

INTERIM REPORT OF THE SPECIAL COMMISSION TO
INVESTIGATE ELECTRONIC EAVESDROPPING
AND WIRETAPPING.

INTRODUCTION

A special commission to investigate electronic eavesdropping was created by the Legislature in 1964. During this period the Commission has held numerous public hearings, executive sessions and has directed its counsel to pursue research and investigation into the laws involving privacy, wiretapping and eavesdropping by law enforcement agencies, and problem of wiretapping and eavesdropping as it is committed by members of the general public.

Public hearings have been held by the Commission to demonstrate the type of eavesdropping devices presently available to members of the general public, and those used at the present time for covert wiretapping and eavesdropping. Public hearings were held to determine the extent and need for service observing as carried on by the New England Telephone and Telegraph Company.

RECENT UNITED STATES SUPREME COURT DECISIONS

Two recent cases decided by the United States Supreme Court clearly indicate that Sections 99, 100, 101, and 102 of Chapter 272 of the General Laws are unconstitutional insofar as they describe the methods by which law enforcement officers may be permitted to commit judicially authorized eavesdropping and wiretapping. In the case of *Berger v. State of New York* a statute very similar to the sections described above was held unconstitutional on its face. The Court found the provisions for obtaining a warrant were too broad and that the statute permitted a "continuous search". The United States Supreme Court for the first time made it clear in that case, that a judicially authorized eavesdrop or wiretap must conform to the Fourth Amendment of the United States Constitution.

This requirement means that an application for such a wiretap or eavesdrop order, to be valid under the Fourth Amendment, must conform to the same test of "probable cause" as is required for a search warrant. In addition the Court makes it clear that it desires close judicial supervision over all aspects of the process of

eavesdropping and wiretapping as it is performed by law enforcement officers.

The impact of these decisions is that the Massachusetts statute must be revised if police and law enforcement officials are to be able to lawfully intercept or wiretap any wire or oral conversations by members of the public under any circumstances.

*DEVICES FOR WIRETAPPING AND EAVESDROPPING
BY MEMBERS OF THE PUBLIC.*

Our hearings and studies have made it clear that eavesdropping devices are readily available to members of the public from commercially available stores. A person with a minimal education in electronics can easily install these commercially available devices for purposes of illegally intercepting wire or oral communications. In addition to devices which are easily available on the commercial market, other devices of much greater sophistication are manufactured by persons specializing in covert wiretapping and eavesdropping.

Due to the ease with which these devices may be obtained and manufactured, and the great proliferation of these devices, it is the Commission's conclusion that there is no way to effectively prohibit their sale or manufacture.

As a result, the Commission has revised the present Massachusetts statute to strictly forbid electronic eavesdropping or wiretapping by members of the public. This has been made necessary due to the fact that only two convictions have been obtained in Massachusetts for wiretapping or eavesdropping to the Commission's knowledge.

SERVICE OBSERVING

As a result of an investigation conducted by this Commission, at a public hearing held pursuant to that investigation the first admission by any telephone and telegraph company was made, that for a long period of time, these companies have operated a service by which the telephone company has overheard the conversations of subscribers without their knowledge. Long distance calls were monitored by the telephone company up until 1956. Local calls were monitored up until 15 days prior to the investigation conducted by the Commission in 1966.

"Service observing" was justified by the telephone company in order for it to check the quality of transmission of conversations over its lines, to supervise its operators, to check on the response of its repair personnel to the calls made by subscribers. The testimony further indicated that at the present time there is no necessity to listen to any conversation by a subscriber. In addition, service observing of the operators was said not to be necessary beyond the point that the operator heard the connection made between the parties for the call. This is due to the fact that improved electronic devices enable the same checks to be made without the necessity for overhearing the conversation of the parties.

To this end the Commission recommends the amendment of the Act governing the regulation of telephone companies by the Department of Public Utilities to insure that the privacy of the subscribers' telephone conversations will be protected. In the system of regulation described by the proposed statute, the Department of Public Utilities is specifically designated to enforce these requirements. The standard of service observing as set forth by the Telephone Company in its testimony before the Commission are incorporated into the provisions of the proposed bill. The scheme of regulation requires an annual report to the Department of Public Utilities of all service observing activities by the Telephone Company, reporting of all rules and regulations of the Telephone Company concerning observing, a report of the amount of money expended for such service, and requires a semi-annual investigation of such service by the Department of Public Utilities.

This Commission feels that past conduct by the Telephone Company indicates that the Telephone Company has clearly favored its business interest against right of the public to have privacy in their telephone conversations. In addition, we take a dim view of a method of supervision which allows an employer to act as "big brother" towards its employees. As a result the Commission feels that a scheme of regulation by a public body with detailed statutory standards is required.

*LAW ENFORCEMENT
EAVESDROPPING AND WIRETAPPING*

The Commission feels that eavesdropping and wiretapping by

law enforcement officials should be permitted in order to effectively combat the menace of organized crime but only if such wiretapping and eavesdropping is limited by the standards set forth by the United States Supreme Court. This means that law enforcement eavesdropping and wiretapping should be strictly supervised by the judicial branch of the government and applications for eavesdropping and wiretapping must conform to the provisions of the Fourth Amendment.

