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STATEMENT

OF

THE HONORABLE EDWARD H. LEVI
ATTORNEY GENERAL OF THE UNITED STATES

BEFORE

THE SENATE JUDICIARY COMMITTEE,
SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES

10:00 A.M.
MONDAY, MARCH 29, 1976
DIRKSEN SENATE OFFICE BUILDING
WASHINGTON, D. C.
Mr. Chairman and Members of the Subcommittee:

I am pleased to appear here today to testify in support of S. 3197, a bill which authorizes applications for a court order approving the use of electronic surveillance to obtain foreign intelligence information.

On February 18, 1976, in a Message to the Congress on the activities of our intelligence agencies, the President stated that the Administration would work with the appropriate leaders of Congress to develop legislation to deal with a critical problem involving personal privacy-electronic surveillance. We have met and worked with a number of Congressional leaders, including members of this Subcommittee, and the discussions have been marked by a bipartisan spirit of cooperation. The legislative proposal is the product of this effort, and I appreciate the support and advice of those who have worked with us on it.

I believe that this bill is significant not only in the way it has been developed but in the safeguards it establishes to protect individual rights. Enactment of this bill will provide major assurance to the public that electronic surveillance will be used in the United States for foreign intelligence purposes pursuant to legislative standards and under procedures requiring accountability for official action, scrutiny of the action by Executive officials at regular
intervals, and the independent review, as provided, by a detached and neutral magistrate.

Before discussing some of the more important provisions of the bill in any detail, I believe it would be helpful at this point to give an overview of the bill.

S. 3197 provides for the designation by the Chief Justice of seven district court judges, to whom the Attorney General, if he is authorized by the President to do so, may make application for an order approving electronic surveillance within the United States for foreign intelligence purposes. The judge may grant such an order only if he finds that there is probable cause to believe that the target of the surveillance is a foreign power or an agent of a foreign power and if a Presidential appointee confirmed by the Senate has certified that the information sought is indeed foreign intelligence information that cannot feasibly be obtained by less intrusive techniques. Such surveillances may not continue longer than 90 days without securing renewed approval from the court. There is an emergency provision in the bill which is available in situations in which there is no possibility of preparing the necessary papers for the court's review in time to obtain the information sought in the surveillance. In such circumstances the Attorney General may authorize the use of electronic surveillance for a period of no more than 24 hours. The Attorney General would be required to notify a judge at the time of the authorization that such a
decision has been made and to submit an application to the judge within 24 hours. Finally, the Attorney General must report annually both to the Congress and the Administrative Office of the United States Courts statistics on electronic surveillance pursuant to the bill's procedures.

The standards and procedures that the proposed bill establishes are not a response to any presumed constitutional requirement of a judicial warrant as a condition of the legality of a surveillance undertaken for foreign intelligence purposes. Such a requirement has not been the holding of the courts, which in general have either found the employment of electronic surveillance without a warrant in the foreign intelligence area to be lawful, as in the Fifth Circuit's decision in Brown and the Third Circuit's decision in Butenko, or have left the decision open, as in Keith. The Zweibon decision of the District of Columbia Circuit has broad dicta among its several opinions but its holding in fact was quite limited and consistent with Butenko and Brown.

The proposed bill's standards and procedures respond, then, not to a constitutional warrant requirement, but to considerations of public policy. It is founded on the necessity that the branches of Government work together to overcome the fragmentation of the present law among the areas of legislation, judicial decisions, and administrative action, and to achieve the coherence, stability and clarity in the law and practice that alone can assure necessary protection of the Nation's safety and of individual rights.
Of course, constitutional considerations have been paramount in shaping the present law in this area. I have described the evolution of this law and my understanding of its present shape in my testimony, last November 6, before the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities. Since the length of my testimony has been the subject of some comment, I will not repeat it, or even summarize it, here, except to emphasize a central point. The law of the Fourth Amendment's requirements has changed over time; the Amendment's general reasonableness standard does not have a fixed content, but depends on a perception of the degree of invasion of individual privacy, the nature and degree of the Governmental interest served, and the barriers that can be raised against the possibilities of abuse.

In 1967, in *Katz v. United States*, the Supreme Court held for the first time that the electronic monitoring of conversations, without physical intrusion, invaded privacy interests protected by the Fourth Amendment and required, in the circumstances there, prior judicial approval. The Court, however, expressly reserved the question whether warrants were required for similar intrusions undertaken for foreign intelligence purposes. In part in response to the *Katz* ruling, Congress in 1968 enacted the Omnibus Crime Control and Safe Streets Act, Title III of which establishes careful and strict procedures for judicial approval of electronic
surveillances. Title III incorporates, as a requisite to such approval, the standard of probable cause to believe that crime has been committed; it includes notice and other requirements appropriate to surveillances undertaken for law enforcement purposes. But echoing the reservation in Katz, and in recognition of the great responsibilities of the President in the areas of foreign relations and protection of the Nation's safety from foreign threats, Congress included in Title III a proviso to the effect that the Act does not limit the constitutional power of the President to take such measures as he deems necessary to protect the nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Then in a separate sentence the proviso goes on to say: "Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means. . . ."

