

PENNSYLVANIA HOUSE OF REPRESENTATIVES
JUDICIARY COMMITTEE

PUBLIC HEARING
WIRETAPPING AND ELECTRONIC SURVEILLANCE and CONTROL ACT
SENATE BILL 1101 and HOUSE BILL 2508

Before: H. WILLIAM DeWEESE, Chairman
DAVID HECKLER
NICHOLAS B. MOEHLMANN
CHRISTOPHER R. WOGAN
DAVID J. MAYERNIK
BABETTE JOSEPHS
MICHAEL E. BORTNER
KAREN A. RITTER
ALLEN KUKOVICH
PAUL McHALE
GERARD A. KOSINSKI

Date : September 29, 1988; 10:10 a.m.

Place : Room 22, Capitol Annex
Harrisburg, Pennsylvania

By : Lori A. Shirk, Notary Public
Registered Professional Reporter

ALSO PRESENT:

MICHAEL P. EDMISTON, Chief Counsel
Judiciary Committee

JOHN J. CONNELLY, JR., Special Counsel
Judiciary Committee

MARY WOOLLEY, Chief Counsel
Minority Judiciary Committee

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1988-106

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1 **REPRESENTATIVE DEWEESE:** Good morning, ladies
2 and gentlemen. On behalf of Chairman Moehlmann and
3 Chief Counsel Edmiston, I would like to welcome you
4 to the September 29th hearing of the House
5 Judiciary Committee on wiretapping and electronic
6 surveillance and control.

7 Before we commence with the introduction of
8 our first witness, I would like to welcome the
9 members, Mr. McHale from the Lehigh Valley, and his
10 colleague, Ms. Ritter, also from the Allentown
11 area, and Mr. Kukovich from Westmoreland County,
12 Ms. Josephs from Philadelphia, Special Counsel
13 Connelly, Mr. Heckler from somewhere on the main
14 line, Counsel Woolley, and Mr. Edmiston to my
15 right.

16 With that as an introduction of our team up
17 here, I would like to welcome the Attorney General
18 of the Commonwealth of Pennsylvania, the Honorable
19 LeRoy Zimmerman. Thank you, General, for being
20 here to testify for our committee this morning.

21 **MR. ZIMMERMAN:** Thank you, Mr. Chairman, and
22 good morning to you and members of the committee.
23 To my right is Paul Yatron, First Deputy Attorney
24 General and Director of my Criminal Law Division in
25 the Commonwealth. To my left is Robert Graci,

1 Chief Deputy Attorney General. Bob Graci is one of
2 the people who have supervised the drafting of this
3 legislation.

4 Mr. Chairman, members of the committee, thank
5 you for this opportunity to testify regarding the
6 extension of the Wiretapping and Electronic
7 Surveillance Control Act.

8 This committee faces two questions, should the
9 act be extended, and if so, to what degree should
10 it be amended to better serve the investigative
11 needs of law enforcement and the privacy rights of
12 our citizens.

13 My testimony focuses on the second question,
14 the issue of amendments, because there should be
15 little dispute regarding the first, at least not
16 within this committee. I believe that as members
17 of the Judiciary Committee, all of you are aware of
18 the critical role the current law plays both in
19 aiding major criminal investigations and in
20 protecting our citizens from surveillance.

21 Suffice it to say that without it, we would
22 return to the days, really, when drug busts meant
23 rounding up street dealers, while major drug
24 traffickers remained in business, and when
25 organized crime investigations meant rounding up

1 numbers runners while the bosses went free.

2 I also believe that all of you are aware of
3 the care we in the law enforcement community have
4 exercised in using the current act. My annual
5 reports to you demonstrate that the current law has
6 struck a fair balance between the privacy
7 expectations of our citizens and the legitimate
8 needs of law enforcement. It has withstood every
9 constitutional privacy challenge.

10 Technology has advanced at such a pace,
11 however, that many of the types of communications
12 that were not familiar in 1978 are not afforded the
13 protection of this act.

14 Both to protect those new forms of
15 communication from unlawful interception and to
16 provide law enforcement authorities with a means of
17 obtaining access to those communications under
18 certain circumstances, I recommend substantial
19 amendments to the act.

20 Those amendments, developed in cooperation
21 with and endorsed by the Pennsylvania District
22 Attorneys Association, were made public in the
23 summer of 1987. They are now before you in the
24 form of S.B. 1101, which has passed the Senate, and
25 in House Bill 2508, identical legislation

1 introduced by your Minority Chairman,
2 Representative Moehlmann.

3 Permit me, then, to provide some additional
4 detail on the need for and the nature of these
5 amendments.

6 These bills would bring our act into complete
7 compliance and virtual symmetry with federal law as
8 amended by the Electronic Communications and
9 Privacy Act of 1986. As you know, Congress has
10 given the states until October 21st of this year to
11 bring our statutes into conformity with that law.

12 There is, frankly, some question as to the
13 consequences of failing to meet that deadline. It
14 is a question that ultimately only the courts could
15 answer, but here is the range of possibilities.

16 At best, after extended appellate litigation,
17 the courts would hold that we could continue
18 conducting wiretaps. At worst, the courts would
19 hold that we could not, that any wiretaps conducted
20 after October 21 were illegal. Obviously, even
21 those of us who are inclined toward the best case
22 scenario would prefer to avoid the risk and the
23 uncertainty of failing to conform.

24 In bringing us into conformity, S.B. 1101 and
25 H.B. 2508 do not substantially alter the existing

1 provisions of the state act, rather, they focus on
2 expanding the act to apply to the newer forms of
3 communications. For instance, by amending the
4 definition of wire communication, they clearly
5 extend to cellular phone conversations the same
6 protection presently afforded traditional telephone
7 calls.

8 They also provide criminal sanctions for the
9 unlawful interception of electronic communications,
10 including computer data, electronic mail, and
11 telecommunications. The sanctions are similar to
12 the present act's sanctions against the unlawful
13 interception of oral or wire voice communications.

14 The bills also provide a means for law
15 enforcement to gain access to or intercept such
16 electronic communications pursuant to appropriate
17 court orders under statutorily imposed procedures.

18 As defined in the bills, electronic
19 communications includes telecommunications and
20 other types of nonverbal communications, such as
21 communication over telephone lines between two
22 computer terminals and the growing number of
23 tele-mail services.

24 Thus these bills provide the same protections
25 for electronic communications as are presently

1 afforded for wire or oral voice communications, and
2 thus they provide law enforcement with access to
3 such communications, pursuant to court order, under
4 the same stringent standards presently applicable
5 to wire and oral voice communications.

6 Now, one provision that does constitute a
7 change from existing law addresses the problem of
8 criminals who change phones frequently to avoid
9 interception. In extremely limited circumstances,
10 the Superior Court would be able to issue an order
11 authorizing a wiretap of an individual before his
12 phone location was known, but still, only one
13 location would be tapped.

14 Section 5712 increases the period for which
15 the court may authorize nonconsensual interceptions
16 from 20 to 30 days. It also removes the limitation
17 in the present law which arbitrarily allows only
18 one extension or renewal of the interception.
19 These changes are entirely consistent with federal
20 law.

21 Mr. Chairman, some have suggested that
22 eliminating the one extension limitation would
23 encourage police to press ahead with nonproductive,
24 intrusive wiretaps. I would emphasize that each
25 renewal would require an additional order from a

1 disinterested Superior Court judge who would have
2 to be convinced that there was probable cause and a
3 continued need to maintain that wiretap.

4 Currently, we sometimes do have to shut down
5 very highly productive wiretaps prematurely because
6 of the arbitrary one extension limit. Major
7 targets have escaped prosecution as a result.

8 Section 5741 makes it a crime to intentionally
9 access, without authority, a facility through which
10 electronic communication services are provided.
11 This section is designed to protect stored
12 electronic and wire communications.

13 Section 5242 prohibits providers of electronic
14 communication services and providers of remote
15 computing services from divulging the contents of a
16 communication that they have stored electronically.
17 This provision also would apply to facilities that
18 provide storage of magnetic tapes and discs.

19 In essence, the section gives the owner of
20 those communications records a privacy interest
21 while those records are in the hands of a third
22 party. That is in accord with the decisions of our
23 Supreme Court on state constitutional issues.

24 The bills provide for and regulate
25 governmental access to electronic communications in

1 storage. Like our present wiretapping law, the
2 bills give a civil cause of action to any customer
3 aggrieved by any intentional violation of these
4 provisions.

5 The bills specifically provide for the use of
6 mobile tracking devices and establish standards for
7 the issuance of court orders for these devices.

8 That standard is less than probable cause,
9 because generally, the use of such devices does not
10 constitute a search. The standards become more
11 restrictive if the device is to be monitored in an
12 area where a person would really have a legitimate
13 expectation of privacy.

14 Finally, the bills address pen registers and
15 trap and trace devices, providing uniform
16 procedures for prosecutors to follow in obtaining
17 the court orders that are required for most uses.

18 Mr. Chairman, I thank you for scheduling this
19 hearing and providing us the opportunity to discuss
20 these amendments with you and this committee. I
21 know you recognize, but I must reiterate for the
22 record, the need for priority action, because the
23 current law expires December 4. The federal
24 deadline is October 21st. And there is yet a third
25 deadline, one that is even more imminent, the day

1 of next week when this House will be recessing.

2 I urge all the members of the committee and
3 all the members of the full House to act on this
4 legislation before you recess. Immediate action is
5 necessary, both to preserve and enhance the privacy
6 rights of our citizens and to retain for law
7 enforcement the tools to do the job that you have
8 assigned to us, particularly in drug
9 investigations.

10 Now, I previously introduced to you my First
11 Deputy Attorney General, Paul M. Yatron, who is the
12 Director of my Criminal Law Division, and the Chief
13 Deputy Attorney General, Robert A. Graci, who
14 supervised the drafting of this legislation. We
15 will be happy to attempt to answer any of your
16 questions.

17 REPRESENTATIVE DeWEESE: Thank you very much
18 for your testimony, Mr. Zimmerman. The Chair would
19 like to welcome Mr. Kosinski from Philadelphia to
20 our proceeding. We have a number of people with
21 questions. We will start off with Mr. Kukovich
22 from Westmoreland County.

23 REPRESENTATIVE KUKOVICH: Good morning.

24 MR. ZIMMERMAN: Good morning, Mr. Kukovich.

25 REPRESENTATIVE KUKOVICH: Just a couple things

1 I need to clarify. The current laws maintain
2 Superior Court judges are the only ones who can
3 issue the order. Is that true?

4 MR. ZIMMERMAN: Yes, that's correct, only
5 Superior Court judges.

6 REPRESENTATIVE KUKOVICH: Regarding the roving
7 taps, because I am not sure I grasp that type of
8 technology, under the current law, you have to be
9 very specific about the location and the character
10 of the tap. Wouldn't that change? I mean, when
11 you go before the Superior Court judge for a
12 so-called roving tap, how do you specify that? My
13 concern -- I am asking the question because I am
14 obviously concerned about overbreadth.

15 MR. ZIMMERMAN: Yes. Well, the term roving
16 tap -- the term roving is used in the act, and I
17 think perhaps a better labeling might have been a
18 deferred tap. What we are talking about is, in a
19 complex surveillance mode, you may not know exactly
20 where you are going to put that tap, but keep in
21 mind that only one tap is going to be made, and
22 that if we are talking about confidential
23 informants or confidential information that will
24 evolve, we go to the Superior Court and tell them
25 that we are proposing to do this tap.

1 The only thing that the judge doesn't know at
2 that point in time is exactly where. He does find
3 that out as soon as we know. And obviously, as in
4 other areas, this will continue to be under the
5 supervision of the Superior Court judge assigned to
6 consider probable cause for the tap in the first
7 instance. I'll defer to Mr. Yatron. He might want
8 to amplify or add a footnote to that answer.

9 MR. YATRON: I think one of the things that we
10 want to emphasize is, the term roving, which is
11 used in the federal legislation, is not used in the
12 colloquial sense of that term. It doesn't mean, it
13 clearly does not mean, that you would be entitled
14 to follow a suspect around from place to place and
15 tap a phone wherever he happened to go. It doesn't
16 mean that.

17 REPRESENTATIVE KUKOVICH: Where is that
18 clarified in the bill?

19 MR. GRACI: If I might, Representative
20 Kukovich --

21 REPRESENTATIVE KUKOVICH: Does 1101 clearly
22 state that you can't literally rove?

23 MR. GRACI: It's the provision that allows for
24 that concept that we'll call a roving tap, although
25 as the General said, I think it's a bad use of that

1 word, because it conjures up a misconception. It
2 limits -- The definition and the procedures that
3 are set forth limit when that type of interception
4 may take place, and it sets forth how the person
5 who is assigned to conduct the tap, after getting
6 the order from the Superior Court judge, must
7 ascertain the specific location, and it allows, as
8 the Attorney General indicated, a deferred
9 determination.

10 We still have to meet all the other probable
11 cause standards, and we have to make a specific
12 showing, keep in mind. And the judge must find, as
13 a matter of fact, that the person who is the target
14 of the interception is taking steps to avoid the
15 interception. So it's a very limited set of
16 circumstances. And the way the statute is
17 phrased -- and I might add, it flows, and, quite
18 frankly, parrots the language of the federal
19 legislation that provides for that.

20 The judge would make the determination that
21 there is probable cause, that the crime is or has
22 been committed, that there is probable cause that
23 there would be this conversation that would be
24 evidence of the crime. The only thing he has not
25 specified is where the communication will be

1 intercepted.

2 It's a relaxation, in a sense, of the
3 particularity requirement that we are all familiar
4 with with respect to traditional search warrants.
5 And with respect to traditional search warrants,
6 particularity and the need for particularity
7 depends upon the given circumstances of the search.

8 REPRESENTATIVE KUKOVICH: I understand your
9 problem. I understand why you need that. I am
10 just --

11 MR. GRACI: I think to directly answer the
12 Representative's question, the language in the bill
13 clearly specifies how that will be accomplished.
14 And I might add, the federal history --

15 REPRESENTATIVE KUKOVICH: Is there a body of
16 federal case law that --

17 MR. GRACI: Not case law, but the history, the
18 reports -- because this is a new idea in the
19 federal system, as well. The federal legislation
20 is consistent with analogous situations that have
21 been addressed by the court on the constitutional
22 particularity or specificity requirement, and the
23 federal history lays out what was intended to be
24 done under the language of the federal act, which
25 is the language that's included in 1101.

1 REPRESENTATIVE KUKOVICH: OK. Let's say you
2 have probable cause on your target but you don't
3 know exactly where you are going to be able to get
4 the information you need, maybe his office phone,
5 maybe a home phone, maybe a pay phone in a
6 restaurant that this person goes to. That's part
7 of the deferred aspect, is that what you're saying?

8 MR. GRACI: Yes, sir. But if I might add, if
9 we had probable cause to believe that you might be
10 using any one of those phones, rather than probable
11 cause to believe that you were trying to evade a
12 lawful tap, we would have to get a specific order
13 as to each of those phones.

14 It's when we don't have the probable cause to
15 specifically identify whether you are going to be
16 making the call from your office or a telephone
17 booth or your home that we get the opportunity, if
18 we can demonstrate -- and this is the limitation,
19 and it's critical -- if we can demonstrate that you
20 are taking steps to avoid the lawful interception.

21 If we can't demonstrate that, we can't even
22 apply for, and the judge would be wrong to allow
23 us, to authorize us, to have what I hate to call a
24 roving tap, because it's just a bad -- That
25 conjures up being able to follow him around and

1 hook it up to every one of those phones, and that's
2 not what's allowed.

3 REPRESENTATIVE KUKOVICH: Again,
4 pragmatically, let's walk through this. You have
5 probable cause, you get a tap on the person's
6 office phone. Right? After eavesdropping for a
7 while, you have reason to believe that the person
8 is definitely not providing information, that the
9 person is trying to avoid incriminating himself or
10 herself. Is that the kind of evidence you need to
11 go back to the Superior Court and say, Target A is
12 avoiding it, we need to tap X phone?

13 MR. GRACI: I think that might be part of the
14 equation. We have had situations where that has
15 happened, where somehow they get spooked, so to
16 speak, and stop using the telephone.

17 MR. ZIMMERMAN: The two different things, as I
18 understand your hypothetical, Representative
19 Kukovich, you are talking about listening to a
20 conversation and learning by listening that the
21 person who is doing the talking is attempting to
22 exonerate himself.

23 REPRESENTATIVE KUKOVICH: I am trying to
24 understand how you prove evasion to a Superior
25 Court judge.

1 MR. ZIMMERMAN: The evasion would have to be
2 something positive said by that person to move --
3 or evidence of that, that this person was going to
4 move from one phone to another or one location to
5 another. I think it would have to be more than
6 just a conversation of exonerating him from
7 criminal culpability of some kind. There would
8 have to be something more than that, in my
9 judgment, to reach the standard of evading or
10 moving.

11 REPRESENTATIVE KUKOVICH: So you wouldn't be
12 able to just arbitrarily tap a home phone, if there
13 is nothing there, go back and say, let's try an
14 office phone?

15 MR. YATRON: No, we clearly would not be able
16 to do that.

17 MR. ZIMMERMAN: People frequently,
18 particularly if they find out -- and we hope that
19 they don't, but it can happen, the confidence line
20 is broken, the security is broken, and people find
21 out that we're on a wire. It's amazing how
22 exculpatory their conversations can be when they
23 learn that.

24 REPRESENTATIVE KUKOVICH: When you say clearly
25 you wouldn't be able to do that, you are saying

1 that based on what has happened with the federal
2 experience. The language in the statute, I'm not
3 sure, makes it quite that clear.

4 MR. YATRON: Well, the hypothetical that you
5 just posited would not, under traditional notions,
6 supply probable cause to believe that going to
7 another phone would do you any good. And again,
8 remember, there are two elements there. You have
9 to be able to establish, first, that the person is
10 deliberately attempting to evade surveillance, and
11 second, you also have to establish that he intends
12 to go somewhere else, as yet unknown, to conduct
13 these communications. It's not just a shot in the
14 dark thing that we think he is going to do, you
15 have to have some information.

5
16 REPRESENTATIVE KUKOVICH: But couldn't you do
17 that now under existing law without the roving tap
18 language?

19 MR. YATRON: Well, you could if you knew where
20 the conversation was going to take place.

21 MR. ZIMMERMAN: You have to be specific with
22 respect to where the phone is located that you want
23 to tap.

24 MR. YATRON: If we know that Target X is going
25 to go to the next town over to such and such an

1 address and make a critical phone call, then we can
2 go, if we have probable cause, and get an order for
3 that phone.

4 The purpose of this particular provision is
5 such that if you have information that there is
6 going to be some kind of a meeting or some kind of
7 a communication, say you have this information from
8 some informant who is inside the criminal
9 organization, and he tells you, this is going to
10 happen, we think, on Tuesday afternoon, I don't
11 know where it's going to be yet, no place has been
12 chosen yet, I won't know that until an hour or two
13 before it happens. It's in those kinds of limited
14 circumstances that this provision would come into
15 play.

16 REPRESENTATIVE KUKOVICH: OK. Thank you. One
17 other area. On the --

18 REPRESENTATIVE DeWEESE: If I could interrupt
19 you, Mr. McHale has a point, and then we will come
20 back to you.

21 REPRESENTATIVE KUKOVICH: No problem.

22 REPRESENTATIVE DeWEESE: Mr. McHale has
23 another committee meeting. Paul McHale.

24 REPRESENTATIVE McHALE: Thank you, Allen, I
25 appreciate that. If I may just follow up with one

1 question that was raised briefly by Representative
2 Kukovich, the current procedure requires an
3 application to be submitted to a judge of the
4 Superior Court, if that's correct. In that
5 context, I am a little concerned on Page 16 of the
6 bill, where brackets have been placed around the
7 words "Superior Court." Mr. Graci, in particular,
8 if you could address that, I would appreciate it.

9 MR. GRACI: The reason -- and when it was
10 submitted that way, it was because when you look to
11 the definition of judge in the definitional section
12 of the act, it already says, Judge means a judge of
13 the Superior Court. To place it then in the
14 section with respect to applications was redundant,
15 because if you read the statute, it says, Judge of
16 the Superior Court. Judge already means judge of
17 the Superior Court. It was really to avoid the
18 redundancy. It had no intent to make it other than
19 a judge of the Superior Court.

20 REPRESENTATIVE McHALE: I support this
21 legislation, and I have had a chance to discuss it
22 at some length with Bill Platt, my own district
23 attorney, and I am aware that this has been a very
24 valuable law enforcement tool in our own area quite
25 recently.

1 However, while you are logically correct, the
2 definitional section of the bill does say Superior
3 Court judge, and I was aware of that. As Justice
4 Holmes had said, the life of the law is not logic,
5 it is experience. My concern is that if we delete
6 the language "Superior Court" in the authorization
7 section, not today, but on some future day, there
8 might well be an amendment to this law presented to
9 the General Assembly redefining in just three or
10 four words the definitional section of the bill,
11 thereby causing a ripple effect throughout the
12 legislation, dramatically changing the character of
13 the law, thereby allowing an application to, for
14 instance, a Court of Common Pleas judge.

15 I would not want that kind of very significant
16 change in the law to be available through the form
17 of a very simple, very short amendment to the
18 statute. And therefore, while recognizing that you
19 are logically correct and realizing that today, no
20 one is asking that the power be taken away from the
21 Superior Court, I will be offering an amendment to
22 delete those brackets and, if anything, extend the
23 redundancy throughout the entire legislation so
24 that if, on a future day, the dramatic change in
25 the law that I have described is requested, the

1 General Assembly will have to take more significant
2 action than a very, very brief amendment to the
3 definitional section of the bill.

4 MR. ZIMMERMAN: Representative McHale, in
5 response to your point, which is well taken,
6 certainly this statute was carefully conceived and
7 crafted by this body, and we in law enforcement
8 have used it sparingly and will continue to do so,
9 and where there are abuses, they should be acted
10 upon.

11 Certainly, what you raised, no one has ever
12 suggested that there ought to be a change with
13 respect to the court supervising the application,
14 the monitoring of wiretaps in the Commonwealth. I
15 think it would be wrong. Sometimes there is a
16 public perception, however, that a district
17 attorney or the attorney general can go down the
18 hall to a friendly judge in some county and apply
19 for a wiretap and get it.

20 REPRESENTATIVE McHALE: General, it's
21 specifically to preclude that possibility in the
22 year 1995 that I want to extend what has been
23 accurately described as a redundancy to the rest of
24 the bill. And I use that word, obviously, in
25 quotes, redundancy.

6

1 It is, perhaps, an unnecessary repetition, but
2 if we don't do that and if, in fact, we go the
3 direction that is advocated in the current draft of
4 the bill, on a future day, a Floor amendment in the
5 House containing three or four words could
6 dramatically shift the responsibility for the
7 granting of these applications from the Superior
8 Court to that friendly judge just down the hall.

9 And I realize you are not asking for that
10 today. I want to make it more difficult for
11 someone in your office five or ten years from now
12 to make that request, because I want the General
13 Assembly at that time to seriously debate, if that
14 time ever arrives, whether we want to shift the
15 power from the Superior Court to the trial court.

16 And lastly, I certainly would not suggest
17 abuse of the legislation, as it has existed, by the
18 Attorney General or by district attorneys. I think
19 admirable restraint has been shown. So I am not
20 raising that criticism, and I am not challenging
21 Mr. Graci's drafting of the statute as it is
22 proposed today, but I am looking down the road a
23 little bit, and I want that power to remain with
24 the Superior Court, not with the trial court.

25 MR. ZIMMERMAN: Mr. McHale, it's a point well

1 taken, and to the distinguished Chairman of this
2 committee, I say I would join in your effort to
3 make that correction.

4 REPRESENTATIVE McHALE: Thank you, General.
5 Thank you, Mr. Chairman.

6 REPRESENTATIVE DeWEESE: You are welcome back
7 after your other committee hearing.

8 REPRESENTATIVE McHALE: I'll be coming back.

9 REPRESENTATIVE DeWEESE: At this time, before
10 Representative Kukovich is recognized and then Mr.
11 Heckler, the Chair would like to recognize the
12 presence of Mr. Micheal Bortner from York County, a
13 member of our committee.

14 REPRESENTATIVE BORTNER: Thank you.

15 REPRESENTATIVE DeWEESE: Mr. Kukovich is
16 recognized to pursue his questioning further.

17 REPRESENTATIVE KUKOVICH: I would like to move
18 to Section 5712. It deals with the length of the
19 surveillance order. I am not sure I understand
20 quite the rationale why the current law is 20 days
21 with one extension of another 20 days. Your
22 changing the law would be 30 days with an infinite
23 amount of extensions of 30 days each. I am
24 wondering why that is necessary.

25 You mentioned, in your testimony on Page 5,

1 that major targets have escaped prosecution. How
2 often has that occurred? Do you have any
3 statistics on how many people you could have
4 indicted because you couldn't extend the wiretaps
5 indefinitely?

6 MR. ZIMMERMAN: Mr. Kukovich, I'll defer the
7 question to Mr. Yatron and to Mr. Graci to amplify,
8 but may I respond briefly by saying that we are
9 required to note how long we are up on a wire in
10 the original period or the extension period that
11 now exists under the law.

12 We can show you that where we don't need to be
13 up on the wire the full 30-day period, we are not
14 up on the wire, and we have evidence of that,
15 statistics to back up that statement, that when and
16 if we feel that there is no reason to be up, we
17 come down and end that wire. It might be ten days.

18 The converse is just as true, and we can
19 support that. There are cases where all of the
20 sudden things don't happen quite like you expect
21 them to happen, the cocaine doesn't come in when
22 you expect it, which would generate the telephone
23 calls from the supplier to the manufacturer or back
24 and forth to the street people. As a result,
25 transportation delays, or whatever it may be,

1 require that we're into more than the 20 days or 30
2 days without getting anything, and it's necessary
3 to go back.

4 Now, keep in mind that any extension that we
5 are proposing in this amendment would be still
6 under the supervision and control of a Superior
7 Court judge and would be for a fixed period of
8 time.

