No. 25-1672

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

DEBRA GOULART, individually and on behalf of all others similarly Situated; MICHEL GARBITT, individually and on behalf of all others similarly situated,
Plaintiffs – Appellants,

JANE DOE; JOHN DOE; JANET DOE,
Plaintiffs,

v.

CAPE COD HEALTHCARE, INC.,
Defendant – Appellee.

On Appeal from United States Court for the District of Massachusetts
No.: 25-cv-10445-RGS

MOTION FOR LEAVE TO FILE BRIEF ON BEHALF OF THE GREATER BOSTON CHAMBER OF COMMERCE AS AMICUS CURIAE

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Pursuant to Fed. R. App. P. 29, the Greater Boston Chamber of Commerce ("Chamber") hereby requests that the Court allow the Chamber to file a brief as amicus curiae in support of the Defendant-Appellee. In support, the Chamber states as follows:

The Chamber is an independent, non-profit organization that is the convener, voice, and advocate of the Greater Boston business community. The Chamber represents more than 1,300 businesses of all sizes from virtually every industry and profession in the Greater Boston region.

The Chamber is committed to driving the region's economic growth and prosperity by ensuring that Massachusetts remains a competitive place to start, expand, and run a business. Plaintiffs' interpretation of the Electronic Communications Privacy Act ("ECPA") threatens our members with retroactive criminal liability and catastrophic civil damages for conduct that has been standard business practice for decades. If adopted, this theory would expose our members to statutory penalties that could lead to bankruptcy.

The Chamber's perspective provides the Court with critical context of the real-world economic implications of this statute's interpretation. The Chamber can demonstrate how Plaintiffs' interpretation would operate in practice across industries and throughout the economy.

The Chamber is an advocate for thoughtful legislation to protect consumer data and privacy nationwide but has significant concerns about policy approaches that criminalize ordinary business practices. The Chamber believes that reversal of the district court's decision would create significant and unreasonable potential civil and criminal liability for thousands of Massachusetts businesses.

For these reasons, the Chamber respectfully requests that this Court allow the Chamber to file the amicus brief submitted contemporaneously, to help provide the relevant context, history, and practical implications from the Chamber's perspective.

Dated: December 18, 2025

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CERTIFICATE OF SERVICE

I certify that on December 18, 2025, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system and that all parties or their counsel of record that are registered as ECF Filers will be served by the CM/ECF system.

/s/ Seth P. Berman
Seth P. Berman

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Dated: December 18, 2025

DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the Greater Boston Chamber of Commerce as Amicus Curiae hereby certifies that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock. The Greater Boston Chamber of Commerce is an independent, non-profit business association representing more than 1,300 businesses throughout the region.

RULE 29(A)(4)(E) STATEMENT

The Greater Boston Chamber of Commerce (the "Chamber") states that this brief was not authored in whole or in part by any counsel for the parties, and no party, their counsel, or any other person contributed money intended to fund the preparation or submission of this brief. No person or entity—other than the Chamber, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief.

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STATEMENT OF IDENTIFICATION

The Greater Boston Chamber of Commerce (the "Chamber") is an independent, non-profit organization that is the convener, voice, and advocate of the Greater Boston business community. The Chamber represents more than 1,300 businesses of all sizes from virtually every industry and profession in the Greater Boston region.

The Chamber is committed to driving the region's economic growth and prosperity by ensuring that Massachusetts remains a competitive place to start, expand, and run a business. Plaintiffs' interpretation of ECPA threatens our members with retroactive criminal liability and catastrophic civil damages for conduct that has been standard business practice for decades. If adopted, this theory would expose our members to extraordinary statutory penalties crippling local businesses. The Chamber believes that reversal of the district court's decision would create significant and unreasonable potential civil and criminal liability for thousands of Massachusetts businesses. The Chamber has contemporaneously filed a motion for leave to appear as amicus curiae pursuant to Fed. R. App. P. 29(a)(3).

SUMMARY OF ARGUMENT

Plaintiffs have propounded an unprecedented interpretation of the Electronic Communications Privacy Act ("ECPA") that, if accepted by this Court, would retroactively criminalize the ordinary and widespread use of common internet advertising technologies and could lead to the bankruptcy of the healthcare system and any business who uses this ubiquitous technology. Their reading is incompatible with the statute's text, its legislative history, and decades of prosecutorial practice under both ECPA and the Health Insurance Portability and Accountability Act ("HIPAA"), the other law that Plaintiffs claim is being violated by the use of common internet tracking tools. Nothing in either ECPA or HIPAA suggests Congress intended to impose criminal liability or catastrophic statutory damages on hospitals and businesses for routine web operations conducted without any malicious purpose.

Plaintiffs claim that the crime-tort exception to ECPA's one-party consent rule permits them to sue hospitals for using common internet tracking tools. ECPA's legislative history makes clear that the crime-tort exception is far narrower than Plaintiffs claim. The crime-tort exception is limited to prevent recordings made for the purpose of blackmail, industrial espionage, or similarly targeted wrongful acts, not any act for which a clever lawyer can claim a potential violation or a crime or tort. The crime-tort exception requires

both (1) a separate criminal or tortious act distinct from the interception itself, and (2) a showing that the defendant's purpose – their primary motivation for the interception – was to commit that wrongful act. Plaintiffs cannot meet either requirement. The use of website advertising technology ("AdTech") as alleged by Plaintiffs serves general commercial functions, was not intended to injure Plaintiffs or anyone else, and certainly was not done for an independent criminal or tortious purpose.

Plaintiffs' theory is also impossible to reconcile with the enforcement history of these statutes. In more than two decades, neither the Department of Justice nor Health and Human Services has prosecuted anyone for using advertising technology on a website under either ECPA or HIPAA. Actual prosecutions involve egregious misconduct such as blackmail, bribery, identity theft, or selling patient information to foreign agents, not the routine operation of hospital websites. Plaintiffs' proposed reading of the statute would convert millions of Americans into federal felons for conduct that regulators universally treat as lawful, all in pursuit of massive civil damages in the absence of any showing of actual harm to Plaintiffs or anyone else.

Even considered in the civil context alone, Plaintiffs' construction would yield absurd results. ECPA's statutory-damages scheme would expose hospitals to liabilities in the trillions of dollars, far exceeding their assets and

even eclipsing national healthcare spending. If Plaintiffs succeed in convincing the Court of their interpretation of the statute, the imposition of damages will not end with hospitals and other healthcare entities: any commercial website using basic analytics tools could face criminal and crippling civil exposure.

Because Plaintiffs' statutory reading contradicts congressional intent, established precedent, and fundamental rules of statutory construction, it must be rejected. The Court should interpret ECPA consistently with its purpose: to target surreptitious monitoring undertaken for harmful ends, not to regulate ordinary business practices far removed from the Act's original aims.

ARGUMENT

Plaintiffs seek to use ECPA to retroactively regulate common internet tracking technology. Their overbroad reading of ECPA conflicts with Congress' stated intent in passing the Act and ignores the history of how both ECPA and HIPAA have been prosecuted. Reading the Act this way would lead to perverse results: a rush to the courthouse to force hospitals (and eventually other businesses) to pay enormous statutory damages even in the absence of a showing of any actual harm.

The threat extends far beyond healthcare. Because ECPA is a criminal statute, Plaintiffs' interpretation would criminalize standard business practices across every industry using common advertising technology. Thousands of

businesses and their employees would be subject to arrest and prosecution for a common and ordinary business practice if their use were deemed to implicate a privacy regulation or common-law tort. Making matters worse, the statute's two-year statute of limitations ensures that there is nothing businesses can now do to prevent being sued for their past use of this commonplace technology. Simply put, Plaintiffs' interpretation of the statute would open the floodgates of litigation that would bankrupt not just hospitals but countless American businesses, all to create an unearned windfall for plaintiffs and their lawyers.

The legislative history is clear that the narrow sub-exception Plaintiffs rely on to bring their claim was designed to address targeted harm such as blackmail and industrial espionage, conduct completely unrelated to the routine commercial practices at issue here. ECPA was never intended to regulate ordinary business operations. Yet under Plaintiffs' reading, nearly any one-party recording could open the door to prosecution as long as some law or theory of tort liability is potentially implicated. Read that way, the statute would make it almost impossible for a person recording a communication to know in advance if she were breaking the law, since the recording would become a crime once a clever lawyer could allege a related tortious act. Congress could not have intended such a sweeping and unworkable result.

I. ADOPTING PLAINTIFFS' INTERPRETATION OF ECPA WOULD LEAD TO ABSURD RESULTS

Plaintiffs' interpretation of ECPA would lead to absurd results, effectively bankrupting the U.S. healthcare system and eventually the U.S. economy while simultaneously creating criminals of all involved. *U.S. v. Kirby*, 74 U.S. 482, 483 (1868) ("All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character."); *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315, 333 (1938) ("to construe statutes so as to avoid results glaringly absurd, has long been a judicial function" and that "[where] the language is susceptible of a construction which preserves the usefulness of the section, the judicial duty rests upon this Court to give expression to the intendment of the law."); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.").

A. Plaintiffs' Theory Results in Exorbitant Penalties

ECPA establishes a two-tier damage system based on the type of violation. For general violations, courts assess the greater of: (A) actual

damages suffered by the plaintiff plus any profits made by the violator, or (B) statutory damages of either $100 per day for each day of violation or $10,000. 18 U.S.C. § 2520. ECPA also authorizes comprehensive equitable relief, including preliminary and declaratory relief, punitive damages in appropriate cases, and reasonable attorneys' fees and litigation costs. 18 U.S.C. § 2520.

If the Court adopts Plaintiffs' reasoning, it would bankrupt the healthcare industry as hospitals' liabilities would far exceed their assets.

To take one example, a healthcare system like UMass Memorial Healthcare, Inc. sees almost 400,000 patients a year.[1] Assuming each patient visits the website once, that implies a potential penalty of $4 billion for a single year ($10,000 per patient for 400,000 patients). Indeed, this may understate the prescribed monetary penalty, as the statute of limitations for a civil violation of ECPA is two years, not one. 18 U.S.C. § 2520(e). The ultimate penalty may be much higher, as some people may visit the website without ever becoming a patient of the hospital. That $4 billion liability is nearly as large as the entire annual revenue of UMass Memorial Healthcare, Inc. ($4.16 billion in 2024).[2]

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[1] Massachusetts Department of Public Health, *Staff Report 11* (on file at Mass.gov), UMass-Memorial Health Care (2025), https://www.mass.gov/doc/staff-report-11/download.

[2] ProPublica, *Nonprofit Explorer: Organization Profile — EIN 912155626*, https://projects.propublica.org/nonprofits/organizations/912155626 (last updated Nov. 19, 2025).

Plaintiffs' rationale becomes even more absurd when considering larger hospital systems. Mass General Brigham is Massachusetts' largest healthcare system. In 2023, Mass General Brigham saw 2.6 million patients and reported $18.7 billion in operating revenue.[3] Assuming each patient visits the website only once in a year, Mass General Brigham could face a $26 billion penalty, a sum far exceeding its annual revenue. Notably, in 2022, Mass General Brigham paid $18.4 million to settle a class action lawsuit alleging that its use of AdTech in essentially the same respects alleged here was a violation of Massachusetts Wiretap Act.[4] That settlement was presumably an attempt to avoid the vast potential liability it faced if plaintiffs' claims were successful. The unfairness of that result was brought into stark relief when the Supreme

[3] Mass General Brigham, *Mass General Brigham Reports 2024 Financial Results* (Dec. 18, 2024), https://www.massgeneralbrigham.org/en/about/newsroom/press-releases/q4-2024-financial-results (last visited Nov. 20, 2025) (Mass General Brigham reported a $20.6 billion total operating revenue in 2024); Mass General Brigham, *Economic Impact 2023* (2023), https://www.massgeneralbrigham.org/content/dam/mgb-global/en/about/documents/economic-impact-2023.pdf (last visited Nov. 20, 2025); Mass General Brigham, *Fiscal Year 2023 Financial Results* (Dec. 8, 2023), https://www.massgeneralbrigham.org/en/about/newsroom/press-releases/fiscal-year-2023-financial-results (last visited Nov. 20, 2025).

[4] Steve Alder, *Mass General Brigham Settles 'Cookies Without Consent' Lawsuit for $18.4 Million, HIPAA Journal* (Jan. 20, 2022), https://www.hipaajournal.com/mass-general-brigham-settles-cookies-without-consent-lawsuit-for-18-4-million/ (last visited Nov. 19, 2025).

Judicial Court ultimately found that the hospitals' use of AdTech did *not* violate the Massachusetts Wiretap Act. *Vita v. New England Baptist Hosp.*, 494 Mass. 824, 243 N.E.3d 1185, 1205 (2024). The mere threat of such ruinous liability resulted in a windfall for plaintiffs and their attorneys, even though no actual violation had occurred.

The principle that statutes should not be interpreted to produce economically catastrophic results is well-established. *Marques v. Fitzgerald*, 99 F.3d 1, 5 (1st Cir. 1996) ("[A] statute may not be construed in a manner that results in absurdities or defeats its underlying purpose."). Courts have long recognized that when a literal reading would destroy an entire industry or impose liability wildly disproportionate to any harm, the interpretation must be wrong. In *Armstrong Paint & Varnish Works*, the Supreme Court emphasized that statutes must be construed to preserve their usefulness and to avoid glaringly absurd results. 305 U.S. at 333. Bankrupting hospital systems is the definition of a glaringly absurd result.

Consider what Congress intended when it set the statutory penalty at $10,000 per violation. That penalty makes sense in the context Congress envisioned: a bad actor making a recording to blackmail someone, embarrass someone, or steal trade secrets. Ten thousand dollars represents substantial punishment for such wrongdoing while remaining proportionate to the harm

caused. But Congress could not have envisioned that single hospitals would face multibillion-dollar penalties, dwarfing their income. Such penalties are not punishment; they are the destruction of not only our hospital systems but eventually the entire U.S. economy.

Furthermore, statutory penalties are typically calibrated to incentivize compliance while remaining economically feasible. Congress wants entities to follow the law, not to go bankrupt. If compliance is economically impossible because entities cannot afford to pay the penalties for past conduct while continuing to operate, then the penalty structure fails to serve its deterrent purpose. *Wakefield v. ViSalus, Inc.*, 51 F.4th 1109, 1123 (9th Cir. 2022) (concluding aggregated statutory damages are subject to constitutional limitation when "wholly disproportioned" and "obviously unreasonable" in relation to the statute's goals and prohibited conduct). Instead, it simply transfers wealth from institutions to plaintiffs' attorneys through a litigation windfall. *Farrar v. Hobby*, 506 U.S. 103, 115 (1992) (admonishing district court for awarding attorneys' fees in action where plaintiff only recovered nominal damages resulting in a windfall to attorneys). That cannot have been Congress' intent in passing ECPA.

B. Plaintiffs' Theory Affects the Entire U.S. Economy

Plaintiffs seek to take a criminal statute meant to be used rarely in egregious situations and apply it to everyday commercial transactions. This misguided theory would have serious implications not only for the healthcare industry but for any organization that uses AdTech. Plaintiffs are now citing HIPAA as the crime or tort that meets ECPA's exception, but HIPAA is by no means the only law that could be enlisted for this purpose. For example, Plaintiffs point to a punitive breach of a physician's duty of confidentiality – a tort – as an alternative basis for liability if their HIPAA argument fails. Appellants' Br. 29. If this Court adopts Plaintiffs' theory, any organization that uses AdTech could be sued for violating the statute, provided an enterprising plaintiff's lawyer can think of any crime or tort that may be violated, including numerous common-law invasion of privacy torts. That would not only stretch ECPA beyond all recognition, it would also effectively create a private right of action for any crime or tort that clever lawyers can connect to an interception consented to by only a single party.

