

CONCLUSION

We emphasize in concluding that while we differ in varying degrees from some of the decisions discussed, we unanimously recognize them as expressions of legally tenable points of view. We support all decisions of the Court as the law of the land, to be respected and enforced unless and until changed by the processes available under our form of government.

In considering any change, the people of the United States must have an adequate understanding of the adverse effect upon law enforcement agencies of the constitutional limitations discussed in this statement. They must also ever be mindful that concern with crime and apprehension for the safety of their persons and property, as understandable as these are today, must be weighed carefully against the necessity—as demonstrated by history—of retaining appropriate and effective safeguards against oppressive governmental action against the individual, whether guilty or innocent of crime.

The determination of how to strike this balance, with wisdom and restraint, is a decision which in final analysis the people of this country must make. It has been the purpose of this statement to alert the public generally to the dimensions of the problem, to record our conviction that an imbalance exists, and to express a viewpoint as to possible lines of remedial action. In going somewhat beyond the scope of the Commission's report, we reiterate our support and our judgment that implementation of its recommendations will have far reaching and salutary effects.

Mr. BYRNE, Chief CAHILL, and Mr. LYNCH concur in this statement.

 ORGANIZED CRIME AND ELECTRONIC SURVEILLANCE—IN VIRGINIA?

The Virginia Crime Commission, created in 1966 and since continued, was authorized to conduct a number of studies. One of these was to determine the activities of organized crime in Virginia, and ways and means to reduce or prevent it.

ORGANIZED CRIME IN VIRGINIA

On March 16, 1971, Delegate Stanley C. Walker, Chairman of the Virginia Crime Commission, stated:

Our preliminary work so far has found that there is some organized crime in Virginia. * * * We have been told (for example) by responsible authorities that about a quarter of a million capsules of heroin are put up every week in the Richmond metropolitan area. Such large scale illegal activities could not occur without large financial support and a framework for the transportation and distribution of such narcotics.

The Commission is continuing its study, and will report by November of this year. In view of this study, it may be of interest to take a look—necessarily a superficial one—at the organized crime problem in our country, and at the use of electronic surveillance as the most effective means of attacking it.

THE NATIONAL SITUATION

As the Virginia study is in process, I will speak generally about the national situation. While the problem is most acute in the great metropolitan areas, it is sufficiently national in scope to encompass the heavily urbanized centers in Virginia.

Most of us think we know a good deal about organized crime—especially since "The Godfather" became the book everyone hides under his mattress. Yet, the truth is that the public generally has little conception of its scope or of the extent to which it preys upon the weakest elements of society.

What is "Organized Crime?"

The National Crime Commission¹ appointed by President Johnson (and on which I served) made an extensive study of this subject. In its 1967 Report, the Commission described organized crime as follows:

An organized society that operates outside of the control of the American people and their government, it involves thousands of criminals, working within structures as complex as those of any large corporation, subject to private laws more rigidly enforced than those of legitimate governments. Its

¹ President's Commission on Law Enforcement and the Administration of Justice, 1965-67.

actions are not impulsive, but rather the result of intricate conspiracies, carried on over many years and aimed at gaining control over whole fields of activities in order to amass huge profits.

The objectives are power and money. The base of activity is the supplying of illegal goods and services—gambling, narcotics, loan sharking, prostitution and other forms of vice. Of these gambling is the most pervasive and the most profitable. It ranges from lotteries (numbers rackets), off-track betting and sports betting to illegal gambling casinos.

The importation and distribution of narcotics, chiefly heroin, is the second most important activity. This enterprise is organized much like a legitimate importing, wholesaling and retail business. The heroin, originating chiefly in Turkey, is moved through several levels between the importer and the street peddler. The markup in this process is fantastic. Ten kilos of opium, purchased from a Turkish farmer at \$350, will be processed into heroin and retailed in this country for perhaps a quarter of a million dollars or more.

An addict must have his heroin. He is usually unemployed, which means that he must steal regularly to support his addiction. The disastrous effect of drugs on those who become addicted is well understood. There is far less understanding of the extent to which the drug traffic directly causes other serious crimes.

The third major activity of organized crime is loan sharking. Operating through an elaborate structure, large sums of cash are filtered down to street level loan sharks who deal directly with ignorant borrowers. Interest rates would make our banker friends green with envy. A charge of 20% per week is not at all unusual. The loan shark is more interested in perpetuating interest payments than in collecting principal. Threats and the actual use of the most brutal force are employed both to collect interest and to prevent borrowers from reporting to the police.

