

PREPARED STATEMENT OF HON. EDWARD H. LEVI, ATTORNEY GENERAL OF THE  
UNITED STATES

I am here today in response to a request from the Committee to discuss the relationship between electronic surveillance and the Fourth Amendment of the Constitution. If I remember correctly, the original request was that I place before the Committee the philosophical or jurisprudential framework relevant to this relationship which lawyers, those with executive responsibilities or discretion, and lawmakers, viewing this complex field, ought to keep in mind. If this sounds vague and general and perhaps useless, I can only ask for indulgence. My first concern when I received the request was that any remarks I might be able to make would be so general as not to be helpful to the Committee. But I want to be as helpful to the Committee as I can be.

The area with which the Committee is concerned is a most important one. In my view, the development of the law in this area has not been satisfactory, although there are reasons why the law has developed as it has. Improvement of the law, which in part means its clarification, will not be easy. Yet it is a most important venture. In a talk before the American Bar Association last August, I discussed some of the aspects of the legal framework. Speaking for the Department of Justice, I concluded this portion of the talk with the observation and commitment that "we have very much in mind the necessity to determine what procedures through legislation, court action or executive processes will best serve the national interest, including, of course, the protection of constitutional rights."

I begin then with an apology for the general nature of my remarks. This will be due in part to the nature of the law itself in this area. But I should state at the outset there are other reasons as well. In any area, and possibly in this one more than most, legal principles gain meaning through an interaction with the facts. Thus, the factual situations to be imagined are of enormous significance.

As this Committee well knows, some of the factual situations to be imagined in this area are not only of a sensitive nature but also of a changing nature. Therefore, I am limited in what I can say about them, not only because they are sensitive, but also because a lawyer's imagination about future scientific developments carries its own warnings of ignorance. This is a point worth making when one tries to develop appropriate safeguards for the future.

There is an additional professional restriction upon me which I am sure the Committee will appreciate. The Department of Justice has under active criminal investigation various activities which may or may not have been illegal. In addition, the Department through its own attorneys, or private attorneys specially hired, is representing present or former government employees in civil suits which have been brought against them for activities in the course of official conduct. These circumstances naturally impose some limitation upon what it is appropriate for me to say in this forum. I ought not give specific conclusory opinions as to matters under criminal investigation or in litigation. I can only hope that what I have to say may nevertheless be of some value to the Committee in its search for constructive solutions.

I do realize there has to be some factual base, however unfocused it may at times have to be, to give this discussion meaning. Therefore, as a beginning, I propose to recount something of the history of the Department's position and practice with respect to the use of electronic surveillance, both for telephone wiretapping and for trespassory placement of microphones.

As I read the history, going back to 1931 and undoubtedly prior to that time, except for an interlude between 1928 and 1931, and for two months in 1940, the policy of the Department of Justice has been that electronic surveillance could be employed without a warrant in certain circumstances.

In 1928 the Supreme Court in *Olmstead v. United States* held that wiretapping was not within the coverage of the Fourth Amendment. Attorney General Sargent had issued an order earlier in the same year prohibiting what was then known as the Bureau of Investigation from engaging in any telephone wiretapping for any reason. Soon after the order was issued, the Prohibition Unit was transferred to the Department as a new bureau. Because of the nature of its work and the fact that the Unit had previously engaged in telephone wiretapping, in January 1931, Attorney General William D. Mitchell directed that a study be made to determine whether telephone wiretapping should be permitted and, if so, under what circumstances. The Attorney General determined that in the meantime the bureaus within the Department could engage in

telephone wiretapping upon the personal approval of the bureau chief after consultation with the Assistant Attorney General in charge of the case. The policy during this period was to allow wiretapping only with respect to the telephones of syndicated bootleggers, where the agent had probable cause to believe the telephone was being used for liquor operations. The bureaus were instructed not to tap telephones of public officials and other persons not directly engaged in the liquor business. In December 1931, Attorney General William Mitchell expanded the previous authority to include "exceptional cases where the crimes are substantial and serious, and the necessity is great and [the bureau chief and the Assistant Attorney General] are satisfied that the persons whose wires are to be tapped are of the criminal type."

During the rest of the thirties it appears that the Department's policy concerning telephone wiretapping generally conformed to the guidelines adopted by Attorney General William Mitchell. Telephone wiretapping was limited to cases involving the safety of the victim (as in kidnappings), location and apprehension of "desperate" criminals, and other cases considered to be of major law enforcement importance, such as espionage and sabotage.

In December 1937, however, in the first *Nardone* case the United States Supreme Court reversed the Court of Appeals for the Second Circuit, and applied Section 605 of the Federal Communications Act of 1934 to law enforcement officers, thus rejecting the Department's argument that it did not so apply. Although the Court read the Act to cover only wire interceptions where there had also been disclosure in court or to the public, the decision undoubtedly had its impact upon the Department's estimation of the value of telephone wiretapping as an investigative technique. In the second *Nardone* case in December 1939, the Act was read to bar the use in court not only of the overheard evidence, but also of the fruits of that evidence. Possibly for this reason, and also because of public concern over telephone wiretapping, on March 15, 1940, Attorney General Robert Jackson imposed a total ban on its use by the Department. This ban lasted about two months.

On May 21, 1940, President Franklin Roosevelt issued a memorandum to the Attorney General stating his view that electronic surveillance would be proper under the Constitution where "grave matters involving defense of the nation" were involved. The President authorized and directed the Attorney General "to secure information by listening devices [directed at] the conversation or other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies." The Attorney General was requested "to limit these investigations so conducted to a minimum and to limit them insofar as possible as to aliens." Although the President's memorandum did not use the term "trespassory microphone surveillance," the language was sufficiently broad to include that practice, and the Department construed it as an authorization to conduct trespassory microphone surveillances as well as telephone wiretapping in national security cases. The authority for the President's action was later confirmed by an opinion by Assistant Solicitor General Charles Fahy who advised the Attorney General that electronic surveillance could be conducted where matters affected the security of the nation.

On July 17, 1946, Attorney General Tom C. Clark sent President Truman a letter reminding him that President Roosevelt had authorized and directed Attorney General Jackson to approve "listening devices [directed at] the conversation of other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies" and that the directive had been followed by Attorneys General Robert Jackson and Francis Biddle. Attorney General Clark recommended that the directive "be continued in force" in view of the "increase in subversive activities" and "a very substantial increase in crime." He stated that it was imperative to use such techniques "in cases vitally affecting the domestic security, or where human life is in jeopardy" and that Department files indicated that his two most recent predecessors as Attorney General would concur in this view. President Truman signed his concurrence on the Attorney General's letter.

According to the Department's records, the annual total of telephone wiretaps and microphones installed by the Bureau between 1940 through 1951 was as follows:

Telephone wiretaps :		Microphones :	
1940 -----	6	1940 -----	6
1941 -----	67	1941 -----	25
1942 -----	304	1942 -----	88
1943 -----	475	1943 -----	193
1944 -----	517	1944 -----	198
1945 -----	519	1945 -----	186
1946 -----	364	1946 -----	84
1947 -----	374	1947 -----	81
1948 -----	416	1948 -----	67
1949 -----	471	1949 -----	75
1950 -----	270	1950 -----	61
1951 -----	285	1951 -----	75

It should be understood that these figures, as is the case for the figures I have given before, are cumulative for each year and also duplicative to some extent, since a telephone wiretap or microphone which was installed, then discontinued, but later reinstated would be counted as a new action upon reinstatement.

In 1952, there were 285 telephone wiretaps, 300 in 1953, and 322 in 1954. Between February 1952 and May 1954, the Department's position was not to authorize trespassory microphone surveillance. This was the position taken by Attorney General McGrath, who informed the FBI that he would not approve the installation of trespassory microphone surveillance because of his concern over a possible violation of the Fourth Amendment. FBI records indicate there were 63 microphones installed in 1952, there were 52 installed in 1953, and there were 99 installed in 1954. The policy against Attorney General approval, at least in general, of trespassory microphone surveillance was reversed by Attorney General Herbert Brownell on May 20, 1954, in a memorandum to Director Hoover instructing him that the Bureau was authorized to conduct trespassory microphone surveillances. The Attorney General stated that "considerations of internal security and the national safety are paramount and, therefore, may compel the unrestricted use of this technique in the national interest."

A memorandum from Director Hoover to the Deputy Attorney General on May 4, 1961, described the Bureau's practice since 1954 as follows: "[I]n the internal security field, we are utilizing microphone surveillances on a restricted basis even though trespass is necessary to assist in uncovering the activities of Soviet intelligence agents and Communist Party leaders. In the interests of national safety, microphone surveillances are also utilized on a restricted basis, even though trespass is necessary, in uncovering major criminal activities. We are using such coverage in connection with our investigations of the clandestine activities of top hoodlums and organized crime. From an intelligence standpoint, this investigative technique has produced results unobtainable through other means. The information so obtained is treated in the same manner as information obtained from wiretaps, that is, not from the standpoint of evidentiary value but for intelligence purposes."

The number of telephone wiretaps and microphones from 1955 through 1964 was as follows:

Telephone wiretaps :		Microphones :	
1955 -----	214	1955 -----	102
1956 -----	164	1956 -----	71
1957 -----	173	1957 -----	73
1958 -----	166	1958 -----	70
1959 -----	120	1959 -----	75
1960 -----	115	1960 -----	74
1961 -----	140	1961 -----	85
1962 -----	198	1962 -----	100
1963 -----	244	1963 -----	83
1964 -----	260	1964 -----	106

It appears that there was a change in the authorization procedure for microphone surveillance in 1965. A memorandum of March 30, 1965, from Director Hoover to the Attorney General states that "[i]n line with your suggestion this morning, I have already set up the procedure similar to requesting of authority for phone taps to be utilized in requesting authority for the placement of microphones."

President Johnson announced a policy for federal agencies in June 1965 which required that the interception of telephone conversations without the consent of one of the parties be limited to investigations relating to national security and

that the consent of the Attorney General be obtained in each instance. The memorandum went on to state that use of mechanical or electronic devices to overhear conversations not communicated by wire is an even more difficult problem "which raises substantial and unresolved questions of Constitutional interpretation." The memorandum instructed each agency conducting such an investigation to consult with the Attorney General to ascertain whether the agency's practices were fully in accord with the law. Subsequently, in September 1965, the Director of the FBI wrote the Attorney General and referred to the "present atmosphere, brought about by the unrestrained and injudicious use of special investigative techniques by other agencies and departments, resulting in Congressional and public alarm and opposition to any activity which could in any way be termed an invasion of privacy." "As a consequence," the Director wrote, "we have discontinued completely the use of microphones." The Attorney General responded in part as follows: "The use of wiretaps and microphones involving trespass present more difficult problems because of the inadmissibility of any evidence obtained in court cases and because of current judicial and public attitude regarding their use. It is my understanding that such devices will not be used without my authorization, although in emergency circumstances they may be used subject to my later ratification. At this time I believe it desirable that all such techniques be confined to the gathering of intelligence in national security matters, and I will continue to approve all such requests in the future as I have in the past. I see no need to curtail any such activities in the national security field."

The policy of the Department was stated publicly by the Solicitor General in a supplemental brief in the Supreme Court in *Black v. United States* in 1966. Speaking of the general delegation of authority by Attorneys General to the Director of the Bureau, the Solicitor General stated in his brief:

"An exception to the general delegation of authority has been prescribed, since 1940, for the interception of wire communications, which (in addition to being limited to matters involving national security or danger to human life) has required the specific authorization of the Attorney General in each instance. No similar procedure existed until 1965 with respect to the use of devices such as those involved in the instant case, although records of oral and written communications within the Department of Justice reflect concern by Attorneys General and the Director of the Federal Bureau of Investigation that the use of listening devices by agents of the government should be confined to a strictly limited category of situations. Under Departmental practice in effect for a period of years prior to 1963, and continuing until 1965, the Director of the Federal Bureau of Investigation was given authority to approve the installation of devices such as that in question for intelligence (and not evidentiary) purposes when required in the interests of internal security or national safety, including organized crime, kidnappings and matters wherein human life might be at stake. . . .

Present Departmental practice, adopted in July 1965 in conformity with the policies declared by the President on June 30, 1965, for the entire federal establishment, prohibits the use of such listening devices (as well as the interception of telephone and other wire communications) in all instances other than those involving the collection of intelligence affecting the national security. The specific authorization of the Attorney General must be obtained in each instance when this exception is invoked."

The Solicitor General made a similar statement in another brief filed that same term (*Schipani v. U.S.*) again emphasizing that the data would not be made available for prosecutorial purposes, and that the specific authorization of the Attorney General must be obtained in each instance when the national security is sought to be invoked. The number of telephone wiretaps and microphones installed since 1965 are as follows:

Telephone wiretaps:		Microphones:	
1965.....	233	1965.....	67
1966.....	174	1966.....	10
1967.....	113	1967.....	0
1968.....	82	1968.....	9
1969.....	123	1969.....	14
1970.....	102	1970.....	19
1971.....	101	1971.....	16
1972.....	108	1972.....	32
1973.....	123	1973.....	40
1974.....	190	1974.....	42

Comparable figures for the year 1975 up to October 29 are:

Telephone wiretaps: 121

Microphones: 24

In 1968 Congress passed the Omnibus Crime Control and Safe Streets Act. Title III of the Act set up a detailed procedure for the interception of wire or oral communications. The procedure requires the issuance of a judicial warrant, prescribes the information to be set forth in the petition to the judge so that, among other things, he may find probable cause that a crime has been or is about to be committed. It requires notification to the parties subject to the intended surveillance within a period not more than ninety days after the application for an order of approval has been denied or after the termination of the period of the order or the period of the extension of the order. Upon a showing of good cause the judge may postpone the notification. The Act contains a saving clause to the effect that it does not 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. Then in a separate sentence the proviso goes on to say, "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 Act specifies the conditions under which information obtained through a presidentially authorized interception might be received into evidence. In speaking of this saving clause, Justice Powell in the *Keith* case in 1972 wrote: "Congress simply left presidential powers where it found them." In the *Keith* case the Supreme Court held that in the field of internal security, if there was no foreign involvement, a judicial warrant was required for the Fourth Amendment. Fifteen months after the *Keith* case Attorney General Richardson, in a letter to Senator Fulbright which was publicly released by the Department, stated: "In general, before I approve any new application for surveillance without a warrant, I must be convinced that it is necessary (1) to protect the nation against actual or potential attack or other hostile acts of a foreign power; (2) to obtain foreign intelligence information deemed essential to the security of the United States; or (3) to protect national security information against foreign intelligence activities."

I have read the debates and the reports of the Senate Judiciary Committee with respect to Title III and particularly the proviso. It may be relevant to point out that Senator Philip Hart questioned and opposed the form of the proviso reserving presidential power. But I believe it is fair to say that his concern was primarily, perhaps exclusively, with the language which dealt with presidential power to take such measures as the President deemed necessary to protect the United States "against any other clear and present danger to the structure or existence of the Government."

I now come to the Department of Justice's present position on electronic surveillance conducted without a warrant. Under the standards and procedures established by the President, the personal approval of the Attorney General is required before any non-consensual electronic surveillance may be instituted within the United States without a judicial warrant. All requests for surveillance must be made in writing by the Director of the Federal Bureau of Investigation and must set forth the relevant circumstances that justify the proposed surveillance. Both the agency and the Presidential appointee initiating the request must be identified. These requests come to the Attorney General after they have gone through review procedures within the Federal Bureau of Investigation. At my request, they are then reviewed in the Criminal Division of the Department. Before they come to the Attorney General, they are then examined by a special review group which I have established within the Office of the Attorney General. Each request, before authorization or denial, receives my personal attention. Requests are only authorized when the requested electronic surveillance is necessary to protect the nation against actual or potential attack or other hostile acts of a foreign power; to obtain foreign intelligence deemed essential to the security of the nation; to protect national security information against foreign intelligence activities; or to obtain information certified as

necessary for the conduct of foreign affairs matters important to the national security of the United States. In addition the subject of the electronic surveillance must be consciously assisting a foreign power or foreign-based political group, and there must be assurance that the minimum physical intrusion necessary to obtain the information sought will be used. As these criteria will show and as I will indicate at greater length later in discussing current guidelines the Department of Justice follows, our concern is with respect to foreign powers or their agents. In a public statement made last July 9th, speaking of the warrantless surveillances then authorized by the Department, I said "it can be said that there are no outstanding instances of warrantless wiretaps or electronic surveillance directed against American citizens and none will be authorized by me except in cases where the target of surveillance is an agent or collaborator of a foreign power." This statement accurately reflects the situation today as well.

Having described in this fashion something of the history and conduct of the Department of Justice with respect to telephone wiretaps and microphone installations, I should like to remind the Committee of a point with which I began, namely, that the factual situations to be imagined for a discussion such as this are not only of a sensitive but a changing nature. I do not have much to say about this except to recall some of the language used by General Allen in his testimony before this Committee. The techniques of the NSA, he said, are of the most sensitive and fragile character. He described as the responsibility of the NSA the interception of international communication signals sent through the air. He said there had been a watch list, which among many other names, contained the names of U.S. citizens. Senator Tower spoke of an awesome technology—a huge vacuum cleaner of communications—which had the potential for abuses. General Allen pointed out that "The United States, as part of its effort to produce foreign intelligence, has intercepted foreign communications, analyzed, and in some cases decoded, these communications to produce such foreign intelligence since the Revolutionary War." He said the mission of NSA is directed to foreign intelligence obtained from foreign electrical communications and also from other foreign signals such as radar. Signals are intercepted by many techniques and processed, sorted and analyzed by procedures which reject inappropriate or unnecessary signals. He mentioned that the interception of communications, however it may occur, is conducted in such a manner as to minimize the unwanted messages. Nevertheless, according to his statement, many unwanted communications are potentially selected for further processing. He testified that subsequent processing, sorting and selection for analysis are conducted in accordance with strict procedures to insure immediate and, wherever possible, automatic rejection of inappropriate messages. The analysis and reporting is accomplished only for those messages which meet specific conditions and requirements for foreign intelligence. The use of lists of words, including individual names, subjects, locations, et cetera, has long been one of the methods used to sort out information of foreign intelligence value from that which is not of interest.

General Allen mentioned a very interesting statute, 18 USC 952, to which I should like to call your particular attention. The statute makes it a crime for any one who by virtue of his employment by the United States obtains any official diplomatic code and willfully publishes or furnishes to another without authorization any such code or any other matter which was obtained while in the process of transmission between any foreign government and its diplomatic mission in the United States. I call this to your attention because a certain indirection is characteristic of the development of law, whether by statute or not, in this area.

The Committee will at once recognize that I have not attempted to summarize General Allen's testimony, but rather to recall it so that this extended dimension of the variety of fact situations which we have to think about as we explore the coverage and direction of the Fourth Amendment is at least suggested.

Having attempted to provide something of a factual base for our discussion, I turn now to the Fourth Amendment. Let me say at once, however, that while the Fourth Amendment can be a most important guide to values and procedures, it does not mandate automatic solutions.

The history of the Fourth Amendment is very much the history of the American Revolution and this nation's quest for independence. The Amendment is the legacy of our early years and reflects values most cherished by the Founders. In a direct sense, it was a reaction to the general warrants and writs of assistance employed by the officers of the British Crown to rummage and ransack colonists' homes as a means to enforce antismuggling and customs laws. General

search warrants had been used for centuries in England against those accused of seditious libel and other offenses. These warrants, sometimes judicial, sometimes not, often general as to persons to be arrested, places to be searched, and things to be seized, were finally condemned by Lord Camden in 1765 in *Entick v. Carrington*, a decision later celebrated by the Supreme Court in *Boyd v. United States* as a "landmark of English liberty . . . one of the permanent monuments of the British Constitution." The case involved a general warrant, issued by Lord Halifax as Secretary of State, authorizing messengers to search for John Entick and to seize his private papers and books. Entick had written publications criticizing the Crown and was a supporter of John Wilkes, the famous author and editor of the *North Briton* whose own publications had prompted wholesale arrests, searches, and seizures. Entick sued for trespass and obtained a jury verdict in his favor. In upholding the verdict, Lord Camden observed that if the government's power to break into and search homes were accepted, "the secret cabinets and bureaus of every subject in this kingdom would be thrown open to the search and inspection of a messenger, whenever the secretary of state shall see fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel."

The practice of the general warrants, however, continued to be known in the colonies. The writ of assistance, an even more arbitrary and oppressive instrument than the general warrant, was also widely used by revenue officers to detect smuggled goods. Unlike a general warrant, the writ of assistance was virtually unlimited in duration and did not have to be returned to the court upon its execution. It broadly authorized indiscriminate searches and seizures against any person suspected by a customs officer of possessing prohibited or uncustomed goods. The writs, sometimes judicial, sometimes not, were usually issued by colonial judges and vested Crown officers with unreviewed and unbounded discretion to break into homes, rifle drawers, and seize private papers. All officers and subjects of the Crown were further commanded to assist in the writ's execution. In 1761 James Otis eloquently denounced the writs as "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book," since they put "the liberty of every man in the hands of every petty officer." Otis' fiery oration later prompted John Adams to reflect that "then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born."

The words of the Fourth Amendment are mostly the product of James Madison. His original version appeared to be directed solely at the issuance of improper warrants.<sup>1</sup> Revisions accomplished under circumstances that are still unclear transformed the Amendment into two separate clauses. The change has influenced our understanding of the nature of the rights it protects. As embodied in our Constitution, the Amendment reads: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Our understanding of the purposes underlying the Fourth Amendment has been an evolving one. It has been shaped by subsequent historical events, by the changing conditions of our modern technological society, and by the development of our own traditions, customs, and values. From the beginning, of course, there has been agreement that the Amendment protects against practices such as those of the Crown officers under the notorious general warrants and writs of assistance. Above all, the Amendment safeguards the people from unlimited, undue infringement by the government on the security of persons and their property.