Adopting Plaintiffs' interpretation would not affect only healthcare; it would criminalize business practices that are standard across virtually all industries:

- Retailers use the same technology at issue here to understand customer preferences and advertise products. Under Plaintiffs' theory, if that practice violates any state consumer protection law, it triggers the crime-tort exception and becomes a federal crime.
- Banks use analytics to detect fraud and improve services. If any aspect of that monitoring implicates any privacy regulation, the entire banking industry has been committing federal crimes.
- News websites track reader engagement. If any of that tracking violates any state statute, journalism becomes a criminal enterprise.

In other words, if using advertising technology with one-party consent violates ECPA whenever any other law or tort might be implicated, then virtually every commercial website in America is operating a criminal enterprise.

This cannot be correct. Congress did not intend to make criminals of every marketing professional, every data analyst, every website designer, and every business executive in America. Yet that is the logical conclusion of Plaintiffs' theory. If standard advertising technology deployed with one-party consent violates ECPA whenever it might also violate some other law, then the entire digital economy is criminal.

The sweep of this interpretation reveals its flaw. The crime-tort exception was designed to target bad actors with wrongful purposes: blackmailers,

corporate spies, extortionists. It was not designed to capture everyone who uses technology in a way that might implicate some regulation somewhere. When an interpretation of a narrow exception to a consent rule would criminalize conduct engaged in by virtually every business in America, that interpretation has gone seriously astray.

Plaintiffs' decision to target hospitals first is strategic, not principled. They chose healthcare presumably because alleged privacy violations involving health information sound more serious than violations involving retail purchases or news reading habits. But the legal theory is the same. If it works against hospitals, it works against everyone. Plaintiffs have not identified any limiting principle that would prevent this theory from expanding to every commercial use of advertising technology in every industry.

Plaintiffs' attorneys across the country are pushing this theory that AdTech violates ECPA. If Plaintiffs are successful, their attorneys will make substantial sums of money, while any actual individual patients will receive less than the statutory penalty given the hospitals will not be able to pay the penalties and will go bankrupt. In the end, the same patients who allege a crime or tort has been committed will be the ones who suffer when the healthcare systems go bankrupt.

II. ECPA MUST BE READ IN LIGHT OF ITS LEGISLATIVE HISTORY TO DISCERN THE LEGISLATURE'S INTENT

Plaintiffs' reading of ECPA contradicts the statute's legislative history and intent, a key factor that must be examined to understand the meaning of a statute. *See, e.g.*, *Wampanoag Tribe of Gay Head (Aquinnah) v. Massachusetts Comm'n Against Discrimination*, 63 F. Supp. 2d 119, 124 (D. Mass. 1999) ("Thus, when a court interprets a statute, 'the face of the Act, the surrounding circumstances and the legislative history are to be examined with an eye toward determining what congressional intent was.'") (quoting *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586-87 (1977)).

The original Wiretap Act aimed to protect the privacy of wire and oral communications and to establish uniform procedures for authorizing electronic surveillance, largely to facilitate law enforcement efforts against organized crime while safeguarding personal communication privacy. 1968 U.S.C.C.A.N. 2112, at 2157.

The Wiretap Act was amended in 1986 by ECPA, which extended protection to electronic communications, such as email. ECPA permits one-party consent to interception "unless such communication is intercepted *for the purpose of* committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State." 18 U.S.C. § 2511(2)(iii)(d) (emphasis added).

Early drafts of the Wiretap Act did not prohibit interception in any circumstance where one of the parties to the communication consented, regardless of the parties' intent. *See* 1968 U.S.C.C.A.N. 2112, at 2182. Senator Philip A. Hart observed that without creating an exception to the one-party consent rule, the Wiretap Act would allow "surreptitious monitoring of a conversation by a party to the conversation, even though the monitoring may be for insidious purposes such as blackmail, stealing business secrets, or other criminal or tortious acts in violation of Federal or State laws." *Id.* at 2236. Senator Hart explained that what would come to be known as the crime-tort exception would be implicated "whenever a private person acts in such situations *with an unlawful motive* …. Such one-party consent is also prohibited when the party acts in any way *with an intent* to injure the other party to the conversation in any other way. For example, the secret consensual recording may be made for the purpose of blackmailing the other party, threatening him, or publicly embarrassing him." 114 Cong. Rec. 14694 (May 23, 1968) (Senator Philip A. Hart) (emphasis added). [5]

[5] The phrase "with an intent to injure the other party to the conversation in any other way" was later removed due to effects on First Amendment rights, particularly for journalists who were being sued for recording conversations they later reported on. 1986 U.S.C.C.A.N. 3555, 3571 ("In numerous court cases the term 'other injurious purposes' has been misconstrued. Most troubling of these cases have been attempts by parties to chill the exercise of first amendment rights through the use of civil remedies under this chapter.").

A. The Crime-Tort Exception Was Designed to Prevent Blackmail and Espionage, Not Regulate Ordinary Business Practices

There is a clear distinction between the harms Congress sought to prevent through the crime-tort exception and the routine use of AdTech. When Senator Hart expressed his concerns about the one-party consent loophole, he identified "insidious purposes such as blackmail, stealing business secrets, or other criminal or tortious acts." 1968 U.S.C.C.A.N. 2112, at 2236. Each example he provided shares a common thread: a deliberate intent to harm a specific, identifiable individual or entity. Blackmail targets a particular victim with threats. Industrial espionage seeks to damage a specific competitor. These are intentional acts made to injure.

AdTech operates on entirely different principles. It serves general commercial purposes without targeting any individual for harm. The purpose is informational and commercial, not predatory or malicious.

Congress understood the difference between harmful intent and legitimate business purposes. The legislative history makes clear that the crime-tort exception was designed to close a gap that would allow "surreptitious monitoring" for "insidious purposes." 1968 U.S.C.C.A.N. 2112, at 2236. Nothing about standard advertising practices is "surreptitious" in the sense relevant here. Internet users understand that websites collect information about their visits.

Nor is AdTech "insidious." The statutory language itself confirms this distinction through its *mens rea* requirement. The phrase "for the purpose of committing any criminal or tortious act" imposes a specific intent requirement that Plaintiffs cannot satisfy. It requires proof that the individual consciously sought to achieve a criminal or tortious objective through the interception. It is not enough that the interception might incidentally result in a technical violation of a statute. The individual must have acted with the conscious objective of committing that separate wrongful act.

The Supreme Court has emphasized that "purpose" requires proof of the individual's conscious objective, not merely knowledge of consequences. *United States v. Bailey*, 444 U.S. 394, 405 (1980) (quoting Model Penal Code § 2.02) ("'purpose' corresponds loosely with the common-law concept of specific intent, while 'knowledge' corresponds loosely with the concept of general intent."); *Counterman v. Colorado*, 600 U.S. 66, 78-79 (2023) ("Purpose is the most culpable level in the standard mental-state hierarchy, and the hardest to prove."). This standard requires more than awareness or even practical certainty that a result will occur, instead requiring that achieving that result be the individual's conscious desire.

Here, the statutory language makes clear that Congress intended a specific-intent standard which this Court should follow. *Bailey*, 444 U.S. at 406

("[C]ourts obviously must follow Congress' intent as to the required level of mental culpability for any particular offense. Principles derived from common law as well as precepts suggested by the American Law Institute must bow to legislative mandates."). The interception must be made with the *conscious objective* of accomplishing some separate criminal or tortious goal. Plaintiffs cannot meet this standard because CCHC's conscious objective was commercial advertising, not committing any crime or tort.

The phrase "for the purpose of" requires that the criminal or tortious outcome be the objective, not merely an unintended consequence. Thus, Plaintiffs must prove the "primary motivation" or a "determinative factor" in Cape Cod Healthcare, Inc.'s ("CCHC") actions was the intent to commit a criminal or tortious act. Plaintiffs cannot make that allegation, as any alleged privacy violation is, at most, an incidental effect of pursuing a legitimate commercial purpose.

III. THE INTERCEPTION CANNOT ALSO BE THE CRIMINAL OR TORTIOUS ACT

In addition, the criminal or tortious act that negates the one-party consent cannot be the interception itself but must be a separate act independent of the interception. Case law confirms this understanding.

In *Caro v. Weintraub*, the Second Circuit considered whether the requisite tortious intent could be inferred from the act of recording itself or if ECPA

required a separate and independent intent to commit a tort beyond the act of recording. 618 F.3d 94, 98 (2d Cir. 2010). In *Caro,* the plaintiff alleged that the defendant recorded a conversation with the plaintiff without plaintiff's knowledge, violating ECPA and various state-law claims including invasion of privacy by intrusion. *Id*. at 96. On appeal, the Second Circuit affirmed the dismissal of plaintiff's complaint, holding to constitute a claim under ECPA, a recording must be made with the intent to commit a crime or tort separate from the act of recording itself. *Id*. at 100. ("If, at the moment he hits 'record,' the offender does not intend to use the recording for criminal or tortious purposes, there is no violation."). The court concluded that plaintiff's claim of invasion of privacy by intrusion upon seclusion could not provide the necessary tortious intent under ECPA, as it occurred through the act of interception itself, not a separate act. *Id*. at 101. Therefore, the court found that plaintiff did not allege an independent tort that could provide the basis for the tortious intent necessary to bring a claim under ECPA. *Id*. at 101-102. This focus on subsequent use demonstrates that courts understand the crime-tort exception to require a separate wrongful objective.

The legislative history's emphasis on blackmail illustrates the two-act requirement. *In re DoubleClick Inc. Priv. Litig*., 154 F. Supp. 2d 497, 515 (S.D.N.Y. 2001) ("legislative history and caselaw make clear that the

'criminal' or 'tortious' purpose requirement is to be construed narrowly, covering only acts accompanied by a *specific contemporary intention* to commit a crime or tort.") (emphasis added). Senator Hart's discussion of the statute confirms this requirement. 114 Cong. Rec. 14694 (May 23, 1968). A recording itself is not blackmail. Blackmail occurs when the recording is used to extort the victim. Without the intent to commit that separate act, there is no blackmail and therefore no violation of the crime-tort exception. The same principle applies here: without intent to commit a separate wrongful act beyond the interception, there is no violation.

In *United States v. Tarantino*, a defendant challenged the admissibility of an incriminating audio recording made by his criminal associate. 617 F. App'x 62, 65 (2d Cir. 2015). The defendant argued that the recording should be inadmissible under the crime-tort exception. *Id*. The court found that even though the associate later used the recording for blackmail, it was not clear that blackmail was his primary motivation or a determinative factor at the time he made the recording. *Id*. Therefore, the court concluded that the recording was admissible, as it did not violate the exception. *Id*.

The *Tarantino* case provides a direct analogy that undermines Plaintiffs' theory. *Id*. at 65. Even in the context of an actual act of blackmail—precisely the harm Congress intended to prevent—the court still required proof that

blackmail was the primary motivation or a determinative factor at the time of recording. *Id.* The court refused to assume that because blackmail later occurred, the recording must have been made for that purpose. *Id.*

Plaintiffs cannot meet the *Tarantino* standard, because they cannot point to any evidence that the hospital's primary motivation was to commit a tort or crime. They cannot identify a determinative factor indicating wrongful intent. They can only point to the use of the technology itself and argue that it somehow violates some law. But that argument fails. The question is not whether the conduct might incidentally violate some regulation. The question is whether the actor's purpose, their primary motivation, their determinative factor, was to commit a wrongful act. Here, the answer is plainly no.

Collapsing these two elements into one would eliminate any meaningful limiting principle on the crime-tort exception. Under Plaintiffs' theory, any interception with one-party consent that violated any law for any reason would trigger the exception. This would swallow the consent exception entirely. Congress created the consent exception to permit certain interceptions. It then carved out a narrow sub-exception for interceptions with wrongful purposes. Plaintiffs' interpretation inverts this structure, making the sub-exception the rule and the consent exception the rarity.

Significantly, many state wiretapping laws reject the one-party consent exception all together and instead require that all parties consent to an interception for it to be legal. If one were to follow Plaintiffs' reasoning, the existence of these state wiretapping multiparty consent statutes would eliminate the one-party consent rule for federal law in those states. For example, Massachusetts requires all parties to consent to a recording. M.G.L. c. 272 § 99(B). If an individual in Massachusetts records a conversation without the consent of the other parties, the recording would violate the Massachusetts Wiretap Act. Applying Plaintiffs' reasoning, the person recording would also be violating ECPA, because although ECPA allows one-party consent, the recording itself is a crime under the Massachusetts Wiretap Act, thereby triggering the federal crime-tort exception. As a result, identical conduct would be a federal crime in Massachusetts, an all-party consent state, but not in Virginia, a one-party consent state. Va. Code Ann. § 19.2-62. Congress cannot have intended the federal criminal law to be so malleable – essentially amendable by any state legislature or state court interpreting state law. This variability is antithetical to the purpose of federal criminal statutes, which is to establish uniform rules of conduct across the nation.

IV. CRIMINAL PROSECUTIONS FOR VIOLATIONS OF ECPA AND HIPAA UNDER PLAINTIFFS' THEORY ARE NONEXISTENT

Criminal prosecutions under ECPA that meet the crime-tort exception are incredibly rare. This amicus is not aware of any criminal case in the last 20 years where an individual was prosecuted for a violation of ECPA that applied the crime-tort exception.[6]

Similarly, criminal prosecutions under HIPAA over the last 20 years are uncommon and have involved egregious conduct, far removed from AdTech.[7] The cases that do exist fall into categories such as accessing and disclosing health information in connection with kickback schemes, bribery, solicitation, fraud, identity theft, selling information to foreign governments, or access after termination. For example, one of the most recent HIPAA prosecutions involved disclosing health information of a U.S. government employee to an undercover agent defendants believed was a Russian operative to ingratiate themselves with the Russian government. *United States v. Gabrielian*, No. CR

[6] Undersigned counsel found no cases on WestLaw in the last 20 years regarding criminal violation of the ECPA involving the crime-tort exception.

[7] Undersigned counsel found fewer than 20 cases where there were federal criminal prosecutions for HIPAA violations on Westlaw.

SAG-22-336, 2024 WL 2384148 (D. Md. May 22, 2024) (unpublished).[8] Another case involved selling patient information knowing that it would be used for an identity theft scheme. *United States v. Corbett*, 921 F.3d 1032 (11th Cir. 2019). These actions involve conduct that is far removed from the sort of conduct Plaintiffs are alleging here.

Federal agencies responsible for enforcing ECPA and HIPAA have not enforced them in the manner Plaintiffs propose. There have been no referrals by Department of Health and Human Services for the use of AdTech or prosecutions by the Department of Justice.

The absence of any prosecution under these circumstances is telling and indicates prosecutors and regulators likely view the actions as lawful. When conduct is widespread, openly engaged in by major corporations and institutions, and never prosecuted notwithstanding ample opportunity and awareness, it suggests that those charged with enforcing the law do not believe the statute criminalizes that conduct.

