



Department of Justice

STATEMENT

BY

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BEFORE

THE SENATE SELECT COMMITTEE ON INTELLIGENCE
SUBCOMMITTEE ON INTELLIGENCE AND THE RIGHTS OF AMERICANS

ON

S. 1566 -- THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1977

10:00 A.M.
TUESDAY, JULY 19, 1977
UNITED STATES SENATE
WASHINGTON, D.C.

I am pleased to appear before you today to testify in support of S. 1566, a bill to authorize applications for a court order approving the use of electronic surveillance to obtain foreign intelligence information within the United States.

I wish to take this opportunity to thank this Committee for holding these hearings promptly, without waiting for the Judiciary Committee's report of the bill. Given the crowded legislative docket facing the Senate, if S. 1566 is to pass the Senate this session, the same spirit of cooperation between the Administration and Congress, and indeed within Congress, which has been demonstrated thus far must continue.

Except for one matter, which I know concerns several of the Members of this Committee, I would like to submit my prepared statement before the Judiciary Committee as my prepared statement before this Committee. The one matter not covered in detail in that statement is the question of extending S. 1566 to cover all United States Government surveillances worldwide.

Before S. 1566 was introduced the Administration seriously considered proposing a bill which would cover all electronic surveillances, not just those within the United States. Because the work on a bill limited to surveillance in the United States was already far advanced and because there was a desire to enact legislation on this subject as soon as possible, it was decided

not to attempt to expand the bill to cover overseas surveillances. It was expected to take several months to iron out the problems which are unique to overseas surveillances, and such a delay would have doomed any hope of legislation on electronic surveillance this year.

At the time S. 1566 was introduced, the Administration announced that it would undertake, in cooperation with interested Members of Congress, to draft separate legislation covering overseas surveillance. We have been engaged in that task for almost two months, and the issues are still not resolved within the Executive Branch. This is due to the number and complexity of the problems uniquely involved in overseas surveillances, and the difficulty in creating and maintaining meaningful safeguards in light of those problems.

While I am not prepared to go into great detail over these problems here, some of which could only be discussed in Executive session, I can say that many of the problems arise out of the fact that overseas there is a fair degree of cooperation between our Government and the police and intelligence services of other nations, and surveillances undertaken are not exclusively for our purposes. The level of cooperation in surveillances, moreover, can span the entire spectrum from situations where we effectively can control all aspects of the surveillance to situations where we have virtually no control.

Restrictions or limitations on such surveillances could result in the loss of cooperation. These cooperative ventures would require adjustments of one form or another in all aspects of S. 1566, if it were to be used as the vehicle for reaching overseas surveillances. It will not be a simple matter to apply to electronic surveillance abroad the provisions of S. 1566 relating to the standards for approval, the information to be given to the judge, and the limitations in the order itself.

A separate problem, not directly related to the joint operation problem is the standard under which Americans may be made the target of a surveillance. Under S. 1566 in almost all cases an American will have to be violating Federal law to be targeted for electronic surveillance. Yet in most cases our laws do not have extraterritorial effect, so that activity in the United States which would violate our laws, would not be a violation if committed abroad. Even more problematic is the fact that overseas there may be a need for electronic surveillance against Americans for positive foreign intelligence purposes, as opposed to counter-intelligence purposes. An easy example is the American citizen who emigrates or defects to another country and rises to a position of power and influence in a foreign government.

In dealing with these problems one must keep in mind that overseas the foreign intelligence need for electronic surveillance is probably more critical than within the United States. The conditions under which our personnel must operate can include

clandestine activities in hostile areas and often involves activities where our ability to engage in electronic surveillance at all is extremely fragile, because it must be covertly conducted in territory not under our control.

In raising these problems, however, I do not mean to suggest that they are insurmountable. I do not believe they are. I mention them only to illustrate what I believe to be the inadvisability of attempting to cover overseas surveillance in S. 1566. It just cannot be done by means of a few simple amendments. The yet unresolved problems, some of which I have mentioned, suggest that if S. 1566 were to be delayed pending their resolution, there would be no legislation this session.

I am, therefore, restating the Administration's commitment to draft separate legislation providing safeguards for Americans abroad from electronic surveillance by this Government for both intelligence and law enforcement purposes. I cannot provide a date by which such legislation will be ready, because it depends in part upon the resolution of some difficult policy problems. I can pledge, however, to move forward with my part of this project as expeditiously as I can responsibly do so. My staff has already reported to me on productive meetings that have been held with the staff of this Committee on this subject. In closing, I urge that this issue not be allowed to cause delay of the passage of S. 1566.