VF Wiretapping

Department of Justice

STATEMENT

OF

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

BEFORE

THE HOUSE JUDICIARY COMMITTEE,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE

ON

H.R. 12750 -- ELECTRONIC SURVEILLANCE

10:00 A.M.
RAYBURN HOUSE OFFICE BUILDING
WEDNESDAY, JUNE 2, 1976
WASHINGTON, D.C.

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to testify in support of H.R. 12750, a bill that would authorize applications for court orders approving electronic surveillance to obtain foreign intelligence information. I believe that the bill is significant. Its provisions have evolved, from the initiative of the President, through bipartisan cooperation and through discussion between the Executive Branch and Members of Congress, including members of this Committee, in an effort to identify and serve the public interest. This bill will, I believe, establish critical safeguards to protect individual rights. As I said in testimony on the companion Senate bill, S. 3197, enactment of the bill "will provide major assurance to the public that electronic surveillance will be used in the United States for foreign intelligence purposes pursuant to legislative standards and under procedures requiring accountability for official action, scrutiny of the action by Executive officials at regular intervals, and the independent review, as provided, by a detached and neutral magistrate."

Since you have already heard extensive testimony on

the bill and are familiar with its provisions, I can perhaps be of greatest service by foregoing an extended statement and by responding to your particular questions. It may be useful, however, for me to describe in briefest form the bill's overall design and purpose, and to address certain concerns about the bill that members of the Subcommittee and witnesses generally have expressed.

H.R. 12750 provides for the designation by the Chief Justice of seven district court judges, to whom the Attorney General, if he is authorized by the President to do so, may make application for an order approving electronic surveillance within the United States for foreign intelligence purposes. The judge may grant such an order only if he finds that there is probable cause to believe that the target of the surveillance is a foreign power or an agent of a foreign power, and if a Presidential appointee confirmed by the Senate has certified that the information sought is indeed foreign intelligence information that cannot feasibly be obtained by less intrusive techniques. Such surveillances may not continue longer than 90 days without securing renewed approval from the court. There is an emergency provision in the bill which is available in situations in which there is no possibility of preparing the necessary papers for the court's review in time to obtain

the information sought in the surveillance. In such circumstances the Attorney General may authorize the use of electronic surveillance for a period of no more than 24 hours. The Attorney General would be required to notify a judge at the time of the authorization that such a decision has been made and to submit an application to the judge within 24 hours. Finally, the Attorney General must report annually both to the Congress and the Administrative Office of the United States Courts statistics on electronic surveillance pursuant to the bill's procedures.

As I said in my statement to the Senate Subcommittee, the standards and procedures of the proposed bill are not a response to a presumed constitutional warrant requirement applicable to domestic surveillances conducted for foreign intelligence purposes. Two circuit courts have held that the Fourth Amendment's warrant requirement does not apply to this area; the Supreme Court in the Keith case, and the District of Columbia Circuit in its Zweibon decision, despite broad dicta among its several opinions, have specifically reserved the question. The bill responds then, not to constitutional necessity, but to the need for the branches of Government to work together to overcome the fragmentation of the present law among the areas of legislation, judicial decisions, and

administrative action, and to achieve the coherence, stability and clarity in the law and practice that alone can assure necessary protection of the Nation's safety and of individual rights. I believe the time has come when Congress and the Executive together can take much-needed steps to give clarity and coherence to a great part of the law in this area, the part of the law that concerns domestic electronic surveillance of foreign powers and their agents for foreign intelligence purposes. To bring greater coherence to this field, one must, of course, build on the thoughts and experiences of the past; to give reasonable recognition, as the judicial decisions in general have done, to the confidentiality, judgments and discretion that the President's constitutional responsibilities require; to give legislative form to the standards and procedures that experience suggests, and to provide added assurance by adapting a judicial warrant procedure to the unique characteristics of this area.

