Approved Draft

AMERICAN BAR ASSOCIATION PROJECT ON
STANDARDS FOR CRIMINAL JUSTICE

STANDARDS RELATING TO

Electronic Surveillance

This volume contains the Tentative Draft of June 1968 and the Supplement of March 1971. The standards in the Tentative Draft, with amendments as shown in the Supplement, were approved by the ABA House of Delegates in February 1971, and may be cited as "Approved Draft, 1971."

INSTITUTE OF JUDICIAL ADMINISTRATION

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Electronic Surveillance

Recommended by the

SPECIAL COMMITTEE ON STANDARDS FOR
THE ADMINISTRATION OF CRIMINAL JUSTICE

William J. Jameson, *Chairman*

and the

ADVISORY COMMITTEE ON THE POLICE FUNCTION
(as of June, 1968)

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Introduction

At the same time that the Advisory Committee on the Police Function was formulating standards relating to electronic surveillance, the Congress was working along the same lines on federal legislation dealing with similar matters. The federal legislation was enacted as Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (P.L. 90-351) during June 1968, the same month as the publication of the Advisory Committee's Tentative Draft. Since then two Annual Surveillance Reports, entitled "Report on Applications for Orders Authorizing or Approving the Interception of Wire or Oral Communications," have been transmitted to the Congress by the Director of the Administrative Office of the United States Courts, as required by Title III. These Reports, in the judgment of the Special Committee, bear out the views of the Advisory Committee as to the desirability of electronic surveillance as a law enforcement technique and as to the efficacy of the imposed restraints in maintaining the use of such techniques within limits tolerable in a free society. In addition, as the cases developed by these techniques have moved along in the judicial process, two federal district courts, one in Florida and one in the District of Columbia, have recently upheld the constitutionality of several key provisions in Title III;* and no court has yet held them to be unconstitutional.

Upon the recommendation of the Council of the Section of Criminal Law, the Special Committee proposed revisions of the Tentative Draft standards which largely would bring them into closer conformity with the provisions of Title III and which, therefore, do not work substantial change. The standards, with these revisions, were supported by the Advisory Committee on the Police Function (as constituted in June 1968),† the Council of the Section of Judicial Administration and, so far as they went, the Criminal Law Council.

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*See United States v. Escandar, 8 Crim. L. Rptr. 2121 (S.D. Fla.; dec'd 11/2/70); United States v. Tantillo, Crim. Case No. 1912-69, D. Col.

†The proposed revisions were submitted for comment to the Advisory Committee as it was constituted when the standards were formulated.

The Criminal Law Council, however, proposed further amendments, which were the subject of debate when the standards were submitted to the House of Delegates for its approval at the February 1971 Mid-Year Meeting.

The further amendments proposed by the Criminal Law Council were submitted in the form of three motions: one dealing with disclosure of transcripts of overheard communications, one dealing with use of evidence obtained under the exercise of the President's powers regarding national security, and one dealing with emergency and lengthy surveillances. The texts of the proposed amendments are set forth in an appendix to this Supplement, *infra*.

The *disclosure* motion had two branches. One branch dealt with pretrial notice of the use of overheard communications as evidence. Section 2.3 (b), as revised by the Special Committee, requires disclosure of electronic surveillance information in accordance with the ABA Standards Relating to Discovery and Procedure Before Trial. The Criminal Law Council sought to substitute a standard requiring disclosure at least ten days in advance of trial. While there was no disagreement in principle, the Criminal Law Council believed that the matter should be specifically covered in this report and the Special Committee thought it more appropriate to leave treatment of the subject to the more comprehensive Discovery report already approved by the House. The second branch of this motion dealt with the standards relating to inventory of court-authorized surveillances, an auditing device designed to maintain visibility of the process. Section 5.15 requires notice to interested persons of facts pertinent to the surveillance other than the content of intercepted communications; section 5.16 deals with permissible disclosure of the communications—only by a law enforcement officer to another in the performance of his duties or in a court or grand jury proceeding, unless good cause is shown therefore before a judicial officer. The Criminal Law Council would have added a new section after 5.15 mandating disclosure, upon request, of the contents of the communications to all persons served with the inventory, on the ground that such disclosure was necessary to permit raising the issue

of unlawful surveillance. The Special Committee argued that the court needed discretion in order to deal appropriately with the case where a person served with the inventory is not a party to the communication, *e.g.*, only the proprietor of the premises, and where one of the parties has a legal privilege against disclosure. The motion was defeated by a vote of 127 to 104.