[8] The *Gabrielian* court also noted the relative rarity of HIPAA criminal prosecutions: "as far as this Court is aware, this is the first case in which the Government has ever charged this particular felony violation of" HIPAA. *Id.* at 1. The court mentioned being aware of other cases with "a more common set of facts: employees of medical offices co-opted and sold health information from their workplaces to persons intending to use the information to further fraud or identity theft schemes." *Id.* at n.1.

An interpretation of a criminal statute that would make millions of Americans felons overnight should be rejected as inconsistent with congressional intent. "[Congress does not] hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001) (discussing fundamental details of a regulatory scheme unlikely to be vague). When Congress wishes to criminalize an entire industry's standard practices, it does so clearly and explicitly. It does not bury such a sweeping prohibition in the ambiguous interplay between a consent exception and a crime-tort sub-exception. This Court should not make the logical leap Plaintiffs suggest. *United States v. Davis,* 588 U.S. 445, 464 (2019) ("Respect for due process and the separation of powers suggests a court may not, in order to save Congress the trouble of having to write a new law, construe a criminal statute to penalize conduct it does not clearly proscribe."). The fact that no prosecutor has ever brought charges under this theory, despite years of open and notorious conduct, demonstrates that Plaintiffs have discovered not a crime but a litigation strategy.

CONCLUSION

For these reasons, the Greater Boston Chamber of Commerce respectfully urges the Court to find in favor of Defendant Cape Cod Healthcare, Inc. and to affirm the District Court's judgment.

Dated: December 18, 2025

Respectfully submitted,

/s/ Seth P. Berman

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CERTIFICATE OF SERVICE

I certify that on December 18, 2025, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system and that all parties or their counsel of record that are registered as ECF Filers will be served by the CM/ECF system.

/s/ Seth P. Berman
Seth P. Berman

CERTIFICATE OF COMPLIANCE

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/s/ Seth P. Berman
Seth P. Berman

ADDENDUM
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Part I. Crimes (Refs & Annos)
Chapter 119. Wire and Electronic Communications Interception and Interception of Oral Communications (Refs & Annos)

18 U.S.C.A. § 2511

§ 2511. Interception and disclosure of wire, oral, or electronic communications prohibited

Effective: November 16, 2018
Currentness

(1) Except as otherwise specifically provided in this chapter any person who--

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

(b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when--

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or

(e)(i) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, intercepted by means authorized by sections 2511(2)(a)(ii), 2511(2)(b)-(c), 2511(2)(e), 2516, and 2518 of this chapter, (ii) knowing or having reason to know that the information was obtained through the interception of such a communication in connection with a criminal investigation, (iii) having obtained or received the information in connection with a criminal investigation, and (iv) with intent to improperly obstruct, impede, or interfere with a duly authorized criminal investigation,

shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

(2)(a)(i) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of a provider of wire or electronic communication service, whose facilities are used in the transmission of a wire or electronic communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the provider of that service, except that a provider of wire communication service to the public shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(ii) Notwithstanding any other law, providers of wire or electronic communication service, their officers, employees, and agents, landlords, custodians, or other persons, are authorized to provide information, facilities, or technical assistance to persons authorized by law to intercept wire, oral, or electronic communications or to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, if such provider, its officers, employees, or agents, landlord, custodian, or other specified person, has been provided with--

(A) a court order directing such assistance or a court order pursuant to section 704 of the Foreign Intelligence Surveillance Act of 1978 signed by the authorizing judge, or

(B) a certification in writing by a person specified in section 2518(7) of this title or the Attorney General of the United States that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required,

setting forth the period of time during which the provision of the information, facilities, or technical assistance is authorized and specifying the information, facilities, or technical assistance required. No provider of wire or electronic communication service, officer, employee, or agent thereof, or landlord, custodian, or other specified person shall disclose the existence of any interception or surveillance or the device used to accomplish the interception or surveillance with respect to which the person has been furnished a court order or certification under this chapter, except as may otherwise be required by legal process and then only after prior notification to the Attorney General or to the principal prosecuting attorney of a State or any political subdivision of a State, as may be appropriate. Any such disclosure, shall render such person liable for the civil damages provided

for in section 2520. No cause of action shall lie in any court against any provider of wire or electronic communication service, its officers, employees, or agents, landlord, custodian, or other specified person for providing information, facilities, or assistance in accordance with the terms of a court order, statutory authorization, or certification under this chapter.

(iii) If a certification under subparagraph (ii)(B) for assistance to obtain foreign intelligence information is based on statutory authority, the certification shall identify the specific statutory provision and shall certify that the statutory requirements have been met.

(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire or electronic communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

(e) Notwithstanding any other provision of this title or section 705 or 706 of the Communications Act of 1934, it shall not be unlawful for an officer, employee, or agent of the United States in the normal course of his official duty to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, as authorized by that Act.

(f) Nothing contained in this chapter or chapter 121 or 206 of this title, or section 705 of the Communications Act of 1934, shall be deemed to affect the acquisition by the United States Government of foreign intelligence information from international or foreign communications, or foreign intelligence activities conducted in accordance with otherwise applicable Federal law involving a foreign electronic communications system, utilizing a means other than electronic surveillance as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, and procedures in this chapter or chapter 121 and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire, oral, and electronic communications may be conducted.

(g) It shall not be unlawful under this chapter or chapter 121 of this title for any person--

(i) to intercept or access an electronic communication made through an electronic communication system that is configured so that such electronic communication is readily accessible to the general public;

(ii) to intercept any radio communication which is transmitted--

(I) by any station for the use of the general public, or that relates to ships, aircraft, vehicles, or persons in distress;

(II) by any governmental, law enforcement, civil defense, private land mobile, or public safety communications system, including police and fire, readily accessible to the general public;

(III) by a station operating on an authorized frequency within the bands allocated to the amateur, citizens band, or general mobile radio services; or

(IV) by any marine or aeronautical communications system;

(iii) to engage in any conduct which--

(I) is prohibited by section 633 of the Communications Act of 1934; or

(II) is excepted from the application of section 705(a) of the Communications Act of 1934 by section 705(b) of that Act;

(iv) to intercept any wire or electronic communication the transmission of which is causing harmful interference to any lawfully operating station or consumer electronic equipment, to the extent necessary to identify the source of such interference; or

(v) for other users of the same frequency to intercept any radio communication made through a system that utilizes frequencies monitored by individuals engaged in the provision or the use of such system, if such communication is not scrambled or encrypted.

(h) It shall not be unlawful under this chapter--

(i) to use a pen register or a trap and trace device (as those terms are defined for the purposes of chapter 206 (relating to pen registers and trap and trace devices) of this title); or

(ii) for a provider of electronic communication service to record the fact that a wire or electronic communication was initiated or completed in order to protect such provider, another provider furnishing service toward the completion of the wire or electronic communication, or a user of that service, from fraudulent, unlawful or abusive use of such service.

(i) It shall not be unlawful under this chapter for a person acting under color of law to intercept the wire or electronic communications of a computer trespasser transmitted to, through, or from the protected computer, if--

(I) the owner or operator of the protected computer authorizes the interception of the computer trespasser's communications on the protected computer;

(II) the person acting under color of law is lawfully engaged in an investigation;

(III) the person acting under color of law has reasonable grounds to believe that the contents of the computer trespasser's communications will be relevant to the investigation; and

(IV) such interception does not acquire communications other than those transmitted to or from the computer trespasser.

(j) It shall not be unlawful under this chapter for a provider of electronic communication service to the public or remote computing service to intercept or disclose the contents of a wire or electronic communication in response to an order from a foreign government that is subject to an executive agreement that the Attorney General has determined and certified to Congress satisfies section 2523.

(3)(a) Except as provided in paragraph (b) of this subsection, a person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication (other than one to such person or entity, or an agent thereof) while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient.

(b) A person or entity providing electronic communication service to the public may divulge the contents of any such communication--

(i) as otherwise authorized in section 2511(2)(a) or 2517 of this title;

(ii) with the lawful consent of the originator or any addressee or intended recipient of such communication;

(iii) to a person employed or authorized, or whose facilities are used, to forward such communication to its destination; or

(iv) which were inadvertently obtained by the service provider and which appear to pertain to the commission of a crime, if such divulgence is made to a law enforcement agency.

(4)(a) Except as provided in paragraph (b) of this subsection or in subsection (5), whoever violates subsection (1) of this section shall be fined under this title or imprisoned not more than five years, or both.

(b) Conduct otherwise an offense under this subsection that consists of or relates to the interception of a satellite transmission that is not encrypted or scrambled and that is transmitted--

(i) to a broadcasting station for purposes of retransmission to the general public; or

(ii) as an audio subcarrier intended for redistribution to facilities open to the public, but not including data transmissions or telephone calls,

is not an offense under this subsection unless the conduct is for the purposes of direct or indirect commercial advantage or private financial gain.

[**(c)** Redesignated (b)]

(5)(a)(i) If the communication is--

(A) a private satellite video communication that is not scrambled or encrypted and the conduct in violation of this chapter is the private viewing of that communication and is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain; or

(B) a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct in violation of this chapter is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain,

then the person who engages in such conduct shall be subject to suit by the Federal Government in a court of competent jurisdiction.

(ii) In an action under this subsection--

(A) if the violation of this chapter is a first offense for the person under paragraph (a) of subsection (4) and such person has not been found liable in a civil action under section 2520 of this title, the Federal Government shall be entitled to appropriate injunctive relief; and

(B) if the violation of this chapter is a second or subsequent offense under paragraph (a) of subsection (4) or such person has been found liable in any prior civil action under section 2520, the person shall be subject to a mandatory $500 civil fine.

(b) The court may use any means within its authority to enforce an injunction issued under paragraph (ii)(A), and shall impose a civil fine of not less than $500 for each violation of such an injunction.

CREDIT(S)

(Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 213; amended Pub.L. 91-358, Title II, § 211(a), July 29, 1970, 84 Stat. 654; Pub.L. 95-511, Title II, § 201(a) to (c), Oct. 25, 1978, 92 Stat. 1796, 1797; Pub.L. 98-549, § 6(b)(2), Oct. 30, 1984, 98 Stat. 2804; Pub.L. 99-508, Title I, §§ 101(b), (c)(1), (5), (6), (d), (f)[1], 102, Oct. 21, 1986, 100 Stat. 1849 to 1853; Pub.L. 103-322, Title XXXII, § 320901, Title XXXIII, § 330016(1)(G), Sept. 13, 1994, 108 Stat. 2123, 2147; Pub.L. 103-414, Title II, §§ 202(b), 204, 205, Oct. 25, 1994, 108 Stat. 4290, 4291; Pub.L. 104-294, Title VI, § 604(b)(42), Oct. 11, 1996, 110 Stat. 3509; Pub.L. 107-56, Title II, §§ 204, 217(2), Oct. 26, 2001, 115 Stat. 281, 291; Pub.L. 107-296, Title XXII, § 2207(h)(2), (j)(1), formerly Title II, § 225(h)(2), (j)(1), Nov. 25, 2002, 116 Stat. 2158; renumbered § 2207(h)(2), (j)(1), Pub.L. 115-278, § 2(g)(2)(I), Nov. 16, 2018, 132 Stat. 4178; amended Pub.L. 110-261, Title I, §§ 101(c)(1), 102(c)(1), July 10, 2008, 122 Stat. 2459; Pub.L. 115-141, Div. V, § 104(1)(A), Mar. 23, 2018, 132 Stat. 1216.)

AMENDMENT OF PARAGRAPH (2)(A)(II)(A)

<Pub.L. 110-261, Title IV, § 403(b)(2), July 10, 2008, 122 Stat. 2474, as amended, provided that effective two years after April 20, 2024, except as provided in section Pub.L. 110-261, § 404, as amended, set out as a Transition Procedures note under 50 U.S.C.A. § 1801, par. (2)(a)(ii)(A) is amended by striking "or a court order pursuant to section 704 of the Foreign Intelligence Surveillance Act of 1978" after "assistance".>

VALIDITY

<For constitutionality of certain provisions of this section as amended by Pub.L. 99-508, Title I, § 101(c)(1)(A), see Bartnicki v. Vopper, U.S.Pa.2001, 532 U.S. 514, 121 S.Ct. 1753, 149 L.Ed.2d 787>

Notes of Decisions (550)

O'CONNOR'S COMMENTS

United States Sentencing Guidelines
§2B5.3 (basic economic offenses)

§2H3.1 (offenses involving individual rights)

18 U.S.C.A. § 2511, 18 USCA § 2511
Current through P.L. 119-47. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 119. Wire and Electronic Communications Interception and Interception of Oral Communications (Refs & Annos)

18 U.S.C.A. § 2520

§ 2520. Recovery of civil damages authorized

Effective: November 16, 2018
Currentness

(a) In general.--Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate.

(b) Relief.--In an action under this section, appropriate relief includes--

(1) such preliminary and other equitable or declaratory relief as may be appropriate;

(2) damages under subsection (c) and punitive damages in appropriate cases; and

(3) a reasonable attorney's fee and other litigation costs reasonably incurred.

(c) Computation of damages.--(1) In an action under this section, if the conduct in violation of this chapter is the private viewing of a private satellite video communication that is not scrambled or encrypted or if the communication is a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, then the court shall assess damages as follows:

(A) If the person who engaged in that conduct has not previously been enjoined under section 2511(5) and has not been found liable in a prior civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $50 and not more than $500.

(B) If, on one prior occasion, the person who engaged in that conduct has been enjoined under section 2511(5) or has been found liable in a civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $100 and not more than $1000.

(2) In any other action under this section, the court may assess as damages whichever is the greater of--

(A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or

(B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000.

(d) Defense.--A good faith reliance on--

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization;

(2) a request of an investigative or law enforcement officer under section 2518(7) of this title; or

(3) a good faith determination that section 2511(3), 2511(2)(i), or 2511(2)(j) of this title permitted the conduct complained of;

is a complete defense against any civil or criminal action brought under this chapter or any other law.

(e) Limitation.--A civil action under this section may not be commenced later than two years after the date upon which the claimant first has a reasonable opportunity to discover the violation.

(f) Administrative discipline.--If a court or appropriate department or agency determines that the United States or any of its departments or agencies has violated any provision of this chapter, and the court or appropriate department or agency finds that the circumstances surrounding the violation raise serious questions about whether or not an officer or employee of the United States acted willfully or intentionally with respect to the violation, the department or agency shall, upon receipt of a true and correct copy of the decision and findings of the court or appropriate department or agency promptly initiate a proceeding to determine whether disciplinary action against the officer or employee is warranted. If the head of the department or agency involved determines that disciplinary action is not warranted, he or she shall notify the Inspector General with jurisdiction over the department or agency concerned and shall provide the Inspector General with the reasons for such determination.

(g) Improper disclosure is violation.--Any willful disclosure or use by an investigative or law enforcement officer or governmental entity of information beyond the extent permitted by section 2517 is a violation of this chapter for purposes of section 2520(a).

CREDIT(S)

(Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 223; amended Pub.L. 91-358, Title II, § 211(c), July 29, 1970, 84 Stat. 654; Pub.L. 99-508, Title I, § 103, Oct. 21, 1986, 100 Stat. 1853; Pub.L. 107-56, Title II, § 223(a), Oct. 26, 2001, 115 Stat. 293; Pub.L. 107-296, Title XXII, § 2207(e), formerly Title II, § 225(e), Nov. 25, 2002, 116 Stat. 2157; renumbered § 2207(e), Pub.L. 115-278, § 2(g)(2)(I), Nov. 16, 2018, 132 Stat. 4178; amended Pub.L. 115-141, Div. V, § 104(1)(B), Mar. 23, 2018, 132 Stat. 1216.)