But our perceptions of the language and spirit of the Amendment have gone beyond the historical wrongs the Amendment was intended to prevent. The Supreme Court has served as the primary explicator of these evolving perceptions and has sought to articulate the values the Amendment incorporates. I believe it is useful in our present endeavor to identify some of these perceived values.

<sup>1</sup>Madison's proposal read as follows: "The rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized."

First, broadly considered, the Amendment speaks to the autonomy of the individual against society. It seeks to accord to each individual, albeit imperfectly, a measure of the confidentiality essential to the attainment of human dignity. It is a shield against indiscriminate exposure of an individual's private affairs to the world—an exposure which can destroy, since it places in jeopardy the spontaneity of thought and action on which so much depends. As Justice Brandeis observed in his dissent in the *Olmstead* case, in the Fourth Amendment the Founders "conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." Judge Jerome Frank made the same point in a dissent in a case in which a paid informer with a concealed microphone broadcast an intercepted conversation to a narcotics agent. Judge Frank wrote in *United States v. On Lee* that "[a] sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure some enclave, some inviolate place which is a man's castle." The Amendment does not protect absolutely the privacy of an individual. The need for privacy, and the law's response to that need, go beyond the Amendment. But the recognition of the value of individual autonomy remains close to the Amendment's core.

A parallel value has been the Amendment's special concern with intrusions when the purpose is to obtain evidence to incriminate the victim of the search. As the Supreme Court observed in *Boyd*, which involved an attempt to compel the production of an individual's private papers, at some point the Fourth Amendment's prohibition against unreasonable searches and seizures and the Fifth Amendment's prohibition against compulsory self-incrimination "run almost into each other." The intrusion on an individual's privacy has long been thought to be especially grave when the search is based on a desire to discover incriminating evidence.<sup>2</sup> The desire to incriminate may be seen as only an aggravating circumstance of the search, but it has at times proven to be a decisive factor in determining its legality. Indeed, in *Boyd* the Court declared broadly that "compelling the production of [a person's] private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government."

The incriminating evidence point goes to the integrity of the criminal justice system. It does not necessarily settle the issue whether the overhearing can properly take place. It goes to the use and purpose of the information overheard.

An additional concern of the Amendment has been the protection of freedom of thought, speech, and religion. The general warrants were used in England as a powerful instrument to suppress what was regarded as seditious libel or non-conformity. Wilkes was imprisoned in the Tower and all his private papers seized under such a warrant for his criticism of the King. As Justice Frankfurter inquired, dissenting in *Harris v. United States*, a case that concerned the permissible scope of searches incident to arrest, "How can there be freedom of thought or freedom of speech or freedom of religion, if the police can, without warrant, search your house and mine from garret to cellar . . .?" So Justice Powell stated in *Keith* that "Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs."

Another concern embodied in the Amendment may be found in its second clause dealing with the warrant requirement, even though the Fourth Amendment does not always require a warrant. The fear is that the law enforcement officer, if unchecked, may misuse his powers to harass those who hold unpopular or simply different views and to intrude capriciously upon the privacy of individuals. It is the recognition of the possibility for abuse, inherent whenever executive discretion is uncontrolled, that gives rise to the requirement of a warrant. That requirement constitutes an assurance that the judgment of a neutral and detached magistrate will come to bear before the intrusion is made and that the decision whether the privacy of the individual must yield to a greater need of society will not be left to the executive alone.

<sup>2</sup> The concern with self-incrimination is reflected in the test of standing to invoke the exclusionary rule. As the Court stated in *United States v. Calandra*: "Thus, standing to invoke the exclusionary rule [under the Fourth Amendment] has been confined to situations where the Government seeks to use such evidence to incriminate the victim of the unlawful search. . . . This standing rule is premised on a recognition that the need for deterrence, and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search."



A final value reflected in the Fourth Amendment is revealed in its opening words: "The right of the people." Who are "the people" to whom the Amendment refers? The Constitution begins with the phrase, "We the People of the United States." That phrase has the character of words of art, denoting the power from which the Constitution comes. It does suggest a special concern for the American citizen and for those who share the responsibilities of citizens. The Fourth Amendment guards the right of "the people" and it can be urged that it was not meant to apply to foreign nations, their agents and collaborators. Its application may at least take account of that difference.

The values outlined above have been embodied in the Amendment from the beginning. But the importance accorded a particular value has varied during the course of our history. Some have been thought more important or more threatened than others at times. When several of the values coalesce, the need for protection has been regarded as greatest. When only one is involved, that need has been regarded as lessened. Moreover, the scope of the Amendment itself has been altered over time, expanding or contracting in the fact of changing circumstances and needs. As with the evolution of other constitutional provisions, this development has been case in definitional terms. Words have been read by different Justices and different Courts to mean different things. The words of the Amendment have not changed; we, as a people, and the world which envelops us, have changed.

An important example is what the Amendment seeks to guard as "secure." The wording of the Fourth Amendment suggests a concern with tangible property. By its terms, the Amendment protects the right of the people to be secure in their "persons, houses, papers and effects." The emphasis appears to be on the material possessions of a person, rather than on his privacy generally. The Court came to that conclusion in 1928 in the *Olmstead* case, holding that the interception of telephone messages, if accomplished without a physical trespass, was outside the scope of the Fourth Amendment. Chief Justice Taft, writing for the Court, reasoned that wiretapping did not involve a search or seizure; the Amendment protected only tangible material "effects" and not intangibles such as oral conversations. A thread of the same idea can be found in *Entick*, where Lord Camden said: "The great end for which men entered into society was to secure their property." But, while the removal and carrying off of papers was a trespass of the most aggravated sort, inspection alone was not: "the eye," Lord Camden said, "cannot by the law of England be guilty of a trespass."

The movement of the law since *Olmstead* has been steadily from protection of property to protection of privacy. In the *Goldman* case in 1942 the Court held that the use of a detectaphone placed against the wall of a room to overhear oral conversations in an adjoining office was not unlawful because no physical trespass was involved. The opinion's unstated assumption, however, appeared to be that a private oral conversation could be among the protected "effects" within the meaning of the Fourth Amendment. The *Silverman* case later eroded *Olmstead* substantially by holding that the Amendment was violated by the interception of an oral conversation through the use of a spike mike driven into a party wall, penetrating the heating duct of the adjacent home. The Court stated that the question whether a trespass had occurred as a technical matter of property law was not controlling; the existence of an actual intrusion was sufficient.

The Court finally reached the opposite emphasis from its previous stress on property in 1967 in *Katz v. United States*. The Court declared that the Fourth Amendment "protects people, not places," against unreasonable searches and seizures; that oral conversations, although intangible, were entitled to be secure against the uninvited ear of a government officer, and that the interception of a telephone conversation, even if accomplished without a trespass, violated the privacy on which petitioner justifiably relied while using a telephone booth. Justice Harlan, in a concurring opinion, explained that to have a constitutionally protected right of privacy under *Katz* it was necessary that a person, first, "have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"

At first glance, *Katz* might be taken as a statement that the Fourth Amendment now protects all reasonable expectations of privacy—that the boundaries of the right of privacy are coterminous with those of the Fourth Amendment. But that assumption would be misleading. To begin with the Amendment still protects some interests that have very little if any thing to do with privacy. Thus, the police may not, without warrant, seize an automobile parked on the owner's

driveway even though they have reason to believe that the automobile was used in committing a crime. The interest protected by the Fourth Amendment in such a case is probably better defined in terms of property than privacy. Moreover, the *Katz* opinion itself cautioned that "the Fourth Amendment cannot be translated into a general constitutional 'right to privacy.'" Some privacy interests are protected by remaining Constitutional guarantees. Others are protected by federal statute, by the states, or not at all.

The point is twofold. First, under the Court's decisions, the Fourth Amendment does not protect every expectation of privacy, no matter how reasonable or actual that expectation may be. It does not protect, for example, against false friends' betrayals to the police of even the most private confidences. Second, the "reasonable expectation of privacy" standard, often said to be the test of *Katz*, is itself a conclusion. It represents a judgment that certain behavior should as a matter of law be protected against unrestrained governmental intrusion. That judgment, to be sure, rests in part on an assessment of the reasonableness of the expectation, that is, on an objective, factual estimation of a risk of intrusion under given circumstances, joined with an actual expectation of privacy by the person involved in a particular case. But it is plainly more than that, since it is also intermingled with a judgment as to how important it is to society that an expectation should be confirmed—a judgment based on a perception of our customs, traditions, and values as a free people.

The *Katz* decision itself illustrates the point. Was it really a "reasonable expectation" at the time of *Katz* for a person to believe that his telephone conversation in a public phone booth was private and not susceptible to interception by a microphone on the booth's outer wall? Almost forty years earlier in *Olmstead* the Court held that such nontrespassory interceptions were permissible. *Goldman* reaffirmed that holding. So how could *Katz* reasonably expect the contrary? The answer, I think, is that the Court's decision in *Katz* turned ultimately on an assessment of the effect of permitting such unrestrained intrusions on the individual in his private and social life. The judgment was that a license for unlimited governmental intrusions upon every telephone would pose too great a danger to the spontaneity of human thought and behavior. Justice Harlan put the point this way in *United States v. White*:

"The analysis must, in my view, transcend the search for subjective expectations or legal attribution of assumptions of risk. Our expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present."

A weighing of values is an inescapable part in the interpretation and growth of the Fourth Amendment. Expectations, and their reasonableness, vary according to circumstances. So will the need for an intrusion and its likely effect. These elements will define the boundaries of the interests which the Amendment holds as "secure."

To identify the interests which are to be "secure," of course, only begins the inquiry. It is equally essential to identify the dangers from which those interests are to be secure. What constitutes an intrusion will depend on the scope of the protected interest. The early view that the Fourth Amendment protected only tangible property resulted in the rule that a physical trespass or taking was the measure of an intrusion. *Olmstead* rested on the fact that there had been no physical trespass into the defendant's home or office. It also held that the use of the sense of hearing to intercept a conversation did not constitute a search or seizure. *Katz*, by expanding the scope of the protected interests, necessarily altered our misunderstanding of what constitutes an intrusion. Since intangibles such as oral conversations are now regarded as protected "effects," the overhearing of a conversation may constitute an intrusion apart from whether a physical trespass is involved.

The nature of the search and seizure can be very important. An entry into a house to search its interior may be viewed as more serious than the overhearing of a certain type of conversation. The risk of abuse may loom larger in one case than the other. The factors that have come to be viewed as most important, however, are the purpose and effect of the intrusion. The Supreme Court has tended to focus not so much on what was physically done, but on why it was done and what the consequence is likely to be. What is seized, why it was seized, and what is done with what is seized are critical questions.

I stated earlier that a central concern of the Fourth Amendment was with intrusions to obtain evidence to incriminate the victim of the search. This concern has been reflected in Supreme Court decisions which have traditionally

treated intrusions to gather incriminatory evidence differently from intrusions for neutral or benign purposes. In *Frank v. Maryland*, the appellant was fined for refusing to allow a housing inspector to enter his residence to determine whether it was maintained in compliance with the municipal housing code. Violation of the code would have led only to a direction to remove the violation. Only failure to comply with the direction would lead to a criminal sanction. The Court held that such administrative searches could be conducted without warrant. Justice Frankfurter, writing for the Court, noted that the Fourth Amendment was a reaction to "ransacking by Crown officers of the homes of citizens in search of evidence of crime or of illegally imported goods." He observed that both *Entick* and *Boyd* were concerned with attempts to compel individuals to incriminate themselves in criminal cases and that "it was on the issue of the right to be secure from searches for evidence to be used in criminal prosecutions or for forfeitures that the great battle for fundamental liberty was fought." There was thus a great difference, the Justice said, between searches to seize evidence for criminal prosecutions and searches to detect the existence of municipal health code violations. Searches in this latter category, conducted "as an adjunct to a regulatory scheme for the general welfare of the community and not as a means of enforcing the criminal law, [have] antecedents deep in our history," and should not be subjected to the warrant requirement.

*Frank* was later overruled in 1967 in *Camara v. Municipal Court*, and a companion case, *See v. City of Seattle*. In *Camara*, appellant was, like *Frank*, charged with a criminal violation as a result of his refusal to permit a municipal inspector to enter his apartment to investigate possible violations of the city's housing code. The Supreme Court rejected the *Frank* rationale that municipal fire, health, and housing inspections could be conducted without a warrant because the object of the intrusion was not to search for the fruits or instrumentalities of crime. Moreover, the Court noted that most regulatory laws such as fire, health, and housing codes were enforced by criminal processes, that refusal to permit entry to an inspector was often a criminal offense, and that the "self-protection" or "non-incrimination" objective of the Fourth Amendment was therefore indeed involved.

But the doctrine of *Camara* proved to be limited. In 1971 in *Wyman v. James* the Court held that a "home visit" by a welfare caseworker, which entailed termination of benefits if the welfare recipient refused entry, was lawful despite the absence of a warrant. The Court relied on the importance of the public's interest in obtaining information about the recipient, the reasonableness of the measures taken to ensure that the intrusion was limited to the extent practicable, and most importantly, the fact that the primary objective of the search was not to obtain evidence for a criminal investigation or prosecution. *Camara* and *Frank* were distinguished as involving criminal proceedings.

Perhaps what these cases mainly say is that the purpose of the intrusion, and the use to which what is seized is put, are more important from a constitutional standpoint than the physical act of intrusion itself. Where the purpose or effect is noncriminal, the search and seizure is perceived as less troublesome and there is a readiness to find reasonableness even in the absence of a judicial warrant. By contrast, where the purpose of the intrusion is to gather incriminatory evidence, and hence hostile, or when the consequence of the intrusion is the sanction of the criminal law, greater protections may be given.

The Fourth Amendment then, as it has always been interpreted, does not give absolute protection against Government intrusion. In the words of the Amendment, the right guaranteed is security against *unreasonable* searches and seizures. As Justice White said in the *Camara* case, "there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." Whether there has been a constitutionally prohibited invasion at all has come to depend less on an absolute dividing line between protected and unprotected areas, and more on an estimation of the individual security interests affected by the Government's actions. Those effects, in turn, may depend on the purpose for which the search is made, whether it is hostile, neutral, or benign in relation to the person whose interests are invaded, and also on the manner of the search.

By the same token, the Government's need to search, to invade individual privacy interests, is no longer measured exclusively—if indeed it ever was—by the traditional probable cause standard. The second clause of the Amendment states, in part, that "no warrants shall issue but upon probable cause." The concept of probable cause has often been read to bear upon and in many cases

to control the question of the reasonableness of searches, whether with or without warrant. The traditional formulation of the standard, as "reasonable grounds for believing that the law was being violated on the premises to be searched" relates to the Governmental interest in the prevention of criminal offenses, and to seizure of their instruments and fruits (*Brinegar v. United States*). This formulation in *Gould v. United States* once took content from the long-standing "mere evidence rule"—that searches could not be undertaken "solely for the purpose of . . . [securing] evidence to be used . . . in a criminal or penal proceeding, but that they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public . . . may have in the property to be seized." The Government's interest in the intrusion, like the individual's interest in privacy, thus was defined in terms of property, and the right to search as well as to seize was limited to items—contraband and the fruits and instrumentalities of crime—in which the Government's interest was thought superior to the individual's. This notion, long eroded in practice, was expressly abandoned by the Court in 1967 in *Warden v. Hayden*. Thus, the detection of crime—the need to discover and use "mere evidence"—may presently justify intrusion.

Moreover, as I have indicated, the Court has held that, in certain situations, something less than probable cause—in the traditional sense—may be sufficient ground for intrusion, if the degree of intrusion is limited strictly to the purposes for which it is made. In *Terry v. Ohio* the Court held that a policeman, in order to protect himself and others nearby, may conduct a limited "pat down" search for weapons when he has reasonable grounds for believing that criminal conduct is taking place and that the person searched is armed and dangerous. Last term, in *United States v. Brignoni-Ponce*, the Court held that, if an officer has a "founded suspicion" that a car in a border area contains illegal aliens, the officer may stop the car and ask the occupants to explain suspicious circumstances. The Court concluded that the important Governmental interest involved, and the absence of practical alternatives, justified the minimal intrusion of a brief stop. In both *Terry* and *Brignoni*, the Court emphasized that a more drastic intrusion—a thorough search of the suspect or automobile—would require the justification of traditional probable cause. This point is reflected in the Court's decisions in *Almeida-Sanchez* and *Ortiz*, in which the Court held that, despite the interest in stemming illegal immigration, searches of automobiles either at fixed checkpoints or by roving patrols in places that are not the "functional equivalent" of borders could not be undertaken without probable cause.

Nonetheless, it is clear that the traditional probable cause standard is not the exclusive measure of the Government's interest. The kind and degree of interest required depend on the severity of the intrusion the Government seeks to make. The requirement of the probable cause standard itself may vary, as the Court made clear in *Camara*. That case, as you recall, concerned the nature of the probable cause requirement in the context of searches to identify housing code violations. The Court was persuaded that the only workable method of enforcement was periodic inspection of all structures, and concluded that because the search was not "personal in nature," and the invasion of privacy involved was limited, probable cause could be based on "appraisal of conditions in the area as a whole," rather than knowledge of the condition of particular buildings. "If a valid public interest justifies the intrusion contemplated," the court stated, "then there is probable cause to issue a suitable restricted search warrant." In the *Keith* case, while holding that domestic national security surveillance—not involving the activities of foreign powers and their agents—was subject to the warrant requirement, the Court noted that the reasons for such domestic surveillance may differ from those justifying surveillances for ordinary crimes, and that domestic security surveillances often have to be long range projects. For these reasons, a standard of probable cause to obtain a warrant different from the traditional standard would be justified: "Different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens."

In brief, although at one time the "reasonableness" of a search may have been defined according to the traditional probable cause standard, the situation has now been reversed. Probable cause has come to depend on reasonableness—on the legitimate need of the Government and whether there is reason to believe that the precise intrusion sought, measured in terms of its effect on individual security, is necessary to satisfy it.

This point is critical in evaluating the reasonableness of searches or surveillances undertaken to protect national security. In some instances, the Government's interest may be, in part, to protect the nation against specific actions of foreign powers or their agents—actions that are criminal offenses. In other instances, the interest may be to protect against the possibility of actions by foreign powers and their agents dangerous to national security—actions that may or may not be criminal. Or the interest may be solely to gather intelligence, in a variety of forms, in the hands of foreign agents and foreign powers—intelligence that may be essential to informed conduct of our nation's foreign affairs. This last interest indeed may often be far more critical for the protection of the nation than the detection of a particular criminal offense. The Fourth Amendment's standard of reasonableness as it has developed in the Court's decisions is sufficiently flexible to recognize this.

Just as the reasonableness standard of the Amendment's first clause has taken content from the probable cause standard, so it has also come to incorporate the particularity requirement of the warrant clause—that warrants particularly describe “the place to be searched, and the persons or things to be seized.” As one Circuit Court has written, in *United States v. Poller*, although pointing out the remedy might not be very extensive, “[L]imitations on the fruit to be gathered tend to limit the quest itself.”

The Government's interest and purpose in undertaking the search defines its scope, and the societal importance of that purpose can be weighed against the effects of the intrusion on the individual. By precise definition of the objects of the search, the degree of intrusion can be minimized to that reasonably necessary to achieve the legitimate purpose. In this sense, the particularity requirement of the warrant clause is analogous to the minimization requirement of Title III, that interceptions “be executed in such a way to minimize the interception of communications not otherwise subject to interception” under the Title.

But there is a distinct aspect to the particularity requirements—one that is often overlooked. An officer who has obtained a warrant based upon probable cause to search for particular items may in conducting the search necessarily have to examine other items, some of which may constitute evidence of an entirely distinct crime. The normal rule under the plain view doctrine is that the officer may seize the latter incriminating items as well as those specifically identified in the warrant so long as the scope of the authorized search is not exceeded. The minimization rule responds to the concern about overly broad searches, and it requires an effort to limit what can be seized. It also may be an attempt to limit how it can be used. Indeed, this minimization concern may have been the original purpose of the “mere evidence” rule.

The concern about the use of what is seized may be most important for future actions. Until very recently—in fact, until the Court's 1971 decision in *Biven v. Six Unknown Federal Narcotic Agents*—the only sanction against an illegal search was that its fruits were inadmissible at any criminal trial of the person whose interest was invaded. So long as this was the only sanction, the courts, in judging reasonableness, did not really have to weigh any governmental interest other than that of detecting crimes. In practical effect, a search could only be “unreasonable” as a matter of law if an attempt was made to use its fruits for prosecution of a criminal offense. So long as the Government did not attempt such use, the search could continue and the Government's interests, other than enforcing criminal laws, could be satisfied.

It may be said that this confuses rights and remedies; searches could be unreasonable even though no sanction followed. But I am not clear that this is theoretically so, and realistically it was not so. As I have noted earlier, the reasonableness of a search has depended, in major part, on the purpose for which it is undertaken and on whether that purpose, in relation to the person whom it affects, is hostile or benign. The search most hostile to an individual is one in preparation for his criminal prosecution. Exclusion of evidence from criminal trials may help assure that searches undertaken for ostensibly benign motives are not used as blinds for attempts to find criminal evidence, while permitting searches that are genuinely benign to continue. But there is a more general point. The effect of a Government intrusion on individual security is a function, not only of the intrusion's nature and circumstances, but also of disclosure and of the use to which its product is put. Its effects are perhaps greatest when it is employed or can be employed to impose criminal sanctions or to deter, by disclosure, the exercise of individual freedoms. In short, the use of the product seized bears upon the reasonableness of the search.

