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UNITED STATES GOVERNMENT

Memorandum

TO : Mr. W. C. Sullivan

FROM : R. W. Smith

SUBJECT: MICROPHONES
POLICY BRIEF

1 - DeLoach 1 - Tavel
1 - Mohr 1 - Trotter
1 - Wick 1-Baumgardner
1 - Casper
DATE: 7-12-66

1 - N.P. Callahan
1 - Conrad
1 - Felt 1-R.W. Smith
1 - Gale 1-Gray
1 - Rosen
1 - W.C. Sullivan

Tolson
DeLoach
Mohr
Wick
Casper
Callahan
Conrad
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Gale
Rosen
Sullivan
Tavel
Trotter
Tele. Room
Holmes
Gandy

JUNE

It is recommended that the enclosed document entitled "Microphones; Policy Brief" and its accompanying three volumes of numbered exhibits, prepared by the Research Unit of the Research-Satellite Section in close coordination with the Special Investigative Division, be forwarded to the Director for his information and that this brief be updated as required.

The Director's views on eavesdropping by means of electronic devices have been long-standing and openly expressed. With regard to wiretapping, for example, the Director has steadfastly held his ground. In public statements, in discussions with and recommendations to various Attorneys General and in opinions solicited by other Government officials and members of Congress, the Director has continued to caution against the evil that could result through the indiscriminate use of these devices and from the lack of tight administrative controls over their operation.

It is apparent from the widespread press coverage and public discussion of the topic of electronic eavesdropping that the imprecise use of terminology has led to misunderstanding, if not confusion. Microphone surveillances are separate and distinct, although at times related to, technical or telephone surveillances. The use of microphones by the FBI has been brought into issue most recently in the civil suits in Las Vegas involving FBI personnel and in the Fred Black case. This brief attempts to examine microphone surveillances in detail and to trace definitively and authoritatively the legal problems and development of Bureau policy in this highly sensitive area. A separate policy brief on the subject of wiretapping is currently being prepared.

This brief, then, is a study in depth of the history of Bureau policy concerning microphone surveillances. It traces that policy from 1938 when Bureau authority was first required for their use through the continual dealings with the Department for legal guidance and counsel. It relates the

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Enclosures
AWG [redacted]
(10)

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significant court decisions in this area of the law, sets forth the Department's legal advice to the Bureau, and illustrates the Bureau's practical implementation of that guidance.

Throughout this document, the Department's knowledge and/or approval of microphone surveillances are documented. Of particular significance are the Bureau's efforts to obtain Departmental backing for the use of microphones involving trespass after Attorney General McGrath in February, 1952, ruled that he could not authorize them. Confronted with the absolute necessity of using this investigative technique to fulfill its pressing responsibilities, the Bureau began negotiations with the Department culminating in a memorandum from Attorney General Brownell on 5-20-54 which formed the basis for the Bureau's subsequent use of microphones involving trespass in both the security and criminal fields.

Of more recent interest the brief traces Bureau policy through the tenure of Attorney General Kennedy and his drive against organized crime. It documents in detail Mr. Kennedy's knowledge of and approval for microphone surveillances in investigations of organized crime. Moreover the brief sets forth factually the knowledge of Mr. Kennedy's staff that this technique was being used by the FBI. Finally, the brief brings Bureau policy up to date through the tenure of Attorney General Katzenbach.

In this brief an objective study in depth was undertaken to provide the Director with a clear picture of the development of Bureau policy involving microphone surveillances. This brief sets forth documented facts which willnot only defend the Bureau against criticism but also present a positive and convincing case for the Bureau's tightly controlled and strictly limited use of microphone surveillances to achieve investigative coverage essential to the national safety and welfare.

RECOMMENDATIONS:

1. That the enclosed policy brief be furnished to the Director for his information. (A detailed table of contents has been prepared for the Director's ready referral and use. Exhibits mentioned in the brief are keyed by numbers to the documents tabbed in the accompanying three volumes of exhibits).

2. That this brief continue to be updated as required.

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MICROPHONES

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED EXCEPT
WHERE SHOWN OTHERWISE.

Class. & Ext. By SP4 RM/cat
Reason-FCIM II, 1-2.4.2 2.3
Date of Review 9-12-86
3-15-82

Classified by SP4 ELW/cal
Declassify on: OADR
5/26/83

POLICY BRIEF

THIS BRIEF CONTAINS MATERIAL
CLASSIFIED ~~"SECRET"~~

Mr. Tolson
Mr. DeLoach
Mr. Mohr
Mr. Wick
Mr. Casper
Mr. Callahan
Mr. Conrad
Mr. Felt
Mr. Gale
Mr. Rosen
Mr. Sullivan
Mr. Tavel
Mr. Trotter
Tele. Room
Miss Holmes
Miss Gandy

Classified by 675
Exempt from GDS Category 2 and 3
Date of Declassification Indefinite

8-17-66
~~July 11, 1966~~

6/17/[illegible]

AWG,JEK:[redacted]

NOTE: See memorandum, R. W. Smith to W. C. Sullivan, 7/12/6
re "Microphones Policy Brief" AWG[redacted]

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ENCLOSURE

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SUMMARY

Extensive file reviews disclosed only that the early use of microphones by the FBI is not recorded in any detail. It appears that microphones were used by the FBI in the late 1920's and early 1930's to obtain intelligence in criminal cases. Prior Bureau authorization for microphone installations was first required in 1938 and since that time Bureau headquarters has maintained tight control over the field in the use of these devices.

Over the years, the FBI continually sought legal advice from the Department concerning microphone installations and the admissibility of evidence obtained from them. In the early 1940's the Department relied on a significant Supreme Court decision, Goldman v. United States, which held that a microphone surveillance was not equivalent to an illegal search and seizure prohibited by the Fourth Amendment. On the basis of this decision, Alexander Holtzoff, Special Assistant to the Attorney General, even advised that evidence obtained from a microphone installed by trespass would be admissible, because a microphone surveillance was not equivalent to an illegal search and seizure.

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Recognizing the unsettled state of the law in this area, the Department in 1946 observed significantly, "...the operation of the FBI in detecting crime should not be disturbed merely upon a possibility..." Despite this comment by the Department, Bureau officials continued to be concerned about the admissibility of evidence obtained from microphones involving trespass.

In a review of existing policy on microphone installations by the Executive Conference on June 9, 1950, it was noted that the Department had knowledge of the FBI's use of microphones involving trespass in some cases. Nevertheless, the Bureau was installing and using microphones on its own authority--without authorization from the Department. The comment was made that the Bureau, in countenancing illegal activities by authorizing some microphones which involved trespass, was influenced by its overriding obligations to gather intelligence information in the security field and to safeguard the welfare of the country.

In this situation, the Bureau faced a dilemma. Although the Attorney General had authority by Presidential Directive to approve wire taps, he had no such

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authority in regard to microphone installations. The Executive Conference observed that if the FBI asked the Attorney General for authority to install microphones it would, in most instances, amount to a request for authority to engage in an illegal activity (trespass). Obviously, it was extremely doubtful that the Attorney General would grant such authority. Thus, to raise this issue with the Attorney General might result, when trespass was involved, in the loss of this investigative technique so vital to the fulfillment of the Bureau's responsibilities.

The over-all issue of the use of microphones involving trespass was presented directly to the Department in October, 1951. Attorney General McGrath replied as follows on February 26, 1952, "The records do not indicate that this question dealing with microphones has ever been presented before; therefore, please be advised that I

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cannot authorize the installation of a microphone involving trespass under existing law." The Director ordered that FBI microphone installations involving trespass be terminated at once. This was done except for three microphones in security cases.

Following Mr. McGrath's ruling, the Bureau began discussions with the Department because it was confronted with the problem of what actually constituted trespass in the then existing law. At this time, 1952, the Department believed that any microphone installation, except a contact device, constituted trespass unless approval were given by someone who controls the premises, such as a Bureau informant.

Faced with this situation, the Executive Conference of May 5, 1952, unanimously recommended approval of the following which became Bureau policy:

(1) that, basically, microphones be installed without trespass; (2) that, if this is not possible, and the intelligence to be gained is a necessary adjunct to the investigation in select cases, consideration be given to authorizing a microphone. After the Director

conferred with Attorney General McGranery on June 6, 1952, the Attorney General authorized microphone installations in security cases even though trespass might be committed.

Bureau officials had regular discussions with Departmental Attorneys in an attempt to obtain a modification of the Department's strict interpretation of what constituted trespass in the installation of microphones. These discussions were influenced by a 1954 Supreme Court decision, Irvine v. California. Although the Court held that evidence obtained illegally by police from a microphone installed in a bedroom was admissible in a state court on a gambling charge, it described the conduct of the police as "incredible." This led the Department to conclude that the Court might decide the admissibility of evidence obtained by Federal officers from a microphone by balancing their "reprehensible" conduct against the nature of the crime and the weight of the evidence.

The negotiations with Departmental Attorneys for a modification of their interpretation of trespass

culminated in a memorandum from Attorney General Brownell dated May 20, 1954. The Bureau had previously reviewed and approved his final draft of this memorandum. In that review, it was pointed out that the memorandum gave the Bureau a "green light" for the use of microphones in internal security cases. Relative to criminal cases, it was noted that the Attorney General was "not as strong but he takes cognizance of the need for microphone surveillances in cases affecting the national safety and indicates they should be used in only the more important investigations."

Following the receipt of this memorandum from Attorney General Brownell, the Director instructed that Mr. Tolson should pass on all microphone installations whether or not trespass was involved.

When the Bureau's Criminal Intelligence Program, as it exists today, was instituted in November, 1957, the field was instructed that no requests for technical coverage (wire taps) would be considered. Relying on the authority of Mr. Brownell's memorandum of May 20, 1954, the Bureau urged the field to use microphone surveillances in this Program.

The constant Bureau re-evaluation of policy concerning microphone surveillances caused the Executive Conference to again consider, on July 20, 1959, whether the Bureau should seek approval from the Attorney General before instituting microphone surveillances in specific criminal cases. The Executive Conference unanimously agreed, and the Director approved, that the Bureau should continue, as in the past, to rely upon the authority contained in Attorney General Brownell's May 20, 1954, memorandum. This policy was still being followed on January 21, 1961, when Robert Kennedy, who had already built a public image as a crusader against crime, became Attorney General and launched an intensified Federal drive against organized crime.

While Mr. Kennedy was Attorney General he had a close personal relationship with former FBI Assistant Director Courtney Evans who not only served in a liaison role between the FBI and the Attorney General, but also supervised the Bureau's drive against organized crime. Through this liaison, Mr. Kennedy had an opportunity to learn daily of the Bureau's progress in its investigation of organized crime.

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Early in Mr. Kennedy's tenure as Attorney General, his Deputy, Byron White, was furnished a memorandum dated May 4, 1961, for the Attorney General's information. This memorandum stated that the FBI policy on the use of microphone surveillances, with or without trespass, was based upon the May 20, 1954, memorandum from former Attorney General Brownell. It was also pointed out that the FBI was using microphone coverage on a restricted basis to obtain intelligence against organized crime.

When Mr. Evans told Mr. Kennedy in July, 1961, that the FBI was not using wire taps but was using microphones in its investigation of organized crime, the Attorney General stated that he was pleased that the FBI had been using microphone surveillances in organized crime matters.

(4)(D)

(C) Mr. Kennedy's knowledge of FBI's use of microphones in its investigation of organized crime is clearly evident in his written approval, on August 17, 1961 [redacted] In addition,

(7)(C)

Mr. Kennedy, in August, 1961, requested an "appropriate surveillance" of [redacted] who represented James Hoffa. Mr. Kenredy was furnished daily results of a microphone surveillance on [redacted] On

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another occasion, Mr. Kennedy revealed that he was aware that the FBI used microphones when he asked Mr. Evans to determine if the FBI had conducted a microphone surveillance on a former Chief Counsel for the Atomic Energy Commission.

Mr. Kennedy also listened, in March, 1963, to a tape recording in the FBI's Chicago Office. This recording was made from an FBI microphone surveillance. Again, when he was in the FBI's New York Office in November, 1963, Mr. Kennedy listened to a tape recording of a conversation between two La Cosa Nostra leaders. In both instances, the circumstances indicated that the recordings came from FBI microphone surveillances.

