NOVEMBER 3, 1971.

MEMORANDUM

To: Senator John L. McClellan
From: G. Robert Blakey, Chief Counsel, Subcommittee on Criminal Laws and Procedures
Subject: Wiretapping

You asked for a background memorandum on wiretapping.

SUMMARY

The development of national policy in this area has been slow and often inconsistent. Nevertheless, every Attorney General since 1931, including the present, but excluding his predecessor, has supported its use in major criminal investigations. Every Attorney General, without exception, however, has supported its use in the national security area, even without judicial supervision. The courts at first refused to intervene to regulate it at all, then attempted to eliminate it, but have now seemingly recognized the legitimacy of its use under certain safeguards. Congress, as you are aware, seemed unable to resolve the issue from 1928 until 1968, when it finally enacted comprehensive legislation.

DEFINITION OF KEY TERMS

1. *Wiretapping:* interception of communication transmitted over wire from phone *without* consent of participant.
2. *Bugging:* interception of communication transmitted orally *without* consent of participant.
3. *Recording:* electronic recording of wire or oral communication *with* the consent of a participant.
4. *Transmitting:* radio transmission of oral communication *with* the consent of a participant.
5. *Electronic surveillance:* generic term loosely used to cover all of the avove, but often confined to "wiretapping" or "bugging."
6. *National security:* generic term loosely used to refer to wiretapping or bugging aimed at either "foreign" or "domestic" threats to the national security.

a. *Foreign security:* usually meant to cover "wiretapping" or "bugging" to obtain coverage of foreign diplomats, spies, and their American contacts; also directed at Communist party and Communist front activities in the United States; sometimes used to obtain coverage of those involved in foreign intrigue, e.g., gun running to Latin American countries, etc.; primarily useful to prevent damage (theft of documents, etc.), not "solve crimes."

b. *Domestic security:* usually meant to cover "wiretapping" or "bugging" to obtain coverage of extremist groups in the United States, e.g., the Black Panthers, groups within the K.K.K., and La Cosa Nostra; sometimes used to determine the influence of extremist groups in other legitimate organizations (civil rights or peace); primarily useful to prevent damage (assaults, bombings, kidnapping, homicides, riots, etc.).

Note that the "foreign" and "domestic" security distinction is sharper in theory than in practice. Often it is difficult without "wiretapping" or "bugging" to determine the "foreign" or "domestic" character of the threat.

Note, too, that since the emphasis is on the prevention of harmful activity rather than the punishment of those who have already caused harm, police action in these areas tends to cover more people for longer periods of time under less precise standards than conventional criminal investigations.

Caveat: Newspaper reporters, in particular, but all of us sometimes use "wiretapping," "bugging" and "national security" to refer to some or all of these techniques or areas of activity without carefully discriminating between them. This fact alone leads to most of the controversy; people often are not talking about the same things, even though they are using the same words.

CHRONOLOGY OF SIGNIFICANT EVENTS

1. *Olmstead* v. *United States*, 277 U.S. 438 (1928), held: (1) that wiretapping without a warrant did not violate the Fourth Amendment's ban on unreasonable searches and seizures because without a trespass there was no "search" and

without a tangible taking there was no "seizure;" (2) that wiretapping did not violate the Fifth Amendment's ban on compulsory self-incrimination because no compulsion was placed on the speaker to speak; and (3) that the product of wiretapping illegal under state law may be used in Federal courts, since the suppression sanction applied only to violations of constitutional rules.

2. Section 605 of the Federal Communications Act of 1934, 48 Stat. 1103 (1934), 47 U.S.C. §605 (1968), prohibited the "interception" and "divulgence" or "use" of the contents of a wire communication. At passage of the Act, managers of the bill observed, "[I]t does not change existing law." 78 Cong. Rec. 1013 (1934).

3. *Nardone* v. *United States*, 302 U.S. 379 (1937), held that the "divulgence" of a wiretap made by a Federal officer in a Federal court violated Section 605 of the 1934 Act.

4. N.Y. Const., Art. I, §12 (1938), authorized wiretaps.

5. President Franklin D. Roosevelt on May 21, 1940, instructed Attorney General Robert H. Jackson to use wiretapping and bugging against subversive activities against the government of the United States. (A copy of this memo is attached.)

6. Attorney General Robert H. Jackson informed Congress in March 1941 that Section 605 could only be violated by both "interception" and "divulgence" or *private* "use." Hearings before Subcommittee No. 1 of House Judiciary Committee on H.R. 2266 and H.R. 3099, 77th Cong., 1st Sess. 18 (1971).

