

Boundaries of Privacy in US Society

Comm 2 - State Invasions of Privacy

Topic 1 State Laws Concerning Electronic Surveillance

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I. STATEMENT OF THE PROBLEM

The problem of this paper is to investigate the state laws regulating electronic surveillance, the scope of this electronic surveillance and the means by which to improve these laws.

II. SUMMARY OF PRINCIPAL FINDINGS

1. The principal determinant factor as to the present extent and content of state electronic surveillance laws rests most fundamentally on the content of Title III of the Federal Omnibus Crime Control and Safe Streets Act of 1968. No state law regulating the field of electronic surveillance may contain provisions prohibited to it by Title III.

2. Presently certain provisions in Title III, either by direct grant or oversight, allow state procedures for electronic surveillance to be considerably less restrictive than federal procedures.

3. There exists considerable fault to be found with the procedures for conducting electronic surveillance and safeguards against unnecessary electronic surveillances to be found in Title III itself.

4. State law enforcement officials are conducting the overwhelming amount of official law enforcement electronic surveillance.

5. The necessity for establishing ^{more} ~~why~~ restrictive procedural safeguards is made ^{even} more urgent by the relative lack of effective means by which an individual can object to the conduct of surveillance or the evidence secured by this surveillance.

6. The upgrading of the standards for conducting electronic surveillance found in the body of Title III has two effects. One is to raise the standard by which state laws ^{may not} must fall beneath. Two, the upgrading of the standards in the body of Title III would raise the overall safeguards to be applied to federal surveillance as well.

III: POLICY RECOMMENDATIONS

Under Title III

1. The Federal capacity to establish uniformity as to the regulations and effect of federal and state conducted electronic surveillance must be used to the greatest extent possible.

The Federal government should act to eliminate the means by which state conducted electronic surveillance may be of a less restrictive nature than federally conducted electronic surveillance. The principal means of ~~this act~~ would be to eliminate the provision allowing states to conduct surveillance for any crime "dangerous to life limb or property and punishable by more than a year's imprisonment"; the regulation of "consent" surveillance presently left unregulated; and the more careful definition as to exactly who may ask for court orders to conduct surveillance, who may conduct electronic surveillance and who may grant court orders authorizing surveillance (see Areas in Which Title III Allows STATES To Differ from Federal Requirements.)

2. The present provisions of Title III need substantial revision to protect against unnecessary intrusions by electronic surveillance.

The emphasis should be on narrowing the numbers of officials involved in the conduct and authorization of electronic surveillance, narrowing the bases of authority by which law enforcement officials may ask for electronic surveillance, expanding the areasⁱⁿ which electronic surveillance may not be conducted or may be conducted only under very special circumstances, and expanding the legal authority under which a particular person may object to the conduct of electronic surveillance or the introduction of evidence gained by electronic surveillance. (See Pre-Surveillance Weaknesses, Surveillance Weakness, Post-Surveillance Weaknesses under Failings of Title III.)

Title III should remain as the principal focus of those individuals interested in reducing the scope of law enforcement conducted electronic surveillance. (See Effect of Title III under Part II and Present State Laws.)

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V: DISCUSSION

1.

At this preliminary juncture, only three terms need to be defined in order to commence discussion: wiretapping, eavesdropping and electronic surveillance. All other unfamiliar terms, or terms that, due to the nature of the particular subject discussed, need a very precise definition will be defined in the body of the discussion.

Wiretapping in the context of this report is defined as any interception of telephone or telegraph wires so as to intercept messages carried therein.

Eavesdropping, though usually thought to include the act of eavesdropping both using electrical devices and using only the ear, is in the context of this report defined as an attempt to intercept oral communication by use of mechanical or electrical devices only.

Electronic surveillance is defined so as to include both of the above terms.

Although controversy exists as to what exactly is the role a "right to privacy" played in legal history,¹ ancient law with respect to eavesdropping was more clear. Eavesdropping has generally been considered an invasion of some inherent right. The Talmud

¹See Appendix I for discussion of controversy.

declared: "To place a witness behind a wall so they may confirm an admission (of a debt) made privately is of no value."²

(shouldn't be accepted as evidence) In Common Law, eavesdropping was considered an offense. Blackstone, in his Commentaries, states: "Eavesdroppers...are a common nuisance and are indictable at the sessions and punishable by fine and sureties for their good behavior."³

Historical Development of State Laws

The first major steps to control interceptions of communications were initiated by the invention of the telegraph and telephone, and the abuses immediately made of these inventions. Although eavesdropping as an offense pre-dated wiretapping by several hundred years, the initial state activity concerned wiretapping. "Malicious mischief" statutes, that were primarily concerned with the physical destruction of telephone and telegraph property, were initially and unsuccessfully tried as vehicles under which to prosecute those engaged in wiretapping. The courts have held that these "malicious mischief" statutes, unamended so as not to include a specific provision forbidding wiretapping, could not be used to prosecute wiretappers.⁴ Several states, recognizing the possibility of the court's

² Talmud, p. (quoted in S. Horowitz, Spirit of Jewish Law, p. 179).

³ W. Blackstone, IV Commentaries on the Law of England (quoted in R. Hofstader, The Right of Privacy, p. 168).

⁴ See State v. Nordskog, 76 Wash. 427, 136 P. 694 (1913); Young v. Young, 56 R.I. 401, 185 A 901 (1936); State v. Tracey, 100 N.H. 267, 125 A. 2d, 774 (1956).

adversary rulings, amended their "malicious mischief" laws so as to include specific prohibitions against wiretapping.

Though the States generally attempted to prohibit private wiretapping, law enforcement wiretapping usually received preferential treatment. This preferential treatment given to state law enforcement officials quickly raised the issue of use of evidence obtained from wiretapping in criminal proceedings.

Eavesdropping received little uniform treatment in state statutes. Some states had no mention of eavesdropping at all, while simultaneously prohibiting wiretapping, others prohibited both wiretapping and eavesdropping; some states had no treatment of either category. South Carolina enacted a statute in 1937 that prohibited eavesdropping, but made no mention of wiretapping. As to treatment of police eavesdropping, the statutes ran the conceivable range of alternatives: prohibition of such activity; preferential treatment; use under judicial supervision.

Federal-State Relationship: Historical Summary

The first federal attempt to regulate wiretapping, the Federal Communications Act of 1934, had no substantive effect on the state laws or practices concerning electrical surveillance. The Act brought wiretapping under the scope of searches and seizures that were not permitted by federal officials, but the Act did not apply to state law enforcement officials. Earlier, in Weeks v. United States (232 U.S. 383, 1941) the Supreme Court had ruled that evidence

obtained by unreasonable searches and seizures was inadmissible or "excluded" from federal criminal proceedings. This exclusion of evidence was the principal legal deterrent against use of wiretapping and eavesdropping. However, this deterrent was not applicable to states for two reasons. One, as mentioned before, the Federal Comm. Act acted only to prevent federal wiretapping. Thus the states were free to wiretap and perform electronic eavesdropping as they pleased. Two, the exclusion of evidence seized in "unreasonable" searches and seizures, which were prohibited by the Fourth Amendment, was not a rule that applied to state criminal proceedings. Thus the states could perform unlawful or "unreasonable" searches and seizures in the knowledge that any evidence gained from such activity was admissible to state courts.

The effect of the Federal Communications Act, then, was to have no effect. No legal deterrent existed to a private citizen who was under electronic surveillance by law enforcement officials other than the unsubstantial, and in most states non-existent, avenue of initiating civil proceedings against the state law enforcement officials. State law enforcement officials were unregulated as to the extent of electronic surveillance they were permitted to conduct in several states. In these states that had legal regulations, however slight these regulations may have been, the law-enforcement officials were permitted to submit evidence gained from any type of electrical surveillance, be it lawful to unlawful.

For a long period, 1914 (Weeks v. United States) to 1961

(Mapp v. Ohio) there existed this dichotomy between federal and state criminal proceedings as to the exclusion of evidence gained from "unreasonable" or unlawful searches and seizures (the exclusionary rule). Mapp was the significant departure from past doctrine. The Supreme Court decided that the protections offered by the Fourth Amendment against "unreasonable searches and seizures" were now to apply to state as well as federal criminal proceedings in the form of the exclusionary rule. The rationale to the expanded application was the incorporation of the guarantees of certain amendments of the Bill of Rights (in this case, the Fourth) into the Fourteenth Amendment. This incorporation process acted to expand the guarantee of those amendments incorporated to the actions of state governments.

Incorporation as a legal process is currently the subject of significant legal controversy. The incorporation of the Fourth Amendment's protection is not an issue. However, the process as a whole promises to apply more and more of the Bill of Rights Amendments and their guarantees to the states as well as the federal government. A significant portion of the Supreme Court has argued and continues to argue for "total incorporation." The effect of this total incorporation, still the object of controversy, would be to make the constitutional "ground rules" for federal and state laws in the electronic surveillance and the general privacy field similar. The federal-state relationship, as much as it is governed by differences in applicability of certain amendments, would become much more inter-related and inseparable.

Federal-State Relationship: Present State of Affairs

In Berger v. New York (388 U.S. 41, 1967) the Supreme Court struck down the New York electronic surveillance statutes on the grounds of lack of specificity as to the time, place, and subject of surveillance and to other areas the Court considered vitally important to a "reasonable" search and seizure. The attempt by Congress to meet the specifications of reasonableness set down in Berger as to a electronic surveillance procedure by law enforcement officials was Title III of the Omnibus Crime Control and Safe Streets Act of 1968 which was passed on June 19, 1968.

Brief Summary of Title III

Title III of this act regulates the interception of communications when there is some substantial societal need for such interception and prohibits the interception of communications in most other instances. Communications that fall under the boundaries of the Act are those uttered orally which are not expected to be intercepted, and all wire communications. Interceptions are permitted: a) when an employee of a communications carrier or of the Federal Communications Commission performs the intercept during the normal course of their operations; b) when one of the parties has given their consent to the interception; c) under the Constitutional powers of the President to protect national security; d) by federal and state law enforcement officials acting under the authority of a court order under the requirements set down in the Title.

Apart from the four exceptions above, the question as to what types of interceptions are prohibited, is answered in some duplicity because of Constitutional considerations. One section, §2511 (1) (a), forbids all third party interceptions of wire or oral communications using a mechanical device. Congress, unsure of the constitutionality of the above clause, inserted an alternate section, §2511 (1)(b), which forbids all third party interceptions by a mechanical device of oral or wire communications which exist in any of the following categories: If the device used transmits through wire or radio communications; If the device was mailed or transported by other means in interstate commerce; If the interception involves a business that is somehow involved in interstate commerce or if the interception occurs in Puerto Rico, the District of Columbia or any other territory of the United States.

Effect of Title III Upon State Control of Private and Law Enforcement Conducted Electrical Surveillance

The area upon which Title III has the most explicit impact is the use of electronic surveillance by law enforcement officials of the various states. Congress made its intention clear to make any state statuta authorizing wiretapping by law enforcement officials that does not meet the requirements of Title III unenforceable. In other areas the intention and the authority to regulate are not quite so clear. Such as the case with private intrastate interceptions.

Private intrastate interceptions are most likely to be

deemed prohibited by §2511 (1)(a) which expressly prohibits all private interceptions. The application of this clause is generally thought to be intended to supersede state law.⁵ This particular clause is yet to be constitutionally tested. However, the following provision, §2511 (1)(b), is based upon the power of Congress to regulate inter-state commerce, a very broadly interpreted and widely used power. Congress' granted power to regulate all aspects of interstate commerce gives it without question the power to prohibit any interception of communications that meets any of the categories mentioned under §2511 (1)(b) in the preceding section. Thus, the interceptions that would remain outside the scope of automatic prohibition would be: one using a device made of home made materials (because if either the device or materials used to make up the device are in any way involved in interstate commerce the interception is within Congress' power to prohibit); and of a very local and uncommercial nature (because if the device assumes any of the characteristics of a business enterprise, the interception would be under Congress' power to prohibit); and not involving wire or radio communications.

The above argument, though complicated because of the nature of the law, is a step by step dramatization of the narrowing of the State's potential area of control in this area of interception of

⁵Wiretapping and Eavesdropping, Congressional Research Service Publication, p. xvii.

communications. The realm left to exclusive state control, if seen from the perspective of §2511(1)(a) (the complete prohibition) is nonexistent, if seen from §2511(1)(b) (the commerce power restriction) is very, very small indeed.

The other area that is not clearly defined as to the state-federal relationship under Title III is manufacturing, sale and possession of wiretapping and eavesdropping devices, §2512. While the power of Congress to control State regulation of this area is in and of itself not clear, the substantive effect of the prohibition of all private wiretapping and eavesdropping, §2511(1)(a) and (1)(b), and the existence of a detailed guide for the procedure of law enforcement surveillance is to render the authority of the State to regulate the area of manufacturing etc. non-existent. If no private electronic third party surveillance is permitted, the question of control over manufacturing, sale and possession of electronic surveillance devices by the States is not one bound to be raised by State officials.

Areas in Which Title III Allows States to Differ from Federal Requirements

There exist several provisions of Title III which, either through specific grant or by the nature of the state law enforcement system itself, make perhaps not intended special cases of required state proceedings.

Section §2516 lists specifically the offenses for which electrical surveillance is permitted by federal agents in hopes of securing evidence. However, the offenses for which state law enforcement officials are permitted to conduct surveillance to produce evidence extends far beyond the federal list (which is of itself too lengthy). The states may perform surveillance for any crime "...dangerous to life, limb or property and punishable by imprisonment for more than one year."⁶ The boundaries of the offenses so designated are almost without limit. According to Prof. Schwarz⁷: "Legislative history indicates that a crime dangerous to property can include failure to pay taxes."⁷ Thus any kind of pecuniary harm is covered by the statute. A partial list of crimes for which New York allows its law enforcement officials to conduct electronic surveillance is of interest:

"...promoting a suicide attempt...1st, 2nd, 3rd degree sodomy... 1st and 2nd degree abortion...sexual abuse...custodial interference...1st and 2nd degree escape...1st, 2nd, 3rd and 4th degree possession of dangerous drugs...criminal possession of a hypodermic needle...promotion of prostitution...1st and 2nd degree criminal mischief...promotion of conspiracy."⁸

Altogether some 73 assorted crimes, including the catch all "promote of conspiracy," which literally translated is the conspiracy to

⁶§2516 (2), Title III, Crime Control Act.

⁷H. Schwarz⁷, "The Legitimization of Electronic Eavesdropping: The Politics of Law and Order," 67 Michigan Law Review, p. 487.

⁸§814, 8b, Chapter 996, Title III, New York Statutes.

commit conspiracy, are included.⁹ Any state has the potential ability to expand the scope of surveillance to the degree New York has under the provisions of Title III. For an idea of the extent surveillance could possibly come to encompass in New York, consider the following. All users of hard drugs, prostitutes, pimps, homosexuals, users of marijuana and political activists in New York State are legally within the scope of electronic surveillance. The over extent of the permitted scope seems obvious. Added to the fact that the scope is so large, is the agreed conclusion that electronic surveillance has little effectiveness against the vast majority of crimes listed in the New York statute. However this particular area of need and effectiveness of electronic surveillance will be discussed in the section Portends for the Future.

In other areas of Title III, provisions for restrictions placed upon federal agents assume a totally different perspective when applied literally to the states. It is important to remind the reader at this point that Title III's provisions for the proper procedure to be followed for conducting law enforcement surveillance may be incorporated as is by the state governments no matter how absurd or damaging to a ordered system of surveillance the consequences may be.

⁹For a complete list of the offenses for which New York permits electronic surveillance, see Appendix II.

Three areas in particular which assume totally different consequences when the provisions are applied to the federal and state governments are the following: the number of personnel allowed to ask for a court order to conduct surveillance, the number of personnel allowed to actually perform surveillance and the numbers of judges allowed to grant court orders.

Section §2516(2) defines the people to whom is granted the authority to ask for a court-enabling order to conduct surveillance as: "The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political sub-division thereof."¹⁰ Thus, the prosecutor of a city or county and any political sub-division thereof is potentially able to be authorized by state law to have the authority to ask for electronic surveillance. A valid argument may be made as to the unnecessary of allowing even the existing city and county prosecutors to be authorized to conduct surveillance. New Jersey has 21 counties and 5 cities that have prosecuting attorneys. Twenty-six district attorneys is already too many different sources which to allow the power to ask for court orders. But, the potential for abuse is far greater. Any political sub-division may, if there is a prosecuting attorney present, be authorized to ask for court orders. New Jersey has literally hundreds of municipalities.