Notes of Decisions (269)

18 U.S.C.A. § 2520, 18 USCA § 2520

Current through P.L. 119-47. Some statute sections may be more current, see credits for details.

End of Document

KeyCite Red Flag
Unconstitutional or PreemptedUnconstitutional as Applied by Project Veritas Action Fund v. Rollins, 1st Cir.(Mass.), Dec. 15, 2020

KeyCite Yellow Flag
Proposed Legislation

Massachusetts General Laws Annotated
Part IV. Crimes, Punishments and Proceedings in Criminal Cases (Ch. 263-280)
Title I. Crimes and Punishments (Ch. 263-274)
Chapter 272. Crimes Against Chastity, Morality, Decency and Good Order (Refs & Annos)

M.G.L.A. 272 § 99

§ 99. Interception of wire and oral communications

Currentness

Interception of wire and oral communications.--

A. Preamble.

The general court finds that organized crime exists within the commonwealth and that the increasing activities of organized crime constitute a grave danger to the public welfare and safety. Organized crime, as it exists in the commonwealth today, consists of a continuing conspiracy among highly organized and disciplined groups to engage in supplying illegal goods and services. In supplying these goods and services organized crime commits unlawful acts and employs brutal and violent tactics. Organized crime is infiltrating legitimate business activities and depriving honest businessmen of the right to make a living.

The general court further finds that because organized crime carries on its activities through layers of insulation and behind a wall of secrecy, government has been unsuccessful in curtailing and eliminating it. Normal investigative procedures are not effective in the investigation of illegal acts committed by organized crime. Therefore, law enforcement officials must be permitted to use modern methods of electronic surveillance, under strict judicial supervision, when investigating these organized criminal activities.

The general court further finds that the uncontrolled development and unrestricted use of modern electronic surveillance devices pose grave dangers to the privacy of all citizens of the commonwealth. Therefore, the secret use of such devices by private individuals must be prohibited. The use of such devices by law enforcement officials must be conducted under strict judicial supervision and should be limited to the investigation of organized crime.

B. Definitions. As used in this section--

1. The term “wire communication” means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception.

2. The term "oral communication" means speech, except such speech as is transmitted over the public air waves by radio or other similar device.

3. The term "intercepting device" means any device or apparatus which is capable of transmitting, receiving, amplifying, or recording a wire or oral communication other than a hearing aid or similar device which is being used to correct subnormal hearing to normal and other than any telephone or telegraph instrument, equipment, facility, or a component thereof, (a) furnished to a subscriber or user by a communications common carrier in the ordinary course of its business under its tariff and being used by the subscriber or user in the ordinary course of its business; or (b) being used by a communications common carrier in the ordinary course of its business.

4. The term "interception" means to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication; provided that it shall not constitute an interception for an investigative or law enforcement officer, as defined in this section, to record or transmit a wire or oral communication if the officer is a party to such communication or has been given prior authorization to record or transmit the communication by such a party and if recorded or transmitted in the course of an investigation of a designated offense as defined herein.

5. The term "contents", when used with respect to any wire or oral communication, means any information concerning the identity of the parties to such communication or the existence, contents, substance, purport, or meaning of that communication.

6. The term "aggrieved person" means any individual who was a party to an intercepted wire or oral communication or who was named in the warrant authorizing the interception, or who would otherwise have standing to complain that his personal or property interest or privacy was invaded in the course of an interception.

7. The term "designated offense" shall include the following offenses in connection with organized crime as defined in the preamble: arson, assault and battery with a dangerous weapon, extortion, bribery, burglary, embezzlement, forgery, gaming in violation of section seventeen of chapter two hundred and seventy-one of the general laws, intimidation of a witness or juror, kidnapping, larceny, lending of money or things of value in violation of the general laws, mayhem, murder, any offense involving the possession or sale of a narcotic or harmful drug, perjury, prostitution, robbery, subornation of perjury, any violation of this section, being an accessory to any of the foregoing offenses and conspiracy or attempt or solicitation to commit any of the foregoing offenses.

8. The term "investigative or law enforcement officer" means any officer of the United States, a state or a political subdivision of a state, who is empowered by law to conduct investigations of, or to make arrests for, the designated offenses, and any attorney authorized by law to participate in the prosecution of such offenses.

9. The term "judge of competent jurisdiction" means any justice of the superior court of the commonwealth.

10. The term "chief justice" means the chief justice of the superior court of the commonwealth.

11. The term "issuing judge" means any justice of the superior court who shall issue a warrant as provided herein or in the event of his disability or unavailability any other judge of competent jurisdiction designated by the chief justice.

12. The term "communication common carrier" means any person engaged as a common carrier in providing or operating wire communication facilities.

13. The term "person" means any individual, partnership, association, joint stock company, trust, or corporation, whether or not any of the foregoing is an officer, agent or employee of the United States, a state, or a political subdivision of a state.

14. The terms "sworn" or "under oath" as they appear in this section shall mean an oath or affirmation or a statement subscribed to under the pains and penalties of perjury.

15. The terms "applicant attorney general" or "applicant district attorney" shall mean the attorney general of the commonwealth or a district attorney of the commonwealth who has made application for a warrant pursuant to this section.

16. The term "exigent circumstances" shall mean the showing of special facts to the issuing judge as to the nature of the investigation for which a warrant is sought pursuant to this section which require secrecy in order to obtain the information desired from the interception sought to be authorized.

17. The term "financial institution" shall mean a bank, as defined in section 1 of chapter 167, and an investment bank, securities broker, securities dealer, investment adviser, mutual fund, investment company or securities custodian as defined in section 1.165-12(c)(1) of the United States Treasury regulations.

18. The term "corporate and institutional trading partners" shall mean financial institutions and general business entities and corporations which engage in the business of cash and asset management, asset management directed to custody operations, securities trading, and wholesale capital markets including foreign exchange, securities lending, and the purchase, sale or exchange of securities, options, futures, swaps, derivatives, repurchase agreements and other similar financial instruments with such financial institution.

C. Offenses.

1. Interception, oral communications prohibited.

Except as otherwise specifically provided in this section any person who--

willfully commits an interception, attempts to commit an interception, or procures any other person to commit an interception or to attempt to commit an interception of any wire or oral communication shall be fined not more than ten thousand dollars, or imprisoned in the state prison for not more than five years, or imprisoned in a jail or house of correction for not more than two and one half years, or both so fined and given one such imprisonment.

Proof of the installation of any intercepting device by any person under circumstances evincing an intent to commit an interception, which is not authorized or permitted by this section, shall be prima facie evidence of a violation of this subparagraph.

2. Editing of tape recordings in judicial proceeding prohibited.

Except as otherwise specifically provided in this section any person who willfully edits, alters or tampers with any tape, transcription or recording of oral or wire communications by any means, or attempts to edit, alter or tamper with any tape, transcription or recording of oral or wire communications by any means with the intent to present in any judicial proceeding or proceeding under oath, or who presents such recording or permits such recording to be presented in any judicial proceeding or proceeding under oath, without fully indicating the nature of the changes made in the original state of the recording, shall be fined not more than ten thousand dollars or imprisoned in the state prison for not more than five years or imprisoned in a jail or house of correction for not more than two years or both so fined and given one such imprisonment.

3. Disclosure or use of wire or oral communications prohibited.

Except as otherwise specifically provided in this section any person who--

a. willfully discloses or attempts to disclose to any person the contents of any wire or oral communication, knowing that the information was obtained through interception; or

b. willfully uses or attempts to use the contents of any wire or oral communication, knowing that the information was obtained through interception, shall be guilty of a misdemeanor punishable by imprisonment in a jail or a house of correction for not more than two years or by a fine of not more than five thousand dollars or both.

4. Disclosure of contents of applications, warrants, renewals, and returns prohibited.

Except as otherwise specifically provided in this section any person who--

willfully discloses to any person, any information concerning or contained in, the application for, the granting or denial of orders for interception, renewals, notice or return on an ex parte order granted pursuant to this section, or the contents of any document, tape, or recording kept in accordance with paragraph N, shall be guilty of a misdemeanor punishable by imprisonment in a jail or a house of correction for not more than two years or by a fine of not more than five thousand dollars or both.

5. Possession of interception devices prohibited.

A person who possesses any intercepting device under circumstances evincing an intent to commit an interception not permitted or authorized by this section, or a person who permits an intercepting device to be used or employed for an interception not permitted or authorized by this section, or a person who possesses an intercepting device knowing that the same is intended to be used to commit an interception not permitted or authorized by this section, shall be guilty of a misdemeanor punishable by imprisonment in a jail or house of correction for not more than two years or by a fine of not more than five thousand dollars or both.

The installation of any such intercepting device by such person or with his permission or at his direction shall be prima facie evidence of possession as required by this subparagraph.

6. Any person who permits or on behalf of any other person commits or attempts to commit, or any person who participates in a conspiracy to commit or to attempt to commit, or any accessory to a person who commits a violation of subparagraphs

1 through 5 of paragraph C of this section shall be punished in the same manner as is provided for the respective offenses as described in subparagraphs 1 through 5 of paragraph C.

D. Exemptions.

1. Permitted interception of wire or oral communications.

It shall not be a violation of this section--

a. for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of service or to the protection of the rights or property of the carrier of such communication, or which is necessary to prevent the use of such facilities in violation of section fourteen A of chapter two hundred and sixty-nine of the general laws; provided, that said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

b. for persons to possess an office intercommunication system which is used in the ordinary course of their business or to use such office intercommunication system in the ordinary course of their business.

c. for investigative and law enforcement officers of the United States of America to violate the provisions of this section if acting pursuant to authority of the laws of the United States and within the scope of their authority.

d. for any person duly authorized to make specified interceptions by a warrant issued pursuant to this section.

e. for investigative or law enforcement officers to violate the provisions of this section for the purposes of ensuring the safety of any law enforcement officer or agent thereof who is acting in an undercover capacity, or as a witness for the commonwealth; provided, however, that any such interception which is not otherwise permitted by this section shall be deemed unlawful for purposes of paragraph P.

f. for a financial institution to record telephone communications with its corporate or institutional trading partners in the ordinary course of its business; provided, however, that such financial institution shall establish and maintain a procedure to provide semi-annual written notice to its corporate and institutional trading partners that telephone communications over designated lines will be recorded.

2. Permitted disclosure and use of intercepted wire or oral communications.

a. Any investigative or law enforcement officer, who, by any means authorized by this section, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents or evidence in the proper performance of his official duties.

b. Any investigative or law enforcement officer, who, by any means authorized by this section has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may use such contents or evidence in the proper performance of his official duties.

c. Any person who has obtained, by any means authorized by this section, knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents while giving testimony under oath or affirmation in any criminal proceeding in any court of the United States or of any state or in any federal or state grand jury proceeding.

d. The contents of any wire or oral communication intercepted pursuant to a warrant in accordance with the provisions of this section, or evidence derived therefrom, may otherwise be disclosed only upon a showing of good cause before a judge of competent jurisdiction.

e. No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this section shall lose its privileged character.

E. Warrants: when issuable:

A warrant may issue only:

1. Upon a sworn application in conformity with this section; and

2. Upon a showing by the applicant that there is probable cause to believe that a designated offense has been, is being, or is about to be committed and that evidence of the commission of such an offense may thus be obtained or that information which will aid in the apprehension of a person who the applicant has probable cause to believe has committed, is committing, or is about to commit a designated offense may thus be obtained; and

3. Upon a showing by the applicant that normal investigative procedures have been tried and have failed or reasonably appear unlikely to succeed if tried.

F. Warrants: application.

1. Application. The attorney general, any assistant attorney general specially designated by the attorney general, any district attorney, or any assistant district attorney specially designated by the district attorney may apply ex parte to a judge of competent jurisdiction for a warrant to intercept wire or oral communications. Each application ex parte for a warrant must be in writing, subscribed and sworn to by the applicant authorized by this subparagraph.

2. The application must contain the following:

a. A statement of facts establishing probable cause to believe that a particularly described designated offense has been, is being, or is about to be committed; and

b. A statement of facts establishing probable cause to believe that oral or wire communications of a particularly described person will constitute evidence of such designated offense or will aid in the apprehension of a person who the applicant has probable cause to believe has committed, is committing, or is about to commit a designated offense; and

c. That the oral or wire communications of the particularly described person or persons will occur in a particularly described place and premises or over particularly described telephone or telegraph lines; and

d. A particular description of the nature of the oral or wire communications sought to be overheard; and

e. A statement that the oral or wire communications sought are material to a particularly described investigation or prosecution and that such conversations are not legally privileged; and

f. A statement of the period of time for which the interception is required to be maintained. If practicable, the application should designate hours of the day or night during which the oral or wire communications may be reasonably expected to occur. If the nature of the investigation is such that the authorization for the interception should not automatically terminate when the described oral or wire communications have been first obtained, the application must specifically state facts establishing probable cause to believe that additional oral or wire communications of the same nature will occur thereafter; and

g. If it is reasonably necessary to make a secret entry upon a private place and premises in order to install an intercepting device to effectuate the interception, a statement to such effect; and

h. If a prior application has been submitted or a warrant previously obtained for interception of oral or wire communications, a statement fully disclosing the date, court, applicant, execution, results, and present status thereof; and

i. If there is good cause for requiring the postponement of service pursuant to paragraph L, subparagraph 2, a description of such circumstances, including reasons for the applicant's belief that secrecy is essential to obtaining the evidence or information sought.

3. Allegations of fact in the application may be based either upon the personal knowledge of the applicant or upon information and belief. If the applicant personally knows the facts alleged, it must be so stated. If the facts establishing such probable cause are derived in whole or part from the statements of persons other than the applicant, the sources of such information and belief must be either disclosed or described; and the application must contain facts establishing the existence and reliability of any informant and the reliability of the information supplied by him. The application must also state, so far as possible, the basis of the informant's knowledge or belief. If the applicant's information and belief is derived from tangible evidence or recorded oral evidence, a copy or detailed description thereof should be annexed to or included in the application. Affidavits of persons other than the applicant may be submitted in conjunction with the application if they tend to support any fact or conclusion alleged therein. Such accompanying affidavits may be based either on personal knowledge of the affiant or information and belief, with the source thereof, and reason therefor, specified.

G. Warrants: application to whom made.

Application for a warrant authorized by this section must be made to a judge of competent jurisdiction in the county where the interception is to occur, or the county where the office of the applicant is located, or in the event that there is no judge of competent jurisdiction sitting in said county at such time, to a judge of competent jurisdiction sitting in Suffolk County; except that for these purposes, the office of the attorney general shall be deemed to be located in Suffolk County.

H. Warrants: application how determined.

1. If the application conforms to paragraph F, the issuing judge may examine under oath any person for the purpose of determining whether probable cause exists for the issuance of the warrant pursuant to paragraph E. A verbatim transcript of every such interrogation or examination must be taken, and a transcription of the same, sworn to by the stenographer, shall be attached to the application and be deemed a part thereof.

