education, and training of regular law enforcement officers, special law enforcement units, and law enforcement reserve units for the prevention, detection, and control of riots and other violent civil disorders, including the acquisition of riot control equipment.

(7) The recruiting, organization, training and education of community service officers to serve with local and State law enforcement agencies in the discharge of their duties through such activities as recruiting; improvement of police-community relations and grievance resolution mechanisms; community patrol activities; encouragement of neighborhood participation in crime prevention and public safety efforts; and other activities designed to increase public safety and the objectives of this section: Provided, That in no case shall a grant be made under this subcategory without the approval of the local government or local law enforcement agency.

(c) The amount of any Federal grant made under paragraph (5) or (6) of subsection (b) of this section may not exceed 50 per centum of the cost of the program or project specified in the application for such grant. The amount of any grant made under paragraph (4) of subsection (b) of this section may be up to 50 per centum of the cost of the program or project specified in the application for such grant: Provided, That no part of any grant for the purpose of construction of buildings or other physical facilities shall be used for land acquisition.

(d) Not more than 60 per centum of any such grant made under this part may be expended for the compensation of personnel. The amount of any such grant expended for the compensation of personnel shall not exceed the amount of State or local funds made available to increase such compensation. The limitations contained in this subsection shall not apply to the compensation of personnel for time engaged in conducting or undergoing training programs.

Sec. 209. Any State desiring to participate in the grant program under this part shall establish a State planning agency as described in part B of this title and shall within six months after approval of a planning grant under part B submit to the Administration through...
such State planning agency a comprehensive State plan formulated pursuant to part B of this title.

Sec. 303. The Administration shall make grants under this title to a State planning agency if such agency has on file with the Administration an approved comprehensive State plan for a period of not less than one year in age) which conforms with the purposes and requirements of this title. Each such plan shall—

(1) provide for the administration of such grants by the State planning agency;

(2) provide that at least 75 per centum of all Federal funds granted to the State planning agency under this part for any fiscal year will be available to units of general local government or combinations of such units for the development and implementation of programs and projects for the improvement of law enforcement;

(3) adequately take into account the needs and requests of the units of general local government in the State in any fiscal year not required for the purposes set forth in such paragraph;

(4) incorporate innovations and advanced techniques and contain a comprehensive outline of priorities for the improvement and coordination of all aspects of law enforcement dealt with in the title, including descriptions of—(A) general needs and problems; (B) existing systems; (C) available resources; (D) organizational systems and administrative machinery for implementing the plan; (E) the direction, scope, and general types of improvements to be made in the future; and (F) the extent appropriate, the relationship of the plan to other relevant State or local law enforcement plans and other State and local law enforcement programs; and

(5) provide for effective utilization of existing facilities and permit and encourage units of general local government to combine or provide for appropriate review of procedures of actions taken by the State planning agency disapproving an application for which funds are available or terminating or refusing to continue financial assistance to units of general local government or combinations of such units;

(6) demonstrate the willingness of the State and units of general local government to assume the costs of improvement programs contemplated by the statewide comprehensive plan and the programs and projects contemplated by units of general local government;

(7) set forth policies and procedures designed to assure that Federal funds made available under this part will not be used to supplant State or local funds, but to increase the amounts of such funds that would in the absence of such Federal funds be available for such purposes;

(8) provide for such fiscal control and fund accounting procedures as may be necessary to assure proper disbursement of and accounting of funds received under this part; and

(9) provide for the submission of such reports in such form and containing such information as the Administration may reasonably require.

Any portion of the 75 per centum to be made available pursuant to paragraph (2) of this section in any State in any fiscal year not required for the purposes set forth in such paragraph shall be available for expenditure by such State agency from time to time during such year as the Administration may fix, for the development and implementation of programs and projects for the improvement of law enforcement and in conformity with the State plan.

Sec. 304. State planning agencies shall receive applications for financial assistance from units of general local government and combinations of such units. When a State planning agency determines that an application is in accordance with the purposes stated in section 301 and is in conformity with any existing statewide comprehensive law enforcement plan, the State planning agency is authorized to disburse funds to the applicant.

Sec. 305. Where a State fails to make application for a grant to establish a State planning agency pursuant to part B of this title within six months after the date of enactment of this Act, or where a State fails to file a comprehensive plan pursuant to part B within six months after approval of a planning grant to establish a State planning agency, the Administration may make grants under part B and part C of this title to units of general local government or combinations of such units: Provided, however, That any such unit or combination of such units must certify that it has submitted a copy of its application to the chief executive of the State in which such unit or combination of such units is located. The chief executive shall be given not more than thirty days from date of receipt of the application to submit to the Administration in writing an evaluation of the project set forth in the application. Such evaluation shall include comments on the relationship of the application to other applications then pending, and to existing or proposed plans in the State for the development of new approaches to and improvements in law enforcement. If an application is submitted by a combination of units of general local government which is located in more than one State, such application requirements submitted to the chief executive of each State in which the combination of such units is located. No grant under this section to a local unit of general governmental shall be for an amount in excess of 60 per centum of the cost of the project or program with respect to which it was made. 

Sec. 306. Funds appropriated to make grants under this part for a fiscal year shall be allocable by the Administration among the States for use therein by the State planning agency or units of general local government. The Administration may determine, plus such additional amounts as may be made available by virtue of the application of the provisions of section 509 to the grant to any State.

In making grants under this part, the Administration shall be for the prevention, detection, and control of organized crime and of riots and other violent civil disorders.

(b) Notwithstanding the provisions of section 306 of this part, until August 11, 1966, the Administration is authorized to make grants for programs and projects dealing with the prevention, detection, and control of organized crime and of riots and other violent civil disorders.
control of riots and other violent civil disorders on the basis of applications describing in detail the programs, projects, and costs of the programs for which the grants will be used, and the relationship of the programs and projects to the applicant's general program for the improvement of law enforcement.

PART D—TRAINING, EDUCATION, RESEARCH, DEMONSTRATION, AND SPECIAL GRANTS

Sec. 401. It is the purpose of this part to provide for and encourage training, education, research, and development for the purpose of improving law enforcement and developing new methods for the prevention and reduction of crime, and the detection and apprehension of criminals.

(a) There is established within the Department of Justice a National Institute of Law Enforcement and Criminal Justice (hereafter referred to in this part as "Institute"). The Institute shall be under the general authority of the Administration. It shall be the purpose of the Institute to encourage research and development to improve and strengthen law enforcement.

(b) The Institute is authorized—

(1) to make grants to, or enter into contracts with, public agencies, institutions of higher education, or private organizations to conduct research, demonstrations, or special projects pertaining to the purposes described in this title, including the development of new or improved approaches, techniques, systems, equipment, and devices to improve and strengthen law enforcement, including, but not limited to, the effectiveness of programs and projects carried out under this title;

(2) to make continuing studies and undertake programs of research to develop new or improved approaches, techniques, systems, equipment, and devices to improve and strengthen law enforcement, including, but not limited to, the effectiveness of projects and programs funded under this title;

(3) to carry out programs of behavioral research designed to provide more accurate information on the causes of crime and the effectiveness of various programs and projects in combating crime, and to evaluate the success of correctional procedures;

(4) to make recommendations for action which can be taken by Federal, State, and local governments and by private persons and organizations to improve and strengthen law enforcement;

(5) to carry out programs of instructional assistance consisting of fellowships for the programs provided under this section, and special workshops for the presentation and dissemination of information resulting from research, demonstrations, and special projects authorized by this title;

(6) to carry out a program of collection and dissemination of information obtained by the Institute or other Federal agencies, public agencies, institutions of higher education, or private persons or organizations engaged in projects under this title, including information relating to new or improved approaches, techniques, systems, equipment, and devices to improve and strengthen law enforcement; and

(7) to establish a research center to carry out the programs described in this section.

Sec. 403. A grant authorized under this part may be up to 100 per cent of the total cost of each project for which such grant is made. The Administration shall require the use of funds, as a condition of approval of a grant under this part, that the recipient contribute money, facilities, or services to carry out the purpose for which the grant is sought.

Sec. 404. (a) The Director of the Federal Bureau of Investigation is authorized to conduct training programs at the Federal Bureau of Investigation National Academy at Quantico, Virginia, to provide, at the request of a State or unit of local government, training for State and local law enforcement personnel;

(b) to develop new or improved approaches, techniques, systems, equipment, and devices to improve and strengthen law enforcement;

(c) to assist in conducting, at the request of a State or unit of local government, local and regional training programs for the training of State and local law enforcement personnel. Such training shall be provided only for persons actually employed as State police officers or highway patrol officers, and sheriffs and their deputies, and such other persons as the State or unit may nominate for police training while such persons are employed by the State or unit.

Sec. 405. (a) Subject to the provisions of this section, the Law Enforcement Assistance Act of 1965 (79 Stat. 928) is repealed:

(1) The Administration, or the Attorney General until such time as the members of the Administration are appointed, is authorized to obligate funds for the continuation of projects approved under the Law Enforcement Assistance Act of 1965 prior to the date of enactment of this Act to the extent that such approval provided for continuation.

(2) Any funds obligated under subsection (1) of this section and all activities necessary or appropriate for the review under subsection (3) of this section may be carried out with funds previously appropriated to the Administration for the review of eligible projects and programs under subsections (1) and (2) of this section shall be in the discretion of the Administration.

(b) Pursuant to the provisions of subsections (b) and (c) of this section, the Administration is authorized, after appropriate consultation with the Commissioner of Education, to carry out programs of academic educational assistance to improve and strengthen law enforcement.

Sec. 406. Loans. The Administration is authorized to enter into contracts to make and make, payments to institutions of higher education for organizations engaged in projects under this title, including information relating to new or improved approaches, techniques, systems, equipment, and devices to improve and strengthen law enforcement.

(1) The Administration is authorized to make loans, not exceeding $1,800 per academic year to any person, to persons enrolled on a full-time basis in undergraduate or graduate programs approved by the Administration and leading to degrees or certificates in areas directly related to law enforcement or preparing for employment in law enforcement, with special consideration to police or correctional personnel of States or units of general local government on academic leave to earn such degrees or certificates. Loans to persons assisted under this subsection shall be made on such terms and conditions as the Administration and the institution offering such programs may determine, except that the total amount of any such loan, plus interest, shall be canceled for service as a full-time officer or employee of a law enforcement agency at the rate of 25 per centum of the total

30 USC 3001 note.
amount of such loans plus interest for each complete year of such service or its equivalent of such service, as determined under regulations of the Administration.  

(c) The Administration is authorized to enter into contracts to make, and make, payments to institutions of higher education for tuition and fees, not exceeding $500 per academic quarter or $300 per semester for any person, for officers of any publicly funded law enforcement agency employed on a full-time or part-time basis in courses included in an undergraduate or graduate program which is approved by the Administration and which leads to a degree or certificate in an area related to law enforcement or an area suitable for persons employed in law enforcement. Assistance under this subsection may be granted only on behalf of an applicant who enters into an agreement to remain in the service of the law enforcement agency employing such applicant for a period of two years following completion of any course for which payments are provided under this subsection, and in the event such service is not completed, to repay the full amount of such payments on such terms and in such manner as the Administration may prescribe.

**PART E—ADMINISTRATIVE PROVISIONS**

**Sec. 501.** The Administration is authorized, after appropriate consultation with representatives of States and units of general local government, to establish such rules, regulations, and procedures as are necessary to the exercise of its functions, and are consistent with the stated purpose of this title.

**Sec. 502.** The Administration may delegate to any officer or official of the Administration, or, with the approval of the Attorney General, to any officer of the Department of Justice such functions as it deems appropriate.

**Sec. 503.** The functions, powers, and duties specified in this title to be carried out by the Administration shall not be transferred elsewhere in the Department of Justice or elsewhere hereafter authorized by the Congress.

**Sec. 504.** In carrying out its functions, the Administration, or upon authorization of the Administration, any member thereof or any hearing examiner assigned to or employed by the Administration, shall have the power to hold hearings, issue summonses, administer oaths, examine witnesses, and receive evidence at any place in the United States it may designate.

**Sec. 505.** Section 5315 of title 5, United States Code, is amended by adding at the end thereof—

"(90) Administrator of Law Enforcement Assistance,"  

"(91) Associate Administrator of Law Enforcement Assistance."  

**Officer and employees.**

**Sec. 507.** Subject to the civil service and classification laws, the Administration is authorized to select, appoint, employ, and fix compensation of such officers and employees, including hearing examiners, as shall be necessary to carry out its powers and duties under this title.

**Sec. 508.** The Administration is authorized, on a reimbursable basis when appropriate, to use the services, equipment, personnel, and facilities of the Administration. The Administration is further authorized to confer with and avail itself of the cooperation, services, records, and facilities of State, municipal, or other local agencies.

**Sec. 509.** Whenever the Administration, after reasonable notice and opportunity for hearing to an applicant or a grantee under this title, finds that, with respect to any payments made or to be made under this title, there is a substantial failure to comply with—

(a) the provisions of this title;  

(b) regulations promulgated by the Administration under this title; or  

(c) a plan or application submitted in accordance with the provisions of this title;

the Administration shall notify such applicant or grantee that further payments shall not be made (or in its discretion that further payments shall not be made in the manner in which there is such failure), until there is no longer such failure.

**Sec. 510.** (a) In carrying out the functions vested by this title in the Administration, the determination, findings, and conclusions of the Administration shall be final and conclusive upon all applicants, except as hereafter provided.

(b) If the application has been rejected or an applicant has been denied a grant or has had a grant, or any portion of a grant, discontinued, or has been given a grant in a lesser amount than such applicant believes appropriate under the provisions of this title, the Administration shall notify the applicant or grantee of its action and set forth the reason for the action taken. Whenever an applicant or grantee requests a hearing on action taken by the Administration on an application or a grant the Administration, or any authorized officer thereof, is authorized and directed to hold such hearings or investigations at such times and places as the Administration deems necessary, following appropriate and adequate notice to such applicant; and the findings of fact and determinations made by the Administration with respect thereto shall be final and conclusive, except as otherwise provided herein.

If such applicant is still dissatisfied with the findings and determinations of the Administration, following the notice and hearing provided for in subsection (b) of this section, a request may be made for rehearing, under such regulations and procedures as the Administration may establish, and such applicant shall be afforded an opportunity to present such additional information as may be deemed appropriate and pertinent to the matter involved. The findings and determinations of the Administration, following such rehearing, shall be final and conclusive upon all parties concerned, except as hereafter provided.

**Sec. 511.** (a) If any applicant or grantee is dissatisfied with the Administration’s final action with respect to the approval of its application or grant submitted under this title, or any applicant or grantee is dissatisfied with the Administration’s final action under section 509 or section 510, such applicant or grantee may, within sixty days after notice of such action, file with the United States court of appeals for the circuit in which such applicant or grantee is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Administration. The Administration shall thereupon file in the court the record of the proceedings on which the action of the Administration was based, as provided in section 2112 of title 28, United States Code.

**Use of services, equipment, personnel, and facilities of the Administration.** The Administration is further authorized to confer with and avail itself of the cooperation, services, records, and facilities of other governmental agencies, including the Federal Government, and to cooperate with the Department of Justice and such other agencies and instrumentalities in the establishment and
(b) The determinations and the findings of fact by the Administration, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Administration to take further action, supervision, or control over any police force or any other law enforcement agency of any State or any political subdivision thereof.

The determination of law nothing contained in this title shall be construed to authorize the Administration (1) to require, or condition the availability or amount of a grant upon, the adoption by an applicant or grantee under this title of a percentage ratio, quota system, or other program to achieve racial balance or to eliminate racial imbalance in any law enforcement agency, or (2) to deny or discontinue a grant because of the refusal of an applicant or grantee under this title to adopt such a ratio, system, or other program.

Sec. 10. On or before August 31, 1968, and each year thereafter, the Administration shall report to the President and to the Congress on activities pursuant to the provisions of this title during the preceding fiscal year.

Appropriations.
For the purpose of carrying out this title, there is appropriated to be appropriated the sums of $100,111,000 for the fiscal years ending June 30, 1968, and June 30, 1969; $800,000,000 for the fiscal year ending June 30, 1970, and for succeeding fiscal years such sums as the Congress might authorize: Provided, That of the amount appropriated for the fiscal years ending June 30, 1968, and June 30, 1969—

(a) the sum of $25,000,000 shall be for the purposes of part B; and the sum of $60,000,000 shall be for the purposes of part C, of which amount—

(1) not more than $5,500,000 shall be for the purposes of section 302(b)(3);

(2) not more than $15,000,000 shall be for the purposes of section 302(b)(5), of which not more than $1,000,000 may be used within any one State; and

(3) not more than $15,000,000 shall be for the purposes of section 302(b)(6); and

(4) not more than $10,000,000 shall be for the purposes of correction, probation, and parole; and

the sum of $25,111,000 shall be for the purposes of section 302 of this title, of which not more than $10,000,000 shall be for the purposes of section 404.

Sec. 521. (a) Each recipient of assistance under this Act shall keep such records as the Administration shall prescribe, including records which fully disclose the amount and disposition by such recipient of any sums appropriated under this Act for purposes of this title, and make such reports to the Administration as may be required by the Administration.

(b) The Administration and the Comptroller General of the United States, or any of their duly authorized representatives, and any person or other entity having access for purposes of audit and examinations to any books, documents, papers, and records of the recipients that are pertinent to the grants received under this title.

Sec. 321. Section 204(a) of the Demonstration Cities and Metropolitan Development Act of 1966 is amended by inserting "law enforcement facilities," immediately after "transportation facilities."
PART F—DEFINITIONS

TITLE II—ADMISSIBILITY OF CONFESSIONS, REVIEWABILITY OF ADMISSION IN EVIDENCE OF CONFESSIONS IN STATE CASES, ADMISSIBILITY IN EVIDENCE OF EYE WITNESS TESTIMONY, AND PROCEDURES IN OBTAINING WRITS OF HABEAS CORPUS

Sec. 601. As used in this title—
(a) "Law enforcement" means all activities pertaining to crime prevention or reduction and enforcement of the criminal law.

(b) "Organized crime" means the unlawful activities of the members of a highly organized, disciplined association engaged in supplying illegal goods and services, including but not limited to gambling, prostitution, loan-sharking, narcotics, labor racketeering, and other unlawful activities of members of such organizations.

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

(d) "Unit of general local government" means any city, township, town, borough, parish, village, or any other general purpose political subdivision of the State, or an agency so designated, which performs the law enforcement functions as determined by the Secretary of the Interior.

(e) "Combination" as applied to States or units of general local government means any grouping or joining together of such States or units for the purpose of preparing, developing, or implementing a law enforcement plan.

(f) "Construction" means the erection, acquisition, expansion, or repair (but not including minor remodeling or minor repairs) of new or existing buildings or other physical facilities, and the acquisition or installation of initial equipment therefor.

(g) "State organized crime commission council" means a council composed of not more than seven persons established pursuant to State law or established by the chief executive of the State for the purpose of this title, or an existing agency so designated, which council shall be broadly representative of law enforcement officials within such State and whose members by virtue of their training or experience shall be knowledgeable in the prevention and control of organized crime.

(h) "Metropolitan area" means a standard metropolitan statistical area as established by the Bureau of the Census, or any modifications and extensions as the Administration may determine to be appropriate.

(i) "Public agency" means any State, unit of local government, combination of such States or units, or any department, agency, or instrumentality of any of the foregoing.

(j) "Institution of higher education" means any such institution as defined by section 301(a) of the Higher Education Act of 1965 (79 Stat. 1259; 20 U.S.C. 1161(a) (1)), subject, however, to such modifications and extensions as the Administration may determine to be appropriate.

(k) "Community service officer" means any citizen with the capacity, motivation, integrity, and stability to assist in or perform police work but who may not meet the standards for employment as a regular police officer selected from the immediate locality of the police department of which he is to be a part, and meeting such other qualifications promulgated in regulations promulgated by the Secretary of the Interior.

June 19, 1968 - 13 - Pub. Law 90-351

SEC. 701. (a) Chapter 225, title 18, United States Code (relating to witnesses and evidence), is amended by adding at the end thereof the following new sections:

"§ 3501. Admissibility of confessions

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law enforcement officer or law enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a commissioner or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: Provided, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such commissioner or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such commissioner or other officer.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant had been advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

(c) In any criminal prosecution by the United States or by the District of Columbus, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law enforcement officer or law enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a commissioner or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention.
Chapter 119. Wire Interception and Interception of Oral Communications

§ 2510. Definitions

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

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

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

(d) To safeguard the privacy of innocent persons, the interception of wire or oral communications with the consent of any of the parties to the conversation has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and direction of the court.

Section 2518. Procedure for interception of wire or oral communications.

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

Chapter 119. Wire Interception and Interception of Oral Communications

§ 2510. Definitions

"As used in this chapter—

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

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

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

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(d) To safeguard the privacy of innocent persons, the interception of wire or oral communications with the consent of any of the parties to the conversation has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and direction of the court.

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

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(d) To safeguard the privacy of innocent persons, the interception of wire or oral communications with the consent of any of the parties to the conversation has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and direction of the court.

Section 2518. Procedure for interception of wire or oral communications.

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

Chapter 119. Wire Interception and Interception of Oral Communications

§ 2510. Definitions

"As used in this chapter—

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

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

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

(d) To safeguard the privacy of innocent persons, the interception of wire or oral communications with the consent of any of the parties to the conversation has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and direction of the court.
authorized by law to prosecute or participate in the prosecution of such offenses; "(8) 'contents', when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication; "(9) 'Judge of competent jurisdiction' means- "(a) a judge of a United States district court or a United States court of appeals; and "(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications; "(10) 'common carrier' means any person who, for hire or reward, agrees to convey messages or information in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication; Provided, That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks. "(11) 'aggrieved person' means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed. "§ 2511. Interception and disclosure of wire or oral communications prohibited "(1) Except as otherwise specifically provided in this chapter any person who- "(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication; "(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any wire or oral communication when- "(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication, or interferes with the transmission of such communication; or "(ii) such device transmits communications by radio, or operates in concert with another device; and "(ii) such device transmits communications by radio, or operates in concert with another device; or "(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or "(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or "(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;" "(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information obtained through the interception of a wire or oral communication in violation of this subsection; or "(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection shall be fined not more than $10,000 or imprisoned not more than five years, or both.
under this section, by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General.

§ 2514. Immunity of witnesses

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

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

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

§ 2516. Authorization for interception of wire or oral communications

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

(a) any offense punishable by death or by imprisonment for more than one year under sections 2254 through 2267 of title 18 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of title 29 of this title: chapter 37 (relating to espionage), chapter 100 (relating to sabotage), chapter 115 (relating to treason), or chapter 106 (relating to sedition); and

(b) a violation of section 186 or section 501 of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves mur-
(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 202 (bribery in sporting contests), section 1984 (transmission of wagering information), section 1985 (influencing or injuring an officer, juror, or witness generally), section 1991 (obstruction of civil rights), section 1992 (interference with civil complaints), section 1993 (interference with civil rights activities), section 1994 (interference with civil rights proceedings), section 1995 (interference with civil rights enterprises), section 1996 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1997 (theft from employees' benefit plans), section 1998 (interference with civil rights activities), section 224 (bribery in sporting contests), section 1952 (interference with commerce by threats or violence), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 (theft from employees' benefit plans), section 1956 (interference with civil rights activities), section 1957 (interference with civil rights proceedings), section 1958 (interference with civil rights enterprises), section 1959 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1960 (theft from employees' benefit plans), section 1961 (interference with civil rights activities), section 1962 (interference with civil rights proceedings), section 1963 (interference with civil rights enterprises), section 1964 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1965 (theft from employees' benefit plans), section 1966 (interference with civil rights activities), section 1967 (interference with civil rights proceedings), section 1968 (interference with civil rights enterprises), section 1969 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1970 (theft from employees' benefit plans), section 1971 (interference with civil rights activities), section 1972 (interference with civil rights proceedings), section 1973 (interference with civil rights enterprises), section 1974 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1975 (theft from employees' benefit plans), section 1976 (interference with civil rights activities), section 1977 (interference with civil rights proceedings), section 1978 (interference with civil rights enterprises), section 1979 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1980 (theft from employees' benefit plans), section 1981 (interference with civil rights activities), section 1982 (interference with civil rights proceedings), section 1983 (interference with civil rights enterprises), section 1984 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1985 (theft from employees' benefit plans), section 1986 (interference with civil rights activities), section 1987 (interference with civil rights proceedings), section 1988 (interference with civil rights enterprises), section 1989 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1990 (theft from employees' benefit plans), section 1991 (interference with civil rights activities), section 1992 (interference with civil rights proceedings), section 1993 (interference with civil rights enterprises), section 1994 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1995 (theft from employees' benefit plans), section 1996 (interference with civil rights activities), section 1997 (interference with civil rights proceedings), section 1998 (interference with civil rights enterprises), section 1999 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 2000 (theft from employees' benefit plans), section 2001 (interference with civil rights activities), section 2002 (interference with civil rights proceedings), section 2003 (interference with civil rights enterprises), section 2004 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 2005 (theft from employees' benefit plans), section 2006 (interference with civil rights activities), section 2007 (interference with civil rights proceedings), section 2008 (interference with civil rights enterprises), section 2009 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 2010 (theft from employees' benefit plans), section 2011 (interference with civil rights activities), section 2012 (interference with civil rights proceedings), section 2013 (interference with civil rights enterprises), section 2014 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 2015 (theft from employees' benefit plans), section 2016 (interference with civil rights activities), section 2017 (interference with civil rights proceedings), section 2018 (interference with civil rights enterprises), section 2019 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 2020 (theft from employees' benefit plans), section 2021 (interference with civil rights activities), section 2022 (interference with civil rights proceedings), section 2023 (interference with civil rights enterprises), section 2024 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 2025 (theft from employees' benefit plans), section 2026 (interference with civil rights activities), section 2027 (interference with civil rights proceedings), section 2028 (interference with civil rights enterprises), section 2029 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 2030 (theft from employees' benefit plans), section 2031 (interference with civil rights activities), section 2032 (interference with civil rights proceedings), section 2033 (interference with civil rights enterprises), section 2034 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 2035 (theft from employees' benefit plans), section 2036 (interference with civil rights activities), section 2037 (interference with civil rights proceedings), section 2038 (interference with civil rights enterprises), section 2039 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 2040 (theft from employees' benefit plans), section 2041 (interference with civil rights activities), section 2042 (interference with civil rights proceedings), section 2043 (interference with civil rights enterprises), section 2044 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 2045 (theft from employees' benefit plans), section 2046 (interference with civil rights activities), section 2047 (interference with civil rights proceedings), section 2048 (interference with civil rights enterprises), section 2049 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 2050 (theft from employees' benefit plans), section 2051 (interference with civil rights activities), section 2052 (interference with civil rights proceedings), section 2053 (interference with civil rights enterprises), section 2054 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 2055 (theft from employees' benefit plans), section 2056 (interference with civil rights activities), section 2057 (interference with civil rights proceedings), section 2058 (interference with civil rights enterprises), section 2059 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 2060 (theft from employees' benefit plans), section 2061 (interference with civil rights activities), section 2062 (interference with civil rights proceedings), section 2063 (interference with civil rights enterprises), section 2064 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 2065 (theft from employees' benefit plans), section 2066 (interference with civil rights activities), section 2067 (interference with civil rights proceedings), section 2068 (interference with civil right
places specified in the application, and the action taken by the judge on each such application; and

"(f) where the application is for the extension of an order, a statement setting forth the results furnished as to the interception, or a reasonable explanation of the failure to obtain such results;"

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

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

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

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

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

"(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

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

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

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

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

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

"(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate after expiration of such period, or in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (c) of this section. The period of extension shall not be longer than thirty days, unless the judge determines that the extension is necessary to achieve the purpose for which it was granted and in no event for longer than thirty days. Extensions of orders shall be authenticated by the judge, and shall not be destroyed except upon an order of the judge, or when the application for the order is denied, whichever is earlier. The contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be made as provided for in subsection (d) of this section on the person named in the application.