These observations have particular bearing on electronic surveillance. By the nature of the technology the "search" may necessarily be far broader than its legitimate objects. For example, a surveillance justified as the only means of obtaining value foreign intelligence may require the temporary overhearing of conversations containing no foreign intelligence whatever in order eventually to locate its object. To the extent that we can, by purely mechanical means, select out only that information that fits the purpose of the search, the intrusion is radically reduced. Indeed, in terms of effects on individual security, there would be no intrusion at all. But other steps may be appropriate. In this respect, I think we should recall the language and the practice for many years under former § 605 of the Communications Act. The Act was violated, not by surveillance alone, but only by surveillance *and* disclosure in court or to the public. It may be that if a critical Governmental purpose justifies a surveillance, but because of technological limitations it is not possible to limit surveillance strictly to those persons as to whom alone surveillance is justified, one way of reducing the intrusion's effects is to limit strictly the revelation or disclosure or the use of its product. Minimization procedures can be very important.

In discussing the standard of reasonableness, I have necessarily described the evolving standards for issuing warrants and the standards governing their scope. But I have not yet discussed the warrant requirement itself—how it relates to the reasonableness standard and what purposes it was intended to serve. The relationship of the warrant requirement to the reasonableness standard was described in *Johnson v. United States* by Justice Robert Jackson: "Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. . . . When the rights of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent. This view has not always been accepted by a majority of the Court; the Court's view of the relationship between the general reasonableness standard and the warrant requirement has shifted often and dramatically. But the view expressed by Justice Jackson is now quite clearly the prevailing position. The Court said in *Katz* that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." Such exceptions include those grounded in necessity—where exigencies of time and circumstance make resort to a magistrate practically impossible. These include, of course, the *Terry* stop and frisk and, to some degree, searches incident to arrest. But there are other exceptions, not always grounded in exigency—for example, some automobile searches—and at least some kinds of searches not conducted for purposes of enforcing criminal laws—such as the welfare visits of *Wyman v. James*. In short, the warrant requirement itself depends on the purpose and degree of intrusion. A footnote to the majority opinion in *Katz*, as well as Justice White's concurring opinion, left open the possibility that warrants may not be required for searches undertaken for national security purposes. And, of course, Justice Powell's opinion in *Keith*, while requiring warrants for domestic security surveillances, suggests that a different balance may be struck when the surveillance is undertaken against foreign powers and their agents to gather intelligence information or to protect against foreign threats.

The purpose of the warrant requirement is to guard against over-zealousness of Government officials, who may tend to overestimate the basis and necessity of intrusion and to underestimate the impact of their efforts on individuals. It was said in *United States v. United States District Court*: "The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech." These purposes of the warrant requirement must be kept firmly in mind in analyzing the appropriateness of applying it to the foreign intelligence and security area.

There is a real possibility that application of the warrant requirement, at least in the form of the normal criminal search warrant, the form adopted in Title III, will endanger legitimate Government interests. As I have indicated, Title III sets up a detailed procedure for interception of wire or oral communications. It requires the procurement of a judicial warrant and prescribes the information to be set forth in the petition to the judge so that, among other things, he may find probable cause that a crime has been or is about to be committed. It re-

quires notification to the parties subject to the surveillance within a period after it has taken place. The statute is clearly unsuited to protection of the vital national interests in continuing detection of the activities of foreign powers and their agents. A notice requirement—aside from other possible repercussions—could destroy the usefulness of intelligence sources and methods. The most critical surveillance in this area may have nothing whatever to do with detection of crime.

Apart from the problems presented by particular provisions of Title III, the argument against application of the warrant requirement, even with an expanded probable cause standard, is that judges and magistrates may underestimate the importance of the Government's need, or that the information necessary to make that determination cannot be disclosed to a judge or magistrate without risk of its accidental revelation—a revelation that could work great harm to the nation's security. What is often less likely to be noted is that a magistrate may be as prone to overestimate as to underestimate the force of the Government's need. Warrants necessarily are issued *ex parte*; often decision must come quickly on the basis of information that must remain confidential. Applications to any one judge or magistrate would be only sporadic; no opinion could be published; this would limit the growth of judicially developed, reasonably uniform standards based, in part, on the quality of the information sought and the knowledge of possible alternatives. Equally important, responsibility for the intrusion would have been diffused. It is possible that the actual number of searches or surveillances would increase if executive officials, rather than bearing responsibility themselves, can find shield behind a magistrate's judgment of reasonableness. On the other hand, whatever the practical effect of a warrant requirement may be, it would still serve the important purpose of assuring the public that searches are not conducted without the approval of a neutral magistrate who could prevent abuses of the technique.

In discussing the advisability of a warrant requirement, it may also be useful to distinguish among possible situations that arise in the national security area. Three situations—greatly simplified—come to mind. They differ from one another in the extent to which they are limited in time or in target. First, the search may be directed at a particular foreign agent to detect a specific anticipated activity—such as the purchase of a secret document. The activity which is to be detected ordinarily would constitute a crime. Second, the search may be more extended in time—even virtually continuous—but still would be directed at an identified foreign agent. The purpose of such a surveillance would be to monitor the agent's activities, determine the identities of persons whose access to classified information he might be exploiting, and determine the identity of other foreign agents with whom he may be in contact. Such a surveillance might also gather foreign intelligence information about the agent's own country, information that would be of positive intelligence value to the United States. Third, there may be virtually continuous surveillance which by its nature does not have specifically predetermined targets. Such a surveillance could be designed to gather foreign intelligence information essential to the security of the nation.

The more limited in time and target a surveillance is, the more nearly analogous it appears to be with a traditional criminal search which involves a particular target location or individual at a specific time. Thus, the first situation I just described would in that respect be most amenable to some sort of warrant requirement, the second less so. The efficiency of a warrant requirement in the third situation would be minimal. If the third type of surveillance I described were submitted to prior judicial approval, that judicial decision would take the form of an *ex parte* declaration that the program of surveillance designed by the Government strikes a reasonable balance between the government's need for the information and the protection of individuals' rights. Nevertheless, it may be that different kinds of warrants could be developed to cover the third situation. In his opinion in *Almeida-Sanchez*, Justice Powell suggested the possibility of area warrants—issued on the basis of the conditions in the area to be surveilled—to allow automobile searches in areas near America's borders. The law has not lost its inventiveness, and it might be possible to fashion new judicial approaches to the novel situations that come up in the area of foreign intelligence. I think it must be pointed out that for the development of such an extended, new kind of warrant, a statutory base might be required or at least appropriate. At the same time, in dealing with this area,

it may be mistaken to focus on the warrant requirement alone to the exclusion of other, possibly more realistic, protections.

What, then, is the shape of the present law? To begin with, several statutes appear to recognize that the Government does intercept certain messages for foreign intelligence purpose and that this activity must be, and can be, carried out. Section 952 of Title 18, which I mentioned earlier is one example; section 798 of the same title is another. In addition, Title III's proviso, which I have quoted earlier, explicitly disclaimed any intent to limit the authority of the Executive to conduct electronic surveillance for national security and foreign intelligence purposes. In an apparent recognition that the power would be exercised, Title III specifies the conditions under which information obtained through Presidentially authorized surveillance may be received into evidence. It seems clear, therefore, that in 1968 Congress was not prepared to come to a judgment that the Executive should discontinue its activities in this area, nor was it prepared to regulate how those activities were to be conducted. Yet it cannot be said that Congress has been entirely silent on this matter. Its express statutory references to the existence of the activity must be taken into account.

The case law, although unsatisfactory in some respects, has supported or left untouched the policy of the Executive in the foreign intelligence area whenever the issue has been squarely confronted. The Supreme Court's decision in the *Keith* case in 1972 concerned the legality of warrantless surveillance directed against a domestic organization with no connection to a foreign power and the Government's attempt to introduce the product of the surveillance as evidence in the criminal trial of a person charged with bombing a C.I.A. office in Ann Arbor, Michigan. In part because of the danger that uncontrolled discretion might result in use of electronic surveillance to deter domestic organizations from exercising First Amendment rights, the Supreme Court held that in cases of internal security, when there is no foreign involvement, a judicial warrant is required. Speaking for the Court, Justice Powell emphasized that "this case involves only the domestic aspects of national security. We have expressed no opinion as to the issues which may be involved with respect to activities of foreign powers or their agents."

As I observed in my remarks at the ABA convention, the Supreme Court surely realized, "in view of the importance the Government has placed on the need for warrantless electronic surveillance that, after the holding in *Keith*, the Government would proceed with the procedures it had developed to conduct those surveillances not prohibited—that is, in the foreign intelligence area or, as Justice Powell said, 'with respect to activities of foreign powers and their agents.'"

The two federal circuit court decisions after *Keith* that have expressly addressed the problem have both held that the Fourth Amendment does not require a warrant for electronic surveillance instituted to obtain foreign intelligence. In the first, *United States v. Brown* the defendant, an American citizen, was incidentally overheard as the result of a warrantless wiretap authorized by the Attorney General for foreign intelligence purposes. In upholding the legality of the surveillance, the Court of Appeals for the Fifth Circuit declared that on the basis of "the President's constitutional duty to act for the United States in the field of foreign affairs, and his inherent power to protect national security in the conduct of foreign affairs . . . the President may constitutionally authorize warrantless wiretaps for the purpose of gathering foreign intelligence." The court added that "(r)estrictions on the President's power which are appropriate in cases of domestic security become inappropriate in the context of the international sphere."

In *United States v. Butenko* the Third Circuit reached the same conclusion—that the warrant requirement of the Fourth Amendment does not apply to electronic surveillance undertaken for foreign intelligence purposes. Although the surveillance in that case was directed at a foreign agent, the court held broadly that the warrantless surveillance would be lawful so long as the primary purpose was to obtain foreign intelligence information. The court stated that such surveillance would be reasonable without a warrant even though it might involve the overhearing of conversations of "alien officials and agents, and perhaps of American citizens." I should note that although the United States prevailed in the *Butenko* case, the Department acquiesced in the petitioner's application for *certiorari* in order to obtain the Supreme Court's ruling on the question. The Supreme Court denied review, however, and thus left the Third Circuit's decision undisturbed as the prevailing law.



Most recently, in *Zweibon v. Mitchell*, decided in June of this year, the District of Columbia Circuit dealt with warrantless electronic surveillance directed against a domestic organization allegedly engaged in activities affecting this country's relations with a foreign power. Judge Skelly Wright's opinion for four of the nine judges makes many statements questioning any national security exception to the warrant requirement. The court's actual holding made clear in Judge Wright's opinion was far narrower and, in fact, is consistent with holdings in *Brown* and *Butenko*. The court held only that "a warrant must be obtained before a wiretap is installed on a domestic organization that is neither the agent of nor acting in collaboration with a foreign power." This holding, I should add, was fully consistent with the Department of Justice's policy prior to the time of the *Zweibon* decision.

With these cases in mind, it is fair to say electronic surveillance conducted for foreign intelligence purposes, essential to the national security, is lawful under the Fourth Amendment, even in the absence of a warrant, at least where the subject of the surveillance is a foreign power or an agent or collaborator of a foreign power. Moreover, the opinions of two circuit courts stress the purpose for which the surveillance is undertaken, rather than the identity of the subject. This suggests that in their view such surveillance without a warrant is lawful so long as its purpose is to obtain foreign intelligence.

But the legality of the activity does not remove from the Executive or from Congress the responsibility to take steps, within their power, to seek an accommodation between the vital public and private interests involved. In our effort to seek such an accommodation, the Department has adopted standards and procedures designed to ensure the reasonableness under the Fourth Amendment of electronic surveillance and to minimize to the extent practical the intrusion on individual interests. As I have stated, it is the Department's policy to authorize electronic surveillance for foreign intelligence purposes only when the subject is a foreign power or an agent of a foreign power. By the term "agent" I mean a conscious agent; the agency must be of a special kind and must relate to activities of great concern to the United States for foreign intelligence or counter-intelligence reasons. In addition, at present, there is no warrantless electronic surveillance directed against any American citizen, and although it is conceivable that circumstances justifying such surveillance may arise in the future, I will not authorize the surveillance unless it is clear that the American citizen is an active, conscious agent or collaborator of a foreign power. In no event, of course, would I authorize any warrantless surveillance against domestic persons or organizations such as those involved in the *Keith* case. Surveillance without a warrant will not be conducted for purposes of security against domestic or internal threats. It is our policy, moreover, to use the Title III procedure whenever it is possible and appropriate to do so, although the statutory provisions regarding probable cause, notification, and prosecutive purpose make it unworkable in all foreign intelligence and many counterintelligence cases.

The standards and procedures that the Department has established within the United States seek to ensure that every request for surveillance receives thorough and impartial consideration before a decision is made whether to institute it. The process is elaborate and time-consuming, but it is necessary if the public interest is to be served and individual rights safeguarded.

I have just been speaking about telephone wiretapping and microphone surveillances which are reviewed by the Attorney General. In the course of its investigation, the committee has become familiar with the more technologically sophisticated and complex electronic surveillance activities of other agencies. These surveillance activities present somewhat different legal questions. The communications conceivably might take place entirely outside the United States. That fact alone, of course, would not automatically remove the agencies' activities from scrutiny under the Fourth Amendment since at times even communications abroad may involve a legitimate privacy interest of American citizens. Other communications conceivably might be exclusively between foreign powers and their agents and involve no American terminal. In such a case, even though American citizens may be discussed, this may raise less significant, or perhaps no significant, questions under the Fourth Amendment. But the primary concern, I suppose, is whether reasonable minimization procedures are employed with respect to use and dissemination.

With respect to all electronic surveillance, whether conducted within the United States or abroad, it is essential that efforts be made to minimize as much as possible the extent of the intrusion. Much in this regard can be done

by modern technology. Standard and procedures can be developed and effectively deployed to limit the scope of the intrusion and the use to which its product is put. Various mechanisms can provide a needed assurance to the American people that the activity is undertaken for legitimate foreign intelligence purposes, and not for political or other improper purposes. The procedures used should not be ones which by indirection in fact target American citizens and resident aliens where these individuals would not themselves be appropriate targets. The proper minimization criteria can limit the activity to its justifiable and necessary scope.

Another factor must be recognized. It is the importance or potential importance of the information to be secured. The activity may be undertaken to obtain information deemed necessary to protect the nation against actual or potential attack or other hostile acts of a foreign power, to obtain intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities.

Need is itself a matter of degree. It may be that the importance of some information is slight, but that may be impossible to gauge in advance; the significance of a single bit of information may become apparent only when joined to intelligence from other sources. In short, it is necessary to deal in probabilities. The importance of information gathered from foreign establishments and agents may be regarded generally as high—although even here there may be wide variations. At the same time, the effect on individual liberty and security—at least of American citizens—caused by methods directed exclusively to foreign agents, particularly with minimization procedures, would be very slight.

There may be regulatory and institutional devices other than the warrant requirement that would better assure that intrusions for national security and foreign intelligence purposes reasonably balance the important needs of Government and of individual interests. In assessing possible approaches to this problem it may be useful to examine the practices of other Western democracies. For example, England, Canada, and West Germany each share our concern about the confidentiality of communications within their borders. Yet each recognizes the right of the Executive to intercept communications without a judicial warrant in cases involving suspected espionage, subversion or other national security intelligence matters.

In Canada and West Germany, which have statutes analogous to Title III, the Executive in national security cases is exempt by statute from the requirement that judicial warrants be obtained to authorize surveillance of communications. In England, where judicial warrants are not required to authorize surveillance of communications in criminal investigations, the relevant statutes recognize an inherent authority in the Executive to authorize such surveillance in national security cases.<sup>3</sup> In each country, this authority is deemed to cover interception of mail and telegrams, as well as telephone conversations.

In all three countries, requests for national security surveillance may be made by the nation's intelligence agencies. In each, a Cabinet member is authorized to grant the request.

In England and West Germany, however, interception of communications is intended to be a last resort, used only when the information being sought is likely to be unobtainable by any other means. It is interesting to note, however, that both Canada and West Germany do require the Executive to report periodically to the Legislature on its national security surveillance activities. In Canada, the Solicitor General files an annual report with the Parliament setting forth the number of national security surveillances initiated, their average length, a general description of the methods of interception or seizure used, and assessment of their utility.

It may be that we can draw on these practices of other Western democracies, with appropriate adjustments to fit our system of separation of powers. The procedures and standards that should govern the use of electronic methods of obtaining foreign intelligence and of guarding against foreign threats are matters of public policy and values. They are of critical concern to the Executive Branch and to Congress, as well as to the courts. The Fourth Amendment itself is a reflection of public policy and values—an evolving accommodation between governmental needs and the necessity of protecting individual security and rights.

<sup>3</sup> Report of the Committee of Privy Counsellors appointed to inquire into the interception of communications (1957), which states, at page 5, that, "The origin of the power to intercept communications can only be surmised, but the power has been exercised from very early times; and has been recognised as a lawful power by a succession of statutes covering the last 200 years or more."

General public understanding of these problems is of paramount importance, to assure that neither the Executive, nor the Congress, nor the courts risk discounting the vital interests on both sides.

The problems are not simple. Evolving solutions probably will and should come—as they have in the past—from a combination of legislation, court decisions, and executive actions. The law in this area, as Lord Devlin once described the law of search in England, “is haphazard and ill defined.” It recognized the existence and the necessity of the Executive’s power. But the Executive and the Legislature are, as Lord Devlin also said, “expected to act reasonably.” The future course of the law will depend on whether we can meet that obligation.

### TESTIMONY OF HON. EDWARD H. LEVI, ATTORNEY GENERAL OF THE UNITED STATES

Attorney General LEVI. I must warn that even the truncated version, unfortunately, is long.

I am here today, Mr. Chairman, in response to a request from the committee to discuss the relationship between electronic surveillance and the fourth amendment of the Constitution. If I remember correctly, the original request was that I place before the committee the philosophical or jurisprudential framework relevant to this relationship which lawyers, viewing this complex field, ought to keep in mind. If this sounds vague and general and perhaps useless, I can only ask for indulgence. My first concern when I received the request was that any remarks I might be able to make would be so general as not to be helpful to the committee. But I want to be as helpful to the committee as I can be.

The area with which the committee is concerned is a most important one. In my view, the development of the law in this area has not been satisfactory, although there are reasons why the law has developed as it has. Improvement of the law, which in part means its clarification, will not be easy. Yet it is a most important venture. In a talk before the American Bar Association last August, I discussed some of the aspects of the legal framework. Speaking for the Department of Justice, I concluded this portion of the talk with the observation and commitment that “we have very much in mind the necessity to determine what procedures through legislation, court action or executive processes will best serve the national interest, including, of course, the protection of constitutional rights.”

I begin then with an apology for the general nature of my remarks. This will be due in part to the nature of the law itself in this area. But I should state at the outset there are other reasons as well. In any area, and possibly in this one more than most, legal principles gain meaning through an interaction with the facts. Thus, the factual situations to be imagined are of enormous significance.

As this committee well knows, some of the factual situations to be imagined in this area are not only of a sensitive nature but also of a changing nature. Therefore, I am limited in what I can say about them, not only because they are sensitive, but also because a lawyer’s imagination about future scientific developments carries its own warnings of ignorance. This is a point worth making when one tries to develop appropriate safeguards for the future.

There is an additional professional restriction upon me which I am sure the committee will appreciate. The Department of Justice has under active criminal investigation various activities which may or

may not have been illegal. In addition, the Department through its own attorneys, or private attorneys specially hired, is representing present or former Government employees in civil suits which have been brought against them for activities in the course of official conduct. These circumstances naturally impose some limitation upon what it is appropriate for me to say in this forum. I ought not give specific conclusory opinions as to matters under criminal investigation or in litigation. I can only hope that what I have to say may nevertheless be of some value to the committee in its search for constructive solutions.

I do realize there has to be some factual base, however unfocused it may at times have to be, to give this discussion meaning. Therefore, as a beginning, I propose to recount something of the history of the Department's position and practice with respect to the use of electronic surveillance, both for telephone wiretapping and for trespassory placement of microphones.

As I read the history, going back to 1931 and undoubtedly prior to that time, except for an interlude between 1928 and 1931 and for 2 months in 1940, the policy of the Department of Justice has been that electronic surveillance could be employed without a warrant in certain circumstances. During the rest of the thirties it appears that the Department's policy concerning telephone wiretapping generally conformed to the guidelines adopted by Attorney General William Mitchell. Telephone wiretapping was limited to cases involving the safety of the victim, as in kidnappings, location and apprehension of "desperate" criminals, and other cases considered to be of major law enforcement importance, such as espionage and sabotage.

In December 1937, however, in the first *Nardone* case, the United States Supreme Court reversed the Court of Appeals for the Second Circuit, and applied section 605 of the Federal Communications Act of 1934 to law enforcement officers; thus rejecting the Department's argument that it did not so apply. Although the Court read the act to cover only wire interceptions where there had also been disclosure in court or to the public, the decision undoubtedly had its impact upon the Department's estimation of the value of telephone wiretapping as an investigative technique. In the second *Nardone* case in December 1939, the act was read to bar the use in court not only of the overhead evidence, but also the fruits of that evidence. Possibly for this reason, and also because of public concern over telephone wiretapping, on March 15, 1940, Attorney General Robert Jackson imposed a total ban on its use for the Department. This ban lasted about 2 months.