No one knows the total take of organized crime. The President's Crime Commission estimated an annual profit of perhaps \$6 to \$7 billion per year. This illegal, nontaxed income, is greater than the combined net profits of AT&T, General Motors and Standard Oil of New Jersey.

The Victims—Those Least Able

In all of these illicit operations the "customers"—in reality the victims—are the people least able to afford criminal exploitation. They are the poor, the uneducated and the culturally deprived. In the great cities, where organized crime flourishes, the victims come largely from the ghettos. Their number is legion.

But organized crime's activities are not limited to illicit goods and services. To an increasing extent, and with the profits from these activities, organized crime is infiltrating legitimate businesses and unions. In some cities, it dominates jukebox and vending machine operations. Its ventures range from laundries, restaurants and bars to funeral homes and cemeteries. Again, the use of force and intimidation is standard procedure.

The La Cosa Nostra "Families"

The basic core of this criminal conspiracy consists of 24 groups or families, operating as criminal cartels. Known originally as the Mafia, they are now called La Cosa Nostra. The 24 groups are loosely controlled at the top by a national body of overseers. The family members are relatively small—varying from as many as 700 to as few as 25. But their payrolls number in the thousands.

There are several aspects of organized crime which distinguish it from other crime. First, it is institutionalized as an ongoing system for making enormous profits. It protects itself, not casually or episodically but systematically, by bribery of selected police and public officials.

It also protects itself by ruthless discipline, maintained through "enforcers." It is their indelicate duty to maintain undeviating loyalty by the maiming and killing of recalcitrant or disloyal members. Those of you who admit to reading "The Godfather" will remember the fate of Paulie Gatto and Carlo Rizzi.

The efficiency of these professional enforcers is such that even the Federal Government, in organized crime prosecutions, often can protect witnesses only by total confinement. Indeed, it has been necessary on occasions to change their physical appearances, change their names and even to remove them from the country.

Why Has Society Been So Helpless?

At this point, you are probably asking—as I did—why have the American people, our government and our law enforcement agencies permitted these obscene

conspiracies to exist and to prosper. Indeed, why have we seemed to be so helpless in the face of such arrogance and organized criminality?

There are a number of reasons, which I mention only in passing:

1. *Lack of resources.* The necessary commitment of resources simply has not been made—either by the federal or local governments.

2. *Lack of coordination.* Our system of law enforcement is essentially local. The FBI, despite its valiant efforts, cannot command the necessary cooperation and coordination, and the local response is often uninformed and sometimes already corrupted.

3. *Absence of strategic intelligence.* Fighting organized crime is a form of warfare against an enormously rich and well-disciplined enemy. Police intelligence is usually tactical, directed toward a specific prosecution. The greater need is for true strategic intelligence on the capabilities, long-range plans, and the vulnerability of the leadership of the La Cosa Nostra groups.

4. *Inadequate sanctions.* The penalties imposed by law and the courts have been inadequate to deter this type of crime where the profits are so enormous. Until recently, the leaders have seldom been brought to court. This has caused judges to be reluctant to impose stiff sentences on the underlings. Moreover, the rights now afforded persons accused of crime—plus the delays in criminal justice—are exploited to the fullest by the resources available to La Cosa Nostra defendants.

5. *Lack of public and political commitment.* The truth is that the services provided by organized crime are wanted by many people. This tends to blunt the sort of demand by an outraged public which would assure more effective law enforcement. There is also a pervasive ignorance and indifference as to the nature and extent of the problem.

6. *Difficulty in obtaining evidence.* Perhaps the single most crippling limitation on law enforcement has been the difficulty of obtaining evidence adequate to convict the leaders. There is no secret as to the identity of many of these leaders. Their names are known to the police, the press and often to the public. They live in luxury, are often influential in their communities, and even become the subject of admiration—especially by some of the young and witless. They are living proof that crime does pay in America.

The simple truth is that these robber barons of our time rarely are brought to justice because our system of law handicaps itself. These handicaps take many forms. Those rooted in our Bill of Rights must, of course, be preserved for the other values which they protect.

Yet, much can be done within the framework of these rights that will inhibit the growth—if not indeed destroy—these criminal cartels.²

ELECTRONIC SURVEILLANCE

I will speak today only of one major law enforcement weapon which, until recently, we have deliberately denied ourselves. I refer to the most modern scientific method of detection, namely, electronic surveillance.