"(5) Each order authorizing or approving the interception of any wire or oral communication on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such a way as will protect the recording from editing or other alterations. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (c) of this section. The period of extension shall not be longer than thirty days, unless the judge determines that the extension is necessary to achieve the purpose for which it was granted and in no event for longer than thirty days. Extensions of orders shall be authenticated by the judge, and shall not be destroyed except upon an order of the judge, or when the application for the order is denied, whichever is earlier. The contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be made as provided for in subsection (d) of this section on the person named in the application.

"(6) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such a way as will protect the recording from editing or other alterations. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (c) of this section. The period of extension shall not be longer than thirty days, unless the judge determines that the extension is necessary to achieve the purpose for which it was granted and in no event for longer than thirty days. Extensions of orders shall be authenticated by the judge, and shall not be destroyed except upon an order of the judge, or when the application for the order is denied, whichever is earlier. The contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be made as provided for in subsection (d) of this section on the person named in the application.

"(7) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge, otherwise subject to subsection (g) of this section.

"(8) (a) the use or disclosure of the contents of any wire or oral communication intercepted by any means authorized by this chapter shall not be made to the judge until the contents have been presented to him for his use in the enforcement of his order.

"(b) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such a way as will protect the recording from editing or other alterations. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (c) of this section. The period of extension shall not be longer than thirty days, unless the judge determines that the extension is necessary to achieve the purpose for which it was granted and in no event for longer than thirty days. Extensions of orders shall be authenticated by the judge, and shall not be destroyed except upon an order of the judge, or when the application for the order is denied, whichever is earlier. The contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be made as provided for in subsection (d) of this section on the person named in the application.

"(9) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such a way as will protect the recording from editing or other alterations. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (c) of this section. The period of extension shall not be longer than thirty days, unless the judge determines that the extension is necessary to achieve the purpose for which it was granted and in no event for longer than thirty days. Extensions of orders shall be authenticated by the judge, and shall not be destroyed except upon an order of the judge, or when the application for the order is denied, whichever is earlier. The contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be made as provided for in subsection (d) of this section on the person named in the application.

"(10) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge, otherwise subject to subsection (g) of this section.
§ 2519. Reports concerning intercepted wire or oral communications

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(f) the number of convictions resulting from such interceptions and the offenses for which the convictions were obtained and a general assessment of the importance of the interceptions; and

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

(3) In addition to any other right to appeal, the United States Courts shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days from the date the order was entered and shall be diligently prosecuted.
Section 520. Recovery of civil damages authorized

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

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

(b) punitive damages; and

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

A good faith reliance on a court order or on the provisions of section 365(e) of the Communications Act of 1934 (47 Stat. 1103; 47 U.S.C. 605) is amended to read as follows:

"UNAUTHORIZED PUBLICATION OF COMMUNICATIONS"

"As an exception to the provisions of title 5, United States Code, governing appointments in the competitive service, and without regard to the provisions of chapter 51 and subchapter III of chapter 53 of title 5 relating to classification and General Schedule pay rates, but at rates not in excess of the maximum rate for GS-18 of the General Schedule under section 5302 of such title:

(a) an appellee in an appeal or a complaining party in a criminal action brought under this chapter;

(b) a reasonable attorney's fee and other litigation costs reasonably incurred;

(c) a reasonable expert witness fee and other litigation costs reasonably incurred; and

(d) a reasonable cost of any special or investigative services.

The Commission shall make such interim reports as it deems advisable, and it shall make a final report of its findings and recommendations to the President of the United States and to the Congress within the one-year period following the effective date of this subchapter.
June 19, 1968 - 29 - Pub. Law 90-351

TITLE IV—STATE FIREARMS CONTROL ASSISTANCE

FINDINGS AND DECLARATION

Sec. 901. (a) The Congress hereby finds and declares—
(1) that there is a widespread traffic in firearms moving in or otherwise affecting interstate or foreign commerce, and that the existing Federal controls over such traffic do not adequately enable the States to control this traffic within their own borders through the exercise of their police power;
(2) that the ease with which any person can acquire firearms other than a rifle or shotgun (including criminals, juveniles without the knowledge or consent of their parents or guardians, narcotics addicts, mental defectives, armed groups who would subvert the functions of duly constituted public authorities, and others whose possession of such weapons is similarly contrary to the public interest) is a significant factor in the prevalence of lawlessness and violent crime in the United States;
(3) that only through adequate Federal control over interstate and foreign commerce in these weapons, and over all persons engaging in the business of importing, manufacturing, or dealing in them, can this grave problem be properly dealt with, and effective State and local regulation of this traffic be made possible;
(4) that the acquisition on a mail-order basis of firearms other than a rifle or shotgun by nonlicensed individuals, from a place other than their State of residence, has materially tended to supplant the functions of duly constituted public authorities, and thereby to disrupt the exercise of their police power; and
(5) that the sale or other disposition of concealable weapons by importers, manufacturers, and dealers holding Federal licenses, to nonresidents of the State in which the licensees' places of business are located, has tended to make ineffective the laws, regulations, and ordinances in the several States and local jurisdictions relating to such sales.

June 19, 1968 - 27 - Pub. Law 90-351

youthful criminal behavior, and that such firearms have been widely sold by federally licensed importers and dealers to emotionally immature, or thrill-bent juveniles and minors prone to criminal behavior;
(7) that the United States has become the dumping ground of the cast-off surplus military weapons of other nations, and that such weapons, and the large volume of relatively inexpensive pistols and revolvers (largely worthless for sporting purposes), imported into the United States in recent years, has contributed greatly to lawlessness and to the Nation's law enforcement problems;
(8) that the lack of adequate Federal control over interstate and foreign commerce in highly destructive weapons (such as bazookas, mortars, antitank guns, and so forth, and destructive devices such as explosive or incendiary grenades, bombs, missiles, and so forth) has allowed such weapons and devices to fall into the hands of lawless persons, including armed groups who would supplant lawful authority, thus creating a problem of national concern.

(b) The Congress further hereby declares that the purpose of this title is to cope with the conditions referred to in the foregoing subsection, and that it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap shooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes, or to provide for the imposition by Federal regulations of any procedures or requirements other than those reasonably necessary to implement and effectuate the provisions of this title.

Sec. 902. Title 18, United States Code, is amended by inserting after section 917 thereof the following new chapter:

Chapter 44—FIREARMS

Sec. 921. Definitions.
Sec. 922. Unlawful acts.
Sec. 923. Licensing.
Sec. 924. Penalties.
Sec. 925. Exceptions: Relief from disabilities.
Sec. 926. Rules and regulations.
Sec. 927. Effect on State law.
Sec. 928. Separability clause.

"§ 921. Definitions.
(a) As used in this chapter—
(1) The term 'person' and the term 'whoever' includes any individual, corporation, company, association, firm, partnership, society, or joint stock company.
(2) The term 'interstate or foreign commerce' includes commerce between any State or possession (not including the Canal Zone) and any place outside thereof; or between points within the same State or possession (not including the Canal Zone), but through any place outside thereof; or within any possession or the District of Columbia.
punishable by imprisonment for a term exceeding one year or to avoid giving testimony in any criminal proceeding.

"(15) The term 'antique firearm' means any firearm manufactured in or before 1898 (including any matchlock, flintlock, percussion cap, or similar early type of ignition system) or replica thereof, whether actually manufactured before or after the year 1898; and also any firearm using fixed ammunition manufactured in or before 1898, for which ammunition is no longer manufactured in the United States; and is not readily available in the ordinary channels of commercial trade.

"(16) The term 'ammunition' means ammunition for a destructive device; it shall not include shotgun shells or any other ammunition designed for use in a firearm other than a destructive device.

"(17) The term 'Secretary' or 'Secretary of the Treasury' means the Secretary of the Treasury or his delegate.

"(18) The term 'published ordinance' means a published law of any political subdivision of a State which the Secretary of the Treasury determines to be relevant to the enforcement of this chapter and which is contained on a list compiled by the Secretary of the Treasury which list shall be published in the Federal Register, revised annually, and furnished to each licensee under this chapter.

As used in this chapter—

"(1) The term 'firearm' shall not include an antique firearm.

"(2) The term 'destructive device' shall not include—

(A) a device which is not designed or redesigned or used or intended for use as a weapon; or

(B) any device, although originally designed as a weapon, which is redesigned so that it may be used solely as a signaling, light-emitting, safety or similar device; or

(C) any shotgun other than a short-barreled shotgun; or

(D) any nonautomatic rifle (other than a short-barreled rifle) generally recognized or particularly suitable for use for the hunting of big game; or

(E) surplus obsolete ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of sections 4682(2), 4685, or 4590 of title 10, United States Code.

"(3) Any other device which the Secretary finds is not likely to be used as a weapon.

"(4) The term 'crime punishable by imprisonment for a term exceeding one year' shall not include any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices as the Secretary may by regulation designate.

§ 922 Unlawful acts

"(a) It shall be unlawful—

(A) for any person, except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms, or ammunition, or in the course of such business to ship, transport, or receive any firearm or ammunition in interstate or foreign commerce,

(B) for any importer, manufacturer, or licensed dealer under the provisions of this chapter to ship or transport in interstate or foreign commerce, any firearm other than a rifle or shotgun, or ammunition to any person other than a licensed importer, licensed manufacturer, or licensed dealer, except that—

(A) this paragraph shall not be held to preclude a licensed importer, licensed manufacturer, or licensed dealer
from returning a firearm or replacement firearm of the same kind and type to a person from whom it was received.

"(B) This paragraph shall not be held to preclude a licensed importer, licensed manufacturer, or licensed dealer from depositing a firearm or firearm parts in the mails to an officer, employee, agent, or watchman who, pursuant to the provisions of section 1718 of title 18 of the United States Code, is eligible to receive a firearm by mail

"(c) Nothing in this paragraph shall be construed as applying in any manner in the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States differently than it would apply if the District of Columbia, the Commonwealth of Puerto Rico, or the possession were in fact a State of the United States.

"(3) For any person, other than a licensed importer, licensed manufacturer, or licensed dealer, to transport in interstate or foreign commerce any destructive device, machine gun (as defined in section 5848 of the Internal Revenue Code of 1954), short-barreled shotgun, or short-barreled rifle, unless he has in his possession a sworn statement executed by the principal law enforcement officer of the locality wherein the purchaser or person to whom it is otherwise disposed of resides, attesting that there is no provision of law, regulation, or ordinance which would be violated by said person's receipt or possession thereof, and that he is satisfied that it is intended by such person for lawful purposes; and such sworn statement shall be retained by the licensee as a part of the records required to be kept under the provisions of this chapter.

"(4) Any firearm to any person unless the licensee notes in his records required to be kept pursuant to section 923 of this chapter, the name, age, place of residence of such person if the person is an individual, or the identity and principal and local places of business of such person, whichever is applicable.

"(A) Any firearm, other than a shotgun or rifle; or

"(B) Any firearm which the transferee could not lawfully purchase or possess in accordance with applicable laws, regulations or ordinances of the State or political subdivision thereof in which the transferee resides (or in which his place of business is located if the transferee is a corporation or other business entity).

This paragraph shall not apply to transactions between licensed importers, licensed manufacturers, and licensed dealers.

"(6) For any person in connection with the acquisition or attempted acquisition of any firearm from a licensed importer, licensed manufacturer, or licensed dealer, knowingly to make any false or fictitious oral or written statement or to furnish any false or fictitious or misrepresented identification, intended or likely to deceive, or to deal with respect to any fact material to the lawfulness of the sale or other disposition of such firearm under the provisions of this chapter.

"(b) It shall be unlawful for any licensed importer, licensed manufacturer, or licensed dealer to sell or deliver—

"(1) Any firearm to any individual who the licensee knows or has reasonable cause to believe is less than twenty-one years of age, if the firearm is other than a shotgun or rifle.

"(2) Any firearm to any person in any State where the purchase or possession by such person of such firearm would violate any State law or any published ordinance applicable at the place of sale, delivery or other disposition, or in the locality in which such person resides unless the licensee knows or has reasonable cause to believe that the purchase or possession would not be in violation of such State law or such ordinance.

"(3) Any firearm to any person who the licensee knows or has reasonable cause to believe does not reside in (or if the person is a corporation or other business entity, does not maintain a place of business in) the State in which the licensee's place of business is located; except that this paragraph shall not apply in the case of a shotgun or rifle.

"(4) To any person any destructive device, machine gun (as defined in section 5848 of the Internal Revenue Code of 1954), short-barreled shotgun, or short-barreled rifle, unless he has in his possession a sworn statement executed by the principal law enforcement officer of the locality wherein the purchaser or person to whom it is otherwise disposed of resides, attesting that there is no provision of law, regulation, or ordinance which would be violated by such person's receipt or possession thereof, and that he is satisfied that it is intended by such person for lawful purposes; and such sworn statement shall be retained by the licensee as a part of the records required to be kept under the provisions of this chapter.

"(5) Any firearm to any person unless the licensee notes in his records required to be kept pursuant to section 923 of this chapter, the name, age, place of residence of such person if the person is an individual, or the identity and principal and local places of business of such person, whichever is applicable.

Paragraphs (4), (2), (3) and (4) of this subsection shall not apply to transactions between licensed importers, licensed manufacturers, and licensed dealers.

"(c) It shall be unlawful for any licensed importer, licensed manufacturer, or licensed dealer to sell or otherwise dispose of any firearm or ammunition to any person, knowing or having reasonable cause to believe that such person is a fugitive from justice or is under indictment or has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year. This subsection shall not apply with respect to sale or disposition of a firearm to a licensed importer, licensed manufacturer, or licensed dealer who pursuant to subsection (b) of section 923 of this chapter is not precluded from dealing in firearms, or to a person who has been granted relief from disabilities pursuant to subsection (c) of section 925 of this chapter.

"(d) It shall be unlawful for any common or contract carrier to transport or deliver in interstate or foreign commerce any firearm with knowledge or reasonable cause to believe that the shipment, transportation, or receipt thereof would be in violation of the provisions of this chapter.

"(e) It shall be unlawful for any person who is under indictment or who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year, or who is a fugitive from

62 STAT. 720
62 Stat. 793
63 Stat. 95.
Justice, to ship or transport any firearm or ammunition in interstate or foreign commerce.

"(f) Upon the filing of a proper application and payment of the prescribed fee, the Secretary may issue to the applicant the appropriate license, to ship or transport any firearm or ammunition in interstate or foreign commerce.

"(g) It shall be unlawful for any person to transport in interstate or foreign commerce, any stolen firearm or stolen ammunition, knowing or having reasonable cause to believe the same to have been stolen.

"(h) It shall be unlawful for any person knowingly to transport, ship, or receive, in interstate or foreign commerce, any firearm the importer's or manufacturer's serial number of which has been removed, obliterated, or altered.

"(i) It shall be unlawful for any person knowingly to import or bring into the United States any possession thereof any firearm or ammunition, except as provided in subsection (d) of section 925 of this chapter; and it shall be unlawful for any person knowingly to import or bring into the United States or any possession thereof, who have purchased or received firearms or ammunition, knowing or having reasonable cause to believe the same to have been stolen.

"(j) It shall be unlawful for any person to receive, conceal, store, barter, sell, or dispose of any stolen firearm or stolen ammunition, or pledge or accept as security for a loan any stolen firearm or stolen ammunition, moving as or which is a part of or which constitutes interstate or foreign commerce, knowing or having reasonable cause to believe the same to have been stolen.

"(k) It shall be unlawful for any licensed importer, licensed manufacturer, or licensed dealer knowingly to make any false entry in, or to fail to make appropriate entry in or to fail to properly maintain, any record, which he is required to keep pursuant to subsection (d) of section 925 of this chapter or regulations promulgated thereunder.

§ 923. Licensing

"(a) No person shall engage in business as a firearms or ammunition importer, manufacturer, or dealer, or receive any firearm or ammunition, except as provided in subsection (d) of section 925 of this chapter, and it shall be unlawful for any person knowingly to import or bring into the United States or any possession thereof any firearm or ammunition, except as provided in subsection (d) of section 925 of this chapter, and it shall be unlawful for any person knowingly to import or bring into the United States or any possession thereof, who have purchased or received firearms or ammunition, knowing or having reasonable cause to believe the same to have been stolen.

"(1) It shall be unlawful for any person knowingly to import or bring into the United States or any possession thereof any firearm or ammunition, except as provided in subsection (d) of section 925 of this chapter; and it shall be unlawful for any person knowingly to import or bring into the United States or any possession thereof in violation of the provisions of this chapter.

"(2) It shall be unlawful for any licensed importer, licensed manufacturer, or licensed dealer knowingly to make any false entry in, or to fail to make appropriate entry in or to fail to properly maintain, any record, which he is required to keep pursuant to subsection (d) of section 925 of this chapter or regulations promulgated thereunder.

"(b) Upon the filing of a proper application and payment of the prescribed fee, the Secretary may issue to the applicant the appropriate license, to ship or transport any firearm or ammunition in interstate or foreign commerce during the period stated in the license.

"(c) Any application submitted under subsections (a) and (b) of this section shall be disapproved and the license denied and the fee returned to the applicant if the Secretary, after notice and opportunity for hearing, finds that—

"(1) the applicant is under twenty-one years of age; or

"(2) the applicant (including in the case of a corporation, partnership, or association, any individual possessing directly or indirectly, the power to direct or cause the direction of the management and policies of the corporation, partnership, or association) is prohibited from transporting, shipping, or receiving firearms or ammunition in interstate or foreign commerce under the provisions of this chapter; or is, by reason of his business experience, financial standing, or trade connections, not likely to commence business operations during the term of the annual license applied for or to maintain operations in compliance with this chapter; or

"(3) the applicant has willfully violated any of the provisions of this chapter or regulations issued thereunder; or

"(4) the applicant has willfully failed to disclose any material information required, or has made any false statement as to any material fact, in connection with his application; or

"(5) the applicant does not have, or does not intend to have or to maintain, in a State or possession, business premises for the conduct of the business.

"(6) Each licensed importer, licensed manufacturer, and licensed dealer shall maintain such records of importation, production, shipment, receipt, sale or other disposition, of firearms and ammunition at such place, for such period and in such form as the Secretary may by regulations prescribe. Such importers, manufacturers, and dealers shall make such records available for inspection at all reasonable times, and shall submit to the Secretary such reports and information with respect to such records and the contents thereof as he shall require by regulations prescribe. The Secretary or his delegate may enter during business hours the premises (including places of storage) of any firearms or ammunition importer, manufacturer, or dealer, for the purpose of inspecting or examining any records or documents required to be kept by such importer or manufacturer or dealer under the provisions of this chapter or regulations issued pursuant thereto, and any firearms or ammunition kept or stored by such importer, manufacturer, or dealer at such premises. Upon the request of any State, or possession, or any political subdivision thereof, the Secretary of the Treasury may make available to such State, or possession, or any political subdivision thereof, any information which he may obtain by reason of the provisions of this chapter with respect to the identification of persons within such State, or possession, or political subdivision thereof, who have purchased or received firearms or ammunition, together with a description of such firearms or ammunition.

"(d) Licenses issued under the provisions of subsection (6) of this section shall be kept posted and kept available for inspection on the business premises covered by the license.

"(f) Licensed importers and licensed manufacturers shall identify, in such manner as the Secretary shall by regulations prescribe, each firearm imported or manufactured by such importer or manufacturer.
§ 924. Penalties

(a) Whoever violates any provision of this chapter or knowingly makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or in applying for any license or exemption or relief under this chapter, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or causes a firearm to be transported in interstate or foreign commerce shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

(c) Any firearm or ammunition involved in, or used or intended to be used in, any violation of the provisions of this chapter, or regulation promulgated thereunder, or violation of any other criminal law of the United States, shall be subject to seizure and forfeiture and all provisions of the Internal Revenue Code of 1954 relating to seizure, forfeiture, and disposition of firearms, as defined in section 5848(e) of said Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter.

§ 925. Exceptions: relief from disabilities

(a) The provisions of this chapter shall not apply with respect to the transportation, shipment, receipt, or importation of any firearm or ammunition imported for, or sold or shipped to, or issued for the use of the United States or any department, or agency thereof; or any State or possession, or any department, agency, or political subdivision thereof.

(b) A licensed importer, licensed manufacturer, or licensed dealer who is indicted for a crime punishable by imprisonment for a term exceeding one year, may, notwithstanding any other provision of this chapter, continue operations pursuant to his existing license (provided that prior to the expiration of the term of the existing license timely application is made for a new license) during the time he is under indictment and until any conviction pursuant to the indictment becomes final.

(c) A person who has been convicted of a crime punishable by imprisonment for a term exceeding one year (other than a crime involving the use of a firearm or other weapon or a violation of this chapter or of the National Firearms Act) may make a written request to the Secretary for relief from the disabilities under this chapter incurred by reason of such conviction, and the Secretary shall authorize such relief if it is established to his satisfaction that the circumstances regarding the conviction, and the applicant's record and reputation, are such that the applicant will not be likely to conduct his operations in an unlawful manner, and that the granting of the relief would not be contrary to the public interest. A licensee conducting operations under this chapter, who makes application for relief from the disabilities incurred under this chapter by reason of such a conviction, shall not be barred by such conviction from further operations under his license pending final action on an application for relief filed pursuant to this section. Whenever the Secretary grants relief to any person pursuant to this section he shall promptly publish in the Federal Register notice of such action, together with the reasons therefor.

(d) The Secretary may authorize a firearm to be imported or brought into the United States or any possession thereof if the

§ 926. Rules and regulations

The Secretary may prescribe such rules and regulations as he deems reasonably necessary to carry out the provisions of this chapter. The Secretary shall give reasonable public notice, and afford to interested parties opportunity for hearing, prior to prescribing such rules and regulations.

§ 927. Effect on State law

No provision of this chapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any State or possession, or any department, agency, or political subdivision thereof.

§ 928. Separability

If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of the chapter and the application of such provision to other persons not similarly situated or to other circumstances shall not be affected thereby.

Sec. 903. The administration and enforcement of the amendment made by this title shall be vested in the Secretary of the Treasury.

Sec. 904. Nothing in this title or amendment made thereby shall be construed as modifying or affecting any provision of-

(a) The National Firearms Act (chapter 53 of the Internal Revenue Code of 1954); or

(b) section 414 of the Mutual Security Act of 1954 (22 U.S.C. 4665), as amended, relating to munitions control; or

(c) section 1715 of title 18, United States Code, relating to nonmailable firearms.

The table of contents to "PART I.-CRIMES" of title 18, United States Code, is amended by inserting after "False personation..."

a new chapter reference as follows:

"At Firearms..."

"45. False personation..."
TITLE V—DISQUALIFICATION FOR ENGAGING IN RIOTS AND CIVIL DISORDERS

Sec. 1001. (a) Subchapter II of chapter 73 of title 5, United States Code, is amended by adding immediately after section 7312 the following new section:

"§ 7313. Riots and civil disorders

"(a) An individual convicted by any Federal, State, or local court of competent jurisdiction of—

"(1) inciting a riot or civil disorder;

"(2) organizing, promoting, encouraging, or participating in a riot or civil disorder;

"(3) aiding or abetting any person in committing any offense specified in clause (1) or (2); or

"(4) any offense determined by the head of the employing agency to have been committed in furtherance of, or while participating in, a riot or civil disorder;

shall, if the offense for which he is convicted is a felony, be ineligible to accept or hold any position in the Government of the United States or in the government of the District of Columbia for the five years immediately following the date upon which his conviction becomes final. Any such individual holding a position in the Government of the United States or the government of the District of Columbia on the date his conviction becomes final shall be removed from such position.

"(b) For the purposes of this section, 'felony' means any offense specified in clause (1) of section 7301 of title 5, United States Code, immediately preceding section 7311 of such title, for which imprisonment is authorized for a term exceeding one year."

"Subchapter II—Employment Limitations"

Sec. 1002. The provisions of section 1001(a) of this title shall apply only with respect to acts referred to in section 7313(a)(1)–(4) of title 5, United States Code, as added by section 1001 of this title, which are committed after the date of enactment of this title.

Effective date.
enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

(c) As used in this title:

(1) "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country;

(2) "felony" means any offense punishable by imprisonment for a term exceeding one year;

(3) "firearm" means any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; or any firearm muffler or firearm silencer; or any destructive device. Such term shall include any handgun, rifle, or shotgun;

(4) "destructive device" means any explosive, incendiary, or poison gas bomb, grenade, mine, rocket, missile, or similar device; and includes any type of weapon which will or is designed to or may readily be converted to expel a projectile by the action of any explosive and having any barrel with a bore of one-half inch or more in diameter;

(5) "handgun" means any pistol or revolver originally designed to be fired by the use of a single hand and which is designed to fire or capable of firing fixed cartridge ammunition, or any other firearm originally designed to be fired by the use of a single hand;

(6) "shotgun" means a weapon designed or redesigned, made or remade, and intended to fire from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger;

(7) "rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed metallic cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger.