2. If satisfied that probable cause exists for the issuance of a warrant the judge may grant the application and issue a warrant in accordance with paragraph *I*. The application and an attested copy of the warrant shall be retained by the issuing judge and transported to the chief justice of the superior court in accordance with the provisions of paragraph N of this section.

3. If the application does not conform to paragraph F, or if the judge is not satisfied that probable cause has been shown sufficient for the issuance of a warrant, the application must be denied.

I. Warrants: form and content.

A warrant must contain the following:

1. The subscription and title of the issuing judge; and

2. The date of issuance, the date of effect, and termination date which in no event shall exceed thirty days from the date of effect. The warrant shall permit interception of oral or wire communications for a period not to exceed fifteen days. If physical installation of a device is necessary, the thirty-day period shall begin upon the date of installation. If the effective period of the warrant is to terminate upon the acquisition of particular evidence or information or oral or wire communication, the warrant shall so provide; and

3. A particular description of the person and the place, premises or telephone or telegraph line upon which the interception may be conducted; and

4. A particular description of the nature of the oral or wire communications to be obtained by the interception including a statement of the designated offense to which they relate; and

5. An express authorization to make secret entry upon a private place or premises to install a specified intercepting device, if such entry is necessary to execute the warrant; and

6. A statement providing for service of the warrant pursuant to paragraph L except that if there has been a finding of good cause shown requiring the postponement of such service, a statement of such finding together with the basis therefor must be included and an alternative direction for deferred service pursuant to paragraph L, subparagraph 2.

J. Warrants: renewals.

1. Any time prior to the expiration of a warrant or a renewal thereof, the applicant may apply to the issuing judge for a renewal thereof with respect to the same person, place, premises or telephone or telegraph line. An application for renewal must incorporate the warrant sought to be renewed together with the application therefor and any accompanying papers upon which it was issued. The application for renewal must set forth the results of the interceptions thus far conducted. In addition, it must set forth present grounds for extension in conformity with paragraph F, and the judge may interrogate under oath and in such an event a transcript must be provided and attached to the renewal application in the same manner as is set forth in subparagraph 1 of paragraph H.

2. Upon such application, the judge may issue an order renewing the warrant and extending the authorization for a period not exceeding fifteen (15) days from the entry thereof. Such an order shall specify the grounds for the issuance thereof. The application and an attested copy of the order shall be retained by the issuing judge to be transported to the chief justice in accordance with the provisions of subparagraph N of this section. In no event shall a renewal be granted which shall terminate later than two years following the effective date of the warrant.

K. Warrants: manner and time of execution.

1. A warrant may be executed pursuant to its terms anywhere in the commonwealth.

2. Such warrant may be executed by the authorized applicant personally or by any investigative or law enforcement officer of the commonwealth designated by him for the purpose.

3. The warrant may be executed according to its terms during the hours specified therein, and for the period therein authorized, or a part thereof. The authorization shall terminate upon the acquisition of the oral or wire communications, evidence or information described in the warrant. Upon termination of the authorization in the warrant and any renewals thereof, the interception must cease at once, and any device installed for the purpose of the interception must be removed as soon thereafter as practicable. Entry upon private premises for the removal of such device is deemed to be authorized by the warrant.

L. Warrants: service thereof.

1. Prior to the execution of a warrant authorized by this section or any renewal thereof, an attested copy of the warrant or the renewal must, except as otherwise provided in subparagraph 2 of this paragraph, be served upon a person whose oral or wire communications are to be obtained, and if an intercepting device is to be installed, upon the owner, lessee, or occupant of the place or premises, or upon the subscriber to the telephone or owner or lessee of the telegraph line described in the warrant.

2. If the application specially alleges exigent circumstances requiring the postponement of service and the issuing judge finds that such circumstances exist, the warrant may provide that an attested copy thereof may be served within thirty days after the expiration of the warrant or, in case of any renewals thereof, within thirty days after the expiration of the last renewal; except that upon a showing of important special facts which set forth the need for continued secrecy to the satisfaction of the issuing judge, said judge may direct that the attested copy of the warrant be served on such parties as are required by this section at such time as may be appropriate in the circumstances but in no event may he order it to be served later than three (3) years from the time of expiration of the warrant or the last renewal thereof. In the event that the service required herein is postponed in accordance with this paragraph, in addition to the requirements of any other paragraph of this section, service of an attested copy of the warrant shall be made upon any aggrieved person who should reasonably be known to the person who executed or obtained the warrant as a result of the information obtained from the interception authorized thereby.

3. The attested copy of the warrant shall be served on persons required by this section by an investigative or law enforcement officer of the commonwealth by leaving the same at his usual place of abode, or in hand, or if this is not possible by mailing the same by certified or registered mail to his last known place of abode. A return of service shall be made to the issuing judge, except, that if such service is postponed as provided in subparagraph 2 of paragraph L, it shall be made to the chief justice. The return of service shall be deemed a part of the return of the warrant and attached thereto.

M. Warrant: return.

Within seven days after termination of the warrant or the last renewal thereof, a return must be made thereon to the judge issuing the warrant by the applicant therefor, containing the following:

a. a statement of the nature and location of the communications facilities, if any, and premise or places where the interceptions were made; and

b. the periods of time during which such interceptions were made; and

c. the names of the parties to the communications intercepted if known; and

d. the original recording of the oral or wire communications intercepted, if any; and

e. a statement attested under the pains and penalties of perjury by each person who heard oral or wire communications as a result of the interception authorized by the warrant, which were not recorded, stating everything that was overheard to the best of his recollection at the time of the execution of the statement.

N. Custody and secrecy of papers and recordings made pursuant to a warrant.

1. The contents of any wire or oral communication intercepted pursuant to a warrant issued pursuant to this section shall, if possible, be recorded on tape or wire or other similar device. Duplicate recordings may be made for use pursuant to subparagraphs 2 (a) and (b) of paragraph D for investigations. Upon examination of the return and a determination that it complies with this section, the issuing judge shall forthwith order that the application, all renewal applications, warrant, all renewal orders and the return thereto be transmitted to the chief justice by such persons as he shall designate. Their contents shall

not be disclosed except as provided in this section. The application, renewal applications, warrant, the renewal order and the return or any one of them or any part of them may be transferred to any trial court, grand jury proceeding of any jurisdiction by any law enforcement or investigative officer or court officer designated by the chief justice and a trial justice may allow them to be disclosed in accordance with paragraph D, subparagraph 2, or paragraph *O* or any other applicable provision of this section.

The application, all renewal applications, warrant, all renewal orders and the return shall be stored in a secure place which shall be designated by the chief justice, to which access shall be denied to all persons except the chief justice or such court officers or administrative personnel of the court as he shall designate.

2. Any violation of the terms and conditions of any order of the chief justice, pursuant to the authority granted in this paragraph, shall be punished as a criminal contempt of court in addition to any other punishment authorized by law.

3. The application, warrant, renewal and return shall be kept for a period of five (5) years from the date of the issuance of the warrant or the last renewal thereof at which time they shall be destroyed by a person designated by the chief justice. Notice prior to the destruction shall be given to the applicant attorney general or his successor or the applicant district attorney or his successor and upon a showing of good cause to the chief justice, the application, warrant, renewal, and return may be kept for such additional period as the chief justice shall determine but in no event longer than the longest period of limitation for any designated offense specified in the warrant, after which time they must be destroyed by a person designated by the chief justice.

O. Introduction of evidence.

1. Notwithstanding any other provisions of this section or any order issued pursuant thereto, in any criminal trial where the commonwealth intends to offer in evidence any portions of the contents of any interception or any evidence derived therefrom the defendant shall be served with a complete copy of each document and item which make up each application, renewal application, warrant, renewal order, and return pursuant to which the information was obtained, except that he shall be furnished a copy of any recording instead of the original. The service must be made at the arraignment of the defendant or, if a period in excess of thirty (30) days shall elapse prior to the commencement of the trial of the defendant, the service may be made at least thirty (30) days before the commencement of the criminal trial. Service shall be made in hand upon the defendant or his attorney by any investigative or law enforcement officer of the commonwealth. Return of the service required by this subparagraph including the date of service shall be entered into the record of trial of the defendant by the commonwealth and such return shall be deemed prima facie evidence of the service described therein. Failure by the commonwealth to make such service at the arraignment, or if delayed, at least thirty days before the commencement of the criminal trial, shall render such evidence illegally obtained for purposes of the trial against the defendant; and such evidence shall not be offered nor received at the trial notwithstanding the provisions of any other law or rules of court.

2. In any criminal trial where the commonwealth intends to offer in evidence any portions of a recording or transmission or any evidence derived therefrom, made pursuant to the exceptions set forth in paragraph B, subparagraph 4, of this section, the defendant shall be served with a complete copy of each recording or a statement under oath of the evidence overheard as a result of the transmission. The service must be made at the arraignment of the defendant or if a period in excess of thirty days shall elapse prior to the commencement of the trial of the defendant, the service may be made at least thirty days before the commencement of the criminal trial. Service shall be made in hand upon the defendant or his attorney by any investigative or law enforcement officer of the commonwealth. Return of the service required by this subparagraph including the date of service shall be entered into the record of trial of the defendant by the commonwealth and such return shall be deemed prima facie evidence of the service described therein. Failure by the commonwealth to make such service at the arraignment, or if delayed at least thirty days before the commencement of the criminal trial, shall render such service illegally obtained for purposes of

the trial against the defendant and such evidence shall not be offered nor received at the trial notwithstanding the provisions of any other law or rules of court.

P. Suppression of evidence.

Any person who is a defendant in a criminal trial in a court of the commonwealth may move to suppress the contents of any intercepted wire or oral communication or evidence derived therefrom, for the following reasons:

1. That the communication was unlawfully intercepted.

2. That the communication was not intercepted in accordance with the terms of this section.

3. That the application or renewal application fails to set forth facts sufficient to establish probable cause for the issuance of a warrant.

4. That the interception was not made in conformity with the warrant.

5. That the evidence sought to be introduced was illegally obtained.

6. That the warrant does not conform to the provisions of this section.

Q. Civil remedy.

Any aggrieved person whose oral or wire communications were intercepted, disclosed or used except as permitted or authorized by this section or whose personal or property interests or privacy were violated by means of an interception except as permitted or authorized by this section shall have a civil cause of action against any person who so intercepts, discloses or uses such communications or who so violates his personal, property or privacy interest, and shall be entitled to recover from any such person--

1. actual damages but not less than liquidated damages computed at the rate of $100 per day for each day of violation or $1000, whichever is higher;

2. punitive damages; and

3. a reasonable attorney's fee and other litigation disbursements reasonably incurred. Good faith reliance on a warrant issued under this section shall constitute a complete defense to an action brought under this paragraph.

R. Annual report of interceptions of the general court.

On the second Friday of January, each year, the attorney general and each district attorney shall submit a report to the general court stating (1) the number of applications made for warrants during the previous year, (2) the name of the applicant, (3)

the number of warrants issued, (4) the effective period for the warrants, (5) the number and designation of the offenses for which those applications were sought, and for each of the designated offenses the following: (a) the number of renewals, (b) the number of interceptions made during the previous year, (c) the number of indictments believed to be obtained as a result of those interceptions, (d) the number of criminal convictions obtained in trials where interception evidence or evidence derived therefrom was introduced. This report shall be a public document and be made available to the public at the offices of the attorney general and district attorneys. In the event of failure to comply with the provisions of this paragraph any person may compel compliance by means of an action of mandamus.

Credits

Amended by St.1959, c. 449, § 1; St.1968, c. 738, § 1; St.1986, c. 557, § 199; St.1993, c. 432, § 13; St.1998, c. 163, §§ 7, 8.

Notes of Decisions (395)

M.G.L.A. 272 § 99, MA ST 272 § 99

Current through Chapter 65 of the 2025 1st Annual Session. Some sections may be more current, see credits for details.

End of Document

West's Annotated Code of Virginia
Title 19.2. Criminal Procedure (Refs & Annos)
Chapter 6. Interception of Wire, Electronic or Oral Communications (Refs & Annos)

VA Code Ann. § 19.2-62

§ 19.2-62. Interception, disclosure, etc., of wire, electronic or oral communications unlawful; penalties; exceptions

Currentness

A. Except as otherwise specifically provided in this chapter any person who:

1. Intentionally intercepts, endeavors to intercept or procures any other person to intercept or endeavor to intercept, any wire, electronic or oral communication;

2. Intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical or other device to intercept any oral communication;

3. Intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, electronic or oral communication knowing or having reason to know that the information was obtained through the interception of a wire, electronic or oral communication; or

4. Intentionally uses, or endeavors to use, the contents of any wire, electronic or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire, electronic or oral communication; shall be guilty of a Class 6 felony.

B. 1. It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee or agent of a provider of wire or electronic communications service, whose facilities are used in the transmission of a wire communication, to intercept, disclose or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the provider of that service. However, a provider of wire communication service to the public shall not utilize service observing or random monitoring except for mechanical or service quality control checks. It shall not be a criminal offense under this chapter for providers of wire or electronic communications service, their officers, employees and agents, landlords, custodians, or other persons pursuant to a court order under this chapter, to provide information facilities or technical assistance to an investigative or law-enforcement officer, who, pursuant to this chapter, is authorized to intercept a wire, electronic or oral communication.

2. It shall not be a criminal offense under this chapter for a person to intercept a wire, electronic or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

3. It shall not be a criminal offense under this chapter for any person:

(a) To intercept or access an electronic communication made through an electronic communication system that is configured so that such electronic communication is readily accessible to the general public;

(b) To intercept any radio communication which is transmitted (i) by any station for the use of the general public, or that relates to ships, aircraft, vehicles, or persons in distress, (ii) by any governmental, law-enforcement, civil defense, private land mobile, or public safety communications system, including police and fire, readily accessible to the general public, (iii) by a station operating on an authorized frequency within the bands allocated to the amateur, citizens band, or general mobile radio services; or (iv) by any marine or aeronautical communications system;

(c) To intercept any wire or electronic communication the transmission of which is causing harmful interference to any lawfully operating station or consumer electronic equipment, to the extent necessary to identify the source of such interference;

(d) Using the same frequency to intercept any radio communication made through a system that utilizes frequencies monitored by individuals engaged in the provision or the use of such system, if such communication is not scrambled or encrypted;

(e) To use a pen register or a trap and trace device pursuant to §§ 19.2-70.1 and 19.2-70.2; or

(f) Who is a provider of electronic communication service to record the fact that a wire or electronic communication was initiated or completed in order to protect such provider, another provider furnishing service toward the completion of the wire or electronic communication, or a user of that service, from fraudulent, unlawful or abusive use of such service.

C. A person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication, other than one to such person or entity or an agent thereof, while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication or an agent of the addressee or intended recipient. However, a person or entity providing electronic communication service to the public may divulge the contents of any such communication:

1. As authorized in subdivision B 1 of this section or § 19.2-67;

2. With the lawful consent of the originator or any addressee or intended recipient of such communication;

3. To a person employed or authorized, or whose facilities are used, to forward such communication to its destination; or

4. Which were inadvertently obtained by the service provider and which appear to pertain to the commission of a crime, to a law-enforcement agency.

