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A PROPOSED ELECTRONIC SURVEILLANCE CONTROL ACT*

G. Robert Blakey** and James A. Hancock***

"For that which taken singly and by itself may appear to be wrong, when considered with relation to other things may be perfectly right—or at least such as ought to be patiently endured as the means of preventing something that is worse."—Edmund Burke, *Edmund Burke: Selected Writings and Speeches* 318 (P. Stanlis ed. 1963).

Debate over the propriety of using electronic surveillance¹ in the administration of justice has produced a literature "more remarkable for its volume than its cogency."² Indeed, it is not totally unfair to say that no real progress has been made in resolving the controversy in the forty years since the Supreme Court divided so sharply in upholding the constitutionality of wiretapping in *Olmstead v. United States*.³ The Court's decision itself rested on a "harmful"⁴ basis—the majority and dissent taking a polar, either-or approach to the question of the constitutionality of wiretapping. There was, it seemed,⁵ no

* Since this article went to press, the Senate Judiciary Committee has reported out a comprehensive electronic surveillance statute. N.Y. Times, March 28, 1968, at 27, col. 1. The New York Senate and the Michigan House of Representatives have also passed similar statutes. Needless to say, these statutes should be consulted in drafting any new state legislation. Indeed, to the degree that the federal legislation will set national standards, state legislation inconsistent with it will be invalid.

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1 For the purposes of this article, the phrase "electronic surveillance" refers to the over-hearing or recording, without the consent of one of the parties, of any communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying that expectation. Thus, it is coterminous with the protection now afforded by the fourth amendment against "wiretapping" or "bugging." *Katz v. United States*, 389 U.S. 347 (1967); cf. *Lee v. Florida*, 191 So. 2d 84 (1966), cert. granted, 389 U.S. 1033 (1968) (No. 174, 1967 Term). It does not, of course, include "recording" with the consent of one of the parties. *Lopez v. United States*, 373 U.S. 427 (1963); *Rathbun v. United States*, 355 U.S. 107 (1957).

2 F. Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, in *THE SUPREME COURT REVIEW* 33 (Kurland ed. 1961) (Dean Allen's remark was apropos of the suppression rule). For a collection of articles on the use of electronic surveillance, see M. PAULSEN & S. KADISH, *CRIMINAL LAW AND ITS PROCESSES* 900 (1962). See also A. WESTIN, *PRIVACY AND FREEDOM* (1967), unquestionably the best single volume in the area.

3 277 U.S. 438 (1928).

4 A. WESTIN, *PRIVACY AND FREEDOM* 340 (1967).

5 "Seemed" is the appropriate word here. This has certainly been the way the *Olmstead* opinions, particularly Brandeis', have been read. See, e.g., The President's Message on Crime of February 6, 1967, U.S. CODE CONG. & AD. NEWS, 90th Cong., 1st Sess. 168, 177 (1967). No debate lasts long before wiretapping is termed a "dirty business." *Olmstead v. United States*, 277 U.S. 438, 470 (1928) (Holmes, J. dissenting), or an "unjustifiable intrusion," *id.* at 478 (Brandeis, J. dissenting). Indeed, those "who seek to legalize law enforcement tapping or eavesdropping soon find that they are 'toiling uphill against that heaviest of all argumentative weights—the weight of a slogan.'" Kamisar, *The Wiretapping-Eavesdropping Problem: A Professor's View*, 44 MINN. L. REV. 891, 896 (1960) (footnote omitted). It seems clear, however, that Mr. Justice Holmes referred only to wiretapping in violation of a statute and never reached the constitutional issue. See 277 U.S. 438, 469 (1928). Moreover, a careful reading of Justice Brandeis' opinion indicates that he did not condemn wiretapping per se, but rather "wiretapping as was practiced in the case" before him, *id.* at 472—which wiretapping the record shows to have been indiscriminate and unrestrained. Thus, Brandeis did not argue for an absolute "right to [be] let alone," but only for a right to be free from "unjustifiable intru-

room for compromise. The debate thereafter quickly acquired a "stylized"⁶ set of arguments that soon cut off the possibility of any meaningful dialogue. Since then, division, delay and deadlock have been the result.⁷

A series of recent events, however, has now substantially altered that "intolerable"⁸ picture. A majority of the President's Commission on Law Enforcement and Administration of Justice has concluded "that legislation should be enacted granting carefully circumscribed authority for electronic surveillance to law enforcement officers . . ."⁹ Recent opinions of the Supreme Court, *Berger*

sion." 277 U.S. 438, 478 (1928). The dissents of both men, despite popular opinion to the contrary, may be read as open to the possibility of a statute that would set out a procedure on the basis of which the intrusion associated with electronic surveillance might be justified.

6 Westin, *The Wire-tapping Problem: An Analysis and a Legislative Proposal*, 52 Col. L. Rev. 164, 186 (1952).

7 Over the past forty years, approximately 50 bills, resolutions, and joint resolutions dealing with court order wiretapping have been introduced in Congress. None have become law. TEMPORARY STATE COMMISSION ON THE CONSTITUTIONAL CONVENTION, STATE OF NEW YORK, INDIVIDUAL LIBERTIES, THE ADMINISTRATION OF CRIMINAL JUSTICE, 84 n.241 (1967) [hereinafter cited as INDIVIDUAL LIBERTIES].

8 THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 203 (1967) [hereinafter cited as THE CHALLENGE OF CRIME IN A FREE SOCIETY].

9 *Id.* This conclusion was reached apparently over strong opposition by Attorney General Ramsey Clark. See N.Y. Times, Nov. 23, 1966, at 1, col. 7. The Attorney General's view can only be described as, at best, "curious." He has publicly taken the position that electronic surveillance is "neither effective nor highly productive." N.Y. Times, May 19, 1967, at 23, col. 1. Mr. Clark's opinion is not shared by the Director of the Federal Bureau of Investigation, J. Edgar Hoover, who has, in sharp contrast, indicated that "we would never know what we do [know] about the Cosa Nostra without electronic surveillance." THE PROSECUTOR 352 (Sept.-Oct. 1967). Cf. REPORT OF THE COMMITTEE OF PRIVY COUNCILLORS APPOINTED TO INQUIRE INTO THE INTERCEPTION OF COMMUNICATIONS ¶107 (1957), reprinted in *Hearings on Wiretapping, Eavesdropping, and the Bill of Rights Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 85th Cong., 2d Sess., pt. 2, at 459 (1958) [hereinafter cited as PRIVY COUNCILLORS REPORT] ("conclusive evidence of effectiveness"). The President's Crime Commission, moreover, termed the intelligence gathered by the Bureau as "significant." THE CHALLENGE OF CRIME IN A FREE SOCIETY 199. The Commission also noted that only the Bureau had been able "to document fully the national scope" of organized crime. *Id.* at 192.

What may be obtained by the careful use of electronic surveillance techniques is not, of course, information that routinely comes to the public's attention. Summaries of several FBI "airtels" — communication from field offices to the national office of the Bureau in Washington — recently became public, however, during the course of a post-trial hearing in a tax case in Providence, Rhode Island. The airtels dealt with the activities of Raymond Patriarca, a Cosa Nostra "family" boss who, at one time, was thought to be a member of its highest ruling body, the "Commission." *Hearings on Organized Crime and Illicit Traffic in Narcotics Before the Permanent Subcomm. on Investigations of the Senate Comm. on Government Operations*, 88th Cong., 1st Sess., pt. 1, at 567 (1963). On another occasion, the FBI airtels were described in these terms:

[T]hose 10 documents establish the existence of the Cosa Nostra; they establish its structure; they establish the functions of the various members; they indicate the power of the various members — for example, of the boss — they give you the size of various families; they give you the geographical extent of their operations; and they indicate that the Cosa Nostra actively operates in such States as Rhode Island, Illinois, Maryland, Washington, New Jersey, Massachusetts, Florida, and Pennsylvania. They give you also an indication that it operates on an international scale; apparently a group is in Canada. They give you an indication of some of the illegal activities by the Cosa Nostra, including murder, kidnaping, extortion, fraud, bribery, loan sharking, and gambling. They give you some indication of their legal activities — the infiltration of business, including legitimate gambling, labor unions, racetracks, vending machines, and liquor. They show you that the associates of this one boss are in every major area of the country and consist of every hood who has graduated from the drugstore cowboy stage; all were contacted at one time or another by Patriarca. The only description that I can give which accurately capsulizes those airtels is this: Imagine if you could have had an electronic device in on an Italian duke in the 16th century, such as Cesare Borgia, who was dispensing largesse, ordering killings, and all that sort of thing. That is exactly what you had when you put

*v. New York*¹⁰ and *Katz v. United States*,¹¹ have made it clear that electronic surveillance techniques may be employed in the administration of justice within the mandate of the Constitution requiring that searches and seizures be reasonable. Legislation, too, is now pending in the Congress¹² and the legislatures of a number of states¹³ that would authorize electronic surveillance under court order.¹⁴ Finally, public opinion seemingly supports the enactment of such legislation.¹⁵ Thus, it seems that the community deadlock that followed *Olmstead* is about to be broken.