9 REPRESENTATIVE KUKOVICH: You would have the
10 same probable cause burden under the fifth
11 extension as you would under the original?

12 MR. ZIMMERMAN: Yes.

13 REPRESENTATIVE KUKOVICH: Although, in a
14 pragmatic sense, once you've gone for the first
15 probable cause, I guess it would become easier.

16 MR. YATRON: I don't think that that's a
17 correct characterization, Representative, because
18 you have a double burden at that point to get an
19 extension, first, that you have probable cause to
20 believe that there is still going to be
21 incriminating things said over the extension, and
22 secondly, you also have to demonstrate to the judge
23 at that time that it's necessary for you to
24 continue to do this. If the judge feels that you
25 have already accomplished enough, you have already

1 gotten what there is to get, that judge should deny
2 that application.

3 **REPRESENTATIVE KUKOVICH:** Well, you recognize
4 my concern whenever it's indefinite, no matter what
5 the procedural safeguards. You also recognize my
6 concern although you might have brought down the
7 taps within five days after you got your
8 information, there will be another attorney
9 general, and this law applies not only to your
10 office, but it's going to apply to some other
11 offices. I am trying to come up with some way that
12 we can safeguard it for potential abuse, and that
13 is a red flag to me of potential abuse.

14 **MR. YATRON:** There is a body of federal law on
15 this issue, because under the federal statute that
16 has existed for a long time, there was no limit on
17 the number of extentions, but every 30 days, a new
18 application and a briefing must be given to the
19 judge who is supervising the surveillance.

20 So there is a body of cases that discuss that
21 and what's appropriate and what is not, when an
22 extension should be granted and when it should not.
23 So it's not as though this were to be done in a
24 vacuum without any prior experience with it.

25 **MR. GRACI:** Representative Kukovich, the

1 limitation that you suggest is already in the law,
2 and it's not changed. The only thing that's
3 changed is the possible outside time limit. The
4 statute clearly says that the judge is authorized
5 to grant an order for up to 20 days, but under all
6 circumstances, the interception must terminate when
7 the purpose of the interception is achieved.

8 And if we violate that provision of the order,
9 the statute provides a remedy. If you stay up too
10 long, you are subject to suppression. So the
11 remedy is already there. It's provided for in the
12 statute. We shouldn't misunderstand -- and I am
13 sure that the members of the committee don't -- the
14 legislation says the outside limit presently is 20
15 days. We are suggesting it should be 30, which, as
16 the General indicated, would be consistent with the
17 federal law and the law of several states, but it's
18 an outside limit.

19 The orders that are issued by the Superior
20 Court may say up to 20 days, but they require that
21 we terminate when the purpose of the interception
22 is accomplished. And I can share with the
23 representatives' committee, and I'd be happy to
24 provide copies to all, the federal reports, which
25 we are required to file, indicate -- I am just

1 looking in 1985 -- the Attorney General applied for
2 28 wiretap orders. Each was granted for a period
3 of 20 days.

4 REPRESENTATIVE DeWEESE: How many?

5 MR. GRACI: 28.

6 REPRESENTATIVE DeWEESE: In 1985?

7 MR. GRACI: Yes, sir. Each was granted for a
8 period of 20 days. There were two extensions
9 granted, and in each of those, the actual
10 interception extended for 40 days. As to all of
11 the others, I see only one -- I'm sorry, two that
12 actually extended the full -- I'm sorry, three that
13 actually extended the full 20 days that they were
14 authorized. The others were terminated, some in
15 five, six, and seven days, some eight days, a
16 couple of ten, some at thirteen.

17 So we have exercised that restraint as the
18 orders and as the statute requires us to do. We
19 don't stay up 20 days just because the order gives
20 that as an outside limit, because that's not what
21 the order says. It says up to that point, but you
22 have to stop when you have achieved your purpose.

23 REPRESENTATIVE KUKOVICH: How many targets
24 have you lost because of the current law's
25 limitation?

1 MR. GRACI: I am not sure that I --

2 MR. YATRON: I don't know that that's
3 something that can be quantified. Let me give you
4 an example of the typical situation where that
5 would come into play.

6 If you have a middle level drug dealer that
7 you have targeted and you have gotten probable
8 cause and have gone up on a wiretap and you are
9 getting conversations between him and the people to
10 whom he sells, so you are getting good information,
11 which was within the scope of the purpose of the
12 wire, and 12 days into the wire, a new figure
13 appears that no one knows who this person is, but
14 by the conversations, it appears to be apparent
15 that it is the supplier of this deal.

16 That's the kind of situation where, with just
17 a few more days to go, you may never even learn who
18 this person is, you may never learn what phone he
19 is calling from. And if we had the ability to go
20 up for a little bit longer, we might be able to get
21 that person. That's one of the kinds of situations
22 that arise.

23 REPRESENTATIVE KUKOVICH: But you still can't
24 give me at least a ballpark figure of how many
25 targets have escaped because of the existing

1 limitation of the law?

2 MR. YATRON: I certainly can't off the top of
3 my head, and I am not sure that I could with
4 research, although I will attempt to do so.

5 REPRESENTATIVE KUKOVICH: I don't want to put
6 any undue burdens on you. Again, my concern is
7 whether that's overly broad. If that language
8 conforms with the federal law and there doesn't
9 seem to be a problem with it, I guess I'm not --

10 MR. GRACI: I might say, that's not something
11 that was changed in 1986 in the federal law, that's
12 been the federal law since 1968, when the Omnibus
13 Crime Control Act was first passed.

14 REPRESENTATIVE KUKOVICH: All right. I don't
15 want to take up too much time. A statistical
16 question, perhaps. Can you supply us with the
17 number of taps that you put on -- you mentioned one
18 statistic for '85 -- and the corresponding number
19 of convictions? I have been --

20 MR. GRACI: And the corresponding number of
21 what? I'm sorry.

22 REPRESENTATIVE KUKOVICH: Corresponding number
23 of convictions pursuant to those taps. I was just
24 looking this morning at a report on applications,
25 the Administrative Office of the Courts, and I see

1 a number of taps that were put on for gambling, for
2 racketeering, narcotics, et cetera, and I see a lot
3 of, no prosecutor's report, no prosecutor's report.
4 What does that mean? I mean, obviously, it means
5 that they haven't given back any information --

6 MR. ZIMMERMAN: It's very difficult, if not
7 impossible, to relate a conviction against a
8 particular person or persons to a particular event,
9 whether it be a wiretap or anything else, because
10 keep in mind that this is one tool that is utilized
11 by law enforcement, and what we learn in a wiretap
12 can be extended, amplified, and is perhaps, maybe,
13 the beginning, rather than the end, of what we do.
14 So it's very difficult to say that we got a
15 conviction against Defendant A as a result of
16 Wiretap 1.

17 REPRESENTATIVE KUKOVICH: Well, perhaps my
18 question wasn't precise enough. Maybe what we need
19 to know is, in how many cases was evidence entered
20 into a case because of a wiretap?

21 MR. ZIMMERMAN: Let me say this, that the
22 answer to that generically, or generally, I
23 suppose --

24 REPRESENTATIVE KUKOVICH: Is that a statistic
25 that your office would have? I would think so.

1 MR. GRACI: We are required to keep certain --
2 And the Representative just held up, I saw, a copy
3 of one of the Administrative Office of the United
4 States Courts Reports. We file information with
5 that agency every year, and we do track, and we
6 have to file for the immediately preceding year, as
7 well as all other years. And that was, quite
8 frankly, the document that I was looking at, as
9 well. It is difficult, as the Attorney General
10 said, to say that a specific conviction resulted
11 from a specific wiretap. That is part of the
12 evidence, oftentimes the most critical evidence in
13 a particular investigation. We may --

14 REPRESENTATIVE KUKOVICH: Well, again, my
15 purpose for asking the question is that -- I think
16 everybody in the House wants to move ahead with
17 this. We need the legislation. My concern, at
18 least, is to try to find out how successful the
19 existing law has been, the need for it, and balance
20 that with some of these new sections that are being
21 added, which concern me somewhat. It would help
22 our deliberations if we knew how successful they
23 were.

24 MR. ZIMMERMAN: You are really focusing on
25 trying to quantify how successful -- how useful

1 this tool has been. Let me say this, that without
2 this tool, we aren't -- it's not that we're on the
3 playing field, in the game, or in the fight, we're
4 not even in the stadium. Virtually every wiretap
5 is successful, because we -- we don't ask for them,
6 we can't get them unless we need them, and what we
7 get is always essential. It would be like trying
8 to say Officer A is responsible for the conviction
9 against Defendant 1.

10 It's very difficult to relate these things.
11 But without this tool today in the technological
12 era in which we live, the sophistication and the
13 great mobility of professional criminals, whether
14 it be in organized crime or in drug trafficking, we
15 are not even -- we wouldn't be able to even get
16 involved, because it's just so sophisticated. You
17 are talking about highly mobile professional
18 enterprises dealing in large numbers.

19 REPRESENTATIVE KUKOVICH: I agree completely
20 you need that tool. Again, my concern is, as the
21 technology expands, and this new legislation will
22 increase that technology -- and I am sure most of
23 the major convictions you have had would not have
24 been successful without this tool. My concern is
25 how much more in the future do we extend this,

1 especially with the new technology, how much
2 surveillance is going to take place which isn't
3 necessary.

4 And I don't -- I can't say, with at least some
5 equivocation, that, you know, we don't necessarily
6 have the best Superior Court judges in the land,
7 and we can't say who the next attorney generals are
8 going to be. And so when we pass on a law like --
9 This isn't easy for us. I don't think we want to
10 just move ahead and give carte blanche to anybody
11 on the wiretap law. That's what we're trying to
12 drive at.

13 MR. ZIMMERMAN: Some of the information that
14 you want -- and I respect your question -- is
15 contained in the report that we provide to the
16 Supreme Court, our annual report.

17 REPRESENTATIVE KUKOVICH: Perhaps that's
18 enough to respond to some of those questions.

19 MR. ZIMMERMAN: If it's not, we would be happy
20 to provide what we can.

21 REPRESENTATIVE KUKOVICH: Is that available to
22 the committee now or --

23 MR. GRACI: I can have copies made available.
24 Presently, as the law exists, we are required to
25 file this with the AOPC. As the bill now provides,

1 1101, and Representative Moehlmann's counterpart,
2 we would be required to provide that, as well, to
3 the two judiciary committees.

4 REPRESENTATIVE KUKOVICH: That's fine.
5 Mr. Chairman, I'm sorry to take so much time.

6 REPRESENTATIVE DeWEESE: No problem. It's a
7 serious subject. Mr. Heckler and then Mr. Bortner.

8 REPRESENTATIVE HECKLER: Thank you, Mr.
9 Chairman.

10 REPRESENTATIVE DeWEESE: I would like to
11 welcome my cohort, Mr. Moehlmann, from York County.

12 REPRESENTATIVE MOEHLMANN: Lebanon County.

13 REPRESENTATIVE DeWEESE: Lebanon County,
14 excuse me.

15 REPRESENTATIVE HECKLER: Thank you very much,
16 Mr. Chairman. And now, as one of the two minority
17 members of the committee, General, you may be
18 assured, though we are few in number today,
19 certainly that's not for lack of interest or
20 support for the prompt renewal of this legislation.

21 The issue of this uncertain location provision
22 in the law was raised, and I think it may be
23 unclear to some of the people that are going to
24 have to consider this how you go about showing that
25 somebody is trying to avoid being intercepted, and

1 there has been reference to things you pick up on
2 an existing tap.

3 Has some of the technology that's become
4 available recently to the general public, such as
5 call forwarding, been a technique that's been used
6 where you can identify patterns of a phone message
7 or a phone call from somebody you are already aware
8 of in a criminal enterprise going to a series of
9 call forwarding machines and then to a switch of a
10 final location?

11 MR. YATRON: There have been efforts to do
12 that by the use of call forwarding, by the use of
13 portable telephones, that was confidence that was
14 misplaced by the people who attempted to do that,
15 because it goes over the wire as soon as it gets
16 back to the base set. But there are attempts to do
17 that all the time. It has occurred -- Call
18 forwarding schemes have been used, as well, also
19 with limited success.

20 The new cellular phones, however, add sort of
21 a new wrinkle to this, because they are a much more
22 secure technology, and they are much more difficult
23 to intercept, even though they are not currently
24 covered under our statute, because they do not use
25 a radio wave that just goes into a base receiver

1 and goes out over the wires.

2 There are a number of ways where you might
3 pick up this information. There may be -- It's not
4 uncommon to have a target answer the telephone,
5 have someone start out in a conversation that is
6 obviously going to be relevant to the
7 investigation, and then they say, no, no, not over
8 the phone, or not over this phone, I'll call you
9 back later from somewhere else, that sort of thing.
10 That's one way you can get it. You can come right
11 off of the surveillance that you might have already
12 done.

13 It can come from individuals who might be
14 informers who have some connection to that
15 particular organization or that particular
16 individual. That's not uncommon, either. It can
17 be through the use of traditional surveillance
18 techniques, that you know that Dealer X, suspected
19 Dealer X, is doing business from pay phones but
20 that he has no pattern, that he doesn't go to the
21 same pay phone every day or every two days to make
22 his calls, that he gets in his car and goes from
23 place to place. Those are the kinds of things that
24 immediately come to mind as far as the nature of
25 the information.

1 **REPRESENTATIVE HECKLER:** So that there are
2 particular patterns that you can -- or conduct of
3 one sort or another or direct information, as you
4 say, from an informant, that you can set forth in
5 your affidavit which would give rise to a factual
6 basis for a judge to conclude that, in fact, you
7 are confronted with somebody who is at least savvy
8 enough to try to avoid your efforts?

9 **MR. ZIMMERMAN:** Yes.

10 **MR. YATRON:** Yes.

11 **MR. ZIMMERMAN:** Paging devices are one, where
12 you get the message, call me back, different pay
13 phone, after the message. So as you point out,
14 technological advances since 1978 have been pretty
15 awesome.

16 **REPRESENTATIVE HECKLER:** General, you made
17 reference to the difficulties with failing to
18 meet -- or sort of a speculative nature, the
19 difficulties we are going to encounter if the
20 October 21st federal deadline is not met. Do those
21 difficulties apply to consensual interceptions?

22 **MR. ZIMMERMAN:** Not the October 21st deadline.

23 **REPRESENTATIVE HECKLER:** That's probably when
24 the legislation sunsets. Under its own terms, all
25 authority to intercept on any kind of conversation

1 goes out the window.

2 MR. ZIMMERMAN: December 4th.

3 MR. YATRON: Yes.

4 MR. ZIMMERMAN: Yes.

5 REPRESENTATIVE HECKLER: I didn't mention the
6 dates because I couldn't remember.

7 MR. ZIMMERMAN: OK. The October 21 deadline
8 is the compliance deadline; the December 4th
9 deadline is out of business.

10 REPRESENTATIVE HECKLER: Right. But the
11 federal October 21st deadline, then, applies to
12 nonconsensual. Given their requirements and the
13 lack of conformity to those requirements and
14 existing law, that's by nonconsensual?

15 MR. ZIMMERMAN: Yes, Representative Heckler.

16 REPRESENTATIVE HECKLER: And would you
17 anticipate that given the circumstances you are
18 reading and your staff is reading and the law, that
19 it may be necessary for you to terminate, in
20 progress, nonconsensual interceptions if we can't
21 get this resolved by the 21st and get this
22 legislation passed?

23 MR. ZIMMERMAN: Yes, yes.

24 REPRESENTATIVE HECKLER: I believe I saw
25 Representative McHale return, and just timely,

1 because I wanted to raise one issue with regard
2 to -- I would join in the thought that it makes
3 sense to make it clear that the Superior Court
4 judge is intended wherever it is intended.

5 I don't know about the old act, I'm not sure
6 whether -- from the present act, whether there is
7 reference to CP judges at all. But in the new act,
8 or the new proposal, the bills that we're dealing
9 with, there is certainly extensive reference to
10 them in connection with the pen register sections,
11 at least.

12 MR. GRACI: If I might say, the reason that we
13 specifically referenced in that section Court of
14 Common Pleas was so as to differentiate from the
15 term judge as it's otherwise defined.

16 REPRESENTATIVE HECKLER: OK. So that
17 everywhere in the present legislation that you are
18 referring to a Common Pleas judge, you designate
19 them as such?

20 MR. GRACI: Yes, sir.

21 REPRESENTATIVE HECKLER: But we'll want to be
22 careful with drafting any amendment that the only
23 judges we're adding something to is wherever the
24 word judge appears alone.

25 REPRESENTATIVE McHALE: That's correct. Dave,

1 there are numerous sections, as you are aware,
2 where the reference is simply made to "the judge,"
3 and it's only in the definitional section by
4 cross-referencing do we know we're referring to a
5 Superior Court judge.

6 It was for that reason that I raised the
7 concern earlier that a very, very brief amendment
8 could dramatically change the impact of the bill.
9 It is that which I'm wishing to avoid. And when we
10 draft the correct amendment, be very careful not to
11 inadvertently touch upon those sections where
12 specific reference is made to the Common Pleas
13 judges.

14 REPRESENTATIVE HECKLER: My understanding was
15 that the only place Common Pleas judges would pop
16 up in the bill are in the new sections dealing with
17 pen registers. Is that --

18 MR. ZIMMERMAN: That's correct.

19 MR. GRACI: And I believe the mobile tracking
20 devices, as well, sir. I'm not sure that that's
21 specified, but I --

22 REPRESENTATIVE HECKLER: The concern has been
23 raised that the ability to get multiple extensions
24 of a nonconsensual intercept order would lead to
25 some kind of, I guess, abuse in the sense of just

1 fruitless or speculative listening to people's
2 conversations go on to term.

3 Are all of your interceptions subject to
4 minimization requirements? Could you describe to
5 the committee what the concept of minimization is
6 and what duties it imposes upon you people?

7 MR. ZIMMERMAN: Mr. Yatron will address that
8 question, Mr. Heckler.

9 MR. YATRON: We are currently required to
10 prepare what's known as a minimization plan when
11 you are setting up a nonconsensual wiretap. What
12 that means is that you are only permitted to listen
13 to conversations that are relevant to your purpose.

14 For example, if the target narcotics dealer is
15 married and has children and one of his children
16 makes a telephone call, we don't listen to that
17 call. As soon as it becomes clear, after a
18 sentence or two, that this is not a call dealing
19 with narcotics trafficking, we don't intercept or
20 listen to that call any further.

21 We do this in every instance. It must be
22 done. It's one of the requirements, and it's
23 something that we have been scrupulously careful to
24 abide by. You do this in every case. The reports
25 that we file, you know, indicate the numbers of

1 people to whom we send notices and that sort of
2 thing, and we have scrupulous record keeping in
3 order to do that.

4 Minimization, of course, makes sure that
5 innocent parties who may be on that particular
6 telephone line for some purpose totally unrelated
7 to criminal activity are not intruded upon to any
8 significant degree, and that's the purpose of it,
9 and we do it in every instance.

10 REPRESENTATIVE HECKLER: And are you obliged
11 to maintain the tapes of the interceptions which
12 you make?

13 MR. YATRON: Yes.

14 REPRESENTATIVE HECKLER: So that if a target
15 wishes to question whether, in fact, you did stay
16 on the line, your log says, no, that was the
17 target's daughter talking to her boyfriend, and we
18 got off the line after 13 seconds. But if somebody
19 doubts that your people really did, there is an
20 actual record of everything, given the way the
21 equipment is set up, an actual record of everything
22 that is intercepted and permanently preserved?

23 MR. YATRON: The monitors are trained
24 specially in order to do this, and those logs are
25 kept, and the tapes are kept, and they are kept

1 secure.

2 MR. GRACI: Representative Heckler, if I might
3 just add to that, I might indicate there have been
4 at least three cases in our appellate courts that
5 have addressed the propriety of the type of
6 minimization that had been utilized in
7 nonconsensual wiretaps, and each time the Superior
8 Court has approved the way and upheld the way we
9 conducted the minimization, that we did not overly
10 intrude on nonpertinent conversations. And we have
11 to establish that at the time of a challenge, that
12 we only listened to what we were entitled to listen
13 to, that we minimized when necessary.

14 Another thing -- and Mr. Yatron just touched
15 on it -- we are required to send a notice to every
16 person who we can reasonably identify who was
17 intercepted during a wiretap. And you'll see some
18 very large numbers, that a thousand people were
19 intercepted. And we try to notify, because we
20 believe that's what the purpose of the act is and
21 the notice requirements, everybody who we might
22 reasonably identify.

23 Now, maybe what we'll have is a name Dave at
24 an address that comes back to a Heckler. We don't
25 know who you are. You might be the lawyer for

1 somebody, and they just happen to call, can I talk
2 to Dave, but because we -- and you answer the
3 phone. We minimize immediately. But because we
4 can reasonably identify you, we'll send you a
5 notice. We haven't really listened to your
6 conversation, but we have intercepted a very minor
7 part, and we believe that you're entitled to know
8 this, because the statute gives rights to certain
9 people who have been intercepted.

10 And then you would be entitled -- There was
11 nothing incriminating, though your conversation was
12 minimized, though it will never become public, you
13 would be entitled to examine the monitor's records,
14 examine the tape recording that you were a party to
15 to see if, in fact, any of your rights were
16 violated and if you might have a cause of action,
17 which, as you are well aware, results in at least
18 \$1,000 liquidated damages for the person who
19 violated your right.

20 So not only have we minimized, not only have
21 our minimizations been upheld, but there are those
22 protections. And I think the committee must be
23 careful not to be misled by what may appear to be
24 outrageous numbers, you have to understand the
25 context of those numbers.

1 **REPRESENTATIVE HECKLER:** The only other
2 question I have is, what kind of commitment of
3 manpower does a nonconsensual interception take on
4 your part?

5 **MR. ZIMMERMAN:** Well, one of the things that I
6 suppose is, if you want to refer to it as a
7 protective device in the whole area of
8 nonconsensual wiretapping, is the cost and the
9 commitment that one has to make and be prepared to
10 make when you apply for a wiretap.

11 Philadelphia, Pittsburgh, the larger cities,
12 some of the other district attorneys can do this.
13 Medium size, small size counties simply do not have
14 the manpower nor can they afford to do the
15 monitoring that has to be done within the
16 safeguards of the statute to make it workable and
17 practical. It's used sparingly for a variety of
18 reasons, one of which is the cost and the
19 commitment.

20 A large number of people are required to be
21 put into one of these efforts, and that doesn't
22 include the training. Obviously, there is a
23 training process and a certification process. So
24 that it's total commitment, and there aren't a lot
25 of district attorneys across the Commonwealth who

1 can do this.

2 MR. YATRON: Even those that can don't do it
3 unless they believe it's absolutely necessary,
4 because it's simply too expensive. You just can't
5 do something like this in every case, even if you
6 could establish the probable cause.

7 REPRESENTATIVE HECKLER: Even from the
8 standpoint of your office, who, presumably, has
9 greater resources, do you have the manpower to stay
10 on a nonfruitful tap for lengthy periods of time?

11 MR. ZIMMERMAN: Impossible.

12 REPRESENTATIVE HECKLER: Thank you, Mr.
13 Chairman.

14 REPRESENTATIVE DeWEESE: Mike Bortner, York
15 County.

16 REPRESENTATIVE BORTNER: I just have a few
17 questions. I want to follow up on the question or
18 concern about extensions and confirm some things
19 for myself and maybe for the benefit of some of the
20 other members.

21 When you apply to a judge for a wiretap, you
22 have got to meet all the traditional requirements
23 for probable cause, do you not?

24 MR. ZIMMERMAN: Yes.

25 REPRESENTATIVE BORTNER: So that the

1 requirements about stale probable cause would apply
2 just as in any other case where you're getting a
3 search warrant to search an area or to get records
4 or documents?

5 MR. ZIMMERMAN: Yes.

6 REPRESENTATIVE BORTNER: And your probable
7 cause that gets you the initial tap probably would
8 not be sufficient to carry you, by itself, through
9 several extensions, would it?

10 MR. ZIMMERMAN: Well, you may have missed
11 this, Representative Bortner -- Mr. Graci responded
12 to that -- there is an additional burden that we
13 have to meet when we request an extension, in
14 addition to the probable cause burden, the reason
15 for wanting the extension to remain up on the wire.

16 REPRESENTATIVE BORTNER: So it seizes your
17 information you've developed through the wire or
18 otherwise, but you've got to show the continuing
19 need?

20 MR. ZIMMERMAN: That's correct.

21 MR. YATRON: Representative Bortner, if I
22 could add one thing, you are exactly correct when
23 you point out that all the traditional notions of
24 probable cause are required, not only for the
25 initial application, but for any extension

1 thereafter. But there is one other requirement
2 that I think we should keep in mind, and that is
3 part of the requirement when the original order or
4 any extension orders are sought is also to
5 establish the need to do this in the first
6 instance.

7 You aren't permitted, under our statute, to do
8 it simply because you have probable cause to
9 believe that this activity is going on. You also
10 must establish why this particular tool need be
11 used, and you must establish what you have tried in
12 order to complete this investigation and what has
13 failed, for example, the use of informants,
14 undercover agents, and that sort of thing. So the
15 requirements are broader than the requirements that
16 are necessary for a search warrant, for example.

17 MR. GRACI: If I might just add one last point
18 to that, that particular point, the need for
19 interception was recently addressed by our Supreme
20 Court in the first case under the wiretapping
21 statute that they had an opportunity to address,
22 and again said that what we did -- and this
23 happened to be an application over the signature of
24 the Attorney General -- that what we did was what
25 the act required, that we did establish that need.

1 **REPRESENTATIVE BORTNER:** Just for my own
2 benefit, how long do you keep the records, the
3 tapes?

4 **MR. GRACI:** Ten years we're required to by
5 statute.

6 **REPRESENTATIVE BORTNER:** That's in the
7 statute?

8 **MR. GRACI:** Yes, sir. None of them are ten
9 years old yet.

10 **REPRESENTATIVE BORTNER:** You indicated that
11 notification is made to individuals whose
12 conversations are intercepted. When is that done,
13 ordinarily?

