tronics corporations. These lines do not carry communications which can be aurally acquired, nor do they carry classified information, but the information carried, which is not available to the public, when put together, can give valuable information concerning components which are used in U.S. weapons systems."

Comment.—This case, like case No. 1, turns on the meaning of "national defense" and "related" information in current espionage laws. Nothing in section 793 of title 18 limits such information to data that is classified or developed pursuant to contract. Again, given the Court's broad reading in *Gorin*, the "valuable information concerning components which are used in U.S. weapons systems" would be covered under 18 U.S.C. 794. Since all the other element under 2521(b)(2)(B) have been met, there would be probable cause to find that a conspiracy to violate section 794 of title 18 existed.

Case No. 4

"D, a headwaiter in a fashionable Washington, D.C. restaurant, acts as a bookmaker and procurer for several well known and highly placed customers. A *Spinelli*-qualified informant reports that D has been instructed by a foreign intelligence service to relay all embarrassing and personally damaging information about these customers to a resident agent of the foreign intelligence service in Washington. The informant reports that at least one customer has been blackmailed in his job as a Government executive into taking positions favorable to the nation for which the resident agent works."

Comment.—No warrant could be issued either under section 794 of title 18 or under S. 1566. D is not collecting or transmitting information of the kind referred to by S. 1566 or section 794 of title 18. If the Justice Department's argument is that by getting one kind of information, D could trade it for another, then the Justice Department is interpreting S. 1566 in a way which eliminates the safeguards built into it. Moreover, one should also ask if it is necessary to tap this person. For example, his contact at the embassy could be tapped under the "foreign power" provision of S. 1566 and D could be surveilled by less intrusive means. Those who come into contact with D could be warned.

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Case No. 5

"A *Spinelli*-qualified informant reports that E has, pursuant to the direction of a foreign intelligence service, engaged in various burglaries in the New York area of homes of U.S. employees of the United Nations to obtain information concerning U.S. positions in the United Nations."

Comment.—First of all, U.S. employees at the United Nations do not have advance information on U.S. positions at the United Nations. In any case, this situation is trivial. Such information should not be in an employee's home and E could be arrested for burglary. Or is the Justice Department assuming that E discusses his burglary targets on the phone?

Case No. 6

"A telephone tap of a foreign intelligence officer in the United States reveals that F, acting pursuant to the officer's direction, has infiltrated several refugee organizations in the United States. His instructions are to recruit members of these organizations under the

guise that he is an agent of a refugee terrorist leader and then to target these recruited persons against the FBI, the Dade County Police, and the CIA, the ultimate goal being to infiltrate these agencies. F is to keep the intelligence officer informed as to his progress in this regard but his reports are to be made by mail, because the U.S. Government cannot open the mail unless a crime is being committed.

Comment.—As in case No. 4, no tap would be permitted under S. 1566. This is not the kind of information contemplated under the act. A tap would not be permitted under section 794 of title 18 as well. If F is to report in "by mail" is F going to do his recruitment by telephone? Does the Government plan to read S. 1566 to permit the refugee organizations to be wiretapped to find out if they are infiltrated? These are dangerous readings of S. 1566. The proper action is to allow the FBI, having this much information, to foil F's scheme.

In sum, the Justice Department is "reaching" for the exceptional case to establish the need for a deviation from the criminal standard. Contrary to all experience with judicial warrants in the wiretapping area, the Department presumes "strict construction" by judges will hamper legitimate intelligence. The Justice Department should be reminded that only seven judges, picked by the Chief Justice of the U.S. Supreme Court, will review these warrant requests. Of course, this does not give the Justice Department any certainty that all applications will be approved. But the criminal standard does not appreciably make the process more risky for the Government. On the other hand, the noncriminal standard is a dangerous precedent for abuse.

