Department of Justice

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TESTIMONY

OF

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

BEFORE

THE SENATE SELECT COMMITTEE
TO STUDY GOVERNMENTAL OPERATIONS
WITH RESPECT TO INTELLIGENCE ACTIVITIES

10:00 A.M.
THURSDAY, NOVEMBER 6, 1975
RUSSELL SENATE OFFICE BUILDING
WASHINGTON, D. C.

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

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

national interest, including, of course, the protection of constitutional rights."

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

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

There is an additional professional restriction upon me which I am sure the Committee will appreciate. The Department of Justice has under active criminal investigation various activities which may or may not have been illegal. In addition, the Department through its own attorneys, or private attorneys specially hired, is representing present or former government employees in civil suits which have been brought against them for activities in the course of official conduct. These circumstances naturally impose some limitation upon what

it is appropriate for me to say in this forum. I ought not give specific conclusory opinions as to matters under criminal investigation or in litigation. I can only hope that what I have to say may nevertheless be of some value to the Committee in its search for constructive solutions.

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

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

In 1928 the Supreme Court in Olmstead v. United States*/ held that wiretapping was not within the coverage of the Fourth Amendment. Attorney General Sargent had issued an order earlier in the same year prohibiting what was then known as the Bureau of Investigation from engaging in any telephone wiretapping for any reason. Soon after the order was issued, the Prohibition Unit was transferred to the Department as a new Bureau. Because of the nature of its work and the fact that the Unit had previously engaged in telephone wiretapping,

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*/ 277 U.S. 468.

in January 1931, Attorney General William D. Mitchell directed that a study be made to determine whether telephone wiretapping should be permitted and, if so, under what circumstances. The Attorney General determined that in the meantime the Bureaus within the Department could engage in telephone wiretapping upon the personal approval of the bureau chief after consultation with the Assistant Attorney General in charge of the case. The policy during this period was to allow wiretapping only with respect to the telephones of syndicated bootleggers, where the agent had probable cause to believe the telephone was being used for liquor operations. The Bureaus were instructed not to tap telephones of public officials and other persons not directly engaged in the liquor business. In December 1931, Attorney General William Mitchell expanded the previous authority to include "exceptional cases where the crimes are substantial and serious, and the necessity is great and [the bureau chief and the Assistant Attorney General] are satisfied that the persons whose wires are to be tapped are of the criminal type."

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

considered to be of major law enforcement importance, such as espionage and sabotage.

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

On May 21, 1940, President Franklin Roosevelt issued a memorandum to the Attorney General stating his view that electronic surveillance would be proper under the Constitution where "grave matters involving defense of the nation" were involved. The President authorized and directed the Attorney General "to secure information by listening devices [directed

*/Nardone v United States, 302 U.S. 379.

**/Nardone v United States, 308 U.S. 338.

at] the conversation or other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies." The Attorney General was requested "to limit these investigations so conducted to a minimum and to limit them insofar as possible as to aliens." Although the President's memorandum did not use the term "trespassory microphone surveillance," the language was sufficiently broad to include that practice, and the Department construed it as an authorization to conduct trespassory microphone surveillances as well as telephone wiretapping in national security cases. The authority for the President's action was later confirmed by an opinion by Assistant Solicitor General Charles Fahy who advised the Attorney General that electronic surveillance could be conducted where matters affected the security of the nation.

On July 17, 1946, Attorney General Tom C. Clark sent President Truman a letter reminding him that President Roosevelt had authorized and directed Attorney General Jackson to approve "listening devices [directed at] the conversation of other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies" and that the directive had been followed by Attorneys General Robert Jackson and Francis Biddle. Attorney General Clark recommended that the directive "be continued in force" in view of the "increase in subversive

activities" and "a very substantial increase in crime." He stated that it was imperative to use such techniques "in cases vitally affecting the domestic security, or where human life is in jeopardy" and that Department files indicated that his two most recent predecessors as Attorney General would concur in this view. President Truman signed his concurrence on the Attorney General's letter.

