CHARLES McC. MATHIAS, JR.
MARYLAND

COMMITTEES:
APPROPRIATIONS
JUDICIARY
DISTRICT OF COLUMBIA

United States Senate

WASHINGTON, D.C. 20510

October 1, 1975

Mr. Harold Weisberg
Route 12
Frederick, Maryland 21701

Dear Mr. Weisberg:

Thank you for your recent letter responding to my request for your views on the Bill of Rights Procedures Act.

You are correct in assuming that I inadvertently left out a copy of S. 1888, the legislation I have introduced with regard to privacy. Enclosed for your review is the Congressional Record reprint of S. 1888, along with my introductory remarks.

I will bear in mind the views you've already expressed and look forward to receiving any further comments after you have had a chance to review this piece of legislation.

Again, thank you for bringing this oversight to my attention.

With best wishes,

Sincerely,

Charles McC. Mathias, Jr.
United States Senator

CM:mfm
Enclosure

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Senate

By Mr. MATHIAS (for himself, Mr. MANSFIELD, Mr. PHILIP A. HART, Mr. JAVITS, Mr. KENNEDY, Mr. NELSON, and Mr. PEARSON):

S. 1888. A bill to require in all cases court orders for the interception of communications by electric and other devices, for the entering of any residence, for the opening of any mail, for the inspection or procurement of certain records, and for other purposes. Referred to the Committee on the Judiciary.

BILL OF RIGHTS PROCEDURES ACT

Mr. MATHIAS. Mr. President, recent events have demonstrated to all Americans that our Government has at times transcended constitutional processes and involved itself in a variety of excesses in the area of surveillance. These include, but are by no means limited to: military intelligence activities at the 1968 Democratic National Convention, FBI surveillance of various civil rights leaders and of participants at the 1964 Democratic Convention, wiretapping by the White House "plumbers" unit, compilation of thousands of files at the CIA related to domestic security, and the maintenance of FBI files on Members of Congress. Most startling of all is the so-called Huston plan revealed in the course of the Senate Watergate investigations.

Governmental surveillance—the Federal invasion into areas of privacy reasonably expected by all citizens—has sown the seeds of a deep-seated malaise into American life. Watergate, CIA and FBI surveillance, the maintenance of files on congressional Members all are part of this problem. They have been accompanied by an onrush of technological advancement and growing powers of bureaucratic structures, all of which has created a kind of "future shock" sense that things are just moving too fast—have gotten beyond our control.

The malaise gripping an ever-increasing number of Americans in the apprehension and fear that those who register dissent, those who voice displeasure with governmental policy, are subject to unbridled scrutiny through pervasive governmental surveillance techniques. Actual surveillance in blatant disregard of constitutional safeguards has created the apprehension that there may be intrusions at any time upon one of our most cherished ideals, the right to privacy. But perhaps of greater consequence is the chilling effect that accompanies such surveillance. The mere threat of monitoring intimidates individuals, forces withdrawal from political activity, and impinges upon first amendment freedoms. It is by no means an overstatement to claim that unchecked governmental surveillance strikes at the very vitality of this Nation.

The fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Justice Brandeis emphasized the importance of the fourth amendment to the right of privacy in his 1928 Olmstead dissent:

> To protect (the right to be let alone), every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the fourth amendment.

The Supreme Court in *Katz* v. *U.S.*, 389 U.S. 347 (1967) held that the amendment's spirit now shields private speech from unreasonable surveillance. The decision implicitly recognizes that broad and unsuspected governmental incursions into conversational privacy which electronic surveillance entails necessitates the application of the fourth amendment safeguards.

While the fourth amendment speaks of "unreasonable searches and seizures," reasonableness has been determined on the basis of the commands of the warrant clause:

> It is not an inconvenience to be weighed somehow against the claims of policy efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the well-intentioned but mistakenly over-zealous executive officers who are a part of any system of law enforcement. *Coolidge* v. *New Hampshire*, 403 U.S. at 481.