The purpose of this article is not to enter into the still active debate on the propriety of electronic surveillance, nor is it to reexamine the policy arguments for and against court order electronic surveillance legislation.¹⁶ Debate needs

the device in on Raymond Patriarca, and it wasn't Italy; it was the United States, and it wasn't the 16th century; it was today. Testimony of Professor G. Robert Blakey, *Hearings on Controlling Crime Through More Effective Law Enforcement Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 998 (1967) [hereinafter cited as *Hearings on Controlling Crime Through More Effective Law Enforcement*].

A more detailed analysis and the airtels themselves are reproduced in 113 CONG. REC. S. 11142-45, S 11149-53 (daily ed. Aug. 8, 1967).

The record of the Department of Justice in bringing the hard-core of organized crime "to book" underscores the need for enhanced evidence gathering procedures. Today there are an estimated 5,000 members of the Cosa Nostra. Testimony of J. Edgar Hoover, *Hearing on Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for 1967 Before a Subcomm. of the House Comm. on Appropriations*, 89th Cong., 2d Sess. 273 (1967). Yet between 1961 and 1966, indictments were returned against a mere 185, and convictions obtained against only 102 members. *Hearings on the Federal Effort Against Organized Crime Before a Subcomm. of the House Comm. on Government Operations*, 90th Cong., 1st Sess., pt. 1, at 19 (1967). Obviously, more needs to be done. Since experience has shown that electronic surveillance is not only effective, but can be employed without "harmful consequences" and only "infinitesimal" interference with "privacy," PRIVY COUNCILLORS REPORT ¶ 8(7), the case for its authorization would seem to be established.

10 388 U.S. 41 (1967). The *Berger* decision has been followed by the endorsement of permissive electronic surveillance legislation by such diverse groups as The Judicial Conference of the United States, N.Y. Times, Sept. 27, 1967, at 34, col. 1, The National Council on Crime and Delinquency, N.Y. Times, April 21, 1968, at 36, col. 1 and the National District Attorneys Association, *Hearings on Controlling Crime Through More Effective Law Enforcement* 615.

11 389 U.S. 347 (1967). In *Katz*, for example, the Court observed:

[I]t is clear that this surveillance [bug on telephone booth] was so narrowly circumscribed that a duly authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and clearly apprised of the precise intrusion it would entail, could constitutionally have authorized, with appropriate safeguards, the very limited search and seizure that . . . took place. Here . . . a . . . judicial order could have accommodated "the legitimate needs of law enforcement" by authorizing the carefully limited use of electronic surveillance. *Id.* at 354-56 (footnote omitted).

12 *E.g.*, S. 2050, 90th Cong., 1st Sess. (1967); H.R. 13482, 90th Cong., 1st Sess. (1967).

13 *California*, Assembly Bill 598, California Assembly, 1968 Sess. (1968); *Michigan*, H.R. 3729, Michigan House of Representatives, 1968 Sess. (1968); *New York*, Art. 370, § 370.05-55 of the Proposed New York Criminal Procedure Law, Temporary Commission on Revision of the Penal and Criminal Code (1967) [Article 370 is a replacement for § 813-a of the Code of Criminal Procedure, which was declared unconstitutional in *Berger v. New York*, 388 U.S. 41 (1967)]; *Pennsylvania*, S. 1264, General Assembly of Pennsylvania, 1967 Sess. (1967); *Rhode Island*, S. 356, General Assembly of Rhode Island, 1968 Sess. (1968).

14 Citations to present state legislation are collected in *Berger v. New York*, 388 U.S. 41, 47-48 nn.4-5 (1967). Mr. Justice Clark erroneously attributed to California a court order statute. *Id.* at 47-48.

15 *See, e.g.*, the public opinion poll conducted by the Mutual Broadcasting System, *Hearings on Controlling Crime Through More Effective Law Enforcement* 965 (80% of those expressing an opinion supported giving the FBI wiretapping authority in national security and organized crime cases). *See also* A. WESTIN, *PRIVACY AND FREEDOM* 207-08 (1967).

16 The arguments are reviewed in *INDIVIDUAL LIBERTIES* 87-93. The "fallacies" involved

to be brought down to specifics. Mr. Justice Holmes had a favorite admonition, "[T]hink things instead of words."¹⁷ It is our purpose, therefore, to give to that debate a concrete proposal.¹⁸ Our proposal is a statute that is intended to serve as a starting point for meaningful dialogue; it is not meant to be the final word in the debate. Here then is the statute, with commentary,¹⁹ that we propose:

in most of the arguments marshalled against court order legislation are treated in Testimony of Professor G. Robert Blakey, *Hearings on the Anti Crime Program Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 90th Cong., 1st Sess. 1028-31 (1967).

17 F. FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 79 (1938).

18 Our proposal is aimed at state legislatures, since on another occasion one of us has already tried his hand at proposing national legislation. Blakey, *Aspects of the Evidence Gathering Process in Organized Crime Cases: A Preliminary Analysis*, in TASK FORCE REPORT: ORGANIZED CRIME 80, 106-113 (1967). The "Task Force" proposal has already formed the basis of legislation introduced in Congress. See, e.g., S. 2050, 90th Cong., 1st Sess. (1967); H.R. 13482, 90th Cong., 1st Sess. (1967).

19 The commentary is not intended to be exhaustive. In most cases the face of the statute speaks for itself. The commentary is intended to briefly explain the problems to which the statute is addressed and the general intent of the statute.

ELECTRONIC SURVEILLANCE CONTROL ACT OF 1968¹

AN ACT TO PROHIBIT THE INTERCEPTION OF WIRE OR ORAL COMMUNICATIONS BY PERSONS OTHER THAN DULY AUTHORIZED INVESTIGATIVE OR LAW ENFORCEMENT OFFICERS AND TO PROVIDE FOR THE ISSUANCE OF JUDICIAL ORDERS UPON A SHOWING OF PROBABLE CAUSE AUTHORIZING SUCH OFFICERS TO INTERCEPT WIRE OR ORAL COMMUNICATIONS IN THE INVESTIGATION OR PREVENTION OF CERTAIN SPECIFIC OFFENSES AND REPEALING CERTAIN LAWS.²

[Insert appropriate enacting clause]³

Section 1. [Short Title.]⁴ This Act shall be known and may be cited as the "Electronic Surveillance Control Act of 1968."

Section 2. [Definitions.] As used in this Act:

(a) "Wire communication"⁵ means any communication made in whole or in part through the use of facilities:

(1) employed for the transmission of communications by the aid of wire, cable or other like connection between the point of origin and the point of reception; and

(2) furnished or operated by a communication common carrier.

(b) "Oral communication"⁶ means any oral communication uttered:

1 The draft attempts to follow the form established for uniform or model acts in *HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS* 396-403 (1966).

2 States have various requirements for titles. *See generally* Manson, *The Drafting of Statute Titles*, 10 *IND. L.J.* 155 (1934). Should legislation be contemplated, care should be exercised so that the requirements of the particular state are met.

3 States have various forms for enacting clauses. Care should be exercised to make sure the proper form is used because a mistake in such use can be fatal. *See, e.g.,* *May v. Rice*, 91 *Ind.* 546 (1883).

4 Some states have drafting rules against utilizing section headings. The use of brackets should be taken as a warning to ascertain the local law on this point. *HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS* 399 (1966).

5 The definition of "wire communication" is patterned after S. 675, 90th Cong., 1st Sess. § 10(1) (1967) which, in turn, is the bill long supported by the United States Department of Justice. *See, e.g.,* Testimony of Nicholas de B. Katzenbach, *Hearings on Criminal Laws and Procedure, Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 28, 33-35 (1966).

6 The definition of "oral communication" is taken from *Katz v. United States*, 389 U.S. 347, 351-52 (1967). See particularly the concurring opinion of Mr. Justice Harlan, *id.* at 361. The definition is composed of two elements: (1) an expectation that the communication is not subject to "interception,"

(1) by a person exhibiting an expectation that such communication is not subject to interception; and

(2) under circumstances justifying such expectation.⁷

(c) "Contents"⁸ 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 or meaning of such communication.

(d) "Intercepting device"⁹ means any device or apparatus that can be used to intercept a wire or oral communication other than:

(1) an extension telephone instrument installed for the purpose of normal use by the subscriber or user; or

(2) a hearing aid or other device that corrects subnormal hearing to not better than normal.

