STATEMENT OF HON. ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES

Mr. Chairman, the problem of wiretapping is most perplexing because it involves the difficult task of balancing protection of individual privacy with the needs of law enforcement to keep pace with modern scientific advancement.

But I am here today because I believe that this balance can be found and because I wish to urge this Committee and the Congress to enact a wiretapping bill at this session.

Many people have strong views on wiretapping and the merits of these conflicting views have been debated for many years. But the fact remains that with all the debate, there has been little action and the result is that the individual rights of privacy in telephone conversations is not being protected at all and the needs of society to protect itself against the misuse of the telephone for criminal purposes are not being met.

So the present situation is entirely unsatisfactory, and on this I believe both the proponents and opponents of H.R. 10185 will agree. It is inconceivable to me that we should permit this situation to continue and it is also inconceivable to me that we cannot find a fair balance between the legitimate needs of law enforcement and the protection of individual rights of privacy.

We believe that H.R. 10185 strikes this balance. It would make wiretapping illegal except when specifically authorized in investigations of certain major crimes—thus giving far greater protection to privacy than exists today while permitting law enforcement officers to use wiretapping to obtain evidence of certain major crimes under the supervision of the courts.

There are those who sincerely feel that the bill would limit law enforcement officers too much. Others, who are equally sincere, feel that the bill would permit too much invasion of individual rights. Different people will draw the line at different places.

But I earnestly hope that differences of emphasis, and disagreements as to detail, will not be allowed to obscure the basic fact that the existing unsatisfactory situation is getting steadily worse and that corrective legislation is needed now.

Why do I say the existing situation is unsatisfactory?

The existing federal law on wiretapping is Section 605 of the Communications Act of 1934, which provides in part:

". . . no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . ."

This law is unsatisfactory in two respects. It permits anyone to tap wires. Mere interception is not a crime; a crime is not committed until the intercepted information is divulged or published. (Another provision makes it a crime to use such information for one's own benefit.)

Thus even if we find an intercepting device attached to a telephone line, and find out who is doing the intercepting, we still cannot prosecute. We have to find that the information was divulged or published or used improperly. This means that no one's privacy is adequately protected. Anyone can listen in to your telephone conversations, and mine, without violating the federal law.

On the other hand, all divulgence is prohibited. This means that it is against the law for law enforcement officials to disclose in court any of the words they overhear from wiretapping or the substance, purport, or effect of those words—even though what they overhear is clear evidence of a vicious crime.

The Supreme Court so held with respect to federal officers in the *Nardone* case, decided in 1937. And it so held with respect to state officers in the *Benanti* case, decided in 1957. Indeed, the federal courts refuse to receive in evidence, not only the substance of the intercepted conversation, but any evidence obtained as a result of leads which that conversation gave. As a result, wiretapping cannot be used effectively by the federal government or the states to aid in law enforcement, even for the most serious crimes.

The strange paradox is that under this federal law a private individual is free to listen in to telephone conversations for the most improper motives, but law enforcement officials cannot use wiretapping effectively to protect society from major crimes.

State and local prosecutors emphatically agree with me when I say that the law as it exists today does not meet the legitimate needs of law enforcement.

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And you will, I think, find complete agreement that it does not adequately protect the privacy of telephone users and the integrity of the interstate telephone network.

I am sure you will agree that legislation is needed and that it is urgently needed. What kind of bill should be enacted?

Again I want to talk today about general principles. We have drafted H.R. 10185 with considerable care. We have furnished a detailed analysis of the provisions of that bill with our letter to the Speaker, and I ask that that letter and the accompanying analysis be included in the record of these hearings.

I don't want to take time in this statement to go into a detailed section-by-section analysis of H.R. 10185 although I will be happy to answer any questions which any member of this Committee may have. I want rather to emphasize certain basic principles which I think must be met in any satisfactory bill, and to show how we have tried to meet them in H.R. 10185.

A satisfactory bill, must in my opinion, do the following:

1. Provide adequate authority to law enforcement officers to enable them effectively to detect and prosecute certain major crimes;
2. Prohibit all wiretapping by private persons and all unauthorized wiretapping by law enforcement officers;
3. Provide procedural safeguards against abuse of the limited wiretapping which it would authorize;
4. Establish uniform standards for the federal government and the states.