Section §2510(7) defines those personnel allowed to conduct electronic surveillance as an "investigative or law enforcement

¹⁰§2516(2), Title III, Crime Control Act.

officer." Title III in its definition of "investigative or law enforcement officer" states the title is applied to "any officer of the State or political sub-division thereof."¹¹ The numbers of people allowed to perform surveillance at a state level is tremendous. New Jersey has 16,105 full-time state, county or municipal police.¹² Every one of these officers is legally permitted, under the provisions of Title III, to perform surveillance. A necessary step is the authorization by the state, but the potential for abuse is present. The Uniform Crime Reports of 1970 indicate that there exist 233,562 police officers in 4,068 cities which contain 114,757,000 people.¹³ Extrapolating these figures to approximate the number of police officers nationwide a conservative estimate would be 350,000 police officers. Every one of these officials is legally permitted to conduct electronic surveillance if state authorization is extended to the fullest capabilities Title III will allow. These figures do not attempt to include the very real possibility of part-time officers or deputized private citizens acting as "investigative or law enforcement officials."

A third significant area from which application of Title III standards have great potentialities for abuse when applied on a state

¹¹§2510(7), Title III, Crime Control Act.

¹²1970 New Jersey Plan for Criminal Justice, State Law Enforcement Planning Agency, Discrimination Document 8, p. 67 and 76.

¹³Crime in the United States, Uniform Crime Reports, Table 50.

level is the number of judges who are enabled to give court authorizations of surveillance. Section §2510(9) of Title III defines the judges of a State legally permitted to grant Court orders as "a judge of any Court of general criminal jurisdiction of a State who is authorized by a statute of that State."¹⁴ Again the potential for state abuse is immense. Connecticut has 4 U.S. District Court judges who are enabled to grant federal court orders, but over 30 State Superior Court judges who could conceivably be granted authorization to issue court orders enabling surveillance.¹⁵ New Jersey in 1967-1968 had 78 judgeships for the Superior Court, 7 Supreme Court Justices and 88 County Court judgeships.¹⁶ All these judges are legally permitted by Title III to be authorized by New Jersey to grant court orders.

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Areas Left Free of Regulation by Title III

Title III's scope of regulation of electronic surveillance leaves unregulated several areas of wiretapping, only one of which could conceivably be of some application to the states, "consent" electronic surveillance. "Consent" surveillance is surveillance by

¹⁴§2510(9), Title III, Crime Control Act.

¹⁵Weinstein, "The Court Order System of Regulating Electronic Eavesdropping under State Enabling Legislation," Connecticut Law Review 2, Winter 69-70, p. 267.

¹⁶1970 New Jersey Plan for Criminal Justice, op. cit.,

Greater numbers of people associated with the authorization and conduct of electronic surveillance do not necessarily increase abuses of the process. In recognition of this criticism, this paper's recommendation to narrow the present number of people legally permitted to conduct electronic surveillance may be more persuasively supported if the discussion concerns itself with the advantages of this centralization or decrease in number as well as the potential dangers of the present situation.

Legally requiring (by revision of Title III) the centralization of the conduct of electronic surveillance may be discussed from two perspectives. First, the centralization would act to increase the effectiveness of the surveillance itself. The time consuming, complex nature of electronic surveillance lends itself intrinsically to conduct by some sort of centralized professional group. For example, New Jersey has a special investigating unit attached to the State Police which is responsible for conducting surveillance. Electronic surveillance presently is not of a sufficiently large scope ^{in any state} to preclude this exclusive assignment of the responsibility for the conduct of surveillance to a relatively small centralized force. ^{In addition,} Investigators operating within a centralized "special unit" type system through experience would gather information and interpret the gathered information in a more effective, professional manner. Perhaps these investigators might be required to meet more rigid

requirements than a standard police officer and receive special training in techniques of electronic surveillance. Secondly, the centralization would act to better insure against abuses of the system. Electronic surveillance inevitably gathers information not relevant to the purpose of the surveillance. Some of this information may be of an extremely confidential nature. The danger this paper would like to eliminate is that of local police officials conducting surveillance and thus being exposed to this potentially damaging information. Local police officials in an average community have unofficial as well as official relationships with several members of the community. Discounting the possibility of intentional abuses of the information, there exists a possibility of unintentional divulgences by a slip of the tongue or unknowing remark. On the other hand, a centralized special-unit investigating team would enter a particular environment, conduct an investigation and then leave, hopefully carrying with them the inevitable bits of information that are not relevant to the investigation, but are potentially damaging to parties involved in that investigation.

Decreasing the numbers of judges permitted to authorize electronic surveillance and officials permitted to ask for authorization is not so vital an issue as the previous one. However, the narrowing of the number of authorizing judges would help to insure against "judge shopping" by official seeking authorization to conduct surveillance. As to the

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criticism

made of this paper's objection to the number of officials permitted to seek authorization, no substantive supporting argument may be advanced and perhaps the paragraph (marked in red) should be struck. 612

or with the consent of one of the parties to the conversation. This area was left free from regulation by Title III because of the rationale that a participant to a conversation is free to divulge or record the communication. Thus, this is an area which Title III has by default left open to State regulation.

The particular danger of this type of surveillance is that the only alternative for an individual wishing to free himself from the possibility of "consent" surveillance is to not speak--ever. The courts have been unwilling to venture into this field. A recent law review in commenting on the scope of "consent" surveillance states that these practices "...are probably more widespread than third-party surveillance."¹⁷ This particular type of surveillance is by far the most psychologically stifling, because of the perceived pervasiveness of surveillance. Those nations relying on a tightly structured "informer" system (one facet of "consent" surveillance) have shown themselves to be effective in stifling individual dissent or freedom of expression.

Failings of Title III

Up to this point the discussion has centered on those areas in which the Crime Control Act's Title III has indirectly or directly allowed state requirements to be more permissive than federal

¹⁷H. Lee Van Boven, "Electoral Surveillance in California: A Study in State Legislative Control." 57 California Law Review, November, 1969, p. 1231.

requirements as to law-enforcement procedures for electronic surveillance. Title III has also left "consent" surveillance unregulated and thus open to state regulation. However, there is very substantial fault to be found with the body of Title III itself. These faults tend to be incorporated in totality by the states who are now drafting court-order enabling statutes for electronic surveillance. This total incorporation of the Federal law into state statutes occurs because of the added aura of responsibility and posterity the state law assumes in the eyes of the drafters by duplicating federal law and the ease that this incorporation or copying brings to the usually tedious stage of drafting a court order enabling statute for electronic surveillance.

An extensive treatment of the weaknesses of Title III and the means of correcting these weaknesses would be of excessive length for this paper. Therefore the areas of concern will be treated in three broad categories, those procedural failings of pre-surveillance procedures, surveillance procedures and post-surveillance procedures. Previous to an intelligent discussion of the procedural weaknesses of Title III's court order system of electronic surveillance, the system must be summarized. However, again due to limitations of space in this discussion, the summarization may be found in Appendix III.

Pre-Surveillance Procedural Failings

Perhaps the most controversial aspect of the present structure of Title III's requirements for police electronic surveillance

is the "emergency authority" to intercept communications. If an "emergency situation exists with respect to...conspiratorial activities characteristic of organized crime" and "there are grounds upon which an order could be entered under this chapter to authorize such interception,"¹⁸ the persons enabled to ask for court orders (generally district attorneys) are able to perform surveillance without a court order. The district attorney then has 48 hours after the interception has occurred to make an application for an order. This provision literally allows a district attorney to determine for himself when an emergency exists and to perform surveillance.

The weakness of the provision and the rationale behind the provision are substantial. The arguments will be three-fold. First, the advocates of electronic surveillance argue that one of the inherent restrictions of electronic eavesdropping is the considerable difficulty entailed in setting up an interception in just a mechanical sense.¹⁹ If this inherent restriction is true, then the very advocates of electronic surveillance have given a substantial reason why there is no necessity for emergency provision. A cumbersome procedure is of no use in an emergency. Secondly, the time allowed, 2 days, before a court order must be sought is too lengthy. Two days is not a reasonable amount of time expected to be needed to find a judge

¹⁸§2518(7), Title III, Crime Control Act.

¹⁹See section Needs for Wiretapping under heading Portends for the Future, p. 27.

who is authorized to give a court order, especially if the situation is an emergency. Thirdly, the pressure brought to bear on a judge to authorize an intercept ex post facto would be of great magnitude, if incriminating evidence was obtained, perhaps enough to expect that a judge would overlook some small procedural failing in the request. For example, if an "emergency provision" intercept discovered evidence that ^{incriminated} ~~served~~ an official high in the organized crime structure, what judge would not have second thoughts about overlooking some failing?

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The "emergency provision" has little if any effect in actually serving to aid a police official in coping with an emergency situation. The law enforcement officials' own claim of the technical limitations of electronic surveillance negate any benefit that the provision might conceivably bring in dealing with emergencies. Thus, the only possible effect of the emergency provision is to enable ^{zealous} police officials to conduct exploratory searches under the justification of the existence of an emergency.

Privileged communications ^{is} ~~id~~ treated much too permissively by Title III. A privileged communication is generally defined as a doctor-patient, husband-wife, lawyer-client, priest-penitent communication. Traditionally, the law has given these relationships special consideration. Title III does not. Even special consideration, if it were to be included in the provisions of Title III, would not

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Increasingly, the American public has been told by law-enforcement officials that the primary fault for increasing crime in the U.S. falls upon our permissive "revolving door" court system. Without arguing the validity of the charge, one can still recognize the fact that pressures exist for courts to deal more severely with crime. Perhaps a hypothetical situation will prove enlightening. Mr. E, a high official in organized crime, is surveilled under the emergency clause and incriminating evidence is obtained. However, in filling out the application the police official mistakenly filled in the wrong date or hour. A more probable situation perhaps would be that the authorizing judge decided the time taken to report the intercept and ask for authorization had exceeded the deadline. The evidence obtained in these cases would thus be inadmissable. In either of these instances the criticism of the court would be severe. One can imagine the newspaper tabloids and critics of the courts savoring the situation. ^{In order to avoid such pressures,} A judge could very easily say that he received the phone call requesting authorization at 2:00 a.m. instead of 5:00a.m. and the fact that the authorization deadline had passed could go unnoticed.

be sufficient protection. Ostensibly all intercepts of communications are now given careful consideration. The only existing alternative is a flat prohibition of such communication.

Federal electrical surveillance presently may be conducted in hopes of securing evidence of too wide a range of offenses. The effectiveness of wiretapping, however, is conceded even by its most outspoken advocates as effective only against long-term, continuing types of activities (gambling, large-scale drug dealing). According to the American Bar Association, "they (wiretaps and electronic surveillance techniques) offer promise of help to the function usually only where multiparty activity extends over a relatively long period of time."²⁰ Thus those offenses which are included under the offenses for which electronic surveillance may be conducted under Title III should not include crimes of evidence and of an unplanned or individual nature. Only those crimes which fall under the category of effectiveness as stated by the ABA Standards should be included.

Two other areas which should be more stringently controlled are surveillance of public areas and surveillance granted under the heading of "probable cause that an individual is...about to commit an offense."²¹ The former topic is one that should be regulated extremely carefully. The surveillance of public areas involves the

²⁰ Minimum Standards for Electronic Surveillance,
American Bar Association, p. 48.

²¹ §2518, 3(a), Title III, Crime Control Act.

potential of intercepting many innocent communications unless extreme precaution is taken. The limitations on time period for which surveillance can be conducted overall should be extremely limited not to the present 30 days or this discussion's proposed reduction of this limit, but to an even smaller limit. Also the length of time any one intercept is allowed may extend should be severely limited as well. On Katz v. United States the procedures used by the agents who conducted surveillance was exemplified as a reasonable intrusion into a public area. Mr. Justice Stewart declared: "The agents confined their surveillance to the brief periods during which [Katz] used the telephone booth, and they took great care to overhear only the conversations of the petitioner himself."²² This specificity and care with which the agents conducted the electronic surveillance in Katz's case should be codified in the procedures needed to conduct electronic surveillance in any public area in order to insure that wanton interception of innocent communications does not occur.

The later topic, the authorization of court surveillance under the heading of a crime "about to be committed" demands discussion. The Title grants authority to conduct surveillance in this particular case under no discernible justification. If the officer in reality knows that there is an offense that is about to be committed, the prerequisites for a successful conviction are present without a need

²²Katz v. United States, 389 U.S. (1968) at 354.

for electronic surveillance. What the particular clause does accomplish is a fostering of exploratory searches into the communications of those individuals who previously have committed or seem capable of committing the particular offense. For example, an individual's advocacy of an active political demonstration may quite possibly be enough of a "probable cause" that a crime (incitement to riot) is "about to be" committed. The entire concept of "probable cause of an offense to be committed" is too subject to extremely subjective interpretation and also promotes general exploratory searches into the communications of those persons deemed suspicious by officials of law enforcement and the judiciary.

Surveillance Procedures

Title III potentially authorizes continuous eavesdropping for potentially vast periods of time. Although the Title does make provision that the communication must stop after the desired intercept has been obtained, this provision is open to two criticisms. First, what law enforcement official will stop at one indication of incriminating evidence? The natural tendency of police officials and the nature of our court system demand at least ^{in theory} ~~ostensibly~~, substantial proof "beyond a reasonable doubt." Secondly, those individuals who are least deserving of the electronic surveillance in the first place will be exactly the ones who will be subjected to the longest attempts to gain incriminating evidence. The present 30-day time limit is much too long, especially if the necessity for the interception has supposedly been substantially documented in the first

place. One of Berger's fundamental criticisms of the New York statute was its 60-day limit. Thirty days does not seem to be an appropriate reduction.

The other fundamental weakness of the surveillance procedures is the treatment of a situation in which evidence of a crime not specified on the court order is gained (i.e., the order specified gambling and evidence of a narcotics violation appeared). Presently Title III does not bar this evidence from court proceedings. Prof. H. Schwarz has succinctly stated that "curtailing intrusive conduct linger upon reducing the incentive for such conduct." Allowing police officials to use any and all evidence seized destroys the original intention of limiting the intrusions of electronic surveillance to specific crimes. A rule allowing authorization for one offense and use of evidence of another found by the surveillance offense lends itself too much to general exploratory searches. Only evidence of the crime for which the order was initially authorized should be allowed to be admitted into court proceedings.

Post-Surveillance Procedural Weaknesses

The principal weakness of the post-surveillance proceedings have to do with the area of standing needed to challenge the introduction of evidence into a court proceeding. Under Title III, only those people who were parties to the intercepted communication or those "against whom the interception was directed" may object. To submit an example, a drug dealer is convicted on the basis of evidence secured

by electronic surveillance made on the conversation of two acquaintances. The dealer has no legal standing to object to admission of evidence. Although the Supreme Court has recently acted in the area of standing it has not served to definitely enlarge the scope to any considerable extent.

The means by which an aggrieved person may object to evidence secured under an electronic surveillance of alleged legal irregularities is through request of use of the exclusionary rule. However the use of the exclusionary rule is unsuited to a general application in the area of electronic surveillance for several reasons. The exclusionary rule works optimally at prohibiting introduction of specific articles. Unfortunately, the nature of electronic surveillance often leads to general searches for strategic information. A prohibition of introduction of evidence to a trial is often of little value in a case where law enforcement officials make use of general strategic evidence to lead to future prosecution on specific evidence.

Another of the faults of the post-surveillance procedure is the fact that the defendant, upon making a motion to suppress the evidence gained from an illegal intercept of communication, is allowed upon "discretion" of the judge "such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice."²³

²³ ~~H. Schwarz, op. cit., p.~~
 § 2518(10)(b), Title III Crime Control Act

Present Situation: State Laws and Surveillance

A brief review of the present state laws bears out the contention that the principal determinant force in the field of interceptions of communication is and will continue to be the Federal Government through its role in Title III.