Sec. 1203. This title shall not apply to—

(1) any prisoner who by reason of duties connected with law enforcement has expressly been entrusted with a firearm by competent authority of the prison; and

(2) any person who has been pardoned by the President of the United States or the chief executive of a State who has expressly been authorized by the President or such chief executive, as the case may be, to receive, possess, or transport in commerce a firearm.

TITLE VIII—PROVIDING FOR AN APPEAL BY THE UNITED STATES FROM DECISIONS SUSTAINING MOTIONS TO SUPPRESS EVIDENCE

Sec. 1901. (a) Section 3731 of title 18, United States Code, is amended by inserting after the seventh paragraph the following new paragraph:

"From an order, granting a motion for return of seized property or a motion to suppress evidence, made before a trial of a person charged with a violation of any law of the United States, if the United States attorney certifies to the judge who granted such motion that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of the charge pending against the defendant."

(b) Such section is amended by striking out in the third paragraph the end "the defendant shall be admitted to bail on his own recognizance" and inserting "the defendant shall be released in accordance with chapter 207 of this title".


(a) by inserting "(a)", immediately before "in all"; and

(b) by adding at the end thereof the following new subsection:

"(b) The United States may also appeal an order of the District of Columbia Court of General Sessions, granting a motion for return of seized property or a motion to suppress evidence, made before the trial of a person charged with a violation of any law of the United States. The United States attorney conducting the prosecution for such violation certifies to the judge who granted such motion that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of the charge pending against the defendant. Pending the prosecution and determination of such appeal, the defendant, if in custody for such violation, shall be released in accordance with chapter 207 of title 18, United States Code."

TITLE IX—ADDITIONAL GROUNDS FOR ISSUING WARRANT

Sec. 1401. (a) Chapter 264 of title 18, United States Code, is amended by inserting immediately after section 3103 the following new section:

"§ 3103a. Additional grounds for issuing warrant

"In addition to the grounds for issuing a warrant in section 3103 of this title, a warrant may be issued to search for and seize any property that constitutes evidence of a criminal offense in violation of the laws of the United States."

(b) The table of sections for chapter 205 of title 18, United States Code, is amended by inserting after the item relating to section 3103 the following:

"3103a. Additional grounds for issuing warrant."

TITLE X—PROHIBITING EXTORTION AND THREATS IN THE DISTRICT OF COLUMBIA

Sec. 1501. Whoever with intent to extort from any person, firm, association, or corporation, any money or other thing of value: (1) transmits within the District of Columbia any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both; (2) transmits within the District of Columbia any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both; or (3) transmits within the District of Columbia any communication containing any threat to injure the property or reputation of the recipient of the communication or of another or the reputation of a deceased person or any threat to access the recipient of the communication or any other person of a crime, shall be fined not more than $5,000 and imprisoned not more than twenty years, or both.

Sec. 1502. Whoever threatens within the District of Columbia to kidnap any person or to injure the person of another or physically
damage the property of any person or of another person, in whole or in part, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

TITLE XI—GENERAL PROVISIONS

Sec. 1601. If the provisions of any part of this Act or any amendments made thereby or the application thereof to any person or circumstances be held invalid, the provisions of the other parts and their application to other persons or circumstances shall not be affected thereby.

Approved June 19, 1968, 7:14 p.m.

LEGISLATIVE HISTORY:

HOUSE REPORT No. 488 (Comm. on the Judiciary).

SENATE REPORT No. 1097 (Com. on the Judiciary).

CONGRESSIONAL RECORD:

Vol. 113 (1967): Aug. 2, 3, 8, considered and passed House.


May 25, 26, considered and passed Senate, amended, in lieu of S. 917.

June 6, House agreed to Senate amendment.
Proceeding to determine whether defendant was entitled to disclosure of records of warrantless electronic surveillance and monitored conversations. The District Court, Ferguson, J., held that electronic surveillance without warrant of defendant accused of unlawful possession of firearms was not constitutionally proper even though Attorney General had expressly authorized it in the interest of national security.

Order in accordance with opinion.

1. Criminal Law §827.4(9)
Disclosure of government’s records of electronic surveillance is required only if district court determines that the surveillance was improper.

2. Searches and Seizures §7(1)
The President of the United States is subject to the constitutional limitations imposed by the Fourth Amendment with respect to electronic surveillance. U.S.C.A.Const. Amend. 4; 18 U.S.C.A. § 2511(3).

3. Searches and Seizures §7(1)
Electronic surveillance without warrant of defendant accused of unlawful possession of firearms was not constitutionally proper even though Attorney General had expressly authorized it in the interest of national security. 16 U.S.C.A. App. § 1202(a), U.S.C.A.Const. Amend. 4.

4. Searches and Seizures §83.5(5)
An arresting officer is entitled to make a self-protective search of the arrestee for weapons and to make search so as to prevent a destruction of concealment of evidence. U.S.C.A.Const. Amend. 4.

5. Searches and Seizures §7(18)
In wholly domestic situations there is no national security exemption from the search warrant requirement of the Fourth Amendment. U.S.C.A.Const. Amend. 4.


Jean Kidwell, Kidwell, Pestana & Smith, Michael Tigar, Professor of Law, Los Angeles, Cal., for defendant.

MEMORANDUM OPINION
FERGUSON, District Judge.
Melvin Carl Smith was found guilty in this court of two counts involving unlawful possession of firearms in violation of 18 U.S.C., App. § 1202(a) (possession of a firearm by a person previously convicted of a felony). He was sentenced to two years in prison on each of the two counts, to begin and run consecutively. Defendant appealed his conviction on October 31, 1969.

While the appeal was pending, the government disclosed to the Court of Appeals that it had searched its files and discovered that the defendant had participated in conversations which were monitored by electronic surveillance conducted by the federal government to gather intelligence information relating to the national security. In light of this, the circuit court granted the government’s motion for a limited remand to this court “for proceedings required by Alderman v. United States, 394 U.S. 165 [89 S.Ct. 961, 22 L.Ed.2d 176]”.

The Supreme Court held, in Alderman, that “surveillance records as to which any [defendant] has standing to object should be turned over to him without being screened in camera by the trial judge”. 394 U.S. at 162, 89 S.Ct. at 971. In a per curiam opinion, Giordano v. United States, 39 Ct. 1163, 1155, 22
United States, 394 U.S. 310, 313, 89 S. Ct. 1163, 1165, 22 L.Ed.2d 297 (1969), the Court further stated that "[e]ven if course, a finding by the District Court that the surveillance was lawful would make disclosure and further proceedings unnecessary".

Consistent with these Supreme Court guidelines, three separate determinations must be made in this case: (1) whether the defendant has standing to object; (2) whether the electronic surveillance is constitutionally proper; and (3) if it is determined that the surveillance was improper, whether the evidence against the defendant is "tainted".

[1] Since the defendant was a party to the monitored conversations, it is conceded that he has standing to raise an objection. 394 U.S. at 176, 89 S.Ct. 961, 22 L.Ed.2d 176. The second issue is whether the maintenance of the electronic surveillance violated the defendant's Fourth Amendment rights. Disclosure is required only if the court determines that the surveillance was improper. Following an order of disclosure, there would be a full hearing to determine whether the evidence against the defendant at trial grew out of his illegally-overheard conversations. Of course, this recognizes that the government might "prefer dismissal of the case to disclosure of the information". 394 U.S. at 181, 89 S.Ct. at 971, 22 L.Ed.2d 176.

A threshold issue which has been raised by both sides is the relationship of the Omnibus Crime Control and Safe Streets Act of 1968 to the surveillance in question here. The government contends that the Act constitutes a congressional recognition of the authority it claims in the present case. "The Act contains the statement that:"

"Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1148; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power."

The major thrust of the relevant portion of this Act makes electronic eavesdropping a federal crime punishable by a fine of $10,000, or imprisonment of up to five years, or both. However, there are certain exceptions, and under these limited circumstances electronic eavesdropping is not a federal crime. The portion quoted above provides for one of these exceptions. Thus, the President does not commit a crime under this statute when he authorizes electronic surveillance "to obtain foreign intelligence information deemed essential to the security of the United States". Similarly, it provides that the President is exempt from the criminal sanctions of the Act when he takes "such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means".

[2] Regardless of these exceptions in the criminal statute, the President is, of course, still subject to the constitutional limitations imposed upon him by the Fourth Amendment. Congress expressly recognized this when it stated that evidence resulting from such an electronic
surveillance could "be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable". Thus, the issue before this court is whether the electronic surveillance conducted by the government in this case is consistent with the constitutional requirements of the Fourth Amendment.

[3] The government asserts that, in spite of the fact that a warrant was not obtained prior to instituting the surveillance, it was a constitutionally proper surveillance because the Attorney General expressly authorized it to gather "intelligence information deemed necessary to protect the nation from attempts of domestic organizations to use unlawful means to attack and subvert the existing structure of the government". The issue thus becomes whether the government can, consistent with constitutional standards, institute electronic surveillance without prior judicial authorization where it is authorized by the Attorney General in the interest of national security. The Supreme Court has expressly avoided ruling on this issue. Katz v. United States, 389 U.S. 347, 358 n. 23, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); Giordano v. United States, 394 U.S. 110, 314, 89 S.Ct. 1163, 22 L.Ed.2d 297 (1969) (Justice Stewart concurring).

In his concurring opinion in Katz, Justice White expressed the view that the warrant procedure should not be required where the Attorney General has "considered the requirements of national security and authorized electronic surveillance as reasonable". 389 U.S. at 360, 88 S.Ct. 518, 19 L.Ed.2d 576. Justice Douglas and Justice Brennan strongly disagreed, stating that there ought not to be such an exception. 389 U.S. at 369-360, 88 S.Ct. 507, 19 L.Ed.2d 576. Justice Black would presumably allow such surveillance, indeed all electronic surveillance, since he has consistently stated that "eavesdropping carried on by electronic means" does not constitute "a 'search' or 'seizure'", and thus is not within the purview of the Fourth Amendment. 389 U.S. at 364-374, 88 S.Ct. 507, 19 L.Ed.2d 576. In Alderman, Justice White suggested that in light of the disclosure requirement the government might have to dismiss certain cases "in reference to national security". This seems to suggest that he may have reconsidered his initial position, since under it national security cases would be almost per se lawful, and therefore not subject to the disclosure requirement.

The government asserts that the President, acting through the Attorney General, has the inherent constitutional power: (1) to authorize, without a judicial warrant, electronic surveillance in "national security" cases; and (2) to determine unilaterally whether a given situation is a matter within the concept of national security.

It should be noted that the government does not limit its assertion of this power to those cases involving foreign intelligence, i. e., espionage and counter-espionage. Indeed, there is nothing in the present case which suggests that it is "anything other than a purely domestic situation. It might very well be that warrantless surveillance of this type, while unconstitutional in the domestic situation, would be constitutional in the area of foreign affairs. This possible distinction is largely due to the President's long-recognized, inherent power with respect to foreign relations. See, e. g., Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 111, 68 S.Ct. 431, 92 L.Ed. 568 (1948); United States v. Belmont, 301 U.S. 324, 328, 57 S.Ct. 758, 81 L.Ed. 1134 (1937).

This court makes no decision with regard to whether there might be such an exemption from the warrant requirement in security cases involving foreign relations. Nor does it determine whether this exception would apply only to the requirement of the actual warrant, or also to the warrant proceeding wherein it could be judicially determined whether the case in question fell into the exempted area.

The government's Fourth Amendment very reasonably" see, n. 426. Thus, the warrant requirement merely one possibility that the search is constitutional. This basis the government's argument: "Faced with such a situation, any President would have to invest the Constitution with the power to utilize electronic surveillance for intelligence information gathered by those organizations subject to the use of the materials, a power to foment rebellion". Gov't Br. at 7.

The difficulty with this proposition is that in the abstract, "benevolence" becomes "badness." An interpretation of the Fourth Amendment very generally and rather "good government's was adopted by this Court in United States v. Morton, 399 U.S. 56, 70 S.Ct. 281, 94 L.Ed. 1134 (1950). However, in Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 709 (1969), the Court expressly overruled Alderman, and in the latter was incorrect. This Court met the government's "benevolence" argument by saying that "that argument is little more than an appeal regarding the accessibility of certain sorts of police conduct to judicial surveillance relevant to government interests. "The "reasoned analysis" Fourth Amendment protection in this area must be determined at the 'evaporation point'.:" 735, 89 S.Ct. at 2045.

[4] It is true, of course, that this warranty requirement will not always be in effect. Certain exceptions, nearly every incident to the" moving vehicles-which are always in the business. However, the...
The government's position is that the Fourth Amendment prohibits only "unreasonable" searches and seizures. Thus, the warrant provision is viewed as merely one possible means of ensuring that the search is reasonable. With this basis the government then asserts that:

"Faced with such a state of affairs, any President who takes seriously his oath to preserve, protect and defend the Constitution will no doubt determine that it is not 'unreasonable' to utilize electronic surveillance to gather intelligence information concerning those organizations which are committed to the use of illegal methods to bring about changes in our form of Government and which may be seeking to foment violent disorders."

Gov't Br. at 7.

The difficulty with the government's position is that in this context "reasonableness" becomes solely a value judgment.

An interpretation of the Fourth Amendment very similar to the government's was adopted by the Supreme Court in United States v. Rabinowits, 339 U.S. 66, 70 S.Ct. 430, 94 L.Ed. 653 (1960). However, the Court's decision in Chime! v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), expressly overruled Rabinowits insofar as the latter was inconsistent with it. The Court met the government's "reasonableness" argument head-on and concluded that "that argument is founded on the little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on considerations relevant to Fourth Amendment interests. Under such an unconfined analysis, Fourth Amendment protection in this area would approach the evaporation point." 395 U.S. at 764-765, 89 S.Ct. at 2041, 23 L.Ed.2d 685.

[4] It is true, of course, that the warrant requirement is not absolute. Certain exceptions—stop and frisk, searches incident to arrest, searches of moving vehicles—have long been recognized. However, these exceptions are cautiously limited to certain very practical and clearly ascertained circumstances. First, an officer cannot, and should not, be prevented from making a self-protective search for weapons. Second, the officer should be allowed to act so as to prevent the destruction or concealment of evidence. 395 U.S. at 762-763, 89 S.Ct. 2034, 23 L.Ed.2d 685.

The government points out, as precedent for its position, that every President since Franklin D. Roosevelt has authorized electronic surveillance, without warrants, in national security cases. Historical analysis reveals that: (1) this practice grew out of presidential decisions based upon factors other than the Fourth Amendment, rather than judicial constitutional interpretation; and (2) the concept of the proposed national security exception has been drastically expanded since its initiation.

In the first Supreme Court case in this area, Omstead v. United States, 277 U.S. 458, 48 S.Ct. 564, 72 L.Ed. 944 (1928), the Court held that the Fourth Amendment did not prohibit wiretapping without a warrant. This decision was based upon the rationale that conversations could not be "seized". This view is now advocated only by Justice Black. Shortly thereafter, Congress enacted Section 605 of the Federal Communications Act of 1934, 48 Stat. 1103, 47 U.S.C. § 605. The original Section 605 provided that:

"No person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person."

In Nardone v. United States, 308 U.S. 338, 60 S.Ct. 275, 82 L.Ed. 314 (1940), the Court held that Section 605 prohibited wiretapping by law enforcement officers for the purpose of procuring evidence.

Apparently, the Department of Justice viewed Nardone as only precluding divulgence, not wiretapping, and did not consider disclosure within the depart-
ment to be "divulgence." Brownell, The Public Security and Wire Tapping, 39 Cornell L.Q. 195, 197 (1954). The second Nardone case, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307 (1939), involved information obtained from the wiretap, but no direct testimony concerning the content of the intercepted conversation. The Court held that any use of the improper interception was forbidden and again reversed the conviction.

Even after the second Nardone case, the Department of Justice continued, for a short time, to intercept and use the information for agency purposes. 39 Cornell L.Q. at 198. Then in 1940, Attorney General Jackson announced that the department would discontinue wiretapping. Id. at 199. Shortly thereafter, however, President Roosevelt sent a confidential memorandum to Attorney General Jackson authorizing him to utilize wiretaps in certain matters "involving the defense of the nation." See Appendix.

Even assuming that the Roosevelt directive was constitutionally proper, there are several characteristics which distinguish it from the instant situation: (1) Roosevelt conceded that under "normal circumstances wire-tapping by Government agents should not be carried on for the very excellent reason that it is almost bound to lead to abuse of civil rights." However, in response to the fact that other nations were engaged in "fifth column" activities as well as actual sabotage, Roosevelt felt such drastic action was justified; (2) Roosevelt expressly concerned in the Supreme Court's prohibition against the use of such wiretap evidence in criminal cases; (3) Roosevelt concluded with the admonishment "to limit these investigations so conducted to a minimum and to limit them insofar as possible to aliens".

In somewhat expanding form this general authorization to wiretap has been continued by each successive President. See Appendix. However, it is clear that as late as 1954, the Department of Justice did not consider that the then existing law allowed the use of wiretap evidence in criminal cases even in espionage matters. Rogers, The Case for Wire Tapping, 63 Yale L.J. 792 (1954). In this article, then Deputy Attorney General Rogers wrote that: "Law enforcement officers possessed of intercepted information vital to the security of the nation may not use such information in bringing spies and saboteurs to justice in our federal courts." Id. at 785.

Presumably, this was a statutory limitation rather than a constitutional one.

In Katz, 389 U.S. 347, 88 S.Ct. 677, 19 L.Ed.2d 576 (1967), the Supreme Court explicitly discarded reliance upon the property concept in search and seizure cases. Thus, for the first time, the Fourth Amendment constitutional limitations became fully applicable to electronic eavesdropping. The Court, as noted earlier, expressly reserved decision in the present type of case.

The government states that the decision to initiate surveillance in this type of case must be "based on a wide variety of considerations and on many pieces of information which cannot readily be presented to a magistrate." Gov't Br. at 8. This seems to be an attempt to invoke the "practicality" exception to the warrant procedure. In cases involving foreign affairs this argument might very well prevail. In that situation, numerous non-judicial factors are relevant and the decision would probably be far removed from the consideration of probable cause. However, this argument is totally inapplicable in a criminal proceeding in a federal court involving a domestic situation.

It is at this point that the government's assertion of authority and our general concept of political freedom become most closely intertwined. The government has emphasized that the purpose of the surveillance involved was "not to gather evidence for use in a criminal prosecution but rather to provide intelligence information needed to project against the illegal attacks of such organizations." Unlike in the area of foreign affairs, parochial political activity may proceed only in limited and circumscribed fashion. Brandenburg v. Ohio, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969). The government cannot act only to protect its own political institutions and interests. The government cannot create a situation where it states that its direc- tion against "organizing to use force and violence" and "the illegal activities of Amazonian subversive organizations." (Emphasis added)

However, the government may approach these dissident activities in a manner parallel to the treatment of the "fifth column" agents. The government cannot, when only domestic activities are involved, separate espionage from sabotage and terrorism by creating regulations espousing an interpretation of "domestic" espionage. The warrant procedure requires the government, based upon probable cause, to receive an oath or affirmation describing the information sought and the place to be searched. Under the partial judgment of the citizen and the government, the selection of a criminal proceeding in this type of case properly involves the magic of the warrant to determine the existence of probable cause.

The government's two other peripheral cases are not determinative. In one, the meager evidence is quite unconvincing. In the other, involving the president...
of foreign affairs, in the area of domestic political activity the government can act only in limited ways. See, e.g., Brandenburg v. Ohio, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 480 (1969). Due to the various constitutional guaranties protecting political freedom, the government can act only to prevent or punish unlawful acts. The government seems to concede this limitation in its brief when it states that it wishes to take action against "organizations which intend to use force and other illegal means," and "the illegal attacks of such organizations". (Emphasis added.)

However, the government seems to approach these dissident domestic organizations in the same fashion as it deals with unfriendly foreign powers. The government cannot act in this manner when only domestic political organizations are involved, even if those organizations expose views which are inconsistent with our present form of government. To do so is to ride roughshod over numerous political freedoms which have long received constitutional protection. The government can, of course, investigate and prosecute criminal violations whenever these organizations, or rather their individual members, step over the line of political theory and general advocacy and commit illegal acts.

The warrant procedure basically requires the government to obtain a warrant, based upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized. This, in effect, inserts the impartial judgment of a court before the citizen and the government. Since these cases properly involve the investigation of crime, the magistrate in a warrant proceeding in this type of case would be performing his normal function of determining the existence of probable cause.

The government's position presents two other peripheral problems which, while not determinative of the present case, deserve attention. The first involves the presidential delegation of the authority to authorize such warrantless searches. Since the sole basis for the delegation of this authority is a constitutional memorandum from the President, what is to prevent him from delegating this power to persons other than the Attorney General? The government stated at oral argument that the President would not do this, but could give no reason why he could not do it.

The second issue is whether the exception to the warrant provision asserted here would apply to other types of searches and seizures involving similar national security interests. Electronic surveillance is perhaps the most objectionable of all types of searches in light of the intention of the Fourth Amendment. It is carried out against an unsuspecting individual in a dragnet fashion, taking in all of his conversations whether or not they are relevant to the purposes of the investigation and continuing over a considerable length of time. If the government's "reasonableness" rationale is accepted in this case, then it would apply a fortiori to other types of searches. Since they are more limited in time, place and manner, they would be even more "reasonable".

[5] This court is forced to conclude that in wholly domestic situations there is no national security exemption from the warrant requirement of the Fourth Amendment. Since there is no reason why the government could not have complied with this requirement by obtaining the impartial judgment of a court before conducting the electronic surveillance in question here it was obtained in violation of the Fourth Amendment. For this reason the court hereby orders the government to make full disclosure to the defendant of his monitored conversations.

There is one final point which this court must discuss. The government's brief states that "[i]t is here can be no question that the President must and will engage in intelligence gathering operations which he believes are necessary to protect the security of the nation". Gov't Br. at 8. (Emphasis added.) This statement suggests two problems.
The first involves the power of the court to prevent this type of warrantless electronic surveillance. It is true that the court has only limited power to prevent this type of behavior. Due to the limitations of the exclusionary rule, at the present time courts are, for practical purposes, powerless to prevent this type of action should not be prevented, at least with regard to the President's power to take steps to protect the nation from foreign threats. However, limitations which are artificial in the international sphere, are reasonable and proper when solely domestic subversion is involved. In the domestic area, it is important to remember that there are numerous questions which cannot be answered by recognition of the importance of the national security. The Constitution, in response to the dilemma posed by Madison, was written so as to strike a balance between the protection of political freedom and the protection of the national security interest. To guarantee political freedom, our forefathers agreed to take certain risks which are inherent in a free democracy. It is unthinkable that we should now be required to sacrifice those freedoms in order to defend them. The court, therefore, finds that the electronic surveillance conducted in this case was constitutionally improper. The government is ordered to disclose fully to the defendant its surveillance records in order for the court and the parties to proceed with a hearing to determine whether or not evidence against the defendant was tainted.

It is further ordered that this directive shall be stayed for a period of 30 days, in order to grant the government time to perfect an appeal.

It is, therefore, ordered that the clerk of this court serve copies of this memorandum opinion, by United States mail, upon the attorneys for the parties appearing in this action.

APPENDIX

THE WHITE HOUSE
WASHINGTON
CONFIDENTIAL
MEMORANDUM FOR THE ATTORNEY GENERAL

May 21, 1940

I have agreed with the broad purpose of the Supreme Court decision relating to wire-tapping in investigations. The Court is undoubtedly sound both in regard to the use of evidence secured over tapped wires in the prosecution of citizens in criminal cases; and is also right in its opinion that under ordinary and normal circumstances wire-tapping by Government agents should not be carried on for the excellent reason that it is most sound to lead to abuse of civil rights.

However, I am convinced that the Supreme Court never intended any dictum in the particular case which it decided to apply to grave menace of the nation.

It is, of course, true that other nations and the organization called "fifth column" and in preparation as in actual sabotage.

It is too late to take steps to protect the nation from the activities of the United States spies. You are, therefore, directed in such cases after investigation, to authorize agents that secure information direct to the communications of pernicious activities a of the United States spies. I would not limit these agents to a minimum as possible.

(Seal)

OFFICE OF THE
WASHINGTON
July 1

The President,

My dear Mr. President,

Under date of May 21, 1940, the White House addressed to Mr. Jackson, stated:

"You are therefore directed in such cases to prove, after investigation in each case, to sary investigations are at liberty to use listening devices or other agents to prevent or other persons suspected of ties against the United States, spies."
strike a balance be-
 tween political freedom and the national se-
 curety guarantee political leaders agreed to take
 are inherent in a
 is unthinkable that
 re, finds that the
 ed that this direc-
 ered in such cases as you may approve,
 after investigation of the need in each	o authorize the necessary investiga-
tion agents that they are at liberty to se-
 e to the conversation or other com-
munications of persons suspected of sub-
versive activities against the Government
 off the United States, including suspected
 
 s to limit these investigations so con-
ducted to a minimum and to limit them
sofar as possible to aliens.

(a) F.D.R.

OFFICE OF THE ATTORNEY GEN-
ERAL
WASHINGTON, D. C.
July 17, 1946.

The President,
The White House.

My dear Mr. President:

Under date of May 21, 1940, President Franklin D. Roosevelt, in a memorandum addressed to Attorney General Jackson, stated:

"You are therefore authorized and di-
 rected in such cases as you may ap-
 prove, after investigation of the need
 in each case, to authorize the neces-
sary investigating agents that they
 are at liberty to secure information by
 listening devices directed to the con-
duction of cases as you may approve, after investigation of the need in each case, to authorize the necessary investigatory agents that they are at liberty to secure information by listening devices directed to the conversation or other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies."

This directive was followed by Attorneys General Jackson and Biddle, and is being followed currently in this Department. I consider it appropriate, however, to bring the subject to your attention at this time.

It seems to me that in the present troubled period in international affairs, accompanied as it is by an increase in subversive activity here at home, it is as necessary as it was in 1940 to take the investigative measures referred to in President Roosevelt's memorandum. At the same time, the country is threatened by a very substantial increase in crime. While I am reluctant to suggest any use whatever of those special investigative measures in domestic cases, it seems to me imperative to use them in cases vitally affecting the domestic security, or where human life is in jeopardy.

As so modified, I believe the outstanding directive should be continued in force. If you concur in this policy, I should appreciate it if you would so indicate at the foot of this letter.

In my opinion, the measures proposed are within the authority of law, and I have in the files of the Department materials indicating to me that my two most recent predecessors as Attorney General would concur in this view.