14 **MR. GRACI:** Within 90 days after the tap,
15 that's a statutory imposed requirement. If the
16 investigation is continuing such that notification
17 might jeopardize the investigation, we may present
18 that matter to the Superior Court judge who issued
19 the order and ask that the notification
20 requirement -- or the time for notification be
21 extended.

22 **REPRESENTATIVE BORTNER:** But that, again, has
23 to be done with the approval of the judge?

24 **MR. GRACI:** It has to be --

25 **REPRESENTATIVE BORTNER:** If you are going to

1 jeopardize the prosecution because you are going to
2 tip off the suspect, you actually have to have
3 approval from the judge, do you not, that that
4 notification not be given?

5 MR. GRACI: Yes, sir. It says that the period
6 of time for notification may be extended for cause
7 shown before the judge. And under no circumstances
8 may we attempt to use evidence derived from a
9 wiretap in an adversary proceeding without first
10 having given notice at least ten days in advance of
11 the attempted use.

12 REPRESENTATIVE BORTNER: Thank you. That's
13 all the questions I have. I appreciate your
14 presentation.

15 REPRESENTATIVE DeWEESE: Chief Counsel Mike
16 Edmiston for two questions.

17 MR. EDMISTON: The first question I have --
18 and it's a question to the panel, although I
19 imagine the Attorney General, or Mr. Graci, might
20 be the person to answer it -- it spins off the
21 questions of Representative McHale earlier and
22 Representative Bortner.

23 There was a discussion of the
24 interrelationship between the definitional
25 provisions of judge and the bracketing of the words

1 Superior Court judge. There was further discussion
2 as to the utilization of the Courts of Common Pleas
3 for the pen registers and trap and tracing devices.

4 When you get to the mobile tracking devices
5 provision in the bill, the language used there is,
6 issuing authority within the judicial district.
7 Now we have roughly four references to entities
8 authorized to grant authority to undertake
9 surveillance activities, utilize the tools
10 available to law enforcement, should this
11 legislation be enacted.

12 I am wondering whether or not you can tell us
13 what your intention was in using the language,
14 issuing authority within a judicial district, in
15 particular, whether, in light of the inquiries we
16 had earlier on the other provisions, you think that
17 language is clear enough, or, preferable, whether
18 or not it might need some further clarification,
19 and whether you can comment briefly on just what
20 we're talking about when we're referring to mobile
21 tracking devices, in particular, if there is an
22 intention to permit district justices to authorize
23 the utilization of this device.

24 MR. GRACI: If I may, Chief Counsel Edmiston,
25 to answer the first question last, the utilization

1 of the phrase "issuing authority in the judicial
2 district" did contemplate a district justice.
3 Under the rules with respect to the issuance of
4 search warrants, any judicial officer from a
5 district justice up to, and including, a justice of
6 the Supreme Court, may act as an issuing authority.
7 That was our intent.

8 And the reason that we included that was
9 because we're talking about a much less intrusive
10 type of surveillance with respect to a mobile
11 tracking device, different from a pen register,
12 different from a -- certainly a nonconsensual wire
13 interception. That was the basis and the thought.
14 It's a different standard of proof, certainly with
15 respect to -- And the reason I say it's a different
16 level of electronic surveillance, a more minimal
17 intrusion, certainly a lesser expectation.

18 And we built into the statute -- I had seen
19 some criticism leveled that we could use these in
20 areas that would otherwise be protected by a
21 reasonable and legitimate expectation of privacy on
22 only a showing of some legitimate law enforcement
23 need. That's not what the bill, as drafted, says.
24 It says if there is to be monitoring while the
25 person or thing being surveyed is within such an

1 area, that a higher standard, namely, the probable
2 cause standard, the traditional search and seizure
3 standard, must be attained. And that's built into
4 the legislation specifically. And I think in that
5 regard we differ and provide a stronger protection,
6 a more strict protection than is found in the
7 federal act, as I understand it.

8 But it was our intent to utilize, for that
9 very minimal intrusion, a district justice, a
10 district justice or a Common Pleas judge. It
11 certainly was not exclusive. I think I can say for
12 the Attorney General that if the committee would
13 deem it appropriate to suggest that that be a Court
14 of Common Pleas judge, that we would certainly have
15 no objection to that, if the committee would think
16 that would be a lesser or a -- some sort of a
17 restriction.

18 I think as the General has indicated already
19 in his testimony and as the evidence indicates, we
20 have acted with restraint in all of these areas.
21 There is certainly no reason to believe that we are
22 going to do otherwise in this or any of the other
23 areas that are now addressed in Senate Bill 1101
24 and Representative Moehlmann's House bill. But
25 that certainly was the intent. I'm sure that you

1 read it accurately.

2 MR. EDMISTON: The nature of the device, you
3 characterized it as less intrusive. It sounds to
4 me as a subjective observation. Tell us a little
5 bit about the device.

6 MR. GRACI: What we are talking about is a
7 device that emits a radio signal. You might have
8 heard of them referred to as a bird dog, something
9 that might be attached to -- if you're trying to
10 follow someone, say over a country road or in a
11 rural area where visual surveillance, to keep
12 someone in constant contact, would obviously be
13 picked up very quickly. You have to maintain a
14 distance, so you attach a device such as this,
15 which emits a radio signal which can be picked up
16 by a monitoring device, basically a radio, and you
17 can keep track of where that thing is going.

18 The reason I say it is less intrusive -- and I
19 think that's, quite frankly, objective, if I
20 might -- is that it does not intercept a
21 communication. It does not capture anyone's words
22 for posterity. All it lets one know, who is
23 monitoring, is where the person being monitored is.

24 Presently, there is no regulation of them in
25 our statute. This provides a regulation, and the

1 only way you can do it, under the proposal, is
2 where there is a legitimate law enforcement need,
3 not just because I want to know where Chief Counsel
4 Edmiston is tonight, but because it's part of an
5 investigation. That's the limitation we built into
6 it. I believe, as I understand them, they are
7 certainly less intrusive than even a consensual
8 interception -- certainly much less intrusive than
9 a nonconsensual interception. Have I --

10 MR. EDMISTON: Thank you.

11 REPRESENTATIVE DeWEESE: The Chair would like
12 to recognize Chris Wogan of Philadelphia.

13 REPRESENTATIVE WOGAN: Good morning, Mr.
14 Chairman.

15 REPRESENTATIVE DeWEESE: Good morning. I just
16 wanted to say one thing for the record, Mr.
17 Zimmerman. I have had some conversations with
18 members of the Superior Court, and the record
19 should state unequivocally that there are different
20 perspectives among the members of the Superior
21 Court as to the efficacy and prudence of taking the
22 time spent from 20 days to 30 days and also from
23 going to one extension to unlimited extensions. So
24 for the record, it should be stated that certain
25 members of the Superior Court do not wholeheartedly

1 embrace some of the changes that we are considering
2 here.

3 MR. ZIMMERMAN: They are entitled to an
4 academic response, and that's their perspective, I
5 would respectfully urge.

6 REPRESENTATIVE DeWEESE: Pardon me, sir?

7 MR. ZIMMERMAN: I suggest that their
8 perspective is from an academic perspective in
9 terms of the usefulness or the need for additional
10 time.

11 REPRESENTATIVE DeWEESE: I guess Mr. Edmiston
12 has one further question.

13 MR. EDMISTON: This question addresses the
14 nature of the interrelationship between the federal
15 privacy statute, our wiretapping statute, our
16 wiretap control statute, our Declaration of Rights,
17 the federal Bill of Rights, and it addresses
18 generally the comment contained in the Attorney
19 General's prepared remarks where the
20 characterization of the legislative proposal is
21 that of virtual symmetry proposed for the state
22 statute in relation and comparison to the federal
23 statute.

24 My understanding of the law is that we don't
25 have an obligation to shrink Pennsylvania's

1 Declaration of Rights to comply with a federal
2 statute or necessarily the federal Bill of Rights.
3 My understanding of the case law, in particular
4 around this statute, the Wiretapping Control Act,
5 is that should the State choose to be more
6 protective of privacy interests than the federal
7 statute provides, that's an option that's available
8 to the Commonwealth, and, for that matter, our 49
9 sister states. Is your understanding of that law
10 different?

11 MR. ZIMMERMAN: No. And I suppose it's
12 determined by your definition of protecting
13 privacy. It doesn't necessarily follow, I would
14 respectfully suggest, that by not being symmetrical
15 with the federal statute, that you necessarily
16 shrink people's rights in the Commonwealth of
17 Pennsylvania.

18 MR. EDMISTON: Thank you.

19 REPRESENTATIVE DeWEESE: Mr. McHale, then Mr.
20 Heckler, then Mr. Bortner, then Mr. Kukovich. This
21 is going on a little longer than the Chair would
22 have preferred, but it's understandable. It's a
23 weighed subject. And I hope you gentlemen are able
24 to stick with us for a few more minutes. Mr.
25 McHale, then Mr. Heckler, then Mr. Bortner, then

1 Mr. Kukovich.

2 REPRESENTATIVE MCHALE: Thank you, Mr.
3 Chairman. The primary focus of this legislation
4 deals with an application that will be filed in the
5 Superior Court with a Superior Court judge, but
6 various sections of the bill touch upon judicial
7 officers ranging from a district justice, up to and
8 including a justice of the Supreme Court. Is that
9 correct?

10 MR. GRACI: No. I'm sorry, I misstated that.
11 As to a mobile tracking device, it references an
12 issuing authority. I think as Representative
13 Heckler pointed out earlier, as to pen register or
14 trap and trace devices, it references a Court of
15 Common Pleas. When I made reference to the Supreme
16 Court--

17 REPRESENTATIVE MCHALE: That's what I just
18 read. That's why I was curious.

19 MR. GRACI: --that was in reference to what an
20 issuing authority is traditionally known to be by
21 the Rules of Criminal Procedure. And the term
22 means any judicial officer from a district justice
23 up to a Supreme Court justice.

24 As I indicated to -- And I'm sorry, I didn't
25 recognize when the Representative came back,

1 because I was looking in this direction. The
2 Attorney General would certainly have no objection
3 as to mobile tracking devices, use the language or
4 the issuing authority of a Common Pleas judge, as
5 is set forth in the bill with respect to pen
6 registers and trap and trace devices.

7 REPRESENTATIVE McHALE: I understand. And I
8 preface my question with a brief comment, and that
9 is that this legislation in the form of the law,
10 because I think it will be passed, is going to be
11 around long after you and I have disappeared from
12 the landscape. And so the question I ask, really,
13 does not in any way reflect upon the individuals
14 who happen to be in front of us today. It's not
15 meant to attack you. You have, I believe, shown
16 considerable restraint and responsibility in your
17 past exercise of power under this statute.

18 Now, having said that, let's talk about an
19 application for a wiretap that goes to a Superior
20 Court judge. Is there any system which has been
21 established, either by your office or by the
22 Supreme Court, to determine which Superior Court
23 judge will receive the application? In short, is
24 it possible to go judge shopping under this
25 legislation?

1 MR. ZIMMERMAN: No. The answer in a word is
2 no. The Superior Court, not the Supreme Court, the
3 Superior Court has established procedures for the
4 assignment of particular judges for particular
5 periods of time to take applications for wiretaps.

6 REPRESENTATIVE McHALE: I think that's very
7 positive. I was not aware of that, and I think
8 that relieves a temptation that would face normal
9 human beings in your position, as well as providing
10 a degree of certainty and even application of the
11 law within the Superior Court itself. So I find
12 that very encouraging and very protective of Fourth
13 Amendment rights.

14 MR. ZIMMERMAN: Yes.

15 REPRESENTATIVE McHALE: Thank you, Mr.
16 Chairman.

17 REPRESENTATIVE DeWEESE: I also would join in
18 Mr. McHale's comments. When I met with some of the
19 judiciary, that was one of the factors that allowed
20 me some diminution in my apprehension.

21 MR. ZIMMERMAN: What was it, diminution?

22 REPRESENTATIVE DeWEESE: Diminution.

23 REPRESENTATIVE HECKLER: I'll try to be brief,
24 Mr. Chairman, but I'd like to just get another
25 point of view out on the table here. Let me

1 preface it with a comment. I, frankly, have some
2 difficulty with the idea that we need judicial
3 intervention to authorize either pen registers or
4 bumper beepers or whatever you want to call them.

5 Would it be correct to say that in a good part
6 of this country and under federal law and federal
7 case -- constitutional case laws that have evolved
8 that unless you put the bumper beeper in some place
9 that is construed to be within the ambit of a
10 protected area itself, that the mere use of it to
11 track a vehicle isn't an intrusion into an area
12 that's been considered private?

13 MR. ZIMMERMAN: The answer to that is correct,
14 yes, Mr. Heckler. A historical reference is the
15 DeJohn case and its progeny dealing with the need
16 for a probable cause standard to secure bank
17 records, and as a result of that case and what has
18 followed, that we're here at this point today.

19 REPRESENTATIVE HECKLER: I agree that DeJohn
20 certainly suggests that with regard to pen
21 registers -- Well, I guess there had been some
22 cases on --

23 MR. GRACI: Beauford specifically rejected
24 Supreme Court authority on pen registers, which
25 said that it's not a search, so there is no

1 probable cause standard.

2 I might add, following up on what the
3 Representative said, that I believe that our act,
4 not only presently, but if the amendments that the
5 General initially suggested a year ago are adopted,
6 will continue to be more protective of the rights
7 of the citizens of the Commonwealth of Pennsylvania
8 than is afforded by the federal constitution and
9 the federal act.

10 REPRESENTATIVE HECKLER: So that was really my
11 point. This bill, if enacted into law, will be
12 substantially more protective, will involve prior
13 judicial intervention for all of these devices
14 where, in fact, our United States Supreme Court and
15 the courts of many of the states in the United
16 States have not required such activity. Is that
17 correct?

18 MR. ZIMMERMAN: That's correct.

19 REPRESENTATIVE HECKLER: Thanks.

20 REPRESENTATIVE DeWEESE: Mike Bortner.

21 REPRESENTATIVE BORTNER: Just let me ask a
22 question I neglected to the first time around and
23 sort of take you down from this lofty philosophical
24 consideration and ask a very practical question.

25 There is a section of the bill that deals with

1 cost reimbursement, which states, essentially, that
2 you have got to reimburse people assembling or
3 providing information involved. A later section
4 exempts telephone companies from those provisions.
5 I think you may have even responded to an inquiry
6 on this in writing.

7 I have been contacted -- as I'm sure other
8 members have -- from telephone companies who may
9 feel that it is somewhat unfair that they are
10 exempted from the section and that there are
11 considerable costs, in fact, that they incur when
12 they do this, not that they don't want to be good,
13 responsible corporate citizens, but that there is
14 some feeling, anyway, among some of them that
15 perhaps they should also be reimbursed for the
16 expense that they incur in this.

17 And I guess I would just like you to respond
18 to that, number one, if that is, in fact, the case,
19 why that particular provision was included in the
20 bill, and what your feeling is about reimbursing
21 telephone companies for their costs in cooperating.

22 MR. ZIMMERMAN: Mr. Graci will address that
23 question.

24 MR. GRACI: Yes, Representative Bortner, I did
25 respond to an inquiry. I don't recall it having

1 come from your office, but on that specific
2 question.

3 **REPRESENTATIVE BORTNER:** It specifically was
4 not, but it was shared with me because I asked the
5 question. I'm really giving you an opportunity to
6 respond to that now.

7 **MR. GRACI:** If I may. Initially I'll note
8 that as to the services that the phone companies,
9 the traditional phone companies, provide to us in
10 effecting wiretap, that is, nonconsensual
11 interception, the statute presently provides and we
12 do pay them at the reasonable cost incurred for
13 their technical assistance, for records they
14 provide to us, and whatnot in conjunction with the
15 wiretap.

16 The portion of the bill that you reference has
17 to deal with the acquisition of records relating to
18 wire or electronic communications. And the ones
19 that the phone company is most concerned with are
20 when they receive a subpoena or a search warrant
21 for telephone toll information, and we recognize
22 that they do incur a cost in providing that
23 information as good corporate citizens, and I would
24 say that they have been excellent corporate
25 citizens. I wish we would get the cooperation from

1 everybody that we get from them.

2 The reason that they were omitted -- and this
3 goes back to the federal legislation, and our
4 language is identical in this regard -- we now have
5 new providers of remote computing service, we now
6 have new providers of electronic services that are
7 entrepreneurs not subject to regulation by
8 something like a public utilities commission, that
9 they sell a service and a product and they have to
10 get their revenues from the people whom they
11 service.

12 The telephone companies, on the other hand,
13 are subject to regulation by the Commonwealth. I
14 believe it's the PUC. And they have the
15 opportunity in establishing their rates -- not only
16 do they have the opportunity, but they take
17 advantage of the opportunity -- to add in an
18 administrative load to cover these types of
19 administrative expenses. By having that ability,
20 they can spread the cost of the services out over
21 their entire rate base. That's something that is
22 not available to the new forms of technology.

23 I might also add -- and this was the
24 consideration that Congress gave -- that
25 traditionally, these types of records have been

1 provided without any charge. All the act did was
2 codify that which had been the practice. And I
3 think given the difference in that they are
4 regulated entities and that they do have the
5 ability to recoup, quite frankly, what it could
6 lead to is a double dipping. I am not suggesting
7 that they do that, and I'm sure the argument on the
8 other side would be, well, geez, I don't want to go
9 back to the rate maker and ask them to raise my
10 rates. That doesn't look good.

11 But otherwise, you're really getting the money
12 to pay for this from the same people, the taxpayer,
13 because then we'd have to pay it. And quite
14 frankly, I get requests from telephone companies
15 fairly routinely, from banks I get them. I don't
16 have any authority to pay those bills right now,
17 and that's what we have asked to maintain in the
18 present statute, and that's the explanation for it.

19 REPRESENTATIVE BORTNER: Let me just follow
20 up. I don't know that I disagree with that section
21 of the bill, and I have indicated that.

22 MR. GRACI: I know there's an opposition.

23 REPRESENTATIVE BORTNER: Although I do think
24 there is some -- I see some faulty logic in your
25 explanation. I mean, the new companies you're

1 referring to certainly can spread that cost over
2 their customers, and they can do it without getting
3 the approval of any governmental body or agency
4 like the PUC.

5 And I suppose the second argument that I'm
6 sure -- where they ask what you mean by the phone
7 companies, that although yes, they are sort of --
8 they are public utilities subject to control, they
9 also have stockholders, much like these other
10 companies, and they also have to answer to them.

11 So I appreciate your response. I don't know
12 that -- Of course, I guess the other answer is that
13 they are -- that the simple cost would be much,
14 much higher when you throw in the phone companies,
15 as with banks and other companies that you may be
16 reimbursing. I mean, I guess there is just a
17 question of what that additional cost would be.

18 MR. GRACI: To be quite honest, sir, I have no
19 idea what it would be, other than I believe it
20 would be high.

21 REPRESENTATIVE BORTNER: One last question.
22 Did you say that they are reimbursed for the cost
23 of personnel?

24 MR. GRACI: No, sir. If they -- Well, for
25 technical assistance. The act, as it presently

1 exists, requires that they be reimbursed if we buy
2 a lease line from them, for instance, in order to
3 effectuate a wiretap. We pay for that service,
4 just like you pay a phone bill.

5 REPRESENTATIVE BORTNER: In the ordinary case,
6 will a wiretap involve the use of phone company
7 personnel?

8 MR. GRACI: It can, but generally it does not.
9 We have technical people trained to do that.

10 REPRESENTATIVE BORTNER: Who can do that, make
11 the tap without interfering with other services?

12 MR. GRACI: What we have to do is acquire the
13 line from them. Once we do that, our technical
14 people, who have been trained and certified under
15 the act --

16 REPRESENTATIVE BORTNER: Thank you. I don't
17 think it's a major point, it's just one I wanted to
18 have clarified. Thank you, Mr. Chairman.

19 REPRESENTATIVE DeWEESE: Certainly, Mr.
20 Bortner. Mr. Kukovich.

21 REPRESENTATIVE KUKOVICH: With some of the
22 other interrogations going on, I had a chance to
23 look, for the first time, at Subchapters C, D, and
24 E, and I have a question about the burden of proof.
25 It seems to differ. Subchapter E with the pen

1 register, on Page 59, the contents of the order,
2 that looks very good to me. It seems to be
3 stronger than maybe even what the federal standard
4 is.

5 MR. ZIMMERMAN: It is.

6 REPRESENTATIVE KUKOVICH: That's great. What
7 I am wondering about is, why are C and D, if I am
8 reading in the right places, different? For
9 example, the mobile tracking device --

10 MR. ZIMMERMAN: What page are you on?

11 REPRESENTATIVE KUKOVICH: Page 56 for the
12 mobile tracking device, it talks about a reasonable
13 suspicion. Why is there a different standard for a
14 mobile tracking device?

15 MR. GRACI: Because it's a less intrusive type
16 of surveillance.

17 REPRESENTATIVE KUKOVICH: I am assuming you
18 got that language from federal case law?

19 MR. GRACI: I think it's from the federal
20 statute.

21 REPRESENTATIVE KUKOVICH: The federal statute.
22 OK.

23 MR. GRACI: Quite frankly, as Representative
24 Heckler pointed out earlier, these things are not
25 subject to constitutional protection in the federal

1 scheme.

2 REPRESENTATIVE KUKOVICH: Well, fine. I think
3 in here there is a U.S. Supreme Court decision on
4 that of mobile tracking devices.

5 MR. GRACI: Yes, sir.

6 REPRESENTATIVE KUKOVICH: But since the
7 Pennsylvania constitution seems to give stronger
8 privacy rights than the federal constitution -- and
9 I don't think there is any state case law on mobile
10 tracking devices. I'm not sure. But I'm just
11 wondering if maybe we shouldn't have a tougher
12 standard.

13 MR. GRACI: Well, if I may, there is a recent
14 state Superior Court case addressing the reasonable
15 suspicion standard with respect to consensual
16 interceptions, and the Superior Court -- And that's
17 one of the reasons, quite frankly, why this act
18 need be renewed. The Superior Court said that a
19 consensual interception is a search for
20 Pennsylvania constitutional purposes, recognized
21 that only unreasonable searches and seizures are
22 subject to any prohibition under either of our
23 constitutions, and said that because of the
24 limitations contained in our act that ward off the
25 indiscriminate use of consensual interception, that

1 consensual interceptions conducted within those
2 provisions are constitutional. And what do you
3 need? And the court spelled it out. The police
4 need a reasonable suspicion of criminal activity
5 and they need the approval of either the Attorney
6 General or a district attorney. So this is much
7 less intrusive than that.

8 REPRESENTATIVE KUKOVICH: All right. The
9 distinction is --

10 MR. GRACI: So I think it is consistent with
11 the state law.

12 REPRESENTATIVE KUKOVICH: Do you have a case
13 cite on that?

14 MR. GRACI: That case, Commonwealth versus
15 Phillips.

16 REPRESENTATIVE McHALE: Mr. Graci, if I could
17 ask this very briefly, in the Phillips' case, was
18 there an analysis under the Declaration of Rights,
19 as well as under the Fourth Amendment?

20 MR. GRACI: Yes, sir. It was specifically
21 under Article 1, Section 9.

22 REPRESENTATIVE McHALE: Thank you.

23 REPRESENTATIVE KUKOVICH: One other question
24 on standard, and that goes to Subchapter C on the
25 government access to the stored communications or

1 whatever.

2 MR. GRACI: Yes, sir.

3 REPRESENTATIVE KUKOVICH: On Page 46, there
4 you only need reason to believe. That's under --
5 Line 4 under the requirements for court order. It
6 seems to be an even lesser standard.

7 MR. ZIMMERMAN: We don't have the expectation
8 of privacy when they turn this material over to a
9 repository, a third party. That's the reason.

10 REPRESENTATIVE KUKOVICH: And that comports
11 with federal law?

12 MR. GRACI: I think this provision tracks
13 federal law, and I think it comports, as well, with
14 the state standard, as it flows from DeJohn.

15 REPRESENTATIVE KUKOVICH: Thanks.

16 REPRESENTATIVE DeWEESE: Mary Woolley? No
17 further questions from the committee members.
18 General, Bob, Paul, thank you very much for being
19 here this morning.

20 MR. ZIMMERMAN: Mr. Chairman, I want to thank
21 you and members of the committee for this
22 opportunity and note for the record that since this
23 is my last time appearing before this august body
24 as the Attorney General of the Commonwealth, I do
25 take this opportunity to thank you personally as

1 Chair and the members of the committee and the
2 staff for the courtesies that you have always
3 extended to me as the Attorney General and to the
4 members of my office.

5 REPRESENTATIVE DeWEESE: Despite some
6 political differences, you have always been
7 hail-fellow-well-met.

8 MR. ZIMMERMAN: Thank you, Mr. Chairman. I'll
9 leave on that note.

10 REPRESENTATIVE DeWEESE: The committee will
11 proceed. Our next witness is Thomas B. Schmidt,
12 III, Esquire, from the American Civil Liberties
13 Union of Pennsylvania.

14 REPRESENTATIVE McHALE: May we see your card?

15 MR. SCHMIDT: I didn't bring it with me, but I
16 try to carry one at all times.

17 REPRESENTATIVE DeWEESE: I also, like our
18 former chief executive, Mr. Thornburgh, am a
19 card-carrying member of the ACLU. Bluntly, if my
20 membership has lapsed, please send me another blank
21 so I can make sure it's up to date. I am unabashed
22 and unequivocal about that. Mr. Thornburgh, as
23 director in the 1960's, was also involved in your
24 organization.

25 And I personally, as a politician and as a

1 participant in the public arena in general, am
2 proud to welcome you here and am proud to have been
3 a part of your organization and hope to be for
4 many, many years to come. With that as a prevue to
5 your remarks, welcome, and please proceed.

6 MR. SCHMIDT: Thank you, and thank you to all
7 the members of the committee for inviting us to
8 testify this morning. We have handed in some
9 extended written testimony, and let me say at this
10 point that I want to thank the staff of the ACLU
11 for working so hard on it, and Mr. Jay Sherwood in
12 particular, who worked quite hard on finding the
13 case law and doing the analysis that I am
14 privileged to summarize this morning.