Except for a few previously mentioned exceptions, the Federal law of Title III prohibits all private interceptions of communication. Thus, any state law to the contrary is precluded. Those states that do not have a court order enabling statute based on Title III's procedures do not have the opportunity to conduct law-enforcement electronic surveillance. Those are all the states but seventeen. A general summary of the present state of affairs will be found on the Table following this page.¹ However, an important consideration is that only those states listed in the last column (Wiretapping and Eavesdropping under Judicial Supervision) may conduct state-level law enforcement electronic surveillance.

The states having a court order enabling statute are as follows: Arizona, Florida, Colorado, Georgia, Kansas, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New York, Oregon, Rhode Island, South Dakota, Washington and the District of Columbia.

1. Wiretapping and Eavesdropping, Congressional Research Publication, pp. XXVI-XXX.

xxvi

No wiretapping
or
eavesdropping statute Wiretapping law Eavesdropping law Both wiretapping
& & eavesdropping law Wiretapping & eavesdropp-
ing under judicial
supervision

State	No wiretapping or eavesdropping statute	Wiretapping law	Eavesdropping law	Both wiretapping & eavesdropping law	Wiretapping & eavesdropp- ing under judicial supervision
Alabama		X			
Alaska				X	
Arizona				X	X
Arkansas		X			
California				X	X
Colorado				X	
Connecticut				X	
Delaware				X	X
District of Columbia				X	X
Florida				X	X
Georgia				X	
Hawaii					
Idaho			X		
Illinois					
Indiana	X				
Iowa					
Kansas				X	X

<u>State</u>	<u>No wiretapping or eavesdropping statute</u>	<u>Wiretapping law</u>	<u>Eavesdropping law</u>	<u>Both wiretapping & eavesdropping law</u>	<u>Wiretapping & eavesdropp- ing under judicial supervision</u>
Kentucky		X			
Louisiana		X			
Maine	X				
Maryland				X	X
Massachusetts				X	X
Michigan				X	X
Minnesota					
Mississippi	X				
Missouri	X				
Montana		X			
Nebraska		X			
Nevada				X	X
New Hampshire				X	X
New Jersey				X	X
New Mexico		X			
New York				X	X

Wiretapping & eavesdropping under judicial supervision

Both wiretapping & eavesdropping law

Eavesdropping law

Wiretapping law

No wiretapping or eavesdropping statute

State

North Carolina

North Dakota

Ohio

Oklahoma

Oregon

Pennsylvania

Rhode Island

South Carolina

South Dakota

Tennessee

Texas

Utah

Vermont

Virginia

Washington

X

X

X

X

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X

X

X

X

X

X

X

X

X

X

X

xxix

Wiretapping & eavesdropping under judicial supervision

Both wiretapping & eavesdropping law

Wiretapping law Eavesdropping law

No wiretapping or eavesdropping statute

State

West Virginia

Wisconsin

Wyoming

X

X

X

The similarities between the state statutes and Title III are readily apparent. No state can make more permissive regulations and procedures, except where specifically allowed, and not many have made provisions that are more stringent than Title III's provisions for law enforcement interception of communications. A brief summary of the laws stressing the few instances where state law is more restrictive than federal law is contained in Appendix IV.

The most comprehensive source to the amount of official electronic surveillance by state law enforcement officials is the Judicial Conference of the United States Report (1970). The most recent statistics are for the period January 1, 1969 to December 31, 1969. As of that period only eight states (Arizona, Colorado, Florida, Georgia, Maryland, New Jersey, New York and Rhode Island) had court order enabling statutes to conduct electronic surveillance. Therefore, only these eight states were legally permitted to conduct electronic

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surveillance. During the specified period, 269 state authorized court orders were granted as opposed to only 1 denial. The intercepts were authorized for a wide range of time--a few hours to thirty days. The offenses for which court orders were granted ranged from abortion to usury. Predominantly listed, however, were five general areas of offenses. These general areas were Drugs, Extortion, Gambling, Homicide and Robbery. The cost of the intercepts ranged from a high of \$45,554 to a low of \$20 for another. The average cost in the state intercepting the most communications, New York, was in the area of \$1000.²⁴

The above statistical summary communicates several messages and is deserving of comment. The states are the bodies that are conducting the vast majority of court ordered surveillances. As an example, 33 Federal Court orders were granted in the same period.²⁵ This plain fact of state numerical dominance in intercepts is made even more distinct by the following statements: These statistical summaries are summaries of the activities of only eight states; the present number of states legally permitted by Title III to conduct electronic surveillance is presently more than double that number; California and other states have court order enabling statutes proposed before their legislatures. The remaining states will be subjected to pressures to pass court order enabling statutes as

²⁴The figures to be found in this paragraph are generally footnoted as Director of the Administrative Office of the United States Courts, Annual Report (Proceedings of the Judicial Conference of the United States), Appendix III.

²⁵
Ibid.

well for several reasons. One is the logical desire of any state to put the "most advanced tools" of crime fighting within the scope of instruments legally permitted to their law enforcement agencies. Two, a state expressly prohibiting the use of electronic surveillance by its own law enforcement officials could not guarantee that Federal agents would not conduct electronic surveillance inside its boundaries, under a Federal Court order. The authority of a Federal judge to grant authorization to conduct surveillance is independent of any state law expressly forbidding law enforcement surveillance. Therefore the states have little to gain by forbidding law enforcement surveillance, in the way of personal privacy, and much to lose in the eyes of law enforcement officials, by way of increased law enforcement capability and efficiency in its crime fighting function.

Portends for the Future

Potential for Abuse

The states are now and will increasingly become the main vehicles by which electronic surveillance is conducted. In light of this situation, the elimination of those indirect or direct provisions presently existing in Title III that allow states to conduct law enforcement surveillance on a more permissive basis than the Federal requirements assumed special urgency.

The statistics cited in the Judicial Report... prove to some that the states have not and thus will not exploit their capabilities to extend wiretapping to the fullest legal boundaries permitted. Are the relatively low number of intercepts authorized, the tendency, so far, to limit interceptors to crimes of a generally serious nature, and the relatively high average cost of each interception an argument that the states need no further restriction in this area? Even discounting the very real possibility of a difference between officially reported intercepts and actual intercepts, the answer remains no.

The citation of the relatively high cost of each interception ignores the possibility of technological refinements or innovations that would reduce the expense of materials, the man-hour input per unit of surveillance and the technical expertise needed to set up and operate surveillance devices.

The argument for an unnecessary of further limitation on state surveillance procedures is also faulty and lacking in perspective as to the nature of the problem. A fundamental thesis of this discussion is that the potential for abuse should be limited whenever and however possible. The extent to which power is used is in the long run limited by the potential use of that power. The present body of Title III and the manner in which states are allowed to deviate is a potential abuse of the power to conduct electronic surveillance. A sudden expansion of the states potential power in

this field would most likely cause concern, a slow incremental process of expansion may not.²⁶

Two forces that are generally submitted to factors that would limit the extent of surveillance, legislative responsibility and "public opinion," may work towards expanding the general scope of surveillance. State officials, normally a focus of conflicting interests, are presently more receptive to demands of controlling crime in the streets than to the countervailing and much more ambiguous demand for greater individual liberty. The state legislators reflect the interests of their constituents. "Public opinion" is demanding more and more protection from crime in the streets. Americans have been frightened by the political and social events of the past decade. The tranquility and security have assumed positions of tremendous social importance, even if the case of this tranquility is the lessening of other rights.²⁷ The expectancy that public opinion will prove to be a significant balancing force to governmental excesses is tenuous.

²⁶ the areas in which the states could expand are those mentioned previously, pp-9-15, (I.e., making all offenses which are punishable by over a year subject to the possibility of electronic surveillance and the other means by which states had the potential to expand their powers listed under Federal State Relationship Present.

²⁷ A CBS survey of 1,136 persons was published in the April 27, 1970 issue of Time magazine on page 19. The article reported that the results of the survey was as follows. "As long as there appears to be no clear danger of violence, do you think any group, no matter how extreme, should be allowed to organize protests against the Government?" No--76% "Do you think everyone should have the right to criticize the Government, even if their criticism is damaging to the national interest?" No--54%.

arguments against the use of electronic surveillance in the following statements.

"...in several cities where organized crime is most severe, police and prosecution have in the past used wiretap without inhibition. It has not been effective. Organized crime still flounders in these communities..."²⁹

"Organized crime cannot exist where criminal justice agencies are not at least neutralized and probably corrupted to some degree."³⁰

Many people, including law enforcement officials and the AABA, agree that electronic surveillance is not effective against crimes not of an organized nature. Few law enforcement officials, however, would agree with Ramsey Clark's contention that electronic surveillance is not effective against organized crime. Most prosecutors or police officials would at least be sympathetic to the statement made by one of the most successful prosecutors of the nation, Frank Hogan of New York City that "wiretapping is the most effective tool" of law enforcement.

There presently exists little if any empirical data as to the effectiveness of electronic surveillance.³¹ The argument centers more on comparative crime rates, and such other ambiguous comparative statistics between those areas that do or do not employ electronic surveillance. The lack of clarity in the issue favors those in favor

²⁹ Ramsey Clark, Crime in America, p. 267.

³⁰ Ibid., p. 268.

³¹ Preliminary evidence shows a high correlation between official intercepts and arrests. See Annual Report, Proceedings of the Judicial Conference of the United States, op. cit., p. 415.

Challenges to Electronic Surveillance and to Title III: Necessity of to Their Failure

The challenges to electronic surveillance as a concept is two-fold. Some individuals contend that electronic surveillance is per se unconstitutional. The main contentions being that the 4th Amendment prohibits "unreasonable" searches and seizures and that a warrant system of searches and seizures requires that the article to be seized be named specifically. Electronic surveillance is said to violate these two requirements by its inherent nature of intrusiveness and generalness of search. However, this challenge to the existence of electronic surveillance ignores the realities. The Supreme Court has recognized the constitutionality of electronic surveillance, if the surveillance meets certain terms (including "reasonableness" and "specificity") in its opinions in Berger and Katz. Such listing of requirements implies that these requirements may be met. A recent article in a law review noted that debate whether wiretapping and eavesdropping were legal per se was diminishing in importance and substance.²⁸ The main concern presently is regulation.

The efficacy, as well as the constitutionality, of electronic surveillance has been challenged. Ramsey Clark summarizes the

²⁸Weinstein, op. cit., p.

of the status quo, or the use of electronic surveillance.

Title III must be accepted as the vehicle with which one must deal with the conduct and procedures of law-enforcement surveillance. Electronic surveillance will not be deemed illegal nor will it be reformed out of existence. The technique exists and will continue to exist as part of our legal structure. The best method of regulating the system of law enforcement surveillance is a court-order system, which Title III essentially is. With very substantial procedural revisions, Title III serves as the best method of regulating the whole state and federal structure of electronic surveillance.

Conclusion

The substance of Title III must necessarily perform two functions. Title III must eliminate those areas (which exist because of specific exceptions to the states, nonregulation of that entire area or similar standards having dissimilar effects on the federal and state systems of law enforcement) that allow state electronic surveillance to be substantially more permissive than federal standards.

Federal standards as a whole must be substantially revised in order to restrict the power of law enforcement agencies to the smallest and most narrow of grounds absolutely necessary to deal with the problems that are the whole system's original, organized crime.

Areas Outside the Scope of This Report

There exist other state-related but non-electronic surveillance areas in which the state government deals with search or surveillance. Of these areas (Stop and Frisk Laws, Physical Search and Seizure Laws, Use of State Undercover Agents or Informers and State Surveillance for National Security Reasons) the latter two demand revision. This report recommends that State use of informers be submitted to the same restrictions the report recommends for state law-enforcement electronic surveillance. State National or Internal Security Surveillance should be examined as to its necessity. However, this report ^{intuitively} recommends that such "security" surveillance be, unless very strong reasons why the Federal Government cannot assume the responsibility are shown, be left to Federal agents. See the attached article, Appendix V, for a lucid presentation of the present scope of such security surveillance.

Ray Hartwell

APPENDIX I: HISTORY OF THE LEGAL RIGHT TO PRIVACY

The Controversy

Distinguishing the right of privacy from other more visible rights, the right of property and contract, is a fundamental problem in an understanding of the legal right to privacy. Where one legal scholar sees the right of property expressed, another sees the right of privacy. The controversy as to what are the legal roots of privacy arises as a result of these differing perspectives. Two easily identifiable camps can be distinguished in the controversy. One faction notes that privacy has existed as a deeply rooted fundamental right in legal history; another faction sees privacy as a modern, evolving right that has only very limited expression in past legal history. Oddly, the controversy centers more on means than ends. The claim that privacy presently exists to some degree as a legal right is not disputed by any significant number of legal commentators. The claim that the Warren-Brandeis article "The Right to Privacy" had a substantial effect on the cause of the right is also not of a divisory nature. Only the means by which we have arrived at the present existence of some right to privacy is of dispute. The conflict centers more on perspectives from which one views facts and the emphasis upon these facts than upon the nature of the facts themselves. Hence, in some ways, the conflict is without solution and the clearest manner in which to present the legal roots of privacy is to briefly summarize both arguments.

The historically oriented legal scholars, the most prominent being Alan Westin (Privacy and Freedom), argues that the right of privacy is a deeply rooted, well expressed right in legal history. The earliest intimation of a right of privacy is to be found in Jewish law, specifically the Mishnah (a compilation of Oral Law of ancient Israel collected about 200 A.D.). There exists a law governing the height of walls surrounding residences, so that a neighbor "should not peer and look into his house."¹ Maimonides, a renowned Jewish legal scholar in the 12th century declared: "...the harm of being seen in privacy is a legal wrong."² Both Roman and Greek law recognized that injury could be done to the honor and character of a man, as well as to his body, implying a recognizance of the need to protect this honor and character from abuse.

The great extent of English common law and Blackstone's writing on these laws are conspicuously absent of any specific mention of a right of privacy. Nor is privacy significantly mentioned in the writings of the great political philosophers--Hobbes, Locke, Paine, Rousseau, Spencer, Montesquieu. However, the historically oriented adherents to a right to privacy emphasize that a recognition of privacy as a right played a necessary and prerequisite function

¹ Tahmud, Baba Batra, 22b. (quoted by R. Hofstader, The Right of Privacy, p. 9).

² Maimonides, Mishneh Torah, Neighbors II (quoted in R. Hofstader, The Right of Privacy, p. 9).

to the body of political and legal thought to be found in the above mentioned areas.

The Bill of Rights is of central importance to those claiming an expressed historical right to privacy. The protections offered by the First, Third, Fourth, Fifth and Ninth Amendments are claimed to be proof of a high regard for the right of privacy by the framers of the document. The justification to this claim being that these amendments and their protections are without meaningful scope without a high general regard and recognition of the right of privacy.

The period between the passage of the Bill of Rights and the appearance of the Warren-Brandeis article in 1890 is one which produces a significant amount of controversy between the two above mentioned focuses of the controversy over the history of the legal right of privacy. The historically oriented adherents, because of an admitted scarcity of cases on the subject of privacy, rely heavily upon legal commentators of the era. Alan Westin concludes: "Precivil war America had a thorough and effective set of rules with which to protect individual and group privacy from means of compulsory disclosure and physical surveillance known in that era."³ However, a noted law review, in a book review of Westin's book, Privacy and Freedom, claims the above conclusion is "...a strained interpretation

³Alan Westin, Privacy and Freedom, p. 337-338.

of scattered cases and commentaries."⁴ State courts of 19th century America were becoming increasingly concerned with privacy.⁵ One case, Boyd v. United States, which involved a forced disclosure of personal books, papers and invoices for inspection for a suspected infraction of a customs revenue law, is an often-cited example of the awareness of the right of privacy in the United States before the appearance of the Warren-Brandeis article. The most vital portion of the body of the case is as follows:

"It is not the breaking of doors, and the rummaging of his drawers that contributes to the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property."⁶

The legal scholars who view privacy as a relatively modern and recently evolved right critique the above references as scattered and of little value. The expressions of the legal right of property and contract in legal history are viewed with little regard for or belief in an "underlying right to privacy." Privacy as a legal right did not exist, it was created by the response of law to an increasingly complex society. Law is a dynamic body, subject to societal pressures, and thus the right of privacy came into existence.

At the root of the controversy are some necessarily individually-defined concepts and ideas about how a society expresses

⁴Book Review, 15 Univ. of California Law Review, p. 1590.

⁵See MacKenzie v. Mineral Springs Co., 27 Abb. M.C. 402 (1891), and Moore v. N.Y.E.R.R. Co., 130 N.Y. 523 (1892).