7. N.Y. Code of Crim. Proc. §813a (1942) implemented state constitution to authorize court-ordered wiretaps.

8. *Goldman* v. *United States*, 316 U.S. 129 (1942), held that bugging without a warrant did not violate the Fourth Amendment's ban on unreasonable searches and seizures if there was no trespass.

9. President Harry S. Truman on July 17, 1947, concurred in the recommendation of Attorney General Tom C. Clark that the F.D.R. authorization of 1940 be extended to cases of domestic security or where human life was in jeopardy. (A copy of this memo is attached.)

10. *On Lee* v. *United States*, 343 U.S. 747 (1952, held that the use of a transmitter by police officers without a warrant to overhear conversations between an informant and a suspect did not violate the Fourth Amendment's ban on unreasonable searches and seizures where the informant consented to its use.

11. *Irvine* v. *California*, 347 U.S. 128 (1954), held that bugging without a court order accomplished by a trespass violated the Fourth Amendment's ban on unreasonable searches and seizures, but that since the suppression sanction did not operate in state courts, no evidentiary consequences attached to the violation.

12. *Benanti* v. *United States*, 355 U.S. 96 (1957), held that a wiretap under a court order under New York law violated Section 605 of the 1934 Act and its product could not be used in a Federal court.

13. *Rathbun* v. *United States*, 355 U.S. 107 (1957), held electronic recording of a wire communication withthe consent of a participant was not an "interception" under Section 605 of the 1934 Act.

14. *English Privy Councillors Report on Wiretapping* (1957) concluded that wiretapping under the Home Secretary's authorization was effective in crimina investigations, necessary to protect the security of the State, carried with it no harmful social consequences, and should be permitted to continue.

15. N.Y. Code of Crim. Proc. §813a extended to authorize court-ordered bugging in 1959.

16. *Lopez* v. *United States*, 373 U.S. 427 (1963), held that electronic recording of an oral communication with the consent of a participant was not a violation of the Fourth Amendment's ban on unreasonable searches and seizures.

17. *Massiah* v. *United States*, 377 U.S. 201 (1964), held that electronic recording of an oral communication with the consent of a participant after the indictment of the suspect violated the suspect's Sixth Amendment right to counsel.

18. President Lyndon B. Johnson on June 30, 1965, prohibited the use of wiretapping or bugging by Federal agencies except to collect intelligence affecting the national security and on the approval of the Attorney General. (A copy of this memo is attached.)

19. *Osborn* v. *United States*, 385 U.S. 323 (1966), held that electronic recording of an oral communication with the consent of a participant and pursuant to a court order was not a violation of the Fourth Amendment's ban on unreasonable searches and seizures.

20. Prime Minister Harold Wilson in 1966 re-affirmed the conclusions of the 1957 Privy Councillors Report but indicated that the Report's recommendations

would not be followed to the extent that they would permit the interception of the wire communications of members of Parliament. (Rept. C&P Pro. pp. 634–42 (17 Nov. 1966).)

21. The President's Commission on Law Enforcement and the Administration of Justice in 1967 recommended that a carefully drawn statute be enacted to authorize court ordered wiretapping and bugging.

22. *Berger* v. *New York*, 388 U.S. 41 (1967), held that Section 813a of N.Y. Code of Crim. Proc. authorized unreasonable searches and seizures contrary to the Fourth Amendment, but the Court observed that where there was provision for judicial supervision based on adequate showing of probable cause, particularization of the offense under investigation and the type of conversations to be overheard, limitations on the time period of the surveillance, a requirement of termination once the stated objective was achieved, lose supervision of the right to renew and a return to be filed with the court, such surveillance could be reasonable.

23. Attorney General Ramsey Clark, on June 16, 1967, issued regulations that prohibited wiretapping and bugging except in national security matters and required that his approval be obtained prior to recording with or without a court order or transmitting.

24. *Katz* v. *United States*, 389 U.S. 347 (1967), held that bugging without a warrant violated the Fourth Amendment's ban on unreasonable searches and seizures, even though there was no trespass, where the communication was uttered under a reasonable expectation of privacy; *Olmstead* and *Goldman* were overruled, and the Court repeated that a carefully drawn court order statute would be sustained and expressly left open the question of national security wiretaps or bugging without a warrant.