(e) "Intercept"¹⁰ means aurally acquire the contents of any wire or oral

and (2) a characterization of the expectation as "justifiable." A mere subjective anticipation of privacy would not be controlling. Such an expectation might be unjustifiable in, for example, a jail cell, *Lanza v. New York*, 370 U.S. 139 (1962), but would ordinarily merit legal recognition in a person's home, *Silverman v. United States*, 365 U.S. 505 (1961), or his office, *Berger v. New York*, 388 U.S. 41 (1967). Nevertheless, the determining factor would not necessarily be the person's location for the "Fourth Amendment protects people, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967). A judgment that an expectation was justifiable would, in each case, depend upon a careful evaluation of all the facts and circumstances. *Id.*

7 If we were writing on a clean slate it might be preferable to have a single definition for "communication" — speech. But since Section 605 of the Federal Communications Act, 47 U.S.C. § 605 (1964), effectively outlaws wiretapping, it is necessary to draw a distinction between wire and oral communications until Congress amends that Section.

8 The definition of "contents" is patterned after S. 675, 90th Cong., 1st Sess. § 10(7) (1967). The privacy to be accorded to the communication itself is intended to be complete.

9 Though the definition of "intercepting device" resembles S. 675, 90th Cong., 1st Sess. § 10(6) (1967) and S. 928, 90th Cong., 1st Sess. § 2515(d) (1967) (the Administration's "Right of Privacy Act") its scope is not as broad. In order to be excluded from the definition of "intercepting device," and thus from the Act, the "extension telephone instrument" need not be installed by a communication common carrier. There is no reason, we feel, to give telephone companies a monopoly over installation of telephone equipment by criminal legislation. The suggested change is taken from the Testimony of Lee Loewinger, *Hearings on the Right of Privacy Act of 1967 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess., pt. 2, at 518 (1967) [hereinafter cited as *Hearings on the Right of Privacy Act*].

10 The definition of "intercept" is modeled on S. 675, 90th Cong., 1st Sess. § 10(5) (1967). The scope of the definition is intended to encompass

communication through the use of any intercepting device, unless the use of such device:

(1) is by a party to such communication or with the prior authorization of a party;¹¹ or

(2) is by an operator of a switchboard, or an officer, agent or employee of a communication common carrier, acting in the normal course of his employment while engaged in an activity that is a necessary incident to the rendition of such carrier's service or to the protection of the property of such carrier.¹²

(f) "Person"¹³ means any officer, agent or employee of the [insert appro-

all forms of aural surveillance. Excluded are non-aural forms of surveillance such as a searchlight, *United States v. Lee*, 274 U.S. 559 (1927) which was cited with approval in *Katz v. United States*, 389 U.S. 347, 351 (1967), or a scintillator, *Corngold v. United States*, 367 F.2d 1 (9th Cir. 1966). An examination of telephone company records by law enforcement agents in the regular course of their duties would be lawful under this definition of intercept, *United States v. Russo*, 250 F. Supp. 55 (E.D. Pa. 1966). Finally, the proposed legislation is not intended to prevent the tracing of phone calls by the use of a "pen register" — a device used to record the number dialed from a given phone. *But see United States v. Dote*, 371 F.2d 176 (7th Cir. 1966).

11 Paragraph (1) largely reflects existing law concerning the giving of prior consent by a party to a communication. *Lopez v. United States*, 373 U.S. 427 (1963) (oral communication); *Rathbun v. United States*, 355 U.S. 107 (1957) (wire communication). *Contra*, *People v. Kurth*, 34 Ill. 2d 387, 216 N.E.2d 154 (1966). Consent is, moreover, intended to include both actual and implied consent. For example, the use of electronic surveillance devices in banks and apartment houses for institutional or personal protection would be impliedly consented to if fair notice was given of their existence. *Cf. A. WESTIN, PRIVACY AND FREEDOM* 60 (1967). Retroactive authorization would not be possible. *Weiss v. United States*, 308 U.S. 321 (1939). "Party" would mean a person actually participating in a communication. *United States v. Pasha*, 332 F.2d 193 (7th Cir.), *cert. denied*, 379 U.S. 839 (1964).

12 Paragraph (2) may be explained in these terms:

The major reason [for permitting this kind of interception] is, of course, to permit satisfactory completion of the connection. Other reasons might be, for example, to prevent fraud against a telephone company [*See, e.g., United States v. Beckley*, 259 F. Supp. 567 (N.D. Ga. 1965). *But see Babis v. United States*, 384 F.2d 643 (9th Cir. 1967).], to enforce priority requirements under emergency conditions in the private line services, to enforce tariff regulations prescribing different rates for communications services depending upon the contents of the communications (e.g., press messages), and to enforce other requirements of the tariffs and statutes relating to prohibited use of common carrier facilities. *Hearings on the Right of Privacy Act* 516.

13 The definition of "person" is comprehensive. It explicitly includes officers, agents, or employees of governmental units. *But cf. Pierson v. Ray*, 386

prate state] or political subdivision thereof, or any individual, partnership, association, joint stock company, trust or corporation.

(g) "Aggrieved person"¹⁴ means a person who was a party to any intercepted wire or oral communication or any person against whom the interception was directed.

(h) "Court of competent jurisdiction"¹⁵ means [insert appropriate courts].

(i) "Investigative or law enforcement officer"¹⁶ means any officer of the

U.S. 547 (1967). The governmental units themselves, however, are appropriately excluded here. See note 58 *infra*. Because of constitutional limitations on state power, no attempt is made to reach the actions of federal officers. See *Johnson v. Maryland*, 254 U.S. 51 (1920). *Contra*, CAL. PENAL CODE § 632 (West Supp. 1967); *Elson v. Bowen*, 2 BNA CRIM. L. REP. 2265 (Nev. Dec. 20, 1967) (FBI agent must testify in civil suit concerning FBI bugging).

14 When considered with subsection 13(b)(1), *infra*, the definition of "aggrieved person" delineates the class of persons who will be able to invoke the suppression sanction. As such, it is intended to reflect existing case law. *Wong Sun v. United States*, 371 U.S. 471 (1963); *Jones v. United States*, 362 U.S. 257 (1960); *Goldstein v. United States*, 316 U.S. 114 (1942); *United States ex rel. DeForte v. Mancusi*, 379 F.2d 897 (2d Cir. 1967), *cert. granted*, 390 U.S. 903 (1968) (No. 844, 1967 Term). *Contra*, *People v. Martin*, 45 Cal. 2d 755, 290 P.2d 855 (1955).

We recognize, of course, that limiting the right to secure the suppression of illegally seized evidence to those with standing correspondingly lessens its deterrent impact. Our judgment is, however, that as the exclusionary rule is applied "time after time . . . its deterrent efficacy at some stage reaches a point of diminishing returns, and beyond that its continued application is a public nuisance." *Amsterdam, Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 389 (1964). The standing rule, like the attenuation rule, provides a convenient and workable place at which to draw the line between "enough" and "too much" — particularly when it is given the current liberal federal reading. See *Jones v. United States*, 362 U.S. 257 (1960).

15 "Court of competent jurisdiction" is not explicitly defined in the proposed act. What is at issue here is a determination of what class of judicial officers should be entrusted with supervision of the use of electronic surveillance techniques in the administration of justice. Present federal search warrant practice, for example, permits United States Commissioners and city mayors to issue search warrants. 18 U.S.C. § 3041 (1964). Such a class is too broad for the purpose of this Act. A narrower class should be defined. See, e.g., H.R. 13482, 90th Cong., 1st Sess. § 2510(12) (1967) [hereinafter cited as H.R. 13482] which limits the issuance of electronic surveillance warrants to the chief judges of the federal courts or their designates and to certain state court judges. Depending on the structure of the state judicial system, an appropriately limited class should be inserted here.

16 The definition of "investigative or law enforcement officer" raises an issue analogous to that posed in defining "court of competent jurisdiction." See

[insert appropriate police agency] who is empowered by law to conduct investigations of, or to make arrests for, any offense enumerated in subsection (c) of section 7 of this Act and any attorney authorized by law to prosecute or participate in the prosecution of any such offense.

(j) "Communication common carrier" means any person engaged as a common carrier for hire in the transmission of communications by wire or radio.

