

By Mr. St. Cyr of Millis, petition of Edward W. Brooke and Alan Paul Danovitch for legislation to repeal the present wiretapping statute and providing for a new statute in relation thereto. The Judiciary.

The Commonwealth of Massachusetts

In the Year One Thousand Nine Hundred and Sixty-Seven.

AN ACT REPEALING THE PRESENT WIRETAPPING STATUTE AND PROVIDING FOR A NEW STATUTE IN RELATION THERETO.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 Sections 99 and 99A of chapter 272 of the General Laws,
2 as most recently amended by chapter 449 of the acts of 1959,
3 are hereby repealed and the following sections substituted
4 in place thereof:—

5 *Section 99. Eavesdropping.*—Except as otherwise spe-
6 cifically provided in this section, or in section 99B, it shall be
7 unlawful for any person: (1) willfully to overhear, attempt
8 to overhear, or procure any other person to overhear, or at-
9 tempt to overhear any spoken words at any place by using
10 electronic amplifying, transmitting, or recording device, or
11 by any similar device or arrangement, without the consent or
12 knowledge of all parties engaging in the conversation; (2)
13 willfully to disclose, or attempt to disclose, to any person the
14 contents of any conversation if the person disclosing that
15 information knows or has reason to know that that informa-
16 tion was obtained by a procedure which violates paragraph
17 (1); (3) willfully to use, or attempt to use, the contents of
18 any conversation if the person using that information knows
19 or has reason to know that that information was obtained by
20 a procedure which violates paragraph (1); (4) willfully to
21 acquiesce in the installing of any device which is to be used or
22 is used in a manner which violates paragraph (1); provided,
23 that nothing in this section shall be interpreted to prevent a
24 news agency or an employee thereof from using the accepted

25 tools and equipment of that news media in the course of re-
26 porting a public and newsworthy event; and *provided further*,
27 that nothing in this section shall be interpreted to prevent the
28 use by private persons or businesses of any device used for
29 security or business purposes, as long as adequate warning
30 is given to the public that such devices are in operation.

31 A person violating this section shall be guilty of the crime
32 of eavesdropping and shall be punished by imprisonment for
33 not more than five years or by a fine of not more than ten
34 thousand dollars; or both.

35 (B.) *Right of Civil Action.* — Any party to a conversation
36 which is eavesdropped upon in violation of Part A, and who
37 has been damaged due to such violation, may sue the violator
38 or violators therefor and shall recover threefold the damages
39 by him sustained, and the cost of the suit, including a reason-
40 able attorney's fee, and no award shall be less than five hun-
41 dred dollars.

42 *Section 99A. Wiretapping.* — Except as otherwise specifi-
43 cally provided in this section or in section 99B, it shall be
44 unlawful for any person:— (1) willfully to intercept, at-
45 tempt to intercept, or procure any other person to intercept,
46 or attempt to intercept, any wire communication without the
47 consent or knowledge of all parties engaging in the commu-
48 nication; (2) willfully to disclose or attempt to disclose to
49 any other person the contents of any wire communication
50 if the person disclosing that information knows or has reason
51 to know that that information was obtained by a procedure
52 which violates paragraph (1); (3) willfully to use or attempt
53 to use the contents of any wire communication if the person
54 using that information knows or has reason to know that
55 that information was obtained by a procedure which violates
56 paragraph (1); (4) willfully to acquiesce in the installing
57 of any device which is to be used, or is used in a manner
58 which violates paragraph (1); (5) who is an employee of
59 any communications common carrier, and has knowledge ob-
60 tained during the course of his duties for that carrier, of
61 any violation of paragraph (1) to fail to report such knowl-
62 edge to a district attorney or the attorney general of the com-
63 monwealth; provided, that it shall not be unlawful under
64 this section for an operator of a switchboard, or an officer,
65 agent or employee of any communication common carrier,

66 whose facilities are used in the transmission of a wire com-
67 munication to intercept, disclose or use that communication
68 in the normal course of his employment while engaged in any
69 activity which is a necessary incident of the rendition of
70 service.

71 A person violating this section shall be guilty of the crime
72 of Wiretapping and shall be punished by imprisonment for
73 not more than five years, or by a fine of not more than two
74 thousand dollars, or both.

