Department of Justice

STATEMENT

OF

THE HONORABLE GRIFFIN B. BELL
ATTORNEY GENERAL OF THE UNITED STATES

BEFORE

THE SENATE JUDICIARY COMMITTEE
SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES

ON

THE FOREIGN INTELLIGENCE SURVEILLANCE ACT - S. 1566

2:00 P.M.
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UNITED STATES SENATE
WASHINGTON, D.C.

Mr. Chairman and Members of the Committee:

I am pleased to appear here today to testify in support of S. 1566, a bill to authorize applications for a court order approving the use of electronic surveillance to obtain foreign intelligence information within the United States.

There are many difficult questions involved in striking a balance between the need to collect foreign intelligence to secure the safety and well being of this nation and the concurrent need to protect the civil liberties of all persons in the United States and United States citizens abroad. Only in the last few years has this problem received the public scrutiny which it has so long deserved. Past administrations and this administration have confronted this problem daily in dealing with particular cases without the aid of legislation to authorize that which is proper, to prohibit that which is not, and to effectively draw the line between the two.

This bill is the first step in what will be for me and many others a continuing effort to fill that void. We in the Executive branch are well aware of the abuses of the past; internal measures have been taken both by the prior administration and by this administration to assure that those abuses cannot recur. Even if these safeguards are

as effective as we believe, they have not been arrived at through the process of legislation.

This is significant for two reasons. First, no matter how well intentioned or ingenious the persons in the Executive Branch who formulate these measures, the crucible of the legislative process will ensure that the procedures will be affirmed by that branch of government which is more directly responsible to the electorate. Second, any lingering doubts as to the legality of proper intelligence activities will be laid to rest.

As you are aware, the bill before us has been the product of very close coordination between members of the Executive Branch representing all the affected agencies and members of this Committee, the Senate Intelligence Committee, and the House Judiciary Committee. As Senator Bayh said on the occasion of the President's announcement of this bill, this is one of the finest examples of cooperation between the Executive Branch and the Legislative Branch, and I hope that statement will be as accurate after the passage of this bill as it was at the time it was originally made.

I believe this bill is remarkable not only in the way it has been developed, but also in the fact that for the first time in our society the clandestine intelligence activities of our government shall be subject to the regulation and receive the positive authority of a public law for all to inspect. President Carter stated it very

well in announcing this bill when he said that "one of the most difficult tasks in a free society like our own is the correlation between adequate intelligence to guarantee our nation's security on the one hand, and the preservation of basic human rights on the other." It is a very delicate balance to strike, but one which is necessary in our society, and a balance which cannot be achieved by sacrificing either our nation's security or our civil liberties. In my view this bill strikes the balance, sacrifices neither our security nor our civil liberties, and assures that the abuses of the past will remain in the past and that the dedicated and patriotic men and women who serve this country in intelligence positions, often under substantial hardships and even danger, will have the affirmation of Congress that their activities are proper and necessary.

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

The bill provides a procedure by which the Attorney General may authorize applications to the courts for warrants to conduct electronic surveillance within the United States for foreign intelligence purposes. Applications for warrants are to be made to one of seven district court judges publicly designated by the Chief Justice of the Supreme

Court. Denials of such applications may be appealed to a special three-judge court of review and ultimately to the Supreme Court.

Approval of a warrant application under this bill would require a finding by the judge that the target of the surveillance is a "foreign power" or an "agent of a foreign power." These terms, defined in the bill, ensure that no United States citizen or permanent resident alien may be targeted for electronic surveillance unless a judge finds probable cause to believe either that he is engaged in clandestine intelligence, sabotage, or terrorist activities for or on behalf of a foreign power in violation of the law, or that, pursuant to the direction of a foreign intelligence service, he is collecting or transmitting in a clandestine manner information or material likely to harm the security of the United States. The judge would be required to find that the facilities or place at which the electronic surveillance is to be directed are being used or are about to be used by a foreign power or an agent of a foreign power.

As a safeguard, approval of the warrant would also require a finding that procedures will be followed in the course of the surveillance to minimize the acquisition, retention, and dissemination of information relating to United States persons which does not relate to national defense, foreign affairs, or the terrorist activities,

sabotage activities, or clandestine intelligence activities of a foreign power. Special minimization procedures for electronic surveillance targeting entities directed and controlled by foreign governments which are largely staffed by Americans are also subject to judicial review.

Finally, the judge would be required to find that a certification has been made by the Assistant to the President for National Security Affairs or a similar official that the information sought by the surveillance is "foreign intelligence information" necessary to the national defense or the conduct of foreign affairs of the United States or is necessary to the ability of the United States to protect against the clandestine intelligence, terrorist, or sabotage activities of a foreign power. Where the surveillance is targeted against a United States person, the judge can review the certification.