Respectfully yours,

(S) Tom C. Clark
Attorney General

July 17, 1947

(S) Harry S. Truman

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

I am strongly opposed to the interception of telephone conversations as a general investigative technique. I recognize that mechanical and electronic devices
I currently authorized and the reasons for electronic equipment and devices used in conversations. In addition, such reports shall contain a list of any interceptions for or capable of intercepting telephone conversations. In conducting such investigations consequently conform their practices and procedures to the provisions of this order. Utilization of mechanical or electronic devices to overhear non-telephone conversations is an even more difficult problem, which raises substantial and serious regard for the rights of others. I desire that each agency conducting such investigations shall conform their practices and procedures to the provisions of this order.

Utilization of mechanical or electronic devices to overhear non-telephone conversations is an even more difficult problem, which raises substantial and serious regard for the rights of others. I desire that each agency conducting such investigations shall conform their practices and procedures to the provisions of this order.

2. States v.4.13

New York statutes, which authorized procedure by which those who had been initially determined to be eligible for unemployment compensation benefits could be deprived of such benefits pending a hearing on correctness of this determination or a hearing on adverse re-determination, were not invalid on theory that they failed to comply with minimum standards of due process, nor on theory that they were in conflict with the Social Security Act.

Complaint dismissed.

Lasker, District Judge, concurred and dissented in a separate opinion.

L. Constitutional Law v.318

Social Security and Public Welfare v.225

New York statutes, which authorized procedure by which those who had been initially determined to be eligible for unemployment compensation benefits could be deprived of such benefits pending a hearing on correctness of this determination or a hearing on adverse re-determination, were not invalid on theory that they failed to comply with minimum standards of due process, nor on theory that they were in conflict with the Social Security Act.

Complaint dismissed.

Action for judgment declaring that New York unemployment compensation statutes were in violation of Fourth Amendment and the Social Security Act in so far as they authorized the suspension or termination of unemployment compensation benefits without a prior hearing. A three-judge court, Hays, Circuit Judge, held that statutes were not invalid on theory that they failed to comply with minimum standards of due process, nor on theory that they were in conflict with the Social Security Act.

Complaint dismissed.

Lasker, District Judge, concurred and dissented in a separate opinion.

For unemployment compensation benefits could be deprived of such benefits pending a hearing on correctness of this determination or a hearing on adverse re-determination, were not invalid on theory that they were in conflict with the Social Security Act, § 301 et seq.; 28 U.S.C.A. §§ 657, 658, 665; New York Labor Law, §§ 597, 598, 620.


Before HAYS, Circuit Judge.

The complaint for the deprivation of unemployment compensation benefits by the FEDERAL DEPARTMENT OF LABOR, and certain rights of others.

Every agency head shall submit to the Attorney General within 30 days a complete inventory of all mechanical and electronic equipment and devices used for or capable of intercepting telephone conversations. In addition, such reports shall contain a list of any interceptions currently authorized and the reasons for them.

(S) Lyndon B. Johnson
Defendants moved for order directing government to divulge all records of electronic surveillance directed at any of defendants or coconspirators not indicted which indictment was based or which wiretaps were installed by government and requested that hearing be held to determine whether any of evidence upon cause government to divulge all records of defendants was party to conversation monitored by government had standing to object to admission of evidence so obtained and to request disclosure of all logs, records and memoranda of the electronic surveillance. U.S.C.A.Const. Amend. 4.

Defendant who was party to conversation by government had standing to object to admission of evidence so obtained and to request disclosure of all logs, records and memoranda of the electronic surveillance. U.S.C.A.Const. Amend. 4.

Disclosure to defense of conversation overheard during electronic surveillance by government is necessary only when district court determines that the surveillance was conducted illegally. U.S.C.A.Const. Amend. 4.

President, acting through Attorney General, did not have inherent constitutional power to authorize without judicial warrant electronic surveillance in national security cases or to determine unilaterally whether a given situation is a matter within scope of national security. U.S.C.A.Const. Amend. 4.

Orders accordingly.

1. Criminal Law § 627.7(1)
Government must disclose and make available to a defendant who has proper standing any conversations in which he participated or which occurred on his premises and were overheard by government during course of any illegal electronic surveillance. U.S.C.A.Const. Amend. 4.

2. Criminal Law § 627.7(1)
Clear purpose of rule that government must disclose and make available to defendant who has proper standing any conversations in which he participated or which occurred on his premises and were overheard by government during course of any illegal electronic surveillance is to reinforce long-standing exclusionary rule of Fourth Amendment preventing government from building its case upon evidence obtained by unconstitutional methods. U.S.C.A.Const. Amend. 4.

3. Criminal Law § 394.5(3), 627.8(1)
Defendant who was party to conversation monitored by government had standing to object to admission of evidence so obtained and to request disclosure of all logs, records and memoranda of the electronic surveillance. U.S.C.A.Const. Amend. 4.

4. Criminal Law § 627.7(1)
Disclosure to defense of conversation overheard during electronic surveillance by government is necessary only when district court determines that the surveillance was conducted illegally. U.S.C.A.Const. Amend. 4.

5. United States § 23
President, acting through Attorney General, did not have inherent constitutional power to authorize without judicial warrant electronic surveillance in national security cases or to determine unilaterally whether a given situation is a matter within scope of national security.

6. Searches and Seizures § 1.2

7. Telecommunications § 498

8. Telecommunications § 498

9. Searches and Seizures
Regardless of executive branch constitutional power to authorize electronic surveillance a serious crime. 18 U.S.C.A. § 2511.

10. Searches and Seizures
Generally, in order to issue a warrant, court must view request to search objective determination of probable cause of some crime exists, an activity which search reasonable and not unreasonable under Fourth Amendment right. U.S.C.A.Const. Amend. 4.

11. Searches and Seizures
Prior to issuance of warrant, court must view request to search objective determination of probable cause of some crime exists, an activity which search reasonable and not unreasonable under Fourth Amendment right. U.S.C.A.Const. Amend. 4.

12. United States § 23
President has unique powers in field of foreign policy and national security.

13. United States § 5
In area of domestic security, government can act only under authority of Congress.

14. Constitutional Law § 23
Executive branch constitutional power or opportunity to prosecute criminal violation of different standards simply due to different persons which are inconsistent with form of government.

15. Insurrection and Sedition
Attempt of domestic attack and subvert existing...
government surveillance and/or wiretapping is permitted only upon showing of probable cause and issuance of a warrant. U.S.C.A.Const. Amend. 4.


10. Searches and Seizures \(\text{\textcopyright}3.2, 3.6(2)\) - In absence of claim that, at time wiretaps were installed by government pursuant to order of United States Attorney General, as agent of the President, enforcement agents had probable cause to believe that illegal overthrow of government through force or violence was being plotted, warrantless electronic surveillance was not justified on ground that certain domestic organizations were engaged in attacking and subverting existing structure of government and government must make full disclosure to defendants of the illegally monitored conversations and evidentiary hearing must be held to determine existence of taint, either as to indictment or as to evidence introduced at trial. U.S.C.A.Const. Amend. 4.

11. Searches and Seizures \(\text{\textcopyright}3.3\) - Prior to issuance of any search warrant, court must independently review request to search and make an objective determination whether or not probable cause of some criminal activity exists, an activity which would make the search reasonable and not in violation of Fourth Amendment rights. U.S.C.A.Const. Amend. 4.

12. United States \(\text{\textcopyright}23\) - President has unique and plenary powers in field of foreign relations.

13. United States \(\text{\textcopyright}3\) - Areas of domestic affairs, federal government can act only in limited ways.

14. Constitutional Law \(\text{\textcopyright}90\) - Executive branch cannot be given power or opportunity to investigate and prosecute criminal violations under two different standards simply because certain accused persons espouse views which are inconsistent with our present form of government.

15. Insurrection and Sedition \(\text{\textcopyright}2\) - Attempt to attack and subvert existing structure of government is not a crime unless the activity is carried on through unlawful means, such as invasion of rights of others by use of force or violence.

AMENDED

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR DISCLOSURE OF ELECTRONIC OR OTHER SURVEILLANCE

KEITH, District Judge.

After the return of the indictment in the present case, but before the commencement of trial, counsel for the defendants filed a motion for disclosure of electronic surveillance in accordance with the United States Supreme Court's holding in Alderman v. United States,
976
321 FEDERAL SUPPLEMENT

294 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 297 (1968). In essence, the motion requests an order from the Court directing the Government to divulge to defendants all logs, records, and memoranda of electronic surveillance directed at any of the defendants or co-conspirators not indicted. It further requests that a hearing be held to determine whether any of the evidence upon which the indictment is based or which the Government intends to introduce at trial is tainted by such surveillance. In response to this motion the Government submitted an answer which stated that at that time the Government had no knowledge of any electronic surveillance pertaining to any of the defendants but that a further inquiry was then being conducted with the Federal Bureau of Investigation. In its answer the Government stated that the United States Attorney's Office would advise the Court if and when any evidence of electronic monitoring was discovered and, in such event, would file a reply to the defendants' motion to disclose.

Subsequently, the Court received an affidavit signed by the United States Attorney General, John N. Mitchell, stating that he had authorized and deemed necessary the wiretapping of certain of defendant Plamondon's conversations. Sealed records and files were submitted with this affidavit for their examination. Oral argument was heard regarding this issue on January 14 and 16, 1971.

[1-4] In Alderman v. United States, supra, the Supreme Court held that the Government must disclose and make available to a defendant who has the proper standing, any conversations he participated in or that occurred on his premises which the Government overheard during the course of any illegal electronic surveillance. The clear purpose of this ruling is to reinforce the long-standing exclusionary rule of the Fourth Amendment which prevents the Government from building its case upon evidence which is obtained by unconstitutional means. In the instant case, since defendant Plamondon was a party to the monitored conversation, he has the requisite standing to object to the evidence and to request disclosure. See Alderman, supra, at 176, 89 S.Ct. 961. It thus becomes necessary to determine whether the surveillance involved herein was in violation of the defendant's Fourth Amendment rights. Disclosure is necessary only when the District Court determines that the surveillance was conducted illegally. Concurring Opinion of Mr. Justice White in Giron­iano v. United States, 394 U.S. 310, 89 S.Ct. 1163, 22 L.Ed.2d 297 (1968).

The position of the Government in this matter, simply stated, is that the electronic monitoring of defendant Plamondon's conversations was lawful in spite of the fact that the surveillance was initiated and conducted without a judicial warrant. In support of this position, the Government contends that the United States Attorney General, as agent of the President, has the constitutional power to authorize electronic surveillance without a court warrant in the interest of national security. The validity of the Government's position on this issue, under the Fourth Amendment, has not yet been decided by the Supreme Court. See Footnote 23 in Katz v. United States, 389 U.S. 347, 368, 88 S.Ct. 509, 19 L.Ed.2d 578. There have been, however, a few District Court cases which concern this issue. In presenting the United States v. F. (Criminal No. KE-976, September 1, 1970), District Judge Woodard found that surveillance pursuant to the Act was lawful. See also, America v. Dilling­er 196 (N.D. Ill., February 1970) cert. granted, 407 U.S. 961, 22 L.Ed.2d 297.

Particularly noteworthy of defendants' oral argument is their motion for discretionary well-reasoned opinion of the Honorable Judge Ferguson of the Central District of California. United States v. Clay, 27 L.Ed.2d 905 (C.D.Cal.1969). The Government moved to strike the motion contending that the Court was not entitled to receive the motion which concerned then pending before Judge Ferguson.

The great umbrella of Fourth Amendment rights is one protected by the Fourth Amendment to the United States Constitution. In Alderman v. United States, supra, the Supreme Court held that the Fourth Amendment to the United States Constitution operated as a precedent for all Eleventh Amendment cases. See, also, Silverthorne v. United States, 251 U.S. 38, 40 S.Ct. 745, 64 L.Ed. 922 (1920). In Katz v. United States, supra, the Supreme Court held that the Fourth Amendment was not limited to those cases which concerned seizures of tangible evidence. The Fourth Amendment further declares that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The Court was careful to state that the amendment was not limited to searches conducted with a warrant. See United States v. Rabinowitz, 339 U.S. 56, 93, 60 S.Ct. 432, 437, 84 L.Ed. 653 (1940). The Court in Katz held that an unreasonable search conducted without a warrant violates the Fourth Amendment of the United States Constitution and that the government may not introduce evidence obtained thereby at its trial. In the instant case, defendants all logs, records, and memoranda of conversations. Sealed records and files were submitted with this affidavit for their examination. Oral argument was heard regarding this issue on January 14 and 16, 1971.

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which concern themselves with this issue. In presenting its oral argument the Government relies heavily upon United States v. Felix Lindsey O'Neal, Criminal No. KC-CR-1204 (D.C.Kan., September 1, 1970), a case in which the District Judge made an in-court ruling that surveillance pursuant to the authorization of the Attorney General was lawful. See, also, United States of America v. Dillinger, Criminal No. CR 150 (N.D.III., February 20, 1970); United States v. Clay, 430 F.2d 165 (6th Cir. 1970) cert. granted. 400 U.S. 990, 91 S. Ct. 467, 27 L.Ed.2d 438.

Particularly noteworthy, and the basis of defendants' oral argument in support of their motion for disclosure, is the exceptionally well-reasoned and thorough opinion of the Honorable Judge Warren Ferguson of the Central District of California. United States v. Smith, 321 F. Supp. 424 (C.D.Cal.1971). The affidavit and circumstances which were represented before Judge Ferguson are identical to the affidavit and issues now before this Court for consideration. and the Court is compelled to adopt the rule and rationale of the Smith case in reaching its decision today.

The great umbrella of personal rights protected by the Fourth Amendment has unfolded slowly, but very deliberately, throughout our legal history. The celebrated cases of Weeks v. United States, 224 U.S. 368, 34 S.Ct. 541, 58 L.Ed. 992 (1914), and Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), became the cornerstone of the Amendment's foundation and together these two decisions set the precedent for the rule that "evidence secured in violation of a defendant's Fourth Amendment rights may not be admitted against him at his trial. In Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920), the familiar legal simile of the "poisonous tree" became the pillar for the Court's ruling that the exclusionary rule of Weeks was to be expanded to prohibit the admission of any fruits derived from illegally seized evidence. The final buttress to this canopy of Fourth Amendment protection is derived from the Court's declaration that the Fourth Amendment protects a defendant from the evil of the uninvited ear. In Silverman v. United States, 365 U.S. 505, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961), and Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576, the Court ruled that oral statements, if illegally overheard, and their fruits are also subject to suppression.

[5] In the instant case the Government apparently ignores the overwhelming precedent of these cases and argues that the President, acting through the Attorney General, has the inherent Constitutional power: (1) to authorize without judicial warrant electronic surveillance in "national security" cases; and (2) to determine unilaterally whether a given situation is a matter within the scope of national security. The Court is unable to accept this proposition.

We are a country of laws and not of men.

[6-8] The Government contends that the President can conduct warrantless surveillances under the authority of the Omnibus Crime Control and Safe Streets Act of 1968. The effect of this comprehensive statute is to make unauthorized surveillance a serious crime. The general rule of the Act is that Government surveillance and/or wiretapping is permitted only upon the showing of probable cause and the issuance of a warrant. An exception to this general rule permits the President to legally authorize electronic surveillance "to obtain foreign intelligence information, deemed essential to the security of the United States." The Act also provides:

Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 606) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign
intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government.

[9] In addressing himself to the relevance of this statutory provision to the warrantless surveillance issue, Judge Ferguson of the California District Court, in United States v. Smith, supra, stated succinctly that: "Regardless of these exceptions in the criminal statute, the President is, of course, still subject to the constitutional limitations imposed upon him by the Fourth Amendment." This Court is in full accord with this rationale for it is axiomatic that the Constitution is the Supreme Law of the Land.

The contention by the Government that in cases involving "national security" a warrantless search is not an illegal one, must be cautiously approached and analyzed. We are, after all, dealing not with the rights of one individual defendant, but, rather, we are here concerned with the possible infringement of a fundamental freedom guaranteed to all American citizens. In the first Supreme Court case involving wiretapping, Justice Brandeis, in his dissenting opinion, concisely stated the issue at stake in a case of this nature:

"The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect, that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment." Olmstead v. United States, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928).

It is to be remembered that the protective sword which is sheathed in the scabbard of Fourth Amendment rights, and which insures that these fundamental rights will remain inviolate, is the well-defined rule of exclusion. And, in turn, the cutting edge of the exclusionary rule is the requirement that the Government obtain a search warrant before it can conduct a lawful search and seizure. It is this procedure of obtaining a warrant that inserts the impartial judiciary between the Government and the Constitution.

[10, 11] Generally, in order to search a citizen's premises, law enforcement agents must appear before the Court or Magistrate and request a warrant. The request must describe the place to be searched, matter to be seized, and, most importantly, there must be a statement made under oath that the Government has probable cause to believe that criminal activity exists. Through this procedure (the maintenance of a system of checks and balances between the arms of Government), we as citizens are assured the protection of our constitutional right to be free from unreasonable searches and seizures. Prior to the issuance of any search warrant the Court must independently review the request to search and make an objective determination whether or not probable cause of some criminal activity exists, which activity would make the search reasonable and not in violation of Fourth Amendment rights. Absent such a requirement of an objective determination by a magistrate, law enforcement officials would be permitted to make as to the reasonableness of the evidence of a search. This Court recognizes the existence of such authority.

[12, 13] In its brief, the Government cites several cases wherein the President has the power and must authorize electronic surveillance against the hostile agents of the government. Using these as precedents, the Court in the area of surveillance by the Government can be remade to gather intelligence information deemed essential to protect the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government.

[14] An idea which is highly significant is that a dissident is akin to an uncharged defendant, a non-criminal nature which is not limited to "exceptional circumstances" or is a non-criminal nature. The President’s authority, as set forth in his memorandum written in 1940. But, in order to exercise his plenary powers, the President must delegate power to the Attorney General, and whether or not he is given power to delegate electronic surveillance activity, the Government must have the power to gather information and subvert the Government’s ability to gather information against the President. The President has the power and must authorize electronic surveillance against the hostile agents of the government.

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sion to the reasonable, the scope and the evidence of probable cause for a search. This Court is loath to tolerate the existence of such a condition.

[12, 13] In its brief the Government cites several cases which have held that the President has the authority to authorize electronic surveillance which he deems necessary to protect the nation against the hostile acts of foreign powers. Using these as precedents the Government submits that the President should also have the constitutional power to gather information concerning domestic organizations which seek to attack and subvert the Government by unlawful means. This argument, however, is untenable. Although it has long been recognized that the President has unique and plenary powers in the field of foreign relations (Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 68 S.Ct. 431, 92 L.Ed. 568 (1948)), in the area of domestic affairs the Government can act only in limited ways. See Brandenburg v. Ohio, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 480 (1969).

The Government also asserts that the President's authority for warrantless monitoring stems from a confidential memorandum written by President Roosevelt in 1940. But, if the President is given power to delegate who shall conduct wiretaps, the question arises whether there is any limit on this power. Furthermore, the Smith case, supra, in tracing the history of the Roosevelt directive, establishes that the President's power of surveillance is specifically limited to “exceptional cases”—cases of a non-criminal nature or which concern the country's national security.

[14] An idea which seems to permeate much of the Government's argument is that a dissident domestic organization is akin to an unfriendly foreign power and must be dealt with in the same fashion. There is great danger in an argument of this nature for it strikes permitted to make their own evaluation as to the reasonableness, the scope and the evidence of probable cause for a search.
Supp. 424 (C.D. Cal. 1971), which was that:

"* * * in wholly domestic situations there is no national security exception from the warrant requirement of the Fourth Amendment. Since there is no reason why the government could not have complied with this requirement by obtaining the impartial judgment of a court before conducting the electronic surveillance in question here, it was obtained in violation of the Fourth Amendment."

This Court hereby ORDERS that the Government make full disclosure to defendant Plamondon of his monitored conversations. The Court, in the exercise of its discretion, further ORDERS that an evidentiary hearing to determine the existence of taint, either as to the defendant or as to the evidence introduced at trial, be conducted at the conclusion of the trial of this matter.

Eugene W. PATTERSON, Jr.

COMMANDING GENERAL, Headquar­ters, U. S. Army Training Center, In­fantry and Fort Polk, Fort Polk, Lou­isiana.

No. 16101.

United States District Court, W. D. Louisiana,

Action by physician, a commissioned officer in United States Army, for writ of habeas corpus to compel Army to release him from active duty. The Court held, however, that physician was entitled to order directing Army to assign him to duties within his physical profile as found by Army.

Complaint dismissed.

1. Armed Services ☐15

Where at time of physician's entry on active duty in Army there was no proof that his impairment, a herniated nucleus pulposus was not static, Army did not violate any regulations when it found him medically acceptable in accordance with Department of Defense policy. The Court held, however, that physician was entitled to order directing Army to assign him to duties within his physical profile as found by Army.

Complaint dismissed.

2. Armed Services ☐15

Fact that physician was found to have a "3" physical profile within Army regulation providing that individuals so designated are not acceptable for active duty in time of peace did not preclude physician from being medically accepted in Army in peacetime, inasmuch as physicians are admitted under a set of physical standards completely different from others.

3. Mandamus ☐64

Army physician was entitled to mandamus directing Army to assign him to duties within his physical profile as found by Army, where it appeared that it had not done so, even though physician was not entitled to habeas corpus to compel his release. 28 U.S.C.A. § 1361.

Charles S. King, Lake Charles, La., for petitioner.

Donald E. Walter, U.S. Atty., Shreveport, La., for defendant.

EDWIN F. HUNTER, Jr., District Judge.

This action by a commissioned officer in the United States Army, a member of the Medical Corps, seeks a writ of habeas corpus to compel the United States

Army to release alleging that the

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Complaint dismissed.
I speak on behalf of the Special Committee— which has carefully considered and rejected the proposed amendment to Sec 3.02.

Sec 3.01 and 3.02 provide for a National Security exception to the court order & warrant procedure required in non-security cases.

In this debate,

It is essential to understand that this exception relates only to cases where National Security is threatened by foreign powers or activities. The exception does not relate to domestic threats or subversion. This distinction is explicitly clear from the Standard & the Commentary, (p121)

The Standards, therefore, do not go as far as Title III, which makes no distinction between foreign & domestic threats to security.
Thus, the issue on the amend. is a limited one— but it would affect a vitally sensitive area of national interest.

It is important to understand precisely what is proposed.

The C/Law Council would legalize the surveillance in national security cases, but would deny— i.e., exclude— use of its product in all criminal prosecutions.

It will be noted that this position is constitutionally illogical.
It may be noted that this position is constitutionally illogical. The exclusionary rule applies only to evidence unlawfully obtained — its rationale being that in this way, police incursions will be inhibited.

The Council's proposal, recognizing the constitutional right of the President to wire tap but excluding the fruits, would unnecessarily result in the anomaly of lawfully obtained evidence being suppressed.

The practical effect could hardly be in our country's interest. Foreign espionage and subversion continue and are usually not conducted solely by foreign diplomats — who can be expelled from the country. In most cases, there are American collaborators.
American

These are collaborators or agents who are serving the foreign government. Unless the product of the surveillance can be used in evidence, the foreign agent or spy rarely can be prosecuted successfully.

The Council predicates its position on Constitutional grounds. This position cannot be defended either by the cases or by Congressional action.

1. Sup. Ct. has not ruled on the foreign threat situation. Katze expressly kept this open.

in Title III,

3. The Congress, after full consideration of every argument advanced here today, exempted from the court order & warrant procedure, surveillance in foreign & domestic security threat cases.

The first duty of government is to protect against foreign enemies. Every President since F.D.R. has recognized the need for E/S against espionage & foreign subversion. The surveillance is largely ineffectual if its results cannot be used in court.

The 4th Amendment, only when unreasonable.

Unreasonable search & seizure.

Our standards (3,02) would allow use of the evidence only when the reasonableness of the surveillance is reasonable, and is conducted in the interest of national security.

The Special Committee submits that this is a responsible position for the ABA to take. I urge the House to defeat this crippling Amendment.
ELECTRONIC SURVEILLANCE IN NATIONAL SECURITY CASES

Part III (Section 3.1 and 3.2) of the proposed Standards deals with National Security. Section 3.1 authorizes the use of electronic surveillance "by appropriate federal officers" (subject to Presidential and Congressional standards) "to protect the nation from attack" by a foreign power or to protect "national security information against foreign intelligence activities".

Section 3.2 provides that "communications so overheard or recorded" shall be received in evidence "where the overhearing or recording was reasonable."

Position of Criminal Law Council

A majority of the Criminal Law Council opposes these standards, taking the position that evidence so obtained "without presurveillance court order" should be suppressed in every case - even though the surveillance was reasonably conducted pursuant to authority of the President.
The Criminal Law Council would, therefore, stretch the Fourth Amendment to the point where national security - threatened by a foreign power - is subordinated to rigid requirements with respect to showing probable cause and obtaining a prior warrant.

Every President of the United States since Franklin D. Roosevelt has recognized the necessity of using wire-taps against foreign espionage and subversion. The Communications Act of 1934 permitted this activity but prescribed use of the product in evidence. The Omnibus Crime Control Act of 1968 attempted to clarify this situation.

**Omnibus Crime Control Act**

Title III of the Act provides:

"Nothing contained in this chapter . . . shall limit the constitutional power of the President . . . to protect the nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security against foreign intelligence activities."

* * * *
"The contents (of intercepted communications) may be received in evidence . . . only where such interception was reasonable."

It will be noted that the foregoing language from the Omnibus Crime Control Act is substantially identical with that of Sections 3.1 and 3.2 of the Standards.

The Omnibus Crime Control Act contains a further provision to the effect that its provisions shall not limit the power of the President "to protect the United States against the overthrow of the government by force or other unlawful means". This provision was intended to authorize - at least, not to inhibit - electronic surveillance in domestic subversion cases where overthrow of the government is advocated by force or unlawful means.

It is important to note that the Standards recommended to this House do not contain the so-called "domestic subversion" provision. In this important respect, the Standards do not go as far as Title III of the Omnibus Crime Control Act.
Distinction between Foreign and Domestic Threats

Decisions of the Supreme Court (which need not be discussed here)* have not resolved the constitutional issues here involved. Depending upon one's hopes and bias, language in Katz and other cases can be read as supporting or opposing the constitutional right of the President to act to safeguard national security. But however one may read the dicta, or construe the nuances of past decisions, certainly there has been no definitive Supreme Court ruling.