Section 3. [Interception, Disclosure and Use of Wire or Oral Communications Prohibited.]¹⁷ Except as otherwise specifically provided in this Act, any person who:

(a) willfully intercepts, endeavors¹⁸ to intercept, or procures any other person to intercept or endeavor to intercept any wire or oral communication;

(b) willfully discloses or endeavors to disclose to any other person the contents of any wire or oral communication, or evidence derived therefrom, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication; or

note 15 *supra*. That all police officers in a state, including town constables and rural sheriffs, should be allowed to employ the techniques permitted by this Act is questionable. A state might well, for example, decide that only the state police should be entrusted with their use. *See, e.g.*, S. 1264, General Assembly of Pennsylvania, 1967 Sess. § 2(10) (1967). Whatever judgment is reached should be embodied in the legislation at this point. Since the proposed statute envisions close cooperation between police agencies and prosecuting officers, the definition also extends to attorneys authorized by law to prosecute the types of offenses in which warrants may issue.

17 This section of the proposed Act separately sets out prohibitions against "interception," "disclosure," or "use." The history of the interpretation of Section 605 of the Federal Communications Act, 47 U.S.C. § 605 (1964), makes this course advisable. Section 605 has been read to prohibit only "interception" and "divulgence." This interpretation is spelled out in the Testimony of Nicholas de B. Katzenbach, *Hearings on Criminal Laws and Procedures Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 34 (1966), and reflected in Testimony of Ramsey Clark, *Hearings on the Right of Privacy Act* pt. 1, at 56. (The Attorney General notes it would be "unwise" to "try to change the present policy under section 605." *Id.*) The history of the interpretation of Section 605 is traced in Brownell, *The Public Security and Wiretapping*, 39 CORNELL L.Q. 195, 197-200 (1954), and roundly criticized in Donnelly, *Electronic Eavesdropping*, 38 NOTRE DAME LAWYER 667, 671-72 (1963).

As drafted, section 3 makes it explicit that its scope includes both the "contents" of an intercepted wire or oral communication and "evidence derived therefrom." "Knowledge" would be required where "evidence derived therefrom" was "intercepted," "disclosed" or "used." This follows Section 605.

18 The term "endeavors" is employed to avoid all of the technical common law learning on "attempt." *See Osborn v. United States*, 385 U.S. 323, 333 (1966).

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

shall be guilty of a felony and shall be fined not more than ten thousand dollars (\$10,000) or imprisoned not more than five years, or both.¹⁹ Subsections (b) and (c) of this section shall not apply to the contents of any wire or oral communication, or evidence derived therefrom, that has become common knowledge or public information.²⁰

Section 4. [Possession, Sale, Distribution, Manufacture, Assembly, and Advertising of Wire or Oral Communication Intercepting Devices Prohibited.]

(a) Except as otherwise specifically provided in subsection (b) of this section, any person who:

(1) willfully possesses an intercepting device, the design of which renders it primarily useful for the purpose of the interception of a wire or oral communication;

(2) willfully sells an intercepting device, the design of which renders it primarily useful for the purpose of the interception of a wire or oral communication;

(3) willfully distributes an intercepting device, the design of which renders it primarily useful for the purpose of the interception of a wire or oral communication;

(4) willfully manufactures or assembles an intercepting device, the design of which renders it primarily useful for the purpose of the interception of a wire or oral communication; or

19 Violations must be "willful." See *United States v. Murdock*, 290 U.S. 389 (1933). Thus, good faith mistakes under the statute will not be subject to criminal sanctions. This seems only just in light of the technical character of the Act.

20 The last sentence of Section 3, in setting out what undoubtedly would be held to be the law, is intended to forestall the necessity of such judicial interpretation. The "disclosure" or "use" prohibited by the statute should not reach the "disclosure" or "use" of the contents of any wire or oral communication or evidence derived therefrom that has become "common knowledge" or "public information" after the communication is intercepted. For example, should the contents of unlawfully intercepted communications be leaked by an imprudent court attendant, who came in contact with them because inadequate security precautions were taken by a court, the attendant himself might well be subjected to criminal sanctions, but it would go too far to hold each person who repeated the information criminally liable. A similar result ought to obtain in the situation where through regular court proceedings the contents become "public information." Subsequent "disclosure" or "use," for example, in the press ought not be prohibited. This last sentence of Section 3 insures that these situations will not be held to fall within the statute.

(5) willfully places in any newspaper, magazine, handbill or other publication any advertisement of:

(i) any intercepting device, the design of which renders it primarily useful for the purpose of the interception of a wire or oral communication; or

(ii) any intercepting device where such advertisement promotes the use of such device for the purpose of the interception of a wire or oral communication;

shall be guilty of a felony and shall be fined not more than ten thousand (\$10,000) dollars or imprisoned not more than five years, or both.²¹

(b) It shall not be unlawful under this section for:

21 Subsection 4(a) is patterned after S. 928, 90th Cong., 1st Sess. § 2512 (1967). It should provide "significant relief" against the present tide running against privacy of speech. Testimony of Lee Loewinger, *Hearings on the Right of Privacy Act* pt. 2, at 517. The prohibition against advertisement, which includes intercepting devices of whatever design, "may well be one of the most effective provisions of the bill. . . . Such advertising should be proscribed as a means of curtailing the practice of eavesdropping and wiretapping." *Id.*

Only those intercepting devices *primarily* contrived for the acquisition of the contents of wire or oral communications without the consent of a participant are affected by paragraphs (1) through (4). But see Testimony of Ramsey Clark, *Hearings on the Right of Privacy Act* pt. 1, at 49 ("spike microphone," "cuff link microphone," and "martini olive transmitter"). Obviously, interpretation of "primarily" will present difficult questions in some situations. That close cases can be foreseen, however, is never ipso facto a conclusive objection to a proposed definition. Aristotle taught that "[P]recision is not to be sought for alike in all discussions . . . it is the mark of an educated man to look for precision in each class of things just so far as the nature of the subject admits" Aristotle, *Nichomachean Ethics* (W. D. Ross transl.), in INTRODUCTION TO ARISTOTLE 309-10 (R. McKeon ed. 1947). A narrower definition was thus rejected on the grounds that it would be too easily evaded. This was the experience, for example, under the Gambling Device Act of 1951, ch. 1194, 64 Stat. 1134, *as amended*, 15 U.S.C. § 1171 (1964), where after eleven years' experience with a "precise" definition, language analogous to "primarily useful" was adopted. See H.R. REP. NO. 1828, 87th Cong., 2d Sess. 1 (1962). Note, too, that a violation must be "willful." See note 19 *supra*. Good faith mistakes would thus not be culpable.

A number of factors would be relevant in determining the character of a device's design including such aspects as size, construction, portability and method of operation. The existence of a clearly lawful purpose for the device would go a long way toward excluding it from the scope of this subsection. See Testimony of Lee Loewinger, *Hearings on the Right of Privacy Act* pt. 2, at 517-18. The sort of judgment called for indicates that in situations falling neither clearly on one side nor the other, the testimony of an expert witness would be of value. Cf. *United States v. One Device*, 160 F.2d 194 (10th Cir.

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

(2) a person under contract with the United States, a state or a political subdivision thereof, or an officer, agent, or employee of a state or a political subdivision thereof;

to possess, sell, distribute, manufacture or assemble, or advertise any intercepting device, while acting in furtherance of the appropriate activities of the United States, a state or political subdivision thereof or a communication common carrier.²²

Section 5. [Confiscation of Wire or Oral Communication Intercepting Devices.] Any intercepting device:

- (1) possessed;
- (2) used;
- (3) sold;
- (4) distributed; or
- (5) manufactured or assembled;

in violation of sections (3) and (4) of this Act may be seized and forfeited to the [insert appropriate state].²³

Section 6. [Immunity of Witnesses.] Whenever in the judgment of [insert appropriate prosecuting officer], the testimony of any witness, or the production of books, papers or other evidence by any witness, in any trial, hearing, or proceeding before any grand jury or court of the [insert appropriate state] involving any violation of this Act, or any conspiracy to violate this Act, is necessary to the public interest, such [insert appropriate prosecuting officer] may 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 relating to any violation of this Act, or any conspiracy to violate this Act, on the basis that the testimony or evidence required of him may

1947). What is required is a balanced judgment considering all the facts and circumstances.

22 If the interception of wire or oral communications is authorized, it will be necessary for a limited category of individuals to do what would otherwise constitute a violation of subsection 4(a). This provision makes the necessary exception. Note that the exception is carefully limited to "acting in furtherance of the appropriate activities . . ." This proviso limits what might otherwise be a tendency of the exception to swallow the rule.

23 Section 5 is modeled after S. 928, 90th Cong., 1st Sess. § 2513 (1967). It adds a significant additional sanction to the prohibitions of sections 3 and 4. Since equipment employed in electronic surveillance is usually expensive, confiscation of it should be a particularly effective method of stripping a professional eavesdropper of the tools of his trade and in taking off the market the inventory of those who manufacture or sell prohibited devices.