The statute proposed by the Commission has revised the Massachusetts law to require strict compliance with the probable cause provisions of the Fourth Amendment. Wiretapping and eavesdropping by police officials will be limited to specified conversations and "continuous searches" will be prohibited. Applications for warrants must be made to a Justice of the Superior Court. The time limit of searches and warrants are strictly defined and are limited as required by the directions given in the decided cases.

In addition, the Commission's statute has centralized administration of police and law enforcement wiretapping in the Superior Court. As this is the chief trial court of the Commonwealth, and the tribunal which hears the most serious cases, it is hoped that there will be a better uniformity in the application of the law.

In addition, it is required that the original recording or tape or a sworn statement of the complete contents of the intercepted communication if there is no tape, be returned to the judge who issued the warrant so that he may determine whether or not the warrant has been executed in a manner in which he authorized it. This additional judicial supervision, it is hoped, will eliminate the possibility of abuse and add to the public's confidence in the manner in which this statute is employed by law enforcement officials.

The original tapes and statements are to be kept in the custody of the Chief Justice of the Superior Court. This provision has been added to eliminate the possibility of any editing between the time the tapes are obtained and the time they must be made available for trial. We feel this also aids the prosecutor in that the procedure eliminates false charges by a defendant that the tape had been edited or changed. It was felt by the Commission that this added control over the fruits of an interception will be a means of insuring the competence of the public in the system of judicially au-

thorized eavesdropping and wiretapping and a means of promoting confidence in the fairness of a trial in which such evidence is used.

The right of a defendant to be confronted with the evidence against him is protected in that any wiretap information to be used against the defendant must be shown to him prior to the trial.

Provisions are made for annual reports to the legislature describing the extent of wiretapping and eavesdropping conducted during the previous year by the judicial officers of the Commonwealth authorized to seek warrants for wiretapping under this bill.

PROHIBITION OF WIRETAPPING AND EAVESDROPPING BY THE PUBLIC

The Commission is of the opinion that wiretapping and eavesdropping other than by law enforcement officers should be strictly prohibited. The present Massachusetts laws have been revised in our proposed act to strictly prohibit electronic eavesdropping and wiretapping of other persons' conversations without permission. Penalties have been increased and the crimes have been more strictly defined. Possession of illegal wiretapping devices has been made a crime under circumstances evincing an intent to illegally use those devices.

PRIVATE INVESTIGATORS

It is the Commission's view that private investigators should not be permitted to make use of eavesdropping and wiretapping devices. To this end, the Commission recommends the amendment of the Act regulating private investigators in order that their licenses may be revoked in the event they are convicted of any violation of the new wiretapping and eavesdropping statutes.

Respectfully submitted,

MARIO UMANA, *Chairman*
ELLIOT B. COLE
WILLIAM P. HOMANS, JR.
ANDRE R. SIGOURNEY
NORMAN S. WEINBERG
PHILLIP K. KIMBALL

Commission Member Elliot B. Cole concurs in the Commission's legislative recommendations.

Commission Member William P. Homans, Jr., joins Mr. Cole.

I join the majority of the Commission in their legislative recommendations, but I must add some comments on those provisions dealing with law enforcement eavesdropping and with "all-party consent".

In the past I have been a vigorous opponent of provisions which would permit law enforcement eavesdropping and wiretapping. This opposition has been based on both Constitutional considerations and the lack of information available on law enforcement eavesdropping practices.

Today I know no more than I did when I was appointed to this Commission about the practices and effectiveness of law enforcement eavesdropping. Indeed these two elements — practices and effectiveness — appear to be the most secret of all law enforcement secrets. As Prof. Alan Westin states in his treatise *Privacy and Freedom*.

"There has never been a detailed presentation by any law-enforcement agency, in terms that the educated public could judge, to prove this view (the need for wiretapping and eavesdropping in criminal investigations) on a crime-by-crime analysis."

This Commission and Attorney General Richardson agree on the necessity of an annual report by the Commonwealth's prosecuting attorneys stating their activities in this area on a crime-by-crime basis. The secrecy of the past I believe is both destructive and alien to a democracy. It is the inclusion of the reporting provision, which was first put forth by the Attorney General, that has caused me to re-evaluate my previous opposition to law enforcement eavesdropping. It is to be hoped that the information contained in the prosecutor's annual report will provide a basis for the General Court to better evaluate its policy on law enforcement eavesdropping.

The other basis of my opposition to law enforcement eavesdropping has been its constitutionality. This controversy has raged within and without the United States Supreme Court since 1927 when that Court first decided the constitutionality of wiretapping.

In 1961, in *Silverman v. United States*, the Court indicated that eavesdropping under certain circumstances was violative of the Constitution. But recently, in *Berger v. New York*, the Court stated its tolerance for law enforcement eavesdropping given specific standards for judicial regulation. This Commission's Bill, as our Report explains, would implement those standards. If the Bill is not Constitutional and is enacted, I am sure that the Court will have an opportunity to so state.

The Commission have decided to recommend to the General Court a provision which would require the consent of all parties to a conversation before that conversation could be recorded or otherwise electronically 'intercepted'. It is the 'all-party consent' provision which is the essence of any protection which the law can afford the public.