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

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

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

In 1952, there were 285 telephone wiretaps, 300 in 1953, and 322 in 1954. Between February 1952 and May 1954, the

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

A memorandum from Director Hoover to the Deputy Attorney General on May 4, 1961, described the Bureau's practice since 1954 as follows: "[I]n the internal security field, we are utilizing microphone surveillances on a restricted basis even though trespass is necessary to assist in uncovering the activities of Soviet intelligence agents and Communist Party leaders. In the interests of national safety,

microphone surveillances are also utilized on a restricted basis, even though trespass is necessary, in uncovering major criminal activities. We are using such coverage in connection with our investigations of the clandestine activities of top hoodlums and organized crime. From an intelligence standpoint, this investigative technique has produced results unobtainable through other means. The information so obtained is treated in the same manner as information obtained from wire taps, that is, not from the standpoint of evidentiary value but for intelligence purposes."

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

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

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

President Johnson announced a policy for federal agencies in June 1965 which required that the interception of telephone

conversations without the consent of one of the parties be limited to investigations relating to national security and that the consent of the Attorney General be obtained in each instance. The memorandum went on to state that use of mechanical or electronic devices to overhear conversations not communicated by wire is an even more difficult problem "which raises substantial and unresolved questions of Constitutional interpretation." The memorandum instructed each agency conducting such an investigation to consult with the Attorney General to ascertain whether the agency's practices were fully in accord with the law. Subsequently, in September 1965, the Director of the FBI wrote the Attorney General and referred to the "present atmosphere, brought about by the unrestrained and injudicious use of special investigative techniques by other agencies and departments, resulting in Congressional and public alarm and opposition to any activity which could in any way be termed an invasion of privacy." "As a consequence," the Director wrote,"we have discontinued completely the use of microphones." The Attorney General responded in part as follows: "The use of wiretaps and microphones involving trespass present more difficult problems

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

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

> "An exception to the general delegation of authority has been prescribed, since 1940, for the interception of wire communications, which (in addition to being limited to matters involving national security or danger to human life) has required the specific authorization of the Attorney General in each instance. No similar procedure existed until 1965 with respect to the use of devices such as those involved in the instant case, although records of oral and written communications within the Department of Justice reflect concern by Attorneys General and the Director of the Federal Bureau of Investigation that the use of listening devices by agents of the government should be confined to a strictly limited category of situations. Under Departmental practice in effect for a period of years prior to 1963, and continuing until 1965, the Director of the Federal Bureau of Investigation was given

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*/ Sup. Ct. Docket No. 1029, October Term, 1965

> authority to approve the installation of devices such as that in question for intelligence (and not evidentiary) purposes when required in the interests of internal security or national safety, including organized crime, kidnappings and matters wherein human life might be at stake. . . .
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> Present Departmental practice, adopted in July 1965 in conformity with the policies declared by the President on June 30, 1965, for the entire federal establishment, prohibits the use of such listening devices (as well as the interception of telephone and other wire communications) in all instances other than those involving the collection of intelligence affecting the national security. The specific authorization of the Attorney General must be obtained in each instance when this exception is invoked."

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

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

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

Telephone Wiretaps	Microphones
121	24

*/ Schipani v. United States, Sup. Ct. Docket No. 504, October Term, 1966.

In 1968 Congress passed the Omnibus Crime Control and Safe Streets Act. Title III of the Act set up a detailed procedure for the interception of wire or oral communications. The procedure requires the issuance of a judicial warrant, prescribes the information to be set forth in the petition to the judge so that, among other things, he may find probable cause that a crime has been or is about to be committed. It requires notification to the parties subject to the intended surveillance within a period not more than ninety days after the application for an order of approval has been denied or after the termination of the period of the order or the period of the extension of the order. Upon a showing of good cause the judge may postpone the notification. The Act contains a saving clause to the effect that it does not limit the constitutional power of the President to take such measures as he deems necessary to protect the nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Then in a separate sentence the proviso goes on to say, "Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the government."