SENATE REPORT NO. 95-701

[page 1]

The Select Committee on Intelligence, to which was referred the bill (S. 1566) to amend title 18, United States Code, to authorize applications for a court order approving the use of electronic surveillance to obtain foreign intelligence information, having considered the same, reports favorably thereon with amendments and recommends that the bill, as amended, do pass.

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PURPOSE OF AMENDMENTS

The Committee on the Judiciary adopted several amendments to S. 1566 designed to clarify and make more explicit the statutory intent, to provide further safeguards for individuals subjected to electronic surveillance pursuant to this new chapter, and to provide a detailed procedure for challenging such surveillance, and any evidence derived therefrom, during the course of a formal proceeding.

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section apply only to surveillances conducted pursuant to chapter 119 since chapter 120 contains its own requirements.

(k) These amendments are designed to authorize the recovery of civil damages for violations of chapter 120 in the same manner and amounts as already provided for violations of chapter 119. The only category of individuals who would be exempted from the provisions of this section are foreign powers and agents of a foreign power as defined in section 2521(b)(1) and (b)(2)(A) of chapter 120.

CONGRESSIONAL BUDGET OFFICE,
U.S. CONGRESS,
Washington, D.C., March 14, 1978.

Hon. BIRCH BAYH,
Chairman, Select Committee on Intelligence,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed S. 1566, the Foreign Intelligence Surveillance Act of 1977, as ordered reported by the Senate Select Committee on Intelligence, February 27, 1978.

Based on this review, it appears that no additional cost to the Governmnt would be incurred as a result of enactment of this bill.

Sincerely,

ALICE M. RIVLIN, *Director.*

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ADDITIONAL VIEWS OF SENATOR MALCOLM WALLOP

This bill fills an important need. Title III of the Omnibus Crime Act of 1968 did not regulate the executive branch's authority to conduct electronic surveillance for purposes of national security. In 1972 the Supreme Court's *Keith* decision brought electronic surveillance conducted for purposes of national security into the scope of the fourth amendment, and strongly suggested that Congress regulate such surveillance. Since that time, the executive agencies which normally carry out such surveillance have been under massive but conflicting political pressures to surveil and not to surveil. In the case of FBI Special Agent John Kearney, for example, we see a conflict between the need to catch the group which, among other things, bombed the Capitol on the one hand, and some interpretations of the crime bill of 1968 and the *Keith* decision on the other. We also see standards in this field evolving rapidly and perhaps being applied retroactively. The executive agencies have reacted as one might expect. Earlier this year the Attorney General told us that, with one exception, no American citizen was then the target of electronic surveillance. It would be comforting to think this means no American citizens are involved in activities which merit surveillance. Instead it seems that those who normally should be surveilling are afraid to act without firm legal mandate. Their position is entirely understandable. Without fixed standards we cannot expect them to stick their necks out in order to protect the country. This bill provides such standards in limited circumstances. Were there to be a choice between this bill and the cur-

rent state of things I should certainly choose the bill. The bill does give firm legal basis for action to agencies too disheartened to act without it. More important, it represents a genuine attempt—perhaps the first attempt by Congress—to think through and to balance the citizen's competing claims to security from foreign powers, their agents and international terrorists, and to security from electronic surveillance by his own Government.

The bill's premises are altogether reasonable. The power to conduct electronic surveillance for the purpose of gaining foreign intelligence and foreign counterintelligence is ancillary to the President's constitutional power to command the Armed Forces and to direct the Nation's foreign affairs. In order to be lawful however, the power of electronic surveillance, like all other powers, must be exercised only for the purpose for which it was intended. Each exercise of power must be reasonably and proportionally related to the end for which the power exists. The bill therefore was written in order to allow the executive branch to conduct such electronic surveillance—but only such electronic surveillance—as is necessary to gather the intelligence and counterintelligence information truly needed by the country.

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Hence the bill attempts to define the persons who may be surveilled, and the circumstances under which they may be surveilled, as well as the nature of the information to be sought. In addition the bill sets forth standards for the use to which information so gained may be put.