15 It is a technical piece of legislation. Given
16 the time, I think it would benefit from an extended
17 discussion of particular provisions of the statute.
18 But let me attempt, if I can, to paraphrase the
19 written testimony and then respond, as best I can,
20 to any questions that the committee members or
21 staff have.

22 Let me make a couple introductory remarks,
23 because I think that they are important to the
24 understanding of the ACLU's position on this
25 legislation. We are both for it and against it, or

1 against it and for it, and it takes a moment to
2 explain that.

3 We believe very strongly, as the members of
4 this committee know, that there should not be
5 wiretapping and there should not be any
6 interception of oral communications. We were
7 strong supporters of the predecessor prohibition on
8 that kind of invasion of privacy rights, and we
9 lobbied in 1978 against this particular predecessor
10 legislation.

11 I think this is a point for a personal
12 comment. I was a representative of the ACLU at
13 that time and in those proceedings, and I may be
14 one of the few people still in this room who was
15 involved in 1978 in an effort by this committee,
16 under the leadership of Joe Rhoads and Tony
17 Sirrica, to prepare and see passed a number of
18 statutes, many of which are important parts of
19 Pennsylvania's now legal tradition.

20 And the statute that's to be reenacted by
21 Senate Bill 1101 was one that I think represents,
22 if not the ideal world from an ACLU perspective, a
23 very important guarantee in many parts of the
24 privacy rights of Pennsylvanians. Those rights are
25 better protected in Pennsylvania than they are

1 under the federal statutes and, indeed, under the
2 federal constitution. And that is a tradition that
3 we hope this committee will continue, and it's that
4 aspect of this legislation that has our
5 enthusiastic support.

6 Having said that, there are several aspects of
7 the proposal that we think require amendment or
8 modification so that the next statute that governs
9 Pennsylvania has the strong protections that the
10 predecessor statute has, especially as that statute
11 has been interpreted by our state courts.

12 If I could identify a couple of things, let me
13 start with a few of the questions and topics that
14 were raised earlier this morning when Attorney
15 General Zimmerman and his staff were testifying.
16 One of them involves the change in the
17 20-day/20-day requirement.

18 I think the reports that were filed by the
19 Attorney General -- and I believe the committee has
20 copies of them -- indicate that there were 400 plus
21 prosecutions in the reported time period and 200
22 plus convictions in that time period, but there
23 were 11,000 conversations, or people's
24 conversations, intercepted at a cost of several
25 million dollars. There is obviously, in our view,

1 some disproportionate relationship between the
2 number of people who are affected by this kind of
3 intrusive interception of communications and the
4 results of that.

5 Attorney General Zimmerman said this morning
6 there are no unproductive or useless interceptions,
7 but we think it's imperative that this committee
8 and the Legislature measure what the cost is to
9 privacy of having intercepted conversations. And
10 we think that the original statute, which provided
11 for a 20-day order and a 20-day renewal, was a
12 carefully developed -- if it appears somewhat
13 arbitrary, I think that's because we are trying to
14 control behavior in the future -- but it was a
15 carefully developed way of limiting intrusion into
16 privacy.

17 I think that the amendment which says a 30-day
18 initial period and an unlimited number of renewals
19 is an invitation for abuse. That's not to attempt
20 to discredit either the applicants for those orders
21 or the judges who hear them, but once a judge says
22 there is probable cause to intercept a
23 communication, I think there is a built-in
24 arrangement for renewal of that probable cause.

25 The present law says one must stop. It has

1 the minimization requirement in it, and to that
2 extent, that procedure is continued. But it says
3 it must stop after a 40-day period, and we think
4 that restriction should be retained.

5 Now, the Attorney General, this morning, said
6 that a number of important investigations have been
7 interrupted. And of course, I am not privy to
8 those investigations and I have only heard the
9 numbers that were recited this morning, but as I
10 recall his testimony about 1985, it appeared that
11 there were no investigations that were incomplete
12 because of the 20-day/20-day limitation.

13 And I think that kind of investigation into
14 what the need for this expanded opportunity to
15 continue interceptions would be is incumbent upon
16 this committee to make. And if you are not
17 satisfied that it's really necessary as a law
18 enforcement tool, then I urge you not to approve
19 the extension that's been proposed in this bill.

20 One of the other questions is the roving tap
21 question. And as I understand the bill proposal,
22 according to the Attorney General's discussion of
23 it, roving is a misnomer. And I suggest the tap is
24 a misnomer, too, because the statute says that you
25 can have a roving tap or a roving interception of

1 an oral communication. And the description in the
2 statute of what might be the basis for an order
3 approving a roving wire interception includes two
4 factors: one, that it is not practicable to be
5 particular, and secondly, that the target has
6 evidenced some desire to avoid the tap.

7 That second requirement does not apply to
8 intercepting an oral communication, as I read
9 Senate Bill 1101, and in that case, there only
10 needs to be a presentation that the intercept is
11 not practicable. There does not have to be
12 anything established to show that the target is
13 trying to avoid the interception.

14 Practicable is a rather woolly concept, and we
15 believe the whole notion of roving taps, to use the
16 statutory language, is an invitation for abuse. In
17 this sense, the state proposal mimics the federal
18 proposal, but I think it should be clear to this
19 committee that the federal roving tap language only
20 authorizes those kinds of taps for federal law
21 enforcement agents.

22 The statute specifically lists a number of
23 agents and doesn't make it an all-encompassing
24 concept, as I understand the committee report and
25 statute, and it does not represent, in our view, an

1 invitation to the states to engage in the same kind
2 of activity. I understand that there is an
3 amendment that may be proposed to the statute that
4 would eliminate the roving tap language, and the
5 ACLU certainly supports that amendment.

6 The last category of comments I would make
7 involves the new technology issues that are covered
8 by the additional subparts in the statute, and this
9 is an effort by the State to accommodate the
10 directives and goals of the federal legislation.
11 My understanding of Senate Bill 1101 is that we
12 have not only identified the technology and
13 attempted to comply with the federal statutory
14 directive, but this proposal attempts only to meet
15 those federal statutory standards.

16 We believe it is not only Pennsylvania's
17 political and legal tradition to impose a higher
18 threshold before communications can be intercepted,
19 but we believe that since 1978, the state judicial
20 bodies have said that, in fact, Pennsylvania
21 constitutional principles require that a higher
22 threshold be met. Reasonable suspicion and
23 relevance are not as tough as standards as is the
24 standard of probable cause.

25 And we believe in those new areas that are

1 being added to Pennsylvania statute where new areas
2 of technology or new intercepting devices are going
3 to be used, that the standard, generally speaking,
4 should be a standard of probable cause. That's the
5 standard that's part of our tradition in the
6 history of this legislation, and I think it's a
7 standard that's been identified by our appellate
8 courts. We urge that amendments along those lines
9 be adopted.

10 One other minor point, if I might add it, even
11 though I don't believe technically it may be before
12 the committee, but in the same amendment that I
13 believe Representative Piccola is planning to
14 introduce, there is a deletion of the roving tap
15 provisions, which, as I said, we would support, but
16 I believe there is also an addition of the right
17 for the state police to own wiretapping equipment,
18 or intercepting equipment.

19 And we believe that the existing law was very
20 careful in limiting those bodies or institutions
21 that could own the equipment and it had that
22 limitation in there for a reason, and we urge the
23 committee not to accept that amendment which would
24 change what we think was a very carefully drawn
25 line in existing law.

1 I have attempted to summarize our position on
2 the statute. I think there is a good bit more
3 material in the written testimony, but I would be
4 happy now to attempt to even refer to that or
5 answer any questions that members of the committee
6 may have.

7 **REPRESENTATIVE DEWEESE:** Thank you very much,
8 sir. Members of the committee for questions? Mr.
9 Heckler.

10 **REPRESENTATIVE HECKLER:** Thank you, Mr.
11 Chairman. You contend that with regard to the
12 nonspecific interception provisions on Page 22 that
13 there is a different standard for interception of
14 nonwire oral communications than wire oral
15 communications, or wire communications, I should
16 say.

17 Doesn't that logically flow from the nature of
18 the interception itself? In other words, if a
19 judge is going to be asked to allow a law
20 enforcement agency to put a tap on a location,
21 either a monitoring room or a tap on a particular
22 telephone line, you have got to demonstrate a
23 relationship between the miscredence about whom
24 there exists probable cause and then a nexus
25 between them and the particular physical location

1 or physical line to be tapped.

2 In the other case, if we're talking about
3 intercepting my conversations that it would be
4 established that there is probable cause to believe
5 that I will be engaged in conversations which will
6 give evidence of a crime, is it appropriate to say
7 that -- without reference to my efforts to avoid --
8 if it can't be predicted where I'll be and if the
9 effort is going to be focused on me as opposed to a
10 general location -- or a general phone line, which
11 would affect other people, that we don't need that
12 extra requirement?

13 MR. SCHMIDT: Let me answer in two parts.
14 Part of my reason for making the observation was to
15 attempt to make clear what my understanding of the
16 statute is, and that is that to the extent the
17 rationale that the target is attempting to avoid
18 surveillance applies, it is not a standard for
19 getting a roving tap or roving surveillance on an
20 oral communication. So that the standard for
21 getting that kind of surveillance is lower in that
22 sense that there is an element of proof via a
23 target's conduct that isn't necessary to get the
24 application approved by a judge.

25 Secondly, I think that the roving word

1 literally applies not to the tap on a wire
2 communication, but to the attempt to intercept an
3 oral communication. And I think in that sense, the
4 fear that may be generated or the apprehensions
5 that may be generated by the notion of a roving
6 intercept, somebody free out in the landscape
7 literally, perhaps, to intercept communications
8 without the sort of control that is imposed on that
9 by the particularity requirement in the present law
10 is what creates the apprehension.

11 It is synonymous with the sort of general
12 warrant. Somebody is looking for a right, as I
13 understand the proposed amendments, to intercept
14 someone else's communications without restriction
15 to time or place, and that's what the roving
16 authority, as I understand it, would provide.

17 REPRESENTATIVE HECKLER: But are they
18 requesting permission to intercept a particular
19 person's conversations about whom there has to
20 exist probable cause, or the whole business is not
21 justified to begin with, and subject to their duty
22 to minimize, so that if we're talking about their
23 using a parabolic mic to intercept the conversation
24 of somebody out here on the green at lunchtime, if
25 he is talking about what a nice day it is or

1 something else of that sort, they're going to have
2 to shut down.

3 Maybe I didn't make myself clear to begin
4 with, but I always understood the additional
5 restrictions on bugging a room or tapping a wire to
6 have to do with protecting the rights of others who
7 may venture into the intercept because of the
8 nature of it, rather than providing some additional
9 protection to the person who is a target about who
10 there is probable cause. If or by the nature of
11 things we're restricting our activity to the person
12 who is the target, why is it necessary to have some
13 additional protections for him or her?

14 MR. SCHMIDT: Let me preface my comment by
15 saying that there may be -- there is a limit, not
16 maybe, there is a limit, to my knowledge, of how
17 this statute may apply in a particular set of
18 circumstances. But my understanding of the roving
19 authority is that present law requires a certain
20 degree of particularity, where is the interception
21 going to take place. That's in addition to
22 establishing the identity of the target and the
23 probable cause to intercept that target's
24 communications.

25 And my understanding of the particularity

1 requirement is that it imposes some limit so that
2 the interception does not stray into areas where
3 the interception would be inappropriate or have a
4 broader sweep than the application legitimately
5 seeks, and it may extend into privacy areas where
6 the court might determine, well, there can't be a
7 legitimate belief that an interception in that area
8 would be acceptable.

9 So it's fenced around with this particularity
10 requirement, and I understand the roving authority
11 would take that fence down. And I think it's an
12 area that is subject to potential abuse, and in
13 addition to my earlier comment, which is that it
14 need only be shown that it's not practical to
15 identify a place. And I think that there should be
16 some concern about what practical means. I realize
17 that's a concept like reasonable that judges and
18 lawyers are familiar dealing with.

19 REPRESENTATIVE HECKLER: The only other
20 question I have, I noticed in your written
21 testimony that you express concern about -- which
22 we have heard about earlier -- some questions about
23 granting to district justices the authority to
24 attach bumper beepers or so-called tracking devices
25 and would recommend a limitation on those, the term

1 for which those devices could be used.

2 You would agree that attaching a tracking
3 device to the outside of somebody's car is a
4 substantially less extensive intrusion than
5 intercepting even a consensual interception of
6 their conversations with a consenting third party
7 and particularly than is a nonconsensual
8 interception, would you not?

9 MR. SCHMIDT: I am prepared to believe that
10 it's less intrusive. I think less is a good
11 adjective, because we're not talking about two
12 different baskets that things fall into, we're
13 talking about a continuum. And the thrust of our
14 testimony is to say that the threshold or the point
15 on that continuum in Pennsylvania should be drawn
16 more in favor of privacy protection than one might
17 find it in federal law.

18 I was happy to hear that the Attorney General
19 would agree that the issuing authority even for
20 that less intrusive device ought to be a Court of
21 Common Pleas judge. In our testimony, we address
22 the redundancy of identifying Superior Court judges
23 and agree with Representative McHale that that
24 should not be mistaken for a technical amendment
25 and that the bill should be filled with references

1 to Superior Court judges where they ought to be
2 identified.

3 REPRESENTATIVE HECKLER: Well, if I could,
4 isn't it true -- As far as I'm concerned, the
5 Attorney General concedes too much, which may have
6 to do with the eleventh hour nature of these
7 proceedings which should have been done a lot
8 sooner.

9 Isn't it true that right now under
10 Pennsylvania law, a district justice can issue a
11 warrant which would authorize a police officer to
12 enter someone's home, to go into their bedroom, to
13 turn their mattress over, pull out all the contents
14 of the closet and the dresser drawers, given that
15 all of those steps -- and, for that matter, tear up
16 the floorboards and tear down the ceiling, if, in
17 fact, there is probable cause to believe that those
18 areas might contain something that's either
19 contraband or evidence of a crime, that a district
20 justice can authorize that?

21 MR. SCHMIDT: That is true.

22 REPRESENTATIVE HECKLER: Would you not
23 consider that kind of intrusion to be enormously
24 greater than the attachment of a bumper beeper to
25 my Volkswagen and then to have somebody use that to

1 follow me around for the next 90 days?

2 MR. SCHMIDT: Not entirely. And that is
3 because the probable cause based search warrant
4 identifies the place to be searched and the items
5 to be searched for. And what the constitution
6 authorizes is a defeat of a personal privacy right
7 for a very carefully limited purpose in a carefully
8 limited area.

9 Even as a card-carrying member of the ACLU, I
10 believe that -- I don't imagine I would do anything
11 that would embarrass me in the next 90 days, but I
12 do things that I think are my business and my
13 friends' business, and I don't believe it is as
14 limited to say that somebody has the right to know
15 every place I have been for a 90-day period without
16 specifically limiting that the way a search warrant
17 is limited.

18 So it's less intrusive in that nobody has
19 rummaged through my laundry hamper or torn up my
20 floorboards, but it is potentially more intrusive
21 because there is no limit on it, just a limit in
22 time. I don't know if I have explained my answer,
23 but --

24 REPRESENTATIVE HECKLER: No, you certainly
25 did. Well, thank you, Mr. Chairman. Having once

1 been a member of another sort of ACLU which we
2 project in the Bucks County District Attorney's
3 office, which we have christened in the atrocious
4 times in the azon unit, I am happy to have been
5 able to participate in these proceedings.

6 REPRESENTATIVE DeWEESE: Even at the eleventh
7 hour. Mr. McHale is recognized.

8 REPRESENTATIVE McHALE: Thank you, Mr.
9 Chairman. I am looking at the written testimony
10 that you submitted to the committee, and on Page 9,
11 I think you capture a very important point where
12 you state that, quote, In decisions spanning more
13 than 20 years, Pennsylvania courts have held that
14 the state constitution affords a higher level of
15 privacy protection than does the Fourth Amendment,
16 end quote. I see Mr. Graci sitting in the back of
17 the room. Didn't mean to wake you up back there,
18 Mr. Graci.

19 MR. GRACI: I was just reading.

20 REPRESENTATIVE McHALE: When Mr. Graci
21 testified, when the Attorney General testified,
22 they accurately stated that much of what is now in
23 the bill was drafted in conformity with federal
24 standards, be they constitutional or statutory.

25 I am very interested in the different standard

1 of the Declaration of Rights when compared to the
2 Fourth Amendment standard in the federal
3 constitution. Is it the ACLU's position that even
4 for the least intrusive methods of surveillance,
5 the preliminary standard, the threshold standard,
6 should be one of probable cause?

7 MR. SCHMIDT: Yes.

8 REPRESENTATIVE McHALE: And so you do not
9 accept the position that for a less intrusive
10 surveillance, a standard of reasonable suspicion
11 and relevance would be adequate?

12 MR. SCHMIDT: Well, certainly not relevance.
13 Reasonable suspicion, in my mind, rings a bell in
14 another subject area. And we recognize, for
15 instance, that there is a considerable legal debate
16 going on now about drug testing, and reasonable
17 suspicion has become the marker to distinguish
18 legitimate testing under search and seizure
19 provisions from random testing.

20 And I am probably not capable of, and perhaps
21 wouldn't have the time even if I were, to explain
22 situations in which reasonable suspicion is
23 acceptable versus probable cause. And there
24 probably is a range of thresholds -- and perhaps I
25 am mischaracterizing the ACLU's position on all

1 search and seizure issues -- but in this kind of
2 intrusion into privacy area, given the specific
3 provisions of the statute, we believe that the
4 threshold should be probable cause, because even
5 though some means are less intrusive than others,
6 they are all intrusive, they all sweep into their
7 net a great deal of innocent activity, and we think
8 for that reason the threshold should be the
9 threshold specified in the federal constitution and
10 the state constitution.

11 REPRESENTATIVE MCHALE: Mr. Schmidt, as you
12 may be aware, Justice Brennan and others have
13 emphasized, both in speeches and in writings in
14 recent years, the increasing duty, from their
15 perspective, which is being placed on state courts
16 to interpret state constitutions in a manner that
17 would provide a greater safeguard of individual
18 liberty than that which is being provided by the
19 federal constitution as interpreted by the United
20 States Supreme Court.

21 I looked through the material which you
22 presented, and you do not make reference to what I
23 think Mr. Graci said was the Phillips case. Is
24 that the correct -- Is it the Phillips case, Mr.
25 Graci?

1 MR. GRACI: Yes, sir.

2 REPRESENTATIVE McHALE: Are you familiar with
3 that case?

4 MR. SCHMIDT: I am not.

5 REPRESENTATIVE McHALE: I asked Mr. Graci
6 specifically whether or not the analysis in the
7 Phillips case dealt with the Pennsylvania
8 Declaration of Rights, as well as the Fourth
9 Amendment to the United States Constitution, and he
10 responded affirmatively that it did.

11 In the context which I have been asking all of
12 these questions, I would appreciate it if the ACLU
13 might take a look at the Phillips case and then
14 provide, perhaps, a brief written commentary to
15 this committee analyzing the specific question of
16 where Pennsylvania law should go in protecting
17 individual liberty as a matter separate from the
18 level of protection established under federal law,
19 and specifically the federal constitution
20 interpreted by the United States Supreme Court.

21 I heard from Mr. Graci that the Phillips case
22 apparently has improved current procedures in the
23 context of the Declaration of Rights. I would like
24 to know if you agree with that position and then
25 any commentary you might have beyond that as to

1 where the law should go from here.

2 MR. SCHMIDT: We would be happy to supply some
3 written commentary on that point. If I could add,
4 perhaps, a footnote at this time and repeat
5 something I said before, the present statute is
6 something that represents a change in, but a
7 development of, a long-standing Pennsylvania
8 tradition.

9 And this body, the Pennsylvania General
10 Assembly, adopted a prohibition on intercepting
11 communications. It changed that position in a way
12 that allowed certain kinds of interceptions in
13 1978. The statute that's before this committee, in
14 most respects, simply restates the prohibition and
15 that statute.

16 And this legislative body, as a coequal branch
17 with the judiciary, has obviously taken a position
18 over the years that says, in effect, it's part of
19 the legal tradition of the Commonwealth, by
20 statutory law, that we will protect individual
21 privacy in oral and wire communications. And it's
22 not just an effort to comply with the bear minimal
23 requirements even of the Pennsylvania constitution.
24 We support and urge this committee to recommend to
25 the House that that tradition be continued in this

1 statute.

2 REPRESENTATIVE McHALE: I think that's a very
3 important commentary. While I support this
4 legislation -- I think there is an effective law
5 enforcement tool -- I agree with Justice Brennan
6 and I agree with you that we have an obligation in
7 Pennsylvania to protect our civil liberties in a
8 manner which is independent of federal law on the
9 same subject.

10 I happen to think that if federal law moves in
11 a direction which deprives citizens of their basic
12 liberties, that we under state law, and
13 specifically under the Pennsylvania Declaration of
14 Rights, must continue to defend those liberties.
15 And so I don't believe that we can surrender basic
16 rights simply because we are arguing that the
17 manner in which we have proceeded copies federal
18 law. That's not good enough.

19 Throughout the long history in Pennsylvania,
20 we have a tradition of protecting civil liberties,
21 even when other jurisdictions, including the
22 federal jurisdiction, failed to do so. In that
23 context, I would appreciate your commentary on the
24 Phillips case and simply make that observation.

25 MR. SCHMIDT: We'll provide that letter as

1 quickly as possible.

2 **REPRESENTATIVE McHALE:** Thank you

3 **REPRESENTATIVE DeWEESE:** Any further comments
4 or questions? I just have one. What would happen
5 on October 21 if we amend this bill on the Floor --
6 and I doubt if we will, but if we would amend it
7 next week and go back to the Senate, it wouldn't be
8 popped out until after the October 21 deadline.
9 What's your opinion as to what would happen?

10 **MR. SCHMIDT:** Well, I haven't become a scholar
11 of the federal statute, but my understanding of the
12 situation is that the existing Pennsylvania law,
13 not the Senate Bill, but the existing Pennsylvania
14 law, would continue to govern until midnight on
15 December 4th.

16 **REPRESENTATIVE DeWEESE:** Thank you. That was
17 my perspective, also, but I wasn't certain. And I
18 am going to try to ask some other folks that same
19 question.

20 **MR. SCHMIDT:** If I could add one additional
21 comment --

22 **REPRESENTATIVE DeWEESE:** Certainly.

23 **MR. SCHMIDT:** And I'm sorry I omitted it in my
24 summary of our position before, but I think it is a
25 crucially important one from our perspective. We

1 have stated in our testimony, I believe, but I want
2 to emphasize that we believe this statute should
3 have a sunset provision.

4 This process has been very important not just
5 because there is an attempt in Pennsylvania to
6 comply with federal law, but because I think, as
7 members of the committee have observed, it's
8 important periodically to have the opportunity to
9 come back as a legislative body, examine the --

3
10 REPRESENTATIVE DeWEESE: I certainly agree
11 with that observation. Mr. Heckler is recognized.
12 Thank you very much. Mr. Wogan, I'm sorry.

13 REPRESENTATIVE WOGAN: Mr. Schmidt, I am
14 curious, why would you oppose allowing the State
15 Police to own their own equipment, apart from your
16 satisfaction with the present statute?

17 MR. SCHMIDT: I think that the view that
18 prevailed when the statute was enacted in '78, as I
19 understand it, is that the people who make the
20 applications for judicial approval should control
21 the physical means of conducting the interception
22 to the extent there is any law enforcement agency
23 ownership of equipment.

24 The amendment which I reviewed very quickly
25 that proposes that the State Police be permitted to

1 own their own equipment, as I understand it, it
2 includes some circumstances in which they would be
3 allowed to use that equipment. But I believe that
4 it's an important part of the statute, as written,
5 that those who go to a judge to get approval to use
6 the equipment or who have the authority to
7 authorize an interception are the ones who have
8 physical control of the means of making that
9 interception.

10 REPRESENTATIVE DeWEESE: Mary Woolley.

11 REPRESENTATIVE WOOLLEY: In Representative
12 Piccola's absence, his amendment was designed to
13 only give the State Police authority in hostage and
14 barricade situations when there is not the time to
15 make an equitable order application, so that they
16 would have to have, in that scenario, physical
17 possession of the equipment to conduct the tap.
18 They have advised us that intercepting those
19 communications is extremely helpful to the hostage
20 negotiators in terms of figuring out what the
21 hostage-taker is up to psychologically and
22 analyzing the pattern of behavior. So it was a
23 very limited circumstance.

24 REPRESENTATIVE DeWEESE: We, as a committee,
25 toured the State Police Academy and watched their

1 SWAT team in training operations, and I would agree
2 with Mr. Piccola's legislation, or at least his
3 initiative, vis-a-vis hostage-taking situations,
4 under very dire circumstances.

5 What would be -- I mean, I want to hear what
6 my card-carrying buddy thinks about this. I mean,
7 you've got three or four school children behind a
8 barricade with some maniac with a .38 to their
9 head, there is a phone in, coming in and going out.
10 Can they tap? I mean, Piccola and DeWeese and most
11 of the committee members who went that day were
12 impressed by the need for something like this. Do
13 you have a feeling on this?

14 MR. SCHMIDT: I think my feeling is the one I
15 attempted to articulate, and that is that what the
16 existing law does is it says, no interception. It
17 doesn't say, interception in certain particularly
18 horrendous circumstances, it says, no
19 interceptions. And then it says, except when, and
20 then it sets up a chain of decision makers who have
21 responsibility.

22 There isn't any place in the statute that
23 says, now, however horrendous the situation is,
24 we're going to cut through all that crap and give
25 the authority to the cop who is on the scene. And

1 that's basically what happens under Representative
2 Piccola's amendment, as I understand it.