Moreover, members of Mr. Kennedy's staff were aware, on a continuing basis, of the FBI's use of microphones. For example, members of his staff were present in Chicago and in New York City when he listened to recordings from FBI microphone surveillances. Of significance, is a letter sent to Senator Sam J. Ervin, Jr., of North Carolina, by Assistant Attorney General Herbert J. Miller of the Criminal Division on May 25, 1961. In this letter, Mr. Miller said he had learned from the FBI that it was then using electronic listening devices to obtain intelligence regarding organized crime.

On April 9, 1964, the Director, in a memorandum to Assistant Attorney General Miller, stated, "...as the Department knows, this Bureau does utilize, on a very restricted basis, electronic investigative aids in the investigation of important matters affecting the security of the country and in the collection of important criminal intelligence information relating to organized crime..."

Mr. William Hundley, Chief of the Department's Organized Crime and Racketeering Section when Mr. Kennedy was Attorney General, stated in an interview by FBI representatives on December 30, 1965, that he had been aware, at the time, that the FBI had been using microphones in its investigation of the underworld "skimming operations" from gambling receipts at casinos in Las Vegas, and had discussed microphone coverage in Las Vegas with Assistant Attorney General Miller.

In regard to security matters, the FBI has broad authority through the President's Foreign Intelligence Advisory Board to collect foreign intelligence in the United States. [redacted]

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[redacted]

Bureau policy on the use of microphone surveillances has undergone several major changes during the time Mr. Katzenbach has been Attorney General. On March 30, 1965, Mr. Katzenbach requested that, in line with similar procedures of long standing regarding technical surveillances (wire taps), requests for each microphone surveillance be submitted to him for approval.

In view of hearings being conducted by the Long Committee and the pressure it was bringing to bear on the Internal Revenue Service, the Attorney General stated, on July 12, 1965, that he wanted to be in a position to state that the FBI had no microphone coverage. The Director, in ordering the discontinuance of all microphone surveillances, noted that he realized the value of microphone installations in both security and criminal investigations, but he had to comply with the will of Congress and the desire of the Attorney General.

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Attorney General Katzenbach again authorized microphone surveillances in security cases on September 27, 1965. Although he said he recognized the need for microphone surveillances for intelligence relating to organized crime, the Attorney General stated that such coverage should be limited to security cases "in the light of the present atmosphere."

[redacted]

Newspaper and other sources have reported that former Attorney General Kennedy allegedly stated that he

never authorized microphone surveillances in FBI investigations of organized crime. In addition, Mr. Katzenbach has stated that Mr. Kennedy told him that he was unaware of the FBI's use of microphone surveillances against organized crime. Mr. Katzenbach has, however, said "that the actions of the FBI in this area were in any event justified on the basis of understandings between the Bureau and prior (pre-1961) Attorneys General. He added, "I am prepared to stand behind those actions."

DEFINITION OF TERMS

Any clear comprehension of the problems involved in eavesdropping by means of electronic devices requires a precise definition of the terms involved. It is apparent from the widespread press coverage and public discussion of this topic that the imprecise use of terminology has led to misunderstanding, if not outright confusion. Therefore, for the purposes of this brief and in accordance with Bureau usage since May, 1943, the following definition of terms will be used:

Wire Tap (also known as Wire Tap Surveillance, Telephone Surveillance, Technical Surveillance, Tesur)

A wire tap is the monitoring of both ends of a telephone conversation. It is usually accomplished by physically attaching a device to the telephone line.

Microphone (also known as Microphone Surveillance, Misur)

A microphone is a device used to eavesdrop by mean other than wire tapping. Described below are several variations of microphones some of which involve the use of teleph lines and/or equipment but do not constitute wire taps as defined above.

[redacted]

(b)(1)

[redacted]

Combination Wire Tap and Microphone

In some instances, a microphone is concealed in a telephone instrument for the purpose of monitoring conversa in the area of the instrument as well as both ends of the telephone conversations. This is considered a combination wire tap and microphone.

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EARLY POLICY

Early Use of Microphones by FBI

Extensive file reviews disclose only that the early use of microphones by the FBI is not recorded in any detail. It appears that microphones were used by the FBI during the 1920's [redacted] (C)

[redacted] In the late 1920's and in the 1930's, their use was confined to the obtaining of intelligence information in criminal cases. (Exhibit 1)

Bureau Authorization First Required in 1938

In a memorandum from Mr. E. P. Coffey to Mr. Nathan, dated June 3, 1938, the Technical Laboratory expressed the opinion that the question of prior Bureau authorization for the installation of a microphone had not previously arisen. Mr. E. A. Tamm noted on this memorandum that Bureau authorization should be obtained on all occasions. (Exhibit 2)

This requirement for prior Bureau authorization to install a microphone was incorporated in the Manual of Rules and Regulations on November 1, 1938, and read as follows:

[redacted] (Exhibit 3)

Today, a substantially similar provision of the Manual of Rules and Regulations reads,

[redacted] (Exhibit 4)

Instructions to Field, 1941, 1944

All Special Agents in Charge were advised by letter dated September 5, 1941, that all requests for the installation of microphone surveillances must be made by the Special Agent in Charge or the Acting Special Agent in Charge and must be made telephonically to Mr. Tamm or, in his absence, to Mr. Tolson. This letter also stated that Messrs. Tamm and Tolson would not authorize the installation of a microphone surveillance except upon the personal instructions of the Director. (Exhibit 5) These instructions were later modified on April 22, 1944, to permit the field to make the requests by coded teletype or by confidential letter as well as by teletype. (Exhibit 6)

LEGAL INTERPRETATIONS

Supreme Court Decision in Goldman Case, 1942

An important decision involving the use of a microphone was rendered by the United States Supreme Court on April 27, 1942. In this case, Goldman v. United States, the Court held that conversations overheard by Federal agents through the [redacted] (6)(7)(C) installed on a wall adjoining the defendant's room were admissible and that the use of such an instrument was not a violation of the Fourth Amendment's provision against illegal searches and seizures. It is significant to note, however, that the installation of the instrument which produced the evidence did not involve a trespass. (316 U.S. 129)

FBI Distinction between Technical & Microphone Surveillances, 1943

All Special Agents in Charge were advised by letter dated May 15, 1943, that the term technical surveillance would be construed to mean a telephone surveillance as distinguished from a microphone surveillance. (Exhibit 7) The letter stated that it was essential that

this distinction be borne in mind when requesting authorization because microphone surveillances were authorized by the Bureau but technical surveillances had to be approved by the Attorney General.

At the time the letter of May 15, 1943, was written, the Attorney General had authority by virtue of a Presidential Directive of 1940 to approve wire tapping. (Exhibit 8) This Presidential Directive is still in effect today. On the other hand, the Attorney General had not been given similar authority to approve microphone surveillances at that time.

Legal Guidance Sought from Department, 1944

It is clearly evident that Bureau policy on microphone installations was influenced by answers to a series of hypothetical questions provided in a memorandum dated July 4, 1944, by Alexander Holtzoff, Special Assistant to the Attorney General. (Exhibit 9) The Director's inquiry which prompted Holtzoff's answers was the first in what was to become a series of requests over the years posing hypothetical situations involving the use of microphones and seeking legal advice and guidance from the Department.

Pertinent portions of Holtzoff's reply were incorporated in a letter to all Special Agents in Charge dated August 15, 1944. (Exhibit 10) The following pertinent quotations are taken from this letter:

> "'1. Where a contact microphone is used upon the outer extremities of the premises and where no trespass has been made upon the premises from which the information is being obtained.'
>
> "The evidence so obtained is clearly admissible.
>
> "'2. Where a microphone, not a contact microphone, is placed against the innermost property line of the premises of the individual in question. The type of installation had in mind is where the wall, baseboard, or other property is gone through from an adjoining room and the microphone placed against the wall, baseboard, telephone box, etc., of the premises in question.'
>
> "The evidence so obtained is clearly admissible. It should be borne in mind in this connection... that evidence obtained by a trespass not amounting to an unlawful search and seizure is not rendered inadmissible merely because of the means by which it was secured.
>
> "'3. Where entrance is had into the premises in question with permission of the janitor, manager, or anyone else in authority and a microphone installation made within the confines of the room itself. It will be appreciated if an opinion is ventured in this regard: first, where the installation is made prior to the time that the person actually takes possession of the property;

second, where the installation is made after the person is actually in possession and occupying the premises.'

"The evidence is clearly admissible if the installation is made prior to the time when the subject actually takes possession of the property. On the basis of the principles heretofore stated, it would seem also that the evidence should be admissible even if the installation is made while the subject is actually in possession and occupying the premises.

"'4. Where the existing facilities within the premises are used merely through a means of rewiring the same. It is meant by this that no actual microphone is installed and that the facilities presently on the premises are used for this purpose. It will be appreciated in this regard if you will venture an opinion: first, where the same is installed with permission of the janitor, manager, or other person of possible authority; second, where an actual trespass is committed.'

"The answer applicable to case No. 3, just discussed, also governs the situation in case No. 4. It is understood that rewiring does not involve any interception of a conversation passing over a telephone wire.

"'5. Where an actual trespass is committed and a microphone installation is made within the confines of the premises in question.'

"On the basis of the principles heretofore discussed, it would seem that evidence so obtained should be admissible, although no precise case decided by the courts involving such a situation has been found. The basic principle governing the situation is the one heretofore discussed, namely, that trespass not amounting to unlawful search and seizure

does not vitiate the evidence obtained thereby and that microphone surveillance is not equivalent to an illegal search and seizure,* Goldman v. United States, 316 U.S. 129.

"'6. Where a microphone installation is made in a hall or room subject to public hire. In this regard it will be appreciated if you will offer an opinion in the event the installation is made prior to the actual hiring of the hall and after the actual hiring of the hall by the person in question, and where the installation is made with the permission of the management and/or as a result of trespass.'

"In all of the situations envisaged within the foregoing question, it would seem that the evidence is admissible on the principle heretofore discussed. There is clearly no doubt as to its admissibility in the event that the installation is made prior to the actual hiring of the hall and with the permission of the management. While the question is not equally clear in the other instance, it would seem that on the general principle heretofore discussed, the evidence obtained under all of the sets of facts covered by case No. 6, should be admissible."

It should be emphasized that Mr. Holtzoff relied heavily on the decision in Goldman v. United States, particularly that portion of the decision which held that a microphone surveillance was not equivalent to an illegal search and seizure prohibited by the Fourth Amendment.

*Underlining added for emphasis

Instructions to Field, 1944, 1945

Tight Bureau supervision of technical and microphone surveillances is manifest in a letter addressed to all Special Agents in Charge on November 18, 1944. (Exhibit 11) It was stated in this letter that instructions requiring specific Bureau approval for the installation of any technical or microphone surveillance were first issued in a letter to all Special Agents in Charge on September 5, 1941, and had been brought to their attention on several occasions thereafter. These instructions were again being brought to their attention to insure that there would be no possibility of misunderstanding and to advise them that any deviation from these instructions would result in the most drastic administrative action.

Five months later, on April 18, 1945, all Special Agents in Charge were again reminded that they, or the Assistant Special Agents in Charge, must personally approve all requests sent to the Bureau for technical or microphone surveillances. (Exhibit 12)

Legal Guidance Obtained from Department, 1946, 1947

The Bureau's concern for close supervision and tight control of microphones is evident again in the early postwar period. Following the pattern of presenting hypothetical situations involving the use of microphones which had been established by the memorandum to Special Assistant to the Attorney General Holtzoff in 1944, the Director continued to make similar inquiries of the Department.

Assistant Attorney General T. Lamar Caudle responded to one such inquiry by memoranda dated December 3 and December 13, 1946. (Exhibit 13) The Department's answers to these hypothetical situations revealed a transformation in its interpretation of the law regarding the admissibility of evidence obtained from microphones.

In brief, Mr. Holtzoff had felt that the evidence might be admissible even if a trespass were committed, because a microphone did not constitute an unreasonable search and seizure under the Fourth Amendment. The Department was now of the opinion that evidence against the defendant obtained from a microphone would not be admissible even if entry into the space were made under color of authority, such as with the cooperation of a landlord or hotel manager.