The bill presents the Congress with issues of two different kinds. One is the appropriateness of the definitions of persons, circumstances and information. I will argue below that these should be somewhat different than they are. The second, more important, has to do with the role which the bill assigns to the Judiciary.

The judiciary's role

In answer to concerns that the Judiciary is being made to rule on the substance of decisions affecting defense and foreign affairs, the argument has been made that the Judiciary's role in the bill is minimal. The burden of developing the case for surveillance is to rest on the executive branch. The executive branch will have to apply the bill's definitions. The judge, so goes the argument, will merely receive the certification and, when the persons to be surveilled are not U.S. persons will automatically allow the executive branch to proceed. The judge will not have to decide the merits of the cases, nor will he personally decide whether there is "probable cause" for looking at the case as the executive does. He will merely make sure that the executive branch has adhered to the standards set forth by the bill and its accompanying report in determining whether the person(s) in question may be surveilled. The judge will, however, have to control how the information is used. In the first instance the judge's role is merely a clerical one. It could be performed by OMB, by the GAO, or by the staff of any congressional committee. In the second instance the judge's task is managerial. In neither instance is it judicial. Why then confide it to judges? The answer seems to be that judges add an aura of legality to the process. The judicial branch however may not consent to provide rubber stamps and low-level man-

agers for the executive branch. Thus where the judiciary's role is small it is both superfluous and, above all, nonjudicial.

Where U.S. persons are or may be concerned, however, the judiciary's role is undeniably larger. In such case the bill requires the judge to decide whether the executive branch's application of the criteria is or is not "clearly erroneous." Because this places the judge in the position of deciding on the propriety of the executive branch's decision, it raises a number of constitutional questions.

Heretofore the judicial branch has resisted temptations to declare itself competent in foreign affairs and defense. In the case of *Chicago Southern* v. *Waterman Steamship Co.* (333 U.S. 103, 111, 1948), the Supreme Court acknowledged the court's incompetence in matters of foreign intelligence. The substance of such matters, said the courts "are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil." Such decisions are in "the domain of political power, not subject to judicial intrusion or inquiry."

Clearly, defense and foreign relations are political tasks. That is to say, they are to be conducted subject to the people's power to elect.

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The power to surveil for purposes of defense and foreign affairs belongs to that branch of government empowered by the Constitution to command the armed forces and conduct foreign affairs. There are no judicial criteria for interpreting whether this or that foreign visitor is or is not an agent of a foreign power, whether this or that American's connection with persons who may have some relation with the intelligence services of a foreign power has sufficient connections to warrant surveillance.

There are legitimate questions regarding the proper role of the Judiciary in society involved here. In the past we have seen legislation which has directed the courts to check the procedural regularity of the executive branch's actions. All too often we have seen the courts follow the valid logic that one cannot make judgments on procedure without reaching substance, and assume the authority for substantive review. The most recent instance is that of environmental law. Some judges are quite ready to move into foreign affairs in an equally substantive way. Judge Wright has written in the *Zweibon* case (516 F2nd 594 DC Circuit Court, 1975) that judges possess the "analytical ability or sensitivity of foreign affairs necessary to evaluate recommendations" for electronic surveillance. Furthermore, according to Judge Wright, "a Federal judge has lifetime tenure and could presumably develop an expertise in the field of foreign affairs if consistently presented to for authorizations for foreign security wiretaps." No doubt, a judge could; the large question is whether a judge should.

The above mentioned logic would operate swiftly in the areas covered by the bill. Is this information, a judge will have to decide, really necessary to protect the United States against grave hostile acts? Just how hostile is that country toward the United States? Will his information really contribute to the successful conduct of our relations with that country? And what, after all, is success with regard to that country? We must ask whether it would be wise, never mind

constitutional, to place judgments on foreign affairs and defense into the hands of people who are not democratically responsible. Has the country so benefited from judicial activism in domestic affairs that it wishes to give judges responsibilities for foreign affairs and defense as well? And if, under the bill, one wished to minimize the amount of substantive judgment exercised by judges, how could he go about excluding from the special court people who think as Judge Wright does?