But this view has not gained universal acceptance, and is opposed by those who see the possibility — what some of their number describe as the necessity — to secretly record the words of another. These advocates would maintain 'one-party consent', the present statutory standard. Their argument is based on the assumption that any participant in a conversation has the authority to divulge or publish the words and thoughts of his conversational partner. This assumption is ludicrous. If those participating in the conversation were mute and could only communicate via the written word, each participant would himself determine who had access to his thoughts. Furthermore, he could legally enforce his right by enjoining unauthorized publication of those thoughts.

The proponents of 'one-party consent' frequently justify their position by stating that every person runs the risk that his confidence in the person to whom he is talking may be betrayed. This of course is true. But instead of protecting the individual from being betrayed, these proponents would legitimize the betrayal. At the very least the individual should himself be able to determine who should have authority to mechanically reproduce his words.

Again I should like to rely on Prof. Westin. The first of the following passages is taken from that section of his book dealing with legislative provisions which would further protect the individual's right of privacy.

'(I) would *not* include an exception to allow wiretapping or eavesdropping with the consent of one party. This has been the basic charter for private-detective taps and bugs, for "owner" eavesdropping on facilities that are used by members of the public, and for much free-lance police eavesdropping. Allowing eavesdropping with the consent of one party would destroy the statutory plan of limiting the offenses for which eavesdropping by device can be used and insisting on a court-order process. And as technology enables every man to carry his micro-miniaturized recorder everywhere he goes and allows every room to be monitored surreptitiously by built-in equipment, permitting eavesdropping with the consent of one party would be to sanction a means of reproducing conversation that could choke off much vital social exchange.' (Emphasis in the original.)

The following passage is excerpted, with permission, from a letter to me from Prof. Westin on the advisability of incorporating the 'one-party consent' provision into a new Massachusetts statute.

'Based on the studies I have made on wiretapping and eavesdropping practices through the United States, as reflected in my recently published book, *Privacy and Freedom* (New York: Atheneum, 1967), I believe such a provision is unwise. From a public policy standpoint, we must consider what would be the impact in the coming decade, when electronic monitoring devices spread even more widely in the population, of each citizen having to know that the person to whom he is talking in the office, at home, in his car, on the street, in a store, etc., may be recording the conversation with full legal authority and without having to have such clandestine recording authorized in advance by any judicial agency. I think this creates a serious inhibition on freedom of communication, especially because the person who chooses to speak frankly and freely in personal conversation runs the risk, under such a situation, that what he says in jest, with a wink, for its shock value on his conversational partner, or to test some belief held by the other party, can now be produced in evidence against him, with all the impact on the grand or petit jury, that we know such a tape recording exerts. In my book, I call this type of physical surveillance "surveillance by reproducibility." I quote from a 1958 opinion of the Bundesgerichtshof, West Germany's highest civil court, the dangers of this type of surveillance. The court states that "freedom and self-determination" are "essential to the development of [the individual's] personality." This freedom includes the right to decide for himself "whether his words shall be accessible solely to his conversation partner, to a particular group, or to the public, and, *a fortiori*, whether his voice shall be fixed on a record." The opinion notes further that the individual expresses his personality in private conversation, and has a right to do so freely, without distrust and suspicion. This expression of personality would disappear if individuals feared that their conversations, even their tone of voice, were secretly being recorded. Men would no longer be able to engage in natural, free discussion.'

It is clear to me that the passage of the Commissions Bill will protect the privacy of the individual while providing law enforcement agencies with the tools they feel are necessary in this technological era.

ELLIOT B. COLE

WILLIAM P. HOMANS, JR.

The Commonwealth of Massachusetts

APPENDIX A

AN ACT REPEALING THE PRESENT WIRETAPPING AND EAVESDROPPING STATUTES AND PROVIDING 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, 100, 101 and 102 of Chapter 272 of the General
2 Laws are hereby repealed and the following section substituted
3 in place thereof.

4 *Section 99.* Interception of wire and oral communications.

5 A. *Definitions.* As used in this section —

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

11 2. The term “oral communications” means speech, except
12 such speech as is transmitted over the public air waves by
13 radio or other similar device.

14 3. The term “intercepting device” means any device or
15 apparatus which is capable of transmitting, receiving, ampli-
16 fying, or recording a wire or oral communication other than a
17 hearing aid or similar device which is being used to correct
18 subnormal hearing to normal.

19 4. The term “interception” means to secretly hear, secretly
20 record, or aid another to secretly hear or secretly record the
21 contents of any wire or oral communication through the use
22 of any intercepting device by any person other than a person
23 given prior authority by all parties to such communication.

24 5. The term “contents,” when used with respect to any
25 wire or oral communication, means any information concern-
26 ing the identity of the parties to such communication or the
27 existence, contents, substance, purport, or meaning of that
28 communication.

29 6. The term “aggrieved person” means any individual who
30 was a party to an intercepted wire or oral communication or
31 who was named in the warrant authorizing the interception
32 or whose personal or property interest or privacy were in-
33 vaded in the course of an interception.

34 7. The term “designated offense” shall include the offenses
35 of murder, armed robbery, prostitution, kidnapping, extortion,
36 suborning perjury, jury tampering, aggravated assault, arson,
37 bribery, gambling, larceny from the commonwealth, lending of
38 money or thing of value in violation of the laws of the com-
39 monwealth, any offense involving commercial dealings in nar-
40 cotics and any violation of the provisions of this section, being
41 an accessory to any of the foregoing offenses, and conspiracy
42 or attempt to commit any of the foregoing offenses.