More recently the High Court stated in *U.S.* v. *U.S. District Court*, 403 U.S. 297 (1972):

> The fourth amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised. This judicial role accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of government.

There are exceptions to the warrant requirement, but they are few and have been judicially delineated with extreme caution. The court in U.S. district court, supra., rejected the contention that there should be an exception to the warrant requirement in areas of domestic security; the inherent vagueness of the security concept, the necessarily broad and continuing nature of intelligence gathering, and the temptation to use such surveillance to oversee political dissent dictate that the requisites of the fourth amendment be adhered to even in such matters. And the court called upon the Congress to formulate the standards upon which judicial approval of national security surveillance may be rendered. That is what this legislation is designed to provide.

Mr. President, keeping in mind:

The paramount interest we all share in our rights to privacy;

The frightening revelations of the past 2 years;

The chilling effect that unchecked governmental surveillance necessarily breeds; and

Congress' constitutional responsibility to enact statutory guidelines to assure that the Bill of Rights remains secure from the assaults of arbitrary power;

I reintroduce today a bill which would strengthen the guarantees of privacy contained in the fourth amendment. I introduced an identical bill in the 93d Congress, S. 3440. The bill, entitled "The Bill of Rights Procedure Act of 1975," would require any Federal agent to obtain a court order before he or she may conduct any form of surveillance on a private citizen. Probable cause must be demonstrated before the court order could issue and the warrant must be specific in its particulars.

The term surveillance includes bugging, wiretapping, and all other forms of electronic eavesdropping, opening of mail, entering of dwellings, and the inspection or procurement of the records of telephone, bank, credit, medical, or other private transactions. A court order would be required in virtually every instance, the only exceptions being: The serving of an arrest warrant, the hot pursuit of a criminal, or when the consent of the individual has been obtained.

A penalty of up to $10,000 and/or a year imprisonment is provided for any governmental official, employee, or agent who willfully violates or causes the violation of the bill. The legislation requires that within 30 days after application for a court order, the applicant must file a report with the Administrative Office of the U.S. Courts and with the Committee on the Judiciary of the House and Senate. Followup reports on approved surveillance activities would also be required.

It is my firm belief that the discretionary authority in the area of governmental surveillance should not be lodged solely with the executive branch. Surveillance undertaken on any grounds including national security and foreign policy must conform with the requisites of constitutional processes.

The chief judge of the third circuit expressed his belief that there is no executive prerogative in the field of foreign affairs intelligence which may be beyond the reach of those checks and balances which in one way or another limits every other power of the central Government.

It is troubled times such as these that we are now facing that generates warnings and calls for action on the part of Congress. Congress has the responsibility and the power to enact the statutory guidelines necessary to assure that the Bill of Rights citadel constructed by our forefathers is not breached by the exercise of arbitrary power.

The substance of the Bill of Rights reflected the experience of the constitutional framers with governmental excesses; the legislation I introduce today reflects our recent experiences with executive excesses as well.

We have had clear and unmistakable warnings;

There must be provisions for vigorous oversight and full accountability of the activities of the U.S. Government in all areas of surveillance of American citizens; and

We must adhere to the belief upon which our form of government was founded.

Law, freedom, the pursuit of justice, and the exercise of arbitrary and unchecked power are necessary irreconcilable and in eternal conflict.

Mr. President, I am pleased to note today that a companion bill has been introduced in the House of Representatives by the Honorable CHARLES MOSHER of Ohio. That bill has 72 cosponsors and has been the subject of hearings before the Judiciary Committee of the House. This legislation has broad support and I am hopeful that it will receive prompt attention in the other body.

Mr. President, in the course of its deliberations, the House Judiciary Committee has indicated that it may make some changes in their bill. I am certainly amenable to any improvements. If, for instance, more specific standards for the issuance of subpenas were to be provided, I would think we would want to give careful consideration. My point is that I am wedded to the concept of this legislation, but not to specific language.