The judges would be put in an impossible position. They would have to become either the executive's rubber-stamps or the executive's competitors.

The role assigned to the judiciary by the bill also appears somewhat alien to the old Anglo-American tradition that the judicial power may deal only with concrete adversary situations. Unlike European judges, ours until very recently have not issued advisory opinions on administrative proceedings. The judgment of "not clearly erroneous" envisaged by the bill looks like an advisory opinion because the procedure for the warrant is entirely ex parte and because in nearly all cases the warrant procedure will be the entirety of the legal proceeding. The cases which would come before the special court would not, and would not be expected to, go beyond the procedure for

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the warrant. Only incidentally some would result in real trials. But trials are precisely the concrete adversary proceedings which make judgments issued in ex parte proceedings something other than advisory opinions.

Ex parte proceedings which do not normally result in trials are also questionable from the standpoint of individual rights. Unless there is ultimately a trial, the individual affected will never have an opportunity to contest the government's case. Indeed, a body of case law is likely to grow without benefit of arguments contrary to the Government. If the judicial proceedings envisaged by the bill are to be final ones—that is, if they are not to end in trials—then there should at least be a kind of public defender or devil's advocate to argue against the executive branch's position. In the end we must decide whether these are to be real judicial proceedings or not.

The secrecy of the entire proceedings is itself quite foreign to our legal and constitutional system. Can our legal system stand a body of secret case law? It is not altogether clear that all the judges would be privy to the records of all the cases. If they were not, what good could dissenting opinions do? In the end, the only real means available to a dissenting judge or Justice of the Supreme Court, if he deemed a Government act of surveillance grossly abusive, would be to break secrecy and make the case public. It is far from clear that any action short of impeachment could be taken against such a judge. The bill, in short, raises the possibility of a constitutional clash.

In a sense the bill succeeds too well. Under it, each and every act of electronic surveillance authorized by the special court would be ipso facto legal. That is not an unmixed blessing, for it would curtail drastically Congress' ability to question the appropriateness of any such act. Under the bill, the intelligence committees of Congress may indeed have access to all information regarding requests for surveillance and their disposition. But what could any Congressman or Senator do about any act of surveillance he considered unjust or inappro-

priate? That act would have been not only requested under congressional standards, but certified as meeting those standards by a Federal judge. For all practical purposes the Congressman or Senator would face a res adjudicata. His chances of righting what he considered a wrong would be small—especially if he belonged to the minority party, and if the act of surveillance tended to favor the persons or policies of the majority party. Past abuses of the President's power of electronic surveillance for purposes of national security were not stopped by the judiciary, but by the only agency with the political power to do it: Congress. The judiciary's role in this bill would reduce Congress' latitude for action in this area.

The bill, however, gives the unfortunate appearance of trying to turn political questions into legal ones resolvable by judges not subject to election. It is doubtful whether this can be done in this case.

Is it possible under our Constitution for ordinary legislation to take away the President's power to do what he deems necessary to successfully command this country's defense forces and to successfully run our foreign relations? Let there be no mistake that the bill tries to do this when it stipulates that before exercising a power that is acknowledged to be his, he must receive authorization from a judge. The

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principle that would be established here is that any given action of the executive which may affect the constitutional rights of citizens must be judicially deemed reasonable or "not clearly erroneous" before the fact. A moment's reflection is enough to conjure up any number of absurd situations which would be created by the application of this principle. None of this is to say that there can be no check upon the exercise of presidential powers, but rather to indicate that such checks should be political and must be after the fact.

The bill could achieve its worthy intended purpose, and yet avoid all the above mentioned difficulties if only two changes were made: (1) the review of the executive's certification that a particular act of electronic surveillance conforms to the bill's standards should occur after rather than before the fact, and (2) the reviewing body ought not to be a special court but two subcommittees of the intelligence committees of the Congress.