Conduct otherwise an offense under this subsection that consists of or relates to the interception of a satellite transmission that is not encrypted or scrambled and that is transmitted (i) to a broadcasting station for purposes of retransmission to the general public, or (ii) as an audio subcarrier intended for redistribution to facilities open to the public, but not including data

transmissions or telephone calls, is not an offense under this section unless the conduct is for the purposes of direct or indirect commercial advantage or private financial gain. Further, private viewing of a satellite video communication that is not scrambled or encrypted and interception of a radio communication that is transmitted on frequencies allocated under subpart D of Part 74 of the Rules of the Federal Communications Commission that is not scrambled or encrypted when the viewing or interception is not done for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, shall not be offenses under this chapter.

Violation of this subsection shall be punishable as a Class 1 misdemeanor.

Credits

Acts 1975, c. 495; Acts 1988, c. 889; Acts 2004, c. 149.

Notes of Decisions (31)

VA Code Ann. § 19.2-62, VA ST § 19.2-62
The statutes and Constitution are current through the 2025 Regular and Reconvened Sessions.

End of Document

1967 TOTAL PAYMENTS OF $50,000 TO $99,999 UNDER ASCS PROGRAMS (EXCLUDING PRICE SUPPORT LOANS)—Continued

State and name	Address	Amount
WASHINGTON		
D. E. Phillips	Lind, Adams County	$70,757
Leonard & Henry Franz	do	52,917
Hutterian Brethren Inc	Route 1, Espanola, Adams County	51,585
Ralph Gering	108 W. 11th, Ritzville, Adams County	50,373
Bi County Farms	Box 550, Prosser, Benton County	66,673
WASHINGTON—Continued		
Vollmer-Bayne	Box 129 Prosser, Benton County	$52,434
Neil Rasor	Box 117, Royal City, Grant County	69,993
Grote Farms Inc	Care of Ben Grote, Prescott, Walla Walla County	62,221
Glen Miller	Rural Route 2, Colfax, Whitman County	98,936
McGregor Land & Livestock Co	Hooper, Whitman County	84,942

AMENDMENT No. 811

At the appropriate place insert the following:

"SEC. —. Notwithstanding any other provision of law, after January 1, 1969, no producer shall be eligible for payments under any program or programs administered by the Department of Agriculture in any amount in excess of $10,000 for any one year. The foregoing limitation shall include the fair dollar value (as determined by the Secretary of Agriculture) of any payment-in-kind made to a producer."

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

Mr. WILLIAMS of Delaware. I yield.

Mr. MANSFIELD. Mr. President, I have done some checking on the basis of the statements made by the distinguished Senator on yesterday. I am informed by the White House that the President in no manner, shape, or form has issued any instructions or exercised any degree of coercion, persuasion, or threat to bring about an acceptance of a tax bill which would have a maximum of $4 billion reduction in the field of expenditures.

I have also talked with the Secretary of Health, Education, and Welfare, Mr. Wilbur Cohen, and he says that he knows nothing about the type of development which was described on yesterday, and that if he finds out there is anything like that, he will end it immediately.

What I wish to point out is that on the part of the administration there has been no campaign to sway, coerce, or threaten people to get them to see a particular point of view so far as the conference report on the tax bill is concerned.

With respect to the situation concerning excess payments above $10,000, or even above $25,000, in the form of subsidies to farmers, I believe the Senator has a good point. But why should we ask the administration to come forth with a recommendation? After all, it is up to Congress, in the final analysis, to make a disposition of any proposal; and I do not believe the crocodile tears should be shed any more on the part of the administration than on the part of Congress, because we have a responsibility in that respect, also.

Mr. WILLIAMS of Delaware. I thank the Senator. I agree completely that we have a responsibility.

I have had printed at the conclusion of my remarks an amendment which would limit these payments to $10,000. The amendment has been submitted to the Committee on Appropriations. I hope they agree to it, but if they do not, it will be offered on the floor of the Senate. What I am pleading for is administration support of this amendment.

The PRESIDING OFFICER. The time of the Senator has expired.

Mr. WILLIAMS of Delaware. Mr. President, I ask unanimous consent that I may proceed for 2 additional minutes.

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

Mr. WILLIAMS of Delaware. Mr. President, I appreciate the majority leader checking with respect to the statement which I made yesterday. I note that he states unequivocally that the President knows nothing about this. I accept that statement because I have no basis to say otherwise, except that I have a right to assume that he knew it.

I will not accept the point that Mr. Cohen knows nothing about it.

Unless the accuracy of my statement is admitted before the day is out I intend to introduce a resolution asking that Mr. Cohen and the other gentlemen be called before the committee and give their answers under oath. My statement of yesterday has been confirmed to other Members of the Senate. I will not be contradicted in a back-door manner by any such means.

If the matter is not straightened out I shall ask that the two gentlemen be called before the committee.

Mr. MANSFIELD. The Senator is perfectly within his rights. Immediately upon hearing the allegations made yesterday I did call Secretary Cohen. He did deny it on the basis of what I said and he did state if such events were occurring he would see that they were stopped immediately.

Mr. WILLIAMS of Delaware. Did the majority leader call either of the two men whom I named yesterday and who were in charge of the so-called task force?

Mr. MANSFIELD. No; I contacted only the White House and HEW.

Mr. WILLIAMS of Delaware. I shall see to it that they are contacted. As I said before, I will not stand back and let the White House and the Secretary deny something I know is true.

OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1967

The Senate resumed the consideration of the bill (S. 917) to assist State and local governments in reducing the incidence of crime, to increase the effectiveness, fairness, and coordination of law enforcement and criminal justice systems at all levels of government, and for other purposes.

Mr. MANSFIELD. Mr. President, does the controlled time now start?

The PRESIDING OFFICER. The question before the Senate is on agreeing to the amendment of the Senator from Michigan [Mr. HART]. The time for debate is one-half hour, to be equally divided.

Who yields time?

Mr. McCLELLAN. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. How is the time to be charged?

Mr. McCLELLAN. To both sides.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. HART. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

AMENDMENT NO. 755

Mr. HART. Mr. President, a parliamentary inquiry.

The PRESIDING OFFICER. The Senator will state it.

Mr. HART. Mr. President, what is the pending business?

The PRESIDING OFFICER. The pending business is the amendment of the Senator from Michigan, amendment No. 755.

Mr. HART. I thank the Presiding Officer.

The PRESIDING OFFICER. How much time does the Senator yield to himself?

Mr. HART. Mr. President, I yield myself 3 minutes.

The PRESIDING OFFICER. The Senator from Michigan is recognized for 3 minutes.

Mr. HART. Mr. President, the pending amendment is a response to what I think is a problem to which we should give a little thought and I believe we can resolve the problem here.

Title III simply requires notice to a person named in a court order that his communication has been intercepted. The amendment now pending would allow the judge, in his discretion, to disclose the contents of the intercepted communication to such persons, as well as to other parties.

It is intended that in exercising his discretion the judge shall take into account the legitimate privacy interests of the parties in protecting their communications against disclosure. It seems to me that this provision, which clearly makes the decision one for the judge to make, would be a worthwhile addition to the bill and I hope very much that the problem to which this amendment seeks to respond, is resolved by the Senate before we act finally on title III.

I realize that the able Senator in charge of the bill has been giving careful thought to the problems which has been indicated by my comments and I would hope that he might be able to resolve it.

Mr. McCLELLAN. The proposed amendment is constructive and its objectives certainly meet with my approval.

I am, however, going to suggest a modification. The amendment may be all right as it is, but I think we can clarify it. I would insert the concept in the interest of justice in the amendment. I would insert the word "interest" to clarify that. I hope that the Senator would modify his amendment to that extent. I think that would make it clearer.

Mr. HART. The Senator from Arkansas makes a suggestion that, in my judgment, does improve the proposal. I do modify my amendment in the fashion suggested and would hope that as modified, the amendment would be agreed to.

The PRESIDING OFFICER. The amendment is so modified.

Mr. McCLELLAN. I thank the Senator.

There is one other point I should like to make.

The PRESIDING OFFICER. The time of the Senator from Michigan has expired.

Mr. HART. Mr. President, I yield myself 2 additional minutes.

The PRESIDING OFFICER. The Senator from Michigan is recognized for 2 additional minutes.

Mr. McCLELLAN. May I suggest as an amendment embodying that concept in the nature of a substitute, that instead of the language the Senator proposes as modified, that he substitute for it the following:

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice.

I believe that would accomplish what the Senator wants to do and I think it actually does it a little more directly.

Mr. HART. Mr. President, the suggested substitute offered by the Senator from Arkansas would appear to meet the problem that concerns us.

Mr. McCLELLAN. Let me suggest for the Senator's further consideration, if his language is accepted, that on page 73, line 22 of the bill, after the word "order", we insert "and accompanying application," so as to make it conform——

Mr. HART. That would make it consistent.

Mr. McCLELLAN. Yes, that would make it consistent and conform with the other provisions. If the Senator would, upon examination, possibly agree that this is the better language to do the same thing——

Mr. HART. Mr. President, the language suggested by the Senator from Arkansas indeed is preferable. It does meet the problem.

Mr. McCLELLAN. I understand our staffs have worked together on this. It is a combination and a summation of the best judgment of our able advisers.

Mr. HART. Yes, able men.

Mr. McCLELLAN. Able advisers, yes.

Mr. HART. I would hope that the substitute amendment would be agreed to.

Mr. McCLELLAN. Mr. President, I read the substitute for the RECORD.

The PRESIDING OFFICER. Will the Senator send the proposed substitute to the desk as it has now been agreed upon?

Mr. McCLELLAN. I will read it first and then send it to the desk:

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice.

Then further on, on line 22, page 73 of the bill, after the word "order," insert "and accompanying application." That last insertion will make it conform to the substitute.

Mr. HART. I would hope very much that the substitute would be agreed to, and I am grateful to the Senator from Arkansas and his staff for their cooperation.

Mr. McCLELLAN. We appreciate the Senator's labors here in helping us to get the very best bill possible, because that is what we all desire. The Senator has been very helpful on this title.

Mr. HART. Mr. President, I yield back the remainder of my time.

Mr. McCLELLAN. Mr. President, I yield back the remainder of my time.

The PRESIDING OFFICER. All time has now been yielded back. The question is on agreeing to the amendment as modified through the understanding——

Mr. McCLELLAN. That is on the substitute amendment, Mr. President. The amendment as modified by the substitute.

The PRESIDING OFFICER. The amendment as modified by the substitute.

The question is on agreeing to the amendment as modified by the substitute.

The amendment as modified by the substitute was agreed to.

AMENDMENT NO. 760

Mr. HART. Mr. President, I call up my amendment No. 760 and ask that it be stated.

The PRESIDING OFFICER. The clerk will state the amendment.

The bill clerk read as follows:

On page 56, lines 1–4, amend paragraph (c) to read as follows:

"(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where at least one of the parties to the communication has consented to the interception."

Mr. HART. Mr. President, I yield myself 3 minutes.

The PRESIDING OFFICER. The Senator from Michigan is recognized for 3 minutes.

Mr. HART. Mr. President——

Mr. McCLELLAN. Mr. President, will the Senator from Michigan yield for a moment?

Mr. HART. I yield.

Mr. McCLELLAN. Would the Senator not offer the substitute which has been agreed upon by our staffs? If so, I would not have to offer it. I think the Senator should do it.

Mr. HART. Yes. I ask unanimous consent that the amendment now pending be modified in the fashion and form as I now offer it.

The PRESIDING OFFICER. That right is inherent without unanimous consent. It is so modified as proposed.

Mr. HART. Then, Mr. President, I send it forward.

The PRESIDING OFFICER. The amendment as modified will be stated.

The BILL CLERK. On page 56, lines 1–4, amend paragraph (c) to read as follows:

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

Mr. HART. Mr. President, here again the able manager of the bill and his staff and those associated with me have spent considerable time trying to respond to an enormously sensitive problem. The bill as we reported it out of the committee leaves a gaping hole, which would permit surreptitious monitoring of a conversation by one of the parties to the conversation without the consent of the other. It leaves wide open the problem of industrial espionage and many other abuses of the right of privacy.

In the substitute that is now pending we propose to prohibit a one-party consent tap, except for law enforcement officials, and for private persons who act in a defensive fashion. In other words, whenever a private person acts in such situations with an unlawful motive, he will violate the criminal provisions of title III and will also be subject to a civil suit. Such one-party consent is also prohibited when the party acts in any way with an intent to injure the other party to the conversation in any other way. For example the secret consensual recording may be made for the purpose of blackmailing the other party, threatening him, or publicly embarrassing him. The provision would not, however, prohibit such activity when the party records information of criminal activity by the other party with the purpose of taking such information to the police as evidence. Nor does it prohibit such recording in other situations when the party acts out of a legitimate desire to protect himself and his own conversations from later distortions or other unlawful or injurious uses by the other party.

I think the substitute does respond to a problem that is of very great concern to this country; and in the years ahead, as these techniques become more sophisticated still, will become of increasing concern. Let me say in conclusion that the amendment does not in any way limit consensual recording by law enforcement officers or by private persons

acting in conjunction with law enforcement officers.

I am grateful to the Senator from Arkansas.

Mr. McCLELLAN. Mr. President, I have no objection to the modified, substitute amendment. Again I say to my colleagues in the Senate that we are working in a very difficult area. It is not easy, in the first stages here, when we are trying to work out a bill in this field. It is very difficult. The Senator from Michigan is making valuable contributions with the amendments he is offering. I express my appreciation to him.

Mr. HART. I am grateful for the Senator's kind remarks, and I am grateful to him for the help he has given.

Mr. President, I hope the Senate will adopt the amendment.

I yield back my time.

Mr. McCLELLAN. I yield back my time.

The PRESIDING OFFICER. The question before the Senate is on agreeing to the amendment, as modified.

The amendment, as modified, was agreed to.

AMENDMENT NO. 815

Mr. TYDINGS. Mr. President, I call up my amendment No. 815.

The PRESIDING OFFICER. The amendment will be stated by the clerk.

The bill clerk proceeded to read the amendment.

Mr. TYDINGS. Mr. President, I ask unanimous consent that further reading of the amendment be dispensed with and that it be printed in the RECORD at this point.

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

The amendment (No. 815) is as follows:

On page 80, between lines 14 and 15, insert the following:

"SEC. 804. (a) There is hereby established a National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance (hereinafter in this section referred to as the 'Commission').

"(b) The Commission shall be composed of fifteen members appointed as follows:

"(A) Two appointed by the President of the Senate from Members of the Senate;

"(B) Two appointed by the Speaker of the House of Representatives from Members of the House of Representatives; and

"(C) Eleven appointed by the President of the United States from all segments of life in the United States, including lawyers, teachers, artists, businessmen, newspapermen, jurists, policemen, and community leaders, none of whom shall be officers of the executive branch of the Government.

"(c) The President of the United States shall designate a Chairman from among the members of the Commission. Any vacancy in the Commission shall not affect its powers but shall be filled in the same manner in which the original appointment was made.

"(d) It shall be the duty of the Commission to conduct a comprehensive study and review of the operation of the provisions of this title, in effect on the effective date of this section, to determine the effectiveness of such provisions during the six-year period immediately following the date of their enactment.

"(e) (1) Subject to such rules and regulations as may be adopted by the Commission, the Chairman shall have the power to—

"(A) appoint and fix the compensation of an Executive Director, and such additional staff personnel as he deems necessary, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, but at rates not in excess of the maximum rate for GS–18 of the General Schedule under section 5332 of such title; and

"(B) procure temporary and intermittent services to the same extent as is authorized by section 3109 of title 5, United States Code, but at rates not to exceed $100 a day for individuals.