The Act specifies the conditions under which information obtained through a presidentially authorized interception might be received into evidence. In speaking of this saving clause, Justice Powell in the Keith case in 1972 wrote: "Congress simply left presidential powers where it found them." In the Keith case the Supreme Court held that in the field of internal security, if there was no foreign involvement, a judicial warrant was required by the Fourth Amendment. Fifteen months after the Keith case Attorney General Richardson, in a letter to Senator Fulbright which was publicly released by the Department, stated: "In general, before I approve any new application for surveillance without a warrant, I must be convinced that it is necessary (1) to protect the nation against actual or potential attack or other hostile acts of a foreign power; (2) to obtain foreign intelligence information deemed essential to the security of the United States; or (3) to protect national security information against foreign intelligence activities."

I have read the debates and the reports of the Senate Judiciary Committee with respect to Title III and particularly the proviso. It may be relevant to point out that Senator Philip Hart questioned and opposed the form of the proviso reserving presidential power. But I believe it is fair to say that his concern was primarily, perhaps exclusively, with the language which dealt with presidential power to take such measures as the President deemed

necessary to protect the United States "against any other clear and present danger to the structure or existence of the Government."

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

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

Having described in this fashion something of the history and conduct of the Department of Justice with respect to telephone wiretaps and microphone installations, I should like to remind the Committee of a point with which I began, namely, that the factual situations to be imagined for a discussion such as this are not only of a sensitive but a changing nature. I do not have much to say about this except to recall some of the language used by General Allen in his testimony before this

Committee. The techniques of the NSA, he said, are of the most sensitive and fragile character. He described as the responsibility of the NSA the interception of international communication signals sent through the air. He said there had been a watch list, which among many other names, contained the names of U.S. citizens. Senator Tower spoke of an awesome technology -- a huge vacuum cleaner of communications -- which had the potential for abuses. General Allen pointed out that "The United States, as part of its effort to produce foreign intelligence, has intercepted foreign communications, analyzed, and in some cases decoded, these communications to produce such foreign intelligence since the Revolutionary War." He said the mission of NSA is directed to foreign intelligence obtained from foreign electrical communications and also from other foreign signals such as radar. Signals are intercepted by many techniques and processed, sorted and analyzed by procedures which reject inappropriate or unnecessary signals. He mentioned that the interception of communications, however it may occur, is conducted in such a manner as to minimize the unwanted messages. Nevertheless, according to his statement, many unwanted communications are potentially selected for further processing. He testified that subsequent processing, sorting and selection for analysis are conducted in accordance with strict procedures to insure immediate and, wherever possible, automatic

rejection of inappropriate messages. The analysis and reporting is accomplished only for those messages which meet specific conditions and requirements for foreign intelligence. The use of lists of words, including individual names, subjects, locations, et cetera, has long been one of the methods used to sort out information of foreign intelligence value from that which is not of interest.

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

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

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

The history of the Fourth Amendment is very much the history of the American Revolution and this nation's quest for independence. The Amendment is the legacy of our early years and reflects values most cherished by the Founders. In a direct sense, it was a reaction to the general warrants and writs of assistance employed by the officers of the British Crown to rummage and ransack colonists' homes as a means to enforce anti-smuggling and customs laws. General search warrants had been used for centuries in England against those accused of seditious libel and other offenses. These warrants, sometimes judicial, sometimes not, often general as to persons to be arrested, places to be searched, and things to be seized, were finally condemned by Lord Camden in 1765 in Entick v. Carrington,*/ a decision later celebrated by the Supreme Court as a "landmark of English liberty ...one of the permanent monuments of the British Constitution."**/ The case involved a general warrant, issued by Lord Halifax as Secretary of State, authorizing messengers to search for John Entick and to seize his private papers and books. Entick had written publications criticizing the Crown and was a supporter of John Wilkes, the famous author and editor of the North Briton whose own publications had prompted wholesale arrests, searches, and

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*/ 19 Howell's State Trials, 1029

**/ Boyd v. United States, 116 U.S. 616, 627 (1886)

seizures. Entick sued for trespass and obtained a jury verdict in his favor. In upholding the verdict, Lord Camden observed that if the government's power to break into and search homes were accepted, "the secret cabinets and bureaus of every subject in this kingdom would be thrown open to the search and inspection of a messenger, whenever the secretary of state shall see fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel."*/

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

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*/ 19 Howell's State Trials, at 1029.