3 Secondly, at the present time, at least as a
4 matter of state law, no law enforcement agency,
5 including our State Police, should have the
6 physical means to conduct these interceptions.
7 Perhaps the circumstances that are covered by the
8 amendment are compelling, but what is disturbing is
9 a back room in any police barracks where this
10 equipment is sitting and perhaps tempting a police
11 officer to use it without having the people in
12 authority, either the district attorney's office or
13 the Attorney General through the Superior Court,
14 authorizing the use of that equipment.

15 It's a control device. I am sure there is a
16 horrible situation where the control will be
17 frustrating to those involved in it. I think the
18 privacy stakes are high enough as a general matter
19 that our policy shouldn't be changed.

20 REPRESENTATIVE DeWEESE: I understand your
21 point of your view. Thank you very much for your
22 testimony.

23 MR. SCHMIDT: Thank you again for the
24 opportunity.

25 REPRESENTATIVE DeWEESE: Yes, sir. The

1 hearing will continue with Mr. George C. Yatron,
2 Garold Tennis, and George Rayborn, all attorneys
3 and all representing the Pennsylvania DAs
4 Association, Philadelphia DAs Association, and the
5 Attorney General, wiretap. Mr. McHale will take
6 the gavel for five minutes, but the hearing will
7 proceed.

8 REPRESENTATIVE McHALE: Gentlemen, we welcome
9 you. I am assured by Representative DeWeese that
10 he will be prompt with returning, so we'll have his
11 steady hand on the gavel again in just a few
12 moments. Do all three of you have testimony to be
13 presented, or is there a principal spokesperson?

14 MR. YATRON: I'm the principal spokesperson.

15 REPRESENTATIVE McHALE: All right. You may
16 proceed when you're ready.

17 MR. YATRON: Law enforcement capabilities are
18 currently being strengthened to combat drug law
19 violations. One effective crime fighting weapon
20 which has already been used is wiretapping and
21 electronic surveillance.

22 As chief law enforcement officers for each
23 county in the Commonwealth, our job has grown
24 increasingly complicated over the years, especially
25 as it pertains to the fight against drug

1 trafficking, organized crime, and corruption.

2 Many criminals engaged in these activities
3 employ sophisticated methods and techniques,
4 including international crime networks and advanced
5 electronics, to obviate the law and law enforcement
6 efforts. Fighting these crimes, which undermine
7 our social and moral fabric, require we be at least
8 as sophisticated as our adversaries.

9 House Bill 2508 amending Pennsylvania's
10 current Wiretapping and Electronic Surveillance
11 Control Act will provide prosecutors and other law
12 enforcement officials with invaluable tools to
13 combat crime in its most clandestine and sinister
14 form. Moreover, House Bill 2508 serves to protect
15 the privacy rights of our citizenry in new, and as
16 of yet, unprotected areas of electronic
17 communications.

18 Under current law, Pennsylvania citizens enjoy
19 the protection of not having their conversations
20 secretly recorded. If the act is not extended, any
21 person could secretly record an in-person or
22 telephone conversation with another party without
23 that person's knowledge or permission.

24 The current law, as well as House Bill 2508,
25 prohibits this invasion of privacy. Modern

1 developments in these fields mandate the enactment
2 of House Bill 2508, which provides explicit
3 protection for computer data transmission and other
4 new types of electronic communications.

5 As you know, Congress recently passed
6 legislation amending the Electronic Communications
7 Privacy Act, which brought the federal law into
8 conformity with modern technological advancements.
9 That act also provides protection for the rights of
10 private citizens and gives federal law enforcement
11 officials specific guidelines to legally and
12 constitutionally intercept criminal electronic
13 communications. Congress has mandated that
14 individual states conform their wiretap laws to
15 federal standards. House Bill 2508 fulfills this
16 federally mandated directive.

17 The passage of House Bill 2508 would place
18 Pennsylvania law enforcement officials on a more
19 equal footing with their federal counterparts in
20 the use of wiretapping and electronic surveillance
21 to investigate organized crime and corruption.

22 For example, House Bill 2508 would permit
23 properly obtained interception of oral, wire, or
24 electronic communications for 30-day periods with
25 the opportunity to seek further extensions where

1 justified and necessary, removing the present
2 unworkable limitation of one extension.

3 It would permit the installation and
4 monitoring of mobile tracking devices and provide
5 the appropriate standards for court orders for the
6 installation of roving electronic surveillance
7 devices, pen registers, and retrievals of
8 electronically stored information.

9 With these types of provisions as part of
10 Pennsylvania's body of law, local prosecutors and
11 investigators could more effectively combat
12 sophisticated crime and would not have to defer to
13 federal agencies to conduct investigations.

14 Further, as crime and criminals become more
15 computer-reliant, it is imperative that our laws
16 evolve to address these changes. House Bill 2508
17 meets this challenge. Criminal activity,
18 particularly drug trafficking and corruption
19 related schemes, that is, fraud and extortion
20 rings, is becoming more complex and sophisticated.

21 Involved individuals are increasingly aware of
22 how law enforcement conducts its investigations and
23 have adjusted accordingly utilizing creative
24 accounting and banking practices to successfully
25 hide illegal assets and using modern electronic

1 equipment, including electronic surveillance
2 counter-measure equipment.

3 The use of modems to transfer information from
4 one computer system to another is thought to be a
5 practice of some major drug traffickers, who, in
6 many instances, use coded information to keep track
7 of their nefarious dealings. House Bill 2508 will
8 aid in the detection and cracking of such
9 intricate, technologically advanced criminal
10 systems.

11 It is important to point out that
12 Pennsylvania's wiretap law has been with us for
13 about a decade. It is working and working well in
14 preventing abuses of its provisions. The stiff
5 penalty sections embodied in the present act in the
15 form of civil suits, actual and punitive damages,
16 and removal of office have effectively deterred
17 wiretap act violations. I have not heard of even a
18 single wiretap act violation anywhere in the entire
19 Commonwealth.

21 Further, it should be noted that there are
22 very real economic realities that constrain
23 unnecessary usage of electronic surveillance
24 techniques. For instance, it costs approximately
25 \$10,000 to conduct an ordinary 20-day,

1 around-the-clock investigation by means of a
2 nonconsensual wiretap. Given our severe budgetary
3 restraints, it would strain the imagination to
4 expect that law enforcement officials would not
5 conduct electronic surveillance in only the most
6 conservative manner.

7 The sunset provision of this act provides for
8 legislative review to address technological changes
9 and any perceived abuses. House Bill 2508 contains
10 the necessary technological updates and conforms
11 Pennsylvania law to federal law. Also, the clear
12 absence of abuse by law enforcement officials is
13 another reason to extend the wiretap and electronic
14 wiretap surveillance act.

15 I would like to take this opportunity to thank
16 the Attorney General and his staff for doing much
17 of the work in helping to draft the amendments
18 embodied in House Bill 2508, which were reviewed,
19 refined, and approved by the Pennsylvania District
20 Attorneys Association, also, the assistance of the
21 Philadelphia District Attorneys Association and the
22 gentlemen with me today from that office.

23 In conclusion, the Pennsylvania District
24 Attorneys Association and I strongly urge the swift
25 passage of House Bill 2508, which will add to the

1 arsenal of prosecutors in their struggle to pursue
2 criminals in a constitutional but vigorous manner
3 without infringement upon the rights of private
4 law-abiding citizens. Thank you.

5 REPRESENTATIVE McHALE: Mr. Yatron, we thank
6 you. Unless there is further testimony, are there
7 questions from the committee members?

8 REPRESENTATIVE HECKLER: Only briefly, Mr.
9 McHale, just to greet my former colleagues, and
10 although my comments this morning may have
11 suggested to people that I was a public defender at
12 one time, I am happy to greet these folks with whom
13 I was formerly associated. That's all.

14 REPRESENTATIVE McHALE: I do have one
15 question. As I indicated this morning, I support
16 this legislation. I have concerns about the
17 specific points that touch upon fundamental civil
18 liberties, but by in large, I think this has been a
19 good act and ought to be promptly authorized in
20 substantially the form its been submitted. So let
21 me ask a very practical question. Mr. Yatron,
22 you're the DA in Berks County. Is that --

23 MR. YATRON: Yes, sir.

24 REPRESENTATIVE McHALE: That's a neighboring
25 county to my own, Lehigh County, and so I'm fairly

1 familiar with your jurisdiction. How long have you
2 been a DA?

3 MR. YATRON: Nine years.

4 REPRESENTATIVE McHALE: During the nine-year
5 period of time that you have been a DA, could you
6 give us the best example that you would submit to
7 the committee for the implementation of the act as
8 resulted in the incarceration of convicted
9 criminals? When has this really worked for you?

10 MR. YATRON: Primarily in drug investigations.
11 We have primarily used the consensual wiretap
12 aspect of the law. There had been instances --
13 There was one instance in which we did a hard wire
14 or a nonconsensual wiretap which resulted in the
15 prosecution of individuals for gambling violations,
16 and that was with the cooperation of the Reading
17 Police -- we have a number of Reading police
18 officers who are trained and certified with wiretap
19 equipment -- and also with the cooperation of the
20 Pennsylvania State Police and their people who are
21 authorized and expert in this area.

22 As I indicated previously, the primary usage
23 of the wiretap law in a medium-size county such as
24 Berks County would be in the drug violation
25 prosecution. Many times the defendant at trial

1 will raise the issue of entrapment. And if we have
2 the opportunity to have the conversation between
3 the undercover agent and the defendant who is
4 distributing the drugs on tape, it has been easier
5 to get convictions. We have been successful in
6 getting convictions even without this, but very
7 often when the taped evidence is available, the
8 defendant very rarely even goes to trial, they will
9 almost automatically plead guilty.

10 REPRESENTATIVE McHALE: Mr. Yatron, in the
11 last nine years, how many criminals were convicted
12 in Berks County as a direct result of the
13 implementation of this statute?

14 MR. YATRON: I would estimate 50.

15 REPRESENTATIVE McHALE: I'd like to turn to
16 Mr. Tennis, a good friend and the Assistant DA for
17 the City of Philadelphia. Could you give us a
18 similar synopsis of how this law has affected your
19 jurisdiction

20 MR. TENNIS: What I would like to do is just
21 to defer the question to George Rayborn, if I
22 might, because he does most of the wiretapping for
23 our office. He is pretty much in charge of that.

24 MR. RAYBORN: I can't give you a year, but one
25 of the investigations we did involved allegations

1 of corruption in Philadelphia Traffic Court. As a
2 result of a hard wire, which we put in traffic
3 court, I believe eight people were arrested and
4 eventually convicted. Some pled, and I think one
5 went to trial. We would not have made that case
6 without a hard wire because the corruption was over
7 a telephone. It was traffic court to various
8 phones and through individuals throughout the city.

9 One of the first wiretaps we did involved
10 allegations of an illegal distribution of
11 narcotics. We went up on three phones, one phone
12 inside a house, one phone inside a store, and one
13 phone right outside the store.

14 REPRESENTATIVE McHALE: This was
15 nonconsensual?

16 MR. YATRON: This was nonconsensual. This was
17 one of the first ones we did. As a result of that
18 wiretap involving three telephones, we ended up
19 turning the case over to the federal authorities
20 for prosecution, because we ended up with a
21 defendant out of New York State, a defendant from
22 Bucks County, and I believe about four defendants
23 from Philadelphia County.

24 The case was made by the wiretap and then
25 turned over to federal authorities for prosecution,

1 and those individuals all were convicted or either
2 pled guilty. And I think three of them did hard
3 time in the Federal Correctional Institution.

4 Since that time, we have done drug hard
5 wires -- I would say that's the most common use we
6 made of that. We started another investigation
7 which ended up being the investigation which
8 resulted in the corruption in the Philadelphia
9 court system involving former Judge Kenneth Harris.

10 As a result of a determination we made that
11 that would probably take more than 40 days, we
12 turned that over to the U.S. attorney's office and
13 cooperated with them. In fact, the wire did last
14 longer than 40 days. Judge Harris was convicted,
15 and three individuals with him were convicted. And
16 there are, I believe, two pending cases out that
17 are still a result from that. Those are some of
18 the examples that I can bring to you.

19 REPRESENTATIVE McHALE: One final question
20 I'll direct specifically to Mr. Yatron, but if the
21 other two gentlemen would have a comment, that
22 would be fine. The previous witness, who was an
23 attorney speaking on behalf of the ACLU, indicated
24 that the ACLU would advocate a threshold standard
25 of probable cause across the board in every case

1 where a surveillance was to be initiated pursuant
2 to this statute and that a lesser standard of
3 relevance or reasonable suspicion would not be
4 acceptable.

5 If we were to amend this bill requiring proof
6 of probable cause before any surveillance could
7 take place, whatever its level of intrusiveness,
8 would the District Attorneys Association object to
9 that, and if so, why?

10 MR. YATRON: Yes, we would. The reason for
11 that is that there have been many investigations.
12 There is not probable cause. There is reasonable
13 suspicion, there is relevancy, and the intrusion is
14 not that great. So for that reason, there are many
15 instances where we would not be able to use the
16 benefits of this particular law enforcement tool if
17 the standard were raised to the level of probable
18 cause as opposed to reasonable suspicion.

19 REPRESENTATIVE McHALE: Can you advocate a --
20 what I would call a sliding scale, the greater the
21 degree of intrusiveness, the greater degree of
22 preliminary proof that would be required?

23 MR. YATRON: Yes, sir.

24 REPRESENTATIVE McHALE: For a level of
25 surveillance which would be less intrusive, you

1 would support the standard such as reasonable
2 suspicion. For a type of surveillance that would
3 be considered much more intrusive, you would move
4 toward, and then eventually adopt, a standard of
5 probable cause. Is that an accurate paraphrase of
6 your position?

7 MR. YATRON: That is accurate, yes, sir.

8 REPRESENTATIVE MCHALE: Mary Woolley has a few
9 questions for you.

10 REPRESENTATIVE WOOLLEY: I would like to
11 direct this question to Mr. Rayborn, if I may. The
12 representative of the ACLU mentioned their concern
13 regarding the roving tap and the federal
14 legislation and the federal history suggesting that
15 the Congress intended that authority only to go to
16 federal law enforcement officials and that there
17 was no mention of state officials in that section.
18 Has the DAs association taken a look at that issue,
19 and have you reached any conclusion?

20 MR. RAYBORN: We have looked at that. The
21 problem is there is not a lot in the act or not a
22 lot in the legislative history that is clearly
23 definite one way or the other. Certainly, in my
24 opinion, you can read it either way. I think that
25 our position is that the legislation leaves it

1 open, that this provision, like the rest of the
2 provisions of the act, are available to states,
3 state constitution and state guidelines. That's
4 our position.

5 REPRESENTATIVE WOOLLEY: Have you received any
6 communications from the Federal Justice Department
7 suggesting that, in fact, they do intend the states
8 to make use of the roving tap, for example, in your
9 reporting sheets?

10 MR. RAYBORN: The reporting sheet asked us if
11 we have implemented it and have we gone to the
12 roving tap statute, which seems to me to suggest
13 that they think we can do it.

14 REPRESENTATIVE WOOLLEY: Thank you.

15 REPRESENTATIVE McHALE: The temporary chairman
16 is much more than pleased to welcome back
17 Representative Bill DeWeese, the chairman of the
18 committee, and the temporary chairman happily steps
19 down.

20 REPRESENTATIVE DeWEESE: Thank you, Paul.
21 Chief Counsel Mike Edmiston has a couple questions.

22 MR. EDMISTON: Just a couple of them. I think
23 they are fairly practical questions, gentlemen.
24 October 21 and its significance to you, its
25 significance to your ability to utilize

1 surveillance techniques to go about the business of
2 performing your responsibilities you have been
3 elected and appointed to office to perform. I
4 understand that there are some among the district
5 attorneys around the state who appreciate how
6 expensive a proposition the utilization of these
7 technologies are, these devices, and understand
8 full well, universally through the District
9 Attorneys Association, how expensive the appeals
10 process can be, that there may be some reluctance
11 to go forward, reliant on the federal statute with
12 ongoing investigations that utilize the devices,
13 the mechanisms, the technologies that would be
14 available were either of these two bills to be
15 enacted.

16 Is that a correct understanding of the sense
17 of the membership of your association, that you may
18 invest money and expensive resources on matters
19 that will be tied up in court too long and
20 vulnerable to decisions that will prove
21 unfavorable, and that perhaps you will be unduly
22 or extraordinarily cautious in using surveillance
23 techniques as you develop your investigations? I
24 know that's a long question.

25 MR. YATRON: If we pass the October 21st

1 deadline?

2 MR. EDMISTON: Right, without enacting the
3 statute.

4 MR. YATRON: I believe that would cause us
5 some concern.

6 MR. TENNIS: We would have to be more cautious
7 in using the wiretaps, because they would be
8 subject to that court attack. I was glad to hear
9 the ACLU concede the position that we would
10 obviously have to take, which is that we would --
11 any wiretaps we would take between October 21st and
12 December 4th, we would have to take the position
13 that that was still a legal process for us to have.
14 Hopefully they will stick with that position when
15 we get into litigation, which we most certainly
16 will if there is any wiretapping that occurs
17 between October 21st and December 4th.

18 REPRESENTATIVE DeWEESE: Just from a layman's
19 point of view -- Am I interrupting?

20 MR. EDMISTON: You're the chairman.

21 REPRESENTATIVE DeWEESE: From a layman's point
22 of view, what would be wrong with tapping -- Just
23 say that McHale amended it ever so slightly with a
24 word or two or three and it passed the House and
25 went right back to the Senate and was going to go

1 through the Senate like greased lightning, but
2 they had a -- you know, they'd come back but past
3 November the 14th, whatever -- or November 21, for
4 easy math. For that one month, couldn't the
5 wiretap circumstances in Pennsylvania be the same
6 as they have been for the last five years or ten
7 years?

8 MR. TENNIS: The question is really the
9 validity of the present Pennsylvania wiretap act,
10 because the Legislature had not yet acted to put
11 the wiretap act in general conformance with the
12 federal statute, and I think the tap would be
13 generally on whether the wiretap -- Pennsylvania's
14 wiretap statute still had any continued efficacy
15 because it had not been made to conform with the
16 federal act.

17 MR. YATRON: We would not be conceding that it
18 would not be a legal wiretap. We would take the
19 position that it would generally be a legal
20 wiretap, but the issue would be presented,
21 obviously by defense attorneys, that this was not a
22 legal wiretap. There is an argument that could be
23 made, although as an association, we would differ
24 with that argument.

25 REPRESENTATIVE DeWEESE: Well, if you guys in

1 the ACLU and other people are in agreement, it
2 doesn't seem to me to be an extraordinary moment if
3 this thing passed to me today and signed by Bob
4 Casey next Wednesday or three or four weeks down
5 the line.

6 MR. RAYBORN: Can I make one comment, Mr.
7 Chairman?

8 REPRESENTATIVE DeWEESE: Sure.

9 MR. RAYBORN: One of the things that I think
10 that we would all be concerned about is that if the
11 act fails to be amended by October 21st, we are
12 going to have real concerns with our people who are
13 involved in it, in the nonconsensual wiretaps,
14 because if we're wrong, if it turns out, after
15 October 21st, we can't legally wiretap, all our
16 detectives and people who are involved have the
17 real possibility that they will incur the
18 penalties, which includes loss of job, loss of
19 pension, and going to prison.

20 REPRESENTATIVE DeWEESE: That's an aspect I
21 hadn't thought about.

22 MR. RAYBORN: So we have got a real problem
23 with everybody down there. Not only may we be
24 wrong, we may lose all our money, because we may
25 end up having a wiretap that lasted 20, 40 days,

1 and we may not be able to use that. We may have
2 our people that have a real difficult time. You
3 know, what are they going to do when they know --
4 It's a real problem for us.

5 REPRESENTATIVE DeWEESE: I'm glad you added
6 that. Mike Edmiston and then Representative
7 Josephs have questions. Mike defers to Babette.

8 REPRESENTATIVE JOSEPHS: Thank you. You say
9 in your testimony that the present 20/20-day
10 limitation is unworkable. Do you have any
11 instances that can back that up for us?

8
12 MR. TENNIS: We have been in consultation with
13 the United States attorney's office, and they've
14 informed us -- and as you may know, we have at
15 least one assistant district attorney who is
16 cross-designated as an assistant United States
17 attorney -- that the investigations of Nicky Scarfo
18 that have yielded quite a bit of -- a few
19 prosecutions and the roofers' investigations, that
20 neither of those investigations could have led to
21 successful prosecutions under the state wiretap
22 law. It was only because they could have the
23 repeat 30-day extensions and they could come back
24 again.

25 And I believe -- George, you may have the

1 specifics about at what level they finally -- where
2 they got sufficient evidence to actually convince a
3 jury beyond a reasonable doubt. But those are the
4 kind of investigations that if the federal law was
5 the same as the state law, there would have been no
6 prosecutions on the roofers' scandal, and the Nicky
7 Scarfo prosecutions also would have been -- or at
8 least based on what we can tell, it appears there
9 would have been none. The evidence that was used
10 came out of those wiretap procedures.

11 **REPRESENTATIVE JOSEPHS:** But because the
12 federal statute is different, less restrictive, we
13 did not lose those prosecutions, so there is really
14 no example that you are giving me where we lost
15 prosecutions because the Pennsylvania law does
16 protect privacy to an extent that the federal law
17 does not.

18 **MR. TENNIS:** Assuming that the United States
19 attorney's office has the same priorities that a
20 district attorney's office has or state attorney
21 general's office, if you could make that assumption
22 in terms of where they were going to put very
23 substantial resources, then that might be a valid
24 point.

25 In fact, the assumption wouldn't be correct.

1 There would be -- a district attorney's office does
2 have a somewhat different focus than a United
3 States attorney's office, as does the attorney
4 general's. And given the tremendous amount of
5 resources that either office has to put into it,
6 they could be coming into it from totally different
7 perspectives and with different kinds of priorities
8 about what they seek to prosecute.

9 REPRESENTATIVE JOSEPHS: I see. Thank you.
10 I'm finished, Mr. Chairman.

11 REPRESENTATIVE DeWEESE: Mr. Edmiston.

12 MR. EDMISTON: I just have one other question.
13 There is a definitional change contained within the
14 bill as to investigative or law enforcement
15 officers, expanding that definition to include
16 officers of any state or political subdivision --

17 MR. TENNIS: Could you give us the page?

18 MR. EDMISTON: It's on Page 4, Lines 22 and
19 23. I think it's fair to assume that the purpose
20 behind the proposed change is to enhance your
21 capacity to perform your responsibilities. Can you
22 tell us how that definitional change might --

23 MR. YATRON: We'll defer to Mr. Graci, who
24 will address that issue.

25 MR. GRACI: Mr. Chief Counsel, that was

1 inserted for this reason, we have been in a
2 situation in times where we have obtained
3 information pursuant to a lawful wiretap that would
4 be pertinent to an ongoing investigation in another
5 state, particularly down in the Philadelphia area,
6 where the investigation into the racketeers has
7 certainly led to information across the river in
8 New Jersey, where they're doing activities in
9 Atlantic City. Because of the restrictions on
10 disclosure that the act contains, we have not been
11 able to share that information.

12 Quite frankly, what we have done, we are
13 permitted to share it with the federal authorities,
14 who then share it with the other local authorities.
15 This would give us the direct capability to
16 cooperate across the river or if we're going down
17 south across the border, and that's the purpose for
18 that. It was not intended to expand in any fashion
19 the persons who would be able to be involved in
20 interceptions.

21 MR. EDMISTON: I understand that to not have
22 been the purpose. But your response, Mr. Graci,
23 suggests that the utility of the change is
24 particularly evident in our state forums, so that
25 you could share the information --

1 MR. GRACI: Well, we can already do it within
2 the state.

3 MR. EDMISTON: That's what I wanted to hear
4 about, and in particular, the matter "or political
5 subdivisions." In essence, the language "or
6 political subdivisions" would, if I am
7 understanding it correctly, permit you to share the
8 information with the local police department in
9 another state, whereas at present, you cannot share
10 it directly with that local police department. It
11 does now address your ability to share that
12 information with a local law enforcement officer
13 within the state. That's already taken care of.

14 MR. GRACI: Yes. And by the designation --
15 you'll see immediately prior to that insertion,
16 we've stricken the language, "or of the
17 Commonwealth or political subdivision thereof."
18 That was the problem that was only confined to the
19 Commonwealth. Now it's the Commonwealth and every
20 place else. No, we weren't limiting that.

21 MR. EDMISTON: Thank you.

22 REPRESENTATIVE DeWEESE: Further questions
23 from committee members? Hearing none, thank you,
24 gentlemen, for your participation this morning.

25 MR. YATRON: Thank you very much.

1 **REPRESENTATIVE DeWEESE:** The next witness to
2 appear before our committee, the next to the last
3 witness, Mr. William F. Manifesto, Esquire.
4 Welcome, sir, to our hearing.

9
5 **MR. MANIFESTO:** Thank you very much. I am
6 here at the request of the Pennsylvania Trial
7 Lawyers Association, and I am a former member of
8 the Board of Governors of that organization and
9 former chairman of its criminal law section. I
10 also -- although I see the Representative from
11 Lehigh County has left -- served on the
12 Pennsylvania Procedural Rules Committee, appointed
13 by the Supreme Court, the chairman of which is the
14 DA from his county who we referred to earlier. And
15 that's basically why I am here on behalf of the
16 Pennsylvania Trial Lawyers Association.

17 Let me first address an issue that has been
18 raised by counsel, and that is, what happens on
19 October 21st in relationship to the ability of the
20 law enforcement to pursue wiretap. The reason that
21 the United States wiretap law preempts the state is
22 the supremacy clause of the federal constitution.
23 So that the requirements that the state has is that
24 your wiretap law cannot be more liberal as it
25 relates to the police than is the federal law, and

1 that is the restriction. So that if there is
2 anything in the Pennsylvania law which is more
3 liberal on October the 21st, then that would not be
4 enforceable.

5 However, if you are familiar with the new
6 statute, the federal statute, and the present
7 wiretap law in Pennsylvania, you would find that
8 that is not the case. Our law is not more liberal,
9 and therefore not inconsistent with the new federal
10 wiretap law. Therefore, the net effect of any
11 wiretap which may be in place and continuing after
12 October 21st would not be affected at all.