43 8. The term “investigative or law enforcement officer”
44 means any officer of the United States, a state or a political
45 subdivision of a state, who is empowered by law to conduct
46 investigations of, or to make arrests for the designated of-
47 fenses, any attorney authorized by law to participate in the
48 prosecution of such offenses.

49 9. The term “judge of competent jurisdiction” means any
50 justice of the superior court of the commonwealth.

51 10. The term “chief justice” means the chief justice of
52 the superior court of the commonwealth.

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

57 12. The term “communication common carrier” means any
58 person engaged as a common carrier in providing or opera-
59 ting wire communication facilities.

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

65 14. The terms “sworn” or “under oath” as they appear in
66 this section shall mean an oath or by affirmation or a state-

67 ment subscribed to under the pains and penalties of perjury.
68 15. The terms "applicant attorney general" or "applicant
69 district attorney" shall mean the attorney general of the Com-
70 monwealth or a district attorney of the Commonwealth who
71 has made application for a warrant pursuant to this section.

72 16. The term "exigent circumstances" shall mean the show-
73 ing of special facts to the issuing judge as to the nature of the
74 investigation for which a warrant is sought pursuant to this
75 section which require secrecy in order to obtain the informa-
76 tion desired from the interception sought to be authorized.

77 B. Offenses

78 1. *Interception, oral communications prohibited.*

79 Except as otherwise specifically provided in this section
80 any person who —

81 willfully commits an interception, endeavors to commit
82 an interception, or procures any other person to commit
83 an interception or endeavor to commit an interception of
84 any wire or oral communication shall be fined not more
85 than ten thousand dollars, or imprisoned in the state prison
86 not more than five years, or imprisoned in a jail or house
87 of correction not more than two and one half years, or both
88 so fined any given one such imprisonment.

89 Proof of the installation of any intercepting device by
90 any person under circumstances evincing an intent to com-
91 mit an interception which is not authorized or permitted by
92 this section, shall be prima facie evidence of a violation of
93 this subparagraph.

94 2. *Editing of tape recordings in judicial proceeding pro-* 95 *hibited*

96 Except as otherwise specifically provided in this section
97 any person who —

98 willfully edits, alters or tampers with any tape, trans-
99 cription or recording of oral or wire communication by any
100 means, or endeavors to edit, alter or tamper with any tape,
101 transcription or recording of oral or wire communication
102 by any means with the intent to present in any judicial
103 proceeding or proceeding under oath, or who presents such
104 recording or permits such recording to be presented in any

105 judicial proceeding or proceeding under oath, without fully
106 indicating the nature of the changes made in the original
107 state of the recording, shall be fined not more than ten
108 thousand dollars (\$10,000.00) or imprisoned in the state
109 prison not more than five years or imprisoned in a jail or
110 house of correction not more than two years or both so
111 fined and given one such imprisonment.

112 3. *Disclosure, or use of wire or oral communications pro-* 113 *hibited.*

114 Except as otherwise specifically provided in this section
115 any person who —

116 a. willfully discloses or endeavors to disclose to any
117 person the contents of any wire or oral communication,
118 knowing that the information was obtained through in-
119 terception; or

120 b. willfully uses or endeavors to use the contents of
121 any wire or oral communication, knowing that the infor-
122 mation was obtained through interception shall be guilty
123 of a misdemeanor punishable by imprisonment in a jail
124 or a house of correction for not more than two years or
125 by a fine of not more than five thousand dollars or both.

126 4. *Disclosure of contents of applications, warrants, re-* 127 *newals, and returns prohibited.*

128 Except as otherwise specifically provided in this section
129 any person who —

130 willfully discloses to any person, any information con-
131 cerning or contained in, the application for, the granting
132 or denial of orders for interception, renewals, notice or
133 return on an ex parte order granted pursuant to this sec-
134 tion, or the contents of any document, tape, or recording
135 kept in accordance with paragraph M, shall be guilty of a
136 misdemeanor punishable by imprisonment in a jail or a
137 house of correction for not more than two years or by a
138 fine of not more than five thousand dollars or both.

139 5. *Duty to report to law enforcement officers.*

140 An employee of any communication common carrier who
141 has knowledge obtained during the course of such employ-
142 ment of any violation of this section and willfully fails to

143 report such knowledge within seven days to a district at-
 144 torney general shall be guilty of a misdemeanor punishable
 145 by imprisonment in a jail or a house of correction for not
 146 more than two years or by a fine of not more than five
 147 thousand dollars or both.

148 6. *Possession of Interception Devices Prohibited.*

149 A person who possesses any intercepting device under
 150 circumstances evincing an intent to commit an interception
 151 not permitted or authorized by this Section, or a person who
 152 permits an intercepting device to be used or employed for
 153 an interception not permitted or authorized by this Sec-
 154 tion; or a person who possesses an intercepting device know-
 155 ing that the same is intended to be used to commit an in-
 156 terception not permitted or authorized by this Section, shall
 157 be guilty of a misdemeanor punishable by imprisonment in
 158 a jail or house of correction for not more than two years
 159 or by a fine or not more than five thousand dollars or both.

160 The installation of any such intercepting device by such
 161 person or with his permission or at his direction shall be
 162 prima facie evidence of possession as required by this sub-
 163 paragraph.