⁶Boyd v. United States, U.S. (1886).

a desire to protect the human dignity of an individual. Some of these ambiguous ideas and concepts are: the value and relative merit of unexpressed societal and cultural mores about the dimensions of privacy to a explicitly defined legal structure, the exact nature of a right to privacy, the relationship of individual property rights to a right of privacy.

The Warren-Brandeis article serves as a focusing point for all factions of the controversy over the history of a legal right to privacy. The legal scholars who express the conviction that privacy is an evolved right see the article as a point in which property and contract rights were now assumed partially into a "new" right of privacy. The ^{historically} ~~modern~~-oriented faction sees the article as an recognition of a previously existing right of privacy.

The articles' main arguments may be summarized briefly:

- a) The right of privacy had been previously measured under property and contract rights.
- b) The right of privacy should exist because the decencies of civilization require some consideration on the part of society for the desire of an individual to live to himself.
- c) The right to privacy should be one of direct assertion and not of reliance upon other interests for its protection.

The effect of the article was significant. Numerous judicial decisions, if not agreeing with the basis principles of the article, at least mentioned the article as taken into their consideration. Those judicial decisions that acted to uphold some

right of privacy used the article frequently as a fundamental reference. State statutes were spawned as a direct and indirect result of the emerging recognition of the necessity of some right of privacy, a recognition the Warren-Brandeis article definitely helped foster. In 1905, the State Supreme Court of Georgia became the first United States court to expressly recognize a right of privacy (*Pavesick v. New England Life Insurance Co.*). In 1906, the New York legislature prohibited the commercial use of a photograph without the prior consent of the individual photographed.

However, the laws of the states were subject to varying interpretations. Judicial attempts to define some general law of privacy rested more frequently on the specific facts and circumstances of the case than on any general principles in the area. Thus the law of privacy today occupies a very analogous position.

The State Law of Privacy Today

A. Miller, in his The Assault on Privacy, finds the present pattern of state laws relating to privacy characterized by "...uncertain application, lack of predictability, frequently inconsistency, unawareness of new ramifications of new communications media..."⁷ Although the overwhelming majority of state courts (thirty-seven) recognize a right of privacy and only four states expressly deny that

⁷A. Miller, The Assault on Privacy, p.

right (Rhode Island, Texas, Nebraska, Wisconsin), the general application of the principles is without unifying structure.

If the general structure of state laws recognizing a right of privacy is confusing, the state of the law of torts is even more so. Three leading scholars on tort law all disagree as to whether a tort law right of privacy exists and if it does, what areas constitute privacy.⁸

The right of privacy is frequently over and under defined, and adds to the general confusion. Over-defined the right comes to mean an individual's freedom of thought, religion, speech or security against unreasonable search and seizure. Such extensive claims to the boundary of the right are not beneficial to an attempt to place the right of privacy into its proper context to modern life. The right of privacy, or any right, does not exist in a legal vacuum. Over-definition of the right so as to include the above mentioned rights also ignores the very real possibility that the right of privacy is frequently at odds with those rights it is usually thought to encompass. For example, an ordinance designed to protect householder's privacy by requiring that members of a certain religious sect that proselytized door-to-door be required to register at Town Hall was overturned in Martin v. Struthers (319 U.S. 141 (1943)).

⁸ W. Prosser, Torts §(2ed. 1965); E. Bloustein, "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser," 39 New York University Law Review 962; H. Kalvan, "Privacy and Tort Law: Were Warren and Brandeis Wrong?" 31 Law and Contemporary Problems 326.

The rationale being that freedom to distribute information is fundamental to our society. Privacy is not always synonymous with those rights it sometimes is thought to encompass.

Under-definition of the right of privacy relies on past events (legal cases, statutes) to define what rights come under the scope of a right of privacy. This process, in error, assumes law is state and that past definitions of privacy may satisfy today's and tomorrow's claim to protection under that right.

The intrusion of extremely subjective definitions of privacy and perspectives from which one views privacy has created controversy and confusion about the present right of privacy, much as these same elements acted to produce controversy over the legal roots of privacy. Privacy as a legal right has a status that differs from the status of other legal rights. The right of privacy is inextricably linked to these cultural mores and individual definitions, perhaps more than any other right is so linked.

6. "Law enforcement officer" means any public servant who is empowered by law to conduct an investigation of or to make an arrest for a designated offense, and any attorney authorized by law to prosecute or participate in the prosecution of a designated offense.

7. "Exigent circumstances" means conditions requiring the preservation of secrecy, and whereby there is a reasonable likelihood that a continuing investigation would be thwarted by alerting any of the persons subject to surveillance to the fact that such surveillance had occurred.

→ 8. "Designated offense" means any one or more of the following crimes:

(a) A conspiracy to commit any offense enumerated in the following paragraphs of this subdivision or, an attempt to commit any felony enumerated in the following paragraphs of this subdivision which attempt would itself constitute a felony;

(b) Any of the following felonies: assault in the second degree as defined in section 120.05 of the penal law, assault in the first degree as defined in section 120.10 of the penal law, reckless endangerment in the first degree as defined in section 120.25 of the penal law, promoting a suicide attempt as defined in section 120.30 of the penal law, criminally negligent homicide as defined in section 125.10 of the penal law, manslaughter in the second degree as defined in section 125.15 of the penal law, manslaughter in the first degree as defined in section 125.20 of the penal law, murder as defined in section 125.25 of the penal law, abortion in the second degree as defined in section 125.40 of the penal law, abortion in the first degree as defined in section 125.45 of the penal law, rape in the third degree as defined in section 130.25 of the penal law, rape in the second degree as defined in section 130.30 of the penal law, rape in the first degree as defined in section 130.35 of the penal law, sodomy in the third degree as defined in section 130.40 of the penal law, sodomy in the second degree as defined in section 130.45 of the penal law, sodomy in the first degree as defined in section 130.50 of the penal law, sexual abuse in the first degree as defined in section 130.65 of the penal law, unlawful imprisonment in the first degree as defined in section 135.10 of the penal law, kidnapping in the second degree as defined in section 135.20 of the penal law, kidnapping in the first degree as defined in section 135.25 of the penal law, custodial interference in the first degree as defined in section 135.50 of the penal law, coercion in the first degree as defined in section 135.65 of the penal law, burglary in the third degree as defined

in section 140.20 of the penal law, burglary in the second degree as defined in section 140.25 of the penal law, burglary in the first degree as defined in section 140.30 of the penal law, criminal mischief in the second degree as defined in section 145.05 of the penal law, criminal mischief in the first degree as defined in section 145.10 of the penal law, criminal tampering in the first degree as defined in section 145.20 of the penal law, arson in the third degree as defined in section 150.05 of the penal law, arson in the second degree as defined in section 150.10 of the penal law, arson in the first degree as defined in section 150.15 of the penal law, grand larceny in the third degree as defined in section 155.30 of the penal law, grand larceny in the second degree as defined in section 155.35 of the penal law, grand larceny in the first degree as defined in section 155.40 of the penal law, robbery in the third degree as defined in section 160.05 of the penal law, robbery in the second degree as defined in section 160.10 of the penal law, robbery in the first degree as defined in section 160.15 of the penal law, unlawful use of secret scientific material as defined in section 165.07 of the penal law, criminal possession of stolen property in the second degree as defined in section 165.45 of the penal law, criminal possession of stolen property in the first degree as defined in section 165.50 of the penal law, forgery in the second degree as defined in section 170.10 of the penal law, forgery in the first degree as defined in section 170.15 of the penal law, criminal possession of a forged instrument in the second degree as defined in section 170.25 of the penal law, criminal possession of a forged instrument in the first degree as defined in section 170.30 of the penal law, criminal possession of forgery devices as defined in section 170.40 of the penal law, falsifying business records in the first degree as defined in section 175.10 of the penal law, tampering with public records in the first degree as defined in section 175.25 of the penal law, offering a false instrument for filing in the first degree as defined in section 175.35 of the penal law, issuing a false certificate as defined in section 175.40 of the penal law, escape in the second degree as defined in section 205.10 of the penal law, escape in the first degree as defined in section 205.15 of the penal law, promoting prison contraband in the first degree as defined in section 205.25 of the penal law, hindering prosecution in the second degree as defined in section 205.60 of the penal law, hindering prosecution in the first degree as defined in section 205.65 of the penal law, and any of the felonies defined in sections 265.05, 265.10 or 265.35 of the penal law relating to firearms and other dangerous weapons;

(c) Any of the following crimes; criminal possession of a dangerous drug in the fourth degree as defined in section 220.05 of the penal law, criminal possession of a dangerous drug in the third degree as defined in section 220.10 of the penal law, criminal possession of a dangerous drug in the second degree as defined in section 220.15 of the penal law, criminal possession of a dangerous drug in the first degree as defined in section 220.20 of the penal law, criminally selling a dangerous drug in the third degree as defined in section 220.30 of the penal law, criminally selling a dangerous drug in the second degree as defined in section 220.35 of the penal law, criminally selling a dangerous drug in the first degree as defined in section 220.40 of the penal law, criminally possessing a hypodermic instrument as defined in section 220.45 of the penal law, promoting gambling in the second degree as defined in section 225.05 of the penal law, promoting gambling in the first degree as defined in section 225.10 of the penal law, possession of gambling records in the second degree as defined in section 225.15 of the penal law, possession of gambling records in the first degree as defined in section 225.20 of the penal law, and possession of a gambling device as defined in section 225.30 of the penal law;

(d) Commercial bribing, commercial bribe receiving, bribing a labor official, bribe receiving by a labor official, sports bribing and sports bribe receiving, as defined in article one hundred eighty of the penal law;

(e) Criminal usury, as defined in article one hundred ninety of the penal law;

(f) Bribery, bribe receiving, bribe giving for public office and bribe receiving for public office, as defined in article two hundred of the penal law;

(g) Bribing a witness, bribe receiving by a witness, bribing a juror and bribe receiving by a juror, as defined in article two hundred fifteen of the penal law;

(h) Promoting prostitution in the first degree, as defined in article two hundred thirty of the penal law;

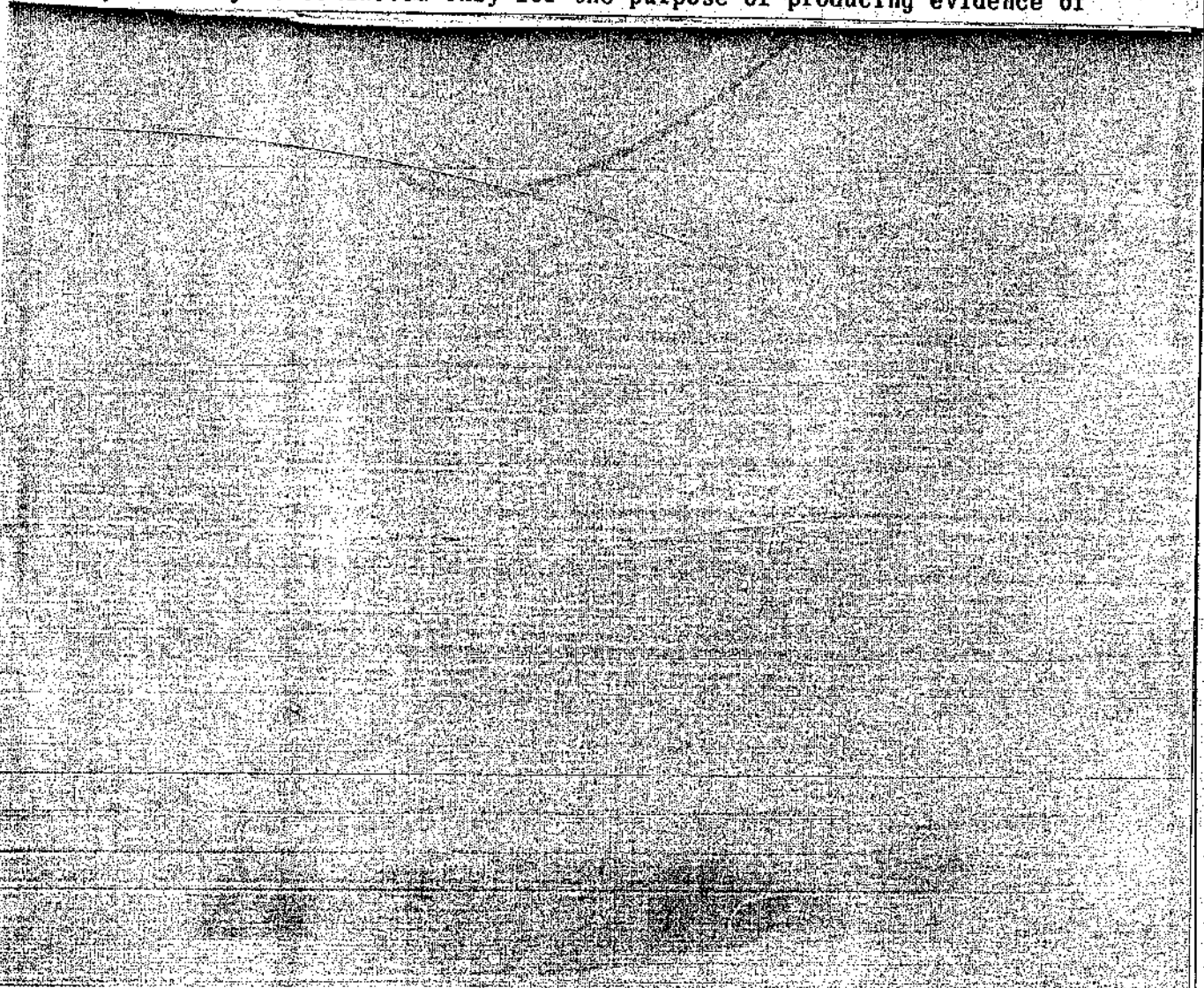
(i) Riot in the first degree and criminal anarchy, as defined in article two hundred forty of the penal law;

(j) Eavesdropping, as defined in article two hundred fifty of the penal law.

APPENDIX III: SUMMARY OF PROCEDURES NEEDED TO AUTHORIZE
ELECTRONIC SURVEILLANCE UNDER TITLE III.

(Reprinted from Wiretapping and Eavesdropping
Congressional Research Service, pp. xii-xvi.)

Perhaps the most controversial sections of Title III are those permitting law enforcement officials to secure a court order approving the interception of oral and wire communications. The procedure whereby law enforcement agencies may secure the court order necessary to institute a wiretap or other electronic surveillance is rather detailed. Any Federal judge of competent jurisdiction may authorize the FBI or any other Federal investigative agency to intercept wire or oral communications upon the application of the Attorney General or any Assisant Attorney General designated by the Attorney General. State court judges of competent jurisdiction may issue a similar order upon the application of the principal prosecuting attorney of the state or any of its political subdivisions, providing state law authorizes him to issue such an order and providing that the order is granted and executed in compliance with the requirements of Title III and state law. Federal interceptions may be conducted only for the purpose of producing evidence of



any of a number of specifically designated crimes ranging from murder and treason to bankruptcy fraud. State orders are permitted where the interception may produce evidence of the commission of a "crime dangerous to life, limb or property and punishable by imprisonment for more than one year," or one of a list of specifically designated offenses.

Every order must fulfill specific requirements involving statements made in the application which preceded its issuance, the criterion used by the court in issuing the order, and the narrow scope of the order. Every application must be in writing, under oath, and contain a statement indicating: (1) the applicant's authority to request the order; (2) the identities of the applicant, of the official who authorized his application, and of the person who committed the offense under investigation and whose conversations are being intercepted if the name of such a person is known; (3) a full and complete statement of the facts justifying the issuance of an order including details of the particular offense involved, a particular description of the facilities to be tapped or of the place where the oral communications are to be intercepted and of the type of conversation sought; whether alternative investigative methods have proved or are likely to prove either too dangerous or unproductive; (4) the period of time for which the interception must be maintained; (5) if the interception is to continue after the conversations specified in the application have been secured, the statement must indicate facts establishing probable cause to believe that additional communications of the same type will occur; (6) a complete summary of all prior applications involving the same person, facilities or places; and (7) where the application is for an extension of an existing order, there must be a statement of the results thus far obtained or reasons for the failure to obtain results.