On May 21, 1940, President Franklin Roosevelt issued a memorandum to the Attorney General stating his view that electronic surveillance would be proper under the Constitution where "grave matters involving defense of the nation" were involved. The President authorized and directed the Attorney General "to secure information by listening devices [directed at] the conversation or other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies." The Attorney General was requested "to limit these investigations so conducted to a minimum and to limit them insofar as possible to aliens." Although the President's memorandum did not use the term "trespassory microphone surveillance," the language was sufficiently broad

to include that practice, and the Department construed it as an authorization to conduct trespassory microphone surveillances as well as telephone wiretapping in national security cases. The authority for the President's action was later confirmed by an opinion by Assistant Solicitor General Charles Fahy who advised the Attorney General that electronic surveillance could be conducted where matters affected the security of the Nation.

On July 17, 1946, Attorney General Tom C. Clark sent President Truman a letter reminding him that President Roosevelt had authorized and directed Attorney General Jackson to approve "listening devices [directed at] the conversation of other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies."

The CHAIRMAN. Mr. Attorney General, you're referring by that term "trespassory microphone surveillance" to bugs, are you not?

Attorney General LEVI. Well—

The CHAIRMAN. Bugs and wiretaps?

Attorney General LEVI. That is one way they are commonly referred to.

The CHAIRMAN. Yes, thank you.

Attorney General LEVI. And that the directive had been followed by Attorneys General Robert Jackson and Francis Biddle. Attorney General Clark recommended that the directive "be continued in force" in view of the "increase in subversive activities" and "a very substantial increase in crime." He stated that it was imperative to use such techniques "in cases vitally affecting the domestic security, or where human life is in jeopardy" and that Department files indicated that his two most recent predecessors as Attorney General would concur in this view. President Truman signed his concurrence on the Attorney General's letter.

In 1952, there were 285 telephone wiretaps, 300 in 1953, and 322 in 1954. Between February 1952 and May 1954, the Attorney General's position was not to authorize trespassory microphone surveillance. This was the position taken by Attorney General McGrath, who informed the FBI that he would not approve the installation of trespassory microphone surveillance because of his concern over a possible violation of the fourth amendment.

Nevertheless, FBI records indicate there were 63 microphones installed in 1952, there were 52 installed in 1953, and there were 99 installed in 1954.

The CHAIRMAN. Was that during Attorney General McGrath's period in office?

Attorney General LEVI. Yes.

The CHAIRMAN. Are you saying then that his orders were disregarded by the FBI?

Attorney General LEVI. I may not be saying that because, as I think the statement will show, there may well have been a view that the approval of the Attorney General was not required. It may be that Attorney General McGrath was simply saying that he would not give his approval, but he may not have been prohibiting the use.

I cannot answer the question better than that.

Senator MATTHEW. Mr. Chairman, the Attorney General has relied upon the views of his predecessors in stating the position of the De-

partment. Perhaps it is not inappropriate to comment that some of his predecessors, as advocates, did have the view that he is purporting. But later when they went to the Supreme Court, in a more neutral and objective position, they changed their views and Attorney General Jackson and Attorney General Clark had that experience. The elevation of defense seemed to give them a different perspective.

Attorney General LEVI. This committee, of course, has an enormous number of documents from the Department of Justice. You may have seen more than I have seen, although I doubt it on this point.

Senator MATHIAS. I do not dispute your reflection of their views as Attorneys General. I am just saying that not only this committee but the Justice Department has copies of Supreme Court opinions where they registered different views.

Attorney General LEVI. I think that the responsibility often determines action. It is also true that when one speaks of Attorney General Jackson, I think he was unique in that his attitude was that he only became a free man when he went on the Supreme Court. That is not a position which I think other people should take, and I always thought it was rather astonishing that he took it.

To continue, the policy against Attorney General approval, at least in general, of trespassory microphone surveillance was reversed by Attorney General Herbert Brownell on May 20, 1954, in a memorandum to Director Hoover instructing him that the Bureau was authorized to conduct trespassory microphone surveillances. The Attorney General stated that:

Considerations of internal security and the national safety are paramount and, therefore, may compel the unrestricted use of this technique in the national interest.

A memorandum from Director Hoover to the Deputy Attorney General on May 4, 1961, described the Bureau's practice since 1954 as follows:

In the internal security field, we are utilizing microphone surveillances on a restricted basis even though trespass is necessary to assist in uncovering the activities of Soviet intelligence agents and Communist Party leaders. In the interests of national safety, microphone surveillances are also utilized on a restricted basis, even though trespass is necessary, in uncovering major criminal activities. We are using such coverage in connection with our investigations of the clandestine activities of top hoodlums and organized crime. From an intelligence standpoint, this investigative technique has produced results unobtainable through other means. The information so obtained is treated in the same manner as information obtained from wiretaps, that is, not from the standpoint of evidentiary value but for intelligence purposes.

President Johnson announced a policy for Federal agencies in June 1965, which required that the interception of telephone conversations without the consent of one of the parties be limited to investigations relating to national security and that the consent of the Attorney General be obtained in each instance. The memorandum went on to state that use of mechanical or electronic devices to overhear conversations not communicated by wire is an even more difficult problem "which raised substantial and unresolved questions of Constitutional interpretations." The memorandum instructed each agency conducting such an investigation to consult with the Attorney General to ascertain whether the agency's practices were fully in accord with the law. Subsequently, in September 1965, the Director of the FBI wrote the Attorney General and referred to the—

\* \* \* present atmosphere, brought about by the unrestrained and injudicious use of special investigative techniques by other agencies and departments, resulting in Congressional and public alarm and opposition to any activity which could in any way be termed an invasion of privacy. As a consequence, we have discontinued completely the use of microphones.

The Attorney General responded in part as follows:

The use of wiretaps and microphones involving trespass present more difficult problems because of the inadmissibility of any evidence obtained in court cases and because of current judicial and public attitude regarding their use. It is my understanding that such devices will not be used without my authorization, although in emergency circumstances they may be used subject to my later ratification. At this time I believe it desirable that all such techniques be confined to the gathering of intelligence in national security matters, and I will continue to approve all such requests in the future as I have in the past. I see no need to curtail any such activities in the national security field.

That was the Attorney General in 1965.

The CHAIRMAN. Is that still the policy?

Attorney General LEVI. That is not quite the policy which I will try to explain.

The CHAIRMAN. Fine.

Attorney General LEVI. The policy of the Department was stated publicly by the Solicitor General in a supplemental brief in the Supreme Court in *Black v. United States* in 1966. Speaking of the general delegation of authority by Attorneys General to the Director of the Bureau, the Solicitor General stated in his brief:

Present Departmental practice, adopted in July, 1965 in conformity with the policies declared by the President on June 30, 1965, for the entire Federal establishment, prohibits the use of such listening devices, as well as the interception of telephone and other wire communications, in all instances other than those involving the collection of intelligence affecting the national security. The specific authorization of the Attorney General must be obtained in each instance when this exception is invoked.

The Solicitor General made a similar statement in another brief filed that same term again emphasizing that the data would not be made available for prosecutorial purposes, and that the specific authorization of the Attorney General must be obtained in each instance when the national security is sought to be invoked.

In 1968, Congress passed the Omnibus Crime Control and Safe Streets Act. Title III of the act set up a detailed procedure for the interception of wire or oral communications. The procedure requires the issuance of a judicial warrant, prescribes the information to be set forth in the petition to the judge so that, among other things, he may find probable cause that a crime has been or is about to be committed. It requires notification to the parties subject to the intended surveillance within a period not more than 90 days after the application for an order of approval has been denied or after the termination of the period of the order or the period of the extension of the order. Upon a showing of good cause the judge may postpone the notification.

The act contains a saving clause to the effect that it does not 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. Then in a separate sentence the proviso goes on to say:

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.

Congress simply left presidential powers where it found them. Now I think a very responsible thing for a Congress to have done, I may say——

The CHAIRMAN. May I ask you what you meant by that?

Attorney General LEVI. I meant, in a matter of this importance, Congress should speak so that its intention is clear and if it meant to affirm this power, as I rather suspect that it did, there should be no ambiguity. But if it meant to pass an act that left a matter of this kind dangling in the air, I do not regard that as responsible.

Senator MATHIAS. Mr. Chairman, let me just say I support the Attorney General absolutely. When we asked about the overload in the courts, it would be much more effective if the Congress, instead of creating new judgeships, would simply write the laws more accurately and more precisely so that there would not have to be as many lawsuits or those we have to be so protracted. And I think the Attorney General has chided us in a way that is entirely justified. To this indictment I think the Congress has to plead guilty.

The CHAIRMAN. In principle I agree, although I think the effect of your proposal may greatly augment the rolls of the unemployed in this country.

Senator MATHIAS. Unemployed lawyers. We have acted as a legal employment bureau long enough, I think.

The CHAIRMAN. All right, Mr. Attorney General.

Attorney General LEVI. In the *Keith* case the Supreme Court held that in the field of internal security, if there was no foreign involvement, a judicial warrant was required by the fourth amendment. Fifteen months after the *Keith* case Attorney General Richardson, in a letter to Senator Fulbright, which was publicly released by the Department, stated:

In general, before I approve any new application for surveillance without a warrant, I must be convinced that it is necessary (1) to protect the nation against actual or potential attack or other hostile acts of a foreign power; (2) to obtain foreign intelligence information deemed essential to the security of the United States; or (3) to protect national security information against foreign intelligence activities.

I have read the debates and the reports of the Senate Judiciary Committee with respect to title III and, particularly, the proviso. It may be relevant to point out that Senator Philip Hart questioned and opposed the form of the proviso reserving presidential power. But I believe it is fair to say that his concern was primarily, perhaps exclusively, with the language which dealt with presidential power to take such measures as the President deemed necessary to protect the United States "against any other clear and present danger to the structure or existence of the Government."

I now come to the Department of Justice's present position on electronic surveillance conducted without a warrant. Under the standards and procedures established by the President, the personal approval of the Attorney General is required before any nonconsensual electronic surveillance may be instituted within the United States without a ju-



dicial warrant. All requests for surveillance must be made in writing by the Director of the Federal Bureau of Investigation and must set forth the relevant circumstances that justify the proposed surveillance. Both the agency and the Presidential appointee initiating the request must be identified. These requests come to the Attorney General after they have gone through review procedures within the Federal Bureau of Investigation. At my request, they are then reviewed in the Criminal Division of the Department. Before they come to the Attorney General, they are then examined by a special review group which I have established within the Office of the Attorney General. Each request, before authorization or denial, receives my personal attention. Requests are only authorized when the requested electronic surveillance is necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power; to obtain foreign intelligence deemed essential to the security of the Nation; to protect national security information against foreign intelligence activities; or to obtain information certified as necessary for the conduct of foreign affairs matters important to the national security of the United States.

In addition the subject of the electronic surveillance must be consciously assisting a foreign power or foreign-based political group, and there must be assurance that the minimum physical intrusion necessary to obtain the information sought will be used. As these criteria will show and as I will indicate at greater length later in discussing current guidelines the Department of Justice follows, our concern is with respect to foreign powers or their agents. In a public statement made last July 9, speaking of the warrantless surveillances then authorized by the Department, I said:

It can be said that there are no outstanding instances of warrantless wiretaps or electronic surveillance directed against American citizens and none will be authorized by me except in cases where the target of surveillance is an agent or collaborator of a foreign power.

This statement accurately reflects the situation today as well.

Having described in this fashion something of the history and conduct of the Department of Justice with respect to telephone wiretaps and microphone installations. I should like to remind the committee of a point with which I began, namely, that the factual situations to be imagined for a discussion such as this are not only of a sensitive but a changing nature. I do not have much to say about this except to recall some of the language used by General Allen in his testimony before this committee. The techniques of the NSA, he said, are of the most sensitive and fragile character. He described as the responsibility of the NSA the interception of international communication signals sent through the air. He said there had been a watch list, which among many other names, contained the names of U.S. citizens.

Senator Tower spoke of an awesome technology—a huge vacuum cleaner of communications—which had the potential for abuses. General Allen pointed out that “The United States, as part of its effort to produce foreign intelligence, has intercepted foreign communications to produce such foreign intelligence since the Revolutionary War.” He said the mission of NSA is directed to foreign intelligence obtained from foreign electrical communications and also from other foreign signals, such as radar. Signals are intercepted by many techniques and processed, sorted, and analyzed by procedures which re-

ject inappropriate or unnecessary signals. He mentioned that the interception of communications, however it may occur, is conducted in such a manner as to minimize the unwanted messages. Nevertheless, according to his statement, many unwanted communications are potentially selected for further processing. He testified that subsequent processing, sorting, and selection for analysis are conducted in accordance with strict procedures to insure immediate and, wherever possible, automatic rejection of inappropriate messages. The analysis and reporting is accomplished only for those messages which meet specific conditions and requirements for foreign intelligence. The use of lists of words, including individual names, subjects, locations, et cetera, has long been one of the methods used to sort out information of foreign intelligence value from that which is not of interest.

General Allen mentioned a very interesting statute, 18 U.S.C. 952, to which I should like to call your particular attention. The statute makes it a crime for any one who by virtue of his employment by the United States obtains any official diplomatic code and willfully publishes or furnishes to another without authorization any such code or any other matter which was obtained while in the process of transmission between any foreign government and its diplomatic mission in the United States. I call this to your attention, because a certain indirection is characteristic of the development of law, whether by statute or not, in this area.

The CHAIRMAN. Can you explain what you mean by that last sentence? Are you suggesting that the law you have cited upon its face makes the activities of the NSA illegal?

Attorney General LEVI. I think that the law on its face seems to be a law to protect the actions of the NSA from having any transmission of messages intercepted go to unauthorized persons. The statute avoids by indirection saying that this is what the U.S. Government should do. It is assumed that it does it, and proceeds to find some way to give added potential.

The CHAIRMAN. That particular statute is specifically limited to codes between foreign governments and its diplomatic mission in the United States, is it not?

Attorney General LEVI. That is right.

As I say, it has a certain indirection.

The CHAIRMAN. Yes.

Attorney General LEVI. The committee will at once recognize that I have not attempted to summarize General Allen's testimony, but rather to recall it so that the extended dimensions of the variety of fact situations which we have to think about as we explore the coverage and direction of the fourth amendment is at least suggested.

Having attempted to provide something of a factual base for our discussion, I turn now to the fourth amendment. Let me say at once, however, that while the fourth amendment can be a most important guide to values and procedures, it does not mandate automatic solutions.

The history of the fourth amendment is very much the history of the American Revolution and this Nation's quest for independence. The amendment is the legacy of our early years and reflects values most cherished by the Founders. In a direct sense, it was a reaction to the general warrants and writs of assistance employed by the officers of

the British Crown to rummage and ransack colonists' homes as a means to enforce antismuggling and customs laws. General search warrants had been used for centuries in England against those accused of seditious libel and other offenses. These warrants, sometimes judicial, sometimes not, often general as to persons to be arrested, places to be searched, and things to be seized, were finally condemned by Lord Camden in 1765 in *Entick v. Carrington*, a decision later celebrated by the Supreme Court as a landmark of English liberty one of the permanent monuments of the British Constitution."

The case involved a general warrant, issued by Lord Halifax as Secretary of State, authorizing messengers to search for John Entick and to seize his private papers and books. Entick had written publications criticizing the Crown and was a supporter of John Wilkes, the famous author and editor of the "North Briton" whose own publications had prompted wholesale arrests, searches, and seizures. Entick sued for trespass and obtained a jury verdict in his favor. In upholding the verdict, Lord Camden observed that if the Government's power to break into and search homes were accepted, "the secret cabinets and bureaus of every subject in this kingdom would be thrown open to the search and inspection of a messenger, whenever the secretary of state shall see fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel."

The practice of the general warrants, however, continued to be known in the colonies. The writ of assistance, an even more arbitrary and oppressive instrument than the general warrant, was also widely used by revenue officers to detect smuggled goods. Unlike a general warrant, the writ of assistance was virtually unlimited in duration and did not have to be returned to the court upon its execution. It broadly authorized indiscriminate searches and seizures against any person suspected by a customs officer of possessing prohibited or uncustomed goods.

The writs, sometimes judicial, sometimes not, were usually issued by colonial judges and vested Crown officers with unreviewed and unbounded discretion to break into homes, rifle drawers, and seize private papers. All officers and subjects of the Crown were further commanded to assist in the writ's execution. In 1761, James Otis eloquently denounced the writs as "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book," since they put "the liberty of every man in the hands of every petty officer." Otis' fiery oration later prompted John Adams to reflect that "then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born."

The words of the fourth amendment are mostly the product of James Madison. His original version appeared to be directed solely at the issuance of improper warrants. Revisions accomplished under circumstances that are still unclear transformed the amendment into two separate clauses. The change has influenced our understanding of the nature of the rights it protects. As embodied in our Constitution, the amendment reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Our understanding of the purposes underlying the fourth amendment has been an evolving one. It has been shaped by subsequent historical events, by the changing conditions of our modern technological society, and by the development of our own traditions, customs, and values. From the beginning, of course, there has been agreement that the amendment protects against practices such as those of the Crown officers under the notorious general warrants and writs of assistance. Above all, the amendment safeguards the people from unlimited, undue infringement by the Government on the security of persons and their property.

But our perceptions of the language and spirit of the amendment have gone beyond the historical wrongs the amendment was intended to prevent. The Supreme Court has served as the primary explicator of these evolving perceptions and has sought to articulate the values the amendment incorporates. I believe it is useful in our present endeavor to identify some of these perceived values.

First, broadly considered, the amendment speaks to the autonomy of the individual against society. It seeks to accord to each individual, albeit imperfectly, a measure of the confidentiality essential to the attainment of human dignity. It is a shield against indiscriminate exposure of an individual's private affairs to the world—an exposure which can destroy, since it places in jeopardy the spontaneity of thought and action on which so much depends. As Justice Brandeis observed in his dissent in the *Olmstead* case, in the fourth amendment the Founders “conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.” The amendment does not protect absolutely the privacy of an individual. The need for privacy, and the law's response to that need, go beyond the amendment. But the recognition of the value of individual autonomy remains close to the amendment's core.

A parallel value has been the amendment's special concern with intrusions when the purpose is to obtain evidence to incriminate the victim of the search. As the Supreme Court observed in *Boyd*, which involved an attempt to compel the production of an individual's private papers, at some point the fourth amendment's prohibition against unreasonable searches and seizures and the fifth amendment's prohibition against compulsory self-incrimination “run almost into each other.” The intrusion on an individual's privacy has long been thought to be especially grave when the search is based on a desire to discover incriminating evidence. The desire to incriminate may be seen as only an aggravating circumstance of the search, but it has at times proven to be a decisive factor in determining its legality. Indeed, in *Boyd* the court declared broadly that “compelling the production of (a person's) private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government.” The incriminating evidence point goes to the integrity of the criminal justice system. It does not necessarily settle the issue whether the overhearing can properly take place. It goes to the use and purpose of the information overheard.

An additional concern of the amendment has been the protection of freedom of thought, speech, and religion. The general warrants were used in England as a powerful instrument to suppress what was

regarded as seditious libel or nonconformity. So Justice Powell stated in *Keith* that "fourth amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs."

Another concern embodied in the amendment may be found in its second clause dealing with the warrant requirement, even though the fourth amendment does not always require a warrant. The fear is that the law enforcement officer, if unchecked, may misuse his powers to harass those who hold unpopular or simply different views and to intrude capriciously upon the privacy of individuals. It is the recognition of the possibility for abuse, inherent whenever executive discretion is uncontrolled, that gives rise to the requirement of a warrant. That requirement constitutes an assurance that the judgment of a neutral and detached magistrate will come to bear before the intrusion is made and that the decision whether the privacy of the individual must yield to a greater need of society will not be left to the executive alone.

A final value reflected in the fourth amendment is revealed in its opening words: "The right of the people." Who are "the people" to whom the amendment refers? The Constitution begins with the phrase, "We the People of the United States." That phrase has the character of words of art, denoting the power from which the Constitution comes. It does suggest a special concern for the American citizen and for those who share the responsibilities of citizens. The fourth amendment guards the right of "the people" and it can be urged that it was not meant to apply to foreign nations, their agents and collaborators. Its application may at least take account of that difference.

The values outlined above have been embodied in the amendment from the beginning. But the importance accorded a particular value has varied during the course of our history. Some have been thought more important or more threatened than others at time. When several of the values coalesce, the need for protection has been regarded as greatest. When only one is involved, that need has been regarded as lessened. Moreover, the scope of the amendment itself has been altered over time. Words have been read by different justices and different courts to mean different things. The words of the amendment have not changed; we, as a people, and the world which envelops us, have changed.

An important example is what the amendment seeks to guard as "secure." The wording of the fourth amendment suggests a concern with tangible property. By its terms, the amendment protects the right of the people to be secure in their "persons, houses, papers and effects." The emphasis appears to be on the material possessions of a person, rather than on his privacy generally.

The CHAIRMAN. Why do you say that when the word "persons" comes first; "houses, papers and effects" comes after "persons?" It seems to me that the emphasis was on persons in the first instance, and material holdings afterward.

Attorney General LEVI. I suspect one reason you think so, Mr. Chairman, is the fact that you are living today, but the emphasis on property and property rights, I think, was the way the amendment was previously looked at. There is an interesting exchange between Sir

Frederick Pollack and Justice Holmes on that very subject at the time of the *Olmstead* case.

In any event, this emphasis on property was the conclusion the court came to on the *Olmstead* case in 1928, holding that the intercept of telephone messages, if accomplished without a physical trespass, was outside the scope of the fourth amendment. Chief Justice Taft, writing for the court, reasoned that wiretapping did not involve a search or seizure; the amendment protected only tangible material "effects" and not intangibles such as oral conversations.

But, while the removal and carrying off of papers was a trespass of the most aggravated sort, inspection alone was not: "The eye," Lord Camden said, "cannot by the law of England be guilty of a trespass."