The bill creates two different types of warrants. A special warrant which will not require as much sensitive information to be given to the judge is only available with respect to "official" foreign powers -- foreign governments and their components, factions of foreign nations, and entities which are openly acknowledged by a foreign government to be directed and controlled by that government. The other warrant is applicable to all U.S. citizens and permanent resident aliens.

The judge could approve electronic surveillance for foreign intelligence purposes for a period of ninety days except where the surveillance is targeted against the

special class of foreign powers, and in such cases the approval can be as long as one year. Any extension of the surveillance beyond that period would require a reapplication to the judge and new findings as required for the original order.

Emergency warrantless surveillances would be permitted in limited circumstances, provided that a warrant is obtained within 24 hours of the initiation of the surveillance.

For purposes of oversight, the bill requires annual reports to the Administrative Office of the United States Courts and to the Congress of various statistics related to applications and warrants for electronic surveillance. The President is committed to providing to the appropriate committees of Congress in executive session such other information as is necessary for effective oversight.

Turning now to specific provisions of the bill of particular importance, I would like to point out the three specific areas in which this bill increases protections for Americans as against a similar bill proposed last year (S.3197).

First, the current bill recognizes no inherent power of the President to conduct electronic surveillance. Whereas the bill introduced last year contained an explicit reservation of Presidential power for electronic surveillance within the United States, this bill specifically states that the procedures in the bill are the exclusive means by which

electronic surveillance, as defined in the bill, and the interception of domestic wire and oral communications may be conducted.

Second, the bill closes a gap that was present in last year's bill by which Americans in the United States could be targeted for electronic surveillance of their international communications. In this bill such targeting will require a prior judicial warrant.

Third, in the bill last year judges were never allowed to look behind the executive certification that the information sought was foreign intelligence information, that the purpose of the surveillance was to obtain such information, and that such information could not reasonably be obtained by normal investigative techniques. In this bill, when United States persons are the target of the surveillance the judge is required to determine that the above certifications are not clearly erroneous. While the clearly erroneous standard is not the same as a probable cause standard, it is the same basis of review which courts ordinarily apply to review of administrative action by executive officials, which administrative action may also directly and substantially impinge on the rights of Americans. We believe it is not unreasonable that where high executive officials with expertise in this area have certified to such facts, some degree of

deference by the court is appropriate. This is especially so because the judges will be called upon to consider highly sophisticated matters of national defense, foreign affairs, and counterintelligence. The wide difference between such issues and the questions normally addressed by judges in warrant proceedings, conducted ex parte without an adversary hearing, is a major reason for adopting a standard other than probable cause.

Thus, the protections for Americans in this year's bill have been substantially increased over the protections of last year's bill.

The bill provides for warrant applications to be authorized by the Attorney General or a designated Assistant Attorney General. This provision will permit the option of eventually delegating some of the substantial administrative burden of reviewing individual case files. I am committed to personally reviewing and authorizing all electronic surveillance requests of the types covered by the bill until the bill has been signed into law and, after that, for a sufficient period to determine how the bill is working in practice and how the courts are interpreting the standards of the bill. The purpose of an eventual delegation of authority to make warrant applications would be to ensure that each individual surveillance request file receives a thorough review by an Assistant Attorney General whose time is not as constrained as that of the Attorney General. I would follow the same practice as I do now for applications for use of electronic surveillance in general criminal cases under 18 U.S.C. 2510 et seq. which are delegated to the Assistant Attorney General for the Criminal Division--I would receive weekly reports on applications authorized and refused. I would also direct my designee to consult with me on cases which present difficult policy problems in light of standards I would set for consideration of warrant applications.

In response to last year's bill, a concern was expressed involving the so-called non-criminal standard for the definition of an agent of a foreign power. A United States person may be made the target of an electronic surveillance under this bill, as I have said before, only if he engages in clandestine intelligence activities, sabotage activities, or terrorist activities for or on behalf of a foreign power which activities involve or will involve violations of federal criminal laws, or if he engages in activities under the circumstances described in Section 2521(b)(2)(B)(iii) found on page 4 of the Committee print.

This so-called non-criminal standard in Subparagraph (iii) is extremely narrowly drawn. There are few, I believe, who would maintain that the activity described therein should not be a basis for electronic surveillance or even the basis for a criminal prosecution. The objection to this subparagraph, I feel, is not based upon a belief that the subparagraph's standards are too broad, but rather that as a matter of principle a United States person should not be made a target of an electronic surveillance unless there is probable cause to believe he has violated the law.