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 or matter concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence. No testimony so compelled shall be used as evidence in any trial, hearing or proceeding against such witness. No such 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.²⁴

24 Since unlawful electronic surveillance is typically a clandestine crime, often committed at the instigation of another person, the usual techniques of criminal investigation will not be adequate to enforce the prohibitions of sections 3 and 4. In most cases, the privilege against self-incrimination will prevent the ultimate principals from being held legally accountable. Thus, this provision for granting immunity is necessary.

The language of section 6 is patterned after 18 U.S.C. § 3486 (1964), *as amended*, § 3486(c) (Supp. I, 1965), and 18 U.S.C. § 1406 (1964). [Both of these federal provisions have been upheld by the Supreme Court against constitutional attacks based, *inter alia*, on the fifth amendment. *Reina v. United States*, 364 U.S. 507 (1960); *Ullman v. United States*, 350 U.S. 422 (1956).] On the federal level, immunity grants must be approved by the Attorney General. Because the relation between state attorney generals and local district attorneys is not the same on the state level, *see generally* Note, *The Role of the Prosecutor in Utah*, 5 UTAH L. REV. 70 (1957), a procedure involving prior approval of the attorney general need not be followed under the proposed Act.

Immunity from prosecution rather than from use of testimony is afforded. This is the conservative approach to what is constitutionally necessary. *See* Blakey, *Aspects of the Evidence Gathering Process in Organized Crime Cases: A Preliminary Analysis*, in TASK FORCE REPORT: ORGANIZED CRIME 85-87 (1967), for an alternative suggestion.

The last sentence of section 6 is probably unnecessary. *See United States v. Monia*, 317 U.S. 424 (1943). However, since it is standard in most immunity statutes, its omission might be unwise. Immunity from contempt or perjury should not be afforded. *See United States v. Orta*, 253 F.2d 312 (5th Cir.), *cert. denied*, 357 U.S. 905 (1958). *Compare* *People v. Goldman*, 2 BNA CRIM. L. REP. 2319 (N.Y. Ct. App. 1967), *with* *People v. Tomosello*, 2 BNA CRIM. L. REP. 2320 (N.Y. Ct. App. 1967).

25 The intervention of a judicial officer is, of course, mandated by the fourth amendment. *Katz v. United States*, 389 U.S. 347 (1967).

26 This subsection echoes a number of proposed bills. *See, e.g.*, S. 675, 90th Cong., 1st Sess. § 5(a) (1967); Art. 370, § 370.05-.55 of the Proposed New York Criminal Procedure Law, Temporary Commission on Revision of the Penal and Criminal Code (1967) — article 370 is a replacement for § 813-a of the Code of Criminal Procedure, which was declared unconstitutional in *Berger v. New York*, 388 U.S. 41 (1967). Subsection 7(a) centralizes, in

Section 7. [Applications for Authorization or Approval of Interception of Wire or Oral Communications.]

(a) The [insert appropriate prosecuting officer] may authorize, in writing, any investigative or law enforcement officer to make application to a court²⁵ of competent jurisdiction for an order authorizing the interception of any wire or oral communication when such interception may provide evidence of any offense enumerated in subsection (c) of this section.²⁶

(b) The [insert appropriate prosecuting officer] may authorize, in writing, any investigative or law enforcement officer to make application to a court of competent jurisdiction for an order of approval of the previous interception of any wire or oral communication when the contents of such communication:

- (1) relate to an offense other than that specified in an order of authorization;
- (2) were intercepted in an emergency situation; or
- (3) were intercepted in an emergency situation and relate to an offense other than that contemplated at the time the interception was made.²⁷

a publicly responsible official subject to the political process, the formulation and implementation of law enforcement policy on the use of electronic surveillance techniques in the administration of justice. This subsection is drafted to provide an option of either limiting authorization to the state attorney general — the path followed by S. 1264, General Assembly of Pennsylvania, 1967 Sess. § 8 (1967) — or to include as well local district attorneys. Centralization in the attorney general, or the attorney general and the local district attorneys, will thus avoid the possibility of divergent practices developing, and if abuses should occur, the lines of responsibility will be clear.

27 While subsection 7(a) treats applications for an order of authorization, this subsection deals with applications for orders of approval. The need for such orders is posed by three distinct, but related, situations.

The first situation is covered by paragraph (1). It deals with the situation where, during the course of an interception authorized for a specific offense, an interception is incidentally made of a communication relating to another offense. *See, e.g.,* *People v. Grossman*, 27 App. Div. 2d 572, 276 N.Y.S.2d 168 (1966), *rev'd on other grounds*, 20 N.Y.2d 346, 229 N.E.2d 589, 283 N.Y.S.2d 12 (1967) (murder overheard on fraud bug). Under a strict interpretation of the particularity requirement of the fourth amendment, this evidence as such could not be used or disclosed. *Marron v. United States*, 275 U.S. 192, 196 (1927). *But cf. Abel v. United States*, 362 U.S. 217 (1960); *Harris v. United States*, 331 U.S. 145 (1947) [the Sixth Circuit read *Harris* as modifying *Marron* in *United States v. Eisner*, 297 F.2d 595 (6th Cir. 1962)]. *See also* *Harris v. United States*, 88 S.Ct. 992 (1968) ("plain view" seizure not during search upheld), and the Brief for Respondent at 9-13 (argument for seizure of evidence in "plain view" during a permissible search). Paragraph (1) sets up a procedure modeled on present search warrant practice under which use and disclosure might be based upon a subsequent court order. *See, e.g., Aron v. United States*,

(c) An application for an order of authorization as provided in subsection (a) of this section or of approval as provided in paragraph (2) of subsection (b) of this section may be authorized only when such interception may provide or has provided evidence of any of the following offenses: [insert appropriate statutory references].²⁸

Section 8. [Procedure for Authorization of Interception of Wire or Oral Communications.]

382 F.2d 965, 973 (8th Cir. 1967); *State v. Hunter*, 235 Wis. 188, 292 N.W. 609 (1940). Such a procedure represents the "safe" way to handle this problem.

The second situation is covered by paragraph (2). It deals with the "emergency situation." Often in criminal investigations a "meet" between known criminals will be set up and held almost simultaneously. Requiring an advance court order in these situations—where the facts establishing probable cause may be the most compelling and the dangers of overbroad or overlong surveillance the least—would be tantamount to failing to authorize surveillance at all. When there is no time to obtain an order, the police have always been thought to have emergency power. *See, e.g., Schmerber v. California*, 384 U.S. 757 (1966); *Carroll v. United States*, 267 U.S. 132 (1925). This paragraph recognizes the applicability of this traditional principle in the area of the use of electronic surveillance devices, a position the Supreme Court questioned, but left open for future resolution in *Katz v. United States*, 389 U.S. 347, 357-58 (1967).

The third situation is covered by paragraph (3). It deals with the situation noted in paragraph (1) when it occurs during a period of emergency interception. Again, a procedure is set up for an order of approval.

28 This subsection imposes a category limitation on the use of electronic surveillance techniques. *See, e.g., NEV. REV. STAT. § 200.660(a)* (1963). The limitation is only placed on orders of authorization and orders of approval in the emergency situation. Where surveillance is once lawfully undertaken, it would be wholly arbitrary to limit the use or disclosure of what is overheard on subsequent orders of approval to set categories of offenses. What protection from unnecessary invasions that might have accrued from the category limitation will already have been lost. When the issue is subsequent use rather than initial authorization, truth, not privacy, is the dominate interest.

Subsection 7(c) is modeled on S. 675, 90th Cong., 1st Sess. § 5(a) (1967). Since any list must, to a certain extent, be arbitrary, no judgment is reached on what specific crimes should be included. The point remains, however, that a line ought to be drawn. Testimony of Robert F. Kennedy, *Hearings on Wiretapping—The Attorney General's Program—1962 Before the Senate Comm. on the Judiciary*, 87th Cong., 2d Sess. 17, 22-23 (1962). It is suggested that the offenses selected should be either serious in themselves or characteristic of organized crime. *Cf. PRIVY COUNCILLORS REPORT ¶ 65* (crimes carrying "three years imprisonment" or those involving a "large number of people"). A list might, therefore, include, at a minimum: murder, kidnapping, extortion, robbery, bribery, syndicated gambling, narcotics, or any conspiracy involving any of the

(a) Each application for an authorization to intercept a wire or oral communication or for approval of the previous interception of any such communication shall be made in writing²⁹ upon oath or affirmation and shall state:

- (1) the authority of the applicant to make such application;
- (2) the identity of the investigative or law enforcement officer for whom the authority to intercept a wire or oral communication is sought and the identity of whoever authorized the application;
- (3) a complete statement of the facts relied upon by the applicant, including:

- (i) the identity of the person, if known, committing the offense and whose communications are to be or were intercepted;

- (ii) the character and location of the wire communication facilities involved or the place where the oral communication is to be or was intercepted;

- (iii) the type³⁰ of communication to be or which was intercepted;

and

- (iv) a statement showing that other investigative procedures have been tried and have failed or reasonably appear or appeared to be unlikely to succeed if tried or to be too dangerous;³¹ and

- (4) a complete statement of the facts concerning all previous applications, known to the individual authorizing and to the individual making the application, made to any court for authorization to intercept or for approval of the previous interception of a wire or oral communication involving any of the same facilities or places specified in the application or involving any person whose communication is to be or has been intercepted, and the action taken by the court on each such application.

above offenses. Such a list could be expanded or contracted as experience develops.