164 7. Any person who permits or on behalf of any other
 165 person commits or endeavors to commit, or any person who
 166 participates in a conspiracy to commit or to endeavor to
 167 commit, or any accessory to a person who commits a viola-
 168 tion of subparagraphs 1 through 6 of paragraph B of this
 169 section shall be punished in the same manner as is provided
 170 for the respective offenses as described in subparagraph 1
 171 through 6 of paragraph B.

172 C. *Exemptions.*

173 1. *Permitted interception of wire or oral communications.*

174 It shall not be a violation of this section —

175 a. for an operator of a switchboard, officer, agent or
 176 employee of any communication common carrier, whose
 177 facilities are used in the transmission of a wire communi-
 178 cation, to intercept, to disclose to officers, agents or em-
 179 ployees of a communication common carrier, or use that
 180 communication in the normal course of his employment

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if such interception shall be made necessary in order to
 repair or test equipment and lines of such communi-
 cation common carrier, or

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 paragraph
 E of this section.

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 communi-
 cation, 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 communi-
 cation, or evidence derived therefrom, may use such con-
 tents or evidence in the proper performance of his official
 duties.

c. Any person who has obtained, by any means au-
 thorized by this section, knowledge of the contents of any
 wire or oral communication, or evidence derived there-
 from, may disclose such contents while giving testi-
 mony under oath or affirmation in any criminal proceed-
 ing 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,

219 may otherwise be disclosed only upon a showing of good
220 cause before a judge of competent jurisdiction.

221 D. *Warrants: when issuable.*

222 A warrant may issue only upon sworn application in con-
223 formity with this section and upon a showing by the appli-
224 cant that there is probable cause to believe that the designated
225 offense has been, is being, or is about to be committed and
226 that evidence of the commission of such an offense may thus
227 be obtained or that information which will aid in the appre-
228 hension of a person who the applicant has probable cause to
229 believe has committed, is committing, or is about to commit a
230 designated offense may thus be obtained.

231 E. *Warrants: application.*

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

240 2. The application must contain the following:

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

244 b. A statement of facts establishing probable cause to
245 believe that oral or wire communications of a particularly
246 described person will constitute evidence of such designa-
247 ted offense or will aid in the apprehension of a person
248 who the applicant has probable cause to believe has com-
249 mitted, is committing, or is about to commit a designated
250 offense; and

251 c. That the oral or wire communication of the par-
252 ticularly described person or persons will occur in a par-
253 ticularly described place and premises or over particularly
254 described telephone or telegraph lines; and

255 d. A particular description of the nature of the con-
256 versation sought to be overheard; and

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e. A statement that the conversation sought is ma-
terial to a particularly described investigation or prose-
cution and that such conversation is not legally privileged;
and

f. a statement of the period of time for which the in-
terception is required to be maintained. If practicable,
the application should designate hours of the day or night
during which the conversation may be reasonably ex-
pected to occur. If the nature of the investigation is
such that the authorization for the interception should not
automatically terminate when the described conversa-
tion has been first obtained, the application must specifi-
cally state facts establishing probable cause to believe that
additional conversation 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
intercept device to effectuate the purposes of the appli-
cation, a statement to such effect; and

h. If a prior application has been submitted or a
warrant previously obtained for eavesdropping, a state-
ment fully disclosing the date, court, applicant, execu-
tion, results, and present status thereof; and

8. If there is good cause for requiring the postpone-
ment of service pursuant to paragraph K, subparagraph
2, a description of such circumstances, including reasons
for the applicant's belief that secrecy is essential to ob-
taining 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 fact alleged, it must be so stated. If the facts estab-
lishing 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 in-
formant and, the reliability of the information supplied by

295 him. The application must also state, so far as possible,
296 the basis of the informant's knowledge or belief. If the
297 applicant's information and belief is derived from tangible
298 evidence or recorded oral evidence, a copy or detailed de-
299 scription thereof should be annexed to or included in the
300 application. Affidavits of persons other than the applicant
301 may be submitted in conjunction with the application if
302 they tend to support any fact or conclusion alleged therein.
303 Such accompanying affidavits may be based either on per-
304 sonal knowledge of the affiant or information and belief,
305 with the source thereof, and reason therefor, specified.

306 *F. Warrants; application to whom made.*

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

316 *G. Warrants; application how determined.*

317 1. If the application conforms to paragraph E, the issuing
318 judge may examine under oath any person for the purpose
319 of determining whether probable cause exists for the is-
320 suance of the warrant pursuant to paragraph D. A verbatim
321 transcript of every such interrogation or examination must
322 be taken and a transcription of the same sworn to by the
323 stenographer shall be attached to the application and be
324 deemed a part thereof.

325 2. If satisfied that probable cause exists for the issuance
326 of a warrant the judge may grant the application and issue
327 a warrant in accordance with paragraph H. The applica-
328 tion and an attested copy of the warrant shall be retained
329 by the issuing judge and transported to the chief justice
330 of the superior court in accordance with the provisions of
331 paragraph M of this section.

332 3. If the application does not conform to paragraph E,

333 or if the judge is not satisfied that probable cause has
334 been shown sufficient for the issuance of a warrant, the
335 application must be denied.