English law book," since they put "the liberty of every man in the hands of every petty officer."*/ Otis' fiery oration later prompted John Adams to reflect that "then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born."**/

The words of the Fourth Amendment are mostly the product of James Madison. His original version appeared to be directed solely at the issuance of improper warrants.***/ Revisions accomplished under circumstances that are still unclear transformed the Amendment into two separate clauses. The change has influenced our understanding of the nature of the rights it protects. As embodied in our Constitution, the Amendment reads: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,

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*/ Tudor, Life of James Otis (1823), p. 66.

**/ Works of John Adams, X, 276.

***/ Madison's proposal read as follows:

> "The rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized."

Annals of Cong., 1st Cong., 1st Sess. p. 452.

shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

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

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

First, broadly considered, the Amendment speaks to the autonomy of the individual against society. It seeks to

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

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*/ Olmstead v. United States, 277 U.S. 471, 478 (1928).

**/ United States v. On Lee, 193, F.2d 306, 315-16 (1951).

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

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*/ United States v. Boyd, 116 U.S. 616, 630 (1886).

**/ The concern with self-incrimination is reflected in the test of standing to invoke the exclusionary rule. As the Court stated in United States v. Calandra 414 U.S. 338, 348 (1974):

> "Thus, standing to invoke the exclusionary rule [under the Fourth Amendment] has been confined to situations where the Government seeks to use such evidence to incriminate the victim of the unlawful search. . . . This standing rule is premised on a recognition that the need for deterrence, and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search."

***/ 116 U.S., at 631-32.

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

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

Another concern embodied in the Amendment may be found in its second clause dealing with the warrant requirement, even though the Fourth Amendment does not always require a warrant. The fear is that the law enforcement officer, if unchecked, may misuse his powers to harass those who hold unpopular or simply different views and to intrude capriciously upon the

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*/ Harris v. United States, 331 U.S. 145, 163 (1947).

**/ United States v. United States District Court, 407 U.S. 297, 314 (1972).

privacy of individuals. It is the recognition of the possibility for abuse, inherent whenever executive discretion is uncontrolled, that gives rise to the requirement of a warrant. That requirement constitutes an assurance that the judgment of a neutral and detached magistrate will come to bear before the intrusion is made and that the decision whether the privacy of the individual must yield to a greater need of society will not be left to the executive alone.

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

The values outlined above have been embodied in the Amendment from the beginning. But the importance accorded a particular value has varied during the course of our history. Some have been thought more important or more threatened than others at times. When several of the values coalesce, the need for protection has been regarded as greatest. When only one is involved,

that need has been regarded as lessened. Moreover, the scope of the Amendment itself has been altered over time, expanding or contracting in the face of changing circumstances and needs. As with the evolution of other constitutional provisions, this development has been case in definitional terms. Words have been read by different Justices and different Courts to mean different things. The words of the Amendment have not changed; we, as a people, and the world which envelops us, have changed.

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

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*/ Olmstead v. United States, 277 U.S. 438.

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

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

The Court finally reached the opposite emphasis from its previous stress on property in 1967 in Katz v. United States. ***/ The Court declared that the Fourth Amendment "protects people, not places," against unreasonable searches and seizures; that oral conversations, although intangible, were entitled to be secure against the uninvited ear of a government

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*/ Goldman v. United States, 316 U.S. 129.
**/ 365 U.S. 505 (1961).
***/ 389 U.S. 347.

officer, and that the interception of a telephone conversation, even if accomplished without a trespass, violated the privacy on which petitioner justifiably relied while using a telephone booth. Justice Harlan, in a concurring opinion, explained that to have a constitutionally protected right of privacy under Katz it was necessary that a person, first, "have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognized as 'reasonable.'"*/

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

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*/ Id., at 361.

