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INVASIONS OF PRIVACY

HEARINGS

BEFORE THE

SUBCOMMITTEE ON
ADMINISTRATIVE PRACTICE AND PROCEDURE

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

EIGHTY-NINTH CONGRESS

SECOND SESSION

PURSUANT TO

S. Res. 190

PART 5

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What we have today is that our Constitution and our Bill of Rights is just another piece of paper, and anybody who thinks otherwise, unless this committee can recommend extreme, strong legislation, barring everybody, our Bill of Rights and our Constitution does not exist. It doesn't exist today and it won't exist 5 years from now.

Senator LONG. Would you care to make any suggestions or recommendations to the committee as to what type legislation you think would solve our problem?

Mr. SPINDEL. Well, there seems to be a double standard and this is the clue to the whole situation. The only one that is ever prosecuted for eavesdropping is the private citizen. Law enforcement can take the stand a dozen times a day and admit that they picked the door open like a common thief or a common burglar, that they violated a man's constitutional rights, violated the Bill of Rights. They have a device that they can tell anything the man is doing. Now, this individual has no way of protecting himself against it. It is a costly thing to do a thorough search, and the know-how is the other requirement. Owning a piano doesn't make you a pianist. And if you gave a man the equipment, he would be absolutely helpless.

But going beyond that, section 605, which is a law covering wiretapping by everybody and anybody, and it is a Federal law which should preempt all the States from making their own individual laws and permitting them to do that—

Senator LONG. That is just the wiretap. That is the Federal Communications Act.

Mr. SPINDEL. That is one phase of it. Bugging is another phase.

Now, 605, as you know, says it is not a crime to wiretap, in essence. It is a crime if you wiretap and you divulge or you make use of the information. But two things have to be present.

Everybody would agree that it would be rather ridiculous if you passed a law and said it was not a crime to rob a bank, it only becomes a crime when you attempt to spend the money. This is, in effect, what 605 is saying.

As far as wiretapping goes, I wouldn't even hedge at this point. Ten years ago, I said in national security cases, I would, under very stringent control, recommend that the FBI and the CIA be permitted to do it. In the 10 years that have passed, I say an outright ban by anybody and everybody. Even if the citizen has to give up the right to record his own conversation to which he is a party, if that law would read that under no circumstances would anyone be permitted to do it, I would waive the right of the individual to self-defense.

As far as bugging is concerned, I would say that that should be an outright ban as well.

Senator LONG. Did you see the cartoon, the Herblock cartoon that appeared in the Washington Post on Sunday, June 5?

Mr. SPINDEL. Yes, I saw that. I think that is very true.

Combined with the double standard that we have, to this day, no one in any law enforcement position has ever been prosecuted for doing what a private citizen does—

Senator LONG. Well, they have a rather unusual interpretation of that law, do they not; that there must be the interception but there also must be the divulgence. They have the fine-spun legal theory that for one agency to intercept, if he tells that agent, that department, that is not divulgence.

Mr. SPINDEL. That is correct. You see, going back quite a few years, we had an Attorney General who, when questioned as to why he did not prosecute a private citizen for wiretapping, honestly and with integrity, said, "I could not in good conscience prosecute a citizen for a crime the Government commits hundreds of times each and every day."

Then, on the other hand, we had another Attorney General who said that it was his opinion that the fact that the FBI taps so many wires per day throughout the country, which they do not divulge, but they make a memorandum on and then put it in the file; the fact that a thousand agents may then read that memorandum and make use of the information, in his opinion, is not divulgence. Well, if they are not going to use the information, why do they bother to do the very costly procedure in the first place?

Senator LONG. Do you own a traveling laboratory?

Mr. SPINDEL. Yes, I do. I don't own it, but one of the companies I am associated with does. It is a laboratory that I designed.

Senator LONG. Would you tell us about it?

Mr. SPINDEL. This is capable of doing the greatest latitude of search that technically, we know how to do today.

Senator LONG. What does it cost?

Mr. SPINDEL. Well, to take the replacement cost of that laboratory at the moment would be about \$150,000.

Senator LONG. What do you use it for? How is it used?

Mr. SPINDEL. It is used for searching of sophisticated eavesdropping.

Senator LONG. In other words, if I wanted you to search my factory or my office, you would use that laboratory?