The CHAIRMAN. Did he really say that?

Attorney General LEVI. Yes; he did.

The movement of the law since *Olmstead* has been steadily from protection of property to the protection of privacy. In the *Goldman* case in 1942 the Court held that the use of a detectaphone placed against the wall of a room to overhear oral conversations in an adjoining office was not unlawful because no physical trespass was involved. The opinion's unstated assumption, however, appeared to be that a private oral conversation could be among the protected "effects" within the meaning of the fourth amendment. The *Silverman* case later eroded *Olmstead* substantially by holding that the amendment was violated by the interception of an oral conversation through the use of a spike mike driven into a party wall, penetrating the heating duct of the adjacent home. The Court stated that the question whether a trespass had occurred as a technical matter of property law was not controlling; the existence of an actual intrusion was sufficient.

The Court finally reached the opposite emphasis from its previous stress on property in 1967 in *Katz v. United States*. The Court declared that the fourth amendment "protects people, not places," against unreasonable searches and seizures; that oral conversations, although intangible, were entitled to be secure against the uninvited ear of a government officer, and that the interception of a telephone conversation, even if accomplished without a trespass, violated the privacy on which petitioner justifiably relied while using a telephone booth. Justice Harlan, in a concurring opinion, explained that to have a constitutionally protected right of privacy under *Katz* it was necessary that a person, first, "have exhibited an actual—subjective—expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"

At first glance, *Katz* might be taken as a statement that the fourth amendment now protects all reasonable expectations of privacy—that the boundaries of the right of privacy are coterminous with those of the fourth amendment. But that assumption would be misleading. To begin with, the amendment still protects some interests that have very little, if anything, to do with privacy. Thus, the police may not, without warrant, seize an automobile parked on the owner's driveway even though they have reason to believe that the automobile was used in committing a crime. The interest protected by the fourth amendment in such a case is probably better defined in terms of property than privacy. Moreover, the *Katz* opinion itself cautioned that "the fourth amendment cannot be translated into a general constitutional 'right

to privacy." Some privacy interests are protected by remaining Constitutional guarantees. Others are protected by Federal statute, by the States, or not at all.

The CHAIRMAN. May I interrupt at this point to suggest that there is a vote in the Senate, a roll-call, which accounts for the fact that the Senators have had to leave. It looks as though the balance of your statement will require the remainder of the session this morning, so that I would suggest, if it is possible for you to do so, that we return upon the completion of your testimony, that we return this afternoon in order that Members then may have an opportunity, having heard parts of your statement and read the rest, to ask questions.

At 2 o'clock this afternoon, we will continue the questioning. I am not going to go to the vote. I am very much interested in the paper. I would like you to continue, please.

Attorney General LEVI. The point that I was making about *Katz* is twofold. First, under the Court's decisions, the fourth amendment does not protect every expectation of privacy, no matter how reasonable or actual that expectation may be. It does not protect, for example, against false friends' betrayals to the police of even the most private confidences. Second, the "reasonable expectation of privacy" standard, often said to be the test of *Katz*, is itself a conclusion. It represents a judgment that certain behavior should as a matter of law be protected against unrestrained governmental intrusion. That judgment, to be sure, rests in part on an assessment of the reasonableness of the expectation, that is, on an objective, factual estimation of a risk of intrusion under given circumstances, joined with an actual expectation of privacy by the person involved in a particular case. But it is plainly more than that, since it is also intermingled with a judgment as to how important it is to society that an expectation should be confirmed—a judgment based on a perception of our customs, traditions, and values as a free people.

The *Katz* decision itself illustrates the point. Was it really a "reasonable expectation" at the time of *Katz* for a person to believe that his telephone conversation in a public phone booth was private and not susceptible to interception by a microphone on the booth's outer wall? Almost 40 years earlier in *Olmstead*, the Court held such nontrespassory interceptions were permissible. *Goldman* reaffirmed that holding. So how could *Katz* reasonably expect the contrary? The answer, I think, is that the Court's decision in *Katz* turned ultimately on an assessment of the effect of permitting such unrestrained intrusions on the individual in his private and social life. The judgment was that a license for unlimited governmental intrusions upon every telephone would pose too great a danger to the spontaneity of human thought and behavior. Justice Harlan put the point this way: "The analysis must, in my view, transcend the search for subjective expectations or legal attribution of assumptions of risk. Our expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present." A weighing of values is an inescapable part in the interpretation and growth of the fourth amendment. Expectations, and their reasonableness, vary according to circumstances. So will the need for an intrusion and its likely effect. These elements will define the boundaries of the interests which the amendment holds as "secure."

To identify the interests which are to be "secure," of course, only begins the inquiry. It is equally essential to identify the dangers from which those interests are to be secure. What constitutes an intrusion will depend on the scope of the protected interest. The early view that the fourth amendment protected only tangible property resulted in the rule that a physical trespass or taking was the measure of an intrusion. *Olmstead* rested on the fact that there had been no physical trespass into the defendant's home or office. It also held that the use of the sense of hearing to intercept a conversing did not constitute a search or seizure. *Katz*, by expanding the scope of the protected interests, necessarily altered our understanding of what constitutes an intrusion. Since intangibles such as oral conversations are now regarded as protected "effects," the overhearing of a conversation may constitute an intrusion apart from whether a physical trespass is involved. The nature of the search and seizure can be very important. An entry into a house to search its interior may be viewed as more serious than the overhearing of a certain type of conversation. The risk of abuse may loom larger in one case than the other. The factors that have come to be viewed as most important, however, are the purpose and effect of the intrusion. The Supreme Court has tended to focus not so much on what was physically done, but on why it was done and what the consequence is likely to be. What is seized, why it was seized, and what is done with what is seized are critical questions.

I stated earlier that a central concern of the fourth amendment was with intrusions to obtain evidence to incriminate the victim of the search. This concern has been reflected in Supreme Court decisions which have traditionally treated intrusions to gather incriminatory evidence differently from intrusions for neutral or benign purposes. In *Frank v. Maryland*, 359 U.S. 360 (1959), the appellant was fined for refusing to allow a housing inspector to enter his residence to determine whether it was maintained in compliance with the municipal housing code. Violation of the code would have led only to a direction to remove the violation. Only failure to comply with the direction would lead to a criminal sanction. The Court, held that such administrative searches could be conducted without warrant. Justice Frankfurter, writing for the Court, noted that the fourth amendment was a reaction to "ransacking by Crown officers of the homes of citizens in search of evidence of crime or of illegally imported goods." He observed that both *Entick* and *Boyd* were concerned with attempts to compel individuals to incriminate themselves in criminal cases and that "it was on the issue of the right to be secure from searches for evidence to be used in criminal prosecutions or for forfeitures that the great battle for fundamental liberty was fought." There was thus a great difference, the Justice said, between searches to seize evidence for criminal prosecutions and searches to detect the existence of municipal health code violations. Searches in this latter category, conducted "as an adjunct to a regulatory scheme for the general welfare of the community and not as a means of enforcing the criminal law, have antecedents deep in our history," and should not be subjected to the warrant requirement.

*Frank* was later overruled in 1967 in *Camara v. Municipal Court*, and a companion case, *See v. City of Seattle*. In *Camara*, appellant was, like *Frank*, charged with a criminal violation as a result of his



refusal to permit a municipal inspector to enter his apartment to investigate possible violations of the city's housing code. The Supreme Court rejected the *Frank* rationale that municipal fire, health, and housing inspections could be conducted without a warrant because the object of the intrusion was not to search for the fruits or instrumentalities of crime. Moreover, the Court noted that most regulatory laws such as fire, health, and housing codes were enforced by criminal processes, that refusal to permit entry to an inspector was often a criminal offense, and that the "self-protection" or "noncrimination" objective of the fourth amendment was therefore indeed involved.

But the doctrine of *Camara* proved to be limited. In 1971 in *Wyman v. James* the Court held that a "home visit" by a welfare caseworker, which entailed termination of benefits if the welfare recipient refused entry, was lawful despite the absence of a warrant. The Court relied on the importance of the public's interest in obtaining information about the recipient, the reasonableness of the measures taken to insure that the intrusion was limited to the extent practicable, and most importantly, the fact that the primary objective of the search was not to obtain evidence for a criminal investigation or prosecution. *Camara* and *Frank* were distinguished as involving criminal proceedings.

Perhaps what these cases mainly say is that the purpose of the intrusion, and the use to which what is seized is put, are more important from a constitutional standpoint than the physical act of intrusion itself. Where the purpose or effect is noncriminal, the search and seizure is perceived as less troublesome and there is a readiness to find reasonableness even in the absence of a judicial warrant. By contrast, where the purpose of the intrusion is to gather incriminatory evidence, and hence hostile, or when the consequence of the intrusion is the sanction of the criminal law, greater protections may be given.

The fourth amendment then, as it has always been interpreted, does not give absolute protection against Government intrusion. In the words of the amendment, the right guaranteed is security against unreasonable searches and seizures. As Justice White said in the *Camara* case, "there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." Whether there has been a constitutionally prohibited invasion at all has come to depend less on an absolute dividing line between protected and unprotected areas, and more on an estimation of the individual security interests affected by the Government's actions. Those effects, in turn, may depend on the purpose for which the search is made, whether it is hostile, neutral, or benign in relation to the person whose interests are invaded, and also on the manner of the search.

By the same token, the Government's need to search, to invade individual privacy interests, is no longer measured exclusively, if indeed it ever was, by the traditional probable cause standard. The second clause of the amendment states, in part, that "no warrants shall issue but upon probable cause." The concept of probable cause has often been read to bear upon and in many cases to control the question of the reasonableness of searches, whether with or without warrant. The traditional formulation of the standard, as "reasonable grounds for believing that the law was being violated on the premises

to be searched" relates to the governmental interest in the prevention of criminal offenses, and to seizure of their instruments and fruits. This formulation once took content from the long-standing "mere evidence rule" that searches could not be undertaken "solely for the purpose of securing evidence to be used in a criminal or penal proceeding, but that they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public may have in the property to be seized." The Government's interest in the intrusion, like the individual's interest in privacy, thus was defined in terms of property, and the right to search as well as to seize was limited to items, contraband and the fruits and instrumentalities of crime, in which the Government's interest was thought superior to the individual's. This notion, long eroded in practice, was expressly abandoned by the Court in 1967 in *Warden v. Hayden*. Thus, the detection of crime, the need to discover and use "mere evidence" may presently justify intrusion.

Moreover, as I have indicated, the Court has held that, in certain situations, something less than probable cause, in the traditional sense, may be sufficient ground for intrusion, if the degree of intrusion is limited strictly to the purposes for which it is made. In *Terry v. Ohio* the Court held that a policeman, in order to protect himself and others nearby, may conduct a limited "pat down" search for weapons when he has reasonable grounds for believing that criminal conduct is taking place and that the person searched is armed and dangerous. Last term, in *United States v. Brignoni-Ponce*, the Court held that, if an officer has a "founded suspicion" that a car in a border areas contains illegal aliens, the officer may stop the car and ask the occupants to explain suspicious circumstances. The Court concluded that the important governmental interest involved, and the absence of practical alternatives, justified the minimal intrusion of a brief stop. In both *Terry* and *Brignoni*, the Court emphasized that a more drastic intrusion, a thorough search of the suspect or automobile, would require the justification of traditional probable cause. This point is reflected in the Court's decisions in *Almeida-Sanchez* and *Ortiz*, in which the Court held that, despite the interest in stemming illegal immigration, searches of automobiles either at fixed checkpoints or by roving patrols in places that are not the "functional equivalent" of borders could not be undertaken without probable cause.

Nonetheless, it is clear that the traditional probable cause standard is not the exclusive measure of the Government's interest. The kind and degree of interest required depend on the severity of the intrusion the Government seeks to make. The requirement of the probable cause standard itself may vary, as the Court made clear in *Camara*. That case, as you recall, concerned the nature of the probable cause requirement in the context of searches to identify housing code violations. The Court was persuaded that the only workable method of enforcement was periodic inspection of all structures, and concluded that because the search was not "personal in nature," and the invasion of privacy involved was limited, probable cause could be based on "appraisal of conditions in the area as a whole," rather than knowledge of the condition of particular buildings. "If a valid public interest justifies the intrusion contemplated," the Court stated, "then there is probable cause to issue a suitable restricted search warrant." In the *Keith*

case, while holding that domestic national security surveillance, not involving the activities of foreign powers and their agents, was subject to the warrant requirement, the Court noted that the reasons for such domestic surveillance may differ from those justifying surveillances for ordinary crimes, and that domestic security surveillances often have to be long-range projects. For these reasons, a standard of probable cause to obtain a warrant different from the traditional standard would be justified: "Different standards may be compatible with the fourth amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens."

In brief, although at one time the "reasonableness" of a search may have been defined according to the traditional probable cause standard, the situation has now been reversed. Probable cause has come to depend on reasonableness, on the legitimate need of the Government and whether there is reason to believe that the precise intrusion sought, measured in terms of its effect on individual security, is necessary to satisfy it.

This point is critical in evaluating the reasonableness of searches or surveillances undertaken to protect national security. In some instances, the Government's interest may be, in part, to protect the Nation against specific actions of foreign powers or their agents, actions that are criminal offenses. In other instances, the interest may be to protect against the possibility of actions by foreign powers and their agents dangerous to national security, actions that may or may not be criminal. Or the interest may be solely to gather intelligence, in a variety of forms, in the hands of foreign agents and foreign powers, intelligence that may be essential to informed conduct of our Nation's foreign affairs. This last interest indeed may often be far more critical for the protection of the Nation than the detection of a particular criminal offense. The fourth amendment's standard of reasonableness as it has developed in the Court's decisions is sufficiently flexible to recognize this.

Just as the reasonableness standard of the amendment's first clause has taken content from the probable cause standard, so it has also come to incorporate the particularity requirement of the warrant clause, that warrants particularly describe "the place to be searched, and the persons or things to be seized." As one circuit court has written, although pointing out the remedy might not be very extensive "limitations on the fruit to be gathered tend to limit the quest itself." The Government's interest and purpose in undertaking the search defines its scope, and the societal importance of that purpose can be weighted against the effects of the intrusion on the individual. By precise definition of the objects of the search, the degree of intrusion can be minimized to that reasonably necessary to achieve the legitimate purpose. In this sense, the particularity requirement of the warrant clause is analogous to the minimization requirement of title III, that interceptions "be executed in such a way as to minimize the interception of communications not otherwise subject to interception" under the title.

But there is a distinct aspect to the particularity requirement, one that is often overlooked. An officer who has obtained a warrant based upon probable cause to search for particular items may in conducting

the search necessarily have to examine other items, some of which may constitute evidence of an entirely distinct crime. The normal rule under the plain view doctrine is that the officer may seize the latter incriminating items as well as those specifically identified in the warrant so long as the scope of the authorized search is not exceeded. The minimization rule responds to the concern about overly broad searches, and it requires an effort to limit what can be seized. It also may be an attempt to limit how it can be used. Indeed, this minimization concern may have been the original purpose of the "mere evidence" rule.

The concern about the use of what is seized may be most important for future actions. Until very recently, in fact, until the Court's 1971 decision in *Bivens*, the only sanction against an illegal search was that its fruits were inadmissible at any criminal trial of the person whose interest was invaded. So long as this was the only sanction, the courts, in judging reasonableness, did not really have to weigh any governmental interest other than that of detecting crimes. In practical effect, a search could only be "unreasonable" as a matter of law if an attempt was made to use its fruits for prosecution of a criminal offense. So long as the Government did not attempt such use the search could continue and the Government's interests, other than enforcing criminal laws, could be satisfied.

It may be said that this confuses rights and remedies; searches could be unreasonable even though no sanction followed. But I am not clear that this is theoretically so, and realistically it was not so. As I have noted earlier, the reasonableness of a search has depended, in major part, on the purpose for which it is undertaken and on whether that purpose, in relation to the person whom it affects, is hostile or benign. The search most hostile to an individual is one in preparation for his criminal prosecution. Exclusion of evidence from criminal trials may help assure that searches undertaken for ostensibly benign motives are not used as blinds for attempts to find criminal evidence, while permitting searches that are genuinely benign to continue. But there is a more general point. The effect of a government intrusion on individual security is a function, not only of the intrusion's nature and circumstances, but also of disclosure and of the use to which its product is put. Its effects are, perhaps greatest when it is employed or can be employed to impose criminal sanctions or to deter, by disclosure, the exercise of individual freedoms. In short, the use of the product seized bears upon the reasonableness of the search.

These observations have particular bearing on electronic surveillance. By the nature of the technology the "search" may necessarily be far broader than its legitimate objects. For example, a surveillance justified as the only means of obtaining valuable foreign intelligence may require the temporary overhearing of conversations containing no foreign intelligence whatever in order eventually to locate its object. To the extent that we can, by purely mechanical means, select out only that information that fits the purpose of the search, the intrusion is radically reduced. Indeed, in terms of effects on individual security, there would be no intrusion at all. But other steps may be appropriate. In this respect, I think we should recall the language and the practice for many years under former section 605 of the Communications Act. The act was violated, not by surveillance alone, but only by surveillance and disclosure in court or to the public. It may be

that if a critical government purpose justifies a surveillance, but because of technological limitations it is not possible to limit surveillance strictly to those persons as to whom alone surveillance is justified, one way of reducing the intrusion's effects is to limit strictly the revelation or disclosure or the use of its product. Minimization procedures can be very important.

In discussing the standard of reasonableness, I have necessarily described the evolving standards for issuing warrants and the standards governing their scope. But I have not yet discussed the warrant requirement itself, how it relates to the reasonableness standard and what purposes it was intended to serve. The relationship of the warrant requirement to the reasonableness standard was described by Justice Robert Jackson:

Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the amendment to a nullity and leave the people's homes secure only in the discretion of police officers.

The CHAIRMAN. That is Senator Mathias' previous point, that once Attorney General Jackson became Mr. Justice Jackson, he took a different view.

Attorney General LEVI. That may be, although I had not realized he had been a police officer. That is Justice Jackson.

The CHAIRMAN. He had been Attorney General.

Attorney General LEVI. I make a substantial distinction.

The CHAIRMAN. I recognize the distinction.

Attorney General LEVI. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent. That makes his point better.

The CHAIRMAN. Yes.

Attorney General LEVI. This view has not always been accepted by a majority of the Court; the Court's view of the relationship between the general reasonableness standard and the warrant requirement has shifted often and dramatically. But the view expressed by Justice Jackson is now quite clearly the prevailing position. The Court said in *Katz* that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the fourth amendment, subject only to a few specifically established and well-delineated exceptions." Such exceptions include those grounded in necessity, where exigencies of time and circumstances make resort to a magistrate practically impossible. These include, of course, the *Terry* stop and frisk and, to some degree, searches incident to arrest. But there are other exceptions, not always grounded in exigency, for example, some automobile searches, and at least some kinds of searches not conducted for purposes of enforcing criminal laws, such as the welfare visits of *Wyman v. James*. In short, the warrant requirement itself depends on the purpose and degree of intrusion. A footnote to the majority opinion in *Katz*, as well as Justice White's concurring opinion, left open the possibility that warrants may not be required for searches undertaken for national security purposes. And, of course, Justice Powell's opinion in *Keith*, while requiring warrants for domestic security surveillances, suggests that a different balance may be struck when the surveillance is undertaken against foreign powers and

their agents to gather intelligence information or to protect against foreign threats.

The purpose of the warrant requirement is to guard against overzealousness of government officials, who may tend to overestimate the basis and necessity of intrusion and to underestimate the impact of their efforts on individuals.

The historical judgment, which the fourth amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech.

These purposes of the warrant requirement must be kept firmly in mind in analyzing the appropriateness of applying it to the foreign intelligence and security area.

The CHAIRMAN. Mr. Attorney General, we are now on final passage of a bill. Since you have been testifying for some time, I think you could probably take a break, take a 5-minute recess, take a drink of water, and I think it would be inappropriate as we examine the vagaries of the fourth amendment for me to miss final vote on the Sunshine bill permitting congressional committees to hold open hearings.

Attorney General LEVI. Without a warrant.

The CHAIRMAN. Without a warrant, right.

[A brief recess was taken.]

The CHAIRMAN. The hearing will please come back to order.

Mr. Attorney General, would you take up where you left off, please?

Attorney General LEVI. There is a real possibility that application of the warrant requirement, at least in the form of the normal criminal search warrant, the form adopted in title III, will endanger legitimate government interests. As I have indicated, title III sets up a detailed procedure for interception of wire or oral communications. It requires the procurement of a judicial warrant and prescribes the information to be set forth in the petition to the judge so that, among other things, he may find probable cause that a crime has been or is about to be committed. It requires notification to the parties subject to the surveillance within a period after it has taken place. The statute is clearly unsuited to protection of the vital national interests in continuing detection of the activities of foreign powers and their agents. A notice requirement, aside from other possible repercussions, could destroy the usefulness of intelligence sources and methods. The most critical surveillance in this area may have nothing whatever to do with detection of crime.

Apart from the problems presented by particular provisions of title III, the argument against application of the warrant requirement, even with an expanded probable cause standard, is that judges and magistrates may underestimate the importance of the Government's need, or that the information necessary to make the determination cannot be disclosed to a judge or magistrate without risk of its accidental revelation, a revelation that could work great harm to the Nation's security. What is often less likely to be noted is that a magistrate may be as prone to overestimate as to underestimate the force of the Government's need. Warrants necessarily are used *ex parte*; often decision must come quickly on the basis of information that must remain confidential. Applications to any one judge or magistrate would be only sporadic; no opinion could be published; this would limit the growth of judicially developed, reasonably uniform standards based,

in part, on the quality of the information sought and the knowledge of possible alternatives. Equally important, responsibility for the intrusion would have been diffused. It is possible that the actual number of searches or surveillances would increase if executive officials, rather than bearing responsibility themselves, can find shield behind a magistrate's judgment of reasonableness. On the other hand, whatever the practical effect of a warrant requirement may be, it would still serve the important purpose of assuring the public that searches are not conducted without the approval of a neutral magistrate who could prevent abuses of the technique.