"(2) In making appointments pursuant to paragraph (1) of this subsection, the Chairman shall include among his appointment individuals determined by the Chairman to be competent social scientists, lawyers, and law enforcement officers.

"(f) (1) A member of the Commission who is a Member of Congress shall serve without additional compensation, but shall be reimbursed for travel, subsistence, and other necessary expenses incurred in the performance of duties vested in the Commission.

"(2) A Member of the Commission from private life shall receive $100 per diem when engaged in the actual performance of duties vested in the Commission, plus reimbursement for travel, subsistence, and other necessary expenses incurred in the performance of such duties.

"(g) Each department, agency, and instrumentality of the executive branch of the Government, including independent agencies, is authorized and directed to furnish to the Commission, upon request made by the Chairman, such statistical data, reports, and other information as the Commission deems necessary to carry out its functions under this section. The Chairman is further authorized to call upon the departments, agencies, and other offices of the several States to furnish such statistical data, reports, and other information as the Commission deems necessary to carry out its functions under this section.

"(h) The Commission shall make such interim reports as it deems advisable, and it shall make a final report of its findings and recommendations to the President of the United States and to the Congress within the one-year period following the effective date of this subsection. Sixty days after submission of its final report, the Commission shall cease to exist.

"(i) (1) Except as provided in paragraph (2) of this subsection, any member of the Commission is exempted, with respect to his appointment, from the operation of sections 203, 205, 207, and 209 of title 18, United States Code.

"(2) The exemption granted by paragraph (1) of this subsection shall not extend—

"(A) to the receipt of payment of salary in connection with the appointee's Government service from any source other than the private employer of the appointee at the time of his appointment, or

"(B) during the period of such appointment, to the prosecution, by any person so appointed, of any claim against the Government involving any matter with which such person, during such period, is or was directly connected by reason of such appointment.

"(j) There is authorized to be appropriated such sum as may be necessary to carry out the provisions of this section.

"(k) The foregoing provisions of this section shall take effect upon the expiration of the six-year period immediately following the date of the enactment of this Act."

The PRESIDING OFFICER. How much time does the Senator from Maryland yield himself?

Mr. TYDINGS. I yield myself 7 minutes.

Mr. President, I think all of us, especially those who are advocates of this title, are very reluctantly authorizing use of electronic surveillance. If it were not that, under present law, anyone, any private eye, any snooper, or any industrial thief, can use electronic surveillance with impunity, perhaps we would not argue as strongly. If we were not persuaded completely that the investigation of organized crime cannot proceed without the use of electronic surveillance, perhaps we would not argue as persuasively. If the bill before us were not so carefully drawn, if there were an alternative to court approved use of electronic devices, perhaps we would be acting differently.

The fact is that today electronic devices are used with impunity by those who should not use them. Telephone communications are making organized criminals immune to investigation. This title is carefully drawn to conform to constitutional law. Its constitutionality has been approved by the Department of Justice, even though the Attorney General personally opposes it.

So, for all these reasons, I urge support of it.

The purpose of amendment No. 815 is to establish a National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance. The Commission would be composed of 15 members. It would meet 6 years after the signing into law of this act. It would then meet for 1 year, hire experts—social scientists and others—study the effects of the law, submit a report to the President and Congress, and then disband.

Mr. President, I understand the distinguished Senator from Arkansas [Mr. McCLELLAN] wishes to suggest three modifications of the amendment, basically on the composition of the commission. I am prepared to accept those modifications.

Mr. McCLELLAN. Mr. President, I am sorry. I was occupied for a moment. Would the Senator advise what amendments he was referring to? With respect to the numbers?

Mr. TYDINGS. The Senator from Arkansas has suggested that on page 1 of the amendment, at line 7, the number "Two" should be increased to the number "Four," so there would be four Members of the U.S. Senate on the commission, rather than two.

The Senator from Arkansas has requested that on page 2 of the amendment, line 1, the number "Two" should be changed to the number "Four." That would increase the representation of the House of Representatives on the Commission from two to four.

Mr. McCLELLAN. Mr. President, the reason I requested that change is that it would enable two members from each party in the Senate to be on the Commission. I assume it would be a bipartisan Commission. That is the intent of it. We do not think there should be a partisan issue here in trying to ascertain whether the law has been effective or not and what provisions are needed.

Mr. TYDINGS. The final modification the Senator from Arkansas suggested was on line 4 of page 2, the number "Eleven" would be changed to the number "Seven."

S. REP. 90-1097, S. Rep. No. 1097, 90TH Cong., 2ND Sess. 1968, 1968 U.S.C.C.A.N. 2112, 1968 WL 4956 (Leg.Hist.)

***2112** P.L. 90-351, OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968

Senate Report (Judiciary Committee) No. 90-1097,
Apr. 29, 1968 (To accompany S. 917)
House Report (Judiciary Committee) No. 90-488,
July 17, 1967 (To accompany H.R. 5037)
Cong. Record Vol. 113 (1967)
Cong. Record Vol. 114 (1968)
DATES OF CONSIDERATION AND PASSAGE
Senate May 24, 1968
House Aug. 8, 1967; June 6, 1968
The House bill was passed in lieu of the Senate bill after substituting for its language the text of the Senate bill.
The Senate Report is set out.

(CONSULT NOTE FOLLOWING TEXT FOR INFORMATION ABOUT OMITTED MATERIAL. EACH COMMITTEE REPORT IS A SEPARATE DOCUMENT ON WESTLAW.)

SENATE REPORT NO. 90-1097

Apr. 29, 1968

THE Committee on the Judiciary, to which was referred the bill (S. 917) to assist State and local governments in reducing the incidence of crime to increase the effectiveness, fairness, and coordination of law enforcement and criminal justice systems at all levels of government, and for other purposes having considered the same, reports favorably thereon, with an amendment in the nature of a substitute, and recommends that the bill, as amended, do pass.

***2113** PURPOSE OF AMENDMENT

The bill, as amended, is divided into five title: Title I, Law Enforcement Assistance; Title II, Admissibility of Confessions, Reviewability of Admission in Evidence of Confessions in State Cases, Admissibility in Evidence of Eyewitness Testimony, and Procedures in Obtaining Writs of Habeas Corpus; Title III, Wiretapping and Electronic Surveillance; Title IV, State Firearms Control Assistance; and Title V, General Provisions.

Title I, Law Enforcement Assistance, authorizes the establishment of a three-member Law Enforcement Assistance Administration within the Department of Justice under the general authority of the Attorney General to administer grant programs to States and units of local government to strengthen and improve law enforcement. These programs will consist of planning grants of up to 80 percent and action grants of up to 60 percent, with grants of up to 80 percent and action grants of up to 60 percent, and control riots and other civil disorders. In addition, grants of up to 100 percent are authorized for research, education, training, and demonstration projects. The Federal Bureau of Investigation National Academy at Quantico, Va., and, at the request of any State or local government, provide training assistance for law enforcement personnel. This provision is directed toward the expansion and upgrading of the law enforcement training program that is already in progress under the auspices of the Federal Bureau of Investigation.

Title II adds three new sections to chapter 223, title 18, United States Code, which relate to (a) the admissibility into evidence of voluntary confessions in criminal prosecutions in Federal courts, (b) reviewability by Federal courts of State court rulings admitting confessions found to be voluntary, and (c) the admissibility into evidence of eyewitness testimony. This title also adds a new section to chapter 153, title 28, United States Code, designed to relieve our overburdened Federal courts from the growing practice of convicted persons using the habeas corpus procedures as a substitute for direct appeal.

Supreme Court cases, to some extent, prior to the Berger decision, which is hereinafter more fully discussed, had clarified a few complexing problems ***2156** in the area of 'bugging.' That case, by a divided Court, held unconstitutional the New York statute authorizing electronic surveillance, but in doing so has laid out guidelines for the Congress and State legislatures to follow in enacting wiretapping and electronic eavesdropping statutes which would meet constitutional requirements.

On the State level, there is little uniformity. Most States have 'malicious mischief' statutes passed in the latter part of the last century to protect the property of telephone companies. Not all of them, however, are broad enough to cover illegal wiretapping that does not involve physical damage to the lines of communication. See, e.g., Washington v. Nordskeg, 76 Wash. 472, 136 P. 694 (1913). Only a few States have enacted statutes dealing with other forms of electronic surveillance. Few States, took have set up needed court order systems for law enforcement officers. Even those existing statutes, however, must now be reformed in light of the standards for constitutional electronic surveillance laid down by the Supreme Court in Berger v. New York, 87 S.Ct. 1873, 388 U.S. 41 (1967), and Katz v. United States, 88 S.Ct. 507, 389 U.S. 347 (1967).

It would be, in short, difficult to devise a body of law from the point of view of privacy or justice more totally unsatisfactory in its consequences. The need for comprehensive, fair and effective reform setting uniform standards is obvious. New protections for privacy must be enacted. Guidance and supervision must be given to State and Federal law enforcement officers. This can only be accomplished through national legislation. This the subcommittee proposes.

PROHIBITION

Virtually all concede that the use of wiretapping or electronic surveillance techniques by private unauthorized hands has little justification where communications are intercepted without the consent of one of the participants. No one quarrels with the proposition that the unauthorized use of these techniques by law enforcement agents should be prohibited. It is not enough, however, just to prohibit the unjustifiable interception, disclosure, or use of any wire or oral communications. An attach must also be made on the possession, distribution, manufacture and advertising of intercepting devices. All too often the invasion of privacy itself will go unknown. Only by striking at all aspects of the problem can privacy be adequately protected. The prohibition, too, must be enforced will all appropriate sanctions. Criminal penalties have their part to play. But other remedies must be afforded the victim of an unlawful invasion of privacy. Provision must be made for civil recourse for dangers. The perpetrator must be denied the fruits of his unlawful actions in civil and criminal proceedings. Each of these objectives is sought by the proposed legislation.

NATIONAL SECURITY

It is obvious that whatever means are necessary should and must be taken to protect the national security interest. Wiretapping and electronic surveillance techniques are proper means for the acquisition of counter intelligence against the hostile action of foreign powers. Nothing in the ***2157** proposed legislation seeks to disturb the power of the President to act in this area. Limitations that may be deemed proper in the field of domestic affairs of a nation become artificial when international relations and internal security are at stake.

LAW ENFORCEMENT

The major purpose of title III is to combat organized crime. To consider the question of the need for wiretapping and electronic surveillance techniques in the administration of justice, it is necessary first to consider the historical development of our system of criminal law and procedure and the challenge put to it today by modern organized crime. We inherited from England a medieval system, devised originally for a stable, homogeneous, primarily agrarian community. In our formative years, we had no professional police force. Today, however, we are a mobile, modern, heterogeneous, urban industrial community. Our Nation, moreover, is no longer small. Our traditional methods in the administration of justice, too, were fashioned in response to the problems of our Nation as they were in its formative years. In years past it was not possible to investigate crime aided by

science. Today it is not only possible but necessary, in the development of evidence, to subject it to analysis by the hands of those trained in the scientific disciplines. Even so, scientific ‘crime detection, popular fiction to the contrary notwithstanding, at present is a limited tool‘ (‘The challenge of Crime in a Free Society ‘ (1967)). In our formative years, offenses usually occurred between neighbors. No specialized law enforcement force was thought necessary to bring such crimes into the system of justice. Ignored entirely in the development of our system of justice, therefore, was the possibility of the growth of a phenomenon such as modern organized crime with its attendant corruption or our political and law enforcement processes.

We have always had forms of organized crime and corruption. But there has grown up in our society today highly organized, structured and formalized groups of criminal cartels, whose existence transcends the crime known yesterday, for which our criminal laws and procedures were primarily designed. The ‘American system was not designed with (organized crime) * * * in mind, ‘ the President's Crime Commission noted in its report ‘The Challenge of Crime in a Free Society‘ (1967), and it has been notably unsuccessful to date in preventing such organizations from preying on society.‘ These hard-core groups have become more than just loose associations of criminals. They have developed into corporations of corruption, indeed, quasi-governments within our society, presenting a unique challenge to the administration of justice. Organized crime has never limited itself to one illegal endeavor. Today, it is active in, and largely controls, professional gambling, which can only be described as exploitative, corruptive and parasitic, draining income away from food, clothing, shelter, health, and education in our ghettos. The net take is estimated at $7 billion a year.

Organized crime also has an almost monopolistic control over the illegal importation, distribution and sale of narcotics, which is estimated to be a $350 million a year business. The destruction of human personality, the ***2158** violation of human dignity, even death, associated with addiction need not be belabored here nor ought it be necessary to point out again who the victims are, the poor, the uneducated, the unskilled, the young. The cost of narcotics varies, but it is seldom low enough to permit the typical addict to obtain money for drugs by lawful means. Theft and prostitution are necessary by products of many addicts.

Loan sharking, finally, is everywhere dominated by organized crime. Its estimated take is $350 million a year. Its victims, in contrast, come from all segments of our society. Only a pressing need for cash and no access to regular channels of credit separate the victim from each of us. Repayment is everywhere compelled by force. Since debtors are often pressed into criminal acts to find repayment, loan sharking also has wide social impact.

Organized crime has not limited itself to criminal endeavors. It has large spheres of legitimate business and union activity undermining our basic economic mores and institutions. In many cities, it dominates the fields of jukebox and vending machine distribution. Laundry services, liquor and beer distribution, night clubs, food wholesaling, record manufacturing, the garment industry, and a host of other lines have been invaded. Our fee control of businesses has been acquired by the sub rosa investment of profits acquired from illegal ventures, accepting business interests in payment of gambling or loan sharks debts, or using various forms of extortion. After takeover, the defaulted loan has sometimes been liquidated by professional arsonists burning the business and collecting the insurance or by various bankruptcy fraud techniques. All of us consequently pay higher insurance premiums and higher prices to cover the losses. Many times the group, using force and fear, will attempt to secure a monopoly in the service or product of the business. When the campaign is successful, the organization begins to extract a premium price from customers. Either way, each of us suffers individually and our traditional economic way of life is damaged.

CORRUPTION OF DEMOCRATIC PROCESSES

Organized crime flourishes best only in a climate of corruption. Today's corruption is less visible, more subtle, and therefore difficult to detect and assess than the corruption of earlier times. With the expansion of governmental regulation of private and business activity, the power to corrupt has given organized crime greater control over matters affecting the everyday life of each of us. At various times, it has been the dominant political force in such metropolitan centers as New York, Chicago, Miami, and New Orleans. Political leaders, legislators, police officers, prosecutors, and judges have been tained by organized crime, and the public is the victim because there can be no true liberty or justice under a corrupt government.

The disclosure of the contents of an intercepted communication that had already become public information‘ or ‘common knowledge ‘ would not be prohibited. The scope of this knowledge required to violate either subparagraph reflects existing law (Pereira v. United States, 74 S.Ct. 358, 347 U.S. 1 (1954)). A violation of each must be willful to be criminal (United States v. Murdock, 54 S.Ct. 223, 290 U.S. 389 (1933)). Each prohibition strikes not only at the prohibited action but also at endeavors (Osborn v. United States, 87 S.Ct. 429, 385 U.S. 323 (1966)) and procurements (Nye & Nissen v. United States, 69 S.Ct. 766, 336 U.S. 613 (1949)). There is no intent to preempt State law. ***2182** Each violation is punishable by a fine of $10,000 or imprisonment of not more than 5 years, or both.