In rendering this opinion, the Department stated:

> "...Heretofore in every case in which the search and seizure have been denounced and the evidence held inadmissible as constituting a violation of the rights secured by the Fourth and Fifth Amendments there has been a physical trespass against the defendant.
>
> "Therefore, it would seem that where there has been a physical trespass upon the premises occupied by the defendant which directly results in affording the Federal agents with the means of listening to private conversations, the evidence obtained by that means would be inadmissible on the ground that it was obtained by an illegal search and seizure. The hypothetical situations listed by the Director of the FBI pose varying degrees of trespass. The answers to the problems presented are a matter of judgment which must be based upon the relationship between the trespass and the ability to overhear the conversation."

It is worthy of note that the Department stressed the physical aspect of the trespass involved in the installation of the microphone. It continued to rely on the authority of Goldman v. United States in stating that there would be no violation of the defendant's constitutional rights when the microphone was not installed within the premises occupied by the defendant and there was no trespass on those premises.

In rendering its opinions on these hypothetical situations, the Department noted the unsettled state of the law in this area and, where it was not sure of its ground because there was no case in point, it observed significantly,

> "...the operation of the FBI in detecting crime should not be disturbed merely upon a possibility..."

After a thorough study of this Departmental opinion, the Bureau incorporated the results into a letter to All Special Agents in Charge dated March 31, 1947. (Exhibit 14)

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PROBLEM OF MICROPHONES INVOLVING TRESPASS

Review of Bureau Policy by Executive Conference, June 9, 1950

The unsettled law regarding the admissibility of evidence obtained from microphones was obviously of continuing concern to Bureau officials. That concern and a realistic effort to deal with this situation are reflected in the deliberations of the Executive Conference held on June 9, 1950. (Exhibit 19) The Conference dealt with the problems inherent in the use of three types of microphone installations: (1) [redacted] which, in addition to monitoring conversations in a room, overhears both sides of any conversation on the telephone; (2) a microphone installed in the space either occupied by the subject or in which the subject is located at the time the conversation occurs; and (3) a microphone located outside the space occupied by a subject, such as a contact microphone on an adjoining wall which does not involve trespass.

The Executive Conference reviewed existing policy on these types of installations and noted that in none of the three installations cited did the Bureau advise the

Department or seek authority for the installation of the microphone* It was noted, however, that prior to the installation of a [redacted] authority was obtained from the Attorney General for the installation of a technical* surveillance because the [redacted] is, in reality, a form of wire tap. In seeking such authority, it was also pointed out that the Attorney General was not advised that the particular technical installation was a combination [redacted]

In discussing the various types of microphones used by the Bureau, the conferees took note of the fact that a microphone installed in the premises of a subject is, in many instances, illegal because the installation is accomplished by trespass. There was also discussion on the point that all such microphones might be considered illegal by the courts even though they were installed on the premises prior to occupation by the subject. It was agreed, therefore, that the problem of using such microphones should be approached under the presumption that they might be considered illegal.

On the other hand, it was agreed that, according to the existing state of the law as interpreted for the Bureau

*Underlining added for emphasis

by the Department, there appeared to be no necessity to seek authorization from the Attorney General for the installation of a contact microphone outside the space occupied by the subject. This was so since there was no trespass involved and, at that time, this type of installation was regarded as legal.

The Executive Conference of June 9, 1950, observed that the Department had, of course, indirect notice of the Bureau's use of the microphone technique. This indirect notice stemmed from the Bureau's requests, over the years, for Departmental opinions as to the admissibility of evidence obtained in a variety of hypothetical situations involving the use of microphones. The Department also had direct knowledge that the FBI was using microphones from the Bureau's replies to questions concerning the availability of witnesses and the admissibility of evidence in some cases being considered for prosecution. For example, a microphone was utilized in the espionage case involving Judith Coplon, an employee of the Justice Department.

Nevertheless, the Conference noted that, under existing policy, the Bureau was installing and using

microphones on its own authority*--without any authorization from the Department--and must assume responsibility for them if the issue of their legality were raised at any time. On the other hand, it was pointed out that the Bureau, in countenancing illegal activities by authorizing some microphones which involved trespass, was influenced by its overriding obligations to gather intelligence information in the security field and to safeguard the welfare of the country.

In this situation the Bureau faced a dilemma. As noted previously, the Attorney General had authority by Presidential Directive to approve wire taps, but no such authority was given to him in regard to microphone installations. The Executive Conference of June 9, 1950, observed that if the FBI asked the Attorney General for authority to install microphones it would, in most instances, amount to a request for authority to engage in an illegal activity (trespass). Obviously, it was extremely doubtful that the Attorney General, as the principal Federal law enforcement official, would grant such authority. The Bureau could not expect him to grant such authority even though the Department was on notice that the Bureau used microphones and

*Underlining added for emphasis

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it had not objected to their use. Thus, to raise this issue with the Attorney General might result, when trespass was involved, in the loss of this investigative technique so vital to the fulfillment of the Bureau's responsibilities.

During the Executive Conference of June 9, 1950, Mr. Tolson stated that he was opposed to the use of any technique known to be illegal. Mr. Tolson believed that the Bureau's position in using such techniques was untenable and that the Bureau would have to answer to criticism for any illegal activities. The Director commented, "I have no other alternative as this is presented but to agree with Tolson."

Under date of July 5, 1950, a memorandum to the Department raising the issue of using microphones involving trespass was prepared. (Exhibit 16) This memorandum, which was never sent to the Department, was returned to the Domestic Intelligence Division on April 23, 1951, with instructions to hold it until a more propitious time.

Department's Continuing Awareness of Microphone Surveillances

Although the Department was not informed in writing at that time of our use of microphones involving trespass,

extensive discussions were held between Bureau representatives and officials of the Department concerning the use of microphones in the cases against communist leaders then being prosecuted under the Smith Act. It was agreed that, whenever the Department was giving serious consideration to the institution of criminal prosecution in any case, the Bureau would, upon request, advise the Department in detail concerning any telephone or microphone surveillance employed by the Bureau or by other Federal agencies when the latter was known. In addition it was agreed that the Bureau would furnish such information without a formal request whenever it was aware or had reason to believe that the Department was seriously considering prosecution. (Exhibit 17)

Mr. Belmont, other Bureau representatives, Deputy Attorney General A. Devitt Vanech, Mr. McInerney, and other Departmental attorneys conferred on October 2, 1951. (Exhibit 18) During this conference, Mr. Belmont asked Mr. McInerney whether there was any doubt in his mind that microphones had been used in cases involving Smith Act subjects and that at least some of the microphones were installed by trespass. Mr. McInerney replied that the Department was aware that such microphones had been used.

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Issue of Microphones Involving Trespass Presented to Department, 1951

In view of allegations made by defense attorneys in the Smith Act cases relative to FBI electronic coverage of defendants, a memorandum was sent to the Attorney General on October 6, 1951. (Exhibit 19) With regard to microphones, this memorandum stated:

> "As you are aware, this Bureau has also employed the use of microphone installations on a highly restrictive basis, chiefly to obtain intelligence information.... In certain instances it has been possible to install microphones without trespass, as reflected by opinions rendered in the past by the Department on this subject matter. In these instances the information obtained, of course, is treated as evidence and therefore is not regarded as purely intelligence information.
>
> "As you know, in a number of instances it has not been possible to install microphones without trespass. In such instances the information received therefrom is of an intelligence nature only."

This Bureau memorandum concluded by presenting the issue in these words:

> "...I would like to have a definite opinion from you as to whether, in view of the highly productive intelligence information gathered from those sources, we should continue to utilize this technique on the present highly restricted basis, or whether we should cease the use of microphone coverage entirely in view of the issues currently being raised."

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Attorney General McGrath Will Not Authorize Microphones Involving Trespass, February 26, 1952

Attorney General McGrath responded to the Director's request by memorandum dated February 26, 1952. (Exhibit 20) He said that the use of a microphone surveillance which did not involve trespass would seem to be permissible under the present state of the law and cited United States v. Goldstein (316 U.S. 129). He observed that surveillances that "involve trespass are in the area of the Fourth Amendment, and evidence so obtained and from leads so obtained is inadmissible." Mr. McGrath went on to say, "The records do not indicate that this question dealing with microphones has ever been presented before; therefore, please be advised that I cannot authorize the installation of a microphone involving a trespass* under existing law."

On this memorandum the Director noted, "See that all such installations are terminated at once." In accordance with the Director's instructions, all Special Agents in Charge were advised by letter dated March 4, 1952, that effective immediately authorization would not be granted to install any microphone surveillance involving trespass and that any such installation presently being utilized should be

*Underlining is in the original memorandum from the Attorney General.

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discontinued at once and the Bureau so advised. (Exhibit 21)

Department Broadens Its Interpretation of Trespass, 1952

Following the receipt of the memorandum of Attorney General McGrath dated February 26, 1952, the Bureau was still confronted with the problem of what actually constituted trespass in the then existing law. Accordingly, another set of hypothetical situations involving microphone surveillances was presented to the Department in a memorandum dated February 28, 1952. (Exhibit 22) The Department's memorandum of reply, dated April 10, 1952, furnished a tentative, but much broader, conception of what constituted trespass. (Exhibit 23) For example, the penetration of a common wall was said to partake of the nature of a trespass. It was even said, in contrast to an earlier opinion, that an installation of a microphone in the air space above the ceiling of a room occupied by a subject now constituted trespass. Another opinion advanced, in contrast to earlier advice, was that a guest in a hotel had the exclusive use of his room and the absolute right of privacy.

To sum up, the Department believed that any microphone installation, with the exception of a contact device, would constitute a trespass unless approval were given for the installation by someone who controlled the premises involved, such as a Bureau informant.

Retention of Three Microphones Involving Trespass in Security Cases

[redacted] (S) (Exhibit 25) [redacted]

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[redacted]

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Bureau Implementation of Attorney General McGrath's Ruling, 1952

In view of Attorney General McGrath's memorandum of February 26, 1952, which advised that he could not, under existing law, authorize the installation of microphones

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involving trespass, the Executive Conference met on March 14, 1952, and discussed Bureau policies to implement this ruling. (Exhibit 28)

Following this Executive Conference, a letter was sent to all Special Agents in Charge on March 26, 1952. (Exhibit 29) They were advised that their requests for authority to utilize microphone surveillances must state that no trespass of any kind would be involved either in the installation or maintenance of the microphone. For guidance in determining if trespass were involved, their attention was called to the hypothetical situations previously furnished to them.

Refinement of Bureau Policy

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Based on the reply from the Department, coupled with opinions previously furnished, it now appeared that it would be possible to install microphones without trespass only in the following instances:

> When Agents had legal access to adjoining property and installed a contact microphone on the outer wall of the space controlled by the subject.
>
> When a microphone was installed within the premises with the knowledge and consent of the occupant. This would apply to persons cooperating with the Bureau, such as sources and informants.
>
> When a microphone was installed in a public hall and the party contracting for the use of the space did not stipulate that it would be a closed meeting.

In analyzing the Bureau's position at that time, the memorandum dated April 28, 1952, stated "We have now reached the point where we must decide whether we should give

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up microphone coverage, for that is the net result of the Department's rulings, or whether our responsibilities for internal security and espionage intelligence require the continued use of this technique on a restricted basis despite trespass." After reviewing the absolute necessity for obtaining such vital information in security cases, the memorandum concluded, "Bearing in mind the intelligence part of our responsibilities as contrasted to the prosecutive, it is questionable whether we can afford to give up microphone coverage."

It was recommended in the memorandum that:

> "1. We insist basically that microphone surveillances be installed without trespass.
>
> "2. If it is not possible to install a microphone as above indicated, and the intelligence to be gained therefrom is a necessary adjunct to the investigation involved, consideration be given to authorizing the installation. These surveillances will be limited to an absolute minimum and will only be authorized when vitally necessary and when prosecution is not contemplated."