In discussing the advisability of a warrant requirement, it may also be useful to distinguish among possible situations that arise in the national security area. Three situations, greatly simplified, come to mind. They differ from one another in the extent to which they are limited in time or in target. First, the search may be directed at a particular foreign agent to detect a specific anticipated activity, such as the purchase of a secret document. The activity which is to be detected ordinarily would constitute a crime. Second, the search may be more extended in time, even virtually continuous, but still would be directed at an identified foreign agent. The purpose of such a surveillance would be to monitor the agent's activities, determine the identities of persons whose access to classified information he might be exploiting, and determine the identity of other foreign agents with whom he may be in contact. Such a surveillance might also gather foreign intelligence information about the agent's own country, information that would be of positive intelligence value to the United States. Third, there may be virtually continuous surveillance which by its nature does not have specifically predetermined targets. Such a surveillance could be designed to gather foreign intelligence information essential to the security of the Nation.

The more limited in time and target a surveillance is, the more nearly analogous it appears to be with a traditional criminal search which involves a particular target location or individual at a specific time. Thus, the first situation I just described would in that respect be most amenable to some sort of warrant requirement, the second less so. The efficacy of a warrant requirement in the third situation would be minimal. If the third type of surveillance I described were submitted to prior judicial approval, that judicial decision would take the form of an *ex parte* declaration that the program of surveillance designed by the Government strikes a reasonable balance between the Government's need for the information and the protection of individuals' rights. Nevertheless, it may be that different kinds of warrants could be developed to cover the third situation. In his opinion in *Almeida-Sanchez*, Justice Powell suggested the possibility of area warrants, issued on the basis of the conditions in the area to be surveilled, to allow automobile searches in areas near America's borders. The law has not lost its inventiveness, and it might be possible to fashion new judicial approaches to the novel situations that come up in the area of foreign intelligence. I think it must be pointed out that for the development of such an extended, new kind of warrant, a statutory base might be required or at least appropriate. At the same time, in dealing with this area, it may be mistaken to focus on the warrant requirement alone to the exclusion of other, possibly more realistic, protections.

What, then, is the shape of the present law? To begin with, several statutes appear to recognize that the Government does intercept certain messages for foreign intelligence purposes and that this activity must be, and can be, carried out. Section 952 of title 18, which I mentioned earlier is one example; section 798 of the same title is another. In addition, title III's proviso, which I have quoted earlier, explicitly disclaimed any intent to limit the authority of the Executive to conduct electronic surveillance for national security and foreign intelligence purposes. In an apparent recognition that the power would be exercised, title III specifies the conditions under which information obtained through Presidentially authorized surveillance may be received into evidence. It seems clear, therefore, that in 1968 Congress was not prepared to come to a judgment that the Executive should discontinue its activities in this area, nor was it prepared to regulate how those activities were to be conducted. Yet it cannot be said that Congress has been entirely silent on this matter. Its express statutory references to the existence of the activity must be taken into account.

The case law, although unsatisfactory in some respects, has supported or left untouched the policy of the Executive in the foreign intelligence area whenever the issue has been squarely confronted. The Supreme Court's decision in the *Keith* case in 1972 concerned the legality of warrantless surveillance directed against a domestic organization with no connection to a foreign power and the Government's attempt to introduce the product of the surveillance as evidence in the criminal trial of a person charged with bombing a CIA office in Ann Arbor, Mich. In part because of the danger that uncontrolled discretion might result in use of electronic surveillance to deter domestic organizations from exercising first amendment rights, the Supreme Court held that in cases of internal security, when there is no foreign involvement, a judicial warrant is required. Speaking for the Court, Justice Powell emphasized that—

This case involves only the domestic aspects of national security. We have expressed no opinion as to the issues which may be involved with respect to activities of foreign powers or their agents.

As I observed in my remarks at the ABA convention the Supreme Court surely realized—

in view of the importance the Government has placed on the need for warrantless electronic surveillance that, after the holding in *Keith*, the Government would proceed with the procedures it had developed to conduct those surveillances not prohibited—that is, in the foreign intelligence area or, as Justice Powell said, “with respect to activities of foreign powers and their agents.”

The CHAIRMAN. May I interrupt to say that Justice Powell's perception of the latent threat of unwarranted surveillance against domestic organizations in the name of national security is of great concern to me and to the members of this committee because nothing could be more intimidating on the right of individuals to express themselves and protest policies of the Government with which they disagree, than the belief that they are being watched and their conversations are being monitored by the Federal Government.

Attorney General LEVI. As I believe you know, Mr. Chairman, it has also been a great concern to me.

The CHAIRMAN. I am simply expressing approval of the Powell opinion and its importance, and I am certain it is being observed.



Attorney General LEVI. The two Federal court decisions after *Keith*—I am not sure, Mr. Chairman, if that is a question. If it were a question, the answer is yes.

The two Federal court decisions after *Keith* that have expressly addressed the problem have both held that the fourth amendment does not require a warrant for electronic surveillance instituted to obtain foreign intelligence. In the first, *United States v. Brown*, the defendant, an American citizen, was incidentally overheard as the result of a warrantless wiretap authorized by the Attorney General for foreign intelligence purposes. In upholding the legality of the surveillance, the Court of Appeals for the Fifth Circuit declared that on the basis of "the President's constitutional duty to act for the United States in the field of foreign affairs, and his inherent power to protect national security in the conduct of foreign affairs, the President may constitutionally authorize warrantless wiretaps for the purpose of gathering foreign intelligence." The court added that "restrictions on the President's power which are appropriate in cases of domestic security become inappropriate in the context of the international sphere."

In the *United States v. Butenko*, the Third Circuit reached the same conclusion—that the warrant requirement of the fourth amendment does not apply to electronic surveillance undertaken for foreign intelligence purposes. Although the surveillance in that case was directed at a foreign agent, the court held broadly that the warrantless surveillance would be lawful so long as the primary purpose was to obtain foreign intelligence information. The court stated that such surveillance would be reasonable without a warrant even though it might involve the overhearing of conversations of "alien officials and agents, and perhaps of American citizens." I should note that although the United States prevailed in the *Butenko* case, the Department acquiesced in the petitioner's application for *certiorari* in order to obtain the Supreme Court's ruling on the question. The Supreme Court denied review, however, and thus left the third circuit's decision undisturbed as the prevailing law.

The CHAIRMAN. Do you know anywhere in the prevailing law that the term "foreign intelligence" is defined?

Attorney General LEVI. I am not sure I can answer that question. I think that the constant emphasis on foreign powers and their agents helps define. In a discussion of the diplomatic powers of the President, his position in terms of the Armed Forces and so on perhaps helps.

The CHAIRMAN. We find it a very elusive term because it can be applied as justification for most anything and broadly defined can go far beyond the criteria that you just suggested. I know no place in the law that undertakes to define the term.

Attorney General LEVI. That, of course, is the problem with all the terms in this area. Also, a problem with the term "internal security," "domestic security," or "national security," because one might tend to billow those terms to the point that they cover foreign intelligence, so that we have a problem.

Most recently, in *Zweibon v. Mitchell*, decided in June of this year, the District of Columbia circuit dealt with warrantless electronic surveillance directed against a domestic organization allegedly en-

gaged in activities affecting this country's relations with a foreign power. It dealt specifically with the Jewish Defense League and the allegation that it was involved with bombing of foreign diplomats of importance to the U.N. Judge Skelly Wright's opinion for four of the nine judges makes many statements questioning any national security exception to the warrant requirement. The court's actual holding made clear in Judge Wright's opinion was far narrower and, in fact, is consistent with holdings in *Brown* and *Butenko*. The court held only that "a warrant must be obtained before a wiretap is installed on a domestic organization that is neither the agent of nor acting in collaboration with a foreign power." This holding, I should add, was fully consistent with the Department of Justice's policy prior to the time of the *Zweibon* decision.

The CHAIRMAN. Is it also prevailing law?

Attorney General LEVI. I regard it as prevailing law.

The CHAIRMAN. Is there an appeal pending? Is it being taken to the Supreme Court?

Attorney General LEVI. My understanding is that the Department is not taking an appeal. I am not sure of the defendants.

Since the Department's policy is really in agreement with the holding, the only way for us to accept as lawyers representing others to take an appeal, would have been to say that the broad language of the court was an attempt to make an illicit extension of its holding and to try to appeal on that. I do not believe you would have gotten anywhere. I would like to have done it partly as a way of telling judges that they should take care what they say.

With these cases in mind, it is fair to say electronic surveillance conducted for foreign intelligence purposes, essential to the national security, is lawful under the fourth amendment, even in the absence of a warrant, at least where the subject of the surveillance is a foreign power or an agent or collaborator of a foreign power. Moreover, the opinions of two circuit courts stress the purpose for which the surveillance is undertaken, rather than the identity of the subject. This suggests that in their view such surveillance without a warrant is lawful so long as its purpose is to obtain foreign intelligence.

But the legality of the activity does not remove from the Executive or from Congress the responsibility to take steps, within their power, to seek an accommodation between the vital public and private interests involved. In our effort to seek such an accommodation, the Department has adopted standards and procedures designed to insure the reasonableness under the fourth amendment of electronic surveillance and to minimize to the extent practical the intrusion on individual interests. As I have stated, it is the Department's policy to authorize electronic surveillance for foreign intelligence purposes only when the subject is a foreign power or an agent of a foreign power. By the term "agent" I mean a conscious agent; the agency must be of a special kind and must relate to activities of great concern to the United States for foreign intelligence or counterintelligence reasons. In addition at present there is no warrantless electronic surveillance directed against any American citizen, and although it is conceivable that circumstances justifying such surveillance may arise in the future, I will not authorize the surveillance unless it is clear that the American citizen is an active, conscious agent or collaborator of a foreign power. In no event, of course, would I authorize any warrantless sur-

veillance against domestic persons or organizations such as those involved in the *Keith* case. Surveillance without a warrant will not be conducted for purposes of security against domestic or internal threats. It is our policy, moreover, to use the title III procedure whenever it is possible and appropriate to do so, although the statutory provisions regarding probable cause, notification, and prosecutive purpose make it unworkable in all foreign intelligence and many counter-intelligence cases.

The standards and procedures that the Department has established within the United States seek to insure that every request for surveillance receives thorough and impartial consideration before a decision is made whether to institute it. The process is elaborate and time consuming, but it is necessary if the public interest is to be served and individual rights safeguarded.

I have just been speaking about telephone wiretapping and microphone surveillances which are reviewed by the Attorney General. In the course of its investigation, the committee has become familiar with the more technologically sophisticated and complex electronic surveillance activities of other agencies. These surveillance activities present somewhat different legal questions. The communications conceivably might take place entirely outside the United States. That fact alone, of course, would not automatically remove the agencies' activities from scrutiny under the fourth amendment since at times even communications abroad may involve a legitimate privacy interest of American citizens. Other communications conceivably might be exclusively between foreign powers and their agents and involve no American terminal. In such a case, even though American citizens may be discussed, this may raise less significant, or perhaps no significant, questions under the fourth amendment. But the primary concern, I suppose, is whether reasonable minimization procedures are employed with respect to use and dissemination.

With respect to all electronic surveillance, whether conducted within the United States or abroad, it is essential that efforts be made to minimize as much as possible the extent of that intrusion. Much in this regard can be done by modern technology. Standards and procedures can be developed and effectively deployed to limit the scope of the intrusion and the use to which its product is put. Various mechanisms can provide a needed assurance to the American people that the activity is undertaken for legitimate foreign intelligence purposes, and not for political or other improper purposes. The procedures used should not be ones which by the indirection in fact target American citizens and resident aliens where these individuals would not themselves be appropriate targets. The proper minimization criteria can limit the activity to its justifiable and necessary scope.

The CHAIRMAN. This is one of the subjects I'm sure the committee will want to question you about this afternoon because we had so much evidence of watch list and even random openings of the mail without any particular criteria, and names of people that would appear to be wholly inappropriate for purposes of surveillance. These are the real life questions that are presented to this committee in terms of what the Government actually has been doing.

Attorney General LEVI. I assume, Mr. Chairman, that the main thrust of the committee is to see what kind of legislation or better procedures can be developed and I've tried very hard speaking on those

subjects that I can speak on, and not speaking on those that I cannot, to try to lay that down before the committee as a base.

Another factor must be recognized. It is the importance of potential importance of the information to be secured. The activity may be undertaken to obtain information deemed 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.

Need is itself a matter of degree. It may be that the importance of some information is slight, but that may be impossible to gauge in advance; the significance of a single bit of information may become apparent only when joined to intelligence from other sources. In short, it is necessary to deal in probabilities. The importance of information gathered from foreign establishments and agents may be regarded generally as high—although even here may be wide variations. At the same time, the effect on individual liberty and security—at least of American citizens—caused by methods directed exclusively to foreign agents, particularly with minimization procedures, would be very slight.

There may be regulatory and institutional devices other than the warrant requirement that would better assure that intrusions for national security and foreign intelligence purposes reasonably balance the important needs of Government and of individual interests. In assessing possible approaches to this problem it may be useful to examine the practices of other Western democracies. For example, England, Canada, and West Germany each share our concern about the confidentiality of communications within their borders. Yet each recognizes the right of the Executive to intercept communications without a judicial warrant in cases involving suspected espionage, subversion or other national security intelligence matters.

In Canada and West Germany, which have statutes analogous to title III, the Executive in national security cases is exempt by statute from the requirement that judicial warrants be obtained to authorize surveillance of communications. In England, where judicial warrants are not required to authorize surveillance of communications in criminal investigations, the relevant statutes recognize an inherent authority in the Executive to authorize such surveillance in national security cases. In each case, this authority is deemed to cover interception of mail and telegrams, as well as telephone conversations.

In all three countries, requests for national security surveillance may be made by the nation's intelligence agencies. In each, a Cabinet member is authorized to grant the request. In England and West Germany, however, interception of communications is intended to be a last resort, used only when the information being sought is likely to be unobtainable by any other means. It is interesting to note, however, that both Canada and West Germany do require the Executive to report periodically to the legislature on its national security surveillance activities. In Canada, the Solicitor General files an annual report with the Parliament setting forth the number of national security surveillances initiated, their average length, a general description of the methods of interception or seizure used, and an assessment of their utility.

It may be that we can draw on these practices of other Western democracies, with appropriate adjustments to fit our system of separation of powers. The procedures and standards that should govern the use of electronic methods of obtaining foreign intelligence and of guarding against foreign threats are matters of public policy and values. They are of critical concern to the executive branch and to the Congress, as well as to the courts. The fourth amendment itself is a reflection of public policy and values—an evolving accommodation between governmental needs and the necessity of protecting individual security and rights. General public understanding of these problems is of paramount importance, to assure that neither the Executive, nor the Congress, nor the courts risk discounting the vital interests on both sides.

The problems are not simple. Evolving solutions probably will and should come—as they have in the past—from a combination of legislation, court decisions, and executive actions. The law in this area, as Lord Devlin once described the law of search in England, “is haphazard and ill-defined.” It recognizes the existence and the necessity of the Executive’s power. But the executive and the legislative are, as Lord Devlin also said, “expected to act reasonably.” The future course of the law will depend on whether we can meet that obligation.

The CHAIRMAN. Indeed, it will, Mr. Attorney General, and I want to thank you for this very learned dissertation on the fourth amendment. I think that it will prompt a number of questions from the committee this afternoon. It is 12:30 now, and I had hoped that we might adjourn until 2 this afternoon.

Senator Mathias?

Senator MATHIAS. Mr. Chairman. I comply with the instruction of the Chair to withhold questions for the moment, but I was one of those urging the invitation of the Attorney General to the session because I anticipated a thorough and scholarly discussion of the subject. I think that the Attorney General has fully met all of our expectations, and this will be an important document on this whole subject, both among those who will cite it for support and those who will wish to argue against it. But I think that it is obviously an important document and I look forward to the dialog this afternoon.

The CHAIRMAN. I think it goes further on the subject than any other previous statement of the Government from any source. Therefore, the committee appreciates the time and effort that you have given to it and we look forward to a chance to question this afternoon.

If there are no further comments, the hearing stands adjourned until 2 this afternoon.

[Whereupon, at 12:30 p.m., the hearing adjourned, to reconvene at 2 p.m. of the same day.]

#### AFTERNOON SESSION

The CHAIRMAN. The hearing will please come to order.

Mr. Attorney General, in your statement this morning, you testified:

I now come to the Department of Justice’s present position on electronic surveillance conducted without a warrant. Under the standards and procedures established by the President, the personal approval of the Attorney General is required before any nonconsensual electronic surveillance may be instituted within the United States without a judicial warrant.

Do you mean by that statement that your approval is required before any one may be bugged or wiretapped without a warrant as long as the target is within the United States? Is that correct?

Attorney General LEVI. Well, I really cannot quite mean that, because—I guess I can. I was going to say that title III, which of course has a warrant provision, permits States to do wiretapping, but I suppose that I do mean that without a judicial warrant, that is—

The CHAIRMAN. The existing practice?

Attorney General LEVI. The standard procedure established by the President.

The CHAIRMAN. Yes. Since it is a procedure established by the President, it could be changed at any time by the President.

Attorney General LEVI. I assume so.

The CHAIRMAN. What about electronic surveillance of messages that have one terminal outside the United States? Is your permission required before an unwarranted interception of such messages may take place?

Attorney General LEVI. Well, my belief is, if it is a surveillance which there is a base in the United States and a communication from the United States, which is what we would ordinarily think of as being covered, I think the Attorney General's approval would be required.

The CHAIRMAN. What about the messages that NSA snatches out of the air? They do not require your approval, do they?

Attorney General LEVI. You are now asking me about the NSA procedures.

The CHAIRMAN. I'm only asking you whether they require your approval.

Attorney General LEVI. I have only started to answer.

The CHAIRMAN. I see.

Attorney General LEVI. The first part of the answer is, I want to make this clear that I do not really know what the NSA procedures are. And I think that is an important point. I do not think that a briefing in which an Attorney General or some other kind of a lawyer is given a certain amount of information which adheres, means that the result of that is that the Attorney General knows what the procedures are. And at this time I would have to say that I do not know what the procedures are. I do not know what the possibilities are. I do not know enough about the minimization possibilities. The position on that is, we have asked that we be fully informed, that we be fully informed as to the leeways, the possible procedures, the possible minimization procedures, and the President has directed the NSA to provide that information to the Department of Justice, to the Attorney General, so that we can make some kind of a determination on it.

The CHAIRMAN. Until you have that information, you really do not have the foggiest idea of whether what they are doing is legal or illegal, constitutional or unconstitutional?

Attorney General LEVI. I would be glad to accept the protective shape of that proposed answer. I suppose I have a foggy idea.

The CHAIRMAN. You do not—

Attorney General LEVI. I do not think I should be in a position of making a determination about it until, for various reasons possibly, but not until I really know what it is and I have told you many times that I do not know what it is. We have requested that we be given a

full account, which is probably not too easy to give. We have requested that procedures be outlined. More important, that the possible protective procedures be outlined and the President has specifically directed them to give them to us.

The CHAIRMAN. These practices have been going on for a long time. Hundreds of thousands of American citizens have had their messages intercepted by the Government, analyzed, disseminated to various agencies of the Government. Do you not think that it is awfully late for the Attorney General to be inquiring about the procedures in order to determine their constitutionality? I commend you for doing it; this question is not meant to be critical of you, but looking back over the years that these practices have gone on, is it not a very late date that we should now be seriously inquiring into their constitutionality at the Justice Department?

Attorney General LEVI. One first has to remember that the law has changed, that some of those practices—I do not know which ones about the NSA you are referring to—began a long time ago, so as a matter of fact, I cannot say that other Attorneys General might not have, years ago, inquired into it. So I do not know how to answer that, except to say that I have not been around that long as Attorney General.

If you go back to 1947, 1949, you really had a different shape to it all, and one would have to look at it in those terms.

The CHAIRMAN. If I understood your testimony this morning correctly, you said that the President has the power to wiretap an American citizen without a warrant if he is an agent or a collaborator of a foreign power. This would be one of those cases where you, as the agent of the President, would approve of a wiretap without a judicial warrant. That is correct, is it not?

Attorney General LEVI. It is correct, although I never—I hope, I do not think that I said that that was all that we would look for.

The CHAIRMAN. Oh, no. I was just taking one example. You laid out the criteria. I think there were two or three things you would look for. But one was an agent or collaborator of a foreign power. I do not think that any of us would quarrel with a wiretap on a foreign agent as falling within the counterintelligence operations of the Government, and having to do with both foreign intelligence and national security.

What I am interested in is how you would view a foreign agent or collaborator. For example, what is a collaborator? Suppose you have young people who were protesting the war, for example, as so many did, and some of them met with certain foreign government officials. Would they then be regarded as collaborators? How does this term apply?

Attorney General LEVI. I think—I will answer directly—I do not want one to think that I am evading the question, but then I want to go on to say something more.

I would not think that that would make a person a collaborator. You have not given all the facts. You could turn it around and say, one cannot say that one is a collaborator because one is, at the same time, taking part in unpopular political causes. One has to look very carefully at what the kind of evidence is, and that really points to the procedure, which it seems to me in any constructive solution of this

kind of problem, one has to look to see what procedures are followed and what kind of evidence has to be weighed.