Mr. SPINDEL. That is correct. Actually, for ordinary industrial espionage, all that equipment is not necessary, because some of the sophisticated methods that this truck would find are not available to ordinary people in the eavesdropping business.

Senator LONG. Are there many of that type of traveling laboratory in existence?

Mr. SPINDEL. As far as I know, perhaps outside the Government, that is the only one.

Senator LONG. What about the blue box, could you tell us what a blue box is and how it works?

Mr. SPINDEL. Well, I know the term and I have read whatever has come to light on the subject. I know how it operates. Are you referring to the one that permits free toll dialing? Is that the one you are referring to?

Mr. FENSTERWALD. Mr. Spindel, how about starting off with something that is generally known as a cheesebox, which is a simpler device. Would you tell us how that operates?

Mr. SPINDEL. Well, a cheesebox basically is a complicated relay network. It is used by people in the betting business to prevent them, or so they originally thought, to prevent them from being caught. What it is: a man would have two telephones; one number he would give to his customers and the other number was his private number. With the attachment of a cheesebox between the two telephone lines, this bookmaker, if you want to call him that, would go anywhere in the city of Washington and call his private number and be able to hold the phone and listen. A customer calling on the "customer's num-

ber" would come in and he would be able to talk to him from a different part of the city through this cheesebox. The reason that it is called the cheesebox is that many years ago, when this first was made, all the electronic components were placed in an empty cream cheese container and from that, it got the name of the cheesebox.

Mr. FENSTERWALD. Mr. Spindel, if we got a blackboard so you could tutor us in this, could you draw a diagram? I think it might be easier.

Mr. SPINDEL. How it works?

Mr. FENSTERWALD. How detection is set up.

Mr. SPINDEL. Unfortunately, you can avoid detection—they learned the hard way that it takes approximately 20 minutes to trace a line.

If you had a building here in downtown Washington, and you have two telephones here, and you put in your cheesebox and you connect your two wires to the private wire, which is the PW, and this is the customer's wire, CW. And by connecting into this, you could go, we will say, to Silver Spring, Md., and take a coin machine there and call this number (PW). Now, if you know that your customers are going to call from 11 to 1 o'clock, by calling the CW number, this device answers this phone automatically.

Another customer, we will say, in Alexandria, Va., is going to call in from his office or coin machine and he calls this number (CW). The moment this phone rings, it is interconnected.

One of the interesting sidelights to this, which, as I understand it, was not originally designed for the purpose, was that as soon as the customer finished making his call from the coin machine, he would get his money back. This part disturbed the telephone company more than the fact that they were using the device.

Now, what the police did to determine this in the first place is an interesting story. They know that a particular drugstore or candy store in the busy center of Washington is a place where known players hang out. So they tap the telephone there and they put a pen register on the line. And they find out that this number, which is Sterling 3, we will say, 1000, is the number that is being called and they hear a bet being made. So they then call the phone company and they say, "Where is Sterling 3-1000 located?" And the telephone company will say it is at such-and-such address, apartment No. 4. Then the police come and they raid and all they find is two telephones and the cheesebox. But the bookmaker is in Silver Spring, Md.

So the next time this occurs, they start tracing back from Sterling 3-1000. They know this other number here. We will say that is Sterling 3-1001. And they try to determine by tracing where the call of origin comes from.

Now, under our telephone system in this country, the calling party is the controlling party. In other words, if I call you at your home. Senator, and I talk to you, and after you finished the conversation with me, if I wanted to be a bad boy and not allow you to get any phone calls, I would leave my phone off the hook. Your phone is dead, because the calling party is the controlling party. You could not receive an incoming call or make an outgoing call.

Based on this principle, if the bookmaker stays at this phone more than 20 minutes after the time they have discovered the cheesebox in operation, they could trace this back to where he is. So the bookmakers

learn after a few arrests that they can't do this. They have to change phone booths every 15 minutes maximum. Because while this is the downtown area in Washington, we will say in Silver Spring, Md., we have another telephone exchange where actually this coin machine goes into this exchange. We will take a random number, 444 exchange. Then it is transferred to this exchange, the Sterling 3. So when they trace back 1000, they know it is coming from the 444 exchange. Then they have to get the men in the central office to then trace the line finders, the selectors, and everything else to come back to this point of origin. So, by changing his phone booth every 15 minutes, they could be in the middle of a trace and the moment he hung up, it was dead. They could not trace him any further.