The Executive Conference of May 5, 1952, unanimously recommended approval of the recommendations set forth above. Mr. Tolson agreed but suggested that those installations about which there was a legal question be reviewed. The

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Director concurred and commented, "I am inclined to discontinue all about which there is any legal question." (Exhibit 30)

Attorney General McGranery Authorizes Microphones Involving Trespass in Security Cases, June 6, 1952

The Director conferred with Attorney General McGranery on June 6, 1952, concerning the problem of microphone installations where trespass was involved. By way of background, a memorandum from Mr. Belmont to Mr. Ladd, dated May 23, 1952, had expressed the opinion that the value of the intelligence information gathered warranted the use of microphone surveillances even though trespass was involved. (Exhibit 31) However, it was essential that the Bureau obtain the backing of the Attorney General for the use of this technique. Mr. Tolson had commented that he believed these microphones should be removed unless the Attorney General authorized them. The Director noted that he would speak to the Attorney General.

In the conference with Attorney General McGranery on June 6, 1952, the Director referred to the fact that the prior Attorney General, McGrath, had ruled he could not approve

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the installation of microphones where trespass was involved. (Exhibit 32) The Director told Attorney General McGranery that such installations had been utilized on a very limited basis by the FBI and only in cases which directly affected the internal security of the United States. The Director pointed out that, after this ruling by Attorney General McGrath on February 26, 1952, the Bureau had discontinued nearly all of the microphone installations which involved trespass.

Attorney General McGranery told the Director that he thought it was entirely proper for installations of microphones to be made in any case where elements were at work against the security of the United States and that, in such instances, where the Director felt there was a need to install microphones, even though trespass might be committed, he would leave it to the Director's judgment as to the steps to take. The Director informed Attorney General McGranery that this authority would be used only in extreme cases and only in cases involving the internal security of the United States.

Discussions to Obtain Modification of Department's Interpretation of Trespass

For almost a year following the Director's conference with Attorney General McGranery on June 6, 1952,

Bureau officials were in regular contact with Departmental attorneys with regard to a study the Department was making to determine under what conditions microphone surveillances might properly be made. The Department's approach to this problem was outlined in conferences with Departmental attorneys William Foley and Thomas Hall of the Criminal Division.

On December 1, 1953, attorneys Foley and Hall stated that it was apparent to them that the Attorney General, as chief law enforcement officer of the country, could not be placed in the position of authorizing outright trespass. (Exhibit 33) However, bearing in mind the value of the microphone technique in cases affecting the national welfare and security, they felt that the Attorney General could, in effect, throw his weight behind the Bureau in those cases where trespass was a technical violation or where trespass was arguable. Attorneys Foley and Hall stated that they believed that the previous interpretation by the Department as to what constituted trespass was far too restrictive.

Mr. Belmont and Mr. Hennrich of the Bureau suggested to attorneys Foley and Hall at this conference on December 1, 1953, that it might be possible for the

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Attorney General to send to the Bureau a memorandum modifying the Department's interpretation of trespass and giving Departmental backing for the use of microphones in situations where there was not outright and clear trespass. Specifically, three situations were cited:

(1) Where a microphone was placed within the subject's dwelling by means of [redacted] in other words, the microphone was [redacted] without actual entry into the space.

(2) Where the microphone was [redacted]

(3) Where a microphone was placed within the subject's room or meeting place through actual access to the space but where such access was gained through the assistance of a person having legal access to the space, such as a landlord, hotel manager, etc.

Mr. Belmont and Mr. Hennrich estimated that, if the Bureau received Departmental backing in regard to installations of the types described, it would cover more than 75 per cent of the microphones the Bureau was then using in security cases. They noted, however, that the Bureau would still be in the position, in certain other exceptional cases where prosecution was not contemplated, of needing

microphone coverage despite the outright trespass involved, because it would be essential to the national welfare.

An interim memorandum concerning the Department's study, dated December 9, 1953, was received from Assistant Attorney General Warren Olney, III. (Exhibit 34) This Departmental memorandum reviewed the state of existing law regarding microphone surveillances and reached conclusions, pertinent portions of which follow:

> "The evidence secured by a microphone surveillance and accompanied by the commission of a trespass may or may not be admissible, depending on the view taken by the Courts, in balancing the 'reprehensible' conduct of federal agents in securing the evidence against the nature of the crime and the weight of the evidence, of their prerogative to exclude the evidence by establishing a judicial rule of evidence, as in the McNabb decision, entirely apart from constitutional considerations.
>
> "In conclusion, this Division is constrained to emphasize what is already manifest from the above discussion and analysis, that the legal questions posed by the hypothetical situations in your memorandum of February 28, 1952, and related memoranda, partake of a novel character and, hence, are not susceptible to precise determination on the basis of precedent or authority. Moreover, our task, in formulating and applying a theoretical yardstick, is made more difficult by the distinct and continuing conceptual conflict within the Supreme Court itself, with respect to the application of the constitutional safeguards against 'unreasonable searches and seizures' and the relative significance of an 'illegal entry' or 'trespass' in determining the admissibility or non-admissibility of the evidence involved herein.

It is obvious, therefore, that in reconsidering this matter and restating our views, it is impossible to forecast with certainty the future trends of the Supreme Court in this area and to predict their judicial acceptability."

Supreme Court Decision in the Irvine Case, 1954

While the Department was engaged in its study of microphone surveillances, a significant case was decided by the United States Supreme Court on February 8, 1954. In this case, Irvine v. California, (347 U.S. 123) local law enforcement officers, with authorization from the district attorney, installed a microphone surveillance involving trespass on the premises of Patrick E. Irvine. The police re-entered Irvine's premises on two separate occasions to change the location of the microphone. After installing the microphone in his bedroom, they were able to obtain evidence which led to his arrest on bookmaking charges.

The United States Supreme Court, in a five to four decision, upheld the conviction on the grounds that the illegally obtained evidence could be admitted in a state court for a state crime and such admission did not violate the due process clause of the Fourteenth Amendment. However, the Court strongly denounced the activities of the police and

suggested that the court record be brought to the attention of the Attorney General of the United States to determine if there were any violations of civil rights statutes.

Of more significance to the work of the Bureau, however, was the fact that the justices, in both the majority and dissenting opinions, felt that the actions of the police were "incredible." This comment by the justices recalled the earlier opinion received from the Department in its memorandum of December 9, 1953, that the Courts might decide whether evidence obtained by microphone surveillance was or was not admissible by balancing the "reprehensible" conduct of Federal agents in securing the evidence against the nature of the crime and the weight of the evidence.

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MEMORANDUM OF AUTHORIZATION FROM ATTORNEY GENERAL BROWNELL

Bureau Continues to Seek Departmental Backing, 1954

Meantime, the Bureau had not received any statement from the Attorney General giving backing for the use of microphones in situations where there was not outright and clear trespass involved. It will be recalled that such backing had been the subject of discussion between Bureau representatives and Departmental attorneys on December 1, 1953.

The Director, therefore, instructed that the Department be pressed on this matter and suggested that Mr. Nichols discuss it with Mr. Rogers of the Department and that Mr. Boardman discuss it with Mr. Olney.

When Mr. Nichols spoke to Mr. Rogers on March 29, 1954, Mr. Rogers inquired regarding the nature of the situations that would involve microphone surveillances. (Exhibit 35) Mr. Nichols explained that they would involve, essentially, espionage and other internal security matters. Mr. Rogers agreed that the Department should back the Bureau in these matters and requested that, on an informal basis, he be furnished with a draft covering the Bureau's requirements.

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Mr. Boardman spoke to Mr. Olney and other Departmental attorneys on March 30, 1954. (Exhibit 36) Mr. Olney referred to the case of Irvine v. California, and discussed it in some detail. He expressed the opinion that the violent reaction of the Supreme Court was due to the fact that the police had installed the microphone in the subject's bedroom and thereby exposed the private domestic life of the occupants. The fact that the police acted under the color of authority provided by the district attorney's knowledge that they had used a microphone surveillance did not, Olney pointed out, soften the Court's violent reaction. Olney added that this decision made it even more difficult for the Department to forecast the reaction of the courts where trespass was involved.

After considerable discussion, Mr. Olney agreed to the following:

(1) that microphone coverage was necessary in security cases in the national interest

(2) that any cases going to prosecution must be carefully evaluated if a microphone had been used

(3) that the Department would modify its interpretation of what constituted trespass in the installation of microphones

(4) that the Department would back the Bureau in the use of microphones in security cases

(5) that the Attorney General should furnish a memorandum to the Bureau covering points one, three, and four above.

Mr. Olney also requested that the Bureau furnish the Department with an informal draft on these points from which the Attorney General's memorandum would be prepared.

Among the suggestions made by Mr. Olney at this conference on March 31, 1954, was one to present proposed microphone installations to the Attorney General for his specific authority, as was being done in wire taps. At the same time, Mr. Olney stated that he doubted that the Attorney General would authorize a microphone installation involving a clear trespass.

In his March 31, 1954, memorandum to the Director reporting this conference with Mr. Olney, Mr. Boardman pointed out that there were two fundamental drawbacks in Mr. Olney's suggestion. First, there would be occasions when it was imperative that a microphone be installed immediately and there could be a delay in obtaining approval from the Attorney General. Second, it was once again doubtful that the Attorney General would approve a microphone

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installation where there was clear trespass. Nevertheless, the Bureau's responsibilities demanded that a limited number of such installations be used. Therefore, the Bureau continued to face a dilemma. It could either install microphones on its own authority in limited situations to obtain vital information or it could risk losing coverage necessary in discharging its responsibilities if these requests for microphone coverage were presented to the Attorney General and denied.

Bureau Presents Draft Memorandum to the Department

In accordance with the suggestions of Mr. Rogers and Mr. Olney, the Bureau furnished the Department, on April 1, 1954, a draft of the proposed memorandum from the Attorney General backing the Bureau in the use of microphones involving a trespass. (Exhibit 37)

Mr. Nichols discussed this proposed draft with Mr. Rogers on April 14, 1954. (Exhibit 38) Mr. Rogers stated that, after further reflection, he did not think much of the idea of having the Attorney General "clear microphone surveillances on the ground that time was of the essence and he thought the Attorney General would be in a

much better position to defend the Bureau in the event there should be a technical trespass if he had not heretofore approved it." Mr. Tolson noted, and the Director agreed, "...we would be in a better position to submit requests to AG as we do wire taps."

Final Draft of Proposed Memorandum from Attorney General Brownell

On May 7, 1954, Mr. J. Walter Yeagley of Mr. Olney's office furnished the Bureau a copy of the final draft for the proposed memorandum from the Attorney General. This proposed memorandum would provide the Bureau with backing in the use of microphone surveillances involving a trespass. This final draft was reviewed and evaluated in a memorandum from Mr. Belmont to Mr. Boardman dated May 8, 1954. (Exhibit 39)

The final draft was approved by the Director, and Mr. Yeagley was advised of that approval on May 10, 1954. That draft became in fact an official memorandum from Attorney General Brownell dated May 20, 1954. (Exhibit 40)

It is important to examine in some detail the Bureau's evaluation of that final draft to comprehend the intent of those who had figured in the negotiations for this official backing from the Attorney General.

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In his memorandum dated May 8, 1954, Mr. Belmont set forth the following analysis of the final draft for the proposed memorandum from Attorney General Brownell:

> "...the Attorney General would be giving us the green light for the use of microphones in internal security* cases... (he) points out the Bureau has an intelligence function as well as a duty to develop evidence for prosecution. In the last sentence of the memorandum it is stated, 'I recognize that for the FBI to fulfill its important intelligence function, considerations of internal security and the national safety are paramount and, therefore, may compel the unrestricted use of this technique in the national interest.'
>
> "...relative to criminal* cases, the Attorney General is not as strong but he takes cognizance of the need for microphone surveillances in cases affecting the national safety* and indicates they should be used in only the more important investigations.
>
> "...The Attorney General points out the need for discretion and intelligent restraint in use of microphones by the FBI in all cases, including internal security matters,* and refers to the Irvine case... The Attorney General, in effect, indicates that we should not put microphones in a bedroom or some comparable intimate location but at the same time, he points out that if important intelligence or evidence relating to matters connected with the internal security can only be obtained by such an installation, it is his opinion that under such circumstances the installation is proper and is not prohibited by the U. S. Supreme Court's decision in the Irvine case.