I am sure that there is really no absolutely automatic way of doing that. One of the strong arguments that is so frequently made for warrantless surveillance is that it is necessary to use it in order to determine whether someone is an agent or a conscious agent. That, of course, is certainly what we have tried to do is make sure that the evidence is better than that.

The CHAIRMAN. Of course, the difficulty is that judgment in a case of this kind, and I would suppose necessarily so, is made by interested parties, so to speak. The Attorney General is a member of the executive branch as an agent of the President. Unlike the ordinary law enforcement case, there is never a necessity to present the reasons that give probable cause to believe that a crime has been performed to some independent tribunal.

Therefore, the procedures and the criteria become very important. Just to press this, because I can think of other examples, I remember the case of Joseph Kraft, a distinguished columnist, meeting with certain foreign agents of a certain foreign government in Paris during the Vietnam war. In your view, he was presumably looking for news, looking for their viewpoints. Would that, in any sense, in your view, make him a collaborator and justify a wiretap?

Attorney General LEVI. Certainly not. I hope I have not said anything that suggests that.

The CHAIRMAN. I do not believe you have. I am just trying to clarify the boundaries by my questions.

Attorney General LEVI. Let me make the point, since we are talking about the foreign legislation remedies you take. If one had a statute, one of the things that I suppose that a judge might have to make some kind of finding on is whether there is evidence sufficient to establish the conscious collaboration of agents.

There is a problem there, because one would know that through the most secret sources, and disclosure might expose someone to assassination. It is the kind of thing which I suppose a judge could make a finding on. As far as the Attorney General's position is concerned, I think that the Attorney General probably feels that his position is one of protecting the laws of the United States, protecting the President. He is probably more vigilant on that account. I assure you that it is much easier for me to sign the title III than it is to handle these cases.

The CHAIRMAN. You have been, I think it is fair to say, a vigilant Attorney General, but that has not always been the case. We have had some Attorneys General who have paid very little heed to the law, and did pretty much as the President wanted them to do. So, unless we have some statutory guidelines, I think that it is very dangerous just to leave it to the Attorney General to decide, knowing that the office changes, and Presidents change. Do you think that there is any way that we could write into law certain statutory guidelines which would determine when warrantless surveillance would be permissible, what test must be met?

Attorney General LEVI. I would hope so. Other countries have been able to do it, and I would hope that this one could, although I am not absolutely confident, as I say, it would have to be the reason I



pointed out this morning. This is an area where people proceed frequently by statutes through indirection, in part, because of the nature of the problem. But I, myself, would hope that it would be possible to have a statute.

The CHAIRMAN. If this committee should decide that among its recommendations we should include a recommended statute that would govern warrantless surveillance in the general field of foreign intelligence and national security, would you be prepared, as Attorney General, to assist the committee in designing such a statute?

Attorney General LEVI. Of course. The more interesting question is whether the committee, since it has more power, would be willing to assist me.

The CHAIRMAN. The power of the committee in this case is merely that of recommending. The actual action upon any recommendations would have to go to the appropriate legislative committees of the Senate. But in any case, I should think that our collaboration may be fruitful, and I welcome it.

The other aspect of this case—there are many aspects of the case that are troubling me. Because other Senators are here now, I do not want to monopolize the time, but I would like to ask you just a question or two on another term that is constantly coming into use, the term “foreign intelligence.” Here we have an agency, the NSA, which has no statutory base, by creation of an Executive order. Its scope of authority rests on certain executive directives that give it a general mission of obtaining foreign intelligence.

Now, as I suggested earlier, foreign intelligence has never been defined by statute, and I suppose that we could all agree that certain kinds of information would clearly be foreign intelligence. But we look at the NSA and we find that they are collecting all kinds of data on economic intelligence: that now falls in what we now call foreign intelligence, having to do with transfer of funds, business investments, the movement of capital.

Suppose that an American company was making a decision with respect to an investment in some foreign land, was interested in keeping that decision secret for business reasons, competitive reasons. Is that a case that would fall within the net of foreign intelligence, thus entitling the government to obtain that kind of information without a warrant, because it is generically a part of what we have come to call foreign intelligence? How do we grapple with this?

Attorney General LEVI. I think the way you have to grapple with it, Mr. Chairman, is not just to belabor the point of what the definition of foreign intelligence means, because, as you pointed out, it can include an enormous variety. It can include, for example, all kinds of economic information. And I am quite sure that professional intelligence people would think that a very wide net might be appropriate because small items of information all by themselves may not mean anything, as I said in my statement, but added to something else, they mean something. So you might have a very broad definition of foreign intelligence within that a very broad notion of important economic information, but certainly the inquiry does not stop there. One has to say, well, how did they get it? What is the target of the surveillance? Is it being obtained through the targeting of an official foreign unit, or is it targeted in such a way as to pick up American firms or Americans who are discussing these problems?

As I tried to say this morning, it seems to me that the fourth amendment coverage will depend to a considerable extent on the limitations one can impose. It is one thing, I think—although this is a very difficult field—for an American company to be discussing something with a foreign official establishment, and quite another thing when it is discussing it with some kind of a foreign concern. So that it is one thing where the information is picked up because the targeting is on the foreign governmental unit, or whatever it is, official unit, whatever it is, and quite another thing where the targeting, in fact, is on the American firm. A great deal will depend on how one—maybe one can mechanically, to a considerable extent, minimize that. When one gets to that point, one has to find out how one can go any further.

The CHAIRMAN. This committee knows that the NSA is one gigantic set of earphones and all kinds of requests are coming in as to what to listen to in the world, and the agencies themselves determine—I do not suppose that the President enters into it, clearly the Attorney General does not enter into it, no department of the government that is supposed to look out for the laws and the Constitution enters into it. We know some of the things they have done; some are laudible in terms of the ultimate objective, for example, drug traffic. That is a good thing to learn about. We are trying to enforce laws in this country, and information that you can get by listening in on telephone conversations—

Attorney General LEVI. Of American citizens abroad?

The CHAIRMAN. American citizens at one end of the terminal, and possibly an American citizen on the other, or a foreign citizen on the other; they listen to all the telephone conversations and extract ones relating to drugs. That is a laudable purpose, but is that foreign intelligence?

Attorney General LEVI. It may be foreign.

The CHAIRMAN. Or is that law enforcement?

Attorney General LEVI. It may be foreign intelligence, but as you stated quite broadly, and you stated quite broadly a number of possible situations. Some of them I would regard as unconstitutional. At that point the word—I cannot imagine the word intelligence is to be defined in such a way as to permit unconstitutional behavior.

The CHAIRMAN. Right. That is terribly important to say because very seldom can you get anybody, when you get into this field of national security, to say that it is subject to the Constitution. It is much more frequent for them to say in this area the Constitution is an archaic document of the 18th century, and we have to be practical about these things. I am not saying you suggested that, but I am happy for you to say that even in questions relating to foreign intelligence and national security, the Constitution and its guarantees remain applicable.

Attorney General LEVI. Mr. Chairman, there are arguments—I must say that I tried in the paper I gave this morning—in fact, Senator Mathias hurt my feelings by complimenting me. I was really trying to be quite neutral. I was really not making an argument on one side or the other. One argument that I did not include which is sometimes made is that if matters are picked up out of the air, so to speak, as waves of some kind go across the ocean, that there is no reason for people to assume that the conversations are private and therefore the

fourth amendment does not apply. I do not make that argument because I do not like it, I guess, and because I think it goes too far. I guess I say that only to say again that this is a very difficult field, and the procedures which are devised and the protections that are devised are terribly complicated.

Senator MATHIAS. If the chairman would yield, I do not think the Attorney General's feelings should be hurt by what I said because I believe I did indicate that there were those that might take this document and raise it as their banner and march off in one direction. There would be others who would take this document and raise it as their banner and march in the other.

Attorney General LEVI. I hoped that is what you were going to say, and I am delighted that you said it.

The CHAIRMAN. There is another example that the committee spent a week looking into, which was 20 years of opening the mail, conducted by the CIA in this case, and it developed in the course of the inquiry that some of this mail was opened because it was clearly foreign government mail.<sup>1</sup> Other mail was opened because various agencies had furnished the CIA with names of American citizens that they wanted watched. If a letter were coming to that citizen or were being sent by that citizen to a foreign address, that mail was opened. Other evidence showed that letters were also opened just at random, random selection to read and photograph and then to distribute to various agencies. Over the years, a quarter of a million letters were opened and photographed in this way. Do you think that that practice, which I think is a fair statement of the range of evidence that we received, conforms with the protections that are supposed to be conferred by the fourth amendment?

Attorney General LEVI. In one statement you mentioned, as I am sure you recognize, many different examples. You might have a letter which for some reason or another you get a warrant to open, and of course, that can be done. You might have letters written by or addressed to particular persons who might or might not be American citizens where you would have good reason to think that they were conscious collaborators, in a meaningful sense, of a foreign government. Then you would have the problem of where does the authorization to proceed under Presidential power, if that is what we are discussing, come from. And I think that one would have to look for the authorization.

Now, you are in an area where there is a criminal investigation by the Department, and I really should not say very much. I do want to say that if one goes back early enough in the forties Director Hoover had a particular position. I think, if I remember correctly, as censor of the mails, appointed by the President for that purpose. So that it does become a matter of some question as to authorization.

The CHAIRMAN. We have looked into the law and we cannot find any authorization for opening the mails. We find laws and court decisions against it. Certainly random opening of the mail could not possibly be reconciled with the fourth amendment.

Attorney General LEVI. I did not say that.

The CHAIRMAN. Could it?

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<sup>1</sup> See Senate select committee hearings, vol. 4, Mail Opening.

Attorney General LEVI. I should not think the random opening could. Certainly in circumstances, I cannot imagine what circumstances to imagine, I suppose random mail from a particular source would no longer be random, so I do not know how to comment on that.

But I would like to go back to the authorization point because I think that what you have said suggests that there cannot be Presidential authorization for it. I have to say that I am not at all sure but I think that there could be a Presidential authorization under very limited circumstances. Then the question would be, would it have to be in writing. I do not know whether it has to be in writing or not. How does one know whether the authorization was given, is it believable, and so on and so on.

The CHAIRMAN. None of these procedures seem to exist in this area. It is part of the work of this committee to try to get them developed and established.

Attorney General LEVI. That is right. I hope the activities to which you are referring do not exist either.

The CHAIRMAN. At the moment, the particular mail opening operation has come to a halt, and since this investigation started, some of the NSA activities have come to a halt, but we would like to see some laws that would keep it that way.

Senator Huddleston.

Senator HUDDLESTON. Thank you, Mr. Chairman.

Attorney General Levi. I appreciate the detail and scholarly dissertation that you have given to this committee on this general subject. I did not hear all of it, but I did have an opportunity to read it. I am one of the few members of this committee that is not an attorney, which I am sure is apparent when I pose questions relating to legal problems. I am wondering, though, after reading your statement whether or not I might be qualified at least to apply for a license to practice law.

Attorney General LEVI. You mean the statement is so inferior that anybody else could do it, too.

Senator HUDDLESTON. If I learned all the knowledge there, I might have something to go along with my honorary doctorate degree of law.

Mr. Attorney General, there have been several court cases, one going back as far as 1928 in *Olstead v. United States* in which the majority held that wire tapping did not constitute a trespass over constitutional rights. Justice Brandeis in a dissent that said, "the progress of science in furnishing Government with the means of espionage is not likely to stop wiretapping. Ways may some day be developed by which the Government, without removal of papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to the jury the most intimate occurrences of a home." In a later case, 1963, *Lopez v. United States*, the effect of technology on the fourth amendment guarantees was again alluded to by the Court through Justice Brennan. He said that "this Court has by and large steadfastly held the fourth amendment against the physical intrusion of a person's home and property by law enforcement officers, but our course of decisions, it now seems, have been outflanked by the technological advances of the recent past." I am just wondering whether you think that the Court's present posture with regard to the fourth amendment has been outflanked by the technology that is now available.

Attorney General LEVI. No; I do not. I think, in fact, what the Court is doing is a little bit like what the Congress is doing, or has done, That is to say, that it knows that technological advances are occurring. It knows that many of these devices can be extremely important for good in the sense that they are essential to the security of the country, or for evil if they are misused. And it is difficult then for the Court, and I think for the Congress, to try to solve the whole problem at once.

I do not believe that the legal system, even though lawyers like sometimes to think it does, I do not think the legal system would say all of these efforts must be banned, period. I think that that is just much too simple. Therefore it is a complicated problem that has to be approached. I myself think it has been approached too piecemeal. I have constantly said that one can put the pieces together.

Senator HUDDLESTON. Are you saying that rather than attempt to legislate the kind of restrictions that would cover all of these possible situations, that we are going to have to rely on court interpretations of each case as we go along?

Attorney General LEVI. You will have court interpretations. And there will have to be procedures, because one cannot really be sure of what new developments will occur. One can build in reporting procedures, one can build in a variety of kinds of procedures to try to handle that.

Senator HUDDLESTON. In your statement you list four purposes of electronic surveillance. The first three come from language of Congress in the 1968 act, so-called conceptions of national security. The fourth one is new, which says "to obtain information certified as necessary for the conduct of foreign affairs matters important to the national security of the United States." Who certifies this?

Attorney General LEVI. As it says, it would have to be an appropriate Presidential appointee.

Senator HUDDLESTON. It may be somebody he may designate, Secretary of State, Director of Central Intelligence.

Attorney General LEVI. It would have to be a Presidential appointee.

Senator HUDDLESTON. In effect, on behalf of the President of the United States.

Attorney General LEVI. I am not sure it would just be that. I think that also speaks to the level of the responsibility that that President has and the appropriateness for him to give that kind of a certificate.

Senator HUDDLESTON. How does that reason differ from the second purpose that you have listed, which was to obtain foreign intelligence deemed essential to the security of the Nation?

Attorney General LEVI. It is an excellent question coming from a nonlawyer, and I interpret the two of them as the same. That has not always been a welcome interpretation.

Senator HUDDLESTON. It seems to me that the latter one would be a little broader.

Attorney General LEVI. I do not interpret it as broader. I interpret it as an attempt to say what foreign intelligence deemed essential to the security of the Nation might mean when it comes to the conduct of foreign affairs, but my flat answer is that the way I have interpreted that is to require that it be deemed essential.

Senator HUDDLESTON. In order for it to be important it has to be essential.

Attorney General LEVI. This is an area where, if you are going to have legislation or procedures, you will find that words of that kind are always used. That is true in the Canadian legislation. It is just generally true.

Senator HUDDLESTON. Another area that is almost foreign to me, as I understand the fourth amendment, it sets out very specifically that warrants should be obtained for intrusion, for search and seizure. It says, at least to me, that these warrants must be very specific, first of all, in the place which is going to be searched; second, in things that are to be seized. How can that be applied to a situation where, while the general purpose may be acceptable—that of security, that of maybe discovering a violation of law—the system is such that it is bound to bring in a lot of extraneous information. It is almost as though you had a warrant to search an apartment for drugs and you also walked out with the dining room table, because a lot of information that is picked up in conversations necessarily does not have anything at all to do with the original purpose.

Attorney General LEVI. If it were a notorious dining room table stolen from the White House and the person who went in for drugs could not help but notice it was there, I suppose it might be within the authority to take it.

Senator HUDDLESTON. I understand if it is a clear observation that there is something illegal about the dining room table, I would take it, too, maybe. In the case of picking up conversations, this is not the case. That is the first part of my question: How in the world can you prescribe the activity to the extent that you would eliminate in the first place getting this information which is a violation of privacy; more importantly, though, is the use of it?

In some of our inquiry there have been at least indications that some agencies have used information for the purpose of either embarrassing or discrediting individuals, although the specific information that they used, gathered from wiretaps, had no relationship at all to a crime or to the purpose that the wiretap was placed there. How do you keep that information from being used in such a way as to be detrimental to the citizen and when it is not related to the original purpose of the surveillance?

Attorney General LEVI. Senator, I really do not know how to answer that one. What you can do is to try to legislatively ban all operations. That, of course, would be an expression of the opinion of the Congress. It would raise a question whether it was Presidential power to continue it anyway, that you could attempt to ban it. I suppose the President could ban it.

Somehow or another that does not seem to me to be a constructive way to approach that kind of a problem because the fourth amendment was not originally conceived of as applying to these kinds of mechanisms anyway. The fourth amendment has shown, by so many other provisions in the Constitution, which is one reason why the Constitution works, that it can both carry important values and have a flexibility and yet have a real meaning of protection. The problem that you are asking me is, of course, the central problem referring to things like, again, the NSA operation which I think you are describing, but I am not sure.

Senator HUDDLESTON. That is true, except you have two parts of it because the NSA is just a collector, and it supplies the information to its so-called customers. They do not know what the customers do with it. The customers might use it in a way entirely different from what had been anticipated.

Attorney General LEVI. It is possible to devise procedures which undoubtedly are not perfect, designed to minimize it. What one has to do is see how far one can go in that, and then take a look at it and see whether the achievement is sufficient. That is one of the reasons that the President asked that these procedures be shown to us. That is the reason that we asked for the description, to see what procedures would be possible. I think the procedures can work at both ends, procedures as to what is picked up; you have to have procedures as to what use is made of it and where it goes.

Senator HUDDLESTON. Another elementary statement: Today under the present interpretation of laws if an individual found out that he had been maligned, damaged, or slandered by use of information that had been gathered in what started out as a legitimate surveillance, what recourse would he have? Could he sue anybody?

Attorney General LEVI. Again, I really do not know how to answer that question. You are asking me what is the relationship between surveillance which may have been proper, or may have been improper and the law of slander—it may be libel in the kind of case you describe. I just have to say I do not know the answer to that question. If I did know it, I would have to remind myself that the Department of Justice is defending a great many defendants in present cases where there are all kinds of lawsuits filed around the country. I do not think I should be making proclamations.

Senator HUDDLESTON. Also in your statement, you say there are appropriate and adequate standards for a person being wiretapped or bugged. The question is, these are your standards. Can they bind any successor of yours, or are they standards that are just constitutionally required by the fourth amendment?

Attorney General LEVI. Well, it is my view—two answers to that. In the first place, the only authority that I have in this area comes from the President, so that a good deal of what is decided is the authorization which is limited in that way by the President. I cannot authorize anything that goes beyond that. My interpretation of it is based on what I regard as the constitutional requirements which I think in this area respond to and do reflect to a considerable degree public policy and concerns about individual rights, so that I think the only power the Attorney General has in this area is, first the authorization and its restrictions, and second, his interpretation of what the Constitution allows.

Senator HUDDLESTON. What would prevent a future President or Attorney General from redefining a foreign agent or collaborator to include a political leader who might collaborate in a sense with a foreign government by lobbying his colleagues for support for that country, and meets with its officials?

Attorney General LEVI. I think the Constitution would prevent that. I am not sure that that is what your question is asking. I do not know how to answer a question which says there is a great deal of variety in political leaders and there is a great deal of history. Of course there is.

I suppose that is why we have the form of government that we do have.

Senator HIDDLESTON. It just occurred to me that a political enemy of a President or Attorney General that may have had some foreign contact could be brought under this as a potential collaborator, and therefore be subject to surveillance.

Attorney General LEVI. I included in the statement that one of the procedures that has to be worked toward is to make sure that there is no partisan political purpose. I am sure, speaking from what I know, there is none. I cannot obviously talk about these other areas.

The CHAIRMAN. Senator Schweiker.

Senator SCHWEIKER. Thank you, Mr. Chairman.

Mr. Attorney General, one of the concerns of this committee as related to the warrant requirements is that the more deeply we got into the various intelligence agencies, CIA, NSA, and FBI, there seems to be a failure in the system to go before any kind of neutral magistrate to make a determination about such requirements. And the result is, of course, because that fail-safe system is not in operation, that we have illegal activities such as mail opening, listening, and black bag jobs. I'd like to ask you, as Attorney General, what is currently being done in the Justice Department to give you some kind of a better check, better control, better feel of the situation in terms of ferreting out possible illegal procedures and making certain that they are followed up as to what happens in the future?

Attorney General LEVI. As far as the Federal Bureau of Investigation is concerned, there are memoranda from me and from the Director which have asked that all activities which might raise any question of impropriety be called to my attention. Insofar as you are talking about what goes on in other agencies, what I think you are referring to are violations of law. We have criminal prosecutions and we have investigations in process now.

Senator SCHWEIKER. The problem here in the case of both mail opening and NSA interceptions—I believe the testimony shows that the Attorney General did not know about the mail openings until 1973 and the NSA interceptions until 1975. So we have seen a breakdown in the system in terms of your people being aware that these things were going on for 20 or 30 years.

Attorney General LEVI. Well——

Senator SCHWEIKER. I'll say your people. I am talking about the system.

Attorney General LEVI. It seems to me that the kind of items that you are describing usually require presidential authorization of some kind or another and I would hope in the future that any such presidential authorization or intended authorization would be passed upon by the Attorney General.

Senator SCHWEIKER. The problem was that it did not have presidential authorization. In the case of mail opening I do not believe we had any testimony specifically linking it to a President. This was one of the troubles. The system seemed to break down because it does not go up the chain of command at present. Apparently, in most cases not to the Attorney General either. It seems to me it places a larger burden on the Attorney General and the Justice Department to have a way of checking this, finding it out, ferreting it out. That is the point I'm trying to raise.



Attorney General LEVI. As I say, I do not understand unless there is Presidential authorization on the mail openings, for example, or the kind of case where you can get a warrant. I am not sure how that differs from any other kind of violation if in fact they occur. There is always the problem about authorization. I would not be so sure about who, after a great many years have passed, has the burden. I really should not discuss that, the question of authorization. If you are saying do I know some automatic way, no; I do not.