The standards and procedures contained in the bill, particularly its provision for prior judicial approval, draw upon the traditional criminal law enforcement search warrant model, the pattern followed in Title III of the Omnibus Crime Control and Safe Streets Act of 1968. I think it is accurate to say that much of the discussion before this Subcommittee has revolved around those features of the bill that depart from this traditional model. The primary purpose of foreign

intelligence surveillances is not to obtain evidence for criminal prosecution, although that may be the result in some cases. The purpose, instead, is to obtain information concerning the actions of foreign powers and their agents in this country -- information that may often be critical to the protection of the Nation from foreign threats. The departures from the criminal law enforcement model reflect this distinct national interest, but these departures are limited so that there are safeguards for individual rights which do not now exist in statutory form. The bill is based on a belief that it is possible to achieve an accommodation that both protects individual rights and allows the obtaining of information necessary to the Nation's safety. As Justice Powell said in the Keith case: "Different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens. For the warrant application may vary according to the governmental interest to be enforced and the nature of citizen rights deserving protection."

The bill allows foreign intelligence surveillance only of persons who there is probable cause to believe are agents of a foreign power. Moreover, the agency must be of

a particular kind, directly related to the kinds of foreign power activities in which the Government has a legitimate foreign intelligence interest. Thus, persons -- not citizens or resident aliens -- are deemed agents only if they are officers or employees of a foreign power. The standard is much higher for a citizen or resident alien. For the purpose of this bill, a citizen or resident alien can be found to be an agent only if there is probable cause to believe that the person is acting "pursuant to the direction of a foreign power," and "is engaged in clandestine intelligence activities, sabotage, or terrorist activities, or who conspires with, or knowingly aids or abets such a person in engaging in such activities."

In the course of this Subcommittee's hearings, there has been some discussion suggesting that electronic surveillance of citizens and permanent resident aliens should not be allowed absent a determination that such persons are violating federal law. My own view is that the concept of "foreign agent" safely should not be limited in this way. As I noted in a letter to Senator Kennedy concerning the companion Senate bill, most of the activities that would, under the bill, allow surveillance of citizens and resident aliens,

constitute Federal crimes. But other foreign agent activities -- like espionage to acquire trade secrets and information about industrial processes or foreign personnel or facilities located in this country; and terrorist or sabotage activities aimed at private persons or property, or officials or property of state and local government -- would not, under current law, be Federal crimes. Yet such acts vitally affect the national interest, because they are undertaken clandestinely within the United States "pursuant to the direction of a foreign power," the standard employed in the bill. The probable cause requirement of the Fourth Amendment is not measured exclusively by the Government's interest in detecting violations of criminal law. Searches for purposes other than criminal law enforcement historically have been permissible, if reasonable in light of the circumstances and the Governmental interest involved. Information concerning the activities of foreign agents engaged in intelligence, espionage or sabotage activities is a valid -- indeed a vital Government interest. I believe that that interest should be the proper standard of permissible surveillances under this legislation. I realize it has been suggested that the Federal espionage act should be broadened sufficiently so that the clandestine activities covered here would all be covered under a Federal criminal law. I doubt the wisdom of such a course.

The distinct purpose of foreign intelligence surveillances, as compared to the traditional criminal law enforce-

ment model, also requires different standards regarding notice to persons surveilled -- standards that have been a source of concern for some Subcommittee members and witnesses. The bill provides for notice only when emergency surveillance has been undertaken without judicial warrant and that surveillance is subsequently disapproved. In 1967, in Berger v. New York, the Supreme Court found fault with a New York surveillance law because it did not limit the absence of notice to exigent circumstances. In the foreign intelligence area, when the surveillance involves agents of foreign powers, exigent circumstances are invariably present. A notice requirement could seriously jeopardize the collection of foreign intelligence critical to our Nation's needs by compromising the fact that the target had been identified as an agent of a foreign power. In many cases such a compromise would also have the effect of revealing sources and endangering the lives of individuals who identified the target as an agent of a foreign power. Even if notice were limited to "innocent" Americans incidentally overheard, there could be no guarantee -- and nothing less would suffice in this sensitive area -- that they would not disclose the notification to the foreign agent who was the target.

Professor Van Alstyne expressed to the Subcommittee concern that the provision allowing applications to be made, without geographical restriction, to any one of seven district judges specially designated by the Chief Justice would allow the Government to apply only to those judges who have proved most willing to grant approval. I believe his suggestion was that authority be given to each Chief Circuit judge to grant applications for surveillance within his circuit.