75 (B) *Right of Civil Action.* — Any party to a conversation
76 which is intercepted in violation of Part A, and who has been
77 damaged due to such violation, may sue the violator or vio-
78 lators therefor and shall recover threefold the damages by
79 him sustained, and the cost of the suit, including a reasonable
80 attorney's fee, and no award shall be less than five hundred
81 dollars.

82 *Section 99B. Court Order to Eavesdrop or Wiretap.* —
83 Any justice of the supreme judicial court, or a justice of the
84 superior court, may, upon proper application by either a dis-
85 trict attorney or the district attorney of the commonwealth
86 grant an *ex parte* order allowing such officer to order an elec-
87 tronic eavesdrop or a wiretap.

88 (1) Such application to be proper, must satisfy the judge
89 that the following requirements have been substantially met.

90 (a) It must be personally signed by either a district attor-
91 ney or the attorney general of the commonwealth, unless it
92 can be shown that that official is unavailable and that delay
93 would endanger either human life or the public safety. In
94 such case, the application must be signed by the highest
95 ranking official available.

96 (b) It must contain a full and complete statement of the
97 facts and circumstances relied on by the applicant including
98 but not limited to: the crime or crimes involved; the infor-
99 mation expected to be obtained; the results of previous inves-
100 tigation which led to the application; and the sources of the
101 information leading to the application, unless such sources
102 are confidential.

103 (c) It must state the nature and location of the premises
104 which are to be eavesdropped upon, or the wire to be tapped,
105 and the person or persons whose conversations are to be over-
106 heard or intercepted. In the case of eavesdropping, the appli-

107 cation shall specify as precisely as possible the building, and
108 the particular rooms in a building, to be bugged. In the case of
109 a telephone, the exact number of the line must be specified,
110 as well as the names of the individuals to whom the phone
111 is listed, and who regularly use the phone.

112 (a) It must state all previous applications in the same
113 matter which involved the same premises, facilities or indi-
114 viduals, and the action taken by the judge on each application.

115 (e) It must allege that other methods of investigation have
116 proven to be or are presumptively inadequate and that there
117 is a reasonable cause to believe that eavesdropping or a wire-
118 tap will be successful.

119 (2) If the judge is not satisfied that the application sub-
120 stantially complies with the requirements of Part A, he
121 may require the applicant to furnish additional information
122 in support of the application.

123 (3) If the judge is satisfied that the application sub-
124 stantially complies with Part A, and specifically, that other
125 methods of investigaion would be inadequate, he may enter
126 an *ex parte* order granting leave to the applicant to eavesdrop
127 or wiretap in conformance with the terms of the order. Such
128 order shall only be granted where there are reasonable
129 grounds to believe that: —

130 (a) It is necessary to save human life; or,

131 (b) In the case of a wiretap, where communications facil-
132 ity itself is an instrumentality of the crime alleged; or,

133 (c) That evidence of a felony may thus be obtained; or,

134 (d) The security of the commonwealth or the public safety
135 is endangered.

136 (4) Such order shall be limited to sixty days, at which
137 time it shall be renewable, in the discretion of the judge, for
138 additional periods of thirty days. An application for renewal
139 must be filed which shall contain as much information as the
140 judge shall deem necessary.

141 (5) Such order shall describe or identify the person or
142 persons who are authorized to implement it, or the person or
143 persons under whose supervision it shall be implemented.

144 (6) An order to eavesdrop shall specify with as much pre-
145 ciseness as possible, the building, and the particular room or
146 rooms in a building, to be bugged. An order to wiretap shall

147 specify the particular wire to be intercepted, if a telephone,
148 by its number.

149 (7) Such order shall specify the purpose for which it has
150 been granted.

151 (B) When an order is granted in accordance with Part A,
152 it shall be the responsibility of the signer of the application
153 as well as anyone connected with implementing the order, to
154 see that it is implemented in a way entirely consistent with
155 the provisions of the order, and that utmost respect is given
156 to the constitutional rights and the privacy of those persons
157 whose conversations are overheard or intercepted by virtue
158 of the order.

159 (1) When any criminal prosecution is brought which in-
160 volves a defendant who has been the subject of a court order
161 under Part A, the state must furnish the defendant with a
162 copy of the order and an accurate transcript of the material
163 proposed to be used as evidence, at least thirty days before
164 the commencement of the trial. If the defendant has any ob-
165 jctions to the order having been granted, or the manner in
166 which it was implemented, he must make them known to the
167 court at least ten days before the commencement of the trial.