*Underlining added for emphasis

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"...relative to trespass, each case will be considered on its own merits but the Department in resolving the problems which may arise, will review the circumstances in the light of the practical necessities of investigation and of the national interest which must be protected."

Mr. Belmont observed, in his memorandum of May 8, 1954, that there was no objection to the final draft of the memorandum from Attorney General Brownell, and stated that Bureau policy would continue to stress the necessity for microphone installations without trespass, particularly in cases which might go to prosecution [redacted] In addition, the Bureau would point out to the field that it should avoid installations in locations such as bedrooms. With regard to criminal cases, it was noted that the same rules would apply and care would be taken to restrict microphone installations to important cases.

Attorney General Brownell Authorizes Microphones Involving Trespass, May 20, 1954

The negotiations between Bureau officials and Departmental attorneys for a modification of the interpretation

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of trespass and for Departmental backing for FBI use of microphone surveillances culminated in a memorandum from Attorney General Brownell to the Director dated May 20, 1954. This memorandum was, as previously noted, identical with the final draft analyzed by Mr. Belmont and approved by the Director. Pertinent portions of this memorandum follow:

> "The recent decision of the Supreme Court entitled Irvine v. California, 347 U.S. 128, denouncing the use of microphone surveillances by city police in a gambling case makes appropriate a reappraisal of the use which may be made in the future by the Federal Bureau of Investigation of microphone surveillance in connection with matters relating to the internal security of the country.
>
> "It is clear that in some instances the use of microphone surveillance is the only possible way of uncovering the activities of espionage agents, possible saboteurs, and subversive persons. In such instances, I am of the opinion that the national interest requires that microphone surveillance be utilized by the Federal Bureau of Investigation. This use need not be limited to the development of evidence for prosecution. The FBI has an intelligence function in connection with internal security matters equally as important as the duty of developing evidence for presentation to the courts and the national security requires that the FBI be able to use microphone surveillance for the proper discharge of both of such functions. The Department of Justice approves the use of microphone surveillance by the FBI under these circumstances and for these purposes...

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"...It is my opinion that the Department should adopt that interpretation which will permit microphone coverage by the FBI in a manner most conducive to our national interest. I recognize that for the FBI to fulfill its important intelligence function, considerations of internal security and the national safety are paramount and, therefore, may compel the unrestricted use of this technique in the national interest."(Exhibit 40)

Bureau Implementation of Departmental Authorization, 1954

After the receipt of Mr. Brownell's memorandum of May 20, 1954, immediate steps were taken to insure that Bureau policy and procedures adhered to the guidelines established by the Attorney General. It was stressed that the FBI would use microphones on a restricted basis in security and important criminal cases. The Director instructed at this time, "I want the same standards to prevail in this project as prevail in the authorization of 'Technicals.' No installations are to be authorized unless approved specifically by Tolson personally." The Director emphasized that he wanted "Tolson to pass on all microphone installations whether with or without trespass." (Exhibit 41)

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USE OF MICROPHONES IN CRIMINAL INTELLIGENCE PROGRAM

Basic Policy

The Bureau's Criminal Intelligence Program, as it exists today, began during the latter part of November, 1957, following the infamous and much publicized meeting of more than 60 racketeers at the estate of Joseph Barbara at Apalachin, New York, on November 14, 1957.

The planning for the Bureau-wide Criminal Intelligence Program took place at a two-day conference, held in Washington, D. C., and attended by Bureau officials and several Special Agents in Charge who would be expected to play major roles in the implementation of this effort.

The original instructions, which were sent to all field offices on November 27, 1957, outlined the general avenues of investigation and the goals to be achieved in establishing broad intelligence coverage of organized crime in this country. (Exhibit 42) These instructions stated, "Existing Bureau instructions must be fully complied with in the utilization of highly confidential sources or microphone surveillances. No requests for technical coverage (wire taps) will be considered."*

*Underlining added for emphasis

In the implementation of the Bureau's Criminal Intelligence Program, the field was urged to use microphone surveillances. For example, all Special Agents in Charge were instructed by letter dated June 11, 1959, to be alert for situations in which extraordinary and confidential investigative techniques could be employed to advantage. (Exhibit 43) This letter cited a microphone surveillance as a good example of a highly confidential investigative technique which had already provided extremely valuable information concerning the activities of a notorious New Jersey hoodlum. The letter specifically pointed out that it would be necessary that aggressiveness, initiative, and good judgment be exercised so these techniques would be utilized in well-selected situations.

Review of Microphone Utilization in Criminal Intelligence Program

In compliance with a request from Mr. Tolson, Mr. Belmont examined the microphone surveillances being used in the Criminal Intelligence Program and reported his findings in a memorandum to Mr. Tolson dated July 2, 1959. (Exhibit 44) In this regard, Mr. Belmont reviewed the developments leading to Attorney General Brownell's memorandum

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of May 20, 1954. Mr. Belmont pointed out that FBI authority for the use of microphones in criminal cases evolved from that portion of Mr. Brownell's memorandum in which he stated, "I recognize that for the FBI to fulfill its important intelligence function, considerations of internal security and the national safety are paramount and, therefore, may compel the unrestricted use of this technique in the national interest." By way of explanation, Mr. Belmont stated:

> "It is noted that the use of the terminology 'national safety' was interpreted by the Bureau to include criminal cases, particularly as in the AG's letter he uses terminology such as the 'need for discretion and intelligent restraint in the use of microphones by the FBI in all cases,* including internal security matters.' It appears, therefore, that the AG's letter, while primarily directed toward security matters as this was the basis on which the issue was raised with the Department, used terminology which was interpreted by the Bureau to apply to criminal cases as well."

Executive Conference Affirms Interpretation of "National Safety"

On July 20, 1959, the Executive Conference again considered the question of seeking approval from the Attorney

*Underlining added for emphasis

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General before instituting microphone surveillances in specific criminal cases. As a result of this deliberation, the following summation, approved by the Director, was made:

> "The Executive Conference considered whether existing policy with reference to installation of microphone surveillances should be changed at this time or whether we should re-present this matter to the AG for reaffirmation of Departmental policy as set out in the AG's memorandum of 5/20/54. It was the belief of the Executive Conference that the language of the AG's 5/20/54 memorandum covered both Security and Criminal matters; that we are adequately protected by this opinion of the AG, supported by that of Mr. Rogers in his discussion of this matter with Mr. Nichols on 4/27/54. The Executive Conference unanimously agreed that as long as Mr. Rogers continues as AG this matter not be represented but that we proceed as in the past on the strength of the 5/20/54 memorandum." (Exhibit 45)

Reminder to Field Where Trespass Involved

By letter dated January 22, 1960, all Special Agents in Charge were reminded that whenever they requested authority to install a microphone surveillance complete details of the proposed installation must be furnished to the Bureau and they must point out specifically whether trespass would be involved and whether the microphone would

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be installed in the telephone or a telephone instrument would be used in any way. (Exhibit 46) The letter stressed that all Special Agents in Charge must continue to supervise personally all microphone surveillances.

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FEDERAL BUREAU OF INVESTIGATION

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TENURE OF ATTORNEY GENERAL ROBERT KENNEDY, 1961-1964

Overall Bureau policy on microphone surveillances which developed from the authority granted in Attorney General Herbert Brownell's memorandum of May 20, 1954, was still being followed on January 21, 1961, when Robert F. Kennedy was sworn in as Attorney General.

Crusader Against Organized Crime

For a number of years prior to January 21, 1961, Mr. Kennedy had built a public image as a staunch crusader against organized crime. He had served as counsel for the Senate Committee which investigated labor racketeering. He had also written a book, "The Enemy Within" (1960), in which he warned, "If we do not on a national scale attack organized criminals with weapons and techniques as effective as their own, they will destroy us." (Exhibit 49)

In November, 1960, Mr. Kennedy appeared on the television program, "Meet the Press." (Exhibit 50) During this program, he said that something must be done about organized crime, and mentioned the meeting of the Nation's top hoodlums at Apalachin, New York. Mr. Kennedy, in discussing what would be done with organized crime if John F. Kennedy were elected President, noted that Federal agencies did not at that time have intelligence coverage in the organized crime field as was maintained in the field of communism, and said that the situation would be changed.

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After he became Attorney General, Mr. Kennedy made the following statement, "...We are now treating organized crime as the Federal Bureau of Investigation has treated communism over the period of the last 30 years." (Exhibit 51)

Mr. Kennedy's crusading tactics against organized crime caused one newspaper to comment, "One certainty about Robert F. Kennedy, when he was named Attorney General, was that he would exert himself as a 'crime buster.'" Mr. Kennedy did, indeed, exert himself against organized crime. Shortly after he took office he made it clear in his public utterances that he would conduct a concerted drive against organized crime in his new position. (Exhibit 52)

Early in 1961, Mr. Kennedy moved to enlist the combined forces of several Federal investigative agencies for an intensified drive against organized crime. To coordinate this concerted effort, Mr. Kennedy used the Organized Crime and Racketeering Section of the Department of Justice. The FBI had, of course, major responsibilities in this program.

Mr. Kennedy Informed Internal Revenue Service Planned Use of Electronic Aids

On February 16, 1961, Mr. Kennedy held a luncheon conference at the Treasury Department. In attendance at this conference were Secretary of the Treasury Douglas Dillon, Commissioner of the Internal

Revenue Service Mortimer M. Caplin, the Director, and other officials. Mr. Kennedy outlined at this conference the program which he had in mind for making inroads into organized crime. (Exhibit 53)

As part of the proceedings, Mr. Caplin presented for the examination of Mr. Kennedy and the Director copies of instructions he had issued to investigative personnel of the Internal Revenue Service concerning the responsibilities of that agency in the drive against organized crime.

These instructions, entitled "Special Racketeer Investigations," were enclosed in a letter from Mr. Caplin to Mr. Kennedy which Mr. Caplin delivered personally to Mr. Kennedy that day. This document made specific reference to planned use of electronic aids in investigation of leading racketeers by the Internal Revenue Service. Page two of this document stated, "In conducting such investigations, full use will be made of available electronic equipment and other technical aids, as well as such investigative techniques as surveillances, undercover work, etc."

Mr. Kennedy Advised of Bureau's Plans Against Organized Crime

In a memorandum dated April 6, 1961, the Director was informed about conferences with selected Special Agents in Charge held in connection with the intensification of the

Criminal Intelligence Program. In this memorandum it was noted that the Bureau had previously furnished Attorney General Kennedy, for his information, instructions to Bure field offices contained in letters to all Special Agents i Charge dated March 1 and March 30, 1961. (Exhibit 54)

The letter of March 1, 1961, stated that each Bureau office had the obligation to establish "that type of coverage" on the criminal underworld which the Bureau h achieved in its investigations of the Communist Party. By way of explanation, the letter stated that the techniques which had proved so invaluable in the internal security fi must be carefully considered and adapted wherever feasible the Criminal Intelligence Program, but there must be adhere to the present policy regarding technical surveillances. (It will be recalled that Bureau policy prohibited the use technical surveillances in the Criminal Intelligence Progr

It was stated in the memorandum of April 6, 1961 that the Bureau had not yet advised Attorney General Kenne in writing about the "crash program" to make cases in the immediate future against ten top hoodlums and racketeers. Concerning this, the Director noted, "I have orally advise A.G. of plans we have in mind."

Deputy Attorney General White Informed of Bureau Policy Concerning Microphones, May 4, 1961

Early in 1961, Attorney General Kennedy had agre to testify concerning proposed wiretap legislation being considered by the Senate Judiciary Subcommittee. On April 26, 1961, a meeting between Departmental representat and Assistant Director Courtney Evans was held in the offi of Deputy Attorney General Byron White to formulate a position on this legislation for the Attorney General. (Exhibit 55)

During the discussion it was pointed out that th Attorney General should also be prepared to answer questio concerning other phases of "eavesdropping," including the use of microphone surveillances. To assist the Attorney General in this regard, the Bureau delivered a memorandum to Deputy Attorney General White dated May 4, 1961. (Exhib This memorandum stated that the Bureau's views on the use microphone surveillances in FBI cases were being furnished in connection with the Attorney General's contemplated appearance before the Senate Subcommittee on Constitutiona Rights. Pertinent portions of this memorandum of May 4, 1 follow:

"Our policy on the use of microphone surveillances is based upon a memorandum from former Attorney General Herbert Brownell dated May 20, 1954, in which he approved the use of microphone surveillances with or without trespass. In this memorandum Mr. Brownell said in part:

"'I recognize that for the FBI to fulfill its important intelligence function, considerations of internal security and the national safety are paramount and, therefore, may compel the unrestricted use of this technique in the national interest.'