336 *H. Warrants; form and content.*

337 A warrant must contain the following:

338 1. The subscription and title of the issuing judge; and
339 2. The date of issuance, the date of effect, and termina-
340 tion date which in no event shall exceed thirty days from
341 the date of effect. The warrant shall permit interception
342 for a period not to exceed fifteen days. If physical instal-
343 lation of a device is necessary, the thirty day period shall
344 begin upon the date of installation. If the effective period
345 of the warrant is to terminate upon the acquisition of
346 particular evidence or information, the warrant shall so
347 provide; and

348 3. A particular description of the person and the place,
349 premises or telephone or telegraph line upon which inter-
350 ception may be conducted; and

351 4. A particular description of the nature of the conversa-
352 tion to be obtained by the interception including a state-
353 ment of the designated offense to which it relates; and

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

358 6. A statement providing for service of the warrant
359 pursuant to Paragraph K, except that if there has been a
360 finding of good cause shown requiring the postponement of
361 such service, a statement of such finding together with
362 the basis therefor must be included and an alternative
363 direction for deferred service pursuant to Paragraph K,
364 Subparagraph 2.

365 *I. Warrants; renewals.*

366 1. Any time prior to the expiration of a warrant or a
367 renewal thereof, the applicant may apply to the issuing
368 judge for a renewal thereof with respect to the same
369 person, place, premises or telephone or telegraph line. An
370 application for renewal must incorporate the warrant sought

371 to be renewed together with the application therefor and
 372 any accompanying papers upon which it was issued. The
 373 application for renewal must set forth the results of the
 374 interceptions thus far conducted. In addition it must set
 375 forth present grounds for extension in conformity with
 376 paragraph E.

377 2. Upon such application, the judge may issue an order
 378 renewing the warrant and extending the authorization for
 379 a period not exceeding fifteen (15) days from the entry
 380 thereof. Such an order shall specify the grounds for the
 381 issuance thereof. An attested copy of the order shall be
 382 retained by the issuing judge to be transported to the chief
 383 justice in attendance with the provisions of sub-paragraph
 384 M of this section.

385 *J. Warrants; manner and time of execution.*

386 1. A warrant may be executed pursuant to its terms
 387 anywhere in the Commonwealth.

388 2. Such warrant may be executed by the authorized
 389 applicant personally or by any investigative or law enforce-
 390 ment officer of the Commonwealth designated by him for
 391 the purpose.

392 3. The warrant may be executed according to its terms
 393 during the hours specified therein, and for the period there-
 394 in authorized, or a part thereof. The authorization shall
 395 terminate upon the acquisition of the conversations de-
 396 scribed in the warrant. Upon termination of the authoriza-
 397 tion in the warrant and any renewals thereof, the inter-
 398 ception must cease at once, and any device installed for
 399 the purpose of the interception must be removed as soon
 400 thereafter as practicable. Entry upon private premises for
 401 the removal of such device is deemed to be authorized
 402 by the warrant.

403 *K. Warrants; service thereof.*

404 1. Prior to the execution of a warrant authorized by this
 405 section or any renewal thereof, an attested copy of the
 406 warrant or the renewal, must, except as otherwise provided
 407 in subparagraph 2 of paragraph K, be served upon a per-
 408 son whose conversation is to be obtained, and if an inter-

409 cepting device is to be installed upon the owner, lessee,
 410 or occupant of the place or premises, or upon the sub-
 411 scriber to the telephone or owner or lessee of the
 412 telegraph line described in the warrant.

413 2. If the application specially alleges exigent circum-
 414 stances requiring the postponement of service and the
 415 issuing judge finds that such circumstances exist, the war-
 416 rant may provide that an attested copy thereof may be
 417 served within thirty days after the expiration of the war-
 418 rant or, in case of any renewals thereof, within thirty
 419 days after the expiration of the last renewal; except that
 420 upon a showing of important special facts which set forth
 421 the need for continued secrecy to the satisfaction of the
 422 issuing judge, said judge may direct that the attested copy
 423 of the warrant be served on such parties as are required
 424 by this section at such time as may be appropriate in the
 425 circumstances but in no event may he order it to be
 426 served later than two (2) years from the time of expi-
 427 ration of the warrant or the last renewal thereof. In the
 428 event that the service required herein is postponed in ac-
 429 cordance with this paragraph, in addition to the require-
 430 ments of any other paragraph of this section, service of
 431 an attested copy of the warrant shall be made upon any
 432 aggrieved person who should reasonably be known to the
 433 person who executed or obtained the warrant as a result
 434 of the information obtained from the interception author-
 435 ized thereby.

436 3. The attested copy of the warrant shall be served on
 437 persons required by this section by any investigative or
 438 law enforcement officer of the commonwealth authorized
 439 to serve criminal process by leaving the same at his usual
 440 place of abode, or in hand, or if this is not possible by
 441 mailing the same by certified or registered mail to his
 442 last known place of abode. A return of service shall be
 443 made to the issuing judge, except, that if such service is
 444 postponed as provided in sub-paragraph 2 of paragraph K,
 445 and in such event to the chief justice. The return of service

446 shall be deemed a part of the return of the warrant and
447 attached thereto.