168 (2) No material obtained in a manner inconsistent with
169 the provisions of any court order granted under Part A shall
170 be admissible as evidence in any judicial proceeding in the
171 commonwealth.

172 (3) It shall be unlawful for any person to edit, alter, or
173 tamper with any tape, transcript, or other recording of any
174 kind of any conversation overheard or intercepted by a court
175 order granted under Part A, and then to present such material
176 in any judicial proceeding, or any proceeding under oath,
177 without fully indicating the nature of all changes made and
178 the original state of the material. Any person violating this
179 paragraph shall be punished by imprisonment for not more
180 than one year, or by a fine of not more than five hundred dol-
181 lars, or both.

182 (4) Any law enforcement official who obtains or misuses
183 in a grossly negligent or malicious manner, the powers given
184 him by a court order under this section, shall be liable in an
185 action for damages by any person aggrieved by, or as a result
186 of such action. The minimum award for such injury shall be
187 two hundred and fifty dollars.

188 (c) In order to protect innocent parties it is essential to
189 preserve the secrecy of any tapes, transcripts or other record-
190 ings of any kind intercepted or overheard under a Part A
191 order, and to insulate the entire proceedings from unauthor-
192 ized view.

193 (1) No application or order under Part A shall be made
194 public by the court, or the applicants, or by any person with
195 knowledge of its existence or contents, until a true indict-
196 ment is returned against the individual or individuals named
197 as the subjects in the application or order.

198 (2) The court shall seal and keep in the custody of the
199 court as the official record, a true copy of each application
200 and order. The order itself shall be delivered to and retained
201 by the applicant as authority for its implementation.

202 (3) Any tapes, transcripts or other recordings of any kind
203 of conversations intercepted or overheard under a Part A
204 order shall be deemed to be in the custody of the court, but
205 may be kept in the possession of the applicant at the discre-
206 tion of the court.

207 (4) All tapes, transcripts or other recordings of any kind
208 of conversations intercepted or overheard under a Part A
209 order must be returned to the possession of the court either
210 at the conclusion of the trial of a defendant who was the sub-
211 ject of such order, or at the end of one year from the date of
212 the expiration of the order, whichever is later.

213 (5) All tapes, transcripts or other recordings of any kind
214 of conversations intercepted or overheard under a Part A
215 order shall be destroyed by the court five years after the date
216 on which they are returned to the possession of the court
217 under paragraph 4.

218 (6) Any person who has been damaged by a violation of
219 Part C, may sue the violator or violators therefor and shall
220 recover the damages by him sustained, and the cost of the
221 suit, including a reasonable attorney's fee, and no award
222 shall be less than five hundred dollars.

223 (D) A commission on electronic surveillance shall be
224 created. Its members shall consist of the chief judge of the
225 supreme judicial court, or his appointed representative, who
226 shall be the chairman; the governor, or his appointed repre-
227 sentative; the attorney general, or his appointed representa-
228 tive; a representative appointed by the Massachusetts bar

229 association; and a member of the faculty of a Massachusetts
230 law school, to be appointed by the chairman. The commission
231 shall meet at least once every year following the passage of
232 this section and by the end of the fifth year after passage, it
233 shall file a written report to the general court giving its evalu-
234 ation of how well the provisions of sections 99, 99A and 99B
235 have been carried out in practice, and recommending any
236 changes it believes will improve the functioning of these sec-
237 tions. The commission shall have limited subpoena power,
238 including the power to inspect all applications and orders
239 under Part A. One year from the date of submission of
240 such report, the commission shall terminate as an official body,
241 unless renewed at that time by act of the general court.

242 *Section 99C.* Whoever secretly overhears, or attempts to
243 overhear or to have any other person overhear the delibera-
244 tions of a jury by use of a device commonly known as a dicto-
245 graph or dictaphone, or however otherwise described, or by
246 any similar device or arrangement with intent to procure any
247 information relative to the conduct of such jury or any of
248 its members, shall be punished by imprisonment for not more
249 than five years or by a fine of not more than five thousand
250 dollars, or both.

1 SECTION 2. This act shall take effect ninety days after
2 passage.