**/ Id., at 350.

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

The Katz decision itself illustrates the point. Was it really a "reasonable expectation" at the time of Katz for a person to believe that his telephone conversation in a public phone booth was private and not susceptible to interception by a microphone on the booth's outer wall? Almost forty years earlier in Olmstead the Court held that such nontrespassory interceptions were permissible. Goldman reaffirmed that holding. So how could Katz reasonably expect the contrary? The answer, I think, is that the Court's decision in Katz turned ultimately on an assessment of the effect of permitting such unrestrained intrusions on the individual in his private and social life. The judgment was that

a license for unlimited governmental intrusions upon every telephone would pose too great a danger to the spontaneity of human thought and behavior. Justice Harlan put the point this way:

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

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

To identify the interests which are to be "secure," of course, only begins the inquiry. It is equally essential to identify the dangers from which those interests are to be secure. What constitutes an intrusion will depend on the scope of the protected interest. The early view that the Fourth Amendment protected only tangible property resulted in the rule that a physical trespass or taking was the measure of an intrusion. Olmstead rested on the fact that

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*/ United States v. White, 401 U.S. 745, 786 (1971) (dissenting opinion).

there had been no physical trespass into the defendant's home or office. It also held that the use of the sense of hearing to intercept a conversation did not constitute a search or seizure. Katz, by expanding the scope of the protected interests, necessarily altered our understanding of what constitutes an intrusion Since intangibles such as oral conversations are now regarded as protected "effects," the overhearing of a conversation may constitute an intrusion apart from whether a physical trespass is involved.

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

I stated earlier that a central concern of the Fourth Amendment was with intrusions to obtain evidence to incriminate the victim of the search. This concern has been reflected in Supreme Court decisions which have traditionally treated intrusions to gather incriminatory evidence differently from intrusions for neutral or benign purposes. In Frank v. Maryland,*/ the appellant was fined for refusing to allow a housing inspector to enter his

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*/ 359 U.S. 360 (1959).

residence to determine whether it was maintained in compliance with the municipal housing code. Violation of the code would have led only to a direction to remove the violation. Only failure to comply with the direction would lead to a criminal sanction. The Court held that such administrative searches could be conducted without warrant. Justice Frankfurter, writing for the Court, noted that the Fourth Amendment was a reaction to "ransacking by Crown officers of the homes of citizens in search of evidence of crime or of illegally imported goods."**/ He observed that both Entick and Boyd were concerned with attempts to compel individuals to incriminate themselves in criminal cases and that "it was on the issue of the right to

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**/ Id., at 363.

be secure from searches for evidence to be used in criminal prosecutions or for forfeitures that the great battle for fundamental liberty was fought."*/ There was thus a great difference, the Justice said, between searches to seize evidence for criminal prosecutions and searches to detect the existence of municipal health code violations. Searches in this later category, conducted "as an adjunct to a regulatory scheme for the general welfare of the community and not as a means of enforcing the criminal law, [have] antecedents deep in our history," and should not be subjected to the warrant requirement.**/

Frank was later overruled in 1967 in Camara v. Municipal Court,***/ and a companion case, See v. City of Seattle.****/ In Camara, appellant was, like Frank, charged with a criminal violation as a result of his refusal to permit a municipal inspector to enter his apartment to investigate possible violations of the city's housing code. The Supreme Court rejected the Frank rationale that municipal fire, health, and housing inspections could be conducted without a warrant because the object of the intrusion was not to search for the fruits or instrumentalities of crime. Moreover, the Court noted that most regulatory laws such as fire, health, and housing codes were

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*/ Id., at 365.

**/ Id., at 367.

***/ 387 U.S. 523.

****/ 387 U.S. 541.

enforced by criminal processes, that refusal to permit entry to an inspector was often a criminal offense, and that the "self-protection" or "non-incrimination" objective of the Fourth Amendment was therefore indeed involved.

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

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

*/ 400 U.S. 309.

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

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

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*/ 387 U.S. 523, 536-37 (1967).

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

Moreover, as I have indicated, the Court has held that, in certain situations, something less than probable cause -- in the traditional sense -- may be sufficient ground for intrusion, if the degree of intrusion is limited strictly to the purposes for which it is made. In Terry v. Ohio***/ the Court held that a

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*/ Brinegar v. United States, 338 U.S. 160, 1975 (1949).