The provision as it now stands is based on several critical considerations. Proposed surveillances may prove to be concentrated in time and place; over time, the focus of the concentration may shift. If only one judge in a given geographical area were given authority to approve applications, the burden might prove too great, especially if the judge is to give each application the rigorous scrutiny that the interests involved require. But designation of more than one judge in each geographical area would, of course, open the same opportunity of forum-shopping that is the source of the present objection. The bill's provision for seven specially designated judges, without geograhical limit on jurisdiction, allows flexibility in response to the problem of shifting concentrations. It also meets other important objectives.

The small number of judges will facilitate the necessary protection of information. More important, perhaps, each judge will, over time, gain experience with the factual patterns that applications present and will be able to bring to new applications the critical judgment that is the best protection against abuse. Moreover, the small number of judges will allow a sharing of information and thus the development of common standards. Such common standards, plus the possibility that the judges will know if they are more favored with applications than other designated judges, will, I believe, provide the greatest assurance that the Government will not be tempted to forum-shop.

Finally, I want to express my understanding of the purposes of the bill's section 2528, which deals with the reservation of Presidential Power. Discussion of the bill has suggested a variety of forms which this provision could take. But in all variations, although some may be more acceptable than others, the purposes, I believe, are essentially the same.

The bill's definition of electronic surveillance limits its scope, to gain foreign intelligence information when the target is a foreign power or its agents, to interceptions within the United States. The bill does not purport to cover interceptions of all international communications where, for example, the interception would be accomplished outside of the United States, or, to take another example, a radio transmission does not have both the sender and all intended recipients within the United States. Interception of international communications, beyond

those covered in the bill, involves special problems and circumstances that do not fit the analysis and system this bill would impose. This is not to say that the development of legislative safeguards in the international communications area is impossible. I know it will be extremely difficult and will involve different considerations. I believe it will be unfortunate, therefore, to delay the creation of safeguards in the area with which this bill deals until the attempt is made to cover what is essentially a different area with different problems. An additional reason for the reservation of Presidential power is that, even in the area covered by the bill, it is conceivable that there may be unprecedented, unforeseen circumstances of the utmost danger not contemplated in the legislation in which restrictions unintentionally would bring paralysis where all would regard action as imperative. One of the purposes of the Presidential power provision, therefore, is simply to make clear that the bill was not intended to affect Presidential powers in areas beyond its scope, including areas which, because of utmost danger, were not contemplated by Congress in its enactment. In the reservation of Presidential power, where the circumstances are beyond the scope or events contemplated in the bill, the bill in no way expands or contracts the President's constitutional powers. As the Supreme Court said of Section 2511 (3) of Title III, "Congress simply left Presidential powers where it found them." The reservation cannot and does not authorize domestic surveillance held unconstitutional in the Keith case.

The express provision that the bill is not to have effect beyond its scope would perhaps not be so critical if the section did not also make clear the intent--an intent that I find clear from the bill as a whole--that within its scope and its intended coverage the bill's requirements are mandatory. In a letter to Senator Kennedy concerning the companion Senate bill, I stated that "this provision would represent the expression of congressional and presidential intent that the President use the procedures established by the bill for all national security surveillance which falls within the scope of this legislation. At the same time, it would assure that every situation important to the national interest would be covered--either by the warrant procedure of the bill or by the President's inherent constitutional power, however that power may be defined by the courts, to conduct electronic surveillance with respect to foreign powers. I reaffirm, however, ... that it will be the policy and intent of the Department of Justice, if this bill is enacted, to proceed exclusively pursuant to judicial warrant with respect to all electronic surveillance against domestic communications of American citizens or permanent resident aliens."

As you know, a difference of opinion may exist as to whether it is within the constitutional power of Congress to prescribe, by statute, the standards and procedures by which

the President is to engage in foreign intelligence surveillances essential to the national security. I believe that the standards and procedures mandated by the bill are constitutional. The Supreme Court's decision in the Steel Siezure case seems to me to indicate that when a statute prescribes a method of domestic action adequate to the President's duty to protect the national security, the President is legally obliged to follow it. My view, of course, does not foreclose future administrations from arguing or acting upon the contrary position. Nor can Congress decide the constitutional question. But Congress can do what this bill clearly does: if it is constitutional to mandate the bill's requirements within its defined scope, it is the statute's intent to do so.

To repeat, I believe that the bill's enactment would be a significant accomplishment in the service of the liberty and security of our people.