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STATEMENT
OF
FBI ASSISTANT DIRECTOR
JAMES K. KALLSTROM
CONCERNING
THE
"SECOND NOTICE OF CAPACITY"

Acting on a mandate from Congress, the Federal Bureau of Investigation today is announcing the amount of telephone system capacity the nation's law enforcement agencies may need for court-approved electronic surveillance to protect the public from terrorism, violence, drugs, and other grave offenses and to deal with unexpected crime emergencies through 1998 and beyond.

The Communications Assistance For Law Enforcement Act of 1994 (CALEA) requires the telephone companies to ensure that their systems and networks have both the capability and capacity to accommodate federal, state, and local law enforcement agencies court-approved intercepts in the face of new or changing telephone technology that could otherwise prevent electronic surveillance.

CALEA by itself will not increase the amount of electronic surveillance but only makes certain that law enforcement agencies will be able to carry out court-approved wiretaps and call tracing no matter how sophisticated wireline or wireless telephone systems may become. As required by CALEA, the "Second Notice of Capacity" being announced today was developed after consultation with other law enforcement agencies, the telephone industry, and academia.

This announcement today is very important. It is important to public safety. It is important to national security. It is important to the ability of law enforcement to protect people from the worst criminals and to address the most serious crimes--crimes like terrorism, kidnapping, espionage, organized crime, violent crime and trafficking in heroin, cocaine, and other devastating drugs.

If law enforcement is to have any chance against sophisticated criminals who have come to rely on modern technology, against the drug dealers flooding our streets with narcotics, and against the violent criminals terrorizing our society, it must have the investigative tools needed to do the job. One of those tools--the ability to do court-approved pen registers, call tracing and wiretaps--is falling an inadvertent victim to galloping technology advances.

Congress wisely moved in 1994 to preserve the capability within America's telephone companies to conduct court-approved electronic surveillance by

establishing a procedure by which industry and law enforcement could work together to identify how best and to what degree this capability within our telephone systems should be saved. Had Congress not acted, the consequence to public safety and national security would have been severe.

Acting on this mandate from Congress, the FBI today is releasing for public comment its "Second Notice of Capacity." This notice is a crucial part of the process established by CALEA to ensure that some modest portion of the capacity that exists within America's telephone systems to support court-ordered pen registers, trap and traces, and wiretaps is preserved as technology advances.

The intent of CALEA is to make certain that local, state and federal law enforcement agencies will be able to continue to conduct the same court-authorized electronic surveillance Congress authorized nearly 30 years ago. Neither CALEA nor this notice expands in any way the authority of law enforcement to use these techniques. The same rigorous statutory requirements remain in place, unchanged.

Electronic surveillance has always been controversial. It is indisputable that it is a technique that must be used judiciously and only within the tightly defined parameters that Congress set forth in 1968. There is no intent in CALEA or interest by law enforcement to change that carefully designed process that relies on prior court authorization and continuing close scrutiny by the courts. CALEA and this notice are not about that. They pertain only to the technical capabilities of America's telephone companies.

When Congress authorized electronic surveillance in 1968 it did so in the face of powerful organized crime syndicates and an onslaught of interstate racketeering and violence. Since then, the drug problem has exploded, international terrorism has come to America at the cost of the lives of our citizens, violent gangs are terrorizing our neighborhoods and sophisticated criminals are able to steal millions of dollars with a few key strokes on a computer.

Like in 1968, once again crime is changing. We are entering a new millennium when information can be more valuable than property and when terrorists can strike from distant places. Nobody ever envisioned that the safety of children in our homes could be jeopardized by criminals using computers over telephone lines.

As a result, the ability to get a court order and then to trace the call of a kidnapper, or find out who a major drug dealer is calling or intercept the call of a terrorist choosing his intended target is more important to public safety and national security than it has ever been. There is example after example where law enforcement has relied upon these tools to save lives and solve the most monstrous crimes. As an example, just for the FBI alone we have used court-authorized electronic surveillance to capture terrorists intent on blowing up buildings and tunnels in New York, to detect and capture pedophiles who intended to brutally murder their intended victim, to arrest and convict vicious organized crime leaders like John Gotti, and to successfully investigate a spy whose espionage cost many their lives.

Early in this decade we saw telephone technology changing. While tremendous technological benefits were on the horizon, it was also clear that an inadvertent by-product of the new technology would be the loss of the capability of America's

telephone systems to support court-authorized electronic surveillance.

Because of the nature of older telephone technology and of law enforcement's traditional court-approved interception methods, previous generations of telephone equipment and services had virtually a 100 percent capacity to accommodate all court-authorized electronic surveillance. However, many of the newer generations of telephone systems are designed with limited or no capacity for conducting any kind of electronic surveillance.