Organized crime operates by word of mouth and the telephone. Records familiar to legitimate business are never maintained. Massive gambling operations, in particular, are conducted nationwide through telephonic communications.

The Law Until 1968

Until 1968, the law with respect to wiretapping was chaotic. The Supreme Court had ruled in 1928 (*Olmstead v. U.S.*) that the Fourth Amendment did not apply to wiretapping, as there was no unlawful entry and no seizure of tangible things. But the Federal Communications Act of 1934 prohibited the use of wiretap evidence in federal trials. The net effect was to permit wiretapping without limitation, but the fruits thereof could not be used in court.

There was no federal law with respect to bugging, and state laws—where they existed—often drew no distinction between private and law enforcement surveillance. In sum, the situation was intolerable, and the President's Crime Commission in 1967 strongly urged federal action.

² We could, for example, relax some of the artificial rules engrafted upon the Fourth, Fifth and Sixth Amendments by divided votes of the Court in cases like *Miranda* and *Escobedo*. See *The Challenge of Crime in a Free Society*, Report of President's Crime Commission, 1967, Additional Views, p. 303 *et seq.* The English Courts, famous for their concern for human rights, have few such rigid, artificial rules.

Since 1968

Congress responded in 1968 by adopting Title III of the Omnibus Crime Control Act.³ Meanwhile, the Supreme Court—in the landmark *Burger* and *Katz* decisions⁴ had overruled *Olmstead*, and held that wiretapping and other forms of electronic surveillance are subject to the search and seizures requirements of the Fourth Amendment.

Guided by these decisions, Congress—in Title III—outlawed all private surveillance, but authorized its court-controlled use in the crimes most frequently associated with organized syndicates—such as murders, kidnapping, extortion, bribery and narcotics offenses.

National and Internal Security

Congress did not legislate affirmatively as to national security cases. Title III does provide that its provisions shall not be construed to limit the inherent power of the President to obtain evidence without a prior court order in cases involving national defense or internal security. As these issues are beyond the scope of this talk, I mention them only in the interest of completeness and to avoid any misunderstanding of the recommendation I will make for Virginia.

I will say in passing that there is little question—at least there should be none—as to the power of the President to take all appropriate measures to protect the nation against hostile acts of a foreign power. But the President's authority with respect to internal security is less clear. There is an obvious potential for grave abuse, and an equally obvious need where there is a clear and present danger of a serious internal threat. The distinction between external and internal threats to the security of our country is far less meaningful now that radical organizations openly advocate violence. Freedom can be as irrevocably lost from revolution as from foreign attack. This perplexing issue is now pending in several cases.⁵ In the end, there may be a need for clarifying legislation.

Title III and Organized Crime

Returning now to the provisions of Title III directed against major criminal activity, a specific legislative finding was made as follows:

Organized criminals make extensive use of wire and oral communications.

The interception of such communications * * * is an indispensable aid to law enforcement and the administration of justice.

The interception authorized by Title III requires a prior court order. The safeguards prescribed with respect to such an order include: (i) showing probable cause; (ii) describing the crime and types of conversations; (iii) limiting the time period of the surveillance (not to exceed 30 days); (iv) terminating the wiretap or bugging once the stated object is achieved; (v) renewing it only by a *de novo* showing of continued probable cause; (vi) showing that normal investigative procedures have been tried and failed; and (vii) finally, reporting to the court on the results of each wiretap.

In light of these safeguards, there is no substance to the fears of some that these provisions of Title III have police state characteristics.

Experience under 1968 Act

The experience under the 1968 Act is interesting. The Johnson Administration had opposed Title III, and although it became law on June 19, 1968, the surveillance authority was not used by Attorney General Clark.

The present Administration has undertaken a massive campaign against organized crime. Task forces, organized for long-term operations, have been established in 17 cities. They use a "systems" approach to organized crime investigations—examining into all possible violations of federal laws, including racketeering, extortion, drug trafficking and income tax evasion. As Attorney General Mitchell has said, by the use of electronic surveillance, these task forces now have the capability of reaching "the whole criminal organization," including—almost for the first time—top members in the "families."

During 1969 and 1970, the Justice Department employed court-authorized surveillance on 309 occasions. Roughly 60% of these involved illegal gambling,

³ Omnibus Crime Control and Safe Streets Act of 1968, Public Law 90-351, 90th Cong., H.R. 5037, June 1968.