Standards

The shortcomings in the bill's standards proceed from three principal causes. First and foremost the bill confuses surveillance conducted for the purpose of gaining information necessary to the defense and foreign affairs of the United States with surveillance for the purpose of enforcing criminal law. Second, in several places the bill leaves to the judge the task of deciding questions on which its authors could not agree. Third, the standards are unduly complex.

The judge may not approve surveillance of U.S. persons unless the Government can show that he or she "knowingly engaged in clandestine intelligence activities which involve or may involve a violation of the criminal statutes of the United States" or knowingly commits, prepares to commit, or aids in the preparation or commission of, acts of sabotage or terrorism. In other words, in order to make himself eligible for surveillance someone not only has to have done something which could land him in jail, but he has to have done it knowingly. The latter, of course, is hard enough to show in a trial, never mind a

hearing. Then there is the fact that most clandestine intelligence activities do not break the law, as shown by the recent case of the East German agent James Sattler. Such activities—secret communications and interviews with Government officials—may include violations of law. But who could blame a judge for deciding that an activity which does not violate the law does not in fact involve a violation of law? Indeed, the report states that activity protected by the Constitution of the United States may form no part of the basis for a finding that a person should be surveiled.

But even if these standards were made permissive enough to explicitly permit the surveillance of persons such as Mr. Sattler, or even of thoroughly innocent dupes, they would still divert the bill from its national purpose: surveillance of persons not for law enforcement but for the very sake of the information to be obtained. In cases where the defense or foreign relations of the United States are concerned, the subject's culpability or responsibility is arguably beside the point. The information gained by surveilling him may not relate to him at all, but may save countless lives. Consider the case of someone with knowledge of a band of nuclear terrorists, hiding in one of a thousand

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apartments in a huge complex. It would be both reasonable and easy to tap every telephone in the complex, discard all intercepts but the correct one, and gain the vital information. But that would involve 999 violations of this bill. Consider also the cases of thoroughly innocent persons used as couriers by foreign agents. By surveilling them we could uncover other parts of a dangerous network. The bill does not allow us to. Consider, finally, the case of a thoroughly innocent American who may have knowledge which, unbeknownst to him, would shed light on foreign military or intelligence plans, and who would be placed in danger if contacted. Under this bill this American could not be surveilled. Whether or not to intrude upon the privacy of the abovementioned Americans would involve decisions of foreign and defense policy, not criminal law. The unwarranted confusion of the two serves neither well.

In some places the bill's standards—as elucidated in the report—are all too explicit. An example is the report's detailed discussion of why, under the standards of the bill, the surveillance of persons who worked to defeat the U.S. effort in Vietnam would be unlawful. The Judiciary Committee report states that during the Vietnam War some activists had coordinated their anti-U.S. efforts with North Vietnam and other Communist powers, but that since they operated autonomously rather than at the behest of Communist regimes, they would have been immune from surveillance under this bill. This kind of ex post facto exoneration of one side of a controversy and indictment of the other is, at best, gratuitous.

These descriptions set forth distinctions where I doubt the American people would find difference. For example, the report says:

> * * * direction from personnel of a foreign power which are not connected with an intelligence service or a network would not be a basis for electronic surveillance . . .

Leaving aside the enormous practical difficulty of probing for the connections between the several component parts of foreign powers, especially given the state of our intelligence, one cannot escape the

question of how many "cutouts" are enough to exempt an American acting on behalf of or in conjunction with a Communist regime from lawful electronic surveillance? Most Americans would probably agree that in such cases it would be better to err on the side of caution and tell the intelligence agencies to survey anyone working with such regimes. The bill ought to reflect this.

Finally, the very complexity of the standards must be judged a drawback. Even if they provided the Nation sufficient protection in peacetime, they would surely be too cumbersome to do so in time of war. In time of war, then, a new bill would have to be hastily enacted to provide for emergency powers. But emergency legislation is generally bad legislation. While we have the time we ought to enact a bill workable in bad times as well as in good times.