Senator SCHWEIKER. Let me put the question another way then. How would you feel about an Inspector General's office under your direction that would have this responsibility?

Attorney General LEVI. That would roam around the Government?

Senator SCHWEIKER. To the areas that you would normally have jurisdiction for prosecution if there were illegal procedures. It seems to me that something is missing in our government procedures. That information has not gotten to the Justice Department so that action could be taken. The CIA has an Inspector General. The question is whether the Attorney General should have for his procedures an Inspector General procedure of some kind.

Attorney General LEVI. The argument that is being made is that the Inspector General worked so well with the CIA, that the Department of Justice should also have a similar, perhaps a more general Inspector General? I really think what is involved is, first, the morality, which is perhaps not the right word, of the administration of the country. I say it is not the right word because I am very conscious that many of these things were begun at different times with different spirit and feeling of importance and what not. But, second, the enforcement of the criminal law. And I think that has to be pursued vigorously. I am not sure that an Inspector General would make any difference in terms of the investigation because the investigation would be conducted for us, as you described it now for the other agencies, by the FBI.

Senator SCHWEIKER. Let me focus maybe even more specifically on my question. Part I, section 9 of the FBI manual, for example, which is entitled "Disciplinary Matters," has this section in it. I would like to read it. This is a matter of the policing of possible areas of possible illegality. It's entitled "Disciplinary Matters."

It reads, and I quote:

Any investigation necessary to develop complete essential facts regarding any allegation against Bureau employees must be instituted promptly, and every logical lead which will establish the true facts should be completely run out unless such action would embarrass the Bureau or might prejudice pending investigations or prosecutions in which event the Bureau will weight the facts, along with the recommendation of the division head.

I think the attitudinal problem, the intrinsic institutional problem, here is a built-in procedure, that if it's embarrassing to the Bureau, that investigation is aborted. I'm talking here to the FBI. Frankly, I can make just as strong a case for CIA as someone else. I do not want to single out the FBI.

It seems to me as long as you have that attitude within the Government by enforcers and people who look at others for laws, we really have some problems. If it is embarrassing, do not pursue it, do not follow it up, do not investigate, abort. What is your response to that.

attitude, that situation? Do you agree with that statement? Should that be a part of the FBI manual?

Attorney General LEVI. Senator, I assume you know I do not agree with the statement. First, I do not know when this delightful statement was written. Statements of this kind have been in the Government long enough, I know get written, and there they are. They do remind me when I was in the Antitrust Division, of similar statements written by employees of companies, and obviously, it is a foolish and wrong statement. I am sure that it does not reflect the present policy or attitude of the Bureau.

On the whole, I think it is a rather good thing that you have this document and that I have it and that one can use it to make the point which I suppose has to be repeatedly made. But I can assure you that as far as I know, that does not represent the present position of the Bureau in any way. I have not seen this before. That should not surprise you. There are a number of these things I have not seen. I am glad to see it. I suppose that this is one of those actions that would embarrass the Bureau and so they will have to deal with it. It is a little unfortunate, I think, because I am sure the present leadership of the Bureau is not reflected in the slightest in this statement. Of course I am opposed to this statement.

Senator SCHWEIKER. To be fair, Mr. Attorney General, we did alert you this morning that I was going to make this point so you would have a response.

Attorney General LEVI. To be fair, that is really not the case. To be fair, I was alerted when I sat down here after lunch and I had no opportunity to check it whatsoever. I did not make any point of it, because it would not have made any difference.

Senator SCHWEIKER. We did call the Bureau this morning, Mr. Attorney General. They came back with a statement to me. I assume they came back to you around lunch time. My only point is we first talked about this esoterically, theoretically. You say you do not really see a need for an Inspector General's office. You do not see a need to police it. I'm getting very specific. I think intrinsically and institutionally that there is a heck of a problem and we have it here and this is just part of it. I am not pinning it on the FBI or CIA.

Attorney General LEVI. The Bureau does have a very active inspection system. The Department of Justice when there is an allegation of wrongdoing—we establish a separate group to look into it. So really it becomes a question—I am not arguing about the means.

Senator SCHWEIKER. I asked you that just 5 minutes ago.

Attorney General LEVI. Then I do not understand the question. I thought the question was, should we have an Inspector General in the Department of Justice for the entire Government. I thought that was what your question was.

Senator SCHWEIKER. Both.

Attorney General LEVI. As to the letter, it seems to me that the Department of Justice's function, when it is not referred to as a matter of law, would be a violation of the criminal law, and we have to be vigilant in the enforcement of criminal law.

Senator SCHWEIKER. What we are dealing with is an intrinsic, inherent institutional problem. In one of the other hearings we had on black bag jobs, a memo again said that in essence black bag jobs are

justified. The special agent in charge must completely justify the need for the use of the technique—black bag job—and at the same time assure that it can be used safely without any danger or embarrassment to the Bureau.

The point that I am making is that the criteria seem to be not what the facts are, not what the legalities are, not what the integrity of the system is, not what the enforcers ought to be doing, but is it embarrassing?

As you look through here, this is really the whole thrust, and to push it off and say: "Gee whiz, we do not need an Inspector General, we do not need this, we do not need that," is to ignore the whole mountain of evidence the other way. I think it is the job of this committee to point this out. I think it is the job of all of us to see if we cannot find a better way of giving assistance.

I do not want to say the FBI—I want to make it very clear you can make just as strong a case against any intelligence agency you would look at. It just so happens that we have something in terms of specifics. To say that there is no problem, to say that we do not need a system, to say that we do not seek some kind of inspector, is to say we do not have to take a look at it. I honestly do not think it's realistic. That is all I have, Mr. Chairman.

Attorney General LEVI. I wish to say that the Attorney General did not say those things.

Senator SCHWEIKER. I would like to insert into the record a statement provided to me by the FBI which is the Bureau's explanation of the provision in the present manual that I have been referring to.

[The material referred to follows:]

The FBI's Manual of Rules and Regulations; Part I, Section 9: Disciplinary Matters; Item C: Investigation; states as follows:

"Any investigation necessary to develop complete essential facts regarding any allegation against Bureau employees must be instituted promptly, and every logical lead which will establish the true facts should be completely run out unless such action would embarrass the Bureau or might prejudice pending investigations or prosecutions in which event the Bureau will weigh the facts, along with the recommendation of the division head."

The statement, "unless such action would embarrass the Bureau," means that in such eventuality, FBI Headquarters desires to be advised of the matter before investigation is instituted so that Headquarters would be on notice and could direct the inquiry if necessary.

The statement, "unless such action . . . might prejudice pending investigations or prosecutions in which event the Bureau will weigh the facts" means that in such cases, FBI Headquarters would desire to carefully evaluate the propriety of initiating or deferring investigation of a disciplinary matter where such investigation might prejudice pending investigations or prosecutions.

Nothing in this Manual provision is intended to deviate from the FBI's established policy of conducting logical and necessary investigation to resolve possible misconduct on the part of its employees.<sup>1</sup>

Senator HART of Colorado. Mr. Attorney General, just an observation of your statement: Much of the case law you presented, and the policy discussions over the years relate to unauthorized use of information by Government employees, FBI agents, or whatever, carrying out surveillance, wiretapping, and so on. One of the reasons that this committee sits and you are here today is the changed circumstances, the situation where the highest officials of our Government use the instrumentalities and the information they gain for whatever purpose,

<sup>1</sup> See Appendix, page 164.

largely for political purposes, often for an illegitimate purpose. What we want to do is address that problem, which is at least in my mind utmost, rather than the problem of the random FBI agent, Justice lawyer, U.S. attorney, or assistant U.S. attorney somewhere, who may strike out with a little bit of information he picked up. We are concerned about the frontiers here and consequently I think your thoughts on the question of warranted versus warrantless search and seizure, are extremely important to us.

I noticed at the beginning of your statement in this connection, you talk about your present policies of authorizing electronic surveillance, and interestingly enough, of the four categories you mentioned, two start off with the purpose of protecting, and two start off with the purpose of obtaining. I personally have very little problem with the two, starting off with protect. I have more problem with the two that talk about obtaining—"to obtain foreign intelligence deemed essential to the security of the Nation." That, as I am sure you would admit, is a very, very wide category. Although your statement is limited to electronic surveillance, it could be broadened to the breaking into embassies and a lot of other things. Do you feel competent to determine, even with the structure established under you, what is essential to the security of this Nation?

Attorney General LEVI. I feel competent to pass in a legal way on whether the kind of certification which has been given to me and to my staff, along with such responses to questions of importance which we may have, so that we are sure that the certification is taken seriously and so that we can have some measure of the importance. Yes: I feel competent to do that. I am sure that a different answer would be that the intelligence people would think that I was quite incompetent to do it.

Senator HART of Colorado. Would you feel equally comfortable with this procedure if you knew your successor were a highly politicized Attorney General, appointed by a President in which you had little confidence, whom you suspected would use this procedure to further his own political purposes?

Attorney General LEVI. I would never feel comfortable with people in high office if that is what it is, distorting the law for political reasons.

Senator HART of Colorado. There is no law here. This is the problem we are talking about.

Attorney General LEVI. That is not my view in the slightest. I think that there is law. I do not know how one defines that. There are cases; they make law.

Senator HART of Colorado. What cases would you refer to, to instruct you as to what is essential to the security of the Nation? We are talking about judgment here, factual judgment.

Attorney General LEVI. All right. That happens to come, that language comes from the proviso which Congress wrote into title III. And I suppose it would be the same law if Congress, in writing it in, had provided some kind of a procedure to implement it. We would still have to make that determination.

I do not know going back to—you asked me really two questions. One is am I competent to make that determination or members of my

staff; and second, how would I feel about someone who is distorting judgments for political reasons or something. I think speaking in this political forum, I always feel uncomfortable if legal matters, if the interpretation of this phrase in a sense is a legal matter, are distorted. But I think that the constructive problem is, if this is not the best way to do it, to find the best way to do it. I tried to discuss in the paper how one would do it if you went to a judge for a warrant; on that you would have exactly the same kind of a problem. It might be worse.

Senator HART of Colorado. How about a congressional oversight committee to which you brought these requests and consulted with them to share that burden?

Attorney General LEVI. That strikes me as raising both of the questions that you asked me. First, the one of competence and second, a political view. So I do not know what to say. You have had more experience than I have had on such matters, about whether that would make it more or less political. And the second question, I do not know if the information is secure. I cannot answer that either. Whether that would be some kind of a check, I do not know—that kind of a procedure as mentioned in the paper is followed in some foreign countries.

While I have not given—and I rather doubt whether a congressional oversight committee might want the specific job of passing on a warrant or an authorization, which I would not regard as oversight at all. I do not know what you would call it. I do not know whether you would want that. I have reported to what I regarded as the appropriate, so-called oversight committees, mainly the Judiciary Committees, quite precisely, on wiretaps and microphones. The question is how far one goes with that. I do not know whether it is the congressional oversight function to pass on a particular warrant. That may be. That seems to me to raise serious constitutional problems.

Senator HART of Colorado. I take it your answers so far would apply to the fourth category, also to obtain information certified as necessary for the conduct of foreign affairs. Does that include, let us say, a Secretary of State who is concerned about members of his staff talking to the press?

Attorney General LEVI. Certainly not.

Senator HART of Colorado. Certainly not?

Attorney General LEVI. Certainly not.

Senator HART of Colorado. Well, if to the degree that conduct of foreign affairs is being jeopardized or was thought to be jeopardized by possible leaks from within the staff, I would think obtaining information about that would be important, would it not?

Attorney General LEVI. If you think that, Senator Hart, I really have to worry about the procedure that you are suggesting about having it go to an oversight committee.

Senator HART of Colorado. I did not suggest it. I was merely asking your opinion.

Attorney General LEVI. My opinion would be it would not.

Senator HART of Colorado. Why is that?

Attorney General LEVI. I do not think that that is an appropriate way to read that kind of doctrine against the background of what I tried in this paper to describe as the reach of the fourth amendment. I would think it quite inappropriate and a violation really of what

the *Keith* case is talking about. I cannot believe that either you or I—

Senator HART of Colorado. I am sorry. We have some dangling answers here. I am not sure I understood what you said.

Attorney General LEVI. Apparently I misunderstood you. I thought you said that a scrutiny of a newspaperman as to whether he was getting leaks, whether that was necessary for the foreign affairs matters and national security of the United States, would that be uncovered? I misunderstood you to say that you thought it would be. That shocked me.

Senator HART of Colorado. I was asking a rhetorical question. Again, we have the problem that we don't know what your successor would think.

Attorney General LEVI. We do not know who he is, I presume.

Senator HART of Colorado. If the Secretary of State were to come to the Attorney General and say, "a member of my staff is talking to the press about matters important to the conduct of foreign affairs"—you say you would not grant it. We do not know whether your successor would.

Attorney General LEVI. It is unconstitutional.

Senator HART of Colorado. I hope your successor feels the same way.

Unfortunately, I have to go vote. We will bid you good day. Thank you very much for your participation.

[A brief recess was taken.]

Senator MATHIAS. Mr. Attorney General, you have chosen to visit us on a very peripatetic day. We seem to have difficulty in arranging our meeting so we do not stumble all over each other.

I was interested in several of the facets of the statement. One, in which you refer to the Constitution as emanating from and applying to the people. And I do not think any of us seriously challenges that as a concept. But I guess the difficulty arises, when do you decide that a certain American is no longer one of the people?

And let me ask the question, maybe more specifically, if an American citizen is charged with foreign espionage, does that separate him from the people?

Attorney General LEVI. No. Of course the fourth amendment applies to it, as do other constitutional protections. I think that was not really intended to be the thrust of that paragraph.

Senator MATHIAS. So that the mere charge or serious suspicion on the part of the law enforcement authorities would not suspend the protections of the fourth amendment?

Attorney General LEVI. Senator, if I may so say to sharpen it, the question is whether you think it applies to foreign nations. And all I was suggesting was that its application must at least take account of that difference.

Senator MATHIAS. Also in your statement, you refer to the fact that at the same time, in dealing with this area, it may be mistaken to focus on the warrant requirement alone to the exclusion of other, possibly more realistic, protections. That could get us into days of discussion on what more realistic protections are. I was more interested that there seemed to be a cross-reference between that and another line in which you refer to the Canadian experience, in which one of the other more realistic protections was the report to the Parliament of the number

of national security surveillances initiated, their average length, a general description of the methods of interception or seizure used, and an assessment of their utility.

You and I, on a previous occasion, discussed a bill which I had introduced which in fact calls for this very kind of a report to the Congress. I wonder if you would like to enlarge on either of these references?

Attorney General LEVI. I think that is a possibility, and I said, I think when you were not here, that I had, in fact, made something of a report that was made public to the Judiciary Committee which gave some of this information. Now, my guess is that the Solicitor General files in Canada are in fact, quite general, and it is probably somewhat the same as my letter, although mine did not include an assessment of the utility. When you were not here, Senator Hart was asking me how I felt about having a so-called oversight committee, if I understood him correctly, to determine whether a warrant or authorization could be given. That seemed to me to mix up all parts of the Government even more than they are now, and to raise security questions and so on. It is obviously something one can think about.

Senator MATHIAS. In somewhat the same area, Kevin T. Maroney who is your Deputy Assistant in the Criminal Division testified in the House and argued against a requirement of judicial warrant in all national security cases. One of the grounds he advanced was the question of the competency of judges, who are perhaps not that accustomed to dealing with foreign policy matters, to evaluate the affidavit of a person who is a foreign intelligence expert. It is a long time since I earned a living at the law. My recollection is, we impose on judges a task of evaluating a wide variety of technical questions on matters that deal with industrial processes, with surgical procedures, with traffic patterns, with environmental questions. Would you not think that a judge could evaluate an affidavit that the person who was a foreign intelligence expert as he does other expert testimony?

Attorney General LEVI. I think that there would be some problems. In the first place, it would be hard to get a doctrine of common law on the subject, because opinions could not really be written. A great deal of the material would be extremely confidential.

Since I concluded that portion of my paper, not Kevin Maroney's, by saying that I thought that a judicial warrant would give a greater sense of security to the country, I do not want to overpress the point that it would be difficult for judges to make the kind of determinations that would be necessary. I would say that I would assume that they would have to spend as much time on it as I do, and would have to have as much a staff on it as I do, which is considerable, and that there would be security problems, and so on and so forth, and the security of the judge. So that, I also think that the judges undoubtedly would respond to this in general by having broad categories where they automatically, where I do not, give the warrant. I think that that is a fact. I do not say that because I wish to keep for myself or my successors this undelightful duty. I think it is something that you have to take account of, though, in thinking about the legislation.

Senator MATHIAS. You have been very patient with us, I must say, in spite of the fact that your voice is still very strong and vigorous—

Attorney General LEVI. It is because of electronic surveillance.

Senator MATHIAS. Without pressing you on that point, I would say that it does concern me that an American has less protection because the "probable cause" standard does not exist if there is a suspicion of a national security interest in the case.

Attorney General LEVI. I think the fact is that at the moment Americans have much more protection under the procedures that we have devised than they do under title III.

Senator MATHIAS. That is a subject that will be debated, I think.

The CHAIRMAN. You are talking about your Department, are you not, and not the NSA?

Attorney General LEVI. Yes; that is all I am talking about.

The CHAIRMAN. You are just talking about the Justice Department?

Attorney General LEVI. That is correct.

Senator MATHIAS. I have two very brief other questions. I am just wondering if, in your view, the constitutional powers in the area of foreign intelligence are exclusive to the Executive or whether they are concurrent with the legislative branch?

Attorney General LEVI. They are sufficiently concurrent so that legislation by the Congress would be influential. You have an example of it, because the wording of the President's memorandum, while not identical, so closely follows the proviso that Congress wrote. You are asking me whether I think there is presidential power beyond that, and my answer is, "Yes."

Senator MATHIAS. Finally, and I realize this might be asking you to make a statement against your interests, whatever way you answer: Do you think the Attorney General ought to be a statutory member of the National Security Council?

Attorney General LEVI. I have never thought of that. Up until the present time, I have been delighted that I have not been.

Senator MATHIAS. If you think further of it and care to share your thoughts with us, we would be glad to hear them.

The CHAIRMAN. One final question from me. I have listened to the discussion of how one set of procedures, a traditional set of procedures involving courts and warrants, has developed in the criminal field; how a very different set of procedures exist in the intelligence or national security field; how, in the latter field, people could be watched and listened to without knowing in any way that their rights had been trespassed upon by a less scrupulous Attorney General than yourself, or a less scrupulous administration; and how there is nothing outside of the executive branch to check on it, and in this way it is different from the ordinary practices in the law; I think it is potentially very dangerous. You can fall back on the argument that good men will establish and follow good procedures, but there is no one outside the executive branch that can check on any of this, and I should think that there ought to be. Maybe it is not a judge that has to give a warrant. That may not be the practical way of dealing with it. Maybe it should be an oversight committee of the Congress that exercises jurisdiction over such matters, a committee that can ascertain to its own satisfaction that procedures are being followed and the laws, whatever they may be, are being adhered to.

The question I have relates however to the FBI. I sometimes think that the FBI has a kind of Jekyll and Hyde complex, in the sense that when it is dealing with law enforcement matters it has these rather



traditional procedures that it must adhere to; but when the same agency deals with the counterintelligence, national security, it is living in a different world. Would it be sensible to break the Bureau in two so that the part that deals with traditional law enforcement is that, and that alone, and that another department within the Justice Department and under the Attorney General would deal exclusively with national security and counterintelligence matters, that are really quite a different character than normal law enforcement?

Attorney General LEVI. Obviously, that is not a question that one answers without a great deal of thought. My own present view is that it would not be a good idea, because the point is to develop procedures which are adhered to just as vigorously in both areas. This is one reason we do have a committee which has been hard at work fashioning guidelines. These guidelines, when completed—I think the committee has seen some of them—will be in statutory or Executive order form.

But I think, whatever the shortcomings may have been in the past, that a strong attribute of the Bureau is its discipline, and that one wants to develop in this area—where, by the way, it is wrong in some sense to fault agencies when the law changed as it did. It would be desirable to develop procedures in that area which would evoke the same discipline and, although the area is quite different, there are comparable points, the checking, the reviewing, the getting permission, and so on. It is really a different world. One of the problems, Mr. Chairman, if I may say so, is when one looks at the past, one finds some terribly interesting things, but sometimes one forgets what the present is like.

The CHAIRMAN. I will not belabor the point, except to say when one agency does both kinds of work, I think that there is some danger, although it may be well-disciplined, for the methods in the one area to creep into the other. It may be more sensible to let counterintelligence and national security matters of that kind be handled by a separate bureau under the Justice Department. I would not want to see it all thrown into the CIA, for example; I want them to look outward in dealing with foreign countries, and not dealing with this country. But a separate department within Justice that deals with this quite separate matter from ordinary law enforcement, is an idea which I think should be given more thought.

Thank you very much for your testimony.

Our next witness is Prof. Philip Heymann of the Harvard Law School.

[The prepared statement of Prof. Philip Heymann in full follows:]

PREPARED STATEMENT OF PHILIP B. HEYMAN, PROFESSOR OF LAW, HARVARD LAW SCHOOL

I. INTRODUCTION

A. This Committee has heard evidence about a number of activities of the intelligence agencies which raise significant questions.

1. Two forms of activities are familiar:

- a. Surreptitious entries.
- b. Domestic electronic surveillance.

2. Two other forms of activity were previously unknown and raise comparatively novel questions:

- a. The opening of mail to and from the United States.