29 A written application is not required by the Constitution. *Sparks v. United States*, 90 F.2d 61 (6th Cir. 1937). It is, however, a requirement under FED. R. CRIM. P. 3-4; *cf. Giordenello v. United States*, 357 U.S. 480, 485-88 (1958). Requiring a written application makes good sense since police agencies will be forced to "shape their detection functions with an awareness of the decision-making processes that are likely to follow." L. TIFFANY, D. MCINTYRE and D. ROTENBERG, *DETECTION OF CRIME* ix (1967). Inadequate affidavits may get by a favorite judge on the initial application, but they will "backfire" at trial. *Id.* at 120. "Forum shopping" will thus be kept to a minimum. *Cf. PRIVY COUNCILLORS REPORT* ¶ 79 (written authority should be required).

30 Since the conversation itself may not, of course, be described before it is spoken, description of "type" meets the test of particularity of offense required by the fourth amendment. *See Berger v. New York*, 388 U.S. 41, 56-57 (1967).

31 See note 35 *infra*.

(b) The court may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(c) Upon such application, the court may enter an *ex parte* order, as requested or as modified,³² authorizing or approving the interception of a wire or oral communication, if the court determines on the basis of the facts submitted by the applicant that there is or was probable cause³³ for belief that:

- (1) the individual whose communication is to be or was intercepted:
 - (i) is engaging or was engaged over a period of time as a part of a continuing criminal activity; or
 - (ii) is or was committing, has or had committed or is or was about to commit at a specific time;
 an offense³⁴ as provided in subsection (c) of section 7 of this Act;
- (2) facts concerning such offense may be or have been obtained through such interception;
- (3) normal investigative procedures have been tried and have failed or reasonably appear or appeared to be unlikely to succeed if tried or to be too dangerous;³⁵ and

32 "[S]ome rather weak cases," Mr. Justice Holmes observed in *The Mangrove Prize Money*, 188 U.S. 720, 725 (1903), "must fall within any law which is couched in general words." Giving the court explicit discretionary power to refuse to grant, or to grant as modified, will serve to guarantee that the use of these techniques will be confined to the situations which are clear-cut.

33 The "probable cause" standard is, of course, a requirement of the fourth amendment. *Berger v. New York*, 388 U.S. 41, 59 (1967).

34 The Supreme Court, in *Berger v. New York*, 388 U.S. 41, 55-57 (1967), made it clear that blanket authorizations could not be squared with the concept of reasonableness in the fourth amendment. *See id.* at 100 (Harlan, J. dissenting) (duration must be related to character of offense). Paragraph (1) of subsection 8(c) attempts, therefore, to draw a distinction between "course of conduct" and "incident" surveillance. Where it is shown that an individual is engaged in an offense as "part of a continuing criminal activity," proportionately longer surveillance may be authorized than where the evidence only establishes that a "single incident" is about to occur. This will guarantee that "no greater invasion of privacy [will be] permitted than [is] necessary under the circumstances." *Id.* at 57; *cf.* PRIVY COUNCILLORS REPORT ¶ 73 (not "kept on longer than . . . necessary for the case in hand").

35 The Supreme Court recognized in *Berger v. New York*, 388 U.S. 41, 60 (1967) that a showing of "special facts" or "exigent circumstances" will be necessary to justify recourse to an electronic surveillance technique where the subject is not given notice before its use. *See generally* Blakey, *The Rule of Announcement and Unlawful Entry: Miller v. United States and Ker v. California*, 112 PA. L. REV. 499 (1964). The same principle was recognized in *Katz v. United States*, 389 U.S. 347, 355-56 n.16 (1967). This paragraph, embodying a requirement for such a finding, is modeled on the English standard for the use of wiretapping on the Home Secretary's warrant. PRIVY COUNCILLORS

(4) the facilities from which, or the place where, the wire or oral communications are to be or were intercepted, are or were being used, or are or were about to be used, in connection with the commission of such offense, or are or were leased to, listed in the name of, or commonly used by, such individual.

(d) The interception of wire or oral communications shall be conducted in such a manner as to minimize or eliminate the interception of such communications not otherwise subject to interception under this Act.³⁶

(e) If the facilities from which a wire communication is to be or was intercepted are or were public,³⁷ no order of authorization or approval shall be issued unless the court, in addition to the matters provided in subsection (c) of this section, determines that there is or was a special need to intercept wire communications over such facilities.

(f) If the facilities from which, or the place where, the wire or oral communications are to be or were intercepted are or were being used, or are or were about to be used, or are or were leased to, listed in the name of, or commonly used by, a licensed physician, a licensed attorney-at-law, or practicing clergyman, or is or was a place used primarily for habitation by a husband and wife, no order shall be issued unless the court, in addition to the matters provided in subsection (c) of this section, determines that there is or was a special need to intercept wire or oral communications over such facilities or in such places.³⁸

REPORT ¶ 64; P. DEVLEN, *THE CRIMINAL PROSECUTION IN ENGLAND* 65-69 (1958). It is also reflected in proposed legislation. *See, e.g.*, H.R. 13482 § 2518(c)(1)(D). The normal investigative procedures referred to would include, for example, standard visual or aural surveillance techniques, general questioning, interrogation under an immunity grant, use of regular search warrants, or the infiltration of conspiratorial groups by informants or undercover agents. Merely because a normal investigative technique was theoretically possible, however, it would not follow that it was "likely" to succeed. *See, e.g., In re Grand Jury Investigation of Giancana v. United States*, 352 F.2d 921 (7th Cir.), *cert. denied*, 382 U.S. 959 (1965). What the provision envisions is that the evidence produced be tested in a practical and common-sense fashion based on all the facts and circumstances. *Cf. United States v. Ventresca*, 380 U.S. 102 (1965).

36 This reflects the approach of *Katz v. United States*, 389 U.S. 347, 354 (1967).

37 Surveillance of a public telephone booth is potentially one of the most sensitive uses of electronic surveillance techniques. Therefore, it ought not to be undertaken without some special showing in addition to that otherwise required. Such a showing of "special need" might, for example, be made where the applicant establishes that the individual consciously avoids the use of regular phones. *See, e.g., The Activities of Raymond Patriarca, Hearings on Controlling Crime Through More Effective Law Enforcement* 938, 946. In this situation, surveillance might properly be authorized.

38 Subsection (8)(e) attempts to surround the public telephone with

No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this Act, shall lose its privileged character.³⁹

(g) Each order authorizing or approving the interception of any wire or oral communication shall specify:

- (1) the jurisdiction of the court issuing the order;
- (2) the individual, if known, whose communications are to be or were intercepted;
- (3) the character and location of the communication facilities as to which, or the place of the communication as to which, authority to intercept is granted or was approved;
- (4) the type of the communication to be or which was intercepted;
- (5) the identity of the investigative or law enforcement officer to whom the authority to intercept a wire or oral communication is given or was approved and the identity of whoever authorized the application; and
- (6) the period of time during which such interception is authorized or was approved.

(h) No order entered under this section shall authorize or approve the interception of any wire or oral communication for a period of time in excess of that necessary under the circumstances. Every order entered under this section shall require that such interception begin and terminate as soon as practicable.⁴⁰ In no case shall an order entered under this section authorize or approve the interception of wire or oral communications for any period exceeding thirty days.⁴¹ Extensions of such an order may be granted for periods of not

special protections. In a like fashion, this provision attempts to grant similar protection to certain well recognized categories of privileged communications. *See generally* 8 J. WIGMORE, EVIDENCE § 2285 (3d ed. 1940). It should serve to guarantee that the incidental interception of otherwise privileged communications will be held to a minimum.

39 While most jurisdictions today recognize one or more categories of privileged communications, they very often hold them inapplicable where an eavesdropper seeks to testify. *E.g.*, *Commonwealth v. Wakelin*, 230 Mass. 567, 120 N.E. 209 (1918). Thus, the privilege is thought to be solely that of restricting the testimony of the spouse, confessor, lawyer, or doctor. The last sentence of this provision is designed to change that rule. Otherwise, the use of electronic surveillance techniques might indirectly undermine the various social policies represented by the various privileges.