**/ Gouled v. United States, 255 U.S. 298, 309 (1921).

***/ 392 U.S. 1 (1968)

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

Nonetheless, it is clear that the traditional probable cause standard is not the exclusive measure of the Government's interest. The kind and degree of interest required depend on the

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*/ U.S. (1975).

**/ 413 U.S. 266 (1973).

***/ U.S. (1975).

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

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*/ 387 U.S. 523 (1967).

**/ Id., at 539

the legitimate need of Government for intelligence information and the protected rights of our citizens."***/

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

***/ 407 U.S. 297, 322-23 (1972).

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

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

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*/ United States v. Poller, 43 F. 2d 911, 914 (CA2, 1930)

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

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

The concern about the use of what is seized may be most important for future actions. Until very recently--in fact, until the Court's 1971 decision in Bivens **/ -- the only sanction against

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*/ 18 U.S.C. § 2518 (5).

**/ Bivens v. Six Unknown Federal Narcotics Agents 403 U.S. 388.

an illegal search was that its fruits were inadmissible at any criminal trial of the person whose interest was invaded. So long as this was the only sanction, the courts, in judging reasonableness, did not really have to weigh any governmental interest other than that of detecting crimes. In practical effect, a search could only be "unreasonable" as a matter of law if an attempt was made to use its fruits for prosecution of a criminal offense. So long as the Government did not attempt such use, the search could continue and the Government's interests, other than enforcing criminal laws, could be satisfied.

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

greatest when it is employed or can be employed to impose criminal sanctions or to deter, by disclosure, the exercise of individual freedoms. In short, the use of the product seized bears upon the reasonableness of the search.

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

lance is justified, one way of reducing the intrusion's effects is to limit strictly the revelation or disclosure or the use of its product. Minimization procedures can be very important.

In discussing the standard of reasonableness, I have necessarily described the evolving standards for issuing warrants and the standards governing their scope. But I have not yet discussed the warrant requirement itself -- how it relates to the reasonableness standard and what purposes it was intended to serve. The relationship of the warrant requirement to the reasonableness standard was described by Justice Robert Jackson: "Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."*/ This view has not always been accepted by a majority of the Court; the Court's view of the relationship between the general reasonableness standard and the warrant requirement has shifted often and dramatically. But the view expressed by Justice Jackson is now quite clearly the prevailing position. The Court said in Katz that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth

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*/ Johnson v. United States, 333 U.S. 10, 13-14 (1948).

Amendment -- subject only to a few specifically established and well-delineated exceptions."*/ Such exceptions include those grounded in necessity -- where exigencies of time and circumstance make resort to a magistrate practically impossible. These include, of course, the Terry stop and frisk and, to some degree, searches incident to arrest. But there are other exceptions, not always grounded in exigency -- for example, some automobile searches -- and at least some kinds of searches not conducted for purposes of enforcing criminal laws -- such as the welfare visits of Wyman v. James. In short, the warrant requirement itself depends on the purpose and degree of intrusion. A footnote to the majority opinion in Katz, as well as Justice White's concurring opinion, left open the possibility that warrants may not be required for searches undertaken for national security purposes. And, of course, Justice Powell's opinion in Keith, while requiring warrants for domestic security surveillances, suggests that a different balance may be struck when the surveillance is undertaken against foreign powers and their agents to gather intelligence information or to protect against foreign threats.

The purpose of the warrant requirement is to guard against over-zealousness of Government officials, who may tend to overestimate the basis and necessity of intrusion and to underestimate the impact of their efforts on individuals. "The historical judgment, which the Fourth Amendment accepts, is that

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*/ 389 U.S. 347, 357 (1967).

unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech."*/ These purposes of the warrant requirement must be kept firmly in mind in analyzing the appropriateness of applying it to the foreign intelligence and security area.