Before granting such an order, the court must be convinced that there is probable cause to believe that one of the offenses listed in §2516 or the appropriate state statute is, has been, or is about to be committed; that there is probable cause to believe that communications involving the offense will be secured by the proposed interception; that alternative methods of investigation have proved or are likely to prove to be too dangerous or unproductive; and that there is probable cause to believe that the facilities being tapped or the place where the interception is to take place are either involved in the commission of the offense or leased, listed or commonly used by the person designated in the application.

Every order must state the identity of the person whose conversations are to be intercepted if known, the facilities or place where the interception is to take place; a particular description of the type of conversation sought and the offense involved; the identity of the agency empowered to conduct the interception and the official who authorized the application; and the period of time during which the interception is authorized.

No order or extension is effective for longer than is required to secure the communications specified in the order or in any event for longer than thirty days without an extension. Applications and the granting of extensions are subject to the same requirements imposed in securing the original order.

~~The~~ The court, in the exercise of its discretion, may require additional evidence to justify the issuance of any order and reports as to the results of the authorization after the order has been issued.

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With these things in mind we shall briefly summarize the variable provisions in the eighteen jurisdictions which have authorized judicial supervision of interception of wire or oral communications by law enforcement officials. Since every court must comply with §2518 in granting an order, only the provisions which are more restrictive than §2518 will be included. In Arizona, the legislative authority for judicial supervision is not as narrow as §2518 in any respect. Therefore, approval orders need only comply with §2518.

An order complying with the requirements of §2518 may be issued by a Colorado court of competent jurisdiction where "there is reasonable ground to believe that evidence may be obtained of the commission of the crime of murder, kidnapping, extortion, armed or aggravated robbery, rape, arson, or an organized criminal conspiracy which constitutes a clear and present danger to the health, safety, or welfare of the people, or violations set forth in section 48-5-20 [narcotic violations], or a crime endangering the national security, or that the same may be committed; or that such evidence is necessary to save human life; or that the communication, conversation, or discussion, as the case may be, is itself an element of a specified crime." Colo. Rev. Stat. §40-4-30.

Florida's wiretapping and electronic surveillance statute enacted in 1969 (Fla. Sess. Laws ch. 69-17) is substantially the same as Title III. Interceptions may be permitted when murder, kidnapping, gambling, robbery, burglary, grand larceny, prostitution, criminal

usury, abortion, bribery, extortion, dealing in narcotic or dangerous drugs, or conspiracy is involved.

Unlike the Florida statute, the Georgia legislation establishing judicial supervision of wiretapping and electronic surveillance was enacted before the Omnibus Crime Control and Safe Streets Act of 1968. Where national or state security or the offenses of treason, insurrection, rebellion, espionage, sabotage, "or any felony involving bodily harm, or any crime under the laws of this State, or the United States involving kidnapping, narcotics, dangerous drugs, prostitution, blackmail, extortion, bribery, gambling or any felony involving alcoholic beverage laws" are under investigation, "investigative warrants" may be issued in compliance with §2518 of Title III, but are effective for only ten days unless extended.

Kansas district court judges and supreme court justices may approve an interception order pursuant to §2518 and Kan.Stat. Ann. §22-2513, in an investigation involving murder, kidnapping, treason, sedition, criminal syndicalism, commercial gambling, racketeering, bribery, narcotics violations, or an offense affecting the safety of human life or national security. Such orders are effective for ten days subject to extension. All records and photographs made under such an order must report to the court and made available to the defendant in the event of a prosecution.

The provisions of the Maryland Code permitting electronic surveillance and wiretapping by state law enforcement officers are no more restrictive than the procedures required under §2518.

In ~~Massachusetts~~, warrants approving interception of wire or oral communications may be issued to secure evidence where the offenses of arson, assault and battery with a dangerous weapon, extortion, bribery, burglary, embezzlement, forgery, gambling, intimidating a witness or juror, kidnapping, larceny, usury, mayhem, murder, prostitution, robbery, perjury or conspiracy are involved. Where practicable the warrants must state the hours of the day during which they may be executed. Approved interceptions may not take place for longer than fifteen days subject to extensions of fifteen days. In all other respects, the application and issuance requirements of the Massachusetts statute are no more limited than §2518 which therefore governs.

Ten day warrants and extensions of existing warrants may be granted approving the interception of wire and oral communications in ~~Minnesota~~ where murder, manslaughter, aggravated assault, aggravated robbery, kidnapping, aggravated rape, prostitution, bribery, perjury, theft, receiving stolen property, embezzlement, burglary, forgery, aggravated forgery, gambling, narcotics offenses or conspiracy are under investigation.

The procedure established by §2518 of Title III may be used by ~~Nevada~~ state law enforcement officers to obtain a court order approving the interception of oral or wire communications when murder, kidnapping, extortion, bribery, narcotics offenses or the national security are involved. The statute establishing judicial supervision imposes no restrictions beyond those required by §2518.

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In ~~New Hampshire~~, ten day warrants may be issued in compliance with §2518 to state law enforcement officers approving wiretapping and electronic eavesdropping for the production of evidence involving organized crime, homicide, kidnaping, gambling, bribery, extortion, blackmail, narcotics offenses and conspiracy.

The ~~New Jersey~~ Wiretapping and Electronic Surveillance Control Act, effective until December 31, 1974, contains a provision identical to §2518. Under the act interception authorization may be obtained where murder, kidnaping, gambling, robbery, bribery, extortion, loan sharking, dealing in narcotic drugs, marijuana or other dangerous drugs, arson, burglary, embezzlement, forgery, receiving stolen property, escape, alteration of motor vehicle identification numbers, larceny or conspiracy are involved.

A ~~New York~~ court of competent jurisdiction may grant an order authorizing the interception of oral and wire communications under procedures no more stringent than those of §2518 where any of the enumerated criminal offenses are involved. ~~The offenses include;~~ first and second degree assault, reckless endangerment, promoting a suicide attempt, criminally negligent homicide, first and second degree manslaughter, murder, first and second degree abortion, first, second and third degree rape, first, second and third degree sodomy, sexual abuse, unlawful imprisonment, first and second degree kidnaping, custodial interference, coercion, first, second and third degree burglary, first and second degree criminal mischief, criminal tampering, first, second and third degree arson, first, second and third degree grand larceny, first, second and third degree robbery, unlawful use of secret scientific material, first and second degree possession of stolen property, first and second degree forgery, first and second degree

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possession of forged instruments or devices, falsifying business records, tampering with public records, offering a false instrument for filing, issuing a false certificate, first and second degree escape, promoting prison contraband, first and second degree hindering prosecution, violations of the weapons and firearms laws, first, second, third and fourth degree possession of dangerous drugs, first, second and third degree selling of dangerous drugs, criminal possession of a hypodermic instrument, first and second degree promotion of gambling, first and second degree possession of gambling records, possession of a gambling device, bribery, usury, promotion of prostitution, rioting, eavesdropping and conspiracy.

~~Oregon~~ permits wiretapping and electronic eavesdropping by law enforcement officers subject to judicial supervision as restricted by §2518 of Title III where a crime "directly and immediately affecting the safety of human life or the national security" is involved.

~~Rhode Island~~ law enforcement officials may utilize the procedures established under §2518 of Title III and approved by state statute when investigating: murder, robbery, kidnapping, extortion, assault with a dangerous weapon, assault with intent to rob or murder, arson, bribery, larceny of more than \$500, narcotics offenses, gambling and weapons offenses, usury and conspiracy. The requirements for judicial approval under the state statute are no more demanding than those of §2518.

1/ There is some question whether all of the offenses contained in the New York statute fall within the required list set forth in §2516(2) of Title III. The Report on Applications for Orders Authorizing or Approving the Interception of Wire or Oral Communications, periodically published in compliance with §2519(3) by the Administrative Office of the United States Courts, indicates that during calendar 1969 there were no orders issued in connection with investigations into such offenses as unlawful imprisonment or custodial interference in New York.

In 1969 ~~South Dakota~~ enacted legislation designed to enable state law enforcement officials to intercept wire and oral communications under the authority of the Omnibus Crime Control and Safe Streets Act in cases involving murder, kidnaping, gambling, robbery, bribery, extortion, dealing in dangerous drugs or rape.

In Washington, orders approving interception of oral and wire communications may be obtained where national security is threatened, human life endangered, arson or riot involved. Such orders and any extensions granted are effective for no more than fifteen days. In all other respects, application for wiretap or electronic eavesdrop authority must conform to the restrictions of §2518.

Circuit courts in the State of Washington may authorize interception of communications pursuant to §2518 in case of murder, kidnaping, commercial gambling, bribery, extortion or dealing in narcotics, Wash. Rev. Code Ann.

§96B.20.

The District of Columbia Court Reform and Criminal Procedure Act of 1970, 84 Stat. 473, 612, permits courts of competent jurisdiction to issue interception orders in arson, blackmail, bribery, burglary, destruction of property (of \$200 value), gambling, grand larceny, kidnaping, murder, obstruction of justice, receiving stolen property, robbery, extortion or dangerous drug cases, D.C. Code §23-546.

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APPENDIX V: "The Theory and Practice of American
Political Intelligence" Frank Donner

ACLU Reprint.

The Theory and Practice of American Political Intelligence

Frank Donner

I
The twentieth century has been marked by a succession of different forms of restraint on political expression: criminal anarchy statutes, sedition laws, deportations, Congressional anti-subversive probes, loyalty oaths, enforced registration. These and related measures still survive. But in recent years new, more formidable ways of responding to political and social movements on the left have emerged. The most important of these is the system of political intelligence, which is rapidly coalescing into a national network.¹

Despite the efforts of intelligence officials to keep intelligence operations secret, reliable information about our intelligence system is steadily accumulating. We now have a clearer picture of the methods and targets of political surveillance. As a result, we can no longer seriously doubt that the main purpose of such activity is political control of dissent or that the frequently advanced justifications of law enforcement or national security are often no more than a "cover."

On March 21, 1971, a group calling itself the Citizens' Commission to Investigate the FBI mailed or delivered to a congressman and senator as well as to the *Washington Post*, *The New York Times*, and the *Los Angeles Times* a packet containing fourteen documents, selected from over 1,000 stolen from a small FBI office in Media, Pennsylvania, a suburb of Philadelphia. The fourteen

The term "intelligence" as used in this article is adapted from foreign intelligence usage and practice. It describes a body of techniques for collecting political information about a subject: (physical surveillance, photography, electronic eavesdropping, informers planted or recruited "in place" and other deceptive or clandestine practices), the product of these activities (files and dossiers), and a set of political assumptions (the intelligence mind).

documents, all of them of recent date and undisputed authenticity, show that the FBI concentrates much of its investigative effort on college dissenters and black student groups. According to a memorandum from J. Edgar Hoover such groups "pose a definite threat to

Swarthmore College philosophy professor regarded as a "radical," the FBI enlisted the assistance of the local police and postmaster, as well as a campus security officer and switchboard operator. In one of the documents, the FBI agent in charge of the



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the Nation's stability and security," a conclusion that he has not been able to support and that both the *Washington Post* and *The New York Times* have challenged:

When conducting surveillance of a

Philadelphia bureau instructs his agents at Media that more interviews are in order for plenty of reasons, chief of which are it will enhance the paranoia endemic in these circles and will further serve

to get the point across that there is an FBI agent behind every mailbox. In addition, some will be overcome by the overwhelming personalities of the contacting agent and will volunteer to tell all—perhaps on a continuing basis.

Dramatic disclosures of this sort as well as the recent Senate hearings on Army intelligence will undoubtedly help to cure the surviving skepticism about these practices. Until fairly recently even the targets of surveillance were reluctant to credit the existence of police activities which violate the most deeply held premises of their society. But political surveillance has become so obtrusive and its targets so numerous that it can no longer be easily ignored or justified. A sharper awareness of intelligence has, in turn, opened up new sources of data about a field which I have been researching since the McCarthy era.²

Of course dossiers, informers, and infiltrators are hardly new. But since the early Sixties, when attorneys general in the South formed a rudimentary intelligence network in order to curb the integrationist activities of students, political surveillance and associated practices have spread throughout the nation.

Surveillance has expanded largely because of the scale and militance of the protest movements that erupted in the Sixties. Policy makers and officers of intelligence agencies were then faced with the need to identify and control new actors on a new political stage—no easy matter in view of the anarchic radical milieu, characterized by highly mobile and anonymous young people, who tend to be hostile to formal organization and leadership. The social remoteness of new radicals concentrat-

²This article is a distillation of verified materials, many of them documentary, drawn from the files of the ACLU political surveillance project and based on the following sources: court proceedings; legislative and administrative hearings; reports by informers and police agents to intelligence units; intelligence evaluations and summaries by intelligence staff and command personnel; interviews and correspondence with subjects, informers, and intelligence officers; the files of lawyers and civil liberties groups; TV scripts, police journals and manuals, graduate theses, newspaper and magazine articles; and the responses to a detailed questionnaire.

ed in "tribal," self-contained groups made it all the more difficult to identify them.

Most of the existing intelligence agencies at that time were no more effective than other institutions in our society. Their techniques were as outmoded as their notions of subversion dominated by an old Left composed of "Communists," "fellow travelers," and "fronts." Intelligence files were choked with millions of dossiers of aging or dead radicals. At the same time, new gadgetry—miniaturization, audio-electronics, infrared lens cameras, computers, and data banks—gave intelligence possibilities undreamed of by the most zealous practitioners of the repressive arts of the nineteenth century.

According to the herald of the "technetronic" society, Zbigniew Brzezinski, new developments in technology will make it "possible to assert almost continuous surveillance over every citizen and maintain up-to-date files, containing even personal information about the behavior of the citizen, in addition to the more customary data." Full access to critical data, he adds, will give the undercover agent and the roving political spy greater flexibility in planning and executing countermeasures.³

II

Twenty federal agencies are engaged in intelligence activities. The most important are:

- the FBI, with an estimated 2,000 agents on political investigative assignments in charge of thousands of undercover informers,
- the Army, which concededly had at one time 1,200 agents in the field, together with a huge staff operating a dossier bank of 25 million "personal-

³To hasten the arrival of this brave new world, federal funds allocated by the Law Enforcement Assistance Administration are being channeled to state and local police units to subsidize such surveillance gear as twenty-four hour infrared lens closed circuit TV cameras which are being attached to telephone poles on the streets of American cities. Sensors and other electronic gadgetry developed for the military in Indochina are being adapted for internal intelligence use and tested on an experimental basis in a number of cities.

ities,"

- the CIA,
- the Internal Revenue Service (for several weeks in 1970 its agents requested access to the circulation records of public libraries in a number of cities in order to learn the names of borrowers of books on explosives and other "militant and subversive" subjects, a practice which it defended as "just a continual building of information"),

—the Intelligence Division of the Post Office,

—the Secret Service (where names of 50,000 "persons of interest" are on file),

—the Customs Bureau of the Treasury Department,

—the Civil Service Commission (15 million names of "subversive activity" suspects),

—the Immigration and Naturalization Service,

—the Navy, Air Force, Coast Guard,

—the Passport Division of the State Department,

—the Department of Justice Community Relations Service which feeds information into its computerized Inter-Divisional Intelligence and Information Unit,⁴

—civil rights and poverty projects sponsored by the Department of Health, Education and Welfare and the Office of Economic Opportunity. The Executive Department agencies cooperate with and are supplemented by the Congressional anti-subversive committees.

Intelligence operations are also flourishing in states and counties. A typical state intelligence agency is the Massachusetts Division of Subversive Activities which conducts investigations in response to complaints by private cit-

⁴It was on the basis of information supplied by this unit that Attorney General Mitchell was informed in a confidential memorandum that the likelihood of violence during the November, 1969, moratorium was "extremely high... beyond the violence which was witnessed during the Pentagon demonstration in October, 1967, the Democratic National Convention in Chicago, in August, 1968, and the demonstration in Chicago on October 11th conducted by the Students for a Democratic Society." This prophecy turned out to be unfounded.

izens and acts as a central repository for information about subversion. The Division's Annual Report for 1969 is revealing:

A file is kept of peace groups, civil rightists and other such groups where, due to their enthusiasm, they might have a tendency to adopt or show a policy of advocating the commission of acts of force or violence to deny other persons their rights under the Constitution. These files are kept up-dated by communications with the Federal Bureau of Investigation, the House Internal Security Committee. Subversive Activities units in other states and decisions of the United States Supreme Court.