40 These first two sentences reflect the strict time limitation of the fourth amendment set out in *Berger v. New York*, 388 U.S. 41, 59 (1967), and *Katz v. United States*, 389 U.S. 347, 353-56 (1967). "Practicable," of course, does not mean an unlimited period. In the event, the interception could not begin relatively soon, it might be necessary to return and secure a new order. At what point this would be required would be a question of fact in each case.

41 This time limitation is made necessary by progressive "staleness" of

more than thirty days. An extension shall not be granted unless an application for it is made in accordance with this section, and the court makes the findings required by this section.⁴²

Section 9. [Procedure for Approval of Interception of Wire or Oral Communications.]

(a) An order of approval of the interception of any wire or oral communication relating to an offense other than that specified in the order of authorization may be issued where the court finds on an application for an order of approval as provided in section 8 of this Act that such interception was otherwise made in accordance with this Act. Such application shall be made as soon as practicable.⁴³

(b) Notwithstanding any other provision of this Act, any investigative or law enforcement officer who determines that:

(1) an emergency situation exists that requires a wire or oral communication to be intercepted immediately; and

(2) there are grounds upon which an order could be entered to authorize such interception;

may intercept such wire or oral communication if an application for an order of approval of such interception is made in accordance with section 8 of this Act within forty-eight hours after the interception has occurred or has begun to occur.⁴⁴

(c) An order of approval of the interception of any wire or oral communication may include the approval of the interception of a wire or oral communication in an emergency situation where the communication relates to an offense other than that contemplated at the time the interception was made if the court finds that such interception was otherwise made in accordance with this Act. Such application shall be made as soon as practicable.

(d) In addition to any other right to appeal, the [insert appropriate state] shall have the right to appeal from a denial of an order of approval made under this section if the [insert appropriate prosecuting officer] shall certify to the court that the appeal is not taken for purposes of delay. The appeal shall be taken within thirty days after the denial was made and shall be diligently prosecuted.⁴⁵

the original showing of probable cause because of the passage of time. Cf. *People v. Dolgin*, 415 Ill. 434, 114 N.E.2d 389 (1952) (49 days is all right where the course of conduct is shown); see generally 100 A.L.R.2d 525 (1965).

42 The absence of this sort of provision was criticized in *Berger v. New York*, 388 U.S. 41, 59 (1967).

43 Subsections (a) and (c) of this section are addressed to the problems discussed in note 27 *supra* concerning paragraphs (1) and (3) of subsection 7(b). The application should be made as soon as "practicable." No set time limitation is intended. But as soon as it is reasonable after such an interception is made, or its relevancy becomes clear, the order should be sought.

44 This subsection is addressed to the problem discussed in note 27 *supra* concerning paragraph (2) of subsection 7(b).

45 See note 55 *infra*.

Section 10. [Maintenance and Custody of Records.]

(a) Any wire or oral communication intercepted in accordance with sections 8 and 9 of this Act shall, if practicable, be recorded by tape or wire or other comparable method. The recording shall be done in such a way as will protect it from editing or other alteration. Immediately upon the expiration of the period the order or extensions thereof, the tapes or wire recordings or other records shall be transferred to the court issuing the order and sealed under its direction.⁴⁶ Custody of the tapes or wire recordings or other records shall be maintained wherever the court directs. They shall not be destroyed except upon an order of such court and in any event shall be kept for ten years. Duplicate tapes or wire recordings or records may be made for disclosure or use pursuant to subsection (a) of section 12 of this Act. The presence of the seal provided by this section, or a satisfactory explanation for its absence, shall be a prerequisite for the disclosure of the contents of any wire or oral communication, or evidence derived therefrom, under subsection (b) of section 12 of this Act.

(b) Applications made and orders granted under sections 8 and 9 of this Act shall be sealed by the court. Custody of the applications and orders shall be maintained wherever the court directs. They shall not be destroyed except on order of the court and in any event shall be kept for ten years. They may be disclosed only upon a showing of good cause before a court of competent jurisdiction.

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

Section 11. [Inventory.] Not later than ninety days after the termination of the period of the order or extensions thereof or the date of the denial of an order of approval, the issuing or denying court shall cause to be served on the individual named in the application an inventory which shall include:

(a) notice of the entry of the order or the application for a denied order of approval;

(b) the date of the entry of the order or the denial of the application for an order of approval;

(c) the period of authorized, approved or disapproved interception; and

(d) a record of the relevant contents of the interception, if any, of wire or oral communications.⁴⁷

46 This subsection embodies the return requirement of the fourth amendment set out in *Berger v. New York*, 388 U.S. 41, 60 (1967), and *Katz v. United States*, 389 U.S. 347, 356 (1967).

47 This section is patterned after H.R. 13482 § 2518(i). *See also* FED. R. CRIM. P. 41(d). The language of *Berger v. New York*, 388 U.S. 41, 60 (1967), seemed to indicate that such an inventory is constitutionally required. The Court's opinion in *Katz v. United States*, 389 U.S. 347, 354-57 (1967), however, seems less insistent. In any event, an inventory requirement is included since we feel that it serves the sound social policy of ultimately making all electronic surveillance less "surreptitious." Through it, each individual against whom

On an ex parte showing of good cause, the court may postpone the serving of the inventory required by this section.⁴⁸

Section 12. [Authorization for Disclosure and Use of Intercepted Wire or Oral Communications.]

(a) Any investigative or law enforcement officer who has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose or use such contents or evidence to the extent that such disclosure or use is appropriate to the proper performance of his official duties.⁴⁹

(b) Any person who has obtained knowledge of the contents of any wire or oral communication intercepted in accordance with sections 8 and 9 of this Act, or evidence derived therefrom, may disclose the contents of such communication or evidence while giving testimony under oath or affirmation in any criminal trial, hearing, or proceeding before any grand jury or court.⁵⁰

(c) The contents of any intercepted wire or oral communication, or evi-

a surveillance order is issued will have his day in court to vindicate any unjustifiable invasion of privacy that might have occurred. *Cf.* PRIVY COUNCILLORS REPORT ¶ 134 (distaste of surveillance based on secret character without opportunity to object).

48 The last sentence of section 11 covers those situations in which it may be necessary to postpone the serving of the required inventory. For example, where interception is discontinued at one location, because the subject moves, but is re-established at a new location, or the investigation itself continues and looks into the activities of close associates of the subject, it will be necessary to postpone the filing of an inventory until the investigation is complete. Otherwise, the investigation might be aborted. This is the type of showing of "good cause" the provision envisions.

49 This subsection constitutes the basic authorization for disclosure and use by law enforcement agents of evidence directly or indirectly obtained through electronic surveillance techniques. It envisions such use and disclosure in systems of criminal intelligence, *see, e.g.*, R.I. GEN. LAW ANN. §§ 42-37-1 to 3 (Supp. 1967) (New England State Police Compact), to establish probable cause for arrest, *Ginsberg v. United States*, 96 F.2d 433 (5th Cir. 1938), to establish probable cause to search, *Foley v. United States*, 64 F.2d 1 (5th Cir.), *cert. denied*, 289 U.S. 762 (1933), or to develop witnesses, *In re Saperstein*, 30 N.J. Super. 373, 104 A.2d 842, *cert. denied*, 348 U.S. 874 (1954); *New York v. Saperstein*, 2 N.Y.2d 210, 140 N.E.2d 252 (1957). The range of possible uses is wide.

50 This subsection constitutes the basic authorization for evidentiary use of the product of electronic surveillance techniques. Its use, it should be noted, is limited to criminal proceedings. While the subsection envisions no direct use of illegally intercepted communications, there are situations, however, where illegally intercepted communications might properly be used to unmask affirmative perjury, *Walder v. United States*, 347 U.S. 62 (1954), or against those who have no standing to complain of the illegality, *Goldstein v. United States*, 316 U.S. 114 (1942).

dence derived therefrom, may otherwise be disclosed or used only upon a showing of good cause before a court of competent jurisdiction.⁵¹

Section 13. [Procedure for Disclosure and Suppression of Intercepted Wire or Oral Communications.]

(a) The contents of any wire or oral communication intercepted in accordance with sections 8 and 9 of this Act, or evidence derived therefrom, shall not be disclosed in any trial, hearing, or proceeding before any court of [insert appropriate state] unless ten days before the trial, hearing, or proceeding:

(1) the inventory as provided in section 11 of this Act has been served; and

(2) the parties to the action have been served with a copy of the order and accompanying application under which the interception was authorized or approved.⁵²

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

(b) (1) Any aggrieved person⁵³ in any trial, hearing, or proceeding in

51 This subsection explicitly puts into the system of rigid disclosure and use an essential measure of flexibility. It recognizes that in certain cases it may be permissible to use what was originally gathered for criminal prosecution for other purposes. The authorization of such use shall be made on a case by case basis and only when there has been a showing of "good cause." Congressional investigations in the past, for example, have found court order wire taps to be "vitally important." J. MAGUIRE, EVIDENCE OF GUILT § 6.00 n.16 (1959).