The *national security* motion sought to prohibit the use in evidence of communications overheard under the President's power to authorize use of electronic surveillance to protect the nation from hostile acts of foreign powers and from foreign intelligence activities (section 3.1). While recognizing that the President may have the right to authorize such surveillance without court approval, the Criminal Law Council argued that there is no such exception permissible under the Fourth Amendment, and, since the methods required by *Berger*, 388 U.S. 41 (1967), and *Katz*, 389 U.S. 347 (1967), would not be met, the evidence could not be used in a criminal prosecution. The Special Committee argued that the issue had not yet been squarely faced by the Supreme Court and supported the use of such evidence, as provided in section 3.2, on the ground that, if the overhearing was constitutionally within the President's powers, the seizure was not unreasonable under the Fourth Amendment, and there was no constitutional purpose served in excluding the evidence thereby obtained. The motion was defeated by a voice vote.

The *emergency and lengthy surveillance* motion sought to bar emergency surveillances without prior court approval (deleting section 5.2) and to restrict the length of time a particular surveillance could be authorized to five days, with one five-day extension (deleting section 5.4 and amending section 5.9). The Criminal Law Council argued that surveillances conducted without prior court approval and longer court-approved surveillances than those recommended were unreasonable invasions of privacy and, moreover, were already prohibited under the Supreme Court's decisions in *Berger* and *Katz*. The Special Committee argued that *Berger* and *Katz* did not have to be read as narrowly as the reading urged by the Criminal Law Council and that the scope of surveillance authorized

by the standards (and Title III of the federal statute) was necessary to be feasible, and was not unreasonable under the various safeguards required, *e.g.*, that the emergency surveillance meet the test required for the court to authorize an ordinary surveillance if the evidence obtained is to be admissible, that probable cause be shown for the initial 15-day period and any 30-day extensions authorized by the standards. The motion was defeated by a voice vote.

Additional exposition of the Criminal Law Council's views may be found in its report to the House of Delegates at the February 1971 Mid-Year Meeting. Further discussion of the Special Committee's position is contained, generally, in the commentary in the Tentative Draft of June 1968 and, more specifically, in the commentary to the sections involved, *infra*.

One member of the Special Committee, Arthur J. Freund, requested that his vote in opposition to the promulgation of any standards in this area be specifically recorded. Mr. Freund's dissenting views are set forth at the end of the standards and commentary, *infra*.

The standards and commentary which follow are set forth in the form in which they were submitted to the House of Delegates.

Proposed Final Draft of Standards

PART I. GENERAL PRINCIPLES

1.1 Objectives; prohibition; exception.*

(a) Objectives; privacy; justice.

The objectives of standards relating to the use of electronic surveillance techniques should be the maintenance of privacy and the promotion of justice.

(b) Prohibition; public; private.

Except as otherwise expressly permitted, the use of electronic surveillance techniques for the overhearing or recording of wire or oral communications uttered in private without the consent of one of the parties should be expressly prohibited. Subject to limitations of constitutional power and considerations of federal-state comity, the prohibition should be enforced with appropriate criminal, civil, and evidentiary sanctions.

(c) Exception; public.

Subject to strict statutory limitations conforming to constitutional requirements, [law enforcement officers in the administration of criminal justice] the Attorney General of the United States, or the principal prosecuting attorney of a state or local government, or law enforcement attorneys or officers acting under his direction should be permitted to use electronic surveillance techniques for the overhearing or recording of wire or oral communications uttered in private without the consent of [the parties] a party only in investigations of the kinds of criminal activity referred to in sections 3.1 and 5.5 of these standards. The limitations should be enforced through appropriate administrative and judicial processes.

*The standards are reproduced as originally proposed by the Advisory Committee. Material which is recommended for deletion is placed in brackets. Material which is recommended for addition is underlined.

Commentary

These amendments are designed to reflect the relationship between the general principles and the specific standards. No change in substance is intended.

PART II. SANCTIONS

2.1 Criminal sanctions.

(a) Penalty.