Smith Case (Central District of California) - Jan. 8, 1971

This issue has recently been considered by Judge Warren J. Ferguson in U.S. v. Smith, decided in the Central District of California on January 8.

In that case, electronic surveillance had been employed - upon order of the Attorney General - against "domestic organizations" believed to be using "unlawful means

*See in particular Katz, 389 U.S. 347.
to attack and subvert the existing structure of government".

There was no prior judicial authorization of the surveillance.

In holding that the Fourth Amendment was applicable to "purely domestic situations", the court held that the defendant's constitutional rights had been infringed and the evidence was excluded.

In three separate places in the opinion, Judge Ferguson recognized a distinction between "domestic" or internal threats and those emanating from a foreign power.

For example, Judge Ferguson said:

"It might very well be that warrantless surveillance of this type, while unconstitutional in the domestic situation, would be constitutional in the area of foreign affairs."

At another point in his opinion, Judge Ferguson said:

*The Court pointed out that this distinction can be based on the President's long-recognized inherent power with respect to foreign relations. See, e.g., Chicago & Southern Airlines v. Waterman Steamship Corp., 333 U.S. 103; U.S. v. Belmont, 301 U.S. 324.*
"In cases involving foreign affairs this argument (that it would be impracticable to obtain a prior court order and warrant) might very well prevail. In that situation, numerous nonjudicial factors are relevant, and the decision would probably be far removed from the consideration of probable cause. However, this argument is totally inapplicable to a criminal proceeding in a federal court involving a domestic situation."

"Limitations which are artificial in the international sphere (such as requiring court order and warrant) are reasonable and proper when solely domestic subversion is involved".

As Judge Ferguson states, the limitations which the Criminal Law Council would impose are artificial and unrealistic. They could seriously handicap the ability of the President to protect the vital interests of this country. They should be rejected by this House.
ORGANIZED CRIME AND ELECTRONIC SURVEILLANCE - IN VIRGINIA?

The Virginia Crime Commission, created in 1966 and since continued, was authorized to conduct a number of studies. One of these was to determine the activities of organized crime in Virginia, and ways and means to reduce or prevent it.

Organized Crime in Virginia

On March 16, 1971, Delegate Stanley C. Walker, Chairman of the Virginia Crime Commission, stated:

"Our preliminary work so far has found that there is some organized crime in Virginia. . . . We have been told (for example) by responsible authorities that about a quarter of a million capsules of heroin are put up every week in the Richmond metropolitan area. Such large scale illegal activities could not occur without large financial support and a framework for the transportation and distribution of such narcotics."

The Commission is continuing its study, and will report by November of this year. In view of this study, it may be of interest to take a look - necessarily a superficial
one - at the organized crime problem in our country, and at
the use of electronic surveillance as the most effective means
of attacking it.

The National Situation

As the Virginia study is in process, I will speak
generally about the national situation. While the problem is
most acute in the great metropolitan areas, it is sufficiently
national in scope to encompass the heavily urbanized centers
in Virginia.

Most of us think we know a good deal about organized
crime - especially since The Godfather became the book every-
one hides under his mattress. Yet, the truth is that the public
generally has little conception of its scope or of the extent
to which it preys upon the weakest elements of society.

What is "Organized Crime"?

The National Crime Commission* appointed by President
Johnson (and on which I served) made an extensive study of
this subject. In its 1967 Report, the Commission described
organized crime as follows:

*President's Commission on Law Enforcement and the Administra-
"An organized society that operates outside of the control of the American people and their government, it involves thousands of criminals, working within structures as complex as those of any large corporation, subject to private laws more rigidly enforced than those of legitimate governments. Its actions are not impulsive, but rather the result of intricate conspiracies, carried on over many years and aimed at gaining control over whole fields of activities in order to amass huge profits."

The objectives are power and money. The base of activity is the supplying of illegal goods and services - gambling, narcotics, loan sharking, prostitution and other forms of vice. Of these gambling is the most pervasive and the most profitable. It ranges from lotteries (numbers rackets), off-track betting and sports betting to illegal gambling casinos.

The importation and distribution of narcotics, chiefly heroin, is the second most important activity. This enterprise is organized much like a legitimate importing, wholesaling and retail business. The heroin, originating chiefly in Turkey, is moved through several levels between the importer and the street peddler. The markup in this process is fantastic. Ten kilos of opium, purchased from a Turkish farmer at $350, will be processed into heroin and retailed in this country for perhaps a quarter of a million dollars or more.
An addict must have his heroin. He is usually unemployed, which means that he must steal regularly to support his addiction. The disastrous effect of drugs on those who become addicted is well understood. There is far less understanding of the extent to which the drug traffic directly causes other serious crimes.

The third major activity of organized crime is loan sharking. Operating through an elaborate structure, large sums of cash are filtered down to street level loan sharks who deal directly with ignorant borrowers. Interest rates would make our banker friends green with envy. A charge of 20% per week is not at all unusual. The loan sharker is more interested in perpetuating interest payments than in collecting principal. Threats and the actual use of the most brutal force are employed both to collect interest and to prevent borrowers from reporting to the police.

No one knows the total take of organized crime. The President's Crime Commission estimated an annual profit of perhaps $6 to $7 billion per year. This illegal, nontaxed income, is greater than the combined net profits of AT&T, General Motors and Standard Oil of New Jersey.
The Victims - Those Least Able

In all of these illicit operations the "customers" - in reality the victims - are the people least able to afford criminal exploitation. They are the poor, the uneducated and the culturally deprived. In the great cities, where organized crime flourishes, the victims come largely from the ghettos. Their number is legion.

But organized crime's activities are not limited to illicit goods and services. To an increasing extent, and with the profits from these activities, organized crime is infiltrating legitimate businesses and unions. In some cities, it dominates jukebox and vending machine operations. Its ventures range from laundries, restaurants and bars to funeral homes and cemeteries. Again, the use of force and intimidation is standard procedure.

The La Cosa Nostra "Families"

The basic core of this criminal conspiracy consists of 24 groups or families, operating as criminal cartels. Known originally as the Mafia, they are now called La Cosa Nostra. The 24 groups are loosely controlled at the top by a national
body of overseers. The family members are relatively small - varying from as many as 700 to as few as 25. But their payrolls number in the thousands.

There are several aspects of organized crime which distinguish it from other crime. First, it is institutionalized as an ongoing system for making enormous profits. It protects itself, not casually or episodically but systematically, by bribery of selected police and public officials.

It also protects itself by ruthless discipline, maintained through "enforcers". It is their indelicate duty to maintain undeviating loyalty by the maiming and killing of recalcitrant or disloyal members. Those of you who admit to reading *The Godfather* will remember the fate of Paulie Gatto and Carlo Rizzi.

The efficiency of these professional enforcers is such that even the Federal Government, in organized crime prosecutions, often can protect witnesses only by total confinement. Indeed, it has been necessary on occasions to change their physical appearances, change their names and even to remove them from the country.
Why Has Society Been So Helpless?

At this point, you are probably asking - as I did - why have the American people, our government and our law enforcement agencies permitted these obscene conspiracies to exist and to prosper. Indeed, why have we seemed to be so helpless in the face of such arrogance and organized criminality?

There are a number of reasons, which I mention only in passing:

1. **Lack of resources.** The necessary commitment of resources simply has not been made - either by the federal or local governments.

2. **Lack of coordination.** Our system of law enforcement is essentially local. The FBI, despite its valiant efforts, cannot command the necessary cooperation and coordination, and the local response is often uninformed and sometimes already corrupted.

3. **Absence of strategic intelligence.** Fighting organized crime is a form of warfare against an enormously rich and well-disciplined enemy. Police intelligence is usually tactical, directed toward a specific prosecution. The greater need is for true strategic intelligence on the capabilities,
long-range plans, and the vulnerability of the leadership of the La Cosa Nostra groups.

4. **Inadequate sanctions.** The penalties imposed by law and the courts have been inadequate to deter this type of crime where the profits are so enormous. Until recently, the leaders have seldom been brought to court. This has caused judges to be reluctant to impose stiff sentences on the underlings. Moreover, the rights now afforded persons accused of crime - plus the delays in criminal justice - are exploited to the fullest by the resources available to La Cosa Nostra defendants.

5. **Lack of public and political commitment.** The truth is that the services provided by organized crime are wanted by many people. This tends to blunt the sort of demand by an outraged public which would assure more effective law enforcement. There is also a pervasive ignorance and indifference as to the nature and extent of the problem.

6. **Difficulty in obtaining evidence.** Perhaps the single most crippling limitation on law enforcement has been the difficulty of obtaining evidence adequate to convict the leaders. There is no secret as to the identity of many of these
leaders. Their names are known to the police, the press and often to the public. They live in luxury, are often influential in their communities, and even become the subject of admiration—especially by some of the young and witless. They are living proof that crime does pay in America.

The simple truth is that these robber barons of our time rarely are brought to justice because our system of law handicaps itself. These handicaps take many forms. Those rooted in our Bill of Rights must, of course, be preserved for the other values which they protect.

Yet, much can be done within the framework of these rights that will inhibit the growth—if not indeed destroy—these criminal cartels.*

Electronic Surveillance

I will speak today only of one major law enforcement weapon which, until recently, we have deliberately denied

*We could, for example, relax some of the artificial rules engrafted upon the Fourth, Fifth and Sixth Amendments by divided votes of the Court in cases like Miranda and Escobedo. See The Challenge of Crime in a Free Society, Report of President's Crime Commission, 1967, Additional Views, p. 303 et seq. The English Courts, famous for their concern for human rights, have few such rigid, artificial rules.
ourselves. I refer to the most modern scientific method of
detection, namely, electronic surveillance.

Organized crime operates by word of mouth and the
telephone. Records familiar to legitimate business are never
maintained. Massive gambling operations, in particular, are
conducted nationwide through telephonic communications.

The Law Until 1968

Until 1968, the law with respect to wiretapping was
chaotic. The Supreme Court had ruled in 1928 (Olmstead v.
U.S.) that the Fourth Amendment did not apply to wiretapping,
as there was no unlawful entry and no seizure of tangible things.
But the Federal Communications Act of 1934 prohibited the use
of wiretap evidence in federal trials. The net effect was to
permit wiretapping without limitation, but the fruits thereof
could not be used in court.

There was no federal law with respect to bugging,
and state laws - where they existed - often drew no distinction
between private and law enforcement surveillance. In sum, the
situation was intolerable, and the President's Crime Commission
in 1967 strongly urged federal action.
Since 1968

Congress responded in 1968 by adopting Title III of the Omnibus Crime Control Act.* Meanwhile, the Supreme Court - in the landmark Burger and Katz decisions** had overruled Olmstead, and held that wiretapping and other forms of electronic surveillance are subject to the search and seizures requirements of the Fourth Amendment.

Guided by these decisions, Congress - in Title III - outlawed all private surveillance, but authorized its court-controlled use in the crimes most frequently associated with organized syndicates - such as murders, kidnapping, extortion, bribery and narcotics offenses.

National and Internal Security

Congress did not legislate affirmatively as to national security cases. Title III does provide that its provisions shall not be construed to limit the inherent power of the President to obtain evidence without a prior court


order in cases involving national defense or internal security. As these issues are beyond the scope of this talk, I mention them only in the interest of completeness and to avoid any misunderstanding of the recommendation I will make for Virginia.

I will say in passing that there is little question - at least there should be none - as to the power of the President to take all appropriate measures to protect the nation against hostile acts of a foreign power. But the President's authority with respect to internal security is less clear. There is an obvious potential for grave abuse, and an equally obvious need where there is a clear and present danger of a serious internal threat. The distinction between external and internal threats to the security of our country is far less meaningful now that radical organizations openly advocate violence. Freedom can be as irrevocably lost from revolution as from foreign attack. This perplexing issue is now pending in several cases.* In the end, there may be a need for clarifying legislation.

*See United States v. Smith, Criminal Case No. 4277-CD, U.S. District Court, Central District of California, Jan. 8, 1971; United States v. Sinclair, Criminal Case No. 44375, U.S. District Court, Eastern District of Michigan, Jan. 26, 1971; see also recent Sixth Circuit Court of Appeals case (Times Dispatch, April 9, 1971), in which a Circuit Court for the first time held that the President lacks inherent power with respect to internal subversion.
Title III and Organized Crime

Returning now to the provisions of Title III directed against major criminal activity, a specific legislative finding was made as follows:

"Organized criminals make extensive use of wire and oral communications. The interception of such communications . . . is an indispensable aid to law enforcement and the administration of justice."

The interception authorized by Title III requires a prior court order. The safeguards prescribed with respect to such an order include: (i) showing probable cause; (ii) describing the crime and types of conversations; (iii) limiting the time period of the surveillance (not to exceed 30 days); (iv) terminating the wiretap or bugging once the stated object is achieved; (v) renewing it only by a de novo showing of continued probable cause; (vi) showing that normal investigative procedures have been tried and failed; and (vii) finally, reporting to the court on the results of each wiretap.

In light of these safeguards, there is no substance to the fears of some that these provisions of Title III have police state characteristics.
Experience under 1968 Act

The experience under the 1968 Act is interesting. The Johnson Administration had opposed Title III, and although it became law on June 19, 1968, the surveillance authority was not used by Attorney General Clark.

The present Administration has undertaken a massive campaign against organized crime. Task forces, organized for long-term operations, have been established in 17 cities. They use a "systems" approach to organized crime investigations - examining into all possible violations of federal laws, including racketeering, extortion, drug trafficking and income tax evasion. As Attorney General Mitchell has said, by the use of electronic surveillance, these task forces now have the capability of reaching "the whole criminal organization", including - almost for the first time - top members in the "families".

During 1969 and 1970, the Justice Department employed court-authorized surveillance on 309 occasions. Roughly 60% of these involved illegal gambling, and about 20% narcotics traffic. A total of more than 900 arrests have resulted, some 500 persons have been indicted, and over 100 convictions
already have been obtained. Most of those indicted have not yet been tried.*

Several top leaders of organized crime already have been convicted or have pled guilty. These include two leading members of New York families, and the acknowledged syndicate boss in New Jersey, Samuel DeCavalcante.

**Need for State Laws**

Despite the success under Title III, there is still need for comparable state laws. Most of the crimes committed violate state laws. The fight against organized crime has the greatest chance of success where both state and federal authorities can cooperate in the employment of the same weapons. The Congress recognized this need by providing in Title III for parallel state action.** The American Bar Association also recommends the adoption of carefully safeguarded state laws.


**Public Law 90-351, § 2516(2). Congress was careful to provide that state statutes must contain at least the procedural safeguards, protections and restrictions imposed by the federal statute.
electronic surveillance statutes.*

The situation in most states is still unsatisfactory - ranging from no law at all to inadequate or unconstitutional provisions. As of October 1970, 17 states had legislative authority for court-controlled surveillance. A model statute is now available, embodying the substance of the ABA Standards and complying with Title III of the Federal Act. New Jersey has recently adopted this model statute.**

The state with the greatest experience with wire-tapping is New York. Its statute, held unconstitutional in the Burger case, has since been revised to meet the Burger and Title III standards. Frank Hogan, famed District Attorney in New York City, has testified before a Congressional Committee that electronic surveillance is "the single most valuable weapon in law enforcement's fight against organized crime".

He further testified that without wiretap evidence his office

*This was one of the subjects studied by the ABA project on Criminal Justice, and the Minimum Standards to be incorporated in state statutes were approved by the House of Delegates at its February 1971 meeting. These ABA Standards were cited with approval by the Supreme Court in the recent case of U.S. v. White, decided April 5, 1971.

**See article in 43 Notre Dame L. Rev. 657 (1968), discussing an earlier form of the model statute.
could never have convicted Luciano, Jimmy Hines, Shapiro and a long list of other notorious racketeers.

**The Need for Legislation in Virginia**

If the preliminary findings of the Virginia Crime Commission are substantiated, the General Assembly should consider the enactment in 1972 of an appropriate surveillance statute.

Indeed, even if the evidence as to organized crime's activities in Virginia is inconclusive, there are strong reasons for enacting a carefully drawn law which prohibits all private surveillance but authorizes court-controlled wiretapping and bugging compatible with the federal legislation and the ABA Standards.

Organized crime is no longer confined to a few major cities. Its criminal activities are being diversified in scope and extended geographically. As Virginia increasingly becomes a part of the eastern urbanized corridor, the criminal syndicates are certain to operate here.*

I am not unaware of the strong feelings of many that a free society should not tolerate this intrusion upon privacy.

*The President's Crime Commission found that "organized criminal groups are known to operate in all sections of the Nation." Supra, p. 191.
They argue that, despite all safeguards, the conversations of some innocent people will be intercepted.

The answer, it seems to me, on this issue - as indeed on many others - is that there must be a rational balancing of the interests involved. Uncontrolled government surveillance would indeed be intolerable. But is it not equally intolerable for society so to shackle itself that cartels of organized criminals are free to prey upon millions of decent citizens and to make a mockery of the rule of law?

Happily the choice need not be between these two extremes. The sound answer lies in the middle course charted by the Federal Act and by the ABA Standards. It is to be hoped that this is the course Virginia will follow.
4th Amendment - which prohibits unreasonable searches and seizures. This clause limits the power of the government to search and seize personal property or data without proper authorization.

The phrase "unreasonable searches and seizures" refers to actions taken by law enforcement that are not justified by law or a warrant. The Amendment protects individuals from having their privacy invaded without proper warrant or reasonable cause.
REMARKS OF
ATTORNEY GENERAL JOHN N. MITCHELL
BEFORE THE
KENTUCKY STATE BAR ASSOCIATION

Cincinnati, Ohio
April 23, 1971

Good morn;
1. Fidelity of charges to F.B.I.
2. Electronic surveillance in Nat. Sec. cases.
Tonight I want to discuss two fundamental American rights: the individual's right of privacy and the people's right to preserve their form of Government.

Americans cherish their right of privacy, and they react strongly when they think it is threatened. At the outset, therefore, I want to speak candidly about recent efforts to frighten Americans into the conviction that their privacy is in jeopardy from an agency of their own Government. Specifically I refer to charges by a certain Senator and a certain Congressman against the Federal Bureau of Investigation and J. Edgar Hoover.

Let me set the record straight here and now.

**Charge No. One:** On April 14 the Senator made a lengthy speech claiming that the FBI makes "general political surveillance" of members of the Senate. He based this startling conclusion on the fact that FBI representatives had attended an Earth Day Rally last year where the Senator had been one of the speakers.

The FBI does not conduct general political surveillance of Senators, Congressmen or any one else. The reason the FBI attended the rally had nothing to do with the Senator. They were there only to observe
certain persons whose known records indicated the possibility of violent or unlawful conduct. Indeed, one such person—who shared the speakers' platform with the Senator—was out on bail at the time under Federal conviction for inciting to riot. Let me ask you: If the FBI trailed a suspect to a ball game of the Cincinnati Reds, would Johnnie Bench have reason to think he was under surveillance?

The plain fact is that the Senator was not under surveillance and he knew he was not under surveillance. Yet he twisted the facts to make a political headline, and he owes an apology and a retraction to the FBI and Mr. Hoover.

Charge No. Two: On April 5 the Congressman stated flatly and unequivocally that the FBI "taps telephones of members of this body and members of the Senate"—and he later said he had "proof positive" to support his charges.

He even had the audacity to compare the FBI to Hitler's Gestapo.

His unproven charges were widely circulated, and he was repeatedly challenged by his colleagues and others to produce proof. Day after day he refused to do so. Yesterday he finally took the floor of the House and made a lengthy speech. It was full of adjectives, but not one iota of
proof of the reckless charges he had made. Instead, it turned out
that he thought he heard interference on his phone at home and
suspected it was being tapped. He had it checked by the telephone
company, which reported to him that his phone had not been tapped.
The Congressman stated that the phone company always denies a tap
that has been made by the FBI, so he said this proved his point. When
"no" means "yes," I am reminded of the type of hypochondriac who
insists he is sick, regardless of the doctor's assurances. The
Congressman has been afflicted by a new type of paranoia--called
tapanopia--the belief that your telephone is being tapped.

I repeat what I said at the time: The FBI has not tapped the
telephone of any member of the House or Senate--now or in the past.
And the Congressman also owes a full retraction and apology to
Mr. Hoover and the FBI.

I do not want to mislead you into thinking there have been no
investigations of Congressmen. Where there is probable cause to
believe a Federal crime has been committed, the FBI has a duty to
obtain evidence. I am happy to add that with two or three possible
exceptions, members of Congress agree that they are entitled
to no special immunity from the normal process of law. On rare
occasions over the years, a member of Congress has indeed been the
subject of normal investigative procedures--but not wiretapping--when
the evidence indicated that such procedures were appropriate and necessary.
But with regard to the charges of general surveillance and wiretapping of Congressmen, those who are trying so hard to discredit the FBI for their own political purposes can't come through with the facts. All they have come up with is confirmation that the FBI is carrying out its statutory duties in the manner that the American people would want them carried out.

Now let us move from the realm of fantasy to the real world of fact. As you know, the whole question of electronic surveillance has been evolving in the courts for many years. In the Katz decision of 1967, the Supreme Court held for the first time that the Fourth Amendment protects private conversations as well as private premises from "unreasonable searches and seizures." It also held that a prior court order is necessary for electronic surveillance. But it left open the question of whether such a court order is necessary in a situation involving the national security.
Taking this cue, Congress enacted some careful wiretapping legislation in 1968. Wiretapping by private parties was outlawed, but Government wiretapping was authorized in cases of specified serious crimes. Such wiretapping is strictly regulated by the need to get a court order from a judge after showing probable cause for belief that a crime has been or would be committed. The detailed requirements of the law actually provide more protection of privacy rights than does the warrant procedure that has long been established for physical searches and seizures.

Thus I cannot conceive how court-authorized wiretapping as such can continue to be a public issue, any more than making a search or seizure with a warrant. The principle has been set forth by the Supreme Court and the procedures have been spelled out by Congress.

I might add that its use has proven extremely effective in getting evidence that would otherwise be impossible against organized criminals. From January 1969 to March 1971, 315 Federal court-authorized wiretaps—including 51 extensions—were executed. All but 12 produced incriminating evidence. As a result, over 900 persons were arrested and so far, 100 of them were convicted. Additional convictions will undoubtedly result as other defendants among those arrested are brought to trial.
Far from being a source of public fear, as some would have us believe, court-authorized wiretapping provides added protection to the public against organized crime. Used with careful legal limitations, as it has been under the 1968 law, it is a positive benefit to the community.

Let me turn now to the other type of wiretapping that was also covered in the 1968 Act. Congress specifically excepted from the court order requirement the President's need to obtain information to protect the nation against foreign attack or against, and I quote, "the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government." This was also in conformity with Justice Byron White's concurring opinion in the Katz case, in which he wrote:

"We should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable."
The fact is that such wiretapping had been used at least since 1940, when President Franklin D. Roosevelt called attention to the danger of "Fifth Columns" and authorized the Attorney General to use "listening devices" against "persons suspected of subversive activities against the Government of the United States, including suspected spies." He added, "You are requested furthermore to limit these investigations so conducted to a minimum and to limit them insofar as possible to aliens."

Let me point out that national security wiretapping without a court order has been used by every subsequent Administration. Congress agreed in its 1968 law, believing that such wiretapping was outside the traditional type of judicial decision involving probable cause for a warrant. National security wiretapping is an executive decision, requiring a variety of national considerations other than judicial ones.

Since this 1968 legislation, the wiretap issue has continued to unfold in the courts. A distinction has been manufactured between so-called "foreign national security wiretapping" and so called "domestic national security wiretapping." Two Federal district courts have ruled that the "domestic" variety is unconstitutional without a court order.

Two other district courts have ruled that such wiretapping is constitutional
without a court order. The Sixth Circuit Court of Appeals, sitting here in Cincinnati, has upheld the contention of one of the district courts that so-called "domestic national security wiretapping" requires a court order.

I have made these brief historical references to make it clear that national security wiretapping is not a sudden invention of this Administration. What is new is the contention that national security wiretapping should be separated into "foreign" and "domestic," and that the latter should require a court order.

This raises a number of questions, which I would like to discuss.

Question: Is a court order appropriate for any national security wiretaps?

Answer: As you know, a court order is required to execute a wiretap in the prosecution of a criminal offense. In order to obtain such a court order, considerable evidence must already have been gained to show "probable cause." Time is not of the essence in gathering such prior evidence.
But in a case where the national security is threatened, prevention is the first consideration. We first need intelligence on the movements of suspected conspirators, not formal evidence on which to convict them. In order for a national security wiretap to do any good it should come near the beginning of the investigation. Yet at that time we may not have enough evidence to show probable cause for a court order to wiretap. In fact, if we had such evidence we could probably prevent the threat in question without needing a wiretap.

I hope I have said enough to show that the requirement for a court order is appropriately applied to orthodox criminal-type wiretaps, but it does not fit the situation when applied to the national security field. By the time enough evidence is obtained to show probable cause, it may well be too late.

Question: Does a national security wiretap without court order conflict with the individual's right of privacy, and must it give way before that right?

Answer: Privacy is a precious right, but it is never absolute to the exclusion of other rights. The Fourth Amendment, which protects privacy, does not prohibit all searches and seizures. It prohibits only unreasonable searches and seizures. This contrasts to the unqualified guarantees in the First, Fifth and Sixth amendments. In fact, the courts have even
indicated that the right of free speech set forth so clearly in the First Amendment must be weighed against other individual rights in such areas as slander, libel, plagiarism, copyright, and the right of privacy itself.

On the other hand, what about another right—the right of the public to protect itself and to preserve the government it has created? This right is implicit in the Constitution's very existence, and in the political theory on which it is based. I refer to the social contract by which man voluntarily gives up a degree of jungle liberty to a government of his own making, which in turn protects his liberties against jungle attack by others.

Preserving such a government is most certainly a right of the people who constituted it. As Abraham Lincoln said in his First Inaugural Address, "It is safe to assert that no government proper ever had a provision in its organic law for its own termination." And as I would add, the United States Constitution does not end with the words, "This document will self-destruct."

My point is that the issue of privacy must be considered in this dual context; where these two rights appear to conflict, then we must do what we can to preserve both as fully as possible. But neither commands our total allegiance while the other is dismissed out of hand.
Question: Does the tapping of telephone lines constitute a reasonable exercise of the Government's right of self-preservation?

Answer: It is not only reasonable in this context, but the proper authorities would be derelict if they did not use it. Where there is reason to believe persons are planning a violent attack on the existing structure of the Government, that Government is justified in finding out about those plans. It would be little comfort, after the Government had been overthrown by force, to say, "Well, we didn't feel we should eavesdrop."