Let me take up these criteria in turn and indicate how, in my judgment, H.R. 10185 meets them.

1. The bill must provide adequate authority to law enforcement officers to enable them effectively to detect and prosecute certain major crimes

Wiretapping is an important tool in protecting the national security. In 1940, President Roosevelt authorized Attorney General Jackson to approve wiretapping in national security cases. Attorney General Clark, with President Truman's concurrence, extended this authorization to kidnapping cases.

As Congress has been advised each year by the Director of the Federal Bureau of Investigation, the practice has continued in a limited number of cases upon express permission from the Attorney General. But, as I have pointed out, the evidence received from these wiretaps or developed from leads resulting from these wiretaps cannot be used in court. It is an anomalous situation to receive information of a heinous crime and yet not be able to use that information in court.

And, of course, this applies not only in cases of espionage and treason but in pressing the fight against organized crime. Testimony presented to committees of both Houses of Congress last year highlighted, as did the Kefauver and McClellan Committees' investigations, how the nation is being corrupted financially and morally by organized crime and racketeering.

The problem of organized crime is growing progressively more serious. It is a far graver threat now than in the 1920's and 1930's. The limited wiretapping authority for which we ask in this bill would help greatly in our effort to bring organized crime down to the point where it can be controlled effectively by local law enforcement.

There are over 100 million phones in the United States. The organized criminal syndicates which are engaged in racketeering activities involving millions of illicit dollars, do a major part of their business over this network of communication.

The very fact that the telephone exists has made law enforcement more difficult. It permits criminals to conspire and carry out their activities without ever getting together and, therefore, without giving the police the opportunity to use other techniques of investigation.

The telephone is not only a means of facilitating crime, but it may be an instrumentality of crime. It is used in bribery, extortion, and kidnapping, with the added advantage of protecting the identity of the criminal.

As Attorney General Robert H. Jackson said in 1941: "Criminals today have the run of our communications system, but the law enforcement officers are denied even a carefully restricted power to confront the criminal with his telephonic and telegraphic footprints. Unless we can use modern, scientific means to protect against the organized criminal movements of the underworld, the public cannot look to its law enforcement agencies for the protection it has a right to expect."

I submit that the federal government should be permitted to use wiretaps to investigate and to use the evidence so gained to prosecute for certain specified crimes, with appropriate procedural safeguards and centralized control.

This legislation also is necessary to clarify the authority of state officials to wiretap and use the evidence so obtained. Even though, under applicable state laws, state law enforcement officers may wiretap, recent federal court decisions make it clear that the disclosure in court of evidence obtained by such wiretapping is illegal under Section 605.

Although the federal courts have refused to enjoin the introduction in state courts of such evidence, prosecuting attorneys in New York City have dropped cases dependent on evidence obtained through wiretapping because they feel that to introduce the evidence would be a violation of federal law.

Some state judges no longer will issue orders giving state law-enforcement officers authority to wiretap notwithstanding the fact that the applicable state law authorizes such orders. As a result, a number of important state criminal prosecutions have been abandoned or are in jeopardy.

The particular offenses for which wiretapping should be authorized will, I have no doubt, be the subject of much discussion before your committee. There is room for honest difference of opinion on this point. We have tried to draw a line that seems logical to us. The Congress may feel that we have included too many offenses or excluded some that should be included.

H.R. 10185 would authorize wiretapping and introduction of wiretap evidence in court for the following federal offenses:

Crimes affecting the national security: Espionage, sabotage, treason, sedition, subversive activities and unauthorized disclosure of atomic energy information;

Murder and kidnapping;

Extortion and bribery;

Dealing in narcotics and marihuana;

Interstate transmission of gambling information and interstate travel in aid of racketeering enterprises.

H.R. 10185 would permit state officials to tap wires for the following state offenses if state law permits such action:

Murder and kidnapping;

Extortion and bribery;

Dealing in narcotics and marihuana.