13 REPRESENTATIVE DeWEESE: Between the 21st and
14 December 4th?

15 MR. MANIFESTO: And December -- Of course,
16 December being the sunset date, I'm referring to
17 that. So that, in fact, there is no jeopardy. And
18 I haven't heard anyone testify here today to point
19 out provisions which are more liberal in our state
20 law than that in the federal law that would place
21 in jeopardy any wiretap or any other consensual or
22 nonconsensual recordings going on.

23 In fact, there are some issues that deal with
24 consensual wiretaps. We have a case called
25 Commonwealth vs. Shaffer decided by Judge Cirillo

1 quite recently which requires a search warrant if
2 you are going to seize oral communications in one's
3 home. Now, that was the issue, and the case seemed
4 to limit it to the home. However, as I reviewed
5 this act, that restriction isn't there, and we
6 haven't recognized the Superior Court decision by
7 Judge Cirillo in the Shaffer case.

8 But I did want to address that issue of this
9 October 21st deadline, because it seems there is a
10 tremendous rush to move on this legislation and
11 that, in fact, October 21st has been some kind of
12 target deadline, which I think is not borne out by
13 the facts.

14 Let me only suggest that there are some other
15 differences that exist within the federal wiretap
16 law and the state, and that is, of course, in order
17 to get an authorization to even submit to a federal
18 judge for a wiretap order, it requires approval
19 from the Attorney General or his immediate designee
20 in Washington, D.C., so that in the Middle
21 District, Jim West, in the Western District, Jerry
22 Johnson, in the Eastern District -- the U.S.
23 attorney himself cannot make that ultimate
24 decision.

25 He requests -- he writes a prosecutorial

1 memorandum, it goes to the Attorney General of the
2 United States, and this is the rule across all 50
3 states. And the Attorney General or his immediate
4 designee, not lower than the head of the Criminal
5 Division for the United States of America, makes
6 the decision as to whether or not the U.S. attorney
7 may go to a federal judge and request a wiretap
8 order.

9 REPRESENTATIVE DeWEESE: How often does this
10 happen, every day?

11 MR. MANIFESTO: It doesn't happen every day.
12 In fact, I find that the federal government uses
13 the wiretap rather sparingly, and they do
14 exhaust -- and I do mean exhaust -- generally
15 speaking, the investigative techniques prewiretap
16 before they seek it and, in many cases, do not seek
17 it. And they use it in very limited kinds of
18 cases, and they usually are cases of extreme high
19 priority, major drug prosecutions, sedition,
20 treason, and gambling. That's been my experience.

21 Now, let me also say that one of the
22 differences we have, of course, in Pennsylvania is
23 that not only the Attorney General -- and there has
24 been some reference as to who will be the attorney
25 generals in the future -- but we have every

1 district attorney who has the ability to seek court
2 authorization. So there is not this built-in
3 requirement that the federal government has that
4 says only the highest officials in the government
5 answerable to the public can make those
6 determinations as to whether or not wiretap
7 surveillance will be utilized.

8 So all I am suggesting is that if there are
9 reasons for restricting Pennsylvania, more -- more
10 people have the ability to go out and seek it. And
11 in this bill, of course, as exists, so does the
12 Pennsylvania Crime Commission. So we have a number
13 of entities throughout the state who have the
14 ability to go out and wiretap. And the more people
15 you have, obviously the more possibilities are
16 there for use of that particular intrusive weapon.

17 REPRESENTATIVE DeWEESE: You don't mind a
18 little give and take?

19 MR. MANIFESTO: No. Please, go ahead.

20 REPRESENTATIVE DeWEESE: If this would become
21 law, we would be immeasurably more liberal in our
22 wiretap efforts day to day, week in, week out, year
23 in, year out, than the federal government.

24 MR. MANIFESTO: Well, I don't know that I
25 would say more liberal in that my review of this

1 bill basically parrots the federal wiretap. From a
2 standpoint of possibilities and exposure to misuse
3 of that process, I think, yes. You know, we have
4 tremendous numbers of crimes which overlap, state
5 and federal. I mean, it is the general practice in
6 the Western District of the State Police, as a
7 matter of fact, if they secure a serious case, they
8 run to the federal authorities for prosecution, not
9 to the state. And that deals with narcotic cases,
10 and I have been involved in a number of cases which
11 were taken to the U.S. attorney by the State Police
12 for prosecution and not locally.

13 There has been a lot said about the relaxation
14 of the probable cause requirements for oral
15 interception and wire interception, the roving tap.
16 A lot has been said about it, but let me just -- I
17 listened to the Attorney General talk about, well,
18 if we have someone who says, I am going to use
19 different pay phones, we need a roving tap to go
20 chase after those pay phones, and yet even another
21 question he responded that he would interpret his
22 amendment to mean he could only use it on one
23 phone.

24 So it really strikes me as something which, at
25 least as far as wire communication, would be

1 basically ineffective if he uses two pay phones or
2 three pay phones. And the example that the
3 Attorney General gave was someone who was going to
4 use different pay phones and go to different places
5 to make telephone calls, and we would want to tap
6 those calls. And if that's what roving means, if
7 that's what he meant by that, and yet he
8 interpreted his own amendment to mean he could only
9 tap one facility, then basically it's a useless
10 tool to be able to rove.

11 The ability to seize oral communications --
12 and maybe -- I don't know, maybe your recollection
13 of his testimony is different than mine, but that's
14 what I recall. So that to be an effective tool, if
15 he wants this amendment, then he has to be able to
16 tap unlimited phones and to be able to do it on a
17 moment's notice.

18 Now, technologically, I'm not so certain that
19 that's easily or accurately done, because
20 technologically, if I jump in my car and drive to a
21 pay phone, on a quarter, make a three-minute call,
22 I'm not so certain that he can record and tap me,
23 and then the next day I use another phone down the
24 street, that he can even technologically seize
25 those, unless he starts to tap every phone and hope

1 I start to repeat that pattern. So from that
2 standpoint, I'm not so certain that I see it as an
3 effective tool.

4 To seize oral communications, not over the
5 wire, of course, it is a different situation, and,
6 of course, that, it seems to me, would require the
7 supersensitive types of listening devices that
8 you'd follow someone around and record what he
9 says.

10 My concern is that when we begin to relax
11 probable cause, when we begin to relax the one
12 thing that stands between the citizen and the
13 government's intrusive use, we take that away,
14 because probable cause is the only thing that does
15 that.

16 And I would submit that there is no difference
17 in asking to relinquish probable cause requirements
18 than there is to have another amendment on a
19 different statute to suggest that we relax Article
20 1, Section 8, of the state constitution and say,
21 well, the police now know that there is a narcotics
22 dealer who is going to come into the possession of
23 narcotics, and we know he is going to hide it
24 somewhere.

25 Now, we don't know where, but we know it's

1 going to be hidden in a house. Now, we want a
2 search warrant to go search some house in the next
3 ten days. Now, we don't know where, we don't know
4 who owns it, we don't know what the relationship
5 is, but we know he is going to hide it, because we
6 have an informant who says he hides it in the
7 house. So give us a blank search warrant to go
8 search any house, we'll fill it in, and we'll come
9 back and tell you what house we searched when we do
10 it.

11 It's clearly, clearly, I think, something
12 which is repugnant to the citizenry and I would
13 think to this committee. And there is not a great
14 deal of difference between that and what this act
15 is asking for. And you're right, there are times
16 when it may thwart active police investigation, but
17 isn't that the penalty that you pay for protecting
18 all the rest of us?

19 Because I don't want someone following me
20 around with some kind of listening device without
21 probable cause to do it. And I am concerned about
22 that, because what we tend to do is we tend to look
23 at this kind of legislation as decreasing or making
24 it easier to get the criminal. And that's a
25 laudable reason. And though I do spend a great

1 deal of my time on defense cases, I think it's a
2 proper function of government.

3 By the same token, I think it is just as
4 important for those of us who are not breaking the
5 law, that we be willing -- or that you be willing
6 to give us some protection and not decrease our
7 rights. So I would strongly endorse the position
8 taken by the ACLU, that probable cause remain a
9 necessity in our state law regardless of what the
10 federal law may provide.

11 Let me also suggest to you -- As I said, the
12 Shaffer case is certainly worth reviewing in light
13 of one-sided consensual discussions, because the
14 Superior Court has already limited what law
15 enforcement can do when they send an informant in
16 or a police officer in wearing a wire to record the
17 face-to-face conversations. If it's in a home, you
18 now need a search warrant. This bill doesn't
19 suggest that that's the case, but it is the case, I
20 think you'll find.

21 I don't want to spend a lot of time on the
22 relaxation of probable cause. It is an important
23 issue, but I think it's been addressed by other
24 speakers.

25 As to the addition of ad infinitum 30-day

1 wiretaps, I would suggest to you that the only
2 thing I have heard today from the representatives
3 of the district attorney's office dealing with the
4 Scarfo case, which clearly was in federal
5 jurisdiction and clearly is the kind of case that
6 the federal government is, indeed, interested in
7 doing, which are public corruption cases, which are
8 major narcotic cases, which are major gambling
9 cases -- and I can suggest to you over the 25 years
10 I have been a lawyer and the period of time that I
11 was a prosecutor and now have been on the defense
12 cases, that the State of Pennsylvania or any of its
13 political subdivisions does not have the wealth,
14 the manpower, or the facilities to do the kinds of
15 prosecutions that the federal government does.

16 And it has also been my experience that when
17 the federal government gets cases that do not meet
18 the size or the magnitude that they are interested
19 in prosecuting, they turn the information over to
20 the state, generally to the local district attorney
21 or the state, and, in fact, they do prosecute. And
22 it has also been my experience that most of the
23 district attorneys, if they come upon something
24 which they find is probably beyond their
25 capabilities, it goes down to the street to the

1 federal courts, and they do prosecute it.

2 The last two wiretap cases I have been
3 involved in in the past six months, one was a
4 federal prosecution and the other a state
5 prosecution, they both began with state wiretaps.
6 In fact, the one which was a federal narcotics
7 prosecution started with the target of that federal
8 prosecution being tapped for 40 days by the State
9 and another co-defendant ultimately being tapped
10 for 40 days by the State.

11 Nothing came of those taps. And in fact, when
12 the prosecution finally occurred in the Western
13 District of Pennsylvania, the taps were not even
14 utilized in the prosecution. And the federal
15 government did not tap any of these people. What
16 the federal government did is a tremendous amount
17 of work, and that's what they are capable of doing.
18 The Internal Revenue Service and the FBI began an
19 exhaustive grand jury investigation and inquiry
20 into these individuals, and all 28 individuals were
21 either pled out or were convicted in that
22 particular case.

23 So what I am suggesting to you is that wiretap
24 in and of itself is generally -- is meaningful and
25 significant, but it doesn't give up the requirement

1 that you use normal investigative techniques. And
2 what I have seen on occasion is that the
3 investigative techniques are relaxed a great deal
4 in the hope that you can get a wiretap and the case
5 will be made by the wiretap.

6 In another case which was a local wiretap, it
7 was billed in the newspaper when the indictments
8 came down as the biggest automobile chop shop ever
9 to hit the Western District of Pennsylvania. What,
10 in fact, they had was one car after 40 days' worth
11 of taps and what they had was a bunch of people who
12 were narcotics addicts who spent 40 days and 2800
13 telephone calls trying to find out where they're
14 going to get their next fix. So that had the
15 appropriate investigative techniques been performed
16 ahead of time, I think they would have known that
17 and the necessity for wiretap not used.

18 I only give those examples because I think
19 that wiretap should be restricted and utilized in
20 only the most severe cases, because it is such an
21 intrusion. In the last case that I talked about --
22 Though there are minimization requirements in the
23 act, as counsel to one of them, I was taped totally
24 in four conversations without any minimization, and
25 I was not a subject. Nothing we talked about was

1 criminal in nature, because that would make it
2 appropriate to continue to tape my telephone call
3 if I were engaging in any criminal activity.

4 So that I think that though the rules are
5 there, enforcement is significant. And again, I
6 think of enforcement only at the highest levels.
7 And that's why, again, I am concerned about making
8 it wholesale available. I am not suggesting that
9 you are going to amend that, because I think that's
10 a realization of life that's here, but I think it's
11 something that you have to be concerned about when
12 you consider expanding and broadening the effect of
13 this act.

14 And that brings me to Subchapters C, D, and E
15 of the proposed amendment. Subchapter C, of
16 course -- C, D, and E do not exist in Pennsylvania
17 law today, and this is part of the new federal act.

18 Access to electronic storage material and
19 transactional records. Now, that material is
20 available to law enforcement today. You can use a
21 search warrant, based upon probable cause, to
22 secure it. I'm talking about banks, stock
23 brokerage houses, whatever the particular
24 institution is. The search warrant is here, and
25 it's available to law enforcement. You have

1 probable cause -- You have judicial authority to
2 review it, determine if there's probable cause, and
3 then you can go out -- I can go out as a law
4 enforcement officer and get your bank records.

5 Now, there also are, within the state in
6 certain situations, statutory administrative
7 subpoenas which are available to law enforcement
8 under limited circumstances. And lastly, there is
9 the grand jury investigation and their subpoena.

10 But what this section does is it creates a new
11 cause -- it creates a new process, something which
12 didn't exist in law until this, if you amend it and
13 make it law. And that's something which is less
14 than probable cause, that's something which is,
15 quote, relevant to a legitimate investigation or
16 law enforcement inquiry. That's the only burden
17 that is there.

18 And that, at least, because it was alluded to
19 earlier as to who can do this, who is a law
20 enforcement officer -- and as I read the
21 definition, it's representatives of a political
22 subdivision, also. And if I am correct in my
23 interpretation, then any political subdivision
24 representative can seek those records, your bank
25 records, your stock brokerage records, based solely

1 upon the allegation that it's pursuant to a
2 legitimate law enforcement inquiry, and that's
3 pretty frightening.

4 That's what the Allegheny County District
5 Attorney's office did in the DeJohn case a few
6 years ago, not even quite as bad as that, but
7 that's what they tried to do. They took a subpoena
8 they typed up to the bank, give me this woman's
9 records, and they went, and the bank gave it to
10 them. Well, of course, they didn't subpoena it to
11 a trial or they didn't subpoena it to a hearing,
12 they just used and made up what was, in fact, an
13 illegal subpoena, because it didn't meet the
14 requirements of probable cause or of a grand jury
15 investigation.

16 The frightening thing about that is that if
17 there is going to be a grand jury investigation, a
18 grand jury subpoena issued to get your bank
19 records, then there is supervision. And, in fact,
20 what there is, is there has been a grand jury
21 convened to investigate you, and there has been
22 probable cause to do that investigation, or there
23 has been a search warrant and there has been a
24 judge who has determined that there is probable
25 cause to secure your bank records.

1 Here, all the police need to do is file a
2 petition with the judge and say, we have a
3 legitimate police inquiry, and what's that inquiry,
4 well, we have an allegation from an informant that
5 Mr. DeWeese has taken money from someone, and we
6 want to get into his bank account, because we want
7 to see whether there are any deposits there. And
8 that's a legitimate police inquiry, and they can do
9 it under this. If they won't do it without this,
10 they'd have to have a search warrant based upon
11 probable cause, satisfy a judge there is probable
12 cause, and get it, or have a grand jury
13 investigation, which gets it.

14 **REPRESENTATIVE DeWEESE:** We're going to get
15 Mr. Heckler in. Help me out here. You're a former
16 prosecutor.

17 **REPRESENTATIVE HECKLER:** I expressed my
18 thoughts on this earlier. I have absolutely no
19 trouble with their being able to do that, and I
20 want to develop that with some questions.

21 **MR. MANIFESTO:** That's the trust me theory.
22 You know, trust me, I won't abuse it.

23 **REPRESENTATIVE DeWEESE:** To get my bank
24 records, the police officers --

25 **MR. MANIFESTO:** As I understand the definition

1 that was brought in earlier as to who is qualified
2 under this act, I believe an investigative or law
3 enforcement officer is defined as any officer of
4 the United States or any state or political
5 subdivision thereof. And I would assume that
6 Allegheny County or --

7 REPRESENTATIVE DeWEESE: Sergeant Joe Friday.

8 MR. MANIFESTO: Bell Acres Township Police
9 Department didn't like me because I angered them a
10 little bit to go get my bank records on a
11 legitimate police inquiry.

12 So I am concerned about that, because this is
13 not the restrictive utilization that -- I mean, I
14 see no reason for a legitimate police inquiry. If
15 you want to say, you can go get it, go get it under
16 existing law, which is what everything else in this
17 section says, except we add this new process that
18 appears nowhere in the law and has not since this
19 Commonwealth was incepted, since its inception.

20 REPRESENTATIVE DeWEESE: Because it's
21 computerized or because it's --

22 MR. MANIFESTO: It makes no difference. It's
23 records. Whether it's on a computer or whether
24 it's handwritten, OK, you can go get those with a
25 search warrant.

1 REPRESENTATIVE DeWEESE: Yes. But now, if
2 this were to become law?

3 MR. MANIFESTO: If this were to become law,
4 now you -- What it also does is it makes a penalty
5 for people who would violate that trust, but you
6 can do that simply by amending the Crimes Code and
7 make it a crime for somebody to do this, you don't
8 have to give the police a new process to do that.
9 OK? I mean, if you are -- and let me tell you what
10 goes on in this section.

11 Let's assume that you pass this. Now they go
12 after your bank records, and you say, oops. And
13 let's assume you can find out, because they don't
14 have to tell you, they just give a little notice
15 that says, we don't tell Mr. DeWeese that we got
16 his bank records. And they can hold you in
17 abeyance for 180 days or 6 months without even
18 knowing they took it.

19 That aside, let's assume you say, hey, I
20 learned about this, and I want to file a motion to
21 quash that court order. I mean, I want to
22 challenge it. Fourteen days, if I have notice to
23 challenge it under the section, so I want to
24 challenge it. Well, your duty is, number one, to
25 file a petition with the court saying, number one,

1 those are my records, and that gives me standing to
2 challenge.

3 Of course, the other end of the coin of that
4 is, that, under this statute, can be used against
5 you later if you are prosecuted as an admission
6 that those are, in fact, your records. So you have
7 an Article 1, Section 8, state constitution, Fifth
8 Amendment, federal constitution, which hasn't been
9 addressed. If you're going to do this, then you
10 have to say, and that can't be used against the
11 customer in any subsequent proceedings.

12 Let's move on. That's number one. That gives
13 you standing. Number two, what does it take for me
14 to stop, to challenge, this legitimate police
15 inquiry? I don't think it's a legitimate police
16 inquiry. I am not entitled to know from the police
17 what their inquiry is. OK? They don't have to
18 tell me. But I have to convince the judge it's not
19 a legitimate police inquiry.

20 Now, I submit, how do you do that? How do you
21 satisfy the second prong of that requirement under
22 the statute when I don't -- I'm not entitled to
23 know the nature of your inquiry? The only thing
24 that the police have to do is if the judge is
25 satisfied that I have first satisfied him that this

1 may not be a legitimate police inquiry, may not be
2 a legitimate police inquiry, then he goes to the
3 police, and he says, file with me an answer in
4 camera, the other side is not allowed to know about
5 what you say in it, and convince me that you are
6 right.

7 Now, I am suggesting to you, you can't ever
8 meet the first requirement, because how can you
9 challenge legitimacy of that inquiry when you are
10 not entitled to know what it's about? The only way
11 you can do that, if you want to accept that
12 legislation, is you have got to do some other
13 things. You either have to force the police to
14 come forward and satisfy -- tell you what that
15 legitimate inquiry is about so you can challenge it
16 or create a presumption in your favor so that you
17 have a legal presumption that you go in, and they
18 have to convince the judge that they have overcome
19 that presumption.

20 But there is no reason to get to all of
21 those -- I mean, you have to really sit down and
22 tear this legislation apart section by section and
23 say, what am I doing? What is happening if I pass
24 this? You are creating a new process in the law
25 which is a reasonable inquiry to get your records

1 that you have a reasonable expectation of privacy
2 in under the state constitution and under the
3 federal constitution. And I would strongly suggest
4 that you not, not consider changing and adding any
5 new process under the guise of some electronic
6 wiretap statute.

7 What it does is gives access to the police in
8 every borough and township, access to individuals'
9 records without any articulable facts sufficient to
10 satisfy a judge that they have a right to get it.
11 That is no probable cause. A legitimate police
12 inquiry is absolutely too broad.

13 Subchapter D, which is the mobile tracking
14 devices -- and there has been a lot of talk about
15 how nonintrusive it is, but it also says packages.
16 Now, you can insert that mobile tracking device on
17 the outside of the car. There is nothing here that
18 says you can't install it on the inside of the car.
19 And if you are entitled to install it on the inside
20 of the car, then you have a right to do a search of
21 that car pursuant to the insertion of that device.
22 And what you have done now is you will have
23 permitted a search, an entry into a vehicle,
24 without probable cause.

25 If I missed something in the statute, I would

1 be happy to have it pointed out to me, that it says
2 the tracking device must be kept on the outside of
3 the vehicle and you may not intrude the vehicle.

4 I don't know how you can put a tracking device
5 on a package which is mailed through -- delivered
6 by parcel post, which is sealed, by putting it on
7 the outside. You have got to insert it in the
8 inside. And what you have done is you have allowed
9 an intrusion for the insertion of that device.

10 And there is nothing here that says that these
11 tracking devices do not permit an entry into, an
12 intrusion into, the motor home, the automobile, the
13 package. In fact, it authorizes packages.

14 And now what happens is, I want to search this
15 package. I'm a police officer, and I know bloody
16 well I don't have probable cause to get into that
17 package. So I'm going to get me down to the
18 magistrate's office, and I'm going to get me
19 authority from him to put it in the package. And
20 then I'm going to open the package, and lo and
21 behold, I'm going to find some contraband. And now
22 I'm in there, and it's in plain view, and I'm in
23 there by authority. I go make an arrest.

24 So that there are abuses which are available
25 under these sections, and, you know, we see it

1 every day. We have something in the law which is
2 court authorized which is called an inventory
3 search of an automobile. There are many states
4 which say that the owner of the automobile has a
5 right to waive that inventory search, because the
6 function of an inventory search, by way of an
7 example, is only to protect the police from being
8 accused that they seized the car and stole
9 something from the car.

10 Many states provide that I can say, I don't
11 want you to search my car and inventory the items.
12 If anything is missing, I'll give you a release and
13 a waiver right now, and you can't search. So what
14 the police oftentimes do is impound a vehicle, and
15 that gives them the right to search, vis-a-vis an
16 inventory search, where they don't have probable
17 cause to make a search for anything else.

18 So they stop you for a traffic ticket, drunk
19 driving, pull the car over to the side of the road,
20 they could leave it there, if it's not blocking
21 anything, take you down to the police station, but
22 they search it, and they search it pursuant to an
23 inventory search, and they find contraband.

24 Now, it may all well be that we say, well, so
25 what if they find contraband, those are bad guys,

1 and they deserve to have it found. But there are
2 many, many people who aren't bad guys and who have
3 a right to reasonable expectation of their privacy,
4 and that's the people we are trying to protect.

5 So the mobile tracking device -- and what is
6 the requirement? What's the probable cause for a
7 mobile tracking device? It's, again, basically
8 reasonable suspicion. OK? Reasonable suspicion,
9 not probable cause.

10 Now, what's reasonable suspicion? You know,
11 there are a series of federal cases which have come
12 down over the years dealing with, what's the
13 profile of a drug courier. And when you put them
14 all together, every one of us sitting here is a
15 drug courier profile. Some people look innocent.
16 That makes them a drug profile. Some people look
17 criminal, they have shifty eyes. And I have seen
18 enough of these and I have been involved in these
19 to know that you can make anything you want it to
20 be.

21 So what's reasonable suspicion for the need
22 for a mobile tracking device? It's next to
23 nothing. Not probable cause that a crime is, has
24 been, or will be committed, it's reasonable
25 suspicion that there is going to be some crime, and

1 that's no criteria whatsoever for that invasion.
2 And six months we can do it for.

3 So the local policeman who knows I have a
4 girlfriend and who is mad at me puts the mobile
5 tracking device on because he has got reasonable
6 suspicion that I am involved with some of my
7 clients in some improper conduct. That's
8 reasonable suspicion. And now he follows me around
9 for six months and some pretty embarrassing
10 material comes out that, in fact, is no
11 relationship whatsoever to a crime, is, may be,
12 will be committed, because there is no probable
13 cause that would satisfy a court in authorizing it,
14 probable cause, mobile tracking device.

15 You know, all of this is here to relax the
16 requirements, and I understand that it would be a
17 benefit to law enforcement, but it also is an
18 intrusion on all of us, and that's what I am
19 concerned about, because there is a balancing
20 effect, and they can't have it all one way. We,
21 the people, are entitled to have a little bit our
22 way, too.

23 Subchapter E is the pen register and the trap
24 and trace, and it was aptly pointed out by some of
25 the representatives here that there is a probable

1 cause requirement in this act. And the question
2 was raised, why is there a probable cause
3 requirement for pen registers, which is certainly
4 less intrusive than -- or more intrusive than
5 mobile tracking -- or less intrusive, or no more
6 intrusive, I should say, than mobile tracking
7 devices and so forth?

8 It's because our state courts have said, we're
9 going to -- They decided the pen register case. It
10 was brought up before them, and they made a
11 decision. They said, you need probable cause,
12 gentlemen. You want to put a pen register on, you
13 need probable cause. You want to put a wiretap and
14 record, you need probable cause.

15 Now we're suggesting -- And that's why it's
16 there, not because the drafters of this amendment
17 felt something akin to wanting to change the
18 requirements, but nobody has decided yet mobile
19 tracking devices, to my knowledge, in Pennsylvania.
20 There are federal decisions which have decided it.
21 Maybe there are Pennsylvania cases I'm not aware
22 of. But I know there are cases which require
23 probable cause for the insertion of a pen register.
24 And as we know, it doesn't record what you say, it
25 merely is the numbers that you call.