Question: What about something less than the threat of actual overthrow? The bombing of the Capitol building? The assassination of a President?

If we could prevent such monstrous acts through wiretap knowledge, do we have the constitutional right? In such cases should the Government's right to defend itself against violent attack prevail over the individual's right of privacy?

Answer: It must prevail, unless we wish to allow our orderly representative government to be disrupted. Liberty no less than security is endangered when government is prevented from governing.

Question: Should we distinguish between "foreign" national security wiretapping and "domestic" national security wiretapping?
Answer: How do we distinguish "domestic" and "foreign" enemies of our governmental structure? If they are aliens who are working on their own and are not connected with the government of another country, is their threat foreign? If they are American citizens directed by a foreign power, is the threat domestic? And while we are trying to find out which is which, may we tap a wire, or do we have to wait and search the rubble to find out?

If the institutions of our government have been destroyed, does it help to be able to say, "they have been destroyed from within?"

If this case seems too remote, let us look again at an occurrence that has been all too real. I refer to Presidential assassination, which certainly would fall under the classification of "a clear and present danger to the structure or existence of the Government." Since the Civil War four Presidents—Lincoln, Garfield, McKinley, and Kennedy—have been assassinated. Unsuccessful attempts were made on the life of one President-elect, Franklin D. Roosevelt, and one President, Harry Truman. None of these six deeds was done at the direction of a foreign
power; I believe those who would make a distinction between foreign and domestic subversion would classify them as "domestic." At least two of them—the cases of Lincoln and Truman—were conspiracies. The question is, if it would have been possible to uncover these conspiracies and prevent them through wiretapping, should the Government have done so?

I would answer this with another question: Are we to stand by and let the plot unfold, so we can say, "Yes, it was a true-blue American bullet?"

Ladies and gentlemen, national security is indivisible. You cannot separate foreign from domestic threats to the Government and say that we should meet one less decisively than the other. I don't see how we can separate the two, but if it were possible, I would say that experience has shown greater danger from the so-called domestic variety. Either we have a constitutional government that can defend itself against illegal attack, or in the last analysis we have anarchy. The issue was eloquently expressed by Abraham Lincoln in his special message to Congress after the Civil War had begun.

"And this issue," he said, "embraces more than the fate of these United States. It presents to the whole family of man the question whether a constitutional republic or democracy—a government of the people by the
same people—can or cannot maintain its territorial integrity against
its own domestic foes... It forces us to ask: Is there in all republics
this inherent and fatal weakness? Must a government, of necessity,
be too strong for the liberties of its own people, or too weak to maintain
its own existence?"

This crucial question has resounded for more than a century since
Lincoln. Obviously, we are still grappling with it today. Just as
obviously, the answer lies in pursuing a fine balance between individual
liberty on the one hand and collective survival on the other. So far we
have maintained this balance as we have developed a sound body of
constitutional law. But if we ever choose unbridled liberty over
government itself, we will soon have neither.
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economic growth must combine with the police objective of diffusing the fruits of this growth, and it becomes ever more evident throughout the nation. As the economic pie grows, people must increasingly be asked to accept the fact that this pie eats up in more months if healthful social structures are to be built and democratic institutions are to be sustained. The areas where considerably more emphasis should be placed are throughout Latin America which would contribute to a broader discussion of the cause of economic growth:

1. The development of more efficient systems of installment credit which would open the door to more persons in terms of home ownership and ownership of consumer durables;

2. The broader distribution of ownership in corporations to the people through the development of healthier capital markets including efficient systems of controlling financial monopolies and such controls increasingly determine export performance and export sales.

The lesson that we have learned in the advanced nations in the industrial world—and that Japan is just learning—is that man does not live by GNP alone. I would also suggest that economic and politically polices now apparently being followed by some ingredients of the business world can concentrate on redistributing the existing economic system, more economically distributed GNP do not serve the best interests of their country.

2. The American's are greatful for which is the wisdom of the Statesman, the Director of the Federal level, and from January of 1969 through March of 1971, 315 court approved surveillance orders, including extensions, have been executed. All but 72 produced incriminating evidence. As a result, over 500 warrants have been arrested, and, so far, 100 of these individuals have been convicted. Additional convictions will undoubtedly be had as the defendants among those arrested are brought to trial. No case has yet reached the Supreme Court, but I am encouraged that the lower Federal courts have hence far treated the constitutional issues on the basic scheme of the act. District Attorney Hogan's characterization of electronic surveil­ lance is a most valuable weapon in the fight against organized crime. The 587 applications filed during the 12 months of 1970 compare with the 304 applications filed in 1969 and 174 filed in 1968. In 6 months of 1968, on the Federal level, the increase from 23 in 1969 to 163 in 1970 reflects the attitude of the Department of Justice's drive against organized crime. The number of wiretapping or other forms of electronic surveil­ lance are now in operation in cities throughout the Nation. On the State level, the increase from 265 in 1969 to 414 in 1970, reflects the implementation of new laws in several states, primarily in New York. In 1969, only 45 applications were made in New Jersey; in 1970, the number increased to 122 and the State attorney general's office accounted for 83 in its increased organized crime efforts.

On the Federal level, 183 applications, 104 were made by the Department of Justice. The 183 au­ thorizations were granted for an average length of 17 days; the extensions for an average of 9 days. The State picture varied. In New Jersey, for example, of the 82 authorized intercepts of the attorney general's office, 82 were installed and 19 warrant extensions were made. The 82 warrant extensions are granted for an average length of 16 days; the extensions for 19 days.

In 1970, of the 587 applications that resulted in an intercept, 539 involved a wiretap. Those developments can be further clarified as an account of the number of wiretapping devices, such as a microphone. In 1970, the number of wiretapping devices, such as a microphone, in 1970, the number of wiretapping devices, such as a microphone, was given by Mr. Justice Clark. In 1970, the number of wiretapping devices, such as a microphone, was given by Mr. Justice Clark. In 1970, the number of wiretapping devices, such as a microphone, was given by Mr. Justice Clark. In 1970, the number of wiretapping devices, such as a microphone, was given by Mr. Justice Clark. In 1970, the number of wiretapping devices, such as a microphone, was given by Mr. Justice Clark. In 1970, the number of wiretapping devices, such as a microphone, was given by Mr. Justice Clark. In 1970, the number of wiretapping devices, such as a microphone, was given by Mr. Justice Clark. In 1970, the number of wiretapping devices, such as a microphone, was given by Mr. Justice Clark. In 1970, the number of wiretapping devices, such as a microphone, was given by Mr. Justice Clark.
May 10, 1971

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act, however, since the Congress in the 1963 act did not wish to limit in any fashion the constitutional power of the President, including the Chief of the Nation's Armed Forces to respond to either foreign powers or clear and present domestic threats to the survival of the Nation. See 18 U.S.C. 551(13); 14

CONGRESSIONAL RECORD 65246—daily 1969. In 1960, the average intercept in the Federal courts was 12.169. These figures alone should do a great deal to put into context people's fear of excessive use of these techniques. Most police agencies including the Federal, simply do not have the manpower and other resources to conduct widespread surveillance.

Most of the cases in which they were involved were ones that were under investigation or were actual trials. However, the reports indicate that a total of 1,974 persons and 52,461 intercepts were made, of which 237 or 80 percent were incriminating.

The total costs of each intercept—manpower and equipment—ranged from a low of $11.06 per hour in 1960 to a high of $203 per hour in 1969. The average national intercept running $53.54, and the average Federal intercept running $12.169. These figures alone should do a great deal to put into context people's fear of excessive use of these techniques. Most police agencies including the Federal, simply do not have the manpower and other resources to conduct widespread surveillance.

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and myself, copies of the three President's memorandums, a staff memo summarizing the developments of the law in this area, and important court decisions

that this examination could mature into public hearings. The report of the Senate and the House will reflect the facts of this area of wiretapping and electronic surveillance.

As you may also be aware, after the first Senate hearings and the subsequent hearings of the Subcommittee, the Department of Justice, in April of 1969, by the Administrative Office of the Courts, I directed that a committee of the subcommittee on Criminal Laws and Procedures, the Subimunity Subcommittees which have legislative oversight in the area of wiretapping and electronic surveillance, be established to undertake a review of the operation of the 1968 act and the possible amendments to it and to make recommendations. These recommendations will be presented to the Senate and the House in June of 1972. It is my hope that these recommendations will be a fitting tribute to the Senate and the House and to the late Senator William Proxmire, who was a leader in the fight for the abolition of the 1968 act and collaborated with me in the fight for the passage of the 1969 act.

In light of all these steps, I believe, in short, that the effort is intended to undertake at this time a comprehensive review of the law and practice in these fields and that the result should help to bring some degree of stability into the public hearings by early

... 

As I said sure you are aware, I sponsored the enactment in 1968 of title III of Public Law 90-284, which deals with wiretapping and other forms of electronic surveillance, out of the depths of deep-seated concern that our law enforcement and weighing the legitimate need for secrecy of our Nation's citizens, title III of Public Law 90-284, will there be effective for a period of six months, beginning on June 18 of this year, a period during which it has been utilized on the federal level for 23 years and in which the legislatures of 13 of our states have enacted comparable legislation and which has legislative oversight in the state of wiretapping and electronic surveillance, established by title II and recently strengthened by Public Law 91-446, will come into operation in June of 1972. It is my hope that these recommendations will be a fitting tribute to the Senate and the House and to the late Senator William Proxmire, who was a leader in the fight for the abolition of the 1968 act and collaborated with me in the fight for the passage of the 1969 act.

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CONGRESSIONAL RECORD — SENATE

May 10, 1971

S. 6478

Dear Senator McClellan:

In response to your letter of April 20, 1971 concerning a study of wiretapping and electronic surveillance to be undertaken by the Subcommittee on Criminal Laws and Procedures, we at the Department of Justice are well aware, Senator, of your key role in the enactment of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, the landmark legislation sanctioning with wiretapping and electronic surveillance, and of your interest in improving our legal enforcement efforts while at the same time safeguarding individual liberties. Our experience under the statute in the last 27 months has proved the wisdom of the framers of it on both counts.

We agree also that this is an appropriate time for us to report to the Congress on our experience under Title III, and for the Subcommittee on Criminal Laws and Procedures to undertake a comprehensive review of law and practice in the areas of wiretapping and electronic surveillance, as well as related areas. You may be assured, therefore, of our full cooperation in the endeavor.

Members of my staff will be in touch with the staff of the Subcommittee as you requested. Sincerely, 

[Exhibits No. 2]

[Exhibits No. 3]

[From the Sunday Star, May 2, 1971] Workshops

Q. Mr. President, regarding the use of wiretaps in domestic security matters—Nixon: The kind that you don't have to wiretap, to a police state. Would you comment on the threat or a police state in the use of this type of activity? A. Well, I have great respect for Congress—Congressman Celler as a lawyer and, of course, as the dead—as you know, he is the dean of all the congressmen, in the House. A very distinguished congressman. However, in this respect I would only say, where was he in 1965? Where was he in 1963?

Today, right today, at this moment there are one-half as many taps as there were in 1961, '62 and '63, and 10 times as many news stories about them. Now, there wasn't a police state in 1961, '62 and '63, in my opinion, because even then there were less than 100 taps and there are less than 50 today, and there is none, none, at the present time.

All of this hysteria—and it is hysteria, and much or, of course, a political demagogu­ery to the effect that the FBI is tapping by the staff of the Subcommittee as you requested.

In my view, the taps, which are always approved by the attorney general, in a very limited area. Dealing with those who would use violence or other means to overthrow the government, and limited, as they are at the present time, to less than 60 at any one time. I think there are justified, and I think that the 200 million people in this country do not need to be concerned that the FBI, which, with all the criticism of it, which has a fine record of being non-political, non-partisan, and which is recognized throughout the world as probably the best police force in the world, the people of this country should be thanking that we have an FBI that is so greatly returned in this respect.

This is not a police state. I have been to police states. I know what they are. I think the best thing that could happen is some of the congressmen and senators and others who talk about police states is to take a trip—mean a trip abroad, of course—and when they go abroad, try a few police states.

This isn't a police state and isn't going to become one.

I should also note this out: Where were some of the critics in 1965 when there was Army surveillance of the Democratic National Committees—at the convention, I mean? We have stopped that.

This administration is against any kind of repression, any kind of action that brings on the right of privacy, and it is—trying to put it in words, I still haven't found any kind of action necessary to protect this country that those who would preserve the peace that all people are entitled to enjoy.

EXHIBIT No. 4

TABLE 7—SUMMARY REPORT ON AUTHORIZED INTERCEPTS GRANTED PURSUANT TO TITLE III OF UNITED STATES CODE, SEC. 2518, 1968, 1969, 1970

<table>
<thead>
<tr>
<th>Tapping period</th>
<th>Total Number of Intercepts</th>
<th>Average length (in days)</th>
<th>Average number of taps</th>
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<tr>
<td>April 20 to Dec. 31, 1968</td>
<td>174</td>
<td>147</td>
<td>129</td>
</tr>
<tr>
<td>May 1 to Dec. 31, 1969</td>
<td>1,917</td>
<td>1,518</td>
<td>878</td>
</tr>
<tr>
<td>June 1 to Dec. 31, 1970</td>
<td>567</td>
<td>253</td>
<td>182</td>
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<tr>
<td>July 1 to Dec. 31, 1971</td>
<td>138</td>
<td>39</td>
<td>20</td>
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<tr>
<td>August 1 to Dec. 31, 1971</td>
<td>59</td>
<td>13</td>
<td>7</td>
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Footnotes on following page.
Note that the "foreign" and "domestic" security distinction is much weaker in theory than in practice. Often it is difficult without "wiring" or "bugging" to determine if the "foreign" or "domestic" character of the threat.

Note that the interception and "wiring" was sometimes necessary to determine the nature of the threat.

10. On June 5, 1972, United States, 349 U.S. 747 (1964) held that the use-of-a-transmitter by police officers without a warrant to overhear conversations between an informant and a suspect did not violate the Fourth Amendment's ban on unreasonable searches and seizures where the informant consented to the use.

11. Irvine v. California, 347 U.S. 124 (1954) held that bugging without a court order did not violate the Fourth Amendment's ban on unreasonable searches and seizures where the informant consented to the use.

12. Federal Bureau of Investigation v. United States, 361 U.S. 330 (1959) held that electronic recording of a wire communication with the consent of a participant was not a violation of the Fourth Amendment's ban on unreasonable searches and seizures.

13. Morse v. United States, 325 U.S. 22 (1945) held that electronic recording of an oral communication with the consent of a participant was not a violation of the Fourth Amendment's ban on unreasonable searches and seizures.

14. English v. United States, 365 U.S. 107 (1961) held that electronic recording of a wire communication with the consent of a participant was not a violation of the Fourth Amendment's ban on unreasonable searches and seizures.

15. N.Y. Code of Crim. Proc. § 1803 (1965) held that electronic recording of an oral communication with the consent of a participant was not a violation of the Fourth Amendment's ban on unreasonable searches and seizures.

16. Morse v. United States, 325 U.S. 22 (1945) held that electronic recording of an oral communication with the consent of a participant was not a violation of the Fourth Amendment's ban on unreasonable searches and seizures.

17. Morse v. United States, 325 U.S. 22 (1945) held that electronic recording of an oral communication with the consent of a participant was not a violation of the Fourth Amendment's ban on unreasonable searches and seizures.

18. Morse v. United States, 325 U.S. 22 (1945) held that electronic recording of an oral communication with the consent of a participant was not a violation of the Fourth Amendment's ban on unreasonable searches and seizures.
on an adequate spelling of probable cause.

23. Attorney General, Stanley Clark, on June 13, 1965, issued regulations that prohibited wiretapping and bugging except in national security matters and required that his approval be obtained prior to recording with or without a court order or transmitting.

24. Katz v. United States, 389 U.S. 347 (1967) held that buggry without a warrant violated the Fourth Amendment's ban on unreasonable searches and seizures, even though there was no trespass, since the communication was uttered under a reasonable expectation of privacy. Gonzales and Goldwagen were overturned, and the Courts repeated that a carefully drawn court order would be sustained and expressly left open the question of national security wiretaps or bugging.

25. Title III of Public Law 90-351 (June 19, 1968) provides as follows:

(a) prohibited all private wiretapping and bugging (18 U.S.C. § 2511 (1))
(b) prohibited state or federal law enforcemenet wiretapping and bugging except under court order system (18 U.S.C. § 2511),
(c) set up a federal court order system for wiretapping and bugging (18 U.S.C. § 2516 (1), (2)),
(d) set standards for optional state court orders for wiretapping or bugging (18 U.S.C. §§ 2516 (2), 516)
(e) made unsanctioned wiretapping or bugging a Federal civil tort (18 U.S.C. § 2606),
(f) required annual reports for Federal and state wiretapping and bugging (18 U.S.C. § 2520).

26. The first Annual Surveillance Report for 1968 was issued; it indicated small increases had been made and orders issued for wiretaps or bugs, which resulted in 3036 applications.

27. Alderman v. United States, 394 U.S. 165 (1969) held that illegally obtained evidence must be disclosed to suspects without an in camera review so that an opportunity can be afforded to them to suppress evidence against them at trial.

28. The second Annual Surveillance Report for 1969 was issued; it included that 304 applications had been made and 302 orders were issued for wiretaps or bugs, which resulted in 655 arrests.

29. Title VIII of Public Law 91-454 (October 15, 1970) set aside the rule of Alderman for wiretapping and bugging occurring prior to June 19, 1968, and set up an in camera disclosure procedure.

30. United States v. Clay, 407 F.2d 165 (5th Cir. 1970), held that wiretapping directed by the Attorney General without a warrant to obtain foreign intelligence did not violate the Fourth Amendment.

31. United States v. Cline, 420 F.2d 165 (5th Cir. 1970), held that wiretapping was directed by the Attorney General without a warrant to obtain foreign intelligence did not violate the Fourth Amendment.

32. Wiretaps v. United States, No. 13, October Term 1970 decided April 26, 1971, L. Reptr. 647 (6-7-71), sustained against Fourth Amendment objection the use of a wiretap by police officers without a warrant to overhear conversations between an informant and a suspect where the suspect complained to his lawyer.

33. United States v. Keith, No. 71-1105, United States Court of Appeals for the Sixth Circuit, decided August 20, 1971, reversed the authorization of a wiretap in a domestic security matter by the Attorney General without judicial sanction violated the Fourth Amendment and had an unreasonable seizure and seizures.

[Appendix A]

Confidential Memorandum for the Attorney General

The White House, Washington, D.C., May 21, 1940.

I have agreed with the President as to the course of the Supreme Court decision relating to wiretapping in investigations. The Court is undoubtedly sound both in regard to the use of evidence secured over tapped wires in the prosecution of citizens in criminal cases; and it is my view that the decision, when placed in its ordinary and normal circumstances, indicates that the Government should be carried on for the excellent reason that it is almost bound to lead to abuse of civil rights.

However, I am convinced that the Supreme Court never intended any dictum in the particular case which it decided to apply to gavel matters involving the domestic life of the nation.

It is, of course, well known that certain other systems have been engaged in the organization of propaganda of so-called "fifth columns" in other countries and in preparation for sabotage, as well as in actual sabotage.

It is too late to do anything about it after sabotage, assassinations and "fifth column" activities have been completed.

You are, therefore, authorized and directed in such cases as you may approve, after investigation of the need in each case, to authorize the necessary investigators agents that they are at liberty to secure information by means of devices directed to the conversation or other communications of persons suspected of subversive activities against the Government of the United States, and of foreign nations suspected espies. You are requested further to limit these investigations so conducted as a minimum and to limit them insofar as possible to aliens.

(Signed) F. D. R.

Office of the Attorney General


The President.

My Dear Mr. President: Under date of May 21, 1940, President Franklin D. Roosevelt, in a memorandum addressed to Attorney General Jackson, stated:

"You are therefore authorized and directed to act in such cases as may appear, after investigation of the need for such action, to authorize the necessary investigators agents that they are at liberty to secure information by means of devices directed to the conversation or other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies.

This directive was followed by Attorney General Jackson and Bedle, and is to be followed currently in this Department. I consider it appropriate, however, to bring the subject to your attention at this time.

It seems to me that in the present tense period in international affairs accompanying as it is by an increase in subversive activity at home, it is as necessary as it was in 1940 to take the investigative measures referred to in the directive.

At the same time, the country is beset by a very substantial increase in crime. While I am reluctant to employ any of these special investigative means in domestic cases, it seems to me imperative to use them in cases vitally affecting the security of the country, and where human life is in jeopardy. I believe that the outstanding directive should be continued in force. If you concur in this policy, I should appreciate it if you would so indicate at the foot of this letter.

In my opinion, the measures proposed are within the authority of the law, and I have in the Files of the Department letters from the Attorney General which come to me that my two most recent predecessors as Attorney General were in full accord in this matter.

Respectfully yours,

C. M. CLARK, Attorney General.


Memorandum for the Heads of Executive Departments and Agencies

I strongly opposed opposition and any opposition of telephonic communications as a general rule. It is obvious that I believe that mechanical and electronic devices may sometimes be essential in protecting our national security. Nevertheless, it is clear that in eliminating use of these investigative devices we are oversimplifying the knowledge or consent of any of the persons involved, could result in serious abuses and invasion of privacy. In my view, the invasion of privacy of communications involving a highly offensive practice which should be engaged in only where the national security, and shall not be followed by any government agencies.

(1) No federal personnel is to intercept telephone conversations, or the United States by any mechanical or electronic means, without the consent of one of the parties involved. (The use of investigative devices in the investigation of matters related to the national security).

(2) The United States Government shall not adopt any legislation or any other means by which it can be held to be followed by all government agencies.

(3) We shall not permit the use of any device for the purpose of intercepting any communication at all, other than the United States Government. It is clear that in eliminating use of these investigative devices we are oversimplifying the knowledge or consent of any of the persons involved, could result in serious abuses and invasion of privacy. In my view, the invasion of privacy of communications involving a highly offensive practice which should be engaged in only where the national security.
May 10, 1971

CONGRESSIONAL RECORD—SENATE

§ 648.

(2) No interception shall be undertaken or continued without first obtaining the approval of the Attorney General.

(3) All federal agencies shall immediately conform their procedures and practices to the provisions of this order.

"Utilization of mechanical or electronic devices to overhear non-telephone conversations is an even more difficult problem, which raises substantial and unresolved questions of Constitutional interpretation. I therefore seek from the agency conducting such surveillance guidance consistent with the Attorney General to ascertain whether the agency's practices are fully in accord with the law and with this regard for the rights of others.

Every agency head shall submit to the Attorney General a written report within 30 days of a complete inventory of all mechanical and electronic equipment and devices used for or capable of intercepting telephone conversations. In addition, such reports shall contain a list of any intercepts previously undertaken and the reasons for them.

/ By LINDON S. BISHOP/  
J. EDGAR HOOVER

Mr. TIDWELL, Mr. President, today marks the 47th anniversary of the dedication of the headquarters building here in Washington, D.C., J. Edgar Hoover. Director of the Federal Bureau of Investigation. The construction of such an institution is a unique phenomenon. It is the FBI, the most powerful force in the world, and it is the FBI's building. The FBI and its director, J. Edgar Hoover. The newsletter I have prepared for release today is entitled, "J. Edgar Hoover and His Critics." I ask unanimous consent that it be printed in the Record.

There being no objection, the newsletter was ordered to be printed in the Record.

J. EDGAR HOOVER AND HIS CRITICS

(By Senator Strom Thurmond)

Anniversaries are currently occurring a concentrated assault against one of our most respected and revered institutions, the FBI, J. Edgar Hoover, Director of the Federal Bureau of Investigation. The attack, conducted simultaneously on radio, in newspapers, and in church and political ambitiously individuals, has, as its purpose the removal of Hoover from his post as head of the nation's foremost and freest bureau of investigation— the FBI. A secondary aim is to discredit the FBI as an institution in order to heighten concerns of the numerous revolutionary groups that continue to advocate violence and illegal dissidents.

In 1914 when Hoover took over as Director of the FBI, it was a scandal-ridden and ineffective bureaucracy. Since Hoover's tenure the FBI has grown from a small bureau conducting a crime. The image of honesty and integrity of the FBI has been irrevocably=is never been blushed.

SPECULATION ON EFFECTIVENESS

In addition to the FBI's well-deserved reputation for integrity, the bureau under Hoover's guidance has also gained a worldwide reputation for effectiveness. The crime-fighting record of the FBI is unexcelled, whether the law-breakers are part of organized crime, or part of the growing number of young people who从事 bombing governmental buildings. The history of the FBI shows great advancement in apprehending foreign agents and subversives, both in and during the Second World War. The American people have always been quick to recognize the value of the FBI in combating foreign espionage agents and subversives.

The record of the FBI is an honest and effective investigative agency that has created a tremendous feeling of confidence in J. Edgar Hoover and in the FBI by the American people. The FBI has shown judgment and restraint where judgment and restraint were needed. It has shown courage and daring where those qualities are required. It is in fact under the FBI's directorship that the outstanding record has resulted in such unprecedented attacks upon hoover and the FBI.

Mr. President, it is in keeping with the American people and their need for a strong FBI that I ask the Senate for the opportunity to make a few comments on the Senate's Intelligence Committee's attacks on the FBI and the problems that we are encountering in this country today.

JACOB JACKSON

Mr. CHILES. Mr. President, the able junior senator from Washington (Mr. JACKSON) in his capacity as chairman of the Senate Government Operations Committee's Subcommittee on National Security and International Operations is taking the floor. In commenting on the first major congressional look into the process and problems of international negotiation. The focus of the subcommittee's inquiry revolves around lessons to be learned from the past and present experience in the international negotiations leading to the Helsinki Accords of 1975. The subcommittee is finding that little, if any, up-to-date or substantial analytical materials have been done and this subcommittee is breaking into new ground.

During my brief tenure in the U.S. Senate, the subcommittee has held four hearings relating to this goal, they were:

February 26—Dr. Dirk U. Stuker, former Netherlands Minister of Foreign Affairs and Secretary General of NATO from 1961 to 1994;

March 17—Bernard Lewis, Professor of History of the Near and Middle East, University of London;

April 2—Robert Byrne, Distin­

April 2—Robert Conquest, noted British author and analyst of the Soviet Union;

The Senate's attention to an article by the subcommittee's distinguished chairman, published in National's Review for April 1971, raises an obvious and unmis­

In my opinion, "How Not to Negotiate With the Russi­

The second charge—that the FBI has recklessly spied on legitimate political activities—has also been shown, to be baseless. FBI agents have had under surveillance organizations that have been suspected of involvement in illegal activities aimed at the U.S. government, and some of its agents have attended and legitimate political functions from time to time. However, in an age where many political groups are proscribed far too often under such forms as bombing the Capitol or massive protest in about down the street by blocking traffic and entrances to Congress, it is difficult indeed to find fault with FBI efforts to gather intelligence on individuals and groups who may be mixed.