Many state prosecutors feel that the states should be authorized to tap wires for gambling offenses also. They are entirely correct in saying that gambling is central to the problem of organized crime. On the other hand, to permit tapping the wires of every two dollar bettor would be to permit very extensive wiretapping. We have thought it best to limit the authority to tap wires for gambling to those offenses which involve interstate transmission of gambling information, in the thought that this would be sufficient to reach the large organized operators.

Let me clarify one possible misconception. H.R. 10185 would leave it entirely up to the states as to whether they want to authorize wiretapping. Some states may feel that they do not want to authorize any wiretapping. They will be free to make that judgment. All that H.R. 10185 does, as to the states, is to impose limits beyond which they cannot go.

2. The bill must effectively prohibit all wiretapping by private persons and all unauthorized wiretapping by law enforcement officers

H.R. 10185 would remove the impediments to effective prevention of unauthorized wiretapping that now exist. Section 3 of the bill provides explicitly that it is unlawful for any person, except as authorized by the bill, to intercept any wire communication or to disclose the contents of such communication or to use the contents of such communication. "Intercept" and "contents" are broadly defined.

Attempts and procuring others to act are also prohibited. The general conspiracy statute would apply to conspiracy to do any of these things. Violations would be punishable by two years imprisonment or a fine of $10,000, or both.

These prohibitions will, we believe, enable us effectively to protect telephone users from unauthorized wiretapping. They will enable us to arrest, prosecute and convict for the mere fact of interception. The only evidence we will need for a conviction is evidence that an intercepting device was attached and that the defendant attached it, or procured someone to attach it, or conspired with someone to attach it. This will plug the loophole in the existing law.

These prohibitions would apply not only to private persons but to public officers who tap wires otherwise than in accordance with the bill. Until now the Department of Justice has been reluctant to prosecute state or local officials for actions taken in good faith in conformity with a state law authorizing wiretapping and disclosure in court of wiretap evidence. If this bill is passed, I assure you that we will prosecute anyone, private person or government officer, who is found tapping wires without lawful authority.

In addition to these criminal sanctions the bill attempts to remove a major incentive to illegal wiretapping by providing, in sec. 4, that no evidence obtained by unauthorized wiretapping may be received in any state or federal court, department, agency, regulatory body or legislative committee. This exclusion applies not only to the contents of the intercepted message but also to any information obtained by leads furnished by that message. It enacts in statutory form the rule declared by the Supreme Court in the second *Nardone* case, prohibiting use in evidence of the so-called "fruits of the poisonous tree."

These provisions of the bill, together with the safeguards which I am about to discuss, will mean that if the bill is passed the privacy of telephone users will be much better protected than it is now.

3. The bill must provide effective procedural safeguards against abuse of the limited wiretapping it would authorize

We have made a determined effort to surround the limited wiretapping which the bill would authorize with workable safeguards against abuse. Let me indicate some of the important safeguards.

First. Except for cases involving the national security, which I shall discuss in a moment, wiretapping could be authorized only by order of a judge. Section 8 specifies in detail the information which would have to be submitted under oath and the findings which a judge must make in order to issue such an order. The judge must find that there is probable cause for believing that—

(1) an offense for which an application may be filed under the bill is being, has been, or is about to be committed;

(2) facts concerning that offense may be obtained through the interception;

(3) no other means are readily available for obtaining that information; and

(4) the facilities to be intercepted are being used in connection with the commission of the offense, or are leased to, listed in the name of, or commonly used by, a person involved in such offense.

Law enforcement officers could not just tap any telephone. The judge must find that the telephone is being used in connection with the commission of an offense or is leased to, listed in the name of, or commonly used by the suspected criminal. And his order must specify the particular telephone which may be tapped.

A wiretap could not be in effect for more than 45 days. Any extension would require a new application and new findings by the judge.

This requirement of a court order is considerably more restrictive than the procedure on searches of a man's home or person. Many searches are made without a warrant, either where incident to an arrest or involving a moving vehicle or under a statute—such as the customs laws—permitting administrative searches.