The files in this Division have grown to such an extent that the Federal Bureau of Investigation, Immigration and Naturalization Service, Department of Defense, U.S. Army Intelligence, Federal Civil Service Commission, Treasury Department, several departments of the Commonwealth, Industrial Plants and Educational Institutions now clear with this Division on security checks.*

Requests for investigations, or assistance in investigations, received from various police departments, Federal Bureau of Investigation, House Committee on Un-American Activities and the Subversive Activities Control Board, complied with such requests [sic].

Members of the Division attended demonstrations conducted in the area by various groups. Note was made of the leaders and organizations participating, occasionally photographs are taken, the persons identified, and a file was made.

The Division is continuing to compile and tabulate a check on new organizations in the Civil Rights area so as to be sure of any inclinations toward communist-front activities or the infiltration into these organizations of known communists or communist sympathizers.

During the past year, as a result of the increased activity of the Communist and Subversive Groups in racial demonstrations throughout the country, this Division has kept a watch on these developments so as to note any trend toward that end in Massachusetts.

During the past year, this Division continued to submit informa-

tion relative to subversive organizations and individuals to several local police departments who are in the process, or have started, Intelligence Units within their respective departments.

Sometimes state intelligence agencies operate under concealed or obscure auspices. For example, the Ohio Highway Patrol runs an intelligence unit which claims to have recruited student informers on every campus in the state. According to the head of the unit, "We have actually had informers who are members of the board of trustees [sic] of various dissident groups." State intelligence units are also at work in several universities in Maryland and Illinois.

Urban intelligence units ("red squads") have multiplied greatly and are becoming a standard tool in local police practice. Increasingly powerful, they operate under a variety of names (Anti-Subversive Squad, Intelligence Unit, Civil Disobedience Unit); in some cases they use a "Human Relations" or "Community Relations" cover, which is considered an efficient means of penetrating the ghetto.⁵

Black communities swarm with urban intelligence agents and informers, as do university and peace groups;

⁵Police departments have in recent years been loaded with recommendations from commissions and professional groups to develop intelligence techniques as a means of curbing crime—especially organized crime. But the intelligence units which have come into being as a result have been converted into instruments for political surveillance—especially of the ghetto.

The day and night surveillance of blacks, as a group, by these newly constituted units is considered self-justifying, very much like the surveillance of aliens in the Twenties. This is true even of small and medium-sized cities, which are rife with mounting crime and corruption, but proud of their "mod squads" and the increasing number of intelligence "inputs" to the ghetto, the "long-hair" community, and the campus.

As for the large cities, there are, according to Illinois Police Superintendent James T. McGuire, more police in the Chicago area on political intelligence assignments than are engaged in fighting organized crime. The same is true in Philadelphia.

invitations to young people to defect or to sell information at high prices are becoming routine. Young college graduates—black and white—are offered "career opportunities" in urban intelligence; courses in intelligence and surveillance are being taught to municipal police units and campus security police.⁶

In fact, the campus constabulary is spreading throughout the country's higher education community. Its functions are expanding to include clandestine intelligence activities such as undercover work and wiretapping and are meshed with the work of other intelligence agencies. We get a glimpse of this new collaboration in one of the recent Media documents, dated November 13, 1970.

On 11/12/70 MR. HENRY PEIRSOL, Security Officer, Swarthmore College, Swarthmore, Pa. advised that DANIEL BENNETT is a Professor of Philosophy at that School and in charge of the Philosophy Department. He has been there about three years having previously taught at University of Mass. MRS. BENNETT is not employed and there are two small children in the family ages about 8 to 12 years.

The BENNETTs reside in a semi-detached house located near PEIRSOL's residence although he does not have any social contact with them. PEIRSOL has noted that there does not appear to be anyone other than the BENNETTs residing at their home but that numerous college students visit there frequently. BENNETT drives a two tone blue, VW station wagon, bearing Penna. license 5V0245. There are no other cars in the family and no other cars normally parked in their driveway.

⁶The campus has become the theater of intensive intelligence activities by undercover urban police agents and paid informers. A recent investigation by the Committee on Academic Freedom of the University of California, Los Angeles Division, Academic Senate, concludes that "there are undercover activities by governmental agencies on campus, that some of these activities are conducted by operatives of the Los Angeles Police Department and that it is unclear what other agencies, if any are involved."

PEIRSOL was furnished [sic] with the wanted flyers on the subjects and he stated he would remain alert in his neighborhood for their possible appearance. Also he will alert his sources at the college for any information about the subjects particularly any information that subjects might be in contact with the BENNETTS.

(Those who are familiar with the quality of FBI reporting will not be surprised to learn that some of this report is not true. As Professor Bennett has pointed out, he is unacquainted with the subject of the "wanted flyers," has one child not two, and owns two cars not one.)

Many of the red squads run by city police are growing so fast that they are hard put to find enough agents. The permanent intelligence staffs are frequently augmented by detectives and plainclothesmen—as Chicago's regular intelligence unit was doubled for the SDS convention in 1969. There are also many informer recruits and trainees who report to intelligence units but are not counted as employees or officers. The official membership of Detroit's intelligence unit, which was formed in 1961, grew by 1968 to seventy members. In 1968, Boston had forty agents, New York had at least sixty-eight on its intelligence staff (ninety as of 1970) and fifty-five more line agents planted undercover; Chicago had more than 500, Houston fourteen. The Los Angeles Police Department doubled its Intelligence Division personnel from eighty-four in 1969 to 167 in 1970.

Intelligence is not a wholly public function. Political surveillance has been routinely practiced by private detectives since the nineteenth century, when objections to a political police force left the Pinkerton and Burns agencies free to engage in these activities without official competition. Today the private agencies are an important channel for political intelligence. Often they recruit employees with access to official files from government intelligence agencies and sell such information to private industry.⁷

⁷A Dayton, Ohio, firm which calls itself Agitator Detection, Inc., advertises a "sure-fire method for keeping radical America out of work": "We have," the company boasts, "complete,

Local and national intelligence agencies are beginning to coalesce into an "intelligence community." For example, the young demonstrators who came to Chicago in 1968 encountered red squad operatives from their home towns. The overheated reports of these visiting local agents led Mayor Daley's office to conclude that a plot to assassinate Johnson had been hatched. The urban agents cooperated with their federal counterparts, as well as with the Army and Navy secret operatives at the Chicago demonstrations. During the subsequent conspiracy trial no fewer than thirty of about forty substantive prosecution witnesses were police agents or infiltrators associated with governmental surveillance at various levels.

The FBI plays a central role in coordinating the intelligence system; it exchanges information with other agencies, performs investigative work for intelligence groups with limited jurisdiction, and trains intelligence agents for service in other agencies. Its intelligence techniques and political standards serve as a model for local operations. It compiles albums of photographs and files of activists which are transmitted to agencies throughout the United States.⁸

Congressional anti-subversive committees have also expanded their intelligence activities beyond the passive compilation of dossiers available only to government investigative personnel. They now provide a forum for local intelligence agencies, publish dossiers,

computerized files on every known American dissident... And all 160 million of their friends, relatives and fellow travelers."

A scattering of right-wing organizations and publications across the country also has access to intelligence data. For example, the Church League of America, headed by Edgar Bundy, boasts of its over 7 million cross-indexed files of political suspects, its "working relationships" with "leading law enforcement agencies," and its cooperation with undercover agents.

These organizations are prized by intelligence agencies because they share the basic intelligence assumption that the country is in the grip of a widespread subversive conspiracy. Intelligence agents and informers use the platform and publications of the far right to document this thesis with "inside" information.

mug shots, and other photographs of subjects obtained by surveillance and supplied by police witnesses.⁹ They also independently engage in intelligence activities.

III

The changing role of the police in carrying out surveillance was described a few years ago by Inspector Harry Fox of the Philadelphia police. In his Senate testimony, he said:

Police now have become "watch-dogs" and "observers" of vocal, subversive and revolutionary minded people. This function has been institutionalized in Philadelphia in a "civil-disobedience unit" composed of selected and highly trained plainclothesmen. They cover all meetings, rallies, lectures, marches, sit-ins, laydowns, fasts, vigils, or any other type of demonstration that has ominous overtones.

These officers know by sight the hard core men and women who lead and inspire demonstrations. They know their associates, family ties, techniques, and affiliations with organizations leaning toward Communism both on and off the Attorney General's list. They see them day in and day out recruiting, planning, carrying signs, and verbally assaulting the principles of democracy.

Yes, the police role has become one of... surveillance, taking

⁸The FBI circulates through its own internal intelligence channels a document known as the "agitator index," which is made available to local agencies. In the spring and summer of 1968 the Washington field office of the FBI compiled an elaborate collection of dossiers and photographs for use in connection with the Resurrection City demonstration.

That material was thereafter augmented and organized into an album; multiple copies were made and transmitted to the Chicago police for use in dealing with protest activity around the Democratic convention. The FBI agent who was responsible for the idea received a special commendation. Such albums of "known leftists" are now widely circulated.

⁹In a hearing last year, Chief Counsel Sourwine of the Senate Internal Security Subcommittee described the subcommittee's mission in these words:

"We seek information with respect

photographs, identifying participants, and making records of the events. On this basis, local police are able to piece together this jigsaw puzzle and see the widespread activity of the hard core demonstrators and instigators.

This account naturally omits the harassing and "guerrilla warfare" aspects of police tactics. To the policeman, public protest is an unwelcome disruption of the tranquillity which he regards as natural and proper. His response to antiwar activities is particularly hostile because he sees himself as a beleaguered defender of "patriotic" values, which he tends to protect by abusing his power, harassing demonstrators, and intimidating suspects. His resentment and anger are provoked in the same way by the nonconformity and personal style of many young people, who are now the principal targets of heavy surveillance and who are constantly subjected to detention and arrest on flimsy charges.

Protest activities have inevitably served to draw the police into politics and to expand their intelligence functions. Especially ominous is the widening use of photographic surveillance by intelligence units. Police in communities throughout the country systematically photograph demonstrations, parades, confrontations, vigils, presentations of petitions to congressmen and senators, and related activities. The photographers attached to the Philadelphia intelligence unit, for example, cover more than a thousand demonstrations a year. Any "incident" considered "controversial" is a predictable subject for the police photographer.

to the persons who head these subversive organizations and are active in them and who participate in them, the persons who support them: about the interconnections, the channels of authority, and the sources of funds.

"We are asking police departments from all across the country to sift their records and bring these facts here for the committee... by gathering all of the available information from leading police departments throughout the country, the committee hopes to be able eventually to present a picture. We are charting the organizations in each area, the persons in each area who are connected... and we hope when we finish we will have a picture which will show just what this country is up against."

Protest demonstrations against the Vietnam war are automatically considered "controversial," but not those in favor. In the South, photographing integrationist protesters is given top priority.

Subjects are often photographed from as close as three to five feet. Sometimes police photographers openly ridicule the demonstrators. Children who accompany their parents are photographed as are casual bystanders and nonparticipants. To convey and conceal photographic equipment, panel trucks are sometimes used, occasionally camouflaged to look like the equipment of a television station (referred to by veteran surveillance subjects as

"WFBI"). Surveillance photographers acquire spurious press credentials; bona fide cameramen often moonlight as police or FBI informers.¹⁰ Supplementary photographic data are occasionally obtained from cooperating newspaper and television stations.

Photographs are sometimes covertly taken by unobtrusive plainclothesmen when a "respectable" group is involved—for example, parents picketing a school. Usually, however, policemen, sometimes in uniform, do not bother to conceal their activities: they either man the cameras themselves or direct their aides by pointing out individuals or groups to be photographed. The deterrent effect of open photography

NEW LEFT NOTES - PHILADELPHIA

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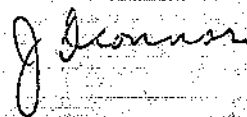
This newsletter will be produced at irregular intervals as needed to keep those persons dealing with New Left problems up to date in an informal way. It is not a serial and is considered an informal routing slip. It should be given the security afforded a Bureau serial, classified confidential, but may be destroyed when original purpose is served.

The New Left conference at SOG 9/10-11/70 produced some comments:

In disseminating reports recommending for the SI it is preferable to designate and disseminate to Secret Service immediately and put the FD-376 (the buck slip to Secret Service) on the second Bureau copy.

There was a pretty general consensus that more interviews with these subjects and managers-on are in order for plenty of reasons, chief of which are it will enhance the paranoia endemic in those circles and will further serve to get the point across there is an FBI Agent behind every mailbox. In addition, some will be overcome by the overwhelming personalities of the contacting agent and volunteer to tell all - perhaps on a continuing basis. The Director has okayed PSI's and SI's age 18 to 21. We have been blocked off from this critical age group in the past. Let us take advantage of this opportunity.

In payments to informants, if the total of services and expenses to an informant is less than \$300 in a lump sum payment or per month, our request for such payment is waived within division 5. If the lump sum payment or monthly authorization is \$300 or more, it must be approved on a much higher level. Note: If an informant is to travel outside our division and we initially go in and request expense payment of less than \$300, it can be handled simply while the services payment can be requested later based on what he has produced.



From the FBI Media documents

The appendix to the volume from which this is quoted contains a series of documents from the intelligence files of the Flint, Michigan, Police Department including a "steno pad" which was owned by one of the top members of the SDS, taken from a car in a raid which had no justifiable basis.

¹⁰In view of the overwhelming need for identification it is hardly surprising that informers with photographic skills are paid a bonus. Louis Salzborg, a New York photographer, received about \$10,000 in the two years he served as an FBI informer. He used this money to finance a studio which sold pictures to left publications. The

is not lost on the police but is justified on the ground, among others, that it "cools" the "subversive agitator" and prevents potential lawlessness.¹¹

Photographs of individuals not already known to the police are submitted to informers and undercover agents for identification. Sometimes tentative identifications are verified by automobile license numbers which the police systematically collect at meetings and rallies and in front of the houses of "known militants." Then they ask other agencies, urban, state, and federal, to help to identify the subjects.

Once the individual is identified, his name is entered in an index. The local intelligence unit then sets out to obtain information about the subject—solely on the basis of his or her attendance at a single "controversial" event—from other intelligence sources, state and federal. In addition, the contents of the file are passed on, as Captain Drake, Commander of the New Orleans Police Department, has explained, to "every conceivable authority that might have an interest in causing any prosecution or further investigation of these persons."

IV

Photography describes the subject. But other techniques must also be used to obtain political data. These include interrogation of associates, employers, landlords, etc., collection of data about negatives of which were turned over to the FBI. He surfaced at the Chicago conspiracy trial and subsequently testified before the House Internal Security Committee which was also supplied with the negatives as well as with documents and correspondence taken by Salzberg from the files of the Veterans for Peace and the Fifth Avenue Peace Parade Committee.

¹¹ The importance of photography in the new intelligence scene was amusingly demonstrated during the Chicago conspiracy trial. By court order, to safeguard the integrity of the judicial process, photographers were excluded from the federal courthouse during the trial. But this prohibition unwittingly closed a valuable surveillance channel and the order was amended to permit intelligence photographers to continue to ply their trade.

financial resources, bank deposits and withdrawals, and about the subject's background. Where meetings are held publicly, whether indoors or out, the speeches are monitored by portable tape recorders—a practice which is common in large cities but which also is growing in smaller communities, especially in college towns.

Wiretapping and electronic bugging are also common, in spite of judicial restraints on their use.¹² Local police specialists use these devices not only for their own purposes but also on behalf of the FBI. The 1968 Crime Control Law has authorized electronic eavesdropping in certain criminal cases; twelve states have passed similar legislation, while six others are now considering it. A variety of electronic devices is now being offered by commercial supply houses to state and local police departments to implement this legislation. Once they become available for even limited purposes, it is extremely unlikely that they will not be used for political surveillance as well.

Still, personal surveillance is necessary in those areas where technology cannot—at present anyway—replace human beings. Thus infiltration of dissident groups by informers remains a common procedure. Ironically, the Warren Court's limitations on wiretapping and bugging have themselves led to a heavier reliance on informers as a substitute. Moreover, these limitations encourage the use of informers because they can supply "probable cause" of a crime and so justify a wiretap order.¹³

¹² Attorney General Mitchell has asserted an inherent power flowing from executive responsibility for the national security (a term of enormous looseness) to disregard constitutional restraints in this area whenever, in his unreviewable discretion, an individual may be seeking "to attack and subvert the government by unlawful means." And even before the Mitchell regime, wiretapping and bugging were systematically used by the FBI in cases (such as those of Martin Luther King, Jr., and Elijah Muhammad) not even remotely linked to national security.