That basically is what the cheesebox was. The cheesebox is not used today. It is an obsolete piece of equipment, actually.

Senator LONG. In this connection, while you were talking about the use of these telephones, I have a bill pending now which is an effort to stop obscene telephone calls and that type. Are you familiar with that?

Mr. SPINDEL. The procedure for tracing?

Senator LONG. Yes; is there any way for any suggestion—

Mr. SPINDEL. Well, the telephone company does not want to be bothered with the tracing of calls. They tell you it can't be done and so on. Actually, they have methods in which they can hold the train of relays and selectors so they can determine who the calling party is. But this is a very costly procedure.

Senator LONG. Do they have any way of—

Mr. SPINDEL. Yes; it has always been available to them, but they don't like to use it, because it costs them money to operate this system.

Mr. FENSTERWALD. You say it is not new but has been available for some time?

Mr. SPINDEL. Yes.

Mr. FENSTERWALD. Did not they just announce they have some new equipment which they put into effect in New York?

Mr. SPINDEL. They did announce some new equipment, but actually, you go back to the fact that there are different types of telephone dial systems throughout the country, the old manual step by step and the cross bars and so on. Each requires a little different piece of equipment to accomplish the same thing.

Mr. FENSTERWALD. While you are there, could you tell us what a blue box is and how it works?

Mr. SPINDEL. You are talking about the tone dial unit?

Mr. FENSTERWALD. Yes.

Mr. SPINDEL. This has been found on numerous occasions. In fact, I believe a 17-year-old boy was the one that designed the first one. What it permits you to do is here in the city of Washington, if you called, we will say, area code 305 to a telephone number you know would not answer, or you left instructions between 1 and 2 o'clock not to answer that phone, you would go to a coin machine and place the call, direct dial, through to area code 305, which is Miami. Now, they are not going to answer. This blue box could have either just the tone signal, or what we call the audio-oscillators, with the touch tone button for dialing. And it creates tones. There are two tones produced for every button you depress, which activates the telephone equipment the same as if you dialed the digit.

You also have a key on this box. Actually, the box—a complete model, one of the models looks like this, with a standard dial up here for your numbers and you have the equivalent of an operator's key here and then here you have the touch tone dial tone generators, right through the same as it would appear on a normal telephone.

Now, coming back to this, what you would do is you dial Miami. Then when the party does not answer, you hit this button, which holds the trunk line, the long distance line open, but disconnects you from Miami. Then you could dial, let's say, the Los Angeles area code and dial whatever number you want. The only thing that would appear on the record is that you made a call from Washington to area code 305 and the line was busy. But you could make 20 long distance calls throughout the country at no charge with the blue box.

Mr. FENSTERWALD. Did you say that was invented by a 17-year-old?

Mr. SPINDEL. The original one was invented by a 17-year-old university student.

Mr. FENSTERWALD. I judge the telephone company sort of frowns on that practice, too.

Mr. SPINDEL. They do.

Mr. FENSTERWALD. Did they hire this boy?

Mr. SPINDEL. There has been talk that they did hire him eventually.

Senator LONG. What is your view about the constitutionality of this New York law permitting this type of invasion of privacy?

Mr. SPINDEL. I think it is a clear violation of the constitutional rights. I think that the wiretap portion of the law is a violation not only of the constitutional rights but also of our Federal statute 605.

Senator LONG. Do all the judges in New York sign these or what is the judicial opinion?

Mr. SPINDEL. Well, it has seesawed back and forth and there is no clearcut case on it at the moment. There is a time that it is not permitted and there is a time that it is permitted. As an example, we had a ruling last year by Judge Sobel in a murder case involving three defendants. This is an interesting one, because there were two separate eavesdrops by two separate law enforcements on the same place at the same time. Now, Judge Sobel dismissed the indictments, even though the police had a recording.

Senator LONG. Without objection, that opinion of Judge Sobel will be placed in the record at this point.

(The document referred to follows:)

THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF, *v.* LEONARD GROSSMAN, MICHAEL SCANDIFIA AND LAWRENCE PISTONE, DEFENDANTS.

