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.

Mr. HART. Mr. President, I thank the Senator from Illinois very much.

Mr. President, I invite attention to page 56 of the bill. I refer to section 2511 (3). As I read it, this is an exemption to insure that nothing in the restriction on wiretapping shall limit the President in certain areas and under certain conditions. What does it say?

It says that nothing in this chapter or in the bill shall 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.

It then goes on to say that nothing in the bill shall limit the power of the President to take such measures as he deems necessary to protect the United States—and this is what bothers me—"against any other clear and present danger to the structure or existence of the Government."

What is it that would constitute a clear and present danger to the structure or existence of the Government? As I read it—and this is my fear—we are saying that the President, on his motion, could declare—name your favorite poison—draft dodgers, Black Muslims, the Ku Klux Klan, or civil rights activists to be a clear and present danger to the structure or existence of the Government.

If that is the case, section 2511(3) grants unlimited tapping and bugging authority to the President. And that means there will be bugging in areas that do not come within our traditional notions of national security.

Is my reading of that a fair one? Is my concern a valid one? If it is, why do we not agree to knock out the last clause?

Mr. MCCLELLAN. Mr. President, this language is language that was approved and, in fact, drafted by the administration, the Justice Department. I have not challenged it. I was perfectly willing to recognize the power of the President in this area. If he felt there was an organization—whether black, white, or mixed, whatever the name and under whatever auspices—that was plotting to overthrow the Government, I would think we would want him to have this right.

What such an amendment would do would be to circumscribe the powers we think the President has under the Constitution. As far as I am concerned, I would like to see it remain in here. I do not want to undertake to detract from any power the President already has. I do not think we could do so by legislation anyway. In fact, I know we could not. However, what we have done here is in keeping with the spirit of permitting the President to take such action as he deems necessary where the Government is threatened. I cannot find any bugger in the woodpile from looking at it, myself.

Mr. HART. Mr. President, some people can take comfort, I think, in the language of section 2511(3), and especially the statement that the President is indeed limited by the Constitution in his exercise of the national security power. This is why I think it might be useful to have this exchange.

We notice that the recital runs this way:

Nothing contained in this chapter . . . shall be deemed to limit the constitutional power of the President to do whatever he wants in the area of bugging against any other clear and present danger to the structure or existence of the Government.

If we agree that the President does not have constitutional power to put a tap on an organization that is advocating the withholding of income tax payments—to cite a current, though as yet a small movement—I would feel more at ease. But if, in fact, we are here saying that so long as the President thinks it is an activity that constitutes a clear and present danger to the structure or existence of the Government, he can put a bug on without restraint, then clearly I think we are going too far.

The PRESIDING OFFICER. The time allotted to the Senator from Michigan has expired.

Mr. MCCLELLAN. Mr. President, I ask unanimous consent that the Senator from Michigan have an additional 5 minutes without being charged any time.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. HOLLAND. Will the Senator yield?

Mr. HART. I yield.

Mr. HOLLAND. Mr. President, I think that the distinguished Senator is unduly concerned about this matter.

The section from which the Senator has read does not affirmatively give any power. It simply says, and I will not read the first part of it because that certainly says that nothing shall limit the President's constitutional power, but the part from which the Senator has read continues in the same spirit. It reads:

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.

And so forth. We are not affirmatively conferring any power upon the President. We are simply saying that nothing herein shall limit such power as the President has under the Constitution. If he does not have the power to do any specific thing, we need not be concerned. We certainly do not grant him a thing.

There is nothing affirmative in this statement.

Mr. McCLELLAN. Mr. President, we make it understood that we are not trying to take anything away from him.

Mr. HOLLAND. The Senator is correct.

Mr. HART. Mr. President, there is no intention here to expand by this language a constitutional power. Clearly we could not do so.

Mr. McCLELLAN. Even though intended, we could not do so.

Mr. HART. A few days ago I wondered whether we thought that we nonetheless could do something about the Constitution. However, we are agreed that this language should not be regarded as intending to grant any authority, including authority to put a bug on, that the President does not have now.

In addition, Mr. President, as I think our exchange makes clear, nothing in section 2511(3) even attempts to define the limits of the President's national security power under present law, which I have always found extremely vague, especially in domestic security threats, as opposed to threats from foreign powers. As I recall, in the recent Katz case, some of the Justices of the Supreme Court doubted that the President has any power at all under the Constitution to engage in tapping and bugging in national security cases without a court order. Section 2511(3) merely says that if the President has such a power, then its exercise is in no way affected by title III. As a result of this exchange, I am now sure no President thinks that just because some political movement in this country is giving him fits, he could read this as an agreement from us that, by his own motion, he could put a tap on.

Mr. PASTORE. Mr. President, will the Senator yield?

Mr. HART. I yield.

Mr. PASTORE. Mr. President, I think the only mistake is in the use of the word "deems." That word indicates someone else's interpretation. The word should be "intends." When we say "Nor shall anything in this chapter be deemed to limit," that is an interpretation that someone makes. I think the word ought to be "intended."

Mr. HOLLAND. Mr. President, I still reiterate my position. I do not think there is a single indication here that anything affirmative is being done.

We are simply negating any intention to take away anything that the President has by way of constitutional power. We could not do it if we wanted, and we are making clear that we are not attempting any such foolish course.

Mr. PASTORE. That is the point I make. No matter what is "deemed," you just cannot take powers away from the President that he constitutionally has. All we are saying is that we do not intend to do it because of anything that is in the bill.

THE WHITE HOUSE,
Washington, D.C., May 21, 1940.

MEMORANDUM FOR THE ATTORNEY GENERAL

I have agreed with the broad purpose of the Supreme Court decision relating to wire-tapping in investigations. The Court is undoubtedly sound both in regard to the use of evidence secured over tapped wires in the prosecution of citizens in criminal cases; and is also right in its opinion that under ordinary and normal circumstances wire-tapping by Government agents should not be carried on for the excellent reason that it is almost bound to lead to abuse of civil rights.

However, I am convinced that the Supreme Court never intended any dictum in the particular case which it decided to apply to grave matters involving the defense of the nation.

It is, of course, well known that certain other nations have been engaged in the organization of propaganda of so-called "fifth columns" in other countries and in preparation for sabotage, as well as in actual sabotage.

It is too late to do anything about it after sabotage, assassinations and "fifth column" activities are completed.

You are, therefore, authorized and directed in such cases as you may approve, after investigation of the need in each case, to authorize the necessary investigation agents that they are at liberty to secure information by listening devices direct to the conversation or other communications of persons suspected of subversive activities against the Government of the United States, including us-