Except as otherwise permitted under these standards, [all aspects of] conduct as specified in this section relating to the use of [electronic surveillance techniques] a mechanical, electronic or any other device for overhearing or recording of wire or oral communications uttered in private without the consent of [the parties] a party should be made criminal or regulated.

(b) Scope; overhearing; recording; use; disclosure; devices.

The [prohibition] legislation should include—

(i) prohibition of the intentional overhearing or recording of such communications [so overheard or recorded] by means of such a device;

(ii) prohibition of the intentional use or disclosure of such communications so overheard or recorded or evidence derived therefrom;

(iii) prohibition of the intentional unauthorized use or disclosure of such communications otherwise lawfully so overheard or recorded or evidence derived therefrom;

(iv) regulation, backed by criminal sanctions, of the [intentional] possession, sale, distribution, advertisement or manufacture of a device the design or disguise of which makes it primarily useful for the surreptitious overhearing or recording of such communications;

(v) prohibition of the intentional promotion, whether by advertising or otherwise, of any device [where the advertisement

promotes the] for unlawful use [of the device] in overhearing or recording such communications; and

(vi) a provision for the confiscation of any overhearing or recording device possessed, used, sold, distributed or manufactured in violation of the prohibition or regulation.

[A good faith mistake of fact or law should constitute a defense to criminal liability.

Consistent with the standards in Parts IV and V, law enforcement officers, or those under contract with them, acting in the proper performance of their official duties, or in fulfillment of their contract, should be excluded from the prohibition.]

(c) Enforcement; immunity.

The prohibition, where necessary, should carry with it provision for the granting of immunity from prosecution in the investigation of violations of it.

Commentary

The amendments to subsection (a) and the first paragraph of subsection (b) are designed to clarify the scope and intent of the standard. The paragraph as to mistake is deleted in order to leave the matter to applicable principles of substantive criminal law. The last paragraph is deleted because it proved to be a source of misunderstanding as to the scope of the law enforcement exception, which is set forth in other standards, and is a matter of detail in any event, to be taken care of in any implementing legislation. The omission of this explicit provision is not intended as a change of substance.

2.2 Civil sanctions.

(a) Cause of action.

Except as otherwise expressly permitted, the use of electronic surveillance techniques for the overhearing or recording of wire or oral communications uttered in private without the consent of [the parties] a party or the use or disclosure of such communications or evidence derived therefrom, knowing or having reason to know that such communication or evidence was so obtained, should give rise

to a civil cause of action against any person or governmental agency who so overhears, records, or [knowingly] discloses or uses such communications or evidence derived therefrom, or procures or authorizes another to do so.

(b) Defense; court order.

Good faith reliance on a court order or other legislative authorization should constitute a complete defense to civil recovery.

Commentary

The first amendment reflects the decision of the Special Committee regarding consent under section 4.1 to parallel the standards to the provisions of Title III of Public Law 90-351, noted below. The second amendment merely makes explicit the principle that the standard would also apply to procured or authorized surveillance.

2.3 Evidentiary sanctions.

(a) Suppression.

Except as otherwise expressly permitted under these standards, [No] no wire or oral communication uttered in private and overheard or recorded without the consent of [the parties] a party [except as otherwise expressly permitted], or evidence derived therefrom, should be received in evidence in any trial, hearing or proceeding in or before any court, grand jury, department, officer, agency, regulatory body or other authority,

(b) Pre-use notice [; waiver] in criminal cases.

[No such communication so overheard or recorded, except as otherwise expressly permitted, or evidence derived therefrom should be received in evidence in or before such court, department, officer, agency, regulatory body, or other authority unless within ten days before such trial, hearing or proceeding the party offering such communication or evidence derived therefrom furnishes other interested parties copies of the relevant portions of the records of the communications, the court order, and accompanying applications under which the overhearing was authorized or approved. Where a failure to furnish parties copies of such records, orders and applica-

tions was not culpable or will not work prejudice, the communication or evidence derived therefrom should be admissible in the exercise of the sound discretion of the appropriate authority.] The standards set forth in ABA Standards Relating to Discovery and Procedure Before Trial should apply to disclosure by the prosecution in a criminal case of information relating to use of electronic surveillance techniques and to evidence derived therefrom.