MALCOLM WALLOP.

HOUSE CONFERENCE REPORT NO. 95-1720

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JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 1566) to amend title 18, United States Code, to authorize applications for a court order approving the use of electronic surveillance to obtain foreign intelligence information, submit the explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report.

The managers recommend that the Senate agree to the amendments of the House, with an amendment. That amendment will be referred to here as the "conference substitute." Except for certain clarifying, clerical, conforming, and other technical changes, there follows an issue by issue summary of the Senate bill, the House amendments, and the conference substitute.

TITLE

The Senate bill amended Title 18 (Crimes and Criminal Procedures) of the United States Code, to authorize applications for a court order approving the use of electronic surveillance to obtain foreign intelligence information.

The House amendments provided for an uncodified title, to authorize electronic surveillance to obtain foreign intelligence information.

The conference substitute adopts the House provision. The conferees agree that this change is not intended to affect in any way the jurisdiction of Congressional Committees with respect to electronic surveillance for foreign intelligence purposes. Rather, the purpose of the change is solely to allow the placement of Title I of the Foreign Intelligence Surveillance Act in that portion of the United States Code (Title 50) which most directly relates to its subject matter.

DEFINITION OF "FOREIGN POWER"

The Senate bill defined "foreign power", with respect to terrorist groups, to mean a foreign-based terrorist group.

The House amendments defined "foreign power" to include a group engaged in international terrorism or activities in preparation therefor.

The conference substitute adopts the House definition. The conferees agree that the limitation to foreign-based groups may be unnecessarily burdensome and that surveillance of a group engaged in preparation for international terrorism may be necessary.

DEFINITION OF "AGENT OF A FOREIGN POWER"

The Senate bill defined "agent of a foreign power", with respect to persons other than U.S. persons, to include persons who act in the

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United States as officers or employees of foreign powers; and certain persons who act for or on behalf of foreign powers which engage in clandestine intelligence activities contrary to the interests of the United States. With respect to any person, including a U.S. person, the Senate bill defined "agent of a foreign power" to include, *inter alia*, persons who knowingly engage in activities in furtherance of sabotage or terrorism for or on behalf of a foreign power; and persons who conspire with any person knowing that such person is engaged in specified activities.

The House amendments defined "agent of a foreign power", with respect to persons other than U.S. persons, to include persons who act in the United States as officers, *members*, or employees of foreign powers; and certain persons who act for or on behalf of foreign powers; which engage in clandestine intelligence activities in the United States contrary to the interests of the United States. With respect to any person, including a U.S. person, the House amendment defined "agent of a foreign power" to include, *inter alia*, persons who knowingly engage in activities that are in preparation for sabotage or international terrorism for or on behalf of a foreign power; and persons who knowingly conspire with any person to engage in specified activities.

The conference substitute adopts the House definition except that the definition with respect to persons other than U.S. persons includes members of groups engaged in international terrorist activities or activities in preparation therefor, rather than members of any foreign power. The conferees agree that surveillance of non-resident aliens who act as members of international terrorist groups may be necessary. The conferees note that a member of an international terrorist group will most likely not identify himself as such upon entering the United States, as would an officer or employee of a foreign power. In the latter instance, a copy of the person's visa application will usually suffice to show that he is acting in the United States as an officer or employee of a foreign power. However, in the case of a member of an international terrorist group, the government will most likely have to rely on more circumstantial evidence, such as concealment of one's true identity or affiliation with the group, or other facts and circumstances indicate that such person is in the United States for the purpose of furthering terrorist activities. The conferees also agree that the "preparation" standard for surveillance of U.S. persons does not mean preparation for a specific violent act, but for activities that involve violent acts. It may reasonable be interpreted to cover providing the personnel, training, funding or other means for the commission of acts of international terrorism. It also permits surveillance at some point before