Supreme Court, Criminal Term, Kings County, February 28, 1965. (257 N.Y.S. 21266)

Constitutional law—electronic eavesdropping—ex parte order authorizing electronic eavesdropping (Code Crim. Pro., § 813-a) cannot constitutionally be used as warrant to intrude upon person's business premises and search for and seize conversations (U.S. Const., 4th and 5th Amdts.); nor can such inadmissible conversations constitute probable cause for issuance of search warrant pursuant to which pistols were seized as physical evidence (Code Crim. Pro., § 792); such conversations and such physical evidence are ordered suppressed (Code Crim. Pro., § 813-c); since there was no other evidence before Grand Jury, indictment is ordered dismissed—United States Supreme Court decisions govern—to extent to which sections 792 and 813-a of Code of Criminal Procedure authorize seizure of "property constituting evidence

of crime" and of conversations as "evidence of crime" only, they violate Fourth, Fifth and Fourteenth Amendments—court has power to hold pretrial hearing and order suppression of unconstitutionally seized evidence; thus District Attorney has right of appeal which he would not have if court made these rulings at trial.

1. The United States Constitution (4th Amdt.) provides that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause". A person's place of business is such a constitutionally protected area. The police may obtain an ex parte order (Code Crim. Pro., § 813-a) authorizing them to install an electronic eavesdropping device; but when, in order to install and conceal such a device, they break and enter or physically intrude or trespass on constitutionally protected premises, they have made an unreasonable, unlawful and unconstitutional search. Any evidence thus obtained is inadmissible and should be suppressed (Code Crim. Pro., § 813-c). When the police obtain a search warrant (Code Crim. Pro., § 792) based upon such inadmissible evidence, no probable cause is established for the issuance of the warrant, and hence the physical evidence which is seized pursuant to such a warrant must likewise be suppressed (Code Crim. Pro., § 813-c). Furthermore, if a Grand Jury has issued an indictment based solely on such inadmissible evidence, both physical and intangible, the indictment should be dismissed.

2. The New York State Constitution (art. I, § 12) contains the same provision as does the Federal Fourth Amendment. However, the constitutional principle which excludes unlawfully seized evidence is commanded upon the States by the Federal Fourth Amendment via the Fourteenth Amendment. Therefore, the Federal standards stated by the decisions of the United States Supreme Court should determine the constitutionality of State legislation which authorizes eavesdropping or wire tapping, such as section 813-a of our Code of Criminal Procedure, which provides that "An ex parte order for eavesdropping"—which is otherwise prohibited by the Penal Law (§ 733)—"may be issued * * * upon oath or affirmation * * * that there is reasonable ground to believe that evidence of crime may be thus obtained".

3. A grand larceny of jewelry by false pretenses having been committed, the police made affidavit showing that there was reasonable ground to believe that one Scandifia was implicated in that crime, and obtained an ex parte order authorizing them to install an electronic eavesdropping device (Code Crim. Pro., § 813-a) in a service station owned by Scandifia. They installed the device by breaking and illegally entering the service station in the early morning hours. At two-month intervals they obtained orders extending the original order's duration (Code Crim. Pro., § 813-a; cf. Code Crim. Pro., § 802). Meantime, they obtained a similar ex parte order authorizing electronic eavesdropping of the business premises of one Ferrara; and there too they surreptitiously installed a device by physically intruding upon Ferrara's constitutionally protected premises. This order was based on an affidavit alleging conspiracy and coercion and "shylocking", but not showing probable cause. By mean of these electronic devices, the police listened to all conversations, not only telephonic ones. Apparently they heard nothing relating to those crimes. What they eventually did hear, on the Scandifia eavesdrop device, were conversations between Scandifia and one Grossman indicating their unlawful possession of two pistols and bullets and a conspiracy among those two and Ferrara and one Pistone to assault or kill any and all stool pigeons. A police officer presented an affidavit as to these inadmissible conversations and obtained a warrant to search an automobile owned by Grossman (Code Crim. Pro., § 792). The warrant was executed and disclosed two pistols. On motions of defendants and after a hearing thereon, the seized pistols and the overheard conversations are ordered suppressed (Code Crim. Pro., § 813-c); and, since there was no other evidence before the Grand Jury, the indictment which charges all of the defendants with conspiracy to commit assault or murder and which further charges defendants Grossman and Scandifia with illegal possession of weapons, is dismissed.

4. Ex parte orders authorizing eavesdropping (Code Crim. Pro., § 813-a) cannot be used as "Warrants", under the Fourth Amendment of the United States Constitution, so as to authorize a physical intrusion or invasion into constitutionally protected premises in order to search for and seize evidence consisting of verbal statements or conversations.