Mr. President, I ask unanimous consent that the text of my bill be printed at this point in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 1888

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Bill of Rights Procedures Act of 1975".

FINDINGS AND PURPOSES

SEC. 2. (a) The Congress hereby finds and declares that—

(1) the rights of the people of the United States under the Constitution of the United States are endangered by interception of communications, other electronic surveillance, the entry of dwellings, opening mail, and the inspection of and procuring of the records of telephone, bank, credit, medical, or other business or private transactions of any individual when undertaken by officials, agents, or employees of the United States without a court order issued upon probable cause that a crime has been or is about to be committed, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

(2) the constitutional duty of the Congress to make the laws and to provide for the common defense, and the constitutional duty of the President to execute the laws and to command the Armed Forces and other security forces according to rules and regulations made by the Congress, would not be impeded by requiring court orders for any interception of communications, other electronic surveillance, the entry of dwellings, opening mail, or the inspection of and procuring of the records of telephone, bank, credit, medical, or other business or private transactions of any individual;

(3) the constitutional duty of the Congress to make laws to protect the national security of the United States and the constitutional duty of the President to execute such laws should not limit the rights of individuals under the Constitution of the United States. Any interception of communications, other than electronic surveillance, the entry of dwellings, opening mail, or the inspection of and procuring of the records of telephone, bank, credit, medical, or other business or private transactions of any individual which is undertaken on any grounds, including but not limited to, national security or foreign policy, without a court order issued upon probable cause that a crime has been or is about to be committed, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized, constitutes "an unreasonable search and seizure" within the meaning of the fourth amendment to the Constitution of the United States.

(b) It is therefore the purpose of this Act to prohibit any interception of communications, other electronic surveillance, surreptitious entry, mail opening, or the inspection of and procuring of the record of telephone, bank, credit, medical or other business or private transaction of any individual without a court order issued upon probable cause that a crime has been or is about to be committed supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

SEARCHES AND SEIZURES

SEC. 3. Section 2236 of title 18, United States Code, is amended to read as follows:

"§ 2236. Searches without warrant

"(a) Whoever, being an officer, agent, or employee of the United States or any department or agency thereof willfully—

"(1) searches any private dwelling used and occupied as a dwelling without a warrant directing such search or maliciously and without reasonable cause searches any other building or property with a search warrant;

"(2) procures or inspects the records of telephone calls bank, credit, medical or other business or private transactions of any individual without a search warrant or the consent of the individual;

"(3) opens and foreign or domestic mail not directed to him without a search warrant directing such opening or without the consent of the sender or addressee of such mail in violation of section 3623(d) of title 39; or

"(4) intercepts, endeavors to intercept, procures any other person to intercept any wire or oral communication except as authorized under chapter 119;

shall be fined not more than $10,000 or imprisoned not more than one year, or both.

"(b) (1) The provisions of section (a) (1) shall not apply to any person—

(A) serving a warrant of arrest;

(B) arresting or attempting to arrest a person comitting or atempting to commit an offense in his presence, or who has committed or is suspected on reasonable grounds of having committed a felony; or

"(C) making a search at the request or invitation or with the consent of the occupant of the premises.

"(2) For purposes of subsection (a) the terms 'wire communication', 'oral comunication', and 'intercept' shall have the same meaning as given to such terms under chapter 119."

INTERCEPTION OF WIRE OR ORAL COMMUNICATIONS

SEC. 4. (a) Section 2511(1) of such title 18 is amended by striking out "Except as otherwise specifically provided in this chapter" and inserting in lieu thereof "Except as specifically provided in this chapter, and except as specifically provided in chapter 109 in the case of any officer, agent or employee of the United States,".

(b) Sections 2511(3), 2518(7), 2518(d), and the last sentence of section 2520 of such title 18 are repealed.

REPORTING OF INTERCEPTED COMMUNICATIONS

SEC. 5. (a) Section 2519 of such title 18 is amended to read as follows:

"§ 2519. Reports concerning intercepted wire, oral, and other communications.