Paragraph (2)(a) provides that it shall not be unlawful for an operator of a switchboard or employees of a common carrier to intercept, disclose, or use wire communications in the normal course of their employment while engaged in any activity which is a necessary incident to the rendition of his service or the protection of the rights or property of the carrier. It is intended to reflect existing law (United States v. Beckley, 259 F.Supp. 567 (D.C. Ga. 1965)). Paragraph (2)(a) further provides that communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks. Service observing is the principal quality control procedure used by these carriers for maintaining and improving the quality of telephone service. Such observing is done by employees known as service observers, and this provision was inserted to insure that service observing will not be used for any purpose other than mechanical and service quality control.

Paragraph (2)(b) provides a similar exception for an employee of the Federal Communications Commission in the normal course of his employment in the discharge of the monitoring responsibility of the Commission.

Paragraph (2)(c) provides that it shall not be unlawful for a party to any wire or oral communication or a persons given prior authority by a party to a communication to intercept such communication. It largely reflects existing law. Where one of the parties consents, it is not unlawful. (Lopez v. United States, 83 S.Ct. 1381, 373 U.S. 427 (1963); Rathbun v. United States, 78 S.Ct. 161, 355 U.S. 107 (1957); On Lee v. United States, 72 S.Ct. 967, 343 U.S. 747 (1952)). Consent may be expressed or implied. Surveillance devices in banks or apartment houses for institutional or personal protection would be impliedly consented to. Retroactive authorization, however, would not be possible. (Weiss v. United States, 60 S.Ct. 269, 308 U.S. 321 (1939)) and ‘party‘ would mean the person actually participating in the communication. (United States v. Pasha, 332 F. 193 (7th), certiorari denied, 85 S.Ct. 75, 379 U.S. 839 (1964)).

Paragraph (3) is intended to reflect a distinction between the administration of domestic criminal legislation not constituting a danger to the structure or existence of the Government and the conduct of foreign affairs. It makes it clear that nothing in the proposed chapter or other act amended by the proposed legislation is intended to limit the power of the President from the acts of a foreign power including actual or potential attack or foreign intelligence activities, or any other danger to the structure or existence of the Government. Where foreign affairs and internal security are involved, the proposed system of court ordered electronic surveillance envisioned for the administration of domestic criminal legislation is not intended necessarily to be applicable. The two areas may, however, overlap. Even though their activities take place within the United States, the domestic Communist party and its front groups remain instruments of the foreign policy of a foreign power (Communist Party, U.S.A. v. Subversive Activities Control Board, 81 S.Ct. 1357, 367 U.S. 1 (1961)). ***2183** Consequently, they fall within the field of foreign affairs and outside the scope of the proposed chapter. Yet, their activities may involve violations of domestic criminal legislation. See Abel v. United States, 80 S.Ct. 683, 362 U.S. 217 (1960). These provisions of the proposed chapter regarding national and internal security thus provide that the contents of any wire or oral communication intercepted by the authority of the President may be received into evidence in any judicial trial or administrative hearing. Otherwise, individuals seeking the overthrow of the Government, including agents of foreign powers and those who cooperate with them, could not be held legally accountable when evidence of their unlawful activity was uncovered incident to the exercise of this power by the President. The only limitations recognized on this use is that the interceptions be deemed reasonable based on an ad hoc judgment taking into consideration all of the facts and circumstances of the individual case, which is but the test of the Constitution itself (Carroll v. United States, 45 S.Ct. 280, 267 U.S. 132 (1925)). The possibility that a judicial authorization for the interception could or could not have been obtained under the proposed chapter would be only one factor in such a judgement.

offering or soliciting kickbacks to influence ***2235** the operation of employee benefit plans (sec. 1954 of title 18), and 'any offense involving the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs.'

Even the most zealous advocate of wiretapping might be hard-pressed to establish some of the preceding crimes as 'major offenses.'

Under the list of offenses spelled out in section 2516, every high school or college student who takes a puff of marihuana could be tapped or bugged; every union activity, too.

One should be able to be against union corruption and illegal drug usage without inaugurating the big brother state which could result if the present list of Federal crimes for which tapping and bugging are authorized is allowed to stand.

3. RANGE OF STATE CRIMES FOR WHICH EAVESDROPPING WARRANTS MAY BE ISSUED (SEC. 2516(2))

It is hard to conceive how the range of State offenses for which such a serious invasion of privacy as wiretapping is authorized could be broader than the Federal offenses, but such is the case.

Section 2516(2) permits wiretapping and eavesdropping for any state crime punishable by more than one year in prison and dangerous to 'life, limb or property.' Nothing in Section 2516(2) thus prohibits the use of bugging or tapping in such sensitive areas as state income tax violations.

Likewise in many states numerous petty offenses will qualify under Section 2516(2) as crimes for which wiretapping and bugging orders may be issued.

4. NATIONAL SECURITY TAPPING-SECTION 2511(3)

Section 2511(3) of Title III permits the President to authorize, without first seeking a court order, wiretapping and eavesdropping in 'national security cases'. In Section 2511(3), however, it states:

Nor should 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 any other clear and present danger to the structure of existence of the Government.

This language leaves too much discretion in the hands of a President. Under 2511(3) a President on his own motion could declare a militant right wing political group (i.e., the Minutemen) or left wing group (i.e., Black Nationalists), a national labor dispute, a concerted tax avoidance campaign, draft protesters, the Mafia, civil rights demonstrations, a 'clear and present danger to the structure of the Government.' Such a declaration would allow unlimited unsupervised bugging to certain crimes and places such eavesdropping under judicial supervision. As drafted, however, Section 2511(3) gives the President a blank check to tap or bug without judicial supervision, whenever he finds, on his motion, that an activity poses a 'clear and present danger to the Government.' Further, section 2511(3) permits the introduction into evidence any bug or tap the President authorizes.

***2236** Section 2511(3) vests power in a President to utilize bugging and tapping in many areas totally unconnected with our traditional concept of 'national security.'

5. CONSENSUAL WIRETAPPING AND EAVESDROPPING (SEC. 2511(2)(c))

Section 2511(2)(c) of title III completely exempts all

consensual wiretapping and eavesdropping from the provisions of the title. So long as at least one of the parties to a conversation has consented to its interception, title III is inapplicable.

Thus, although the title contains blanket prohibitions on all 'third-party ' ('nonconsensual') interception-- that is, interceptions without the consent of at least one of the parties to a conversation-- by private persons, and places strict controls on the use of such interception by law-enforcement officers, it is totally permissive with respect to surreptitious monitoring of a conversation by a party to the conversation, even though the monitoring may be for insidious purposes such as blackmail, stealing business secrets, or other criminal or tortious acts in violation of Federal or State laws.

The use of such outrageous practices is widespread today, and I believe they constitute a serious invasion of privacy. See Greenwalt, 'The Consent Problem in Wiretapping and Eavesdropping: Surreptitious Monitoring with the Consent of a Participant in a Conversation' (68 Col.L.Rev. 189 (1968)). Consensual wiretapping and eavesdropping may be accomplished in several different ways:

A party to a conversation may himself record the conversation;

A party to a conversation may use or even wear a concealed electronic device to transmit the conversation to a nonparty; or

A party to a conversation may consent to the use of an electronic device by a nonparty to overhear the conversation.

Occasionally, it is said that the parties to a conversation rely on their trust of one another not to reveal confidences that are disclosed in the conversation, and that the risk that the confidence will later be repeated to other persons is essentially the same, whether the repetition is by memory or by electronic recording.

I believe, however, that the risk created by electronic recording is of an entirely different order from the risk of repetition involved in normal conversations, and that consensual electronic surveillance presents grave dangers to free and open expression in our society. None of us is so circumspect in our speech that we can countenance the later use of our most private utterances, played with the shattering impact of a broadcast in our own words. Therefore, if the provisions of title III prohibiting the use of electronic surveillance by private persons are to become meaningful protections of the right of privacy, I believe that the abusive practice of consensual wiretapping and eavesdropping by private persons cannot be completely exempted from the title.

There are, of course, certain situations in which consensual electronic surveillances may be used for legitimate purposes by public officials and private persons. Law-enforcement officers use it to record incriminating statements in their confrontations with a suspect, in order to obtain convincing ***2237** evidence that will not be subject to attack on grounds of credibility when it is later introduced at the trial of the suspect. Law-enforcement officers also use it defensively to protect the integrity of government officials from attempts by private persons to distort their conversations or to engage them in criminal or compromising activities. Private persons may use it to preserve accurate records of their conversations in order to refresh their memory, or to prevent future distortions of their remarks by other parties, without intending in any way to harm the nonconsenting party. In addition, private persons placed in compromising circumstances may desire to record incriminating conversations by the other party in order to be able to take an accurate record of such conversations to law-enforcement officers. Such legitimate uses of consensual electronic surveillance should not be prohibited.

Title III contains strong prohibitions against wiretapping and eavesdropping by private persons where none of the parties to the conversation has consented to the interception. I believe that these provisions should be broadened to prohibit the flagrant abuses that now exist in circumstances where some, but not all, of the parties have consented to the interception. Such nefarious practices can readily be curbed without hindering in any way the legitimate needs of law enforcement or private citizens. I urge the Senate to amend title III to accomplish this goal.

S. Rep. No. 541, 99TH Cong., 2ND Sess. 1986, 1986 U.S.C.C.A.N. 3555, 1986 WL 31929, S. REP. 99-541 (Leg.Hist.)
P.L. 99–508, **3555 ELECTRONIC COMMUNICATIONS PRIVACY ACT OF 1986
DATES OF CONSIDERATION AND PASSAGE
House June 23, October 2, 1986
Senate October 1, 1986
House Report (Judiciary Committee) No. 99–647,
June 19, 1986 [To accompany H.R. 4952]
Senate Report (Judiciary Committee) No. 99–541,
Oct. 17, 1986 [To accompany S. 2575]
Cong. Record Vol. 132 (1986)
The House bill was passed in lieu of the Senate bill after amending its language
to contain much of the text of the Senate bill. The Senate Report is set out below.

SENATE REPORT NO. 99–541

October 17, 1986

*1 The Committee on the Judiciary, to which was referred the bill (S. 2575) having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill, as amended, do pass.

I. PURPOSE

The Electronic Communications Privacy Act amends title III of the Omnibus Crime Control and Safe Streets Act of 1968—the Federal wiretap law—to protect against the unauthorized interception of electronic communications. The bill amends the 1968 law to update and clarify Federal privacy protections and standards in light of dramatic changes in new computer and telecommunications technologies.

When the Framers of the Constitution acted to guard against the arbitrary use of Government power to maintain surveillance over citizens, there were limited methods of intrusion into the 'houses, *2 papers, and effects' protected by the fourth amendment. During the intervening 200 years, development of new methods of communication and devices for surveillance has expanded dramatically the opportunity for such intrusions.

The telephone is the most obvious example. Its widespread use made it technologically possible to intercept the communications of **3556 citizens without entering homes or other private places. When the issue of Government wiretapping first came before the Supreme Court in *Olmstead* v. *United States*, 277 U.S. 438 (1928), the Court held that wiretapping did not violate the fourth amendment, since there was no searching, no seizure of anything tangible, and no physical trespass.

Today, the *Olmstead* case is often remembered more for Justice Brandeis' prescient dissent than for its holding. Justice Brandeis predicted:

> Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home . . . Can it be that the Constitution affords no protection against such invasions of individual security?

Forty years later, the Supreme Court accepted Justice Brandeis' logic in *Katz* v. *United States*, 389 U.S. 347 (1967), holding that the fourth amendment applies to Government interception of a telephone conversation. At the same time, the Court extended fourth amendment protection to electronic eavesdropping on oral conversations in *Berger* v. *New York*, 388 U.S. 41 (1967).

provide another example of the importance of, and the interrelationship between, the definitions contained in this legislation. If a person or entity transmits a closed circuit television picture of a meeting using wires, microwaves or another method of transmission, the transmission itself would be an electronic communication. Interception of the picture at any point without either consent or a court order would be a violation of the statute. By contrast, if law enforcement officials were to install their own cameras and create their own ****3571 *17** closed circuit television picture of a meeting, the capturing of the video images would not be an interception under the statute because there would be no interception of the contents of an electronic communication. Intercepting the audio portion of the meeting would be an interception of an oral communication, and the statute would apply to that portion.

Section 101(b)—Exceptions with respect to electronic communications

Subsection 2511(1) of title 18 of the United States Code sets out prohibitions against the interception, disclosure and use of wire or oral communications. Subsection 2511(2) specifies conduct which is not unlawful under chapter 119 of title 18.

Subsection 101(b) of the Electronic Communications Privacy Act amends Subsection 2511(2). Paragraph 101(b), consistent with other provisions of this legislation, deletes references to common carriers. It thus clarifies that any service provider who discloses the existence of an interception or surveillance or the device used to accomplish the interception or surveillance would be liable for civil damages under Section 2520 of title 18.

Paragraph 101(b)(2) of the Electronic Communications Privacy Act amends section 2511(2)(d) of title 18 by striking out 'or for the purpose of committing any other injurious act'. Under current Federal law it is permissible for one party to consent to the interception of a conversation unless that interception is for illegal, tortious or other injurious purposes such as blackmail. In numerous court cases the term 'other injurious purposes' has been misconstrued. Most troubling of these cases have been attempts by parties to chill the exercise of first amendment rights through the use of civil remedies under this chapter. For example, in *Boddie* v. *American Broadcasting Co.*, 731 F.2d 333 (6th Cir. 1984), the plaintiff, whose conversations were recorded by a journalist, sued. Despite the consent of the reporter who was a party to the conversation, the plaintiff claimed that the recording of the conversation was illegal because it was done for an improper purpose, to embarrass her. While the appeals court decision in *Boddie* merely sent the case back for further factual development, it is clear from the facts of the case that the term 'improper purpose' is overly broad and vague. The court's opinion suggests that if the network intended to cause 'insult and injury' to plaintiff Boddie, she might be entitled to recover. This interpretation of the statute places a stumbling block in the path of even the most scrupulous journalist. Many news stories have been brought to light by recording a conversation with the consent of only one of the parties involved—often the journalist himself. Many news stories are embarrassing to someone. The present wording of section 2511(2)(d) not only provides such a person with a right to bring suit, but it also makes the actions of the journalist a potential criminal offense under section 2511, even if the interception was made in the ordinary course of responsible news-gathering activities and not for the purpose of committing a criminal act or a tort. Such a threat is inconsistent with the guarantees of the first amendment. Inasmuch as chapter 119 as amended by the Electronic Communications Privacy Act continues to prohibit interceptions made for the purpose of committing either a ****3572 *18** crime or a tort (including defamation), the public will be afforded ample portection against improper or unscrupulous interception.

Subsection 101(b)(3) of the Electronic Communications Privacy Act amends section 2511(2)(f) of title 18 to clarify that nothing in chapter 119 as amended or in proposed chapter 121 affects existing legal authority for U.S. Government foreign intelligence activities involving foreign electronic communications systems. The provision neither enhances nor diminishes existing authority for such activities; it simply preserves the status quo. It does not provide authority for the conduct of any intelligence activity.

Further the Senate expects that the practice of providing to the House and Senate Intelligence Committees proposed changes in relevant executive branch procedures and regulations governing the conduct of intelligence activities, including those involving electronic surveillance, physical searches, and the minimization of information collected concerning U.S. persons will be