"In light of this policy, in the internal security field, we are utilizing microphone surveillances on a restricted basis even though trespass is necessary to assist in uncovering the activities of Soviet intelligence agents and Communist Party leaders. In the interests of national safety, microphone surveillances are also utilized on a restricted basis, even though trespass is necessary, in uncovering major criminal activities. We are using such coverage in connection with our investigations of the clandestine activities of top hoodlums and organized crime. From an intelligence standpoint, this investigative techniqu has produced results unobtainable through other means. The information so obtained is treated in the same manner as information obtained from wire taps, that is, not from the standpoint of evidentiary value but for intelligence purposes."

"There is no Federal legislation at the present time pertaining to the use of microphone surveillances. The passage of any restrictive legislation in this field would be a definite loss to our investigative operations, both in the internal security field and in our fight against the criminal element. This is especially true in the case of organized crime where we have too few weapons at our command to give up the valuable technique of microphones."

Since this memorandum was furnished to the Deputy Attorney General for the specific use of the Attorney Genera it was official notice to Mr. Kennedy and to the Department of Justice of the Bureau's policy concerning the use of microphone surveillances. Moreover, it spelled out that the Bureau had interpreted Attorney General Brownell's letter of May 20, 1954, to give it authorization for use of microphone surveillances in criminal cases. If there were disagreement with this interpretation, the Bureau should have been so advised at that time.

Mr. Kennedy Pleased About FBI Microphone Coverage

On July 6, 1961, Mr. Kennedy held a conference of attorneys in the Department's Organized Crime and Racketeeri Section as the concluding phase of an inquiry he had been conducting on the activities of this Section. Assistant Director Evans, who was present at this conference, was asked by Mr. Kennedy about "electronic devices," similar to those used in espionage cases, in the investigations of orga ized crime. Since there were a number of people present, Mr. Evans made a general reply which conveyed the message that he would discuss this matter with the Attorney General under more appropriate circumstances. (Exhibit 57)

In a memorandum dated July 6, 1961, Mr. Evans recorded Mr. Kennedy's remark, noted that there was serious question as to whether the Attorney General was aware of the difference between a technical and a microphone surveillance, and asked for permission to discuss this subject with the Attorney General. The Director approved, and Mr. Evans saw Mr. Kennedy in regard to this matter on July 7, 1961. Mr. Evans recorded this discussion with the Attorney General in a memorandum dated July 7, 1961. (Exhibit 58) The following pertinent quotation is taken from this memorandum:

> "It was pointed out to the Attorney General that we had taken action with regard to the use of microphone surveillances in these cases (organized crime investigations) and while they represented an expensive investigative step, we were nevertheless utilizing them in all instances where this was technically feasible and where valuable information might be expected. The strong objections to the utilization of telephone taps as contrasted to microphone surveillances was stressed. The Attorney General stated he recognized the reasons why telephone taps should be restricted to national-defense-type cases and he was pleased we had been using microphone surveillances where these objections do not apply wherever possible in organized crime matters."

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(c) Authorization by Mr. Kennedy for [redacted]

By the time that Mr. Kennedy had become Attorney General, the Bureau had learned from its experience with the Criminal Intelligence Program that the single, most productive intelligence-gathering technique had been microphone surveillances of selected underworld figures.

Many of these microphone surveillances used (c) [redacted] to transmit the information obtained to an FBI monitoring center. These [redacted] (c) [redacted] did not, however, constitute a wire tap or (c) technical surveillance. These [redacted] are similar to "open lines" used by stockbrokers and music companies to transmit information and music from one location to another. It was normally possible for the FBI to make oral arrangements with the telephone company involved (c) for [redacted] (Exhibit 59)

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To obtain this authorization from Attorney General Kennedy, a memorandum on FBI stationery, classified "Top Secret," dated August 17, 1961, and enclosing the proposed letter to the telephone company in New York City, was delivered to Mr. Kennedy on August 17, 1961, by Assistant Director Courtney Evans. (Exhibit 60)

[redacted]

(c)

[redacted] The following is the complete text of this memorandum, which was signed by Mr. Kennedy:

[redacted]

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[redacted]

(c)

The very first sentence of the memorandum of August 17, 1961, which Mr. Kennedy approved, stated that it is frequently necessary to [redacted] in order to monitor microphone surveillances. The memorandum also stated that these situations occur when it is impossible to locate a secure monitoring point in the immediate vicinity of the premises covered by the microphone. On its face, therefore, this document informed former Attorney General Kennedy of the procedures and problems involved in microphone surveillances which were broader in scope than the specific issue presented in regard to New York City.

(c)

By affixing his signature to this memorandum, it is clear that former Attorney General Kennedy was not only authorizing the use of microphone surveillances in the Criminal Intelligence Program in New York City but was also acknowledging that he was on notice that these microphone surveillances were used frequently and in several situations by the FBI elsewhere.

On December 24, 1965, Assistant to the Director DeLoach and Assistant Director Gale interviewed former Assistant Director Evans about what had transpired when he took this memorandum to Attorney General Kennedy on August 17, 1961. During this interview, Mr. Evans recalled that he described fully the [redacted] in connection with microphone surveillances, not only in New York City, but also elsewhere. Mr. Evans stated that there was no doubt in his mind that former Attorney General Kennedy was fully aware that (C) the FBI was [redacted] top hoodlums. (Exhibit 61)

Mr. Kennedy Requests "Appropriate Surveillance" of [redacted]

During the Summer of 1961, information had come to the attention of Mr. Kennedy that Teamster President

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James Hoffa allegedly had sources inside the Criminal Division of the Department of Justice. He also learned that [redacted] Mr. Hoffa, planned to be in Washington, D. C., on August 7, 1961, to meet with his "contact" in the Justice Department. Since [redacted] had no known official business with the Justice Department, Mr. Kennedy felt that this would be a surreptitious contact with one of Mr. Hoffa's alleged sources in the Department.

Mr. Kennedy requested the FBI, through Assistant Director Evans, to conduct an appropriate surveillance of [redacted] while he was in Washington in an attempt to determine the identity of any Department of Justice employee he contacted. (Exhibit 62)

In a memorandum dated March 13, 1962, Mr. Evans referred to Mr. Kennedy's request for an "appropriate surveillance" of [redacted] He explained that while "appropriate surveillance" did not explicitly describe the surveillance requested by Attorney General Kennedy, there was no question but that the Attorney General's request meant both a physical surveillance and a microphone surveillance of [redacted] hotel room. According to Mr. Evans, it was understood that this investigation was to be discreet but that the

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Attorney General wanted all steps possible to be taken to determine if [redacted] made contact with anyone in the Justice Department. Mr. Evans added that the results of the microphone surveillance were reported to Mr. Kennedy in daily memoranda as the information was received. (Exhibit 63)

Mr. Kennedy Inquires About Possible FBI Microphone Surveillances

On March 30, 1962, Mr. Kennedy summoned Mr. Evans to his office and told him that Joseph Volpe, formerly Chief Counsel for the Atomic Energy Commission, had informed the Attorney General that he had learned on the "highest authority" that Volpe's office had been covered with a microphone surveillance during 1953 and 1954. Mr. Kennedy asked Mr. Evans if this had been an FBI microphone surveillance. Mr. Evans later reported to the Attorney General that this was not an FBI microphone surveillance. It is noteworthy, however, that Mr. Kennedy's query reveals that there was little doubt in his mind that the FBI used microphone surveillances. Moreover, whatever doubt there may have been should have been removed when it was necessary for

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Mr. Evans to check on the matter before reporting to Mr. Kennedy that it was not an FBI microphone surveillance. (Exhibit 64)

Mr. Kennedy Listens to Tape Recordings of FBI Microphone Surveillances

If there were any remaining doubt in Mr. Kennedy's mind that the FBI was using microphone surveillances, it should have been dispelled during two visits he made to FBI field offices. On March 19, 1963, Mr. Kennedy was briefed on organized crime investigations in the FBI's Chicago Office. This briefing was attended by other Departmental officials, including William Hundley, Chief of the Organized Crime and Racketeering Section. After Special Agents of the FBI told them about the corruption of local law enforcement officers by Chicago hoodlums, a tape recording from an FBI microphone surveillance was played for them. This recording contained a discussion between the [redacted] and a lieutenant of the Chicago Police Department.

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During the playing of this tape recording, both Mr. Kennedy and Mr. Hundley interrupted from time to time to inquire as to the identity of a particular speaker. The voices involved in the conversation were identified for them. Also during the playing of the tape, or immediately thereafter, Mr. Hundley asked whether the FBI had a "tech" in a particular establishment which he named. He also asked if "techs" were legal or illegal. Mr. Kennedy then stated, "They're all illegal."

Mr. Hundley also asked where the installation was located from which this tape recording was obtained. Mr. Kennedy stated that he did not believe that he wanted to know the exact location of the installation. Following the playing of the tape, Mr. Kennedy asked whether or not the Chicago Police Department was aware of the information contained in this tape. He was told that it was not.

This conference in the FBI's Chicago Office lasted several hours longer than was originally intended. Following the conference and again at the airport prior to his departure from Chicago, Mr. Kennedy said to Mr. Marlin Johnson, Special Agent in Charge of the FBI's Chicago Office, that he was extremely impressed with the Chicago Office's investigative work against

organized crime, and stated that he wanted the Chicago Office to keep up its extensive and intensive investigations in this field.

The Special Agents involved in this Chicago conference have submitted sworn statements concerning what transpired at the conference, including what Mr. Kennedy said. (Exhibit 65)

After he returned to Washington, D. C., Mr. Kennedy sent a letter to Mr. Marlin Johnson in which he said that he appreciated the fine presentation made by Mr. Johnson and his Agents during his visit to Chicago. Mr. Kennedy added that the presentation was well organized and "very informative." (Exhibit 66)

In regard to this conference in Chicago, Mr. Hundley told Assistant to the Director DeLoach and Assistant Director Gale on December 30, 1965, that it was obvious to him at the time of the conference that the recording was obtained as the result of microphone coverage. He stated that he could not, of course, say what was in Mr. Kennedy's mind at the time he listened to the recording, and there was no open discussion of the fact that the recording came from microphone

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coverage. He did say, however, that he felt that this was generally understood. (Exhibit 67)

On another occasion, Mr. Kennedy visited the New York Office of the FBI for a briefing on organized crime. Participants in this conference, held November 4, 1963, were Mr. Kennedy, Mr. Ed Guthman of Mr. Kennedy's Staff, Assistant Directors Courtney Evans and John F. Malone, and approximately 25 FBI Special Agents assigned to the New York Office. At this conference, a tape recording taken from an FBI microphone surveillance was played for Mr. Kennedy. The taped conversation was between [redacted] and [redacted] of notorious hoodlum [redacted] A gangland murder was the subject of the conversation between these two [redacted] Since the recorded conversation was, at times, difficult to understand, Mr. Kennedy was provided with a written transcript to assist him in following the conversation.

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Because there was some difficulty in understanding all of the recorded conversation, Mr. Kennedy asked if this were the best equipment the Bureau had. In reply, Special Agent [redacted] reportedly said

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that these individuals do not always meet in the most desirable locations and, no matter how good the equipment is, it cannot overcome the problem of guttural voices and whispered conversations, such as were on this tape recording.

Special Agents of the FBI who participated in this conference have submitted sworn affidavits as to what transpired, including the question asked by Mr. Kennedy. (Exhibit 68)

Evidence Mr. Kennedy's Staff Was Aware of FBI Use of Microphone Surveillances

In addition to Mr. Kennedy's personal involvement in matters relating to microphone surveillances, members of his Staff were, in specific security and criminal cases, on notice that microphone surveillances were used by the FBI. The following are typical instances:

(1) On May 25, 1961, Herbert J. Miller, Jr., Assistant Attorney General, Criminal Division, Department of Justice, sent a significant letter to Senator Sam J. Ervin, Jr., of North Carolina. The following is the complete text of this very revealing letter:

"Thank you for your letter of May 19, 1961.