(c) Motion to suppress; time; appealability.

Any party aggrieved by the overhearing, recording, use or disclosure of such communications or evidence derived therefrom so overheard, recorded, used or disclosed otherwise than as expressly permitted should be permitted to move to suppress such communications or evidence derived therefrom. The motion should be made prior to the trial, hearing or other proceeding unless there was no opportunity to make the motion or the party was unaware of the grounds on which the motion could be made. Where such a motion is made and granted, prior to the attaching of jeopardy, during the course of a criminal prosecution, the prosecutor, where necessary, should be afforded a right of appeal provided that the appeal is not taken for the purpose of delay and is diligently prosecuted.

[(d) Substantial rights; excusable error.

An error not affecting substantial rights in an application, authorization, or overhearing or recording of the otherwise authorized overhearing or recording of wire or oral communications should not be grounds for the suppression of such communications or evidence derived therefrom. Excusable error made in the process of securing authorization for the overhearing and recording of such communications should be subject to cure by judicial ratification.]

Commentary

The amendment to subsection (a) reflects the change regarding consent in section 4.1.

The substitution of a cross-reference to the Standards Relating to Discovery and Procedure Before Trial for former subsection (b) leaves the matter of disclosure to development by the courts, since

those standards only require notice to the defense that electronic surveillance has taken place. This change reflects the unanimous judgment of the Special Committee that no decision need be taken in the context of these standards which would approve or disapprove the Supreme Court's decision in Alderman v. United States, 394 U.S. 165 (1969), holding that after "standing" (who may object) and "illegality" (was there an unlawful search) have been determined, *all* government files must be disclosed to the defense in order that the issue of "fruit of the poisonous tree" (what must be derivatively suppressed) may be litigated in the context of an adversary hearing. The Congress recently passed legislation that would set aside the *Alderman* decision (Title VII of the "Organized Crime Control Act of 1970"). The Congress has taken the position that *Alderman* is not of constitutional dimension, that is, that it is a supervisory opinion and that it is unwise. See S. Rep. No. 91-617, 1st Cong., 1st Sess. at pp. 62-70 (1969). The Criminal Law Council, in contrast, has urged that the *Alderman* decision is of constitutional dimension and that it reached the right result. It should be noted that the ABA Board of Governors, on July 15, 1970, in endorsing in principle the provisions of the Organized Crime Control Act and urging their enactment as soon as possible, approved Title VII and suggested the following:

> To amend Title VII, Part B, Section 702(a), in order to provide for a more restricted disclosure of evidence to the defendant as provided therein, by permitting the prosecutor to make a written request for an *in camera* screening by the court when he believes that such disclosure would constitute situations enumerated in Part A, Section 701, for example, those which would affect the security of the United States, endanger the lives and safety of informants, Government agents or others, or cause unjustified harm to the reputations of third persons; and to grant discretion to the court to withhold any such information deemed justified by its *in camera* examinations.

By a divided vote of 7-5, the Special Committee decided to omit subsection (d) on the grounds, urged by the Criminal Law Council, that these matters are best handled on a case-by-case basis and need not be stated in the text of the standards themselves.

It should be noted that, where the communication itself is to be

used in evidence at the trial, it must, under the Discovery standards, be disclosed to the defense prior to trial, like all other evidence to be used at the trial, under procedures set forth in considerable detail in those standards.

PART III. NATIONAL SECURITY

3.1 Counter intelligence; supervision.

The use of electronic surveillance techniques by appropriate federal officers for the overhearing or recording of wire or oral communications to protect the nation from attack by or other hostile acts of a foreign power or to protect military or other national security information against foreign intelligence activities should be permitted subject to appropriate Presidential and Congressional standards and supervision.

3.2 Use; disclosure.

Such communications so overheard or recorded, or evidence derived therefrom, should be received in evidence in any federal or state trial, hearing or proceeding in or before any federal or state court, grand jury, department, officer, agency, regulatory body or other authority where the overhearing or recording was reasonable. Other use or disclosure of such communications or evidence derived therefrom should be limited to the use or disclosure necessary to achieve the purpose of the overhearing or recording or on a showing of good cause before a judicial officer.