1 So I am suggesting, if that's the requirement
2 necessary to find out what phone call numbers I am
3 dialing, then why would it be any less required to
4 find out where I'm going, who I'm seeing, where my
5 packages are going, and where my car or other motor
6 home is going?

7 **REPRESENTATIVE DeWEESE:** What do you think
8 about that, Dave? I mean, help me on this. This
9 is why we are having a public hearing. He made a
10 good point. Do you have a reaction to that?

11 **REPRESENTATIVE HECKLER:** Well, what I would
12 like to do is ask some questions whenever he is
13 done.

14 **REPRESENTATIVE DeWEESE:** You'll help me with
15 that point?

16 **REPRESENTATIVE HECKLER:** Absolutely.

17 **MR. MANIFESTO:** Basically, those are my
18 comments on those particular sections. In
19 conclusion, my concern is, as I said earlier, that
20 it is not sufficient to paint the worst case
21 scenario. And the one that I always see is public
22 corruption, narcotics. And in fact, if you don't
23 give us everything that we ask for, we in law
24 enforcement, then you're in favor of narcotics,
25 you're in favor of criminals, and you're in favor

1 of all of the bad things that society hates.

2 And I guess the concern, if I were in the
3 political arena, I would be concerned that my
4 constituents may view me that way. And I think you
5 wouldn't hold these hearings here if you didn't
6 feel that that's not the overriding consideration.
7 The overriding consideration is appropriateness to
8 all of the citizens of Pennsylvania, not only those
9 people who are targeted, but the rest of us who may
10 be targeted for whatever reason, and that our long
11 tradition in Pennsylvania of guarding individual
12 rights continue.

13 I am not suggesting that these things that are
14 requested are bad, it's the nature in which they
15 are requested. It is the relaxation of the
16 standards that I am concerned about. I have no
17 problem with the authorities securing bank
18 accounts, clients of my own, if I am involved in
19 any illegal activity, but I want them to do it with
20 probable cause. I don't want to be the subject of
21 harassment. I don't want to be the subject of an
22 overzealous prosecutor because I beat him in the
23 last case, or because of some politically motivated
24 reason, that some local municipal police officer
25 decides he wants to get some borough councilman and

1 harass him or utilize these processes which are so
2 relaxed for any purposes that would be
3 inappropriate. Those are my comments.

4 REPRESENTATIVE DeWEESE: Excellent testimony,
5 Counsel. Thank you very much. I want to
6 participate in a little give and take, but I have
7 to defer to my colleague who has eminently more
8 acquaintanceship with the law. Mr. Heckler, would
9 you please commence with some of your questions and
10 allow some flexibility, as we make it almost a
11 tripartite experience.

12 REPRESENTATIVE HECKLER: I'd be happy to.
13 Thank you, Mr. Chairman. Mr. Manifesto, you are
14 certainly a good talker and an effective witness.

15 MR. MANIFESTO: Thank you.

16 REPRESENTATIVE HECKLER: Would it be fair to
17 say just -- An awful lot of your testimony is
18 focused on this idea of probable cause and that
19 this legislation would suspend the requirement of
20 probable cause for certain kinds of intrusions.

21 Would it be fair to say that the United States
22 Supreme Court has not found that there is an
23 expectation of privacy in a variety of the areas
24 you are referring to, specifically bumper beepers,
25 telephone -- well, bank records for sure? DeJohn

1 goes its own -- We have gone our own way in
2 Pennsylvania so far as the United States Supreme
3 Court --

4 MR. MANIFESTO: DeJohn, no. I mean, under
5 DeJohn, what the Allegheny County district attorney
6 did was he took a subpoena -- There was a case
7 pending --

8 REPRESENTATIVE HECKLER: I am familiar with
9 the facts of DeJohn.

10 MR. MANIFESTO: Well, what they did is, they
11 wanted DeJohn's bank records, and they didn't
12 secure them properly. They could have subpoenaed
13 the bank to produce those bank records for the
14 trial and had them. That would be the proper use
15 of the subpoena. But what they wanted to do is
16 they wanted to get their hands on those records
17 without having any way to do it. All right? They
18 didn't want to subpoena the records to the trial.
19 Don't ask me why.

20 But recently, I had it happen -- I'll give you
21 another example -- where the City of Pittsburgh
22 Police Department went to a client of mine who is
23 an automobile dealer and made up a subpoena. And
24 you just get this. You go to the prothonotary's
25 office, the clerk's office, and you get it. So he

1 made up a subpoena to this particular automobile
2 dealer and said, give me the records of a
3 particular leased car. The client doesn't know,
4 I'm out of town. He calls. He sees a subpoena.
5 It's a police officer, he gets the records, and he
6 gives it to him.

7 That process doesn't exist. OK? Now you're
8 going to create it if you give this reasonable
9 suspicion kind of thing. But anyways, it doesn't
10 exist. He could have gotten a search warrant,
11 probable cause, to get that information, but he
12 elected not to do that because he didn't have
13 probable cause. So he made up a phony subpoena and
14 went in and got it. That's not unheard of.

15 And that's what they did in DeJohn, only that
16 was the DA's office, not a police officer. I held
17 a hearing with the police officer. I filed a
18 motion for return of confiscated goods, and I got
19 him on the stand, and he ultimately admitted, of
20 course, that he knew it was wrong, but it was
21 expedient. Those are the frightening kinds of
22 problems that we're talking about.

23 REPRESENTATIVE HECKLER: Well, I don't know
24 how frightened I am that somebody is going to get a
25 car rental receipt or see a bank record of mine.

1 MR. MANIFESTO: I am, when it becomes a
2 potential of my records.

3 REPRESENTATIVE HECKLER: Well, that's your
4 privilege. But to get back to the facts at hand,
5 the United States Supreme Court isn't frightened by
6 that concept, and aside from -- I don't know what
7 the authority is in other jurisdictions, but in
8 much of the United States, there is not the
9 requirement -- there is nothing that says that an
10 officer can't go to this fellow and say, could I
11 see this particular record.

12 MR. MANIFESTO: The answer to him was no.
13 Then he went and got the subpoena.

14 REPRESENTATIVE HECKLER: Well, he did some
15 sloppy police work.

16 MR. MANIFESTO: No, he did illegal police
17 work.

18 REPRESENTATIVE HECKLER: He did some mostly
19 lazy police work.

20 MR. MANIFESTO: Illegal, I'm sorry.

21 REPRESENTATIVE HECKLER: OK. Would it not --
22 Is it not correct that the DeJohn decision, which
23 dealt with a patently illegal subpoena, held that
24 there must be either a search warrant or some other
25 judicial process, some other judicial review, not

1 specifying the requirement of probable cause?

2 MR. MANIFESTO: Search warrant, because there
3 was no other way other than a subpoena to a
4 particular hearing, which they could do.

5 REPRESENTATIVE HECKLER: Well, we differ. The
6 DeJohn case is in the law books for us to look at.
7 It is certainly my understanding of the DeJohn case
8 that the Supreme Court indicated that some other
9 procedure involving potential judicial review would
10 be appropriate.

11 MR. MANIFESTO: Correct.

12 REPRESENTATIVE HECKLER: Isn't it a fact that
13 if this statute is enacted and presumably records
14 will be seized pursuant to it, that that will, in
15 fact, go before the same Supreme Court --

16 MR. MANIFESTO: You've changed the
17 requirements. And let me only say, in response to
18 your earlier portion, that the Supreme Court -- and
19 quite candidly, I think you know what side of the
20 fence I'm on, with the Reagan appointees to the
21 judiciary, to the federal judiciary, I expect to
22 see a lot more things in the federal government be
23 considered no reasonable expectation of privacy. I
24 think we are going to see a lot more coming out of
25 the federal judiciary that way. That doesn't mean

1 we have to, in Pennsylvania, cower to that
2 position.

3 REPRESENTATIVE HECKLER: The Miller decision
4 came out of Maryland, and the Maryland Supreme
5 Court took the lack of privacy view and lack of
6 expectation of privacy, and that was decided some
7 years ago.

8 MR. MANIFESTO: We can deal with other states,
9 and we can talk about how our constitution says
10 that no evidence may be introduced against someone,
11 as opposed to the federal constitution which talks
12 about, you may not be a witness against oneself and
13 that that's different, and there are states such as
14 Georgia and others which interpret differently than
15 the federal way.

16 I mean, I don't know that we want to get into
17 that. I don't know that that's appropriate so much
18 for the discussion of this legislation, because
19 then you and I are going to go back and forth on
20 other states, and we both dealt with those in the
21 past.

22 REPRESENTATIVE HECKLER: Well, just so we are
23 clear, this isn't some bunch of hangmen down in
24 Washington who have suddenly decided to throw the
25 constitution out the window. Wouldn't you agree

1 that Miller was decided eight years ago, at least?
2 Wasn't it?

3 MR. MANIFESTO: Which case are you talking
4 about?

5 REPRESENTATIVE HECKLER: If I have the name
6 right, it's either White or Miller. And the ACLU
7 testimony, which was very well prepared,
8 specifically delineated --

9 MR. MANIFESTO: I'm not sure of the name of
10 the case. I don't want to --

11 REPRESENTATIVE HECKLER: That's the case out
12 of Maryland which specifically reaches the opposite
13 conclusion from DeJohn, that bank records are --
14 that one does not have a specific expectation of
15 privacy in DeJohn, and that was decided, I see, in
16 1976.

17 MR. MANIFESTO: Oh, sure. Those were
18 third-party records you're talking about. You
19 don't have --

20 REPRESENTATIVE HECKLER: Counsel --

21 MR. MANIFESTO: No, no. There is a major
22 difference when you start dealing with third-party
23 recorder keepers and the right for you to get
24 those. I mean, the third-party records are not
25 subject to the Fifth Amendment. I have no right

1 against self-incrimination to challenge your
2 securing them under the Fifth because they're
3 third-party records.

4 You might not be able to get them from me, but
5 if they are third-party records, you can get them.
6 But Pennsylvania says that there is a reasonable
7 expectation of privacy, and you can get them
8 pursuant to a search warrant based upon probable
9 cause. You are now suggesting in this legislation
10 that you no longer need probable cause, what you
11 need is reasonable suspicion, and I am suggesting
12 to you that that's not what DeJohn said.

13 REPRESENTATIVE HECKLER: OK. And I would
14 suggest that is it not correct that this statute,
15 if enacted just as it stands, will ultimately be
16 reviewed by the Pennsylvania Supreme Court as soon
17 as one of your defendants gets a chance to raise
18 that issue?

19 MR. MANIFESTO: Yes, if someone picks it up,
20 sure.

21 REPRESENTATIVE HECKLER: So that somebody has
22 the feeling that this comports with DeJohn. Would
23 that be fair to say?

24 MR. MANIFESTO: Are you suggesting then that
25 it is the function of the Legislature to try and

1 exceed the bounds as far as one can to reduce
2 probable cause and then leave it up to the Supreme
3 Court, if they decide it's constitutional, it
4 should pass?

5 REPRESENTATIVE HECKLER: No, no.

6 MR. MANIFESTO: I mean, I think we have a duty
7 here.

8 REPRESENTATIVE HECKLER: Well, one just gets
9 to ask the questions, and the other gets to answer
10 them.

11 MR. MANIFESTO: I'm so accustomed to
12 questioning, that it's very difficult for me to --

13 REPRESENTATIVE HECKLER: Obviously. However,
14 the point that at least I am making here is that --
15 and I would hope you would acknowledge, because I
16 think we both know what the rules of the game
17 are -- that this statute is going to have to
18 conform to the standards of the Pennsylvania
19 constitution as those standards are applied by our
20 Supreme Court.

21 MR. MANIFESTO: Sure. Every bit of
22 legislation you pass requires that.

23 REPRESENTATIVE HECKLER: So presumably, unless
24 they decide to reverse themselves on DeJohn, either
25 this language comports with DeJohn, which I haven't

1 suggested it does, because it provides for some
2 prior judicial review --

3 MR. MANIFESTO: I don't think DeJohn is
4 relevant, really, to this inquiry, to your
5 question. But OK, let's go on.

6 REPRESENTATIVE HECKLER: We are talking about
7 bank records and telephone records, and that's
8 covered with DeJohn.

9 MR. MANIFESTO: I don't want to quibble with
10 that.

11 REPRESENTATIVE HECKLER: I want to deal with
12 it.

13 MR. MANIFESTO: OK.

14 REPRESENTATIVE HECKLER: That's covered by
15 DeJohn. Now, what I am saying to you is -- and I
16 think these people should understand what we are
17 talking about -- that DeJohn, that standard is
18 going -- this statute will be reviewed by that
19 standard. Isn't that right?

20 MR. MANIFESTO: This statute will be reviewed
21 by the Supreme Court by whatever standard, you
22 know, that they wish to review it. All I am
23 suggesting to you is that the appropriate -- I am
24 suggesting -- You and I obviously differ. I am
25 suggesting that the appropriate standard that the

1 Legislature of the Commonwealth of the Pennsylvania
2 should impose upon the police is that of probable
3 cause.

4 REPRESENTATIVE HECKLER: OK. But would you
5 concede that DeJohn doesn't necessarily impose that
6 standard? You're now asking us, in our legislative
7 authority, to do something which the Supreme Court
8 is perfectly free to do, ultimately.

9 MR. MANIFESTO: Well, I don't know that they
10 legislate. I don't think that they legislate.

11 REPRESENTATIVE HECKLER: If they view that the
12 constitution mandates that requirement, then
13 certainly they do.

14 MR. MANIFESTO: Counsel thinks that they do.

15 REPRESENTATIVE HECKLER: We need a copy of the
16 DeJohn case here, but one other point. Would you
17 agree that we cannot diminish the scope of the
18 protections which are provided by the Pennsylvania
19 constitution as interpreted by our Supreme Court by
20 legislation?

21 MR. MANIFESTO: Would I agree -- I'm sorry.

22 REPRESENTATIVE HECKLER: That we, as a
23 Legislature, cannot diminish the scope of the
24 protections. The heck with the scope, the
25 protections --

1 MR. MANIFESTO: Sure. I'll agree with that.

2 REPRESENTATIVE HECKLER: OK.

3 MR. MANIFESTO: If the Supreme Court says it's
4 unconstitutional, it's unconstitutional whether you
5 agree with it or not.

6 REPRESENTATIVE HECKLER: Right. So that if,
7 in fact, this would fly in the face of the
8 doctrines of the Supreme Court as articulated in
9 DeJohn and whatever other cases there are out
10 there -- you're right, there is, I believe, a
11 misconceived pen register case, but there is a pen
12 register case out there. That's their business.
13 They have decided it. That's what they do, and we
14 can't alter that decision to the extent that it's
15 grounded on the constitution.

16 MR. MANIFESTO: What you are saying is that we
17 have a case that says the pen register requires
18 probable cause, and I'm hoping that we can get
19 through the Supreme Court the mobile tracking
20 device with less than probable cause, and that
21 there is a different rationale between mobile
22 tracking devices and package tracking devices than
23 there is with pen registers, and that's what you're
24 saying.

25 You're saying, look, we have pen registers,

1 that tells what number I dial on the phone, that
2 requires probable cause. I want to follow someone
3 for 90 days with a tracking device, I want to have
4 the ability to open up packages, to even enter the
5 car, if necessary, and -- sure, that's another
6 issue that comes, packages -- and therefore, we
7 should have a relaxed standard.

8 I am saying that to me, logically, if probable
9 cause is the correct standard for pen registers,
10 then logically it becomes the same standard for
11 tracking devices, and you would disagree.

12 REPRESENTATIVE HECKLER: And leaves the
13 Pennsylvania Supreme Court perfectly free, when the
14 proper case is presented to them, to reach that
15 conclusion, if that's what they think.

16 MR. MANIFESTO: Sure. If you want to bait the
17 Supreme Court, that's what you want to do.

18 REPRESENTATIVE HECKLER: Now, is there
19 anything in the statute -- getting to the issues of
20 this intrusion -- is there anything in the statute
21 that authorizes the entry into a vehicle, into the
22 part of the vehicle that anybody would believe --

23 MR. MANIFESTO: There is nothing that says you
24 can't, and that's the frightening thing. Put it
25 in. Say you can't.

1 **REPRESENTATIVE HECKLER:** Do we have
2 vindications of the constitutional rights, which we
3 all concede that we have, in statute when they're
4 already in the constitution? I mean, is there a
5 Pennsylvania statute that says that a police
6 officer can't simply enter my home and search?
7 I don't know if there's a statute.

8 **MR. MANIFESTO:** Is there a statute? No.

9 **REPRESENTATIVE HECKLER:** No. It's in the
10 constitution.

11 **MR. MANIFESTO:** Right.

12 **REPRESENTATIVE HECKLER:** And if a police
13 officer does that and seizes evidence of a crime,
14 it's going to be suppressed pursuant to well
15 established procedures. If he doesn't and -- you
16 know, he just looks around and harasses my wife,
17 then he is going to be sued civilly. Isn't that
18 correct?

19 **MR. MANIFESTO:** Well, you do have an immunity
20 that deals with law enforcement officers in the
21 course of their duties. He might be sued certainly
22 individually. But in certain political
23 subdivisions, there is immunity from suit based
24 upon legislation that you have passed.

25 **REPRESENTATIVE HECKLER:** Well, let's get back

1 to the issue of the intrusion. Are you
2 suggesting --

3 MR. MANIFESTO: I don't see --

4 REPRESENTATIVE HECKLER: Wait a minute. Are
5 you suggesting that if we -- Let's say we are
6 ill-advised by your view and passed this
7 legislation as it is. Are you suggesting that it
8 will be appropriate for a prosecutor to argue that
9 because of this legislation, police are entitled to
10 open the trunk of a car to put a tracking device
11 inside or to open a package that they did not
12 otherwise have a right to open and to insert
13 something inside, because of this legislation?

14 MR. MANIFESTO: Yes. I don't see anything
15 that says you can't.

16 REPRESENTATIVE HECKLER: No, no. That's not
17 the -- We both know the constitution --

18 MR. MANIFESTO: You want to be certain that
19 they don't do it? Then you say it. You put in
20 here -- It's a very simple amendment. Why are you
21 reluctant to do that?

22 REPRESENTATIVE HECKLER: It's not a question
23 of reluctance. This legislation is in the eleventh
24 hour. You are here telling this committee why this
25 bill is defective, intrudes upon existing rights of

1 citizens. And, you know, don't play those games
2 with me about what am I afraid of. I'm not afraid
3 of anything. You tell me --

4 MR. MANIFESTO: I'm afraid.

5 REPRESENTATIVE HECKLER: Good. That's your
6 problem. You tell me whether you can honestly say
7 that if this legislation is passed, it will
8 constitute some kind of authorization that doesn't
9 already exist for intrusions into places where
10 there is a legitimate expectation of privacy.

11 MR. MANIFESTO: Well, first of all, if I have
12 a package that is sealed, I am not aware of any way
13 that you can get into that package, as law
14 enforcement officers, short of seizing it based
15 upon some probable cause to make a seizure.

16 REPRESENTATIVE HECKLER: OK. Whether
17 that's --

18 MR. MANIFESTO: Or pursuant to an arrest, you
19 arrest me, then there is some question. But let's
20 assume that if it's pursuant to a valid arrest,
21 although there is some question about that.

22 REPRESENTATIVE HECKLER: Fine. OK. Whatever
23 the case may be. There are some circumstances in
24 the normal course of proper law enforcement
25 activity where people come into -- the law

1 enforcement authorities will come into possession
2 of a package and may have the opportunity to insert
3 something. Right?

4 MR. MANIFESTO: Possibly.

5 REPRESENTATIVE HECKLER: OK. Are you
6 suggesting that the language in this legislation
7 expands that authority, will enable them simply to
8 go into somebody's mailbox, grab a package because
9 it's addressed to somebody, and stick a beeper in
10 it?

11 MR. MANIFESTO: Sure.

12 REPRESENTATIVE HECKLER: That's what you
13 believe?

14 MR. MANIFESTO: That's what I believe, because
15 that's what I see this bill giving the authority to
16 do. It doesn't say that you can put a tracking
17 device on a package without intruding into that
18 package, and so your position would be -- What we
19 really get to is, if we're going to limit the
20 authority of the police to enter that package, then
21 let's say it. Let's not trust that the court will
22 say something differently. Let's say it.

23 REPRESENTATIVE HECKLER: We have been perking
24 along here for several hundred years with our
25 constitution. I haven't seen anybody beating a

1 path to this legislation to say we need a statute
2 that says that you can't torture prisoners into
3 confession, we need a statute that says you can't
4 intrude upon people's homes, or some place else
5 they have a legitimate expectation of privacy,
6 without probable cause.

7 MR. MANIFESTO: Sure.

8 REPRESENTATIVE HECKLER: Those things are in
9 the constitution and they're given. And we can't,
10 we cannot -- I wish Paul McHale were here, I think
11 he'd agree with me on this -- we cannot authorize
12 violations of the constitution in some statute, and
13 I think it's disingenuous of you to suggest that we
14 can.

15 MR. MANIFESTO: And what has been the
16 crying -- and I don't know, and maybe you can
17 enlighten me -- the crying demand to be able to
18 place tracking devices into packages? I mean, why
19 not go with the constitution. The police, have
20 they had problems with the constitution?

21 REPRESENTATIVE HECKLER: The point of this
22 legislation -- I think we have already covered
23 this, but wouldn't you agree that this legislation
24 is more restrictive than any law mandated by
25 federal law and the law of many, at least, of the

1 states in this United States?

2 MR. MANIFESTO: This law is not more
3 restrictive, because, in fact, it is the federal
4 law. You copied it. So it isn't more restrictive.
5 I mean, this statute that you're proposing,
6 Subchapter D --

7 REPRESENTATIVE HECKLER: You are saying that
8 the federal law requires prior judicial
9 authorization for the placement of mobile tracking
10 devices?

11 MR. MANIFESTO: Sure. For the last two years,
12 this has been the law.

13 REPRESENTATIVE HECKLER: My knowledge is at
14 least that stale. That's what happens when you
15 come to the Legislature. So I will defer to you on
16 that.

17 MR. MANIFESTO: I may have misunderstood your
18 question, but this is the federal law and has been
19 the law. Therefore, it is certainly the federal
20 law as exists.

21 REPRESENTATIVE HECKLER: Are you saying that
22 if I were an FBI agent and I wanted to put a bumper
23 beeper on somebody's car, that I have to get prior
24 judicial authority to do that?

25 MR. MANIFESTO: You have to follow the federal

1 statute.

2 REPRESENTATIVE HECKLER: And does the federal
3 statute require me to get prior judicial approval?

4 MR. MANIFESTO: Now it does, reasonable
5 suspicion.

6 REPRESENTATIVE HECKLER: And who do I
7 articulate that reasonable suspicion to?

8 MR. MANIFESTO: You go to a federal
9 magistrate. Let me say that there is a major
10 difference, and I'm sure -- because obviously,
11 you're a lawyer. You practiced both in the federal
12 and the state systems. The federal magistrate -- I
13 certainly don't want to be misinterpreted by this,
14 but the federal magistrates are all lawyers. They
15 sit in a different capacity. And there is a major
16 difference between the federal magistrate and the
17 district justice, who is not a lawyer, who is not
18 trained in the law. I mean, many of them do an
19 excellent job, and I don't mean to suggest that
20 they don't, but, in fact, there is a major
21 difference.

22 REPRESENTATIVE HECKLER: I'll concede that the
23 federal magistrates are a different kettle of fish
24 from district justices. I'm sorry, I knew there
25 was one other area that I wanted to address. You

1 have testified -- I missed part of your early
2 testimony, but it's my understanding that you
3 testified that there would be virtually no
4 consequence to nonconsensual interceptions that are
5 up and going if the October 21st deadline passes
6 without action on this legislation.

7 MR. MANIFESTO: We were talking about the hard
8 wire. I thought that's what we were talking about.

9 REPRESENTATIVE HECKLER: Nonconsensual
10 intercepts, whether it's hard wire, a parabolic
11 microphone, whatever.

12 MR. MANIFESTO: That's my understanding.

13 REPRESENTATIVE HECKLER: OK. Would you tell
14 us that if you have a client who comes to you, say
15 somewhere next year, and it's learned that, in
16 fact, the State wishes to introduce evidence gained
17 in an interception during the period of time --
18 let's say sometime in November before we have
19 reenacted this law, that you would not raise that
20 issue, you would not suggest to the courts of
21 Pennsylvania that there was a defect in the
22 authorization for that?

23 MR. MANIFESTO: I think what I would do is I
24 would advise the client, as I do normally, that I
25 would raise the issue. I would also advise him we

1 don't have a Chinese chance in hell of being
2 successful, but in order to avoid a postconviction
3 charge later that I was incompetent in failing to
4 raise that issue, I would raise it.

5 Frankly, I don't know what I would attempt to
6 use as law to back up that position, but I would
7 clearly raise the issue. But I would have to
8 demonstrate why the Pennsylvania law -- and as
9 applies -- As a matter of fact, I brought the
10 pocket part to U.S. C.S. Title 18 with me, because
11 it dealt with it. And there are a series of cases,
12 of course, which are there, all of which deal with
13 state cases which have gone up challenging the
14 inconsistency in the federal wiretap law and state
15 law.

16 And it's all very clear that the underlying
17 theme, of course, is that the difference is the
18 state's law may not be less restrictive on the
19 police. Therefore, if we say, you don't need
20 probable cause and the federal law says you do need
21 probable cause and we have a tap without probable
22 cause, I am going to lose that, because a supremacy
23 clause says the federal rules will apply.

24 I have reviewed the federal act and the state
25 amendment, as suggested, and I am unable to find

1 anything in the state law which is more -- the
2 present state law that is more liberal than the
3 federal amendment. Therefore, I could not come up
4 with a basis for challenging it. I would probably
5 raise the issue, stick some gobbledygook in a
6 brief, and hope that I have acquitted myself of any
7 incompetency questions in not raising the issue.
8 But candidly, here, I couldn't see what I would use
9 as a basis for challenging it.