⁴ *Burger v. New York*, 388 U.S. 41 (1967) and *Katz v. U.S.*, 388 U.S. 347 (1967). See also *U.S. v. White*, decided by Supreme Court April 5, 1971, which clarifies the scope of *Katz*.

⁵ See *United States v. Smith*, Criminal Case No. 4277-CD, U.S. District Court, Central District of California, Jan. 8, 1971; *United States v. Sinclair*, Criminal Case No. 44375, U.S. District Court, Eastern District of Michigan, Jan. 26, 1971; see also recent Sixth Circuit Court of Appeals case (*Times Dispatch*, April 9, 1971), in which a Circuit Court for the first time held that the President lacks inherent power with respect to internal subversion.

and about 20% narcotics traffic. A total of more than 900 arrests have resulted, some 500 persons have been indicted, and over 100 convictions already have been obtained. Most of those indicted have not yet been tried.⁶

Several top leaders of organized crime already have been convicted or have pled guilty. These include two leading members of New York families, and the acknowledged syndicate boss in New Jersey, Samuel DeCavalcante.

NEED FOR STATE LAWS

Despite the success under Title III, there is still need for comparable state laws. Most of the crimes committed violate state laws. The fight against organized crime has the greatest chance of success where both state and federal authorities can cooperate in the employment of the same weapons. The Congress recognized this need by providing in Title III for parallel state action.⁷ The American Bar Association also recommends the adoption of carefully safeguarded state electronic surveillance statutes.⁸

The situation in most states is still unsatisfactory—ranging from no law at all to inadequate or unconstitutional provisions. As of October 1970, 17 states had legislative authority for court-controlled surveillance. A model statute is now available, embodying the substance of the ABA Standards and complying with Title III of the Federal Act. New Jersey has recently adopted this model statute.⁹

The state with the greatest experience with wiretapping is New York. Its statute, held unconstitutional in the *Burger* case, has since been revised to meet the *Burger* and Title III standards. Frank Hogan, famed District Attorney in New York City, has testified before a Congressional Committee that electronic surveillance is "the single most valuable weapon in law enforcement's fight against organized crime". He further testified that without wiretap evidence his office could never have convicted Luciano, Jimmy Hines, Shapiro and a long list of other notorious racketeers.

THE NEED FOR LEGISLATION IN VIRGINIA

If the preliminary findings of the Virginia Crime Commission are substantiated, the General Assembly should consider the enactment in 1972 of an appropriate surveillance statute.

Indeed, even if the evidence as to organized crime's activities in Virginia is inconclusive, there are strong reasons for enacting a carefully drawn law which prohibits all private surveillance but authorizes court-controlled wiretapping and bugging compatible with the federal legislation and the ABA Standards.

Organized crime is no longer confined to a few major cities. Its criminal activities are being diversified in scope and extended geographically. As Virginia increasingly becomes a part of the eastern urbanized corridor, the criminal syndicates are certain to operate here.¹⁰

I am not unaware of the strong feelings of many that a free society should not tolerate this intrusion upon privacy. They argue that, despite all safeguards, the conversations of some innocent people will be intercepted.

The answer, it seems to me, on this issue—as indeed on many others—is that there must be a rational balancing of the interests involved. Uncontrolled government surveillance would indeed be intolerable. But it is not equally intolerable for society to shackle itself that cartels of organized criminals are free to prey upon millions of decent citizens and to make a mockery of the rule of law?

Happily the choice need not be between these two extremes. The sound answer lies in the middle course charted by the Federal Act and by the ABA Standards. It is to be hoped that this is the course Virginia will follow.

⁶ See interview with Attorney General Mitchell. U.S. News & World Report, March 22, 1971, p. 36 *et seq.*

⁷ Public Law 90-351, § 2516(2). Congress was careful to provide that state statutes must contain at least the procedural safeguards, protections and restrictions imposed by the federal statute.

⁸ This was one of the subjects studied by the ABA project on Criminal Justice, and the Minimum Standards to be incorporated in state statutes were approved by the House of Delegates at its February 1971 meeting. These ABA Standards were cited with approval by the Supreme Court in the recent case of *U.S. v. White*, decided April 5, 1971.

⁹ See article in 43 *Notre Dame L. Rev.* 657 (1968), discussing an earlier form of the model statute.

¹⁰ The President's Crime Commission found that "organized criminal groups are known to operate in all sections of the nation." *Supra*, p. 191.