448 L. *Warrant; return.*

449 Within twenty-one days after termination of the warrant
450 or the last renewal thereof, a return must be made there-
451 on to the judge issuing the warrant by the applicant
452 therefor, containing the following:

- 453 a. a statement of the nature and location of the com-
454 munications facilities, if any, and premises or places
455 where the interceptions were made; and
- 456 b. The periods of time during which such interceptions
457 were made; and
- 458 c. the names of the parties to the communications inter-
459 cepted if known; and
- 460 d. the original recording of the oral or wire communica-
461 tions intercepted, if any; and,
- 462 e. a verbatim transcript of any recording made pursuant
463 to the warrant attested under the pains and penalties of
464 perjury as a true transcript of the oral or wire com-
465 munications contained in the recording to the best
466 ability of the person who so transcribed it and a
467 statement attested under the pains and penalties of
468 perjury by each person who heard oral or wire com-
469 munications as a result of the interception authorized
470 by the warrant which was not recorded stating every-
471 thing that was overheard to the best of their recollec-
472 tion at the time of the execution of the statement.

473 M. *Custody and Secrecy of papers and recordings made*
474 *pursuant to a warrant.*

475 1. The contents of any wire or oral communication in-
476 tercepted pursuant to a warrant issued pursuant to this
477 section shall, if possible be recorded on tape or wire or
478 other similar device. Duplicate recordings may be made
479 for use pursuant to subparagraphs 2(a) and (b) of para-
480 graph C for investigations. Upon examination of the re-
481 turn and a determination that it complies with this sec-
482 tion, the issuing judge shall forthwith order that the appli-
483 cation, warrant, all renewal orders and the return thereof

484 be transmitted to the chief justice by such persons as he
485 shall designate. Their contents shall not be disclosed ex-
486 cept as provided in this section. The application, warrant,
487 the renewal order and the return or any one of them or
488 any part of them may be transferred to any trial court,
489 grand jury proceeding of any jurisdiction by any law en-
490 forcement or investigative officer designated by the chief
491 justice upon application made as provided herein and a
492 trial justice may allow them to be disclosed in accordance
493 with paragraph C, subparagraph 2, or paragraph N or
494 any other applicable provision of this section.

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

501 2. Upon application to the chief justice,

502 a. ex parte by the applicant district attorney or his suc-
503 cessor or the applicant attorney general or his successor,
504 the application, warrant, renewal orders, or return, shall
505 be made available for their use under such conditions as
506 will comply with the provisions of this section.

507 b. ex parte by any person or his attorney who is named
508 in the application, warrant, any renewal orders or the re-
509 turn or who can offer evidence sufficient to show that
510 his oral or wire communications have been intercepted
511 pursuant to a warrant, an attested copy of the application,
512 and statement, which are a part of the return as required
513 and statement, which are a part of the return as required
514 by this section shall be made available without charge
515 upon oath or affirmation by the person or his attorney
516 that the items described herein or any one of them, or
517 information contained therein is to be used in any criminal
518 proceeding in any jurisdiction where the person is a de-
519 fendant.

520 c. to any other person who shall have need in the interest
521 of justice and in accordance with the purposes of this act,

522 the original or copies of the application, warrant, renewal
 523 orders, and return, or all of them under such terms or
 524 conditions as the chief justice shall determine. Such appli-
 525 cation shall be upon oath or affirmation by the person
 526 and shall state sufficient reliable facts to enable the chief
 527 justice to determine from its face the interception sought.
 528 In the event the application does not so state such facts
 529 the chief justice shall deny it. In the event the application
 530 shall state such sufficient facts the chief justice shall cause
 531 the applicant district attorney or attorney general or their
 532 their respective successors to be notified of the application
 533 pursuant to this sub-paragraph. If the district attorney
 534 or attorney general submit to the chief justice a statement
 535 in writing upon oath or affirmation within thirty (30)
 536 days following notification stating that the information
 537 sought must remain secret for investigative purposes, the
 538 chief justice must refuse to grant an application pursuant
 539 to this sub-paragraph. In such event he may require the
 540 district attorney or attorney general to designate a date
 541 at which time the information may be made available
 542 to the person making the application in the event the
 543 chief justice shall determine that the person has need in
 544 the interests of justice and in accordance with the pur-
 545 poses of this act. Such a date may not exceed three (3)
 546 years from the date of an application pursuant to the sub-
 547 paragraph nor may it exceed thirty (30) days prior to
 548 the date of destruction of the respective document or
 549 items as required by this section whichever is sooner.
 550 Determination of the need of the person applying pursuant
 551 to this sub-paragraph shall be in the discretion of the chief
 552 justice.

553 d. Except as provided by other provisions of this section,
 554 in no event until an application is granted pursuant to
 555 sub-paragraphs a, b, c of paragraph M by the chief justice
 556 or upon order granted by the Supreme Judicial Court
 557 after appeal, shall the person applying pursuant to sub-
 558 paragraphs a, b or c of Paragraph M or any person on
 559 his behalf at any time or for any reason have any right

560 nor be granted permission to examine any of the applica-
 561 tions, warrants, renewals orders, or returns in the custody
 562 of the chief justice.