We set one of very few peoples in the world who know that they are being spied upon and, through recognition of their rights, and have been protected has been, to a large extent, the FBI and the FBI's free people who have been priviledged to live in a nation based on effective procedures and the rights of individuals. If crime, subversion, and illegal acts have been committed for the purpose of circumventing or destroying the democratic process this evidence has been, it is difficult indeed for us to find fault with FBI efforts to gather intelligence on individuals and groups who may be mixed.

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The United States
LAW WEEK

June 30, 1971

Volume 39, No. 50

OPINION ANNOUNCED JUNE 30, 1971

The Supreme Court decided:

NEwSPAPERS AND MAGAZINES — Freedom of Press


Full Text of Opinion

Nos. 1873 and 1885.—October Term, 1970


[June 30, 1971]

PER CURIAM.


The judgment of the Court of Appeals for the District of Columbia Circuit is therefore affirmed. The order of the Court of Appeals for the Second Circuit is reversed and the case is remanded with directions to enter a judgment affirming the judgment of the District Court for the Southern District of New York. The stays entered June 25, 1971, by the Court are vacated. The mandates shall issue forthwith.

SO ordered.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, concurring.

I adhere to the view that the Government’s case against the Washington Post should have been dismissed and that the injunction against the New York Times should have been vacated without oral argument when the cases were first presented to this Court. I believe that every moment’s continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment. Furthermore, after oral arguments, I agree completely that we must affirm the judgment of the Court of Appeals for the District of Columbia and reverse the judgment of the Court of Appeals for the Second Circuit for the reasons stated by my Brothers DOUGLAS and BRENNAN. In my view it is unfortunate that some of my Brethren are apparently willing to hold that the publication of news may sometimes be enjoined. Such a holding would make a shambles of the First Amendment.

Our Government was launched in 1789 with the adoption of the Constitution. The Bill of Rights, including the First Amendment, followed in 1791. Now, for the first time in the 182 years since the founding of the Republic, the federal courts are asked to hold that the First Amendment does not mean what it says, but rather means that the Government can halt the publication of current news of vital importance to the people of this country.

In seeking injunctions against these newspapers and in its presentation to the Court, the Executive Branch seems to have forgotten the essential purpose and history

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Section 4

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of the First Amendment. When the Constitution was adopted, many people strongly opposed it because the document contained no Bill of Rights to safeguard certain basic freedoms. They especially feared that the new powers granted to a central government might be interpreted to permit the government to curtail freedom of religion, press, assembly, and speech. In response to an overwhelming public clamor, James Madison offered a series of amendments to satisfy citizens that these great liberties would remain safe and beyond the power of government to abridge. Madison, who wrote the First Amendment in three parts, two of which are set out below, and one of which proclaimed: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable." The amendments were offered to curtail and restrict the general powers granted to the Executive, Legislative, and Judicial Branches two years before in the original Constitution. The Bill of Rights changed the original Constitution into a new charter under which no branch of government could abridge the people's freedoms of press, speech, religion, and assembly. Yet the Solicitor General argues and some members of the Court appear to agree that the general powers of the Government adopted in the original Constitution should be interpreted to limit and restrict the specific and emphatic guarantees of the Bill of Rights adopted later. I can imagine no greater perversion of history. Madison and the other Framers of the First Amendment, able men that they were, wrote in language they earnestly believed could never be misunderstood: "Congress shall make no law . . . abridging the freedom of the press . . . ." Both the history and language of the First Amendment support the view that the press would remain safe and beyond the power of the Executive to function or make it impossible for the Executive to function or to protect the security of the United States."

In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to counter the Government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell. In my view, far from deserving condemnation for their courageous reporting, the New York Times, the Washington Post, and other newspapers should be commended for serving the purpose that the Founding Fathers saw so clearly. In revealing the workings of government that led to the Viet Nam war, the newspapers nobly did precisely that which the Founders hoped and treated they would do.

The Government's case here is based on premises entirely different from those that guided the Framers of the First Amendment. The Solicitor General has carefully and emphatically stated:

"Now, Mr. Justice [Black], your construction of . . . [the First Amendment] is well-known, and I certainly respect it. You say that no law means no law, and that should be obvious. I can only say, Mr. Justice that to me it is equally obvious that 'no law' does not mean 'no law', and I would seek to persuade the Court that that is true . . . . If there are other parts of the Constitution that grant power and responsibilities to the Executive and . . . the First Amendment was not intended to make it impossible for the Executive to function or to protect the security of the United States."

And the Government argues in its brief that in spite of the First Amendment, "[t]he authority of the Executive Department to protect the nation against publication of information whose disclosure would endanger the national security stems from two interrelated sources: the constitutional power of the President over the conduct of foreign affairs and his authority as Commander-in-Chief."

In other words, we are asked to hold that despite the First Amendment's emphatic command, the Executive Branch, the Congress, and the Judiciary can make laws enjoining publication of current news and abridging freedom of the press in the name of "national se-

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1 Transcript of Oral Argument, at 70.
2 Brief for United States, at 12.

CL M.
ND K.

Published each Tuesday except Chinese New Year in August and Sept Tuesday in September by The Bureau of National Affairs, Inc., 1112 Twenty-third Street, N.W., Washington, D.C. 20037. Subscription rates (in single or multiple subscriptions at same address) are $30.00 first year and $60.00 per year thereafter. Air mail delivery $5.00 per year additional. Second class postage paid at Washington, D.C., and at additional mailing offices.
The Government does not even attempt to rely on any act of Congress. Instead, it makes the bold and dangerously far-reaching contention that the courts should take it upon themselves to "make" a law abridging freedom of the press in the name of equity, presidential power and national security, even when the representatives of the people in Congress have adhered to the command of the First Amendment and refused to make such a law. See currying opinion of Mr. Justice DOUGLAS, post, at 319 U.S. 254, 298 (my dissenting opinion); Rutk v. United States, 354 U.S. 429, 430 (my dissenting opinion which Mr. Justice Black joined); Yates v. United States, 354 U.S. 298, 329 (separate opinion of Mr. Justice BLACK which I joined); Garrison v. Louisiana, 379 U.S. 64, 80 (my concurring opinion which Mr. Justice BLACK joined). 1

Mr. Justice DOUGLAS, with whom Mr. Justice BLACK joins, concurring.

While I join the opinion of the Court I believe it necessary to express my views more fully.

It should be noted at the outset that the First Amendment provides that "Congress shall make no law... abridging the freedom of speech or of the press." That leaves, in my view, no room for governmental restraint on the press. 2

There is, moreover, no statute barring the publication of the press of the material which the Times and Post seek to use. 18 U.S.C. § 793 (e) provides that "whoever having unauthorized possession of, access to, or control over any document, writing... or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates... the same to any person not entitled to receive it... shall be fined not more than $10,000 or imprisoned not more than ten years or both.

The Government suggests that the word "communicates" is broad enough to encompass publication.

There are eight sections in the chapter on espionage and censorship, §§ 792-799. In three of those eight "publish" is specifically mentioned: § 794 (b) provides "Whoever in time of war, with the intent that the same shall be communicated to the enemy, collects records, publishes, or communicates... [the disposition of armed forces]." Section 797 prohibits "reproduces, publishes, sells, or gives away" photos of defense installations.

Section 708 relating to cryplogy prohibits: "communicates, furnishes, transmits, or otherwise makes available... or publishes..." Thus it is apparent that Congress was capable of and did distinguish between publishing and communication in the various sections of the Espionage Act.

The other evidence that § 793 does not apply to the press is a rejected version of § 793. That version read: "During any national emergency resulting from a war to which the U. S. is a party or from threat of such a war, the President may, by proclamation, prohibit the publishing or communicating of, or the attempting to publish or communicate any information relating to the national defense, which in his judgment is of such character that it is or might be useful to the enemy."

See Broun v. Illinois, 343 U.S. 260, 277 (dissenting opinion of Mr. Justice BLACK), 298 (my dissenting opinion); Rutk v. United States, 354 U.S. 429, 430 (my dissenting opinion which Mr. Justice Black joined); Yates v. United States, 354 U.S. 298, 329 (separate opinion of Mr. Justice BLACK which I joined); Garrison v. Louisiana, 379 U.S. 64, 80 (my concurring opinion which Mr. Justice BLACK joined).

1 These papers contain data concerning the communications system of the United States, the publication of which is made a crime. But the criminal sanction is not urged by the United States or the basis of equity power.

2 Compare the views of the Solicitor General with those of James Madison, the author of the First Amendment. When speaking of the Bill of Rights in the House of Representatives Madison said: "If they [the first ten amendments] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive: they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." 1 Annals of Congress 429 (1834).


4 Mr. Justice Hughes—great man and great Chief Justice that he was—when the Court held a man could not be punished for attending a meeting run by Communists.

5 The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government. 5

6 Compare the views of the Solicitor General with those of James Madison, the author of the First Amendment. When speaking of the Bill of Rights in the House of Representatives Madison said: "If they [the first ten amendments] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive: they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." 1 Annals of Congress 429 (1834).
the debates in the Senate the First Amendment was specifically cited and that provision was defeated. 55 Cong. Rec. 2196.

Judge Gurfein's holding in the Times case that this Act does not apply to this case was therefore preeminently sound. Moreover, the Act of September 23, 1950, in amending 18 U.S.C. §793 states in § 1(b) that:

"Nothing in this Act shall be construed to authorize, require, or establish military or civilian censorship or in any way to limit or infringe upon freedom of the press or of speech as guaranteed by the Constitution of the United States and no regulation shall be promulgated hereunder having that effect." 64 Stat. 987.

Thus Congress has been faithful to the command of the First Amendment in this area.

So any power that the Government possesses must come from its "inherent power." The power to wage war is "the power to wage war successfully." See Hirabayashi v. United States, 320 U.S. 81, 93. But the war power stems from a declaration of war. The Constitution by Article I, § 8, gives Congress, not the President, power "to declare war." Where are presidential wars authorized. We need not decide therefore what leveling effect the war power of Congress might have.

These disclosures may have a serious impact. But that is no basis for sanctioning a previous restraint on the press. As stated by Chief Justice Hughes in Near v. Minnesota, 283 U.S. 697, 710-720:

"... While reckless assaults upon public men, and efforts to bring obloquy upon those who are endeavoring faithfully to discharge official duties, excite a baseful influence and deserve the severest condemnation in public opinion, it cannot be said that this abuse is greater, and it is believed to be less, than that which characterized the period in which our institutions took shape. Meanwhile, the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to more serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities. The fact that the liberty of the press may be abused by disreputable purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct."

As we stated only the other day in Organization for a Better Austin v. Keefe, --- U.S. ---, "any prior restraint on expression comes to this Court with a heavy presumption against its constitutional validity."

The Government says that it has inherent powers to go into court and obtain an injunction to protect that national interest, which in this case is alleged to be national security.

Near v. Minnesota, 283 U.S. 697, repudiated that expansive doctrine in no uncertain terms.

The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information. It is common knowledge that the First Amendment was adopted against the widespread use of the common law of seditious libel to punish the dissemination of material that is embarrassing to the powers-that-be. See Emerenc, The System of Free Expressions, c. V (1970); Chafee, Free Speech in the United States, c. XIII (1941). The present cases will, I think, go down in history as the most dramatic illustration of that principle. A debate of large proportions goes on in the Nation over our posture in Vietnam. That debate antedated the disclosure of the contents of the present documents. The latter are highly relevant to the debate in progress.


I would affirm the judgment of the Court of Appeals in the Post case, vacate the stay of the Court of Appeals in the Times case and direct that it affirm the District Court.

The stays in these cases that have been in effect for more than a week constitute a flouting of the principles of the First Amendment as interpreted in Near v. Minnesota.

MR. JUSTICE BRENNAN, concurring.

I

I write separately in these cases only to emphasize what should be apparent: that our judgment in the present cases may not be taken to indicate the propriety, in the future, of issuing temporary stays and restraining orders to block the publication of material sought to be suppressed by the Government. So far as I can determine, never before has the United States sought to enjoin a newspaper from publishing information in its possession. The relative novelty of the questions presented, the necessary haste with which decisions were reached, the magnitude of the interests asserted, and the fact that all the parties have concentrated their arguments upon
the question whether permanent restraints were proper may have justified at least some of the restraints hereinafter imposed in these cases. Certainly it is difficult to fault the several courts below for seeking to assure that the issues here involved were preserved for ultimate review by this Court. But even if it be assumed that some of the interim restraints were proper in the two cases before us, that assumption has no bearing upon the propriety of similar judicial action in the future. To begin with, there has now been ample time for reflection and judgment; whatever values there may be in the preservation of novel questions for appellate review may not support any restraints in the future. More important, the First Amendment stands as an absolute bar to the imposition of judicial restraints in circumstances of the kind presented by these cases.

II

The error which has pervaded these cases from the outset was the granting of any injunctive relief whatsoever, interim or otherwise. The entire thrust of the Government's claim throughout these cases has been that publication of the material sought to be enjoined "might," or "might, or "may" prejudice the national interest in various ways. But the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result. Our cases, it is true, have indicated that there is a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden. Our cases have thus far indicated that such cases may arise only when the Nation "is at war," Schenck v. United States, 249 U. S. 47 (1919), during which times "no one would question but that a Government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." Near v. Minnesota, 283 U. S. 697, 716 (1931). Even if the present world situation were assumed to be tantamount to a time of war, or if the power of presently available armaments would justify even in peacetime the suppression of information that would set in motion a nuclear holocaust, in neither of these actions has the Government presented or even alleged that publication of items from or based upon the material at issue would cause the happening of an event of that nature. "The chief purpose of the First Amendment's guarantee [is] to prevent previous restraints upon publication." Near v. Minnesota, supra, at 713. Thus, only governmental allegation and proof that publication must inevitably, directly and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order. In no event may mere conclusions be sufficient: for if the Executive Branch seeks judicial aid in preventing publication, it must inevitably submit the basis upon which that aid is sought to scrutiny by the judiciary. And therefore, every restraint issued in this case, whatever its form, has violated the First Amendment—and none the less so because that restraint was justified as necessary to afford the court an opportunity to examine the claim more thoroughly. Unless and until the Government has clearly made out its case, the First Amendment commands that no injunction may issue.

Mr. Justice Stewart, with whom Mr. Justice White joins, concurring.

In the governmental structure created by our Constitution, the Executive is endowed with enormous power in the two related areas of national defense and international relations. This power, largely unchecked by the Legislative and Judicial branches, has been pressed to the very hilt since the advent of the nuclear missile age. For better or for worse, the simple fact is that a President of the United States possesses vastly greater constitutional independence in these two vital areas of power than does, say, a prime minister of a country with a parliamentary form of government.

In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people.

*Freedman v. Maryland, 380 U. S. 51 (1965), and similar cases regarding temporary restraints of allegedly obscene materials are not in point. For those cases rest upon the proposition that "obscenity is not protected by the freedom of speech and press." Roth v. United States, 354 U. S. 470 (1957). There is no question here that the material sought to be suppressed is within the protection of the First Amendment; the only question is whether, notwithstanding that fact, its publication may be enjoined for a time because of the presence of an overwhelming national interest. Similarly, copyright cases have no pertinence here: the Government is not asserting an interest in the particular form of words chosen in the documents, but is seeking to suppress the ideas expressed therein. And the copyright laws, of course, protect only the form of expression and not the ideas expressed.

1 The President's power to make treaties and to appoint ambassadors is of course limited by the requirement of Article II, § 2, of the Constitution that he obtain the advice and consent of the Senate. Article I, § 8, empowers Congress to "raise and support Armies," and "provide and maintain a Navy." And, of course, Congress alone can declare war. This power was last exercised almost 30 years ago at the inception of World War II. Since the end of that war in 1945, the Armed Forces of the United States have suffered approximately half a million casualties in various parts of the world.

Yet it is elementary that the successful conduct of international relations and the maintenance of an effective national defense require both confidentiality and secrecy. Other nations can hardly deal with this Nation in an atmosphere of mutual trust unless they can be assured that their confidences will be kept. And within our own executive departments, the development of considered and intelligent international policies would be impossible if those charged with their formulation would not communicate with each other freely, frankly, and in confidence. In the area of basic national defense the frequency and scope of absolute secrecy only can self-evidently carry its weight.

I think there can be but one answer to this dilemma, if dilemma it be. The responsibility must be where the power is.1 If the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then under the Constitution the Executive must have the largely unshared duty to determine and exercise that power successfully. It is an awesome responsibility, requiring judgment and wisdom of a high order. I should suppose that moral, political, and practical considerations would dictate that a very first principle of that wisdom would be an insistence upon avoiding secrecy for its own sake. For when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion. I should suppose, in short, that the hallmark of a truly effective internal security system would be the maximum possible disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained. But be that as it may, it is clear to me that it is the constitutional duty of the Executive— as a matter of sovereign prerogative and not as a matter of law as the courts know law—through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibility.

1 "It is quite apparent that if, in the maintenance of our international relations, emasculation—perhaps serious emasculation—is to be avoided and secrecy for our sate achieved, congressional legislation which is to be made effective through requisition and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be advisable were domestic affairs alone involved. Moreover, the Congress has, for better opportunity of knowing the conditions which prevail in foreign countries, and especially in the true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular, and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty—a refusal the wisdom of which was recognized by the House itself and has never since been doubted..." United States v. Curtiss-Wright Corp., 299 U. S. 304, at 320.

This is not to say that Congress and the courts have no role to play. Undoubtedly Congress has the power to enact specific and appropriate criminal laws to protect government property and preserve government secrets. Congress has passed such laws, and several of them are of very colorable relevance to the apparent circumstances of these cases. And if a criminal prosecution is instituted, it will be the responsibility of the courts to decide the applicability of the criminal law under which the charge is brought. Moreover, if Congress should pass a specific law authorizing civil proceedings in this field, the courts would likewise have the duty to decide the constitutionality of such a law as well as its applicability to the facts proved.

But in the cases before us we are asked neither to construe specific regulations nor to apply specific laws. We are asked, instead, to perform a function that the Constitution gave to the Executive, not the Judiciary. We are asked, quite simply, to prevent the publication by two newspapers of material that the Executive branch insists should not, in the national interest, be published. I am convinced that the Executive is correct with respect to some of the documents involved. But I cannot say that disclosure of any of them will surely result in direct, immediate, and irreparable damage to our Nation or its people. That being so, there can under the First Amendment be but one judicial resolution of the issues before us. I join the judgments of the Court.

Mr. Justice WHITE, with whom Mr. Justice Stewart joins, concurring.

I concur in today's judgments, but only because of the concededly extraordinary protection against prior restraints enjoyed by the press under our constitutional system. I do not say that in no circumstances would the First Amendment permit an injunction against publishing information about government plans or operations.1 Nor, after examining the materials the Government
The "grave and irreparable danger" standard is that asserted by the Government in this Court. In reminding us Judge Gershon for further writings in the Times Censorship, five editors of the Court of Appeals for the Second Circuit directed him to determine whether disclosure of certain items specified, with particularity by the Government, would "cause such grave and immediate danger to the security of the United States as to warrant their publication being enjoined."
factories, the location of defense works, and all that sort of thing." 55 Cong. Rec. 2000 (1917).

The criminal code contains numerous provisions potentially relevant to these cases. Section 707 makes it a crime to publish certain photographs or drawings of military installations. Section 708, also in precise language, prescribes knowing and willful publications of any classified information concerning the cryptographic systems or communication intelligence activities of the United States as well as any information obtained from communication intelligence operations. If any of these

"Section 793 also states that, "[t]here are other methods and means of communication and intelligence gathering that are almost identical in their purposes, both in the object and in the method, to the methods and means used in obtaining the cryptographic systems and the communication intelligence operations of this Nation in the process of communication intelligence operations."

Thesubsection was added in 1956 because pre-existing law provided no

as covering "only a small category of classified matter, a category which is both vital and vulnerable to an almost infinite degree." id., at 9. Existing legislation was deemed inadequate.

"At present there are other acts protect this information, but only in a limited way. These are the Espionage Act of 1917 (48 Stat. 217) and the act of June 10, 1933 (48 Stat. 122). Under the first, unauthorized revelation of information of this kind can be penalized only if it can be proved that the person making the revelation did so with an intent to injure the United States. Under the second, only diplomatic codes and messages transmitted in diplomatic codes are protected. The present bill is designed to protect against knowing and willful publication or any other revelation of all important information affecting the United States communication intelligence operations and all direct information about all United States codes and ciphers." Ibid.

Section 708 obviously was intended to cover publications by non-


Section 793 (c) of 18 U. S. C. provides that:

"(a) Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same and fails to deliver it to the officer or employee of the United States entitled to receive it;

is guilty of an offense punishable by 10 years in prison, a $10,000 fine, or both. It should also be noted that 18 U. S. C. § 793 (g), added in 1930, sec 64 Stat. 1004-1016 (1949); S. Rep. No. 2395, 78th Cong., 2d Sess., s (1950), provides that "(f) If two or more persons conspire to violate any of the foregoing provisions of this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy."
penalty for the unauthorized possessor unless demand for the documents was made." "The dangers surrounding the unauthorized possession of such items are self-evident, and it is deemed advisable to require their surrender in such a case, regardless of demand, especially since their unauthorized possession may be unknown to the authorities who would otherwise make the demand." S. Rep. No. 2369, 81st Cong., 2d Sess., 9 (1950). Of course, in the cases before us, the unpublished documents have been demanded by the United States and their import has been made known at least to counsel for the newspapers involved. In Gorin v. United States, 312 U. S. 19, 28 (1941), the words "national defense" as used in a predecessor of §793 were held by a unanimous court to have "a well understood connotation"—a "generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness"—and to be "sufficiently definite to apprise the United States activities" and to be consonant with due process. 312 U. S., at 28. Also, as construed by the Court in Gorin, information "connected with the national defense" is obviously not limited to that threatening "grave and irreparable" injury to the United States."

It is thus clear that Congress has addressed itself to the problems of protecting the security of the country and the national defense from unauthorized disclosure of potentially damaging information. Cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579, 585-586 (1952); see also id., at 593-606 (Frankfurter, J., concurring). It has not, however, authorized the injunctive remedy against threatened publication. It has apparently been satisfied to rely on criminal sanctions and their deterrent effect on the responsible as well as the irresponsible press. I am not, of course, saying that either of these newspapers has yet committed a crime or that either would commit a crime if they published all the material now in their possession. That matter must await resolution in the context of a criminal proceeding if one is instituted by the United States. In that event, the issue of guilt or innocence would be determined by procedures and standards quite different from those that have purported to govern these injunctive proceedings.

Mr. Justice MARSHALL, concurring.

The Government contends that the only issue in this case is whether a suit by the United States, "the First Amendment bars a court from prohibiting a newspaper from publishing material whose disclosure would pose a grave and immediate danger to the security of the United States." Brief of the Government, at 6. With all due respect, I believe the ultimate issue in this case is even more basic than the one posed by the Solicitor General. The issue is whether this Court or the Congress has the power to make law.

documents relating to the national defense. I intimate no views on the correctness of that conclusion. But neither communication nor publication is necessary to violate the subsection.

Also relevant is 18 U. S. C. §794. Subsection (b) thereof forbids in time of war the collection or publication, with intent that it shall be communicated to the enemy, any information with respect to the movements of military forces, "or with respect to the plans or conduct . . . of any naval or military operations . . . or any other information relating to the public defense, which might be useful to the enemy. . . ."
In this case there is no problem concerning the President's power to classify information as 'secret' or 'top secret.' Congress has specifically recognized Presidential authority, which has been formally exercised in Executive Order 10201, to classify documents and information. See, e.g., 18 U. S. C. § 798; 50 U. S. C. § 783. Nor is there any issue here regarding the President's power as Chief Executive and Commander-in-Chief to protect national security by disciplining employees who disclose information and by taking precautions to prevent leaks.

The problem here is whether in this particular case the Executive Branch has authority to invoke the equity jurisdiction of the courts to protect what it believes to be the national interest. See In re Debs, 189 U. S. 564, 584 (1903). The Government argues that in addition to the inherent power of any government to protect itself, the President's power to conduct foreign affairs and his position as Commander-in-Chief give him authority derived from the President's mandate to conduct foreign affairs and to act as Commander-in-Chief there is a basis for the invocation of the equity jurisdiction of this Court as an aid to prevent the publication of material damaging to "national security," however that term may be defined.

It would, however, be utterly inconsistent with the concept of separation of powers in this Court to use its power of contempt to prevent behavior that Congress has specifically declined to prohibit. There would be a similar damage to the basic concept of these coequal branches of Government if when the Executive has adequate authority granted by Congress to protect "national security" it can choose instead to invoke the contempt power of a court to enjoin the threatened conduct. The Constitution provides that Congress shall make laws, the President execute laws, and courts interpret law. Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579 (1952). It did not provide for government by injunction in which the courts and the Executive can "make law" without regard to the action of Congress. It may be more convenient for the Executive if it needs only to convince a judge to prohibit conduct rather than to ask the Congress to pass a law and it may be more convenient to enforce a contempt order than seek a criminal conviction in a jury trial. Moreover, it may be considered politically wise to get a court to share the responsibility for arresting those who the Executive has probably cause to believe are violating the law. But convenience and political considerations of the moment do not justify a basic departure from the principles of our system of government.

In this case we are not faced with a situation where Congress has failed to provide the Executive with broad power to protect the Nation from disclosure of damaging state secrets. Congress has on several occasions given extensive consideration to the problem of protecting the military and strategic secrets of the United States. This consideration has resulted in the enactment of statutes making it a crime to receive, disclose, communicate, withhold, and publish certain documents, photographs, instruments, appliances, and information. The bulk of these statutes are found to chapter 37 of U. S. C., Title 18, entitled Espionage and Censorship. In that chapter Congress has provided penalties ranging from a $10,000 fine to death for violating the various statutes.

Thus it would seem that in order for this Court to issue an injunction it would require a showing that such statutes were insufficient to cover the information at issue.