¹³ For example, the primary basis for successful application for, and repeated renewals of, wiretap authorization orders against a group of New York

Informers are indispensable to political intelligence systems. Electronic eavesdropping and wiretapping are ill-suited to the slow pace, confusion, ambiguity, and factionalism of the dissenting political activities that are the targets of intelligence. Besides, wiretaps can be circumvented once the subject becomes aware of them. Indeed, nothing can quite take the place of the classic tool of intelligence, the informer. But in addition to the moral stigma attached to informing in Western culture,¹⁴ informers have always been regarded anyway as unreliable and treacherous observers, reporters, and witnesses. Most of them become informers for money. Their income, tenure, and future usefulness depend on their capacity to produce material useful to the police.¹⁵ Others are "hooked" because of previous involvements with the law, or are recruited for ideological reasons—either as police plants or as defectors.

Both the pressures and the inducements, along with the sense of guilt that requires the betrayer to find some justification for his betrayal, tend to produce tainted information. All too frequently it is inaccurate, highly selective, and based on sinister and

City Panthers consisted of an account by an informer of a conspiracy by the Panthers to engage in the ambush and murder of policemen—a story admittedly invented by the informer, one Shaun Dubonnet, to secure leniency in a criminal case, earn a little money, and further his career as a double agent. Neither Dubonnet's substantial prior criminal record—including two convictions for impersonation—nor his repeated hospitalization for mental illness served to impair his credibility with the police.

The tips and reports of informers, frequently fabricated, provide pretexts for raids. One example of many that could be cited is the alleged tip by the undercover agent to the FBI that the Chicago Black Panthers had assembled an arsenal of guns. This led to a predawn raid in which Fred Hampton and Mark Clark were killed. Only a few guns were found.

¹⁴ Judge Anderson tersely summed up the matter when he wrote in 1920 in the case of *Colyer v. Skeffington*, "A right-minded man refuses such a job."

¹⁵ According to information from an FBI source, "informants" (as the FBI

unwarranted inferences. Where a literal version of a target's utterances would seem innocent, the informer will insist on stressing the connotations; conversely, where the language is figurative or metaphysical the informer reports it as literally intended. Most important of all, he seizes on the transient fantasies of the powerless—rhetoric and images not intended to be acted upon—and transforms them into conspiracies whose purpose and commitment are wholly alien to their volatile and ambiguous context.

It need only be added that the hazards inherent in the testimony of political informers are especially great in conspiracy cases. The vague, inchoate character of the conspiracy charge and the atmosphere of plotting and hidden guilt which accompanies it make it a perfect foil for the undercover agent who surfaces on the witness stand, a hero returned from the dark wood.¹⁶

The informer is not only a reporter or an observer, but also an actor or participant, and he frequently transforms what might otherwise be idle talk or prophecy into action. Professor Zachariah Chafee, Jr., once remarked, "The spy often passes over an almost imperceptible boundary into the agent

prefers to call them, "informers" is a subversive usage) submit vast quantities of data of a highly inflammatory character. The "contact" does not challenge it because he is afraid to lose the informant. Frequently he ignores this suspect material in his own reports either because he is convinced that it is incredible or that the informant would have to surface, to testify, if it became the basis for a criminal charge. This would again result in losing the informant and require the "contact" to recruit a replacement. It is infinitely preferable, I was told, to cover up for an informant even if his reports are wholly false than to be forced to go to the trouble of finding a replacement.

¹⁶ Conspiracy is a classic vehicle for the political informer for another reason. Under conspiracy law, evidence of acts and statements of co-conspirators to bring about the purposes of the conspiracy agreement are admissible against all the co-conspirators even though without the agreement (frequently proved by flimsy and remote evidence); it would be incompetent and inadmissible as hearsay.

provocateur." The purpose of such provocations, as Allen Dulles wrote in *The Craft of Intelligence*, is to "provide the pretext for arresting any or all of [the group's] members. Since the agent report[s] to the police exactly when and where the action is going to take place, the police [have] no problems."

There are powerful reasons for viewing provocation as the handmaiden of infiltration, even when it is not part of a planned intelligence strategy. A merely passive, "cool" infiltrator-observer cannot hope to play more than a lowly "Jimmy Higgins" role in the target group, if he gains entry at all. In order to enhance his usefulness he must penetrate planning circles by becoming highly active. Moreover, the pressure to produce results in the form of concrete evidence of illegal activity often drives the infiltrator into provocative acts, regardless of the official cautionary advice which he may be given when he receives his assignment. Such advice is routinely conveyed by the agent's "handler" for the record, as a defense against a possible charge of entrapment.

Convincing evidence of provocation has emerged in a number of recent cases.¹⁷ But the motives of the agent provocateur are frequently complex and difficult to reconstruct from the

The informer's tale in this way becomes binding on all of the alleged co-conspirators including individuals he has never seen or met. The conspiracy charge thus economizes on the number of informer witnesses needed to make a case. This is a highly important consideration to intelligence agencies, which are traditionally reluctant to surface informers.

The general question of the reliability of informer witnesses as well as their role in conspiracy cases is dramatized by the current conspiracy indictment of the Berrigans, which is based on evidence supplied by a prison informer, Boyd Douglas, Jr., who also inspired and arranged for a number of the "overt acts," allegedly in furtherance of the "conspiracy."

¹⁷ Thomas Tongyai (Tommy the Traveler), an undercover agent on the campus of Hobart College (an Episcopalian school with a tradition of nonviolence), was charged by students with preaching revolution, using violent rhetoric to gain converts, and demon-

materials available. The most common provocateur is simply a professional police agent who coldly engineers a single provocative act designed to "set up" leaders for roundup and arrest.

Another type (of which Tommy the Traveler is an example) is the ultrarightist who becomes a spy in order to destroy the target group. He is often driven to act out his paranoid fantasies with bombs and guns when his delusions about the group's sinister goals fail to conform to reality.

On the other hand, as the FBI student informer William T. Divale has disclosed in his recently published confessions, *I Lived Inside the Campus Revolution*, a planted informer may come to share the values of his victims, with the result that his newly acquired convictions carry him far beyond the call of duty—a form of conversion characteristic of infiltrators of black and youth groups. The infiltrator's secret knowledge that he alone in the group is immune from accountability for his acts dissolves all restraints on his zeal. He does, of course, take the risk of exposure and punitive reprisal, but this possibility itself encourages him to disarm suspicion by acting as a super-militant. This almost schizoid quality of the behavior of informers seems inherent in political surveillance and has recurred throughout its history.

strating the M1 carbine and the construction of various types of bombs. He did not deny these allegations but explained, "The best cover for an undercover agent who wanted to get into the campus was portraying the part of a radical extremist which I did."

According to Alabama Civil Liberties Union lawyers, in May of 1970 a student infiltrator for the FBI and the Tuscaloosa police on the University of Alabama campus, Charles Grimm, Jr., committed arson and incited acts of violence, which were then used as a reason for declaring a campus protest meeting an unlawful assembly, a ruling which resulted in criminal charges against 150 students. One of the attorneys contended that the agent had admitted the violent acts to him and that the FBI and local police had spirited the agent away to make him unavailable in the court cases.

William Frapolly, a Chicago police spy at Northeastern Illinois State College, was the leader of an SDS sit-in and participated in a Weatherman action which culminated in throwing the

Many student informers who have surfaced or recanted have been revealed as operating for two intelligence agencies at the same time—usually a local and a federal one. Several informers commonly penetrate a single organization; indeed this is prescribed as sound intelligence practice, because each surveillance report can cross-check the others.¹⁸ Attempts to recruit young leftists as police spies have also recently become common. For example, in the fall of 1969, young volunteers for the New Mobilization Committee to End the War in Vietnam were solicited to become informers by FBI agents. "Will you work for us?" they were asked as they entered the elevator on their way to the Committee's office. The FBI has recently acquired official jurisdiction on college campuses, which will result in even more extensive subsidy of student informers.

As the FBI Media documents make clear, Bureau agents now have formal authority from Washington to recruit informers as young as eighteen, including those attending two-year junior and community colleges. This authorization of September, 1970, made official a practice which long preceded the institution's president off a stage, conduct which led to his expulsion for two semesters. As the only Weatherman SDS representative on Northeastern's campus, Frapolly actively recruited young students to join the SDS Weatherman faction and to participate in the Weatherman-sponsored "Days of Rage" in Chicago in the fall of 1969. He surfaced as a prosecution witness in the Chicago conspiracy trial, where he conceded on the witness stand that during convention week he proposed a number of schemes for sabotaging public facilities and military vehicles, although his assigned duties as a marshal were to maintain order.

There are half a dozen comparable cases. The UCLA Academic Freedom Committee report which I have already cited states that its probe revealed suggestive evidence of "the presence of undercover agents as *agents provocateurs*, engaging in or precipitating the behavior they are charged with suppressing."

¹⁸There is no optimal number of infiltrators. An FBI agent whom I recently interviewed said that at a Washington Peace Mobilization meeting

ance of the directive but was consistently denied for public relations reasons. In fact, J. Edgar Hoover repeated this denial as recently as February of this year.

Moreover, local police—especially in university communities—have lately been given special funds to hire secret informers. For this purpose at least one state, Wisconsin, has made available the sum of \$10,000.¹⁹

V

In the past the police agencies (whether federal or local) preferred to act as the informer's "handler," "controller," or "contact." Police officers themselves only rarely resorted to impersonation, dissembling loyalties, the fabrication of false cover identities—techniques made familiar by foreign intelligence practice and regarded as abhorrent to our traditions. It was one thing to hire an agent as an independent contractor to do the dirty work of political snooping, but quite another for a public servant to do it himself.

Today, however, the police themselves often go underground. In New Orleans an intelligence division officer gained access to the Black Panther headquarters by impersonating a priest. At least six agents of New York's Special Service Division infiltrated the Black Panthers, and appeared as witnesses in their current trial.

Three members of Chicago's intelligence unit infiltrated the Chicago Peace

in 1969, of the thirty-two individuals present, nine were undercover agents. The number of informers an FBI agent can recruit is limited only by his budget for this purpose. An informer is first used *ad hoc* and is paid a small stipend. He is known in the Bureau's records as a potential security informant (PSI) or a potential racial informant (PRI). When he proves his worth he becomes a "reliable informant," acquires a file, cover name, and is paid a fixed salary (sometimes disguised or augmented as "expenses"), which is increased from time to time as his usefulness grows.

¹⁹Some students are paid a fixed stipend but the practice is growing, especially in urban intelligence units, of paying them for each item of information. Houston pays them from \$5 to \$400, depending on the value of the information.

Council. One of them, in order to enhance his credibility, exposed another to Council leaders as a policeman. According to Karl Meyer, the Council's chairman, "At our meetings they invariably took the most militant positions, trying to provoke the movement from its nonviolent force to the wildest kind of ventures." "They were," he concluded, "about our most active members." The Peace Council became suspicious of possible spies when it and other Chicago groups—the Latin American Defense Organization, Women Strike for Peace, the Fellowship of Reconciliation—suffered a number of burglaries of files and records. (Office machines and small amounts of money were also stolen but subsequently returned.)

Agents of the Chicago intelligence unit are scattered throughout Illinois and sometimes do not report to their superiors for days or even months. Their real identities are concealed even from their colleagues. Their methods include disguises, wiretapping, and the creation of elaborate "covers," such as dummy businesses. In numerous cities, including San Diego, Houston, Oakland, Los Angeles, New Orleans, and Columbus, the agent-informer is becoming a familiar phenomenon. We are moving toward the classic European model of political infiltration, in which the planted police agent lives a double life for years if necessary, clandestinely reporting to his superiors. This kind of intelligence requires skill and training, so one should not be surprised to see the emergence of schools of instruction in the deceptive arts, similar to those run by the CIA for indoctrination in foreign intelligence and guerrilla activity.

VI

At an ever increasing rate the activities of antiwar, anti-Establishment, civil rights, black militant, student, and youth groups are being recorded and compiled. Lists and dossiers are coded, computerized, stored, and made accessible to all branches of the intelligence network. Here is how Lt. George Fenel, head of Philadelphia's civil disobedience unit, describes its filing system:

We've been acquainted with quite a number of people through

out the years we've been handling demonstrations. We have made a record of every demonstration that we've handled in the city of Philadelphia and reduced this to writing, first by report and then taking out the names of persons connected with the different movements.

We have some 18,000 names and we've made what we call an alphabetical file. We make a 5x8 card on each demonstrator that we know the name and so forth that we handle. This card shows such information as the name, address, picture if possible, and a little rundown on the person... which group he pickets with and so forth.

Also on the back of the card, we show the different demonstrations, the date, time and location and the groups that the person picketed with. We have some 600 different organizations that we've encountered in the Philadelphia area.

This new intelligence system concentrates more on compiling names than on the content of speeches or other activities. For example, a report submitted to the Detroit Criminal Investigation Bureau by two undercover agents reads as follows:

At 8:00 P.M. on Thursday, November 11, 1965, the WEST CENTRAL ORGANIZATION held a special meeting which was comprised primarily of executives, delegates and clergy. The meeting was called for a briefing by MR. SAUE ALINSKY of the INDUSTRIAL AREAS FOUNDATION, Chicago, Illinois, who was in the Detroit area on November 10 and 11, 1965. Thirty-seven persons attended this meeting.

The following persons were identified as being in attendance at the above meeting, identifications being made by surveilling officers as well as by Confidential Informant 059. [A list of twenty-one names follows.]

The following vehicles were observed parked in the immediate vicinity of 3535 Grand River, occupants entering same. [There follows a list of eleven automobiles together with the names and addresses of eleven individuals who are presumably the title registrants.]

There is nothing in the report which suggests the reason for the surveillance or what took place at the meeting.

Experience with other official record systems suggests that it is only a matter of time before the intelligence now being collected by thousands of federal and local agencies will be codified and made accessible on a broad scale. Indeed, we are not far away from a computerized nation-wide system of transmittal and storage.

VII

While the recent bombings and the hunt for fugitives have supplied justification for some surveillance practices, the emerging system as a whole is oriented toward the future and is justified as preventive: the security of the nation against future overthrow is said to require the present frenzy of surveillance. In cases where such an argument makes no sense, surveillance is justified on grounds that it is necessary to prevent local violence and disorder in the future.

Political intelligence indiscriminately sweeps into its net the mild dissenters along with those drawn to violence; when the national security is at stake, so the argument runs, it is folly to take risks. The quarry is pursued long before expressions or associations of radicals are likely to incubate into violent or revolutionary acts. The fear of waiting "until it is too late" conditions the intelligence mind to suspect all forms of dissent as signs of potential "subversion."²⁰

Thus peaceful, moderate, lawful organizations—from the NAACP to the Fellowship of Reconciliation—become intelligence targets on the theory that they are linked to communism or subversion.²¹ This lack of selectivity, a familiar phenomenon to students of intelligence, has now been abundantly docu-

²⁰Or, in the talismanic intelligence usage, "threats to the national security."

²¹The informer's super-militance in such groups, his proclaimed impatience with the slow pace of his associates, clothe him with the requisite credibility when he seeks ultimate entry into the more inaccessible organizations, in spite of his possible differences in social class and personal style.

mented by the Senate testimony of former Army Intelligence agents and the recent Media documents.

To equate dissent with subversion, as intelligence officials do, is to deny that the demand for change is based on real social, economic, or political conditions. A familiar example of this assumption is the almost paranoid obsession with the "agitator." Intelligence proceeds on the assumption that most people are reasonably contented but are incited or misled by an "agitator," a figure who typically comes from "outside" to stir up trouble. The task is to track down this sinister individual and bring him to account; all will then be well again.

Since the agitator is elusive and clever, one never knows who he will turn out to be or where he will show his hand. Indeed, the striking characteristic of the agitator, according to the rhetoric and testimony of the intelligence people, is not his views nor his actions but his persistence. A subject who keeps coming to meetings or rallies or is repeatedly involved in "incidents" is soon marked as an agitator²² (more sophisticated terms: "militant," "activist," sometimes preceded by "hard core").