"I have been advised that as of February 8, 1960, the Federal Bureau of Investigation maintained 78 wiretaps.

"You also request information 'relative to the nature and extent of the use of electronic eavesdropping apparatus by agents of the Department of Justice.' I have checked with the Federal Bureau of Investigation and, as in the case of wiretapping, the technique of electronic listening devices is used on a highly restricted basis. The Federal Bureau of Investigation has 67 of these devices in operation. The majority are in the field of internal security with a few used to obtain intelligence information with regard to organized crime.*

"The Department feels the information in the third paragraph should remain confidential. However, whether the information should be made public is left with your discretion." (Exhibit 69)

(b)(1)

[redacted]

(C)

[redacted] (Exhibit 70)

*Underlining for added emphasis

**Discontinued because of pending prosecutive action under Internal Security Act of 1950.

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(3) On August 16, 1962, Mr. William Foley, Acting Assistant Attorney General, Criminal Division, was orally advised by FBI representatives that the Los Angeles Office of the FBI had a microphone surveillance on [redacted] was closely allied with the "skimming operation" involving the flow of illegal diverted funds from Las Vegas gambling casinos to the leadership of La Cosa Nostra and other top racket elements [redacted] was being considered for prosecution on an obstruction of justice charge. (Exhibit 71)

(4) On April 23, 1963, Assistant Attorney General Herbert J. Miller of the Criminal Division was orally advised that the FBI had microphone coverage of several of the subjects involved in the case [redacted] et al. This was a large-scale bookmaking operation in Kansas City, Missouri, (Exhibit 72)

(5) On July 11, 1963, Assistant Attorney General Miller was orally advised by FBI representatives that a microphone surveillance covering [redacted] in Las Vegas, Nevada, had been compromised. [redacted] was at that time under subpoena to a Federal Grand Jury in Los Angeles,

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California, probing the activities of [redacted] a key figure in the "skimming operation" at Las Vegas. (Exhibit 73)

(6) On March 6, 1964, Assistant Director Evans orally advised Assistant Attorney General Herbert Miller that the FBI had microphone surveillances on [redacted] activities in Philadelphia, Pennsylvania [redacted] as Attorney General Kennedy knew, was a member of [redacted] He was then the subject of a case involving Interstate Transportation in Aid of Racketeering-Extortion, and was awaiting trial. Assistant Director Evans also told Mr. Miller on March 6, 1964, that the FBI had microphone coverage on the [redacted] an illegal gambling casino in Hot Springs, Arkansas, inasmuch as there was a possibility of Federal Grand Jury inquiry into prevalent illegal gambling in that city. (Exhibit 74)

(7) A memorandum dated April 9, 1964, entitled "Electronic Surveillance" was sent from the FBI to Assistant Attorney General Miller. Mr. Miller had forwarded a copy of a Departmental memorandum on the subject of electronic surveillances, which proposed that the

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Department undertake a survey of equipment being used and a legal study of this matter. Mr. Miller had asked, in his letter of transmittal, that the FBI comment on this proposal. The Director's memorandum to Mr. Miller stated that such a study was not believed desirable principally because it would disclose confidential investigative techniques. The Director's memorandum also stated:

> "...as the Department knows, this Bureau does utilize, on a very restricted basis, electronic investigative aids in the investigation of important matters affecting the security of the country and in the collection of important criminal intelligence information relating to organized crime, as well as similar investigative matters involving the safety and well-being of a victim such as in kidnapping cases.
>
> "In such matters, the Department is aware that these electronic investigative aids have proven to be useful in the past and continue to be very helpful at present." (Exhibit 75)

Since criminal intelligence information relating to organized crime was not one of the categories for which the Attorney General could approve a technical surveillance (wire tap), the reference to "electronic investigative aids" in the Director's memorandum could only have been interpreted by the Department to have meant microphone surveillances insofar as criminal intelligence matters were concerned.

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(8) Mr. William Hundley, Chief of the Organized Crime and Racketeering Section of the Department of Justice, who also served in this position during the time Mr. Kennedy was the Attorney General, discussed his knowledge of FBI microphone surveillances with Assistant to the Director DeLoach and Assistant Director Gale on December 30, 1965. Mr. Hundley stated that he had been aware that the FBI had been using microphones in its investigation of the underworld "skimming operations" pertaining to gambling receipts from casinos in Las Vegas. Mr. Hundley said, "You cannot be in this business as long as I have been and read the FBI reports concerning skimming without knowing that this type of information had to come as a result of microphone coverage." (Exhibit 76)

Mr. Hundley also stated that he had never discussed this with former Attorney General Kennedy but that he had discussed microphone coverage in Las Vegas with former Assistant Attorney General Herbert J. Miller who was head of the Criminal Division while Mr. Kennedy was the Attorney General. Hundley added that he had several discussions with Mr. Miller concerning

microphone surveillances in Las Vegas after a leak of information in March, 1963, resulted in the exposure of an FBI microphone surveillance at the Fremont Hotel in Las Vegas.

Civil Suits in Las Vegas Involving FBI Microphones

Following the discovery in March, 1963, of the FBI microphone surveillance in the office of Edward Levinson, President of the Fremont Hotel in Las Vegas, Nevada, a civil suit was brought on February 26, 1964, by Levinson and the Fremont Hotel against the telephone company in Las Vegas. Although this suit was dismissed with prejudice on May 20, 1965, another civil suit was instituted on December 10, 1965, against the telephone company and the Special Agent in Charge, the Assistant Special Agent in Charge, and two Special Agents of the Las Vegas Office of the FBI. (Exhibit 77)

The Fred Black Case

As noted previously, tracing the flow of funds from the "skimming operation" at gambling casinos in Las Vegas, Nevada, to La Cosa Nostra leaders was of

prime importance in the Bureau's over-all efforts to combat organized crime.

During the time that Mr. Kennedy was Attorney General, information was developed that Washington lobbyist Fred Black, because of his known connections with individuals who served as couriers in the "skimming operation," appeared to be personally involved in this flow of funds to La Cosa Nostra. As part of this investigation, a microphone surveillance was instituted on Black at the Sheraton-Carlton Hotel, Washington, D. C., on February 8, 1963. (Exhibit 78)

During an interview with Bureau officials on June 2, 1966, former Assistant Director Evans stated that while Mr. Kennedy was Attorney General he had briefed Mr. Kennedy on the Black investigation. Mr. Evans further stated that on one occasion he furnished Mr. Kennedy information which could only have come from a microphone. He added that the Attorney General could well have inferred the usage of microphones as a result of receiving this information. (Exhibit 98)

On the basis of an investigation conducted by the Internal Revenue Service, Black was convicted in the

United States District Court, Washington, D. C., on May 5, 1964, for violation of Federal income tax laws. The conviction was upheld in the Court of Appeals and the United States Supreme Court denied certiorari.

Subsequently, on May 24, 1966, United States Solicitor General Thurgood Marshall filed a memorandum before the Supreme Court advising the Court that there was an electronic surveillance of Black and that conversations between Black and his attorney had been intercepted. As a result of Mr. Marshall's memorandum, the Supreme Court requested additional details concerning the electronic coverage of Black.

Almost two weeks before Mr. Marshall's memorandum was filed, Assistant to the Director DeLoach and Assistant Director Gale had, on May 11, 1966, brought to the Department's attention the pitfalls involved in so advising the Supreme Court. The Department was told that the results of the conversation between Black and his attorney had not been disseminated outside the Bureau. Therefore, the prosecution was not aware of the monitoring and did not, of course, use it against the defendant. Furthermore, no motion had been made by the defense to

determine if the Government had microphone coverage. In addition, the monitoring occurred approximately one year before the trial and involved an attorney who did not appear as an attorney of record. Finally, the disclosure would trigger unwarranted criticism of the FBI and the Department and could come at an inappropriate time in view of the pending case against Bobby Baker and the civil suit in Las Vegas. Despite these cogent arguments, the Department filed the memorandum so it would have "clean hands." (Exhibit 93)

The Department also wanted to have "clean hands" on the matter of authorization for microphone surveillances. Attorney General Katzenbach had, in a conference on May 23, 1966, attended by Assistant Director Gale, agreed to include in the memorandum a footnote stating "there was general Departmental authorization of longstanding for the use of these devices." On the following day, the Attorney General had this footnote deleted from the memorandum. (Exhibit 94)

As of July 11, 1966, this matter was still pending before the Supreme Court.

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PRESIDENTIAL KNOWLEDGE OF FBI MICROPHONE SURVEILLANCES

[redacted] (S)

(Exhibit 79)

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On July 16, 1964, the Director, in a telephone conversation with the President, discussed the FBI's investigation of events surrounding the murder of Negro educator Lemuel Penn on a Georgia highway. (Exhibit 80) During this telephone conversation, the Director told the President that the FBI had installed a microphone in a building next to the garage where Klansmen gathered in Athens, Georgia.

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DEPARTMENTAL POLICY ON MICROPHONES UNDER ATTORNEY GENERAL KATZENBACH

Review of Bureau Policy, October, 1964

In the interim period from the resignation of Attorney General Kennedy on September 3, 1964, to the swearing in of Attorney General Nicholas deB. Katzenbach on February 13, 1965, existing Bureau policy concerning special investigative techniques, including microphones, was reviewed. The results of this review were set forth in a memorandum from former Assistant to the Director Belmont to Associate Director Tolson dated October 6, 1964. (Exhibit 82)

In regard to microphones, Mr. Belmont stated that they were being used in security cases and criminal intelligence matters and that each installation had to be approved by Mr. Tolson. He also said that microphone surveillances had been a primary source of information on organized crime, particularly in regard to La Cosa Nostra. He added that this information had enabled the FBI to infiltrate, penetrate, and disrupt organized crime. Moreover, it had also provided leads for the development of live informants.

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Mr. Belmont also pointed out in his memorandum that the FBI had discontinued dissemination of information from microphone surveillances to the Department of Justice and United States Attorneys, except when an impending murder was involved. This policy had been adopted following the leak of information from the Department, which exposed the FBI microphone surveillance at the Fremont Hotel in Las Vegas in March, 1963. The Director approved the policies outlined by Mr. Belmont.

Mr. Katzenbach to Approve All Microphone Surveillances

Attorney General Katzenbach, in a conversation with the Director on March 30, 1965, stated that he would like to set up a procedure, similar to that in effect concerning technical surveillances, whereby he would be advised by the Bureau of microphone surveillance installations. (Exhibit 83) On the same day, the Director sent a memorandum to the Attorney General which contained the following:

> "In line with your suggestion this morning, I have already set up the procedure similar to requesting of authority for phone taps to be utilized in requesting authority for the placement of microphones.

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> In other words, I shall forward to you from time to time requests for authority to install microphones where deemed imperative for your consideration and approval or disapproval. Furthermore, I have instructed that, where you have approved either a phone tap or the installation of a microphone, you be advised when such is discontinued if in less than six months and, if not discontinued in less than six months, that a new request be submitted by me to you for extension of the telephone tap or microphone installation." (Exhibit 84)

On May 6, 1965, the Director and Mr. Belmont discussed microphone and technical surveillances with Attorney General Katzenbach. (Exhibit 85) At the outset, the Attorney General stated that he was not concerned about the use of these techniques in security cases. He stated that he agreed with the Director's position, originally presented to Attorney General Tom Clark, that all technical surveillances used throughout the Federal Government should be approved by the Attorney General. He then suggested the desirability of channeling all these Federal Government technical surveillances to the FBI for central control and handling.

The Director argued successfully against this proposal by stating that, as the FBI had learned through

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experience, it is necessary to hold knowledge of these surveillances to an absolute minimum. It was further stated that Departmental notification of FBI technical and microphone surveillances was confined to him and his office staff, except where prosecution was being considered in a particular case.

During this discussion, the Attorney General expressed concern that the Department and the Bureau might be embarrassed in court over the use of microphone surveillances involving trespass in hoodlum cases. In answer to a question, the Attorney General was advised that approximately 95 per cent of the microphone installations involved trespass.