10 REPRESENTATIVE HECKLER: But it's an issue
11 that would certainly be litigated, both probably at
12 the appellate level, as well as the trial level, if
13 you got that far without --

14 MR. MANIFESTO: Well, you know, we also have
15 an ethical duty, I think, which -- And when I say
16 rather glibly that I would raise it, I think we
17 also have an ethical duty not to raise issues that
18 we consider to be inappropriate. And I think I'd,
19 in considering that, have to weigh both those
20 requirements and decide whether or not it would be
21 appropriate for me to raise it. My testimony
22 simply is, if it is raised, it will be lost.

23 REPRESENTATIVE HECKLER: You have testified,
24 however -- and I am glad you did, because it was
25 obviously news to me -- that the bumper beeper, if

1 you will, the tracking device language in this
2 statute, is mandated by federal law, or at least
3 is -- now, the present state of the law being
4 silenced on this issue -- is not consistent with
5 federal law. Does that need to be brought into
6 compliance with the federal amendment?

7 MR. MANIFESTO: I'm sorry. Are you suggesting
8 that now -- My opinion would be you need probable
9 cause. Let's just assume that for the moment.
10 Let's assume you need probable cause to put a
11 tracking device on the bumper of my car.

12 REPRESENTATIVE HECKLER: But there is no
13 Pennsylvania statute that says that.

14 MR. MANIFESTO: No, but let's just assume that
15 that's the law for the moment. OK? And the
16 federal law says, you don't need probable cause,
17 you need reasonable suspicion. We have then been
18 more restrictive than the federal law, and
19 therefore, we are not in violation of the federal
20 amendment.

21 If you are suggesting -- if the law of
22 Pennsylvania is that you don't need even reasonable
23 suspicion, that police can just willy-nilly go out
24 and put tracking devices on cars, then to put a
25 tracking device on a car willy-nilly with no basis

1 whatsoever, just because I don't like the color of
2 your hair, would not meet minimum federal
3 requirements under this act, and therefore, any
4 evidence secured by reason of that improper device
5 would be suppressed.

6 REPRESENTATIVE HECKLER: OK. Now, let's take
7 a third hypothetical, which resembles reality,
8 which is that right now there is no existing
9 statutory authorization, there are no court cases
10 which have delineated this issue, and, in fact,
11 police officers are acting only judiciously with
12 reasonable suspicion. But, of course, there being
13 no legal authority, they are not required to
14 articulate that with any issuing authority. But
15 they attach a bumper beeper to one of your client's
16 cars with abundant articulable reasons. Let's say
17 they have probable cause, which can be demonstrated
18 after the fact, but there is no statute which
19 comports with federal requirements.

20 Is information gained during the course of a
21 surveillance conducted with that bumper beeper
22 during this gap in time going to be subject to a
23 fruit of the poison tree argument or something of
24 that sort?

25 MR. MANIFESTO: Well, it would be a fruit of

1 the poison tree argument if, in fact, it is derived
2 from an illegally seized bit of evidence, but I am
3 not sure I understand your question.

4 REPRESENTATIVE HECKLER: Well, let me try to
5 boil it down. Does the federal amendment -- and I
6 apologize, again, for my ignorance -- does the
7 federal amendment require some kind of bumper
8 beeper language consistent with federal law, that
9 is, some kind of prior authorization?

10 MR. MANIFESTO: No, it doesn't require that
11 the State of Pennsylvania pass anything to say
12 probable cause, to say reasonable suspicion, or to
13 say nothing. We aren't required to do that to be
14 in conformity with this act. It's up to the State
15 to decide what they want to do, and if they want to
16 do something, then what burden. The only
17 requirement is you can't do less than reasonable
18 suspicion.

19 REPRESENTATIVE HECKLER: OK. But it does not
20 necessarily have to be articulated to an issuing
21 authority prior, you simply have to be able to
22 prove, after the fact, that you had articulable
23 reasonable suspicion?

24 MR. MANIFESTO: No, I don't think so, because
25 I think that -- Well, let me take a look. I'm not

1 sure. I have to take a quick look at the federal
2 act.

3 REPRESENTATIVE HECKLER: I'm so grateful that
4 we found something you're not absolutely sure of.

5 MR. MANIFESTO: It's rare that it happens. I
6 may not be right, but I'm always sure. Let me just
7 see. I can't remember whether you need to get
8 prior judicial authority on the federal act or not.
9 If you'll just indulge me while I try to find it
10 here.

11 REPRESENTATIVE JOSEPHS: I might suggest we go
12 off the record.

13 (Off the record.)

14 MR. MANIFESTO: Let me respond to that
15 question. I have some help from a representative
16 of the ACLU, and I gladly accept that, because I
17 couldn't remember it being in the statute. And
18 he's correct, that it's not in the statute, that
19 it's Supreme Court decisional law which said that
20 you need prior judicial authority in order to place
21 that device on a vehicle, but the standard is
22 something less than probable cause, but that
23 standard was not particularly articulated and was
24 the Kayrow case.

25 So that what we have, unless and until that

1 device appeared somewhere where you would expect a
2 reasonable expectation of privacy and then
3 something else occurs. So basically -- I don't
4 know if that answers your question, but the federal
5 statute -- there were no federal statutes that
6 specifically articulated that position. That was
7 court law.

8 REPRESENTATIVE HECKLER: OK. Now, however --
9 and again, I acknowledge the assistance of Mr.
10 Graci -- it would appear -- and I don't mean to be
11 quizzing you about something you don't have in front
12 of you -- but it would appear that Section 3117 of
13 the amended federal act does provide for mobile
14 tracking devices and specifically references the
15 proposition that if a court is empowered to issue a
16 warrant or other order for installation of a mobile
17 tracking device, such order may authorize the use
18 of that device within the jurisdiction of the court
19 and outside that jurisdiction, if the device is
20 installed within, without any articulation of any
21 standard of probable cause, reasonable suspicion,
22 you know, a glint in the eye, whatever.

23 MR. MANIFESTO: Well, the Supreme Court has
24 ruled on that in the case that we just talked
25 about, and that's what the statute says. And the

1 Supreme Court said, you don't need probable cause
2 to do it, but you do need something less than
3 probable cause, which -- whatever that is.

4 REPRESENTATIVE HECKLER: OK. But they didn't
5 articulate what -- they didn't say reasonable
6 suspicion, they didn't say --

7 MR. MANIFESTO: I don't have the case in front
8 of me, and I don't recall the specific wording.

9 REPRESENTATIVE HECKLER: But the statute
10 doesn't articulate any particular standard at all?

11 MR. MANIFESTO: No. The Supreme Court
12 supplied that standard.

13 REPRESENTATIVE HECKLER: But you can't
14 remember what it is?

15 MR. MANIFESTO: Something less than probable
16 cause, more than nothing.

17 REPRESENTATIVE HECKLER: OK. Now, that gets
18 me back to the question -- and I am about to end.
19 I don't want to be too tedious with this. We have
20 got a proposed statute which authorizes something
21 which, presently, Pennsylvania law is silent about.
22 We have a federal amendment which contains this
23 section that we have just read which suggests that
24 you do need prior court authorization but is silent
25 as to the standard. Aren't we obliged to comply

1 with this section, as well as the rest of that
2 amendment, by the 21st of October?

3 MR. MANIFESTO: No.

4 REPRESENTATIVE HECKLER: No. So that you're
5 saying that if we just march on into November and
6 the law enforcement agencies of the Commonwealth
7 want to use bumper beepers, have, let's say, as I
8 said, probable cause, have an abundantly good
9 reason to do it in a particular case, they are not
10 going to be challenged later because they did not
11 have any mechanism by which they could go to an
12 issuing authority prior to doing something?

13 MR. MANIFESTO: They can go to an issuing
14 authority. They can go to a magistrate and ask for
15 authority to do it, the same as they would ask for
16 a search warrant. Every magistrate can do that.
17 So every magistrate or judicial officer in the
18 Commonwealth of Pennsylvania could authorize them
19 to do it.

20 The standard that the defense lawyer would
21 challenge that with would be that under the Supreme
22 Court's case, because we are bound by the law of
23 the Supreme Court, and so you would challenge it
24 under the Fourth Amendment. You would say, this is
25 a violation of the Fourth Amendment. And in fact,

1 you would then use the Supreme Court's decision and
2 say, police officer, you didn't do this. They say,
3 hey, we went beyond what -- we went to a magistrate
4 and got authority to do that.

5 So that even if you didn't need to do it, in
6 an abundance of caution, if you want to consider it
7 that, that's what they would do. But it may well
8 be that the burden they have to establish is not
9 probable cause under the federal law, because we
10 know that's not, it may be reasonable suspicion.
11 So that's how you would do it. And if I were asked
12 by a police officer -- and there are occasions when
13 I am asked and do advise -- that's what I would
14 suggest them to do to be ultimately sure under the
15 circumstances.

16 **REPRESENTATIVE HECKLER:** However, they would
17 be asking a district justice, let's say, or a judge
18 of the Court of Common Pleas to give some
19 authorization for which they had not been provided
20 any authority, either in the Rules of Criminal
21 Procedure or in the Pennsylvania statutes.

22 **MR. MANIFESTO:** Well, the Rules of Criminal
23 Procedure don't apply to the preinvestigative
24 situation. The rules of procedure don't
25 necessarily dictate what investigative procedures

1 exist on behalf of the police.

2 REPRESENTATIVE HECKLER: I think I have
3 covered the concerns I have.

4 REPRESENTATIVE DeWEESE: Thank you. Mr.
5 Manifesto, thank you very much.

6 MR. MANIFESTO: Thank you. I appreciate the
7 opportunity.

8 REPRESENTATIVE DeWEESE: It's a little late,
9 but thank you for your patience. You had to wait a
10 long time to testify today. We appreciate your
11 perspective. And I, for one, as a card-carrying
12 member of the ACLU, will probably vote accordingly.
13 But nevertheless, you have given us additional
14 insights, and I would like to make sure I am able
15 to touch base with you some time, via telephone, in
16 the next few days or week, so if you'll leave Gwen
17 a couple phone numbers where I could call you. I
18 won't put any beepers on you or anything.

19 MR. MANIFESTO: Promise?

20 REPRESENTATIVE DeWEESE: Sure. Our next and
21 final witness -- speaking of apologies, Michael, I
22 wanted to make sure you weren't two hours late to
23 testify, but an hour and 55 minutes is bad enough.
24 You're an old pro, you've been around these halls
25 for a long time. We asked more questions than I

1 would have anticipated today. The Chairman of the
2 Pennsylvania Crime Commission, Mike Reilly. Mike,
3 would you like to bring some of your long-suffering
4 staff up to the front desk?

5 MR. REILLY: No.

6 REPRESENTATIVE DeWEESE: Are you going to give
7 us the other side again?

8 MR. REILLY: Let's start from the top. I
9 think the thing Bill Manifesto and I learned today
10 was to bring a lunch. I have submitted prepared
11 testimony. I won't read that. Let me summarize it
12 a little bit, if I might.

13 As was pointed out by the representative from
14 the American Civil Liberties Union, he was one of
15 our, frankly, more significant witnesses ten years
16 ago when we elected to change the law of this
17 Commonwealth and pass the crime control package of
18 1978. Some other people were involved in that,
19 too. Chairman DeWeese was a member of that
20 investigative committee, as was Chairman Moehlmann.
21 I was a member of the staff of that committee.

22 We looked at these issues rather closely. I
23 concur that the law of Pennsylvania had been
24 prohibitive rather than permissive for a period of
25 time prior to that. That has not been the law in

1 Pennsylvania forever. That was legislatively
2 created law, that was not constitutional
3 Pennsylvania law.

4 There has never been a constitutional
5 prohibition against electronic surveillance,
6 wiretapping, electronic intrusion. In fact, when
7 we passed the bill -- When the bill was passed by
8 the Legislature and signed by the Governor in '78,
9 it immediately was taken on an expedited appeal
10 before the Pennsylvania Supreme Court, who found it
11 to be constitutional.

12 For a long time Pennsylvania was one of the
13 more extensive wiretapping states in the country
14 under our -- no statute and a very mild statute.
15 Then that statute was amended to make us the most
16 restrictive jurisdiction. That was a legislative
17 determination. That was not a constitutional
18 interpretation. It was a determination by the
19 Pennsylvania Legislature, which the Pennsylvania
20 Legislature, in its wisdom, eventually changed ten
21 years ago, to be precise.

22 The people that put that package together were
23 people who had a unique mandate. They were not
24 sent to investigate organized crime, they were sent
25 to investigate organized crime, public corruption,

1 and violations of civil rights. It was kind of a
2 unique mandate that that committee had ten years
3 ago when they developed this package of bills.
4 They had a sensitivity that investigative
5 committees seldom have.

6 I was very actively involved in developing
7 these bills, and I can tell you why the Governor
8 signed them. And I can tell you the Governor had
9 gone to an FBI conference and gone on the stage and
10 pledged he would veto any wiretap bill that ever
11 passed in Pennsylvania, and then eventually
12 Governor Schapp did sign those bills. And every
13 one of those provisions I can tell you why they
14 were developed. And of course, I can't give you
15 legislative history on them, because there is no
16 real legislative history other than the limited
17 debates on the floor.

18 I believe that the time has come for
19 Pennsylvania to go forward and take the next step
20 in the area of wiretap. I think the 20-day
21 limitations made sense when they were put into the
22 bills, the 20 and 20 limitation. It was brand new.
23 There had, frankly, been a history of abuse in
24 Pennsylvania. There had been, under the prior
25 wiretap act and the nonstatutory wiretapping, there

1 had been abuses at the local level, there had been
2 abuses at the state level. So we were very
3 cautious when we brought Pennsylvania back into
4 wiretapping.

5 You will not find a parallel to the
6 Pennsylvania statute's requirement that wiretap
7 applications be made to a state appellate court
8 anywhere in the nation or in the federal system.
9 Those were all carefully crafted, carefully thought
10 out, and I think thoughtfully developed.

11 I, as the chairman of the State Crime
12 Commission and personally, feel it is time for
13 Pennsylvania to move forward. I think it was
14 correctly stated that we haven't done a lot of
15 fancy cases here in the Commonwealth that require
16 the indefinite extension of wiretaps. One of the
17 reasons is because we haven't had that ability.
18 Some of those cases have been done, but other
19 states have done them.

20 I mean, we're all glibly acknowledging that
21 the Scarfo kind of prosecutions would not have
22 happened under the Pennsylvania statute, but
23 frankly, the wiretaps that made those possible were
24 not done by the federal government, those wiretaps
25 were done by the New Jersey State Police using the

1 New Jersey statute, which is a 30-day -- indefinite
2 number of 30-day extensions.

3 I'll give you another very specific example,
4 and that is the Commission case. The Commission
5 case is the case in which the heads of the Mafia
6 families were all convicted in New York City, and a
7 lot of the best evidence was done with protracted
8 wiretaps. Because if you are going to go after a
9 local drug dealing network, as you heard from the
10 reports, there is seldom need for 20 days. I mean,
11 those wires go down in five, seven days. You get
12 enough evidence, you take the wire down.

13 If you're going to go after the criminal
14 organizations, if you're going to go after the
15 sophisticated criminal organization and destroy it,
16 wiretaps are invaluable in providing intelligence,
17 in providing the information with which an
18 investigative assault can be planned, and finally,
19 in providing the kind of evidence that you take
20 before a jury and argue to that jury to prove the
21 existence of the conspiracy, the extent of the
22 conspiracy, the wealth of the conspiracy.

23 And those kinds of things require not only the
24 excellent investigation that Bill Manifesto talked
25 about, but also require, beyond that -- and I

1 personally, as the author of the current
2 Pennsylvania wiretap statute, believe very, very
3 strongly in conventional investigations. Anyone
4 who attempts to use a wiretap as an easy way out or
5 as a quick way to shortcut doing conventional
6 surveillance or witness canvassing has just put
7 themselves in a position where they will have an
8 untenable case when they're done, or they will
9 never have the case that's there, if that's the
10 first step they take. That's why our -- both our
11 wiretap and our grand jury statute commend
12 conventional investigative techniques to the law
13 enforcement and prosecutorial community.

14 Let me suggest that it does make sense to give
15 Pennsylvania that option. Now, it's not mandated.
16 There are a few things we sort of skipped over as
17 we talked. The law doesn't say a judge must give a
18 30-day order. It sets a limit that a judge can put
19 in a single order. If a Superior Court judge --
20 and I keep going back to first names, and I
21 apologize for that, because I know a lot of
22 folks -- Chairman DeWeese, as you suggested --

23 CHAIRMAN DeWEESE: Bill is fine.

24 MR. REILLY: As you suggested, you had
25 occasion to talk to some Pennsylvania Superior

1 Court judges. If those judges think the 30-day
2 application is more than is required, they can sign
3 a 10-day order. They can sign a 15-day order.
4 They just may not sign an order under the current
5 law more than 20 days, under the proposed
6 amendments, more than 30 days.

7 I think it's time to see whether Pennsylvania
8 can do what New Jersey has done, which is to say be
9 more effective in dealing with these organizations
10 than the federal government has been in their area,
11 or what New York has done, which is develop
12 information which often is most appropriately
13 prosecuted in a federal courtroom, because the
14 federal laws, especially in comparing New York and
15 Pennsylvania, there are better federal laws to
16 prosecute these kinds of corrupt criminal
17 organizations than we have.

18 To go off the agenda, we suggested a few
19 amendments back in December which might put
20 Pennsylvania in a little better posture to
21 prosecute those kinds of cases, but we'll see what
22 comes of those in the future.

23 I think the first issue I really very, very
24 strongly believe, if you're going to do anything
25 fancy, you're going to target -- our mandate, which

1 is organized crime and public corruption, you're
2 going to need to be able to do 30-day plus
3 indefinite extension taps, intrusions,
4 surveillance.

5 Our mandate, as you know, is -- our mandate as
6 a Crime Commission is organized crime, but it is
7 also public corruption. I think this is a very
8 significant issue in the question of public
9 corruption.

10 I think most of the significant federal public
11 corruption cases that have been prosecuted that
12 have been won have been won because of electronic
13 interception, have been won because the jury sits
14 there and sees what was actually said. And
15 frankly, a number of the public corruption cases
16 that have been lost were lost because of the
17 electronic interception, because they saw what the
18 real attitudes of the people were, and they decided
19 whether or not they believed the Governor or
20 whether or not they believed the congressman or
21 they believed the senator.

22 I think that it is a very, very important
23 tool. And though everybody wants to come in and
24 talk about narcotics -- and we, as you know, have
25 taken the position now for four years that

1 narcotics is the most significant organized crime
2 facing this Commonwealth -- we don't want to limit
3 our analysis of electronic surveillance and
4 electronic surveillance laws to the issue of
5 organized crime, certainly not to the issue of
6 narcotics or the issue of organized crime.

7 I think public corruption is a major issue
8 where electronic surveillance is of tremendous
9 value, both to clear the person who is unjustly
10 accused and to provide evidence that could convict
11 the person who is properly accused.

12 Let me suggest another thing we have not heard
13 much about here today because we went down a number
14 of different paths. This was pointed out to me,
15 frankly, by the people I didn't let come to the
16 table with me, for no good reason. That is, that
17 one of the things that we forget, those of us who
18 are in the prosecution business rather than in the
19 law enforcement business, is how often we are able
20 to be pro-active because of electronic
21 interceptions, how often we have been able to stop
22 a crime before it can occur.

23 We start up on a wire because of one crime
24 that we have probable cause to believe we will
25 gather information about, and what happens is we

1 learn things that allow us to stop another crime.

2 In fact, in my executive director's experience
3 with the New Jersey State Police, what his agency
4 has been able to do on several occasions is prevent
5 assaults or assassination attempts against police
6 officers, because when you're working undercover
7 narcotics and you're listening to make your case on
8 a wire and you hear that they have decided to rip
9 off or knock off those two dealers coming in from
10 Queens and you know those are two New Jersey state
11 troopers working on the Northern Jersey detail, you
12 are very happy that you had that wiretap up and
13 working or you had that bug in place. So there are
14 a number of reasons that we haven't necessarily
15 focused on.

16 Let me touch -- and this was not on my agenda,
17 because I didn't know about the amendment when I
18 came here. I heard some discussion about an
19 amendment to provide, under emergency
20 circumstances, wiretap equipment to be available to
21 the Pennsylvania State Police. Be very careful
22 with that issue. I'll tell you why. I think you
23 are going to have a real Title 3 problem if you
24 have the police with some kind of special
25 gerrymandered emergency procedures able to put that

1 equipment up. You have to be extremely careful
2 with Title 3.

3 Title 3 is the federal standard that we all
4 have to meet, and I would hate to have that case
5 happen and have that child rescued and have that
6 whole case blown out of the box because we went in
7 and did something, in entire good faith -- I am not
8 in any way questioning the good faith of the
9 example we gave, but you have to be extraordinarily
10 careful. I would push much harder to have an
11 extremely expedited way to get that properly done.
12 I think that's the real remedy we need there.

13 REPRESENTATIVE DeWEESE: Through the Superior
14 Court?

15 MR. REILLY: Through the Superior Court.

16 REPRESENTATIVE DeWEESE: Even Mr. Mayernik,
17 who is a very strong law and order member of our
18 committee, brought up some of the same
19 considerations, which surprised me, a few minutes
20 after that had been brought up in testimony. So
21 I'm glad you're sharing that with us.

22 MR. REILLY: Well, it's just you hate to build
23 a case-destroying virus into the base of the case.
24 The other thing we want to be careful about, let me
25 remind you, we didn't say that the district

1 attorney and the attorney generals had to own that
2 equipment because we were trying to find a way to
3 channel additional funds to those people, what we
4 were frightened of -- And the people who were
5 frightened of it weren't the liberals in our
6 committee back then, the people who were frightened
7 of it were people who were former prosecutors and
8 people who had law enforcement experience.

9 The tradition in Pennsylvania and the
10 tradition in New York State was that most of the
11 abusive wiretapping that was done was done by law
12 enforcement without any prosecutorial supervision.
13 And the reason we didn't allow any law enforcement
14 agency in this Commonwealth to own that equipment
15 is because the last time we did that in
16 Pennsylvania, the last time we let the law
17 enforcement agencies own the equipment, we had the
18 kind of problems that led the Legislature to
19 eliminate the possibility of wiretapping or
20 electronic surveillance here in the state.

21 So I would walk very gingerly in that area,
22 and I would suggest to you that the need is real,
23 the need to use that equipment to get in and listen
24 to what's going on in a hostage situation, which is
25 as important as this psychological evaluation. I

1 mean, what you want to be able to do -- what the
2 federal government does in an emergency situation
3 like that is they get a bug in there in a hurry so
4 they can hear what the hostage-takers are saying,
5 whether they're going to say, now, we'll wait five
6 minutes to shoot the hostages, then, you know, you
7 come in the windows, because you have got nothing
8 to lose.

9 Normally, in a hostage situation, you wait.
10 Time is on your side. In 99 out of 100 hostage
11 situations, everybody walks away. I mean, you hear
12 three of them a week now. But when you hear that
13 they have decided to do something else, you want to
14 be in a position to act, and that's the kind of
15 thing I think the State Police are really concerned
16 about. We have to find a way to get that to them.

17 REPRESENTATIVE DeWEESE: How do the federal
18 people do it?

19 MR. REILLY: With expedited orders, with
20 expedited orders to get the bug in, get the bug
21 placed, get it on the side of the plane, get it
22 into the -- I mean, that's what you're going to
23 have to find a way to do. And it is a very real
24 need. I completely understand what they're saying,
25 but I say be very cautious in moving down that

1 line. Be very cautious in providing the equipment
2 and some kind of a Pennsylvania statutory way to
3 use the equipment that may well not comport with
4 the requirements of Title 3.

5 REPRESENTATIVE DeWEESE: The law enforcement
6 community, if it wants this to pass, as the DAs
7 association and others have shared with us, in a
8 very quick manner, would probably, just due to, as
9 Representative Heckler said, the eleventh hour
10 situation we're confronted with, would probably be
11 happy enough that this thing went through
12 unmolested, just the way -- without any, say, law
13 enforcement community amendments from Piccola or
14 without any amendments from McHale.

15 MR. REILLY: Yes.

16 REPRESENTATIVE DeWEESE: Is that your
17 general --

18 MR. REILLY: I absolutely have that sense. I
19 mean, we have been very actively lobbying for this.
20 We have been working with the Attorney General's
21 office and the District Attorneys Association, and
22 the bill, in its present form, could be passed
23 tomorrow.

24 REPRESENTATIVE DeWEESE: Without Piccola or
25 without McHale?

1 MR. REILLY: Without amendment would be
2 satisfactory to the law enforcement community in
3 this Commonwealth.

4 REPRESENTATIVE DeWEESE: I didn't mean to
5 interrupt your comments. I guess I did mean to
6 interrupt your comments, because sometimes it's
7 helpful.

8 MR. REILLY: Well, sure, you did, and you
9 succeeded in interrupting my comments. But those
10 were the general thoughts that I wanted to share
11 with the committee.

12 REPRESENTATIVE DeWEESE: Any observations or
13 comments? David?

14 REPRESENTATIVE HECKLER: No. I'm worn out.

5
15 REPRESENTATIVE DeWEESE: Mary? Michael? I
16 feel some contrition in having you wait for four
17 hours and having you talk for fifteen minutes. You
18 call me by my first name, I'll call you by your
19 first name. Mike, thanks for coming up.

20 MR. REILLY: Thank you.

21 REPRESENTATIVE DeWEESE: We will maybe be in
22 touch with you, also, at least Michael and I, in
23 preparation for Floor debate relative to what you
24 and Mr. Manifesto shared.

25 The House Judiciary Committee will adjourn at

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this point. Thank you very much for your
attendance.

(Whereupon, the public hearing concluded at
2:12 p.m.)

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I hereby certify that the proceedings and evidence are contained fully and accurately, to the best of my ability, in the notes taken by me on the within proceedings, and that this copy is a correct transcript of the same.

10/31/88
Date

Lori A. Shirk
Lori A. Shirk, Notary Public
Registered Professional Reporter