In 1972, in the Keith case, the Supreme Court addressed the Fourth Amendment's application to the exercise of the President's constitutional power referred to the part of Title III's proviso I have just quoted, concerning protection
against domestic security threats. In speaking of the proviso as a whole—the parts relating to foreign as well as to domestic threats—the Court stated: "Congress simply left presidential power where it found them." The Court went on to hold that in the field of internal security, if there is no foreign involvement, a judicial warrant is required by the Fourth Amendment. At the same time, the Court emphasized that its ruling addressed "only the domestic aspects of national security. We have expressed no opinion of the issues which may be involved with respect to activities of foreign powers or their agents."

Under the dominant case law, electronic surveillance without a judicial warrant, conducted for foreign intelligence purposes essential to the national security and relating to foreign powers and the agents of foreign powers, is lawful under the Fourth Amendment. This is the shape of the present law, but the legality of an activity does not remove from the Executive or from Congress the responsibility to take steps, within their power, to seek an accommodation between the vital public and private interests involved.

Since at least May of 1940 the Government has, under express authorization of the President, employed electronic surveillance for foreign intelligence or national security
purposes. Under the authorization of the President, the Department of Justice has adopted strict standards and procedures to govern such surveillances, to ensure their conformity to the law and their reasonableness under the Fourth Amendment, and to minimize to the extent practical their intrusion on individual interests. Attorney General Richardson stated the standards employed in a letter to Senator Fulbright dated September 12, 1973. I have reiterated, moreover, that electronic surveillance for foreign intelligence purposes is authorized only when the subject is a foreign power or agent of a foreign power, and in this latter case the agency must be one that relates to activities of concern to the United States for foreign intelligence or counterintelligence reasons. I have said in the past, and I can say again today, that no such electronic surveillance without a warrant is at present directed against any American citizen.

I believe the time has come when Congress and the Executive together can take much needed steps to give clarity and coherence to a great part of the law in this area, the part of the law that concerns domestic electronic surveillance for foreign intelligence purposes. To bring greater coherence to this field, one must, of course, build on the thoughts and experiences of the past, to give
reasonable recognition, as the judicial decisions in
general have done, to the confidentiality, judgments and
discretion that the President's constitutional responsibilities
require, to give legislative form to the standards and
procedures that experience suggests, and to provide added
assurance by adapting a judicial warrant procedure to the
unique characteristics of this area. The statements of
thoughtful judges have suggested, and encouraged, the
belief that adaptation is possible, that it is possible to
achieve an accommodation that allows obtaining information
necessary to the safety of the Republic and protects
individual rights. As Justice Powell said in Keith:
"Different standards may be compatible with the Fourth
Amendment if they are reasonable both in relation to the
legitimate need of Government for intelligence information
and the protected rights of our citizens. For the warrant
application may vary according to the governmental interest
to be enforced and the nature of citizen rights deserving
protection."
The definitions in the bill limit and direct the scope of national security electronic surveillance in the United States to surveillances directed at the agents of foreign powers for the purpose of gathering foreign intelligence information. The key questions, then, are what is meant by electronic surveillance, foreign intelligence information, foreign powers, and agents of a foreign power.

It is the definition of electronic surveillance which restricts the scope of the bill to interceptions within the United States. In brief, S. 3197 authorizes the use of electronic surveillance to intercept any communication between persons in the United States. There are three elements to the definition. First, the bill covers all wiretaps within the United States of telephone or telegram communications regardless of the location of the sender or receiver. Second, all radio transmissions, such as long distance telephone calls carried by microwave, between points within the United States, are covered. Finally, the bill would establish a procedure for seeking a judicial warrant authorizing the use of an electronic, mechanical, or other device, such as a microphone, to acquire information under circumstances in which a person has a reasonable expectation of privacy. Because of the different nature of government operations to collect foreign intelligence by intercepting international communications -- a process described as the interception of signals and the processing of those signals by techniques which sort and analyze the signals to reject those
that are inappropriate or unnecessary -- that use of electronic surveillance is not addressed in this bill.

Foreign intelligence information is defined as: first, information relating to the ability of the United States to protect itself from actual or potential attack or other hostile acts of a foreign power; or second, information with respect to foreign powers or territories which because of its importance is deemed essential to the security or national defense of the Nation or to the conduct of the foreign affairs of the United States; or third, information relating to the ability of the United States to protect the national security against foreign intelligence activities.