"(a) Within thirty days after the date of an order authorizing or approving the interception of a wire or oral communication (or each extension thereof) entered under section 2518, or the denial of an order approving an interception, the person seeking such order shall report to the Administrative Office of the United States Courts and to the Committees on the Judiciary of the Senate and House of Representatives—

"(1) the fact that an order or extension was applied for;

"(2) the kind of order or extension applied for;

"(3) the fact that the order or extension was granted as applied for, was modified, or was denied;

"(4) the period of interceptions authorized by the order, and the number and duration of any extensions of the order;

"(5) the names of all parties to the intercepted communications;

"(6) the offense specified in the order or application, or extension of an order;

"(7) the identity of the investigative or law enforcement officer and agency making the application and the person authorizing the application to be made;

"(8) a copy of the court order authorizing, approving, or denying such interception;

"(9) the nature of the facilities from which or the place where communications were intercepted.

"(b) Within 60 days after the date of an order authorizing or approving the interception of a wire or oral communication (or extension thereof) entered under section 2518, or the denial of an order approving an interception, the judge hearing the application for such order shall transmit to the Committees on the Judiciary of the Senate and House of Representatives a complete transcript of the proceedings.

"(c) Within 90 days after the date of an order authorizing or approving the interception of a wire or oral communication (or each extension thereof) entered under section 2518, and within 60 days after the termination of any such interception, the person authorized to make such interception shall report to the Administrative Office of the United States Courts and to the Committees on the Judiciary of the Senate and House of Representatives the disposition of all records (including any logs or summaries of any such interception) of any such interception and the identity of and action taken by all individuals who had access to any such interception."

(b)(1) Any information transmitted or submitted, pursuant to section 2519(a)(5) of title 18, United States Code (as added by subsection (a) of this section), to the Congress or to any standing, special, or select committee of either House of Congress or to any joint committee of the two Houses of Congress, shall be treated as a confidential communication and kept secret.

(2) Paragraph (1) of this subsection is enacted by the Congress—

(A) as an exercise of the rulemaking power of the Senate and House of Representatives, respectively, and as such shall be considered as a part of the rules of each House, respectively, or of that House to which it specifically applies, and such rule shall supersede other rules only to the extent that they are inconsistent therewith, and

(B) with full recognition of the constitutional right of either House to change such rule (so far as it relates to the procedure in such House) at any time, in the same manner, and to the same extent as in the case of any other rule of such House.

REPORTING AUTHORIZATIONS TO OPEN MAIL

SEC. 6. Chapter 205 of such title 18, is amended by adding at the end thereof the following new section:

"§ 3117. Reporting requirements in the case of warrants issued authorizing the opening of mail

"(a) Within 30 days after the date of issuance of a warrant to open any mail or the denial of such a warrant the person seeking such warrant shall report to the Administrative Office of the United States Courts and to the Committee on the Judiciary of the Senate and House of Representatives.

"(1) the fact that a warrant was applied for;

"(2) the fact that the warrant was issued as applied for, was modified, or was denied;

"(3) the offense specified in the warrant;

"(4) the identity of the investigative or law enforcement officer and the agency making the application and the person authorizing the application to be made;

"(5) the names of the sender and addressee of all mail opened pursuant to such warrant;

"(6) a copy of the approved warrant;

"(7) the nature of the facilities from which or the place where any such mail was opened; and

"(8) the disposition of all records (including any log, copy, or summary) of any such mail or the contents of such mail and the identity of and action taken by all individuals who had access to any such mail.

"(b) Within 60 days after the date of any warrant authorizing the opening of any mail, or the denial of any such warrant, the judge hearing the application for such warrant shall transmit to the Committee on the Judiciary of the Senate and House of Representatives a complete transcript of the proceeding."

TECHNICAL AMENDMENT

SEC. 7. The analysis of chapter 205 of such title 18 is amended by adding at the end thereof the following new item:

"3117. Reporting authorizations to open mail.".