Commentary

The Criminal Law Council proposed an amendment to this standard, which the Special Committee rejected by a divided vote of 9 to 3, requiring compliance with other standards mandating prior judicial approval before the product of electronic surveillance, conducted by the President in the interest of the safety of the nation, could be utilized

in evidence in any judicial or other proceeding. The Special Committee rejected any reading of the Fourth Amendment that would invariably require compliance with a court order system before surveillance in the interest of the national security could be termed constitutionally "reasonable.". The constitutional propriety of national security surveillance outside of the court order system was specifically left open by the Supreme Court in *Katz,* 389 U.S. at 385 n. 23. In addition, the provisions of Title III of Public Law 90-351 recognize, at least obliquely, the possible propriety of the exercise of this power of the President as Commander-in-Chief and impose under federal law only a requirement of ad hoc reasonableness before the product of such surveillance can be used in any trial or other proceeding. Finally, it is noted that the issues involved in this problem are now in litigation in the courts and should be resolved by the Supreme Court in the not-too-distant future. Until such time as the Court squarely prohibits either the use of the techniques or excludes their product in court, the Special Committee was reluctant to approve any standard that might unduly circumscribe, even indirectly, the power of the President to protect the national security interest or to suggest that what is constitutional for the Commander-in-Crief to do under one provision of the Constitution could somehow be termed constitutionally "unreasonable" under the Fourth Amendment.

PART IV. OVERHEARING OR RECORDING WITH CONSENT

4.1 Overhearing or recording.

The [use of electronic surveillance techniques by law enforcement officers for the] surreptitious overhearing or recording of a wire or oral communication[s] with the consent of, or by, one of the parties to the communication should be permitted, unless such communication is overheard or recorded for the purpose of committing a crime or other unlawful harm.

Commentary

This change represents a middle ground between the text of the original standard and the suggestion of the Criminal Law Council. Under the original standard, all private use of surreptitious recording techniques without the consent of *all* of the parties to a particular communication would have been disapproved. This reflects the law in some states. See, *e.g.*, ILL. ANN. STAT., ch. 38, §14.2. The Criminal Law Council suggested any recording with the consent of one of the parties should be permitted. The Special Committee decided, however, to follow the position of Title III of Public Law 90-351, which prohibits private recording where a specific intent to make the recording for the purpose of committing a crime or inflicting unlawful harm can be shown.

4.2 Authenticity.

When [the techniques should be so employed by] law enforcement officers engage in a recording practice permitted under section 4.1, they should employ devices and techniques which will insure that the recording will be insofar as practicable complete, accurate and intelligible. Administrative procedures should be followed under the supervision of the principal prosecuting attorney similar to those set forth in sections 5.13, 5.14 and 5.18.

Commentary

These amendments merely reflect the relationship between this standard and other relevant standards. No change in substance is intended.

PART V. OVERHEARING OR RECORDING WITHOUT CONSENT

5.1 Overhearing or recording; judicial order; authorized application.

The use of electronic surveillance techniques by law enforcement officers for the overhearing or recording of wire or oral communications uttered in private without the consent of [the parties] a party should be permitted upon a judicial order of the highest court of

general trial jurisdiction based on an [suitable] application in compliance with section 5.3 and authorized by the appropriate prosecuting officer, as described in section 1.1(c).

Commentary

These amendments merely reflect the relationship between this standard and other relevant standards. No change in substance is intended, other than to conform to the amendment of section 4.1.

5.2 Emergency situation.

The use of such techniques to so overhear or record such communications without a judicial order should be permitted where the law enforcement officer, specially designated by the appropriate prosecuting officer, as described in section 1.1(c)—

(i) is confronted with an emergency situation which requires such an overhearing or recording to be made within such time that it is not practicable to make an application and the emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime;

(ii) determines that there are grounds consistent with these standards upon which an order could be obtained authorizing such an overhearing; and

(iii) makes an application setting out the facts constituting the emergency for an order of approval of the overhearing to a judicial officer within a reasonable period of time but not more than forty-eight hours after the overhearing has occurred or has begun to occur.

Where an application for approval is denied, all overheard or recorded communications should be treated as provided in 2.3(a) and an inventory filed as provided in 5.15. The denial of an order of approval should be made appealable.

Commentary

These amendments parallel the standard to the provisions of Title III of Public Law 90-351.