Such use for purposes other than the original criminal prosecution would undoubtedly result without this provision—as witnessed by the present experience of the disclosure of information secured under New York's court order statute. See, e.g., *Hearings on James R. Hoffa and Continued Underworld Control of New York Teamster Local 239 Before the Permanent Subcomm. on Investigations of the Senate Comm. on Government Operations*, 87th Cong., 1st Sess. 50 (1961). Although the range of possible situations where "good cause" might be shown under subsection 12(c) remains obviously large, it must surely be narrower than present practice where no such showing is required. The provision should thus be viewed as a "limitation," not an "authorization." Reliance will have to be placed on the sound discretion and good sense of the judicial officer—on which so much of the practical administration of justice depends. See *Nardone v. United States*, 308 U.S. 338, 340 (1939).

52 This subsection, by requiring that notice of intent to use the communications be given before trial, is designed to guarantee that disputes over the legality of intercepted communications will be raised and settled before the trial on the merits. See *Nardone v. United States*, 308 U.S. 338, 340 (1939). It is modeled on S. 675, 90th Cong., 1st Sess. § 8(f) (1967). The provision is also designed to give the person against whom the intercepted communication is to be introduced an adequate opportunity to defend himself in this obviously technical area of the law.

53 The definition of "aggrieved person" is discussed in note 14 *supra*.

or before any court or other authority of [insert appropriate state] may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that:

- (i) the communication was unlawfully intercepted;
- (ii) the order of authorization or approval is insufficient on its face;
- (iii) the interception was not made in conformity with the order of authorization;
- (iv) service was not made as provided in subsection (a) of this section; or
- (v) the seal provided in subsection (a) of section 10 of this Act is not present and there is no satisfactory explanation for its absence.

The motion shall be made at least ten days before the trial, hearing, or proceeding unless there was no opportunity to make the motion or the moving party was not aware of the grounds for the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall not be received in evidence in the trial, hearing, or proceeding.⁵⁴

(2) In addition to any other right to appeal, the [insert appropriate state] shall have the right to appeal from an order granting a motion to suppress if the [insert appropriate prosecuting officer] shall certify to the court that the appeal is not taken for purposes of delay. The appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.⁵⁵

54 This subsection sets out the procedure that an "aggrieved person" must follow to secure the suppression of illegally intercepted communications. A culpable failure to make the motion before trial would warrant its denial. *Seguro v. United States*, 275 U.S. 106 (1927). Thus, it guarantees that the disputes will be settled before trial. Finally, it serves to protect the prosecutor's right of appeal, discussed below. *See Giacona v. United States*, 257 F.2d 450, 455 (5th Cir.) *cert. denied*, 358 U.S. 873 (1958).

55 State practice is mixed on the appealability of pretrial motions to suppress. This provision reflects the judgment that the need for uniformity in the interpretation of the law governing the use of electronic surveillance techniques warrants granting the right. *Compare*, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 140 (recommendation of general right). It should be noted that subsection 9(d) authorizes the appeal of the denials of an order of approval, since such a denial would be tantamount to the granting of a motion to suppress. The language of both this provision and subsection 9(d) closely follow 18 U.S.C. § 1404(a) (1965), which grants the federal prosecutor a right to appeal in narcotics cases.

56 Appellate courts have, of course, upheld the theoretical possibility of recovery for unlawful wiretapping or bugging. *See, e.g., LeCrone v. Ohio Bell Tel. Co.*, 120 OHIO APP. 129, 201 N.E.2d 533 (1963); *Roach v. Harper*, 143 W. Va. 869, 105 S.E.2d 564 (1958). Nevertheless, recovery seems to be dependent upon the existence of a property right in the place bugged or the phone

Section 14. [Authorization for Recovery of Civil Damages.]

(a) Any person whose wire or oral communication is intercepted, disclosed or used in violation of this Act shall:

(1) have a civil cause of action⁵⁶ against any person who intercepts, discloses or uses or procures any other person to intercept, disclose or use, such communication; and

(2) be entitled to recover from any such person:

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

(ii) punitive damages; and

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

(b) A good faith reliance on a court order or legislative authorization shall constitute a complete defense to an action brought under this section.⁵⁷

(c) As used in this section, "person" includes [insert appropriate state] and any political subdivision thereof, and the state or any political subdivision thereof shall not assert its governmental immunity to avoid liability under this section.⁵⁸

Section 15. [Reports Concerning Intercepted Wire or Oral Communications.] In December of each year, [insert appropriate prosecuting officer] shall report to the [insert appropriate legislative or judicial body]:⁵⁹

(1) the number of orders applied for;

(2) the kind of orders applied for;

(3) the number of orders denied and granted as applied for or as modified;

tapped. It thus contained the same theoretical defects that were only recently remedied in constitutional theory in *Katz v. United States*, 389 U.S. 347 (1967). This provision is designed to do the same thing in the civil area. It is modeled on H.R. 13842 § 2520.

57 This provision makes explicit what would probably be followed in practice. *See, e.g., Pierson v. Ray*, 386 U.S. 547, 555 (1967).

58 Existing tort theory allowing recovery for invasions of privacy by law enforcement officers is less than satisfactory. *See generally, A. WESTIN, PRIVACY AND FREEDOM* 330-64 (1967); Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955). The major defect is the existence of sovereign immunity. Subsection 14(c) is intended to eliminate it and any other immunity that would insulate an individual from the consequences of his actions when suit is brought under this section. *But see Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871).

59 Here it will be necessary to select the appropriate legislative or judicial body to which the annual report should be made. *See, e.g., S. 1264*, General Assembly of Pennsylvania, 1967 Sess. § 11 (1967) ("Chief Justice"). The important point is that there be some system of public accounting that allows the community within which the procedures are used to evaluate their continuing social utility. *Cf. PRIVY COUNCILLORS REPORT ¶¶ 119 and 133.*

- (4) the offenses specified in the orders or the applications that were denied;
- (5) the period of time of the interceptions;
- (6) a general description of the interceptions, with a separate category for each offense, including:
 - (i) the character and frequency of incriminating communications intercepted;
 - (ii) the character and frequency of other communications intercepted;
 - (iii) the number of persons whose communications were intercepted; and
 - (iv) the character, amount and approximate cost of the manpower and other resources used in the interception;
- (7) the number of arrests resulting from the interceptions;
- (8) the offenses for which the arrests were made;
- (9) the number of trials resulting from the interceptions;
- (10) the number of motions to suppress made, denied and granted in connection with the interceptions;
- (11) the number of convictions resulting from the interceptions; and
- (12) the offenses for which the convictions were obtained.

Section 16. [Conformity to Federal Law.]

(a) The provisions of sections 8 and 9 of this Act shall not be deemed to authorize or approve the interception of a wire communication where such interception would constitute a violation of any law of the United States.⁶⁰

(b) Notwithstanding any provision of sections 7 through 15 of this Act, any court to which an application is made in accordance with sections 8 and 9 of this Act may take any evidence, make any finding, or issue any order required

60 Section 605 of the Federal Communications Act, 47 U.S.C. § 605 (1964), makes the "interception" and "divulgence" of wire communications — even intrastate, *Weiss v. United States*, 308 U.S. 321 (1939), and by state law enforcement officers pursuant to court order, *Benanti v. United States*, 355 U.S. 96 (1957) — a federal crime. This provision thus suspends the operation of those sections of the proposed Act that are applicable to wire communications until Congress modifies the federal statute.

61 This provision makes explicit the power of a court to do what the New York Court of Appeals did in *People v. Kaiser* (Dec. 7, 1967). In *Kaiser*, the court rehabilitated Section 813-a of the *N.Y. Code of Criminal Procedure*, which the Supreme Court had struck down in *Berger v. New York*, 388 U.S. 41 (1967). It held that in the future Section 813-a must be read in light of *Berger* and that all the defects which the Supreme Court found on the face of the statute must now be cured. In short, *Kaiser* read *Berger* into Section 813-a. This provision will thus guarantee the smooth working of the statute whatever the course of federal constitutional decisions. It will also have the effect of automatically conforming the state statute to any national legislation Congress might enact.

to conform the proceedings or the issuance of any order of authorization or approval as provided in sections 8 and 9 of this Act to the provisions of the Constitution of the United States or of any law of the United States.⁶¹

Section 17. [Insert appropriate severability clause.]

Section 18. [Insert appropriate repeals.]

Section 19. [Insert appropriate effective date.]