Foreign power is defined in the bill as including, in addition to foreign governments, foreign "factions, parties, military forces, or agencies or instrumentalities of such entities, or organizations composed of such entities, whether or not recognized by the United States, or foreign based terrorist groups."

Under the bill a Federal judge would not be authorized to issue a warrant unless he finds that there is probable cause to believe the subject of the surveillance is the agent of a foreign power. The definition of "agent of a foreign power" is, therefore, central to the protection afforded by the bill. A person is considered an agent of a foreign power if he fits within either of two categories: first, that he is an officer or employee of a foreign power but is not a permanent resident alien or citizen of the United States; or second, that pursuant
to the direction of a foreign power, he is "engaged in clandestine intelligence activities, sabotage, or terrorist activities, or . . . [he] conspires with, assists or aids and abets such a person in engaging in such activities."

As I wrote to Senator Kennedy before he introduced this bill, "In my view, the present bill is correct in placing its principal focus not solely upon the factor of Federal criminality, but upon the issue of whether the proposed target of the surveillance is engaging in clandestine intelligence activities, sabotage or terrorism as an agent of a foreign power and pursuant to the foreign powers direction."

This is because some clandestine intelligence activities of foreign powers or their agents may not violate Federal criminal statutes and yet be of great importance.

The bill would authorize a warrant only upon a finding by a neutral magistrate that there is probable cause to believe the subject of the surveillance is, indeed, a foreign agent as defined. I am sure this kind of procedure, taken as a whole, with its emphasis on foreign agency for the purpose of engaging in clandestine intelligence, sabotage or terrorist activities satisfies not only the requirements of the Fourth Amendment but also the requirements of sound public policy and the need for public reassurance.

Turning now from the definitions to some of the substantive provisions, the bill requires that minimization procedures be followed to limit as much as possible the
acquisition and retention of information relating to permanent resident aliens or citizens of the United States that is not foreign intelligence information. I would expect these procedures to differ from case to case depending upon the type of information sought and the nature of the target of the electronic surveillance. When it is impossible to completely prevent the acquisition of information that is not foreign intelligence-related, the bill provides for the minimization of retention of such information.

The bill does not provide for notice to be given to the subjects of foreign intelligence and foreign counterintelligence electronic surveillance except in the instance of an emergency authorization under procedures I have discussed. Under that emergency provision the Attorney General is allowed to authorize surveillances for 24 hours subject to the later approval of a judge. A judge has the discretion to order notice to the subject of a surveillance if he declines to ratify the emergency surveillance.

Finally, I come to section 2528 which relates to the constitutional power of the President to order electronic surveillance under facts and circumstances not covered by this legislation.

As I have indicated, I think this bill can be a step toward coordinating the executive, legislative and administrative law and practice in a significant part of this area. But as I have also pointed out, the bill is by its definition limited to the interception within the United States by electronic surveillance, as defined, of foreign intelligence.
information. The bill does not purport to cover interceptions, other than by use within the United States of devices such as wiretaps and microphones, of international communications. Therefore the provision with respect to Presidential power is directed specifically towards electronic surveillances when the facts and circumstances are beyond the scope of this bill.

In my letter to Senator Kennedy on this bill, I stated that "this provision would represent the expression of congressional and presidential intent that the President use the procedures established by the bill for all national security surveillance which falls within the scope of this legislation. At the same time, it would assure that every situation important to the national interest would be covered -- either by the warrant procedure of the bill or by the President's inherent constitutional power, however that power may be defined by the courts, to conduct electronic surveillance with respect to foreign powers. I reaffirm, however, . . . that it will be the policy and intent of the Department of Justice, if this bill is enacted, to proceed exclusively pursuant to judicial warrant with respect to all electronic surveillance against domestic communications of American citizens or permanent resident aliens."

Section 2528 of the bill and its reference to Section 2511 (3) of Title III must, of course, be read in the light of the Supreme Court's decision in the Keith case. First, by the section, as Justice Powell wrote of Section 2511(3), Title III, "Congress simply left Presidential powers where it
found them." Second, Justice Powell wrote that there is no inherent Presidential power to conduct electronic surveillance without a warrant directed against "a group or organization . . . composed of citizens of the United States and which has no significant connection with a foreign power, its agents or agencies." To state what is obvious, Section 2528 of the bill does not affect the constitutional condemnation of warrantless electronic surveillances of the sort involved in the Keith and Zweibon cases.

In conclusion, I want to say that it is my view that this bill is a significant, even an historic step. I believe it is important to the country, and I hope it will be enacted quickly.

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