There is a real possibility that application of the warrant requirement, at least in the form of the normal criminal search warrant, the form adopted in Title III, will endanger legitimate Government interests. As I have indicated, Title III sets up a detailed procedure for interception of wire or oral communications. It requires the procurement of a judicial warrant and prescribes the information to be set forth in the petition to the judge so that, among other things, he may find probably cause that a crime has been or is about to be committed. It requires notification to the parties subject to the surveillance within a period after it has taken place. The statute is clearly unsuited to protection of the vital national interests in continuing detection of the activities of foreign powers and their agents. A notice requirement -- aside from other possible repercussions -- could destroy the usefulness of

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*/ United States v. U.S. District Court, 407 U.S. 297, 317 (1972).

intelligence sources and methods. The most critical surveillance in this area may have nothing whatever to do with detection of crime.

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

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

The more limited in time and target a surveillance is, the more nearly analogous it appears to be with a traditional

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

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*/ Almeida-Sanchez v. United States, 413 U.S. 266, 275 (1973).

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

The case law, although unsatisfactory in some respects, has supported or left untouched the policy of the Executive in the foreign intelligence area whenever the issue has been squarely confronted. The Supreme Court's decision in the Keith case in 1972 concerned the legality of warrantless surveillance directed against a

domestic organization with no connection to a foreign power and the Government's attempt to introduce the product of the surveillance as evidence in the criminal trial of a person charged with bombing a C.I.A. office in Ann Arbor, Michigan. In part because of the danger that uncontrolled discretion might result in use of electronic surveillance to deter domestic organizations from exercising First Amendment rights, the Supreme Court held that in cases of internal security, when there is no foreign involvement, a judicial warrant is required. Speaking for the Court, Justice Powell emphasized that "this case involves only the domestic aspects of national security. We have expressed no opinion as to the issues which may be involved with respect to activities of foreign powers or their agents."*/ As I observed in my remarks at the ABA convention, the Supreme Court surely realized, "in view of the importance the Government has placed on the need for warrantless electronic surveillance that, after the holding in Keith, the Government would proceed with the procedures it had developed to conduct those surveillances not prohibited--that is, in the foreign intelligence area or, as Justice Powell said, 'with respect to activities of foreign powers and their agents.'"

The two federal circuit court decisions after Keith that have expressly addressed the problem have both held that the Fourth Amendment does not require a warrant for electronic surveillance instituted to obtain foreign intelligence. In the first, United States v. Brown,**/ the defendant, an American citizen, was incidentally overheard as the result of a warrantless wiretap authorized by the

*/ 407 U.S., 322
**/ 484 F.2d 418 (CA5, 1973), cert. denied 415 U.S. 960 (1974).

Attorney General for foreign intelligence purposes. In upholding the legality of the surveillance, the Court of Appeals for the Fifth Circuit declared that on the basis of "the President's constitutional duty to act for the United States in the field of foreign affairs, and his inherent power to protect national security in the conduct of foreign affairs... the President may constitutionally authorize warrantless wiretaps for the purpose of gathering foreign intelligence." The court added that "(r)estrictions on the President's power which are appropriate in cases of domestic security become inappropriate in the context of the international sphere."

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

Most recently, in Zweibon v. Mitchell,**/ decided in June of

*/ 494 F.2d 593 (CA3)(en banc) cert. denied sub nom. Ivanov v. United States, 419 U.S. 881 (1974).

**/ 516 F.2d 594 (CADC, 1975) (en banc).

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

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

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

appropriate to do so, although the statutory provisions regarding probable cause, notification, and prosecutive purpose make it unworkable in all foreign intelligence and many counterintelligence cases.

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

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

Fourth Amendment. But the primary concern, I suppose, is whether reasonable minimization procedures are employed with respect to use and dissemination.

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

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

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

There may be regulatory and institutional devices other than the warrant requirant that would better assure that intrusions for national security and foreign intelligence purposes reasonably balance the important needs of Government and of individual interests. In assessing possible approaches

to this problem it may be useful to examine the practices of other Western democracies. For example, England, Canada, and West Germany each share our concern about the confidentiality of communications within their borders. Yet each recognizes the right of the Executive to intercept communications without a judicial warrant in cases involving suspected espionage, subversion or other national security intelligence matters.

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

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

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

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

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

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

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*/ Devlin, The Criminal Prosecution in England, 53 (1960).

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