Moreover, a federal search warrant can be issued by a United States Commissioner or any state court of record. Under this bill, authority to issue wiretapping orders will be confined to federal district and circuit judges (in the case of federal offenses) and to state judges of courts of general criminal jurisdiction (in the case of state offenses).

In cases involving national security we have provided alternative procedures. Application may be made to a court under the procedures outlined above, but in addition the bill provides that the Attorney General, in person, may authorize interception of wire communications if he finds that the commission of the offense is a serious threat to the security of the United States and that use of the court order procedure would be prejudicial to the national interest.

In a narrowly limited class of cases, both because of the sensitivity of the information involved and in the interests of speed, the Attorney General needs this executive authority to permit wiretapping.

National security requires that certain investigations be conducted under the strictest security safeguards. All Attorneys General since 1940 have been authorized by the President to approve wiretapping in national security cases. Attorney General Clark, with President Truman's concurrence, extended this authorization to kidnapping cases.

This legislation would authorize the Attorney General to order wiretapping after the determination that there was a reasonable ground for belief that the national security was being threatened. In order to proceed, the Attorney General would have to find and certify that the offense under investigation presented a serious threat to the security of the United States; that facts concerning that offense may be obtained through wiretapping; that obtaining a court order would be prejudicial to the national interest and that no other means are readily available for obtaining such information.

Thus, the bill would limit the authority now held by the Attorney General to authorize wiretapping but it would permit evidence obtained thereby to be presented in court. I believe these are most important points.

Second. Responsibility for applying for wiretap orders would be centralized. At the federal level, any application to a court must be approved by the Attorney General or an Assistant Attorney General designated by him. And, in those grave national security cases where wiretapping would be authorized without a court order, the Attorney General must give the authority. Thus, all federal wiretapping must be authorized by a Presidential appointee who is publicly accountable for his acts.

At the state level, the application must be made by a state attorney general or by the principal prosecuting attorney of a city or county, if such person is authorized by state law to make such an application. Some state officials feel that this is too limited. Perhaps it is. The Congress will have to make the decision. But we feel that the principle of focussing responsibility for all wiretapping applications in a small number of officials who can be held publicly accountable is an important safeguard.

To help maintain this public accountability, we have also provided for annual reports to the Congress of statistics on wiretap orders applied for, issued by and denied by federal and state judges.

Third. The bill would limit the disclosure and use of information obtained by authorized wiretapping. It authorizes use of this information by law enforcement officials only in the proper discharge of their official duties. It authorizes disclosure only to other law enforcement officials to the extent appropriate to the performance of their duties, or while testifying under oath in criminal proceedings in federal or state courts or grand jury proceedings. This limitation reflects our view that the justification for wiretapping is to aid in the enforcement of the criminal law, and, therefore, disclosure of information obtained by wiretapping should be permitted only in connection with criminal proceedings.

Fourth. The bill would establish federal court procedures for testing the legality of a wiretap. The defendant may move to suppress any evidence obtained by wiretapping on the grounds that the communication was unlawfully intercepted, that the order or authorization is insufficient on its face, that there was no probable cause for the court order authorizing the tap, or that the interception was not made in conformity with the order or authorization. The granting of such a motion would render the evidence inadmissible in any proceeding.

We believe that these safeguards are practical and will not unduly impede the legitimate use of the limited wiretapping which the bill would authorize. We believe that they provide a large measure of protection against abuse.

4. The bill must establish uniform standards for the federal government and the states

We are here concerned with an interstate telephone network which is regulated by the Congress in detail. A wiretap cannot differentiate between local and long distance calls from the same telephone. For this reason the Supreme Court, in the *Weiss* case in 1939, held that Section 605 of the Communications Act prohibited interception and disclosure of the contents of a telephone call between two parties in the same city.

A national telephone system requires a national policy. I believe it is the responsibility of Congress to protect the integrity of the interstate telephone network and the privacy of its users. Hence, we believe Congress should define the conditions by which any wiretapping by federal or state officials will be permitted.

Moreover, as the Supreme Court has pointed out on a number of occasions, including the recent case of *Mapp* v. *Ohio*, differences in federal and state rules as to investigative techniques and the introduction in court of evidence obtained by such techniques have unfortunate results for the administration of criminal justice.