The outside agitator is a descendent of the "foreign agitator" or the "agent of a foreign power," as he came to be called. The thesis that domestic radicals are either tools or dupes of foreign

²²The special loathing with which grass-roots intelligence functionaries perceive the "agitator" is expressively conveyed in Congressional testimony presented in October, 1970, by Michael A. Amico, sheriff of Erie County, New York, who has organized an elaborate informer and surveillance system in the Buffalo area. Referring to the target groups under surveillance, he testified:

"Many of these organizations start their meetings clandestinely by burning the American flag before they go into their rituals. It is difficult to get young undercover agents to remain disciplined to withstand, if you know the reaction, what does happen upon the burning of the flag. These are the rituals and different practices and, as said by the undercover man, orgasms are obtained by the different activities that follow because of the burning of the flag."

manipulation provides intelligence agencies with their most effective way of exploiting popular fears, one which is also cherished by legislators. All movements on the left—and especially groups such as the Panthers—have come under attack as agents for foreign powers.²³

Such ideological stereotypes give intelligence a powerful bias against movements of protest from the center leftward. To be sure, a handful of ultra-rightist groups such as the Klan and the Minutemen are also under surveillance, but for political intelligence, the presumption of innocence is largely confined to the defenders of the status quo. For individuals and groups committed to social or political protest, the presumption is reversed.²⁴ Peaceful, nonviolent activity must be constantly scrutinized because it may turn out to be a vital clue to a vast subversive conspiracy.

VIII

While intelligence is developing new clandestine activities, it is also becoming highly visible. American political activity is plagued by an intelligence "presence" which demoralizes, intimidates, and frightens many of its targets—and is intended to do so. And it is not merely a "presence." A variety of sanctions are improvised to punish politically objectionable subjects. These include "information management" (such as inclusion on the "ten most wanted" list), press leaks, harassment, prosecution on drug charges, legislative inquisition, physical

²³ Recently declassified Army Intelligence documents (Annex B—Intelligence—to the Department of the Army Civil Disturbance Plan and Department of the Army Civil Disturbance Information Collection Plan), the most revealing intelligence material in the literature, suggest that peace and anti-draft movements are foreign-directed because "they are supporting the stated objectives of foreign elements which are detrimental to the USA."

²⁴ It is hardly surprising that intelligence is most at home with non-crimes such as "subversion" or inchoate crimes such as conspiracy in which innocent conduct is treated as criminal because it is claimed to be enmeshed

violence, the vandalizing of cars, black-listing, the refusal to give police protection when needed, illegal searches and raids on pretexts.

One prevailing assumption of intelligence officers is that "subversion" is financed and supported by respectable "front" institutions (churches, foundations, and universities, for example) and individuals (such as lawyers). Special pressures are brought by intelligence agencies to cut off such suspected subsidies—for example, J. Edgar Hoover's attacks on white contributors to Black Panther defense funds and the listing by the House Internal Security Committee of honoraria paid to liberal and radical campus speakers.

Intelligence is thus becoming an end in itself, rather than an investigative means—a transformation all too clearly reflected in the encouragement of FBI agents to confront subjects in order to "enhance" their "paranoia," as one of the Media documents states. But its claim to be conducting a never-ending investigation into some future unspecified threat to the national security is consistently used to legitimize its expansion. Few want to shackle the police in their hunt for wrongdoers, especially those who threaten the safety of the Republic. Why should one question a "mere" investigation, even if tons of constitutional ore may have to be excavated in order to find a single subversive nugget?

IX

What are the standards that intelligence agencies must follow for selecting subjects of surveillance, for the techniques they use or the data they develop? In fact, there are no effective standards, and there are no effective authorities in this country to insist on such standards. Every surveillance unit claims its own authority to deal with

in an illegal agreement and performed with evil intent. The affinity of the intelligence mind for the conspiracy offense can be illustrated by the testimony of Detective Sergeant John Ungvary, head of the Cleveland intelligence squad, before a Senate committee. He urged that "if we had a law whereby we can charge all of them [black nationalists] as participants or conspirators . . . it would be far better than waiting for an overt act. . . ."

"subversion" or "subversive activities," terms which mean whatever the agency wants them to mean. The head of the Chicago intelligence unit, Lt. Joseph Healy, summed up the matter when he testified at the conspiracy trial that his squad maintained surveillance over "any organization that could create problems for the city or the country." That Army Intelligence took the same view is shown by recent disclosures that it was snooping into a virtually unlimited range of civilian activity.

In most cases, the jurisdiction to engage in political intelligence activities is wholly improvised. This is true not merely of many local agencies but of the FBI itself. The authority the FBI claims it has to stalk nonconformists can be justified neither by its law enforcement powers nor by its domestic spy-catching jurisdiction. The latter, in fact, is based on an obscure 1939 directive which J. Edgar Hoover has interpreted as conferring upon the FBI the power, in his words, "to identify individuals working against the United States, determine their objectives and nullify their effectiveness." Who are these "individuals"? Those whose activities involve "subversion and related internal security problems."

The unlimited scope of their jurisdiction and their virtual autonomy encourage intelligence institutions to consolidate and expand. Intelligence thus constantly enlarges its operations by exaggerating the numbers, power, and intentions of the subversive enemy.

Ironically, this exaggeration is further stimulated by the need to develop some plausible political and constitutional justification for violating democratic rights. Intelligence not only continually expands the boundaries of subversion in its operations, but inevitably generates a stream of fear-monger-

²⁵ The technique of broadening the boundaries of subversion has been developed and refined by the Congressional anti-subversive committees first by the application of notions of vicarious, imputed, and derived guilt; second, by a process of cross-identification which proscribes an organization through the individuals associated with it and the individuals through their relationship to the organizations; and third, by increasing the number of proscribed organizations through

ing propaganda in its evaluation of intelligence data. A troubled period such as the present intensifies this process: the number of surveillance subjects increases greatly as the intelligence agencies circulate propaganda dramatizing their life-and-death struggle with subversion.

X

The link between drug use and political radicalism has also served to expand the scope of political surveillance. In the past, narcotics law enforcement and the policing of political crimes have drawn on similar surveillance techniques. This was so because both involve conduct to which the parties consent and both frequently leave little proof that any crime was committed. Today the "nark" and undercover intelligence operatives are frequently in pursuit of the same prey. The same agents sometimes function in both areas and political militancy is a common cover for the "nark," especially on college campuses.

Similarly, students under surveillance for drug use are frequently selected for their political nonconformity, a link manifest in the background of both the Kent State and Hobart College cases, as well as in the conviction of Dr. Leslie Fiedler of the State University of New York at Buffalo for maintaining premises where marijuana was used. The pot bust has become a punitive sanction against political dissent and the threat of prosecution is a favorite method of "hooking" student informers. Lee Otis Johnson, former head of Houston's Student Non-Violent Coordinating Committee, is now serving a thirty-year jail term for the sale of a single marijuana cigarette to a Houston undercover policeman.

links to one another; fourth, by treating subversion as permanent, irreversible, and even hereditary, with the result that a dossier, no matter how old, never loses its importance nor a subject his "interest."

This technique has been ingeniously applied in a remarkable document, *A Report on the SDS Riots, October 8-11, 1969*, issued by the Illinois Crime Investigating Commission, April, 1970, and reprinted in June, 1970, by the Senate Internal Security Subcommittee. Ostensibly concerned with the Weatherman demonstration ("Days of Rage"), this 400-page report is a virtual

XI

Many young radicals are finding ways of evading undercover surveillance of their political activities. Intelligence inevitably generates countermeasures ("security"), driving its targets into protective secrecy and sometimes underground even though they are usually engaged in legal protest. Such furtiveness is then cited as further proof of subversion and conspiracy ("What have they got to hide?") and reinforces the justification for surveillance.

Radicals in the past few years have tried to protect themselves by rigorously checking the backgrounds of possible infiltrators, isolating a suspected agent or feeding him bogus information, giving him test assignments, banning the use of drugs, cars, and private phones, and forming affinity groups. The radicals themselves sometimes use disguises and false names. The ultimate response to intelligence is counterintelligence, including the penetration of intelligence institutions to thwart their effectiveness. Some groups are beginning to boast about their double agents, counter-spies, and pipelines to police sources. One Berkeley police officer has already complained (and not very convincingly): "I'm afraid they do a better job spying on us than we do on them."

The pilferage and circulation of the Media FBI documents seem to suggest an escalation in counterintelligence tactics. The group responsible for the action has already announced, as a follow-up measure, a planned exposure of a "first group" of FBI informers whose names appear in as yet unreleased stolen documents. This listing of

encyclopedia of militant radicalism among youth, replete with dossiers, photographs, personal letters, diaries, and documents relating not merely to the SDS figures with whom it purports to be primarily concerned, but to a host of other individuals and organizations about whom the Commission had collected intelligence information and whom it linked in the most tortured fashion to the subject matter of the Commission's report. This information, much of it highly inaccurate, was published purely for the purpose of punitive exposure of intelligence targets.

a "first group" is presumably to be followed by publication of lists of others.

Such a tactic will not only create a painful dilemma for present Philadelphia area informers but may vastly complicate the FBI's problems in future recruitment. Because political spies are the keystone of the entire federal political intelligence system, the FBI goes to extraordinary lengths to shield their identities and stresses these protective practices as an inducement for recruits. A breach in the FBI security system may well scare off potential informers not only in the Philadelphia area, but everywhere—Who knows where the Citizens' Commission will strike next? The increased risk is bound to boost the price of the informers' services. At the very least, it will "enhance" among the hunters the same "paranoia" now "endemic" among the hunted.

XII

Our political intelligence apparatus has begun to exert a dangerous influence on the exercise of political power. The attempt by the Los Angeles Chamber of Commerce to use intelligence data to discredit and destroy a group of Los Angeles poverty agencies is a dramatic example of a spreading phenomenon. A candidate for public office learns that he has been made an intelligence target by orders of his opponent, the incumbent. A lawyer for a victim of police brutality is threatened with being disbarred as a "subversive" because of leaks in the police department's intelligence files.

Mayor Ahoto of San Francisco discovers that unevaluated intelligence files compiled by federal and urban agencies, full of smears and unverified rumors, are opened up to the press for an article which threatens his political ruin.²⁶ A check of the California Un-American Activities Committee files

²⁶The mayor's charges against federal agencies have not been denied. The Los Angeles Police Department has admitted supplying confidential files to the writer of the article. The coordinator of intelligence, Sergeant George Bell, stated: "I would pull the index cards and let him go over the resumés, and some of them he asked to see the copy [of the file itself]."

discloses dossiers on many legislators, including the Senate president, with notations reflecting intensive surveillance. A courageous Chicago newsman, Ron Dorfman, who has vigorously attacked intelligence practices in that city, is confronted with a detailed dossier on himself in a session with the Illinois Crime Commission.

It is chilling enough to learn that in this country literally millions of people are systematically suffering invasions of privacy, and, what is worse, are forced to exercise their rights of free expression and assembly under the fear of surveillance. But when a secret political police begins to play an important role in political decisions and campaigns, the democratic process is in grave danger.

Nor is there much comfort in the notion that our current intelligence mania is only a transient response to a particular emergency. History—and for that matter the annals of J. Edgar Hoover's FBI—painfully teaches that once a political intelligence system takes root, it is almost impossible to eradicate it. Fear and blackmail ensure its autonomy and self-perpetuation. How many of us can be expected to challenge a system which has such power to do injury to its critics?²⁷

Americans will now have to answer the question whether the risks that we face—and some of them are real enough—outweigh the danger of a

national secret police. One can hardly question the right of the government to inform itself of potential crimes and acts of violence. The resort to bombing as a political tactic obviously creates a justification for intelligence to forestall such practices. But the evolving intelligence system I have been describing clearly exceeds these limited ends. Before it is too late we must take a cold look at our entire political intelligence system: not to determine whether one aspect or another is repressive—whether, for example, it is possible to keep a dossier confidential—but to decide whether internal political intelligence as an institution, divorced from law enforcement, is consistent with the way we have agreed to govern ourselves and to live politically.

Eighteen cases have now been filed throughout the country, with American Civil Liberties Union support, to challenge various surveillance and filing practices by police agencies as violating constitutional rights of free expression, assembly, privacy, and the protection against unreasonable search and seizure. The constitutional issues imbedded in these cases will undoubtedly be presented ultimately to the Supreme Court. These challenges are important if for no other reason than that they will drag undercover surveillance out of the shadows.

But the political intelligence system

between us and a Commie takeover?" critics are usually silenced. After a motion was carried in January, 1945, to terminate the House Committee on Un-American Activities, the House reversed itself on the plea of Congressman Rankin that "these valuable

cannot be controlled by piecemeal attacks in the courts. If our past experience is a guide, even successful litigation may leave unchecked the particular abuses involved by limiting surveillance in ways that are readily ignored or circumvented by a bureaucracy which is a law unto itself.

Political intelligence is both a symbol of a dying politics and the means of keeping it alive through powerful myths and constraints. A truly effective attack on the evils of intelligence cannot be mounted apart from the political process. A legislative investigation, more sharply focused and more searching than Senator Ervin's investigation, is vital in order to scour this area as thoroughly as Senator LaFollette's investigation scoured labor espionage in the Thirties. Such a probe could develop a fuller understanding of political intelligence and might lay the basis for dismantling a system which, if it is allowed to grow, may choke all possibility of real change in this country. But it is illusory to talk of an effective investigative and statutory attack on the powerful intelligence system at present. The elimination of the evils of political surveillance and dossiers is yet another reason why we need a new politics. □

records that probably involve the fate of the Nation, the safety of the American people, would be dissipated—I want to see that these papers are kept; that is the one thing I am striving for."

Persons who have factual, preferably documented, information on government surveillance activities are urged to contact the ACLU Foundation's Surveillance Project. Write Frank Donner, Esq., Room 235, Yale Law School, New Haven, Conn. 06520.

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It is suggested that the following articles be read in the order in which they are listed below. Read in this order, the articles form an excellent foundation for preliminary understanding of the topic.

Congressional Research Service, Wiretapping and Eavesdropping
Library of Congress. June 18, 1970.

This publication is a comprehensive source specifically designed to aid members of Congress in their personal research on the subject. The relevant Federal and State laws are to be found in the book. A brief introduction summarizes the provisions of Title III and the relationship between Federal and State law at the present. An excellent bibliography may also be found.

American Bar Association, Advisory Committee on the Police
Standards Related to Electronic Surveillance, (1968)

From these standards that the body of Title III was drafted. The book may be taken as the embodiment of the intention and logic of those who drafted Title III of the Omnibus Crime Control and Safe Streets Act.

Law Education and Research Center, Wiretapping
and Electronic Eavesdropping: The Law and its Implications:
A Comparative Study. N.Y.U. School of Law (1969)

This publication presents an overview of the existing law and is as comprehensive as the ABA Standards. It provides a sense of the total situation.

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Schwarz, Herman. "The Legitimazation of Electronic Eavesdropping: The Politics of 'Law and Order'." 67 Michigan Law Review 455 (1969).

Schwarz is recognized as one of the most discerning critics of Title III and law enforcement conducted electronic surveillance. The article deals comprehensively with Title III, explaining its weaknesses and ambiguities in great detail and in addition treats the subject of the efficiency of and need for surveillance.

Greenstein, David. "Court Order System of Regulating Electronic Eavesdropping under State enabling Legislation." Connecticut Law Review 250

Van Boven, "Electoral Surveillance in California: A Study in State Legislative Control" 57 California Law Review November 1969.

These two articles specifically deal with the relationship between state and federal laws regulating electronic surveillance. The various provisions of Title III which allow state surveillance laws to be more permissive than federal standards are treated in depth.

President's Committee on Law Enforcement and the Administration of Justice. The Challenge of Crime in a Free Society (1967)

The various sections dealing with the extent and nature of organized crime and the section specifically devoted to wiretapping offer a good summation of the impetus and many law enforcement officials' protests against the curbs on electronic surveillance.

United States, Director of the Administrative Office of the United States Courts. Annual Report (1970)

15A

This excellent statistical source for the whole spectrum of law enforcement electronic surveillance. The report has tables listing for example, the average cost of an electrical intercept, the number and location of authorizations, the crimes for which surveillance was conducted, the specific judges who authorized particular warrants and other items of information. Every official act of electronic surveillance for the particular year the report covers is recorded.