As a principle this is a worthy goal, but it is important to keep certain factors in mind. First, this principle is not constitutionally required; there are numerous searches which the Supreme Court has found constitutional both with and without a warrant where there is no probable cause to believe a crime has been committed. These range from administrative searches and custom searches to stop-and-frisks and airport searches. In the case of United States v. United States District Court the Supreme Court indicated that the probable cause standard of the Fourth Amendment in intelligence searches did not necessarily mean probable cause to believe that a crime had been committed. Thus, it is our considered belief that the standard in Subparagraph (iii) is constitutional. Second, even though we might desire that the activities described in Subparagraph (iii) be made criminal, I believe that, depending upon the facts, it is possible that the activity described therein would not be held to be a violation of any current federal criminal statute. On the other hand, when a United States person furtively, clandestinely collects or transmits information or material to a foreign intelligence service pursuant to the direction of a foreign intelligence service and where the circumstances surrounding this activity indicate that the transmission of the material or information would be harmful to our security or that the

failure of the government to be able to monitor such activity would be harmful to the security of the United States, then I believe that whether or not that activity is today a violation of our criminal statutes, the government has a duty to monitor that activity to safeguard the security and welfare of the nation. Third, there is a certain danger in extending the criminal law, the purpose of which is to prosecute, convict and normally incarcerate the perpetrator, merely to satisfy the principle that electronic surveillance should not be undertaken absent a criminal violation.

The Department of Justice is undertaking at this time to review the espionage laws for the purpose of making them comprehensive in the areas in which prosecution is warranted and generally to rationalize this area of the law. This undertaking is quite difficult, as illustrated by the fact that the controversial espionage provisions of the former S. 1 were the result of just such an undertaking. I can only assure you today that we

will do our utmost to draft revised espionage laws in such a way that the non-criminal standard might be repealed.

Another issue which has been the cause of some concern is the treatment of non-United States persons; that is, illegal aliens, foreign crewmen, tourists, temporary workers, and other aliens not admitted for permanent residence. Director Kelley will present to you persuasive reasons why the facts require different treatment for such persons whose contacts with or time within the United States is likely to be extremely limited. I would like only to make the point that it is our considered view that such differing treatment wholly conforms to the Constitution. There is no doubt that the Fourth Amendment protects aliens in the United States as well as United States citizens. And under this bill a prior judicial warrant is equally required for all aliens within the United States, whether permanent residents or not. The standards for this warrant are slightly different for certain aliens, however. The bill reflects generally a distinction between different types of persons or entities; that is, the showing for a foreign power is less than for a natural person; the showing for an alien who is an officer or employee of a foreign power is less than that which is required of other aliens; and the showing required for non-resident aliens is less than that

for United States persons, which includes resident aliens. There is a rational basis for each of these distinctions, and this is sufficient to assure that the differing standards do not violate the Equal Protection Clause. Therefore, we believe this differing treatment is wholly in accord with the Constitution of the United States.

There have been some questions raised as to what agencies of the United States Government would be involved in electronic surveillance under the bill and what if any change this would mean from current operating procedures. I do not believe that this bill would make any change in which agencies would in fact conduct electronic surveillance or receive its product. Generally only two agencies would be engaging in electronic surveillance under this bill and that would be the FBI and the National Security Agency. Which agency would be involved might depend on various factors, including the nature of the target, the purpose of the surveillance (whether the purpose was for positive foreign intelligence or counterintelligence), and the type of electronic surveillance involved. The respective military services would have the power to engage in electronic surveillance for counterintelligence purposes on military reservations. The CIA is, of course, barred from conducting electronic surveillance within the United States. There is, however, a large degree of cooperation

and coordination between the various intelligence agencies on particular electronic surveillances. For example, the need for a particular electronic surveillance might come from the State Department, the CIA might be the agency who had developed the particular equipment to be used, the FBI might be the agency to in fact conduct the electronic surveillance, the product of the surveillance might go to another agency for analysis, with only the analyzed product then going to the State Department. The bill does not make any specific limitations on which agency may conduct electronic surveillance, and I do not believe that such a limitation would be advisable. Not only are the organization, structure, and duties of the intelligence community subject to some change, but the development of capabilities and technologies by differing agencies cannot be accurately predicted in advance. There will of course be restrictions on the dissemination of information obtained from electronic surveillance not only for security purposes but also to comply with the minimization procedures that the court would order. Again, I do not believe specific limitations as to specific agencies would be advisable in the statute itself.

There is, I know, a desire on the part of several members of both this Committee and the Senate Select Committee on Intelligence to extend statutory protections to Americans abroad who may be subjected to electronic surveillance. This desire is shared by this Administration. The Justice Department, in coordination with members of the various affected intelligence agencies, is actively at work on developing a proposed bill to extend statutory safeguards to Americans abroad with respect to electronic surveillance for intelligence or law enforcement purposes. There are, however, special problems involved in overseas surveillances, some of which arise out of the fact that the United States' legislative jurisdiction is limited overseas. In the next several months, again after close coordination with interested Members of Congress, we expect to be able to present proposed legislation on this subject.

In closing, I would urge that this bill be swiftly enacted into law as a significant first step toward outlining by statute the authority and responsibility of the Government in conducting intelligence activities.