* There are several other statutory provisions prohibiting and punishing the dissemination of information, the disclosure of which Congress thought sufficiently impaired national security to warrant that result. These include 42 U. S. C. §§ 2101 through 2108 relating to the authority of the Atomic Energy Commission to classify and deduce "Restricted Data." ("Restricted Data" is a term of art employed uniquely by the Atomic Energy Act). Specifically, 42 U. S. C. § 2102 authorizes the Atomic Energy Commission to classify certain information. 42 U. S. C. § 2274, subsection (b) provides penalties for a person who "communicates, transmits, or discloses" such information "where reason to believe such data will be utilized to injure the United States or to secure an advantage to any foreign nation .... " Other sections of Title 42 of the U. S. C. dealing with atomic energy prohibit and punish acquisition, removal, concealment, smuggling with, alteration, multiplication, or destruction of documents incorporating "Restricted Data" and provide penalties for employees and former employees of the Atomic Energy Commission, the armed services, contractors and licensees of the Atomic Energy Commission. 42 U. S. C. §§ 2270, 2277. Title 50 U. S. C. Appendix § 1781 (part of the National Defense Act of 1941, as amended, 55 Stat. 230) prohibits the making of any sketch or other representation of military installations or any military equipment located on any military installation, as specified; and indeed Congress in the National Defense Act, conferred jurisdiction on federal district courts over civil actions "to enjoin any violations" thereof. 50 U. S. C. App. § 1122. 50 U. S. C. § 783 (b) makes it unlawful for any officer or employee of the United States or any corporation which is owned by the United States to communicate material which has been "classified" by the President to any person whom that governmental employee knows or has reason to believe is an agent or representative of any foreign government or any Communist organization.
an injunction would enhance the already existing power of the Government to act. See Bennett v. Lamam, 277 N.Y. 368, 14 N.E. 2d 436 (1938). It is a traditional axiom of equity that a court of equity will not do a useless thing just as it is a traditional axiom that equity will not enjoin the commission of a crime. See Z. Chafee & E. Re, Equity 035-054 (6th ed. 1977); 1 H. Joyce, Injunctions §§ 58-60a, (1900). Here there has been no attempt to make such a showing. The Solicitor General does not even mention in his brief whether the Government considers there to be probable cause to believe a crime has been committed or whether there is a conspiracy to commit future crimes.

If the Government had attempted to show that there was no effective remedy under traditional criminal law, it would have had to show that there is no arguably applicable statute. Of course, at this stage this Court could not and cannot determine whether there has been a violation of a particular statute nor decide the constitutionality of any statute. Whether a good-faith prosecution could have been instituted under any statute could, however, be determined.

At least one of the many statutes in this area seems relevant to this case. Congress has provided in 18 U.S. C. § 793 (e) that whoever "having unauthorized possession of, access to, or control over any document, writing, code book, signal book, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits, the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it, shall be fined not more than $10,000 or imprisoned not more than ten years, or both." 18 U.S. C. § 793 (e).

It is true that Judge Gurfein found that Congress had not made it a crime to publish the items and material specified in § 793 (e): He found that the words "communicates, delivers, transmits ... " did not refer to publication of newspaper stories. And that view has some support in the legislative history and conforms with the past practice of using the statute only to prosecute those charged with ordinary espionage. But see 103 Cong. Rec. 10449 (remarks of Sen. Humphrey). Judge Gurfein's view of the statute is not, however, the only plausible construction that could be given. See my Brother White's concurrence opinion.

Even if it is determined that the Government could not, in good faith bring criminal prosecutions against the New York Times and the Washington Post, it is clear that Congress has specifically rejected passing legislation that would have clearly given the President the power he seeks here and made the current activity of the newspapers unlawful. When Congress specifically declines to make conduct unlawful it is not for this Court to reclassify those issues—to overrule Congress. See Youngstown Sheet & Tube v. Sawyer, 345 U.S. 570 (1952).

On at least two occasions Congress has refused to enact legislation that would have made the conduct engaged in here unlawful and given the President the power that he seeks in this case. In 1917 during the debate over the original Espionage Act, still the basic provisions of § 793, Congress rejected a proposal to give the President in time of war or threat of war authority to directly prohibit by proclamation the publication of information relating to national defense that might be useful to the enemy. The proposal provided that:

"During any national emergency resulting from a war to which the United States is a party, or from threat of such a war, the President may, by proclamation, prohibit the publishing or communicating of, or the attempting to publish or communicate any information relating to the national defense which, in his judgment, is of such character that it is or might be useful to the enemy. Whoever violates any such prohibition shall be punished by a fine of not more than $10,000 or by imprisonment for not more than 10 years, or both: Provided, That nothing in this section shall be construed to limit or restrict any discussion, comment, or criticism of the acts or policies of the Government or its representatives or the publication of the same." 55 Cong. Rec. 1763.

Congress rejected this proposal after war against Germany had been declared even though many believed that there was a grave national emergency and that the threat of security leaks and espionage were serious. The Executive has not gone to Congress and requested that the decision to provide such power be reconsidered. Instead the Executive comes to this Court and asks that it be granted the power Congress refused to give.

In 1937 the United States Commission on Government Security found that "[a]irplane journals, scientific periodicals, and even the daily newspaper have featured articles containing information and other data which should have been deleted in whole or in part for security reasons." In response to this problem the Commission, which was chaired by Senator Cotton, proposed that "Congress enact legislation making it a crime for any person willfully to disclose without proper authorization, for any purpose whatever, information classified 'secret' or 'top secret,' knowing, or having reasonable grounds to believe, such information to have been so classified," Report of Commission on Government Security 619-620 (1957). After substantial floor discussion on the proposal, it was rejected. See 103 Cong. Rec. 10447-10450. If the proposal that Senator Cotton championed on the floor had been enacted, the publication of the documents involved here would certainly have been a crime. Congress refused, however, to make it a.

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crime. The Government is here asking this Court to remake that decision. This Court has no such power.

Either the Government has the power under statutory grant to use traditional criminal law to protect the country or, if there is no basis for arguing that Congress has made the activity a crime, it is plain that Congress has specifically refused to grant the authority the Government seeks from this Court. In either case this Court does not have authority to grant the requested relief. It is not for this Court to sing itself into every breach perceived by some Government official nor is it for this Court to take on itself the burden of enacting law, especially law that Congress has refused to pass.

I believe that the judgment of the United States Court of Appeals for the District of Columbia should be affirmed and the judgment of the United States Court of Appeals for the Second Circuit should be reversed insofar as it remands the case for further hearings.

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Mr. Chief Justice Burger, dissenting.

So clear are the constitutional limitations on prior restraint against expression, that from the time of Near v. Minnesota, 283 U. S. 697 (1931), until recently in Organization for a Better Austin v. Keefe, ___ U. S. ___ (1971), we have had little occasion to be concerned with cases involving prior restraints against news reporting on matters of public interest. There is, therefore, little variation among the members of the Court in terms of resistance to prior restraints against publication. Adherence to this basic constitutional principle, however, does not make this case a simple one. In this case, the imperatives of a free and unlettered press come into collision with another imperative, the effective functioning of a complex modern government and specifically the effective exercise of certain constitutional powers of the Executive. Only those who view the First Amendment as an absolute in all circumstances—a view I respect, but reject—can find such a case as this to be simple or easy. This case is not simple for another and more immediate reason. We do not know the facts of the case. No District Judge knew all the facts. No Court of Appeals judge knew all the facts. No member of this Court knows all the facts.

Why are we in this posture, in which only those judges to whom the First Amendment is absolute and permits of no restraint in any circumstances or for any reason, are really in a position to act?

I suggest we are in this posture because these cases have been conducted in unseemly haste. Mr. Justice Harlan covers the chronology of events demonstrating the hectic pressures under which these cases have been processed and I need not restate them. The prompt setting of these cases reflects our universal abhorrence of prior restraint. But prompt judicial action does not mean judicial haste.

Here, moreover, the frenetic haste is due in large part to the manner in which the Times proceeded from the date it obtained the purloined documents. It seems reasonably clear now that the haste precluded reasonable and deliberate judicial treatment of these cases and was not warranted. The precipitous action of this Court aborting a trial not yet completed is not the kind of judicial conduct which ought to attend the disposition of a great issue.

The newspapers make a derivative claim under the First Amendment; they decimate this right as the public right-to-know; by implication, the Times asserts a sole trusteeship of that right by virtue of its journalist "scoop." The right is asserted as an absolute. Of course, the First Amendment right itself is not an absolute, as Justice Holmes so long ago pointed out in his aphorism concerning the right to shout of fire in a crowded theater. There are other exceptions, some of which Mr. Justice Hughes mentioned by way of example in Near v. Minnesota. There are no doubt other exceptions no one has had occasion to describe or discuss. Conceivably such exceptions may be lurking in these cases and would have been flushed had they been properly considered in the trial courts, free from unwarranted deadlines and frenetic pressures. A great issue of this kind should be tried in a judicial atmosphere conducive to thoughtful, reflective deliberation, especially when haste, in terms of hours, is unwarranted in light of the long period the Times, by its own choice, deferred publication.

It is no disputed that the Times has had unauthorized possession of the documents for three to four months, during which it has had its expert analysts studying them, presumably digesting them and preparing the material for publication. During all of this time, the Times, presumably in its capacity as trustee of the public's "right to know," has held up publication for purposes it considered proper and thus public knowledge was delayed.

No doubt this was for a good reason; the analysis of 7,000 pages of complex material drawn from a vastly greater volume of material would inevitably take time and the writing of good news stories takes time. But why should the United States Government, from whom this information was illegally acquired by someone, along with all the counsel, trial judges, and appellate judges be placed under needless pressure? After these months of delay, the alleged right-to-know has somehow and suddenly become a right that must be vindicated instantly.

Would it have been unreasonable, since the newspaper could anticipate the government's objections to release of secret material, to give the government an opportunity to review the entire collection and determine whether agreement could be reached on publication? Stolen or not, if security was not in fact jeopardized, much of the material could so doubt have been declassified, since it spans a period ending in 1968. With such an approach—one that great newspapers have in the past practiced and stated editorially to be the duty of an honorable press—the newspapers and government might well have narrowed the area of disagreement as to what was and was
not publishable, leaving the remainder to be resolved in orderly litigation as necessary. To me it is hardly believable that a newspaper long regarded as a great institution in American life would fail to perform one of the basic and simple duties of every citizen with respect to the discovery or possession of stolen property or secret government documents. That duty, I had thought—perhaps naively—was to report forthwith, to responsible public officers. This duty rests on taxi drivers, Justices and the New York Times. The course followed by the Times, whether so calculated or not, removes any possibility of orderly litigation of the issues. If the action of the judges up to now has been correct, that result is sheer happenstance.

Our grant of the writ before final judgment in the Times case aborted the trial in the District Court before it had made a complete record pursuant to the mandate of the Court of Appeals, Second Circuit.

The consequence of all this melancholy series of events is that we literally do not know what we are setting on. As I see it we have been forced to deal with litigation concerning rights of great magnitude without an adequate record, and surely without time for adequate treatment either in the prior proceedings or in this Court. It is interesting to note that counsel in oral argument before this Court were frequently unable to respond to questions on factual points. Not surprisingly they pointed out that they had been working literally "around the clock" and simply were unable to review the documents that give rise to these cases and were not familiar with them. This Court is in no better posture. I agree with Mr. Justice Harlan and Mr. Justice Blackmun but I am not prepared to reach the merits. 1

I would affirm the Court of Appeals for the Second Circuit and allow the District Court to complete the trial aborted by our grant of certiorari while preserving the status quo in the Post case. I would direct that the District Court on remand give priority to the Times case to the exclusion of all other business of that court but I would not set arbitrary deadlines. I should add that I am in general agreement with much of what Mr. Justice White has expressed with respect to penal sanctions concerning communication or retention of documents or information relating to the national defense.

1 Interestingly the Times explained its refusal to allow the government to examine its own purloined documents by saying in substance this might compromise their sources and informants! The Times thus asserts a right to guard the secrecy of its sources while denying that the Government of the United States has that power.

2 With respect to the question of inherent power of the Executive to classify papers, records and documents as secret, or otherwise unavailable for public exposure, and to secure aid of the courts for enforcement, there may be as analogy with respect to this Court No statute gives this Court express power to establish and enforce the utmost security measures for the secrecy of our deliberations and records. Yet I have little doubt as to the inherent power of the Court to protect the confidentiality of its internal operations by whatever judicial measures may be required.

We all crave speedier judicial processes but when judges are pressured as in these cases the result is a parody of the judicial process.

Mr. Justice Harlan, with whom The Chief Justice and Mr. Justice Blackmun join, dissenting.

These cases forcefully call to mind the wise admonition of Mr. Justice Holmes, dissenting in Northern Securities Co. v. United States, 193 U. S. 197, 400-401 (1904):

"Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend."

With all respect, I consider that the Court has been almost irresponsibly feverish in dealing with these cases. Both the Court of Appeals for the Second Circuit and the Court of Appeals for the District of Columbia Circuit rendered judgment on June 23. The New York Times' petition for certiorari, its motion for accelerated consideration thereof, and its application for interim relief were filed in this Court on June 24 at about 11 a.m. The application of the United States for interim relief in the Post case was also filed here on June 24, at about 7:15 p.m. This Court's order setting a hearing before us on June 26 at 11 a.m., a course which I joined only to avoid the possibility of even more peremptory action by the Court, was issued less than 24 hours before. The record in the Post case was filed with the Clerk shortly before 1 p.m. on June 26; the record in the Times case did not arrive until 7 or 8 o'clock that same night. The briefs of the parties were received less than two hours before argument on June 26.

This frenzied train of events took place in the name of the presumption against prior restraints created by the First Amendment. Due regard for the extraordinarily important and difficult questions involved in these litigations should have led the Court to shun such a precipitate timetable. In order to decide the merits of these cases properly, some or all of the following questions should have been faced:

1. Whether the Attorney General is authorized to bring these suits in the name of the United States. Compare In re Debs, 158 U. S. 564 (1895), with Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579 (1952). This question involves as well the construction and validity of a singularly obscure statute—the Espionage Act, 18 U. S. C. §793 (e).

2. Whether the First Amendment permits the federal courts to enjoin publication of stories which would present a serious threat to national security. See Near v. Minnesota, 286 U. S. 697, 716 (1931) (dictum).
3. Whether the threat to publish highly secret documents is of itself a sufficient implication of national security to justify an injunction on the theory that regardless of the contents of the documents, harm enough results simply from the demonstration of such a breach of secrecy.

4. Whether the unauthorized disclosure of any of these particular documents would seriously impair the national security.

5. What weight should be given to the opinion of high officers in the Executive Branch of the Government with respect to questions 3 and 4.

6. Whether the newspapers are entitled to retain and use the documents notwithstanding the seemingly uncontested facts that the documents, or the originals of which they are duplicates, were purloined from the Government's possession and that the newspapers received them with knowledge that they had been feloniously acquired.


7. Whether the threatened harm to the national security or the Government's possessory interest in the documents justifies the issuance of an injunction against publication in light of—

a. The strong First Amendment policy against prior restraints on publication;

b. The doctrine against enjoining conduct in violation of criminal statutes; and

c. The extent to which the materials at issue have apparently already been otherwise disseminated.

These are difficult questions of fact, of law, and of judgment; the potential consequences of erroneous decisions are enormous. The time which has been available to us, to the lower courts,* and to the parties has been wholly inadequate for giving these cases the kind of consideration they deserve. It is a reflection on the stability of the judicial process that these great issues—as important as any that have arisen during my time on the Court—should have been decided under the pressures engendered by the torrent of publicity that has attended these litigations from their inception.

Forced as I am to reach the merits of these cases, I dissent from the opinion and judgments of the Court. Within the severe limitations imposed by the time constraints under which I have been required to operate, I can only state my reasons in telescoped form, even though in different circumstances I would have felt constrained to deal with the cases in the fuller sweep indicated above.

*The hearing in the Post case before Judge Gesell began at 8 a.m. on June 21, and his decision was rendered, under the hammer of a deadline imposed by the Court of Appeals, shortly before 5 p.m. on the same day. The hearing in the Times case before Judge Garfein was held on June 18 and his decision was rendered on June 19. The Government's appeals in the two cases were heard by the Courts of Appeals for the District of Columbia and Second Circuits, each sitting en banc, on June 22. Each court rendered its decision on the following afternoon. Cf. United States v.

observe that its order must rest on the conclusion that because of the time elements the Government had not been given an adequate opportunity to present its case to the District Court. At the least this conclusion was not an abuse of discretion.

In the Post litigation the Government had more time to prepare; this was apparently the basis for the refusal of the Court of Appeals for the District of Columbia Circuit on rehearing to conform its judgment to that of the Second Circuit. But I think there is another and more fundamental reason why this judgment cannot stand—a reason which also furnishes an additional ground for not reinstating the judgment of the District Court in the Times litigation, set aside by the Court of Appeals. It is plain to me that the scope of the judicial function in passing upon the activities of the Executive Branch of the Government in the field of foreign affairs is very narrowly restricted. This view is, I think, dictated by the concept of separation of powers upon which our constitutional system rests.

In a speech on the floor of the House of Representatives, Chief Justice John Marshall, then a member of that body, stated:

"The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." Annals, 9th Cong., col. 613 (1800). From that time, shortly after the founding of the Nation, to this, there has been no substantial challenge to this description of the scope of executive power. See United States v. Curtis-Wright Export Corp., 299 U. S. 304, 313-321 (1946), collecting authorities.

From this constitutional primacy in the field of foreign affairs, it seems to me that certain conclusions necessarily follow. Some of these litigations, presumably by the President Washington, declining the request of the House of Representatives for the papers leading up to the negotiation of the Jay Treaty:

"The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers." J. J. Richardson, Messages and Papers of the Presidents 194-195 (1899).

The power to evaluate the "pernicious influence" of premature disclosure is not, however, lodged in the Executive alone. I agree that, in performance of its duty to protect the values of the First Amendment against political pressures, the judiciary must review the initial Executive determination to the point of satisfying itself that the subject matter of the dispute does lie within the proper compass of the President's foreign relations power. Constitutional considerations forbid "a complete abandonment of judicial control."
Reynolds, 345 U. S. 1, 8 (1953). Moreover, the judiciary may properly insist that the determination that disclosure of the subject matter would irreparably impair the national security be made by the head of the Executive Department concerned—here the Secretary of State or the Secretary of Defense—after personal consideration by that officer. This safeguard is required in the analogous area of executive claims of privilege for secrets of state. See United States v. Reynolds, supra, at 8 and n. 20; Duncan v. Cammell, Laird & Co., [1942] A. C. 624, 638 (House of Lords).

But in my judgment, the judiciary may not properly go beyond these two inquiries and reexamine for itself the probable impact of disclosure on the national security.

"[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confined by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or impair. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." Chicago & Southern Air Lines v. Waterman Steamship Corp., 333 U. S. 103, 111 (1948) (Jackson, J.).

Even if there is some room for the judiciary to override the executive determination, it is plain that the scope of review must be exceedingly narrow. I can see no indication in the opinions of either the District Court or the Court of Appeals in the Post litigation that the conclusions of the Executive were given even the deference owing to an administrative agency, much less that owing to a co-equal branch of the Government operating within the field of its constitutional prerogative.

Accordingly, I would vacate the judgment of the Court of Appeals for the District of Columbia Circuit on this ground and remand the case for further proceedings in the District Court. Before the commencement of such further proceedings, due opportunity should be afforded the Government for procuring from the Secretary of State or the Secretary of Defense or both an expression of their views on the issue of national security. The ensuing review by the District Court should be in accordance with the views expressed in this opinion. And for the reasons stated above I would affirm the judgment of the Court of Appeals for the Second Circuit.

Pending further hearings in each case conducted under the appropriate ground rules, I would continue the restraints on publication. I cannot believe that the doctrine prohibiting prior restraints reaches to the point of preventing courts from maintaining the status quo long enough to act responsibly in matters of such national importance as those involved here.

Mr. Justice Blackmun.

I join Mr. Justice Harlan in his dissent. I also am in substantial accord with much that Mr. Justice White says, way of admonition, in the latter part of his opinion.

At this point the focus is on only the comparatively few documents specified by the Government as critical. So far as the other material—vast in amount—is concerned, let it be published and published forthwith if the newspapers, once the strain is gone and the sensationalism is eased, still feel the urge so to do.

But we are concerned here with the few documents specified in the 47 volumes. Almost 70 years ago Mr. Justice Holmes, discounting in a case of unusual significance and importance, observed: "Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some incident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure . . . ." Northern Securities Co. v. United States, 193 U. S. 187, 400-401 (1904).

The present cases, if not great, are at least unusual in their posture and implication, and the Holmes observation certainly has pertinent application.

The New York Times clandestinely devoted a period of three months examining the 47 volumes that came into its unauthorized possession. Once it had begun publication of material from those volumes, the New York case now before us emerged. It immediately assumed, and ever since has maintained, a frenetic pace and character. Seemingly, once publication started, the material could not be made public fast enough. Seemingly, from then on, every deferral or delay, by restraint or other­wise, was abhorrent and was to be deemed violative of the First Amendment and of the public's "right immediately to know." Yet that newspaper stood before us at oral argument and professed criticism of the Government for not lodging its protest earlier than by a Monday telegram following the initial Sunday publication.

The District of Columbia case is much the same.

Two federal district courts, two United States courts of appeals, and this Court—within a period of less than three weeks from inception until today—have been pressed into hurried decision of profound constitutional issues on inadequately developed and largely assumed facts without the careful deliberation that, hopefully, should characterize the American judicial process. There has been much writing about the law and little knowledge and less digestion of the facts. In the New York case the judges, both trial and appellate, had not yet examined the basic material when the case was brought here. In the District of Columbia case, little more was done, and what was accomplished in this respect was only on re­quired remand, with the Washington Post, on the excuse that it was trying to protect its source of information, initially refusing to reveal what material it actually pos-
about three years ago, and the Times itself took three
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of the
were the
prived its public for that period.
light would be
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and court opinions of
orderly
cxpeditio.us, of
the courts. including this one, deserve better than has
I therefore would
I therefore would
Mr. Justice Holmes gave us a suggestion when he said in Schenck,
"It is a question of proximity and degree. When a
nation is at war many things that might be said in
time of peace are such a hindrance to its effort that
their utterance will not be endured so long as men
fight and that no Court could regard them as pro-
tected by any constitutional right." 249 U. S., at
52.
I therefore would remand these cases to be developed
expeditiously, of course, but on a schedule permitting the
 orderly presentation of evidence from both sides, with
the use of discovery, if necessary, as authorized by the
rules, and with the preparation of briefs, oral argument
and court opinions of a quality better than has been seen
to this point. In making this last statement, I criticize
no lawyer or judge. I know from past personal experi-
ence the agony of time pressure in the preparation of
litigation. But these cases and the issues involved and
the courts, including this one, deserve better than has
been produced thus far.
It may well be that if these cases were allowed to
develop as they should be developed, and to be tried as
lawyers should try them and as courts should hear them,
free of pressure and pace and sensationalism, other
light would be shed on the situation and contrary con-
siderations, for me, might prevail. But that is not the
present posture of the litigation.
The Court, however, decides the cases today the other
way. I therefore add one final comment.
I strongly urge, and sincerely hope, that these two
newspapers will be fully aware of their ultimate responsi-
bilities to the United States of America. Judge Wilkey,
dissenting in the District of Columbia case, after a review
of only the affidavits before his court (the basic papers
had not then been made available by either party), con-
cluded that there were a number of examples of docu-
ments that, if in the possession of the Post, and if pub-
lished, "could clearly result in great harm to the nation," and
he defined "harm" to mean "the death of soldiers, the
destruction of alliances, the greatly increased diffi-
culty of negotiation with our enemies, the inability of our
diplomats to negotiate . . . ." I, for one, have now
been able to give at least some cursory study not only to the
affidavits, but to the material itself. I regret to say
that from this examination I fear that Judge Wilkey's
statements have possible foundation. I therefore share
his concern. I hope that damage already has not been
done. If, however, damage has been done, and if, with
the Court's action today, these newspapers proceed to
publish the critical documents and there results there-
from "the death of soldiers, the destruction of alliances,
the greatly increased difficulty of negotiation with our
enemies, the inability of our diplomats to negotiate," to
which list I might add the factors of prolongation of the
war and of further delay in the freeing of United States
prisoners, then the Nation's people will know where the
responsibility for these sad consequences rests.
No. 1873
ALEXANDER BICKEL, New Haven, Conn. (WILLIAM E.
BIRGART, LAWRENCE J. MCKAY, FLOYD ABRAMS, and
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brief) for petitioners; ERWIN N. GRISWOLD, Solicitor General
(ROBERT MARDIAN, Assistant Attorney General, and DANIEL M.
FRIEDMAN, Deputy Solicitor General, with him on the brief) for
respondent; ROBERT ECKHARDT and THOMAS I. EMERSON
filed brief for 27 members of Congress, as amici curiae, seeking
reversal; NOFMAN DORSEN, MELVIN L. WULF, JOEL M. GORA
BURT NEUBORNE, BRUCE J. ENNIS, OSMOND K. FRAENKEL,
MARVIN M. KARPATKIN, JAMES HELLER, and HOPE EAST-
MAN filed brief for American Civil Liberties Union, as amicus
curiae, seeking reversal; VICTOR RABINOWITZ and KRISTIN
BOOTH GLEN filed brief for National Emergency Civil Liberties
Committee, as amicus curiae, seeking reversal.
No. 1885
ERWIN N. GRISWOLD, Solicitor General (ROBERT MARDIAN,
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Solicitor General, with him on the brief) for petitioner; WILLIAM R.
GLENDON, Washington, D.C. (ROGER A. CLARK, ANTHONY
F. ESSAYE, LEO P. LARKIN, IR., STANLEY GODOFSKY, and
ROYALL, KOGEL & WELLS, with him on the brief) for
respondent; ROBERT ECKHARDT and THOMAS I. EMERSON
filed brief for 27 members of Congress, as amici curiae, seeking
affirmance; NORMAN DORSEN, MELVIN L. WULF, JOEL M.
GORA, BURT NEUBORNE, BRUCE J. ENNIS, OSMOND K.
FRAENKEL, MARVIN M. KARPATKIN, JAMES HELLER, and
HOPE EASTMAN filed brief for American Civil Liberties Union,
as amicus curiae, seeking affirmance; VICTOR RABINOWITZ
and KRISTIN BOOTH GLEN filed brief for National Emergency
Civil Liberties Committee, as amicus curiae, seeking affirmance.