The Attorney General was advised that these microphones were necessary unless he wanted to cut back on the attack against organized crime. It was pointed out that La Cosa Nostra is a powerful group which spearheads organized crime. It has immense power through corruption, graft, and influence in political and law enforcement circles. It wields power over its membership and associates through fear. It constitutes a menace to the welfare of the

country because of its power and influence, and has been surrounded by an aura of invincibility.

Mr. Katzenbach was reminded that the FBI had been waging an all-out attack on La Cosa Nostra. In this attack, microphone surveillances had been invaluable in providing intelligence information leading to identification of La Cosa Nostra members, and information concerning their areas of influence, their organization, and their activities.

Attorney General Discontinues All Microphone Surveillances

The Attorney General, on July 12, 1965, informed the Director that he would like to have all microphone surveillances suspended at that time, because of the pressure being brought to bear, particularly on the Internal Revenue Service, by the United States Senate Subcommittee on Administrative Practice and Procedure headed by Senator Long of Missouri. (Exhibit 86) The Attorney General said that he wanted to be in a position to state that the FBI had no microphone surveillance coverage.

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In his memorandum dated July 14, 1965, recording his conversation with the Attorney General on July 12, 1965, the Director enunciated Bureau policy. In so doing, he stated:

> "In view of the growing delicacy in this whole field, I will be more reluctant to approve requests for technical surveillances until the atmosphere has been clarified.
>
> "I realize the value of technical surveillances as well as of microphone installations, both in our security and in our crime investigations, but if it be the will of Congress and the desire of the Attorney General that they be completely suspended, we will, of course, have to comply with it."

Attorney General Again Authorizes Microphone Surveillances in Security Cases

In response to several requests from the Bureau for guidelines in the use of special investigative techniques, Attorney General Katzenbach, by memorandum dated September 27, 1965, made the following statements on microphone surveillances:

> "There are many instances where the use of portable microphones or portable recorders are necessary and appropriate and do not involve trespass or questions of admissibility of evidence or legality. Where such questions are not raised I believe the Bureau should continue to use these techniques in cases where you believe it appropriate without further authorization from me. Again, I am aware that such techniques have been judiciously used in the past, and while they may have been abused by other agencies,

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I do not believe they have been abused by the Bureau in any instance.

"The use of wiretaps and microphones involving trespass present more difficult problems because of the inadmissibility of any evidence obtained in court cases and because of current judicial and public attitudes regarding their use. It is my understanding that such devices will not be used without my authorization, although in emergency circumstances they may be used subject to my later ratification. At this time I believe it desirable that all such techniques be confined to the gathering of intelligence in national security matters, and I will continue to approve all such requests in the future as I have in the past. I see no need to curtail any such activities in the national security field.

"It is also my belief that there are occasions outside of the strict definition of national security (for example, organized crime) when it would be appropriate to use such techniques for intelligence purposes. However, in the light of the present atmosphere I believe that efforts in the immediate future should be confined to national security. I realize that this restriction will hamper our efforts against organized crime and will require a redoubled effort on the part of the Bureau to develop intelligence through other means." (Exhibit87)

Current Bureau Policy on Microphone Surveillances, 1966

After the Attorney General again granted the FBI authority to use microphone surveillances to gather intelligence in national security matters, the Bureau, following the procedure established by Mr. Katzenbach to obtain his

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authorization, reactivated microphone surveillance in selected cases.

In an October 29, 1965, memorandum dealing with the Long Committee, the Bureau's use of wire taps and microphone surveillances was reviewed for the Director. (Exhibit 88) On this memorandum the Director noted,

(C) [redacted]

In accordance with the Director's instructions, all microphone surveillances in security cases were discontinued on November 1, 1965, because all of them used

(C) [redacted] There were, of course, no microphone surveillances on criminal cases at this time because they had been discontinued at the Attorney General's request in July, 1965.

After November 1, 1965, the Attorney General and the Director approved a limited number of microphone surveillances in security cases which did not involve

(C) [redacted] In January, 1966, these microphone

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surveillances were reviewed on an individual basis, and the Director ordered them to be discontinued.

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Presidential Memorandum of June 30, 1965

On July 30, 1965, FBI representatives and Departmental attorneys conferred regarding a Presidential memorandum, dated June 30, 1965, which dealt with technical and microphone surveillances. (Exhibit 90) This memorandum, addressed to all heads of executive departments and agencies, established strict guidelines for the use of technical surveillances, principally the obtaining of approval from the Attorney General. It also required the submission of a complete inventory of all mechanical and electronic equipment capable of intercepting telephone conversations.

Because the Bureau obtained authority from the Attorney General and consulted with the Department regarding the use of these surveillance techniques, the Departmental representatives stated that the Bureau was already complying with the Presidential memorandum and that it would not be necessary to submit an inventory of equipment.

Attorney General Katzenbach Prepared to Stand Behind FBI

During December, 1965, newspaper and other sources brought to the attention of the Bureau that former Attorney General Robert F. Kennedy had allegedly stated that he never authorized the use of microphone surveillances in FBI investigations of organized crime.

By memorandum from the Director to the Attorney General, dated January 5, 1966, reference was made to statements in the press which indicated that former Attorney General Kennedy and Departmental officials had not been aware of the FBI's use of microphones in the investigation of organized crime. (Exhibit 91) The Director then set forth facts which illustrated that Mr. Kennedy and Departmental officials were on notice that the FBI was utilizing

microphone surveillances in its investigation of organized crime. These facts have been incorporated into an earlier section of this brief entitled, "Tenure of Attorney General Robert Kennedy, 1961-1964."

In a memorandum dated January 13, 1966, Attorney General Katzenbach referred to the relationship between former Attorney General Kennedy and the FBI in regard to the use of microphone surveillances in the investigation of organized crime. (Exhibit 92) Mr. Katzenbach stated that Mr. Kennedy had informed him, at the time of the original Las Vegas law suit against the telephone company, and subsequently, that he was unaware that the FBI used microphone surveillances against organized crime. Mr. Katzenbach stated, however, he believed, "that the actions of the FBI in this area were in any event justified on the basis of understandings between the Bureau and prior (pre-1961) Attorneys General. I am prepared to stand behind those actions."

SECRET

ATTORNEYS GENERAL SINCE 1924

Attorney General	Sworn In	Resigned	President
Harlan F. Stone	4/7/24	3/1/25	Coolidge
John G. Sargent	3/18/25	3/5/29	Coolidge
William D. Mitchell	3/5/29	3/4/33	Hoover
Homer S. Cummings	3/4/33	1/2/39	Roosevelt
Frank Murphy	1/2/39	1/18/40	Roosevelt
Robert H. Jackson	1/18/40	7/10/41	Roosevelt
Francis Biddle	9/5/41	6/30/45	Roosevelt
			Truman
Tom C. Clark	7/1/45	8/24/49	Truman
J. Howard McGrath	8/24/49	4/7/52	Truman
James P. McGranery	5/27/52	1/20/53	Truman
Herbert Brownell, Jr.	1/21/53	10/23/57	Eisenhower
William P. Rogers	11/8/57	1/13/61	Eisenhower
Robert F. Kennedy	1/21/61	9/3/64	Kennedy
			Johnson
Nicholas deB. Katzenbach	2/13/65		Johnson

SECRET

ALL (b)(1)

SECRET

FBI MICROPHONE SURVEILLANCE STATISTICS

[redacted]

(c)

[redacted]

(c)

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THE LONG COMMITTEE

In early 1965, the United States Senate Subcommittee on Administrative Practice and Procedure, headed by Senator Edward V. Long of Missouri and popularly known as the Long Committee, began inquiries into Federal encroachments on citizens' privacy. The Committee's early inquiries centered largely on the use of electronic surveillances by the Internal Revenue Service and that agency received considerable adverse publicity as a result of these hearings. Beginning in early 1966, and with the Director's approval, Assistant to the Director DeLoach and Assistant Director Gale conferred with Senator Long and with the Committee's Chief Counsel Bernard Fensterwald, Jr., to present to them a factual account of the Bureau's strictly limited use of electronic surveillances under tightly controlled administrative procedures. (Exhibit 95)

("Invasion of Privacy (Government Agencies)", Hearings before U.S. Senate Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary, 89th Congress, 1st Session, Part I, 1965, p.1)

Following these conferences, the Director sent Senator Long a letter dated January 20, 1966. (Exhibit 96) In this letter, the Director expressed his appreciation for the opportunity to work with the Senator and his Committee staff and for the opportunity to submit to them for their close scrutiny the FBI's policies and procedures regarding

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On April 25, 1966, Senator Long advised Mr. DeLoach that he had no intention whatsoever of holding committee hearings regarding the FBI's use of listening devices. (Exhibit 97) The Senator repeated an earlier statement that, at the right psychological time, he intended to release to the press the Director's letter of January 20, 1966, and a statement from the Committee absolving the FBI of any wrongdoing in its use of microphones and wire taps. According to Senator Long, the time for releasing the Director's letter and the Committee's statement was not then propitious because newspapermen, such as Drew Pearson and David Kraslow, were pressuring him to hold public hearings concerning the FBI's use of electronic eavesdropping devices. Since Senator Long had not made these releases as of July 11, 1966, he apparently feels that the time is still not propitious.

FEDERAL BUREAU OF INVESTIGATION
COMMUNICATIONS SECTION

MAY 18 1976

TELETYPE

Assoc. Dir. ____
Dep.-A.D.-Adm. ____
Dep.-A.D.-Inv. ____
Asst. Dir.:
Adm. Serv. ____
Ext. Affairs ____
Fin. & Pers. ____
Gen. Inv. ____
Ident. ____
Inspection ____
Intell. ____
Laboratory ____
Legal Coun. ____
Plan. & Eval. ____
Rec. Mgmt. ____
Spec. Inv. ____
Training ____
Telephone Rm. ____
Director Sec'y ____

[redacted] DE CODE

4:15PM URGENT MAY 18, 1976 DLR

TO: DIRECTOR (66-3160)

FROM: DETROIT (66-4910)

CONFIDENTIAL

SURREPTITIOUS ENTRIES.

RE BUREAU AIRTEL, MAY 5, 1976, AND TWO TELEPHONE CALLS [redacted] MAY 17, 1976, [redacted]

DETROIT AIRTEL CAPTIONED "SWP-IS", AUGUST 13, 1973, BUFILE 100-16[redacted].

DEPARTMENTAL ATTORNEY WILLIAM L. GARDNER APPEARED AT THE DETROIT FBI OFFICE, MAY 17, 1976, AND APPARENTLY COMPLETED REVIEW OF DETROIT FILES LATE AFTERNOON AS HE DEPARTED DETROIT OFFICE AND INDICATED HE CONTEMPLATED RETURN WASHINGTON, D.C., MORNING, MAY 18, 1976. PER HIS REQUEST GARDNER REVIEWED THE FOLLOWING DETROIT FILES [redacted] CAPTIONED [redacted] SEE [redacted] AKA, SGE [redacted] SM - SWP; 100-1334, SWP - IS, VOLUMES 144-167, DATED NOVEMBER 24, 1969 - JUNE 21, 1974; [redacted] SM - SWP; 100-29805, VOLUME 12, SERIAL 682, FD-306, DATED NOVEMBER 2, 1972, REVEALING FRIDAY NIGHT SOCIALISTS FORUM MEETING, DECEMBER 17, 1971, ATTACHING A [redacted] A COPY OF WHICH IS DISSEMINATED TO DETROIT [redacted] 100-34153,

ALL [illegible] CONTAINED HEREIN IS UNCLASSIFIED EXCEPT WHERE SHOWN OTHERWISE.

CONFIDENTIAL

ROUTE IN ENVELOPE

SPECIAL DM

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(b)(7)(D), (b)(2)

[redacted] NOVEMBER 30, 1966 -

JANUARY 4, 1973 [redacted] BUFILE [redacted] VOLUMES 4 - 9,

[redacted]

(b)(1)

[redacted]

(C)

REGARDING CATEGORY B, QUESTION 9 OF APRIL 21, 1976, LETTER OF J. STANLEY POTTINGER, ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, AS FURNISHED BY REFERENCED AIRTEL, THE DETROIT OFFICE

[redacted]NTIAL