Hence, we feel that uniform rules and standards for the federal and state governments are important in any wiretapping legislation.

I do not want to conclude this statement without reiterating my strong belief, and the strong belief of every responsible official in the Department of Justice, in the importance of individual privacy. We believe, with Justice Brandeis, that the right to be let alone is one of the basic liberties of free men.

We believe that every citizen of the United States has a right not to have strangers listen in on his telephone conversations. Indeed, one of the major reasons we are proposing this legislation is because under existing law the privacy of telephone users is not adequately protected.

But this right of privacy, like most other individual rights in our society, is not absolute or unqualified. Society also has a right to use effective means of law

enforcement to protect itself from espionage and subversion, from murder and kidnapping, and from organized crime and racketeering.

Senator SCOTT. I offer it together with a statement by the former Attorney General Kennedy appearing in an article called "Attorney General's Opinion on Wiretaps."

"He believes they can and should be regulated with due regard for both law enforcement and the right of privacy."

(The material referred to follows:)

ATTORNEY GENERAL'S OPINION ON WIRETAPS

(By Robert F. Kennedy)

In 1959, while inspecting a firealarm station, the Fire Chief of a large Western city made a startling discovery. The recording system had been rigged to record not only firealarm calls but also all calls on the Chief's private line. The Chief looked further. He found a recording tape on which was transcribed a personal telephone conversation between him and a United States Senator.

The Department of Justice discovered the identity of the wiretapper—but was forced to close the file on this case last September without any action against him. He could not be prosecuted under the present Federal wiretapping statute, which should protect against such gross invasion of individual privacy, but does not.

Last fall, District Attorney Frank Hogan of New York City developed a strong case against seven of the top narcotics distributors in the country—men who had operated a multi-million dollar narcotics ring in the New York City area for more than five years. Yet on Nov. 14, Mr. Hogan abandoned his prosecution of the seven men. Much of his evidence came from wiretapping and—although the wiretaps had been authorized by a court, as is permissible in New York—he felt he could not introduce this evidence without committing a Federal crime.

In other words, the men could not be prosecuted because of the present Federal wiretapping statute, which should permit reasonable use of wiretapping by responsible officials in their fight against crime, but does not.

Clearly, there is almost no one who believes this law, which enhances neither personal privacy nor law enforcement, to be satisfactory. Indeed, bills to change it—Section 605 of the Federal Communications Act—have been introduced in virtually every session of Congress since it was passed in 1934. But the present law has remained on the books, the beneficiary of the stalemate resulting from an emotion-hardened debate on the question of wiretapping that has gone on between absolutists for decades.

It is easy to take an absolute position on wiretapping. Some, concerned with encroachments on individual rights by society, say wiretapping of any kind is an unwarranted invasion of privacy. Others, concerned with a rapidly rising crime rate say law-enforcement officers should be free to tap telephone wires to gather evidence.

The heart of the problem—a proper balance between the right of privacy and the needs of modern law enforcement—is easy to see. It is not so easy to devise controls which strike this balance. But it is not impossible, either, and I believe that in the wiretapping bill which the Department of Justice has proposed to Congress we have formed such a balance.

There is no question that the telephone is an important asset to criminals. Here is an instantaneous, cheap, readily available and *secure* means of communication. It greatly simplifies espionage, sabotage, the narcotics traffic and other major crimes.

I do not know of any law-enforcement officer who does not believe that at least some authority to tap telephone wires is absolutely essential for the prevention and punishment of crime. There are over 100 million phones in the United States and the bulk of business is transacted over the telephone. Increasingly, this business includes crime—the organized criminal and racketeering activities, involving millions of dollars, which are among our major domestic problems. Without the telephone, many major crimes would be much more difficult to commit and would be more easily detected.

Last year, Congress enacted five of eight crime bills proposed by the Justice Department. One of these laws recognized that the telephone is a major tool of organized crime and prohibited the use of the telephone for interstate transmission of gambling information. The President signed the bill on Sept. 13. Almost im-