563 e. In addition to any other appeal provided by law,
 564 failure by the chief justice to grant an application pursuant
 565 to sub-paragraph a, b, or c of Paragraph M may be ap-
 566 pealed within twenty (20) days to the Supreme Judicial
 567 Court in Suffolk County by the applicant or his attorney.
 568 The granting of an application pursuant to sub-paragraph
 569 c of section M may be appealed by the applicant district
 570 attorney or attorney general or their respective successors
 571 within twenty (20) days to the supreme judicial court in
 572 Suffolk County. The supreme judicial court may take ad-
 573 ditional testimony, may order the production for its use
 574 of any of the applications, renewal orders, warrants or
 575 returns or copies thereof as it may require for determina-
 576 tion of the issues by it.

577 f. Any violation of the terms and conditions of the chief
 578 justice or any order of the supreme judicial court pursuant
 579 to the authority granted in Paragraph M or the conditions
 580 set forth in Paragraph M shall be punished as a criminal
 581 contempt of court in addition to any other punishment
 582 authorized by law.

583 g. The application, warrant, renewal and return shall be
 584 kept for a period of five (5) years from the date of the
 585 issuance of the warrant or the last renewal thereof at
 586 which time they shall be destroyed by a person designated
 587 by the chief justice. Notice of the destruction shall be
 588 given to the applicant attorney general or his successor
 589 or the applicant district attorney or his successor and upon
 590 a showing of good cause to the chief justice, the applica-
 591 tion, warrant, renewal, and return may be kept for such
 592 additional period as the chief justice shall determine but
 593 in no event longer than the longest period of limitation
 594 for any designated offense specified in the warrant, after
 595 which time they must be destroyed by a person designated
 596 by the chief justice.

597 N. *Introduction of evidence.*

598 Notwithstanding any other provisions of this section or
 599 any order issued pursuant thereto, in any criminal trial
 600 where the Commonwealth intends to offer in evidence any
 601 portions of the contents of any interception or any evidence
 602 derived therefrom, the defendant shall be served with a
 603 complete copy of each document and item which make
 604 up each application, warrant, renewal orders, and return
 605 pursuant to which the information was obtained, except
 606 that he shall be furnished a copy of any recording instead
 607 of the original. The service must be made at the arraignment
 608 of the defendant or, if a period in excess of thirty
 609 (30) days shall elapse prior to the commencement of the
 610 trial of the defendant, the service may be made at least
 611 thirty (30) days before the commencement of the criminal
 612 trial. Service shall be made in hand upon the defendant
 613 or his attorney by any investigative or law enforcement
 614 officer of the Commonwealth authorized to serve criminal
 615 process. Return of the service required by this sub-para-
 616 graph including the date of service shall be entered into
 617 the record of trial of the defendant by the Commonwealth
 618 and such return shall be deemed prima facie evidence
 619 of the service described therein. Failure by the Common-
 620 wealth to make such service at the arraignment or if de-
 621 layed at least thirty (30) days before the commencement
 622 of the criminal trial shall render such evidence illegally
 623 obtained for purposes of the trial against the defendant
 624 and such evidence shall not be offered nor received at
 625 the trial notwithstanding the provisions of any other law
 626 or Rules of Court.

627 P. *Suppression of evidence.*

628 Any aggrieved person who is a defendant in a criminal
 629 trial in a court of the commonwealth may move to sup-
 630 press the contents of any intercepted wire or oral com-
 631 munication or evidence derived therefrom, for the follow-
 632 ing reasons:

633 1. That the communication was unlawfully intercepted.

634 2. That the communication was not intercepted in ac-
 635 cordance with the terms of this section.

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

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

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

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

645 Q. *Civil Remedy.*

646 Any aggrieved person whose oral or wire communica-
 647 tions were intercepted, disclosed or used except as permit-
 648 ted or authorized by this section or whose personal
 649 or property interests or privacy were violated by means
 650 of an interception except as permitted or authorized by
 651 this section shall have a civil cause of action against any
 652 person who so intercepts, discloses or uses such communi-
 653 cations or who so violates personal, property or privacy
 654 interest and shall be entitled to recover from any such
 655 person —

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

659 2. punitive damages; and

660 3. a reasonable attorney's fee and other litigation dis-
 661 bursements reasonably incurred. Good faith reliance on a
 662 warrant issued under this section shall constitute a com-
 663 plete defense to an action brought under this paragraph.

664 R. *Annual Report of Interceptions of the General Court.*

665 On the second Friday of January, each year, the attorney
 666 general and each district attorney shall submit a report
 667 to the general court stating (1) the number of applications
 668 made for warrants during the previous year, (2) the name
 669 of the applicant, (3) the number of warrants issued, (4)
 670 the effective period for the warrants, (5) the number and
 671 designation of the offenses for which those applications

672 were sought, and for each of the designated offenses the
673 following: (a) the number of renewals, (b) the number
674 of intercepts made during the previous year, (c) the num-
675 ber of indictments believed to be obtained as a result of
676 those intercepts, (d) the number of criminal convictions
677 obtained in trials where interception evidence was intro-
678 duced. This report shall be a public document and be
679 made available to the public at the offices of the attorney
680 general and district attorneys. In the event of failure to
681 comply with the provisions of this paragraph any person
682 may compel compliance by means of an action of manda-
683 mus.

684 S. *Severability.*

685 If any provision of this section or application thereof
686 to any person or circumstances is held invalid, such inval-
687 idity shall not affect other provisions of applications of the
688 section which can be given effect without the invalid pro-
689 vision or application, and to this end the provisions of this
690 section are declared to be severable.