25. Title III of Public Law 90–351 (June 19, 1968) provided as follows:

a. Prohibited all private wiretapping and bugging (18 U.S.C. § 2511(1)).

b. Permitted private recording only where not done to commit a tort or crime (18 U.S.C. § 2511(2)(d)).

c. Prohibited State or Federal law enforcement wiretapping and bugging except under court order system (18 U.S.C. § 2511).

d. Permitted State or Federal law enforcement recording (18 U.S.C. § 2511(2)(c)).

e. Expressly disclaimed any intent to regulate Federal, foreign, or domestic security wiretapping or bugging (18 U.S.C. § 2511(3)).

f. Set up a Federal court order system for wiretapping or bugging (18 U.S.C. §§ 2516(1), 2518).

g. Set standards for optional State court order systems for wire tapping or bugging (18 U.S.C. §§ 2516(2), 2518).

h. Made unauthorized wiretapping or bugging a Federal civil tort (18 U.S.C. § 2529).

i. Required annual reports for Federal and State wiretapping and bugging (18 U.S.C. § 2519).

j. Set up a commission to review the operation of the first seven years of the statute in its seventh year (82 Stat. 223). (Note: P.L. 91–644 advanced this date from 1974 to 1973.)

Note: As of October 1970, the following 18 States had legislation for court ordered wiretapping or bugging:

Arizona (Post *Berger*, pre Title III).
Colorado.
Florida.
Kansas.
Georgia (Post *Berger*, pre Title III).
Maryland (Pre *Berger*).
Massachusetts (Revised after *Berger* and Title III).
Minnesota.
Nebraska.
Nevada (Pre *Berger*).
New Hampshire.
New Jersey.
New York (Revised after *Berger* and Title III).
Oregon (Pre *Berger*).
Rhode Island.
South Dakota.
Washington.
Wisconsin.

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26. The first Annual Surveillance Report for 1968 was issued. It indicated that 174 applications had been made and orders issued for wiretaps or bugs, which resulted in 263 arrests.

27. *Alderman* v. *United States*, 394 U.S. 165 (1969) held that illegally obtained evidence must be disclosed to suspects with an *in camera* review so that an opportunity can be afforded them to suppress evidence against them at trial.

28. The second Annual Surveillance Report for 1969 was issued. It indicated that 304 applications had been made and 302 orders issued for wiretaps or bugs, which resulted in 625 arrests.

29. Title VIII of Public Law 91–452 (October 15, 1970) set aside the result of Alderman for wiretapping and bugging occurring prior to June 19, 1968, and set up an *in camera* disclosure procedure.

Note: 18 U.S.C. § 2518(8)(d) and (10)(a) govern disclosure of wiretapping or bugging after June 19, 1968 and provides for an *in camera* disclosure procedure.

30. *United States* v. *Clay*, 430 F. 2d 165 (5th Cir. 1970), held that wiretapping under the direction of the Attorney General without a warrant to obtain foreign security intelligence did not violate the Fourth Amendment's ban on unreasonable search and seizure. (*Cert.* has been denied as to this issue.)

31. The American Bar Association on February 8, 1971, approved electronic surveillance standards for recording, wiretapping and bugging under court order and the use of such techniques in the foreign security field.

32. *White* v. *United States*, 401 U.S. 745 (1971), sustained against Fourth Amendment objections the use of a transmittor by police officers without a warrant to overhear conversations between an informant and a suspect where the suspect consented to its use.

33. *United States* v. *Keith*, No. 71–1105, United States Court of Appeals for the Sixth Circuit, decided April 8, 1971, held that an authorization of a wiretap in a domestic security matter by the Attorney General without judicial sanction violated the Fourth Amendment's ban on unreasonable searches and seizures. *Cert.* has been granted in the case.

ADDENDUM

Following is the text of the foreign and domestic surveillance exclusion of 18 U.S.C. § 2511(3):

(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall 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. Nor shall anything continued 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 contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

Attached also is the portion of the Senate debate on the 1968 Act relevant to Section 2511(3):

[114 Cong. Rec. S 6245–46 (daily ed. May 23, 1968)]

AMENDMENT NO. 715

Mr. DIRKSEN. Mr. President, I call up my amendment No. 715.

Mr. HART. Mr. President, would the Senator from Illinois before calling up his amendment—which would control our time—permit me a couple of minutes to engage in colloquy on one section of the wiretapping title with the Senator from Arkansas?

Mr. DIRKSEN. Mr. President, I ask unanimous consent, without losing my right to the floor, that the distinguished Senator from Michigan [Mr. HART] may have 5 minutes in which to explain the matter he wishes to discuss and not impair my time.

The PRESIDING OFFICER. The Senator will not lose the floor. The Senator from Michigan has yielded to him the right to speak.