Given the potential for grave harm to public safety, law enforcement went to Congress and asked for legislation that would preserve within the telephone systems the capability to conduct court-ordered pen registers, trap and traces, and wiretaps. It was the prudent thing to do--given the grave harm to the public that was certain to flow from the loss of these tools. We did not ask for or receive any new authority to conduct wiretaps.

After carefully considering the issues and the civil liberty and privacy concerns, Congress enacted CALEA. It is a law that pertains only to the technical ability of the telephone companies and not to the authority of law enforcement to conduct electronic surveillance. Again, that remains unchanged.

The notice we are issuing today is part of the process CALEA mandates. CALEA requires that the government and industry work together to find solutions that will minimize costs while still maintaining the capability to support court-authorized electronic surveillance and to determine what portion of the previously existing 100 percent capacity to support electronic surveillance should be preserved as new telephone technology is put into place. It will be the telephone companies, not the government, that will design and implement the solutions. Industry will control the technology, not law enforcement.

CALEA requires us to publish in the Federal Register notice to the telephone companies of what level of capacity their systems should have by October, 1998--called actual capacity--and what maximum level of capacity they must have after October, 1998. Simply stated, this means the number of pen registers, call traces and wiretaps their systems must be able to accommodate on any given day for every law enforcement agency in their service areas.

That does not mean that law enforcement in a particular city will get that many court orders and that there will be that many pen registers, trap and traces and wiretaps. It only means that the near limitless capacity of the old telephone systems will now be defined by a finite and much smaller capacity number that results from the CALEA process.

In October, 1995, we issued the First Capacity Notice that identified capacity levels as a percentage of "engineered capacity." That approach readily led to a common misconception that we intended to grossly increase wiretapping, an erroneous result we never envisioned. Further, the percentage approach suffered from being very imprecise, that is, exact simultaneous capacity numbers could not be calculated. Some interpreted the percentage approach as a plan that would result in a national capacity far in excess of what law enforcement could demonstrate was needed based on any historical experience.

As a result, we went back to the drawing board. We had over 180 meetings with industry representatives, academia, other law enforcement agencies, and privacy

groups and, working in good faith, we developed this new approach that has clearly defined capacity levels that are significantly lower than some interpretations of the percentage approach capacity levels.

Collaboratively, we decided that the most understandable approach was to determine future capacity requirements for telephone companies using precise capacity numbers on a county-by-county basis for traditional telephones and on a market service area basis for cellular and other wireless-types of telephones.

To accomplish this, we did unprecedented research by contacting federal, state and local law enforcement authorities in every state, unsealing all types of federal and state electronic surveillance-related court orders, and surveying approximately 1,500 telephone companies to determine the level of court-authorized pen register, trap and traces, and wiretap activity in every county and service area in America. We used this information to establish a historical baseline upon which the future capacity numbers are based.

These historical numbers represent the actual number of telephone lines involved and, in the notice, they are reflected in a column of numbers referred to as "historical experience." These numbers represent the single busiest day for intercepts for each individual county and service area during the survey period of January 1, 1993, to March 1, 1995. Interestingly, 57 percent of the counties had no intercept activity during that time frame and 90 percent of telephone lines identified were the subject of the less intrusive court-ordered pen registers and trap and traces. Wiretaps amounted to only 10 percent of the surveillance.

It is important to note that there is no direct correlation between the historical simultaneous intercept numbers included in this notice and the number of court orders for wiretaps published annually by the Administrative Offices of the United States Courts. First, unlike the annual report, these numbers include court-ordered pen registers, trap and traces, and wiretaps, not just wiretaps. The annual report includes only the number of wiretap court orders and does not include the actual number of lines associated with each wiretap order nor does it include the number of pen registers and trap and trace orders or their associated lines-related information. Secondly, the annual report by design encompasses only the number of wiretap orders during single specific year. The historical simultaneous intercept numbers represent the single busiest day in each county and market service area during the 26 month review period. For any given county or market service area, the historical experience could be any combination of pen register, trap and trace and wiretap lines, to include the possibility of no wiretaps. Accordingly, while adding all the numbers in the historical intercept column results in a number--24,617--it is a number that does not correlate to the actual number of wiretaps conducted by law enforcement and is not relevant for comparison purposes.

To be clear, a pen register records the numbers dialed in an outgoing telephone call. It does not include the content of the call, i.e., the actual telephone conversation. Trap and trace is a technique that identifies the telephone number and location of an incoming telephone call to a particular telephone. Like the pen register, the content or conversation is not intercepted. A wiretap captures the actual conversation or data going to or from a particular telephone. There are strict and precise legal requirements concerning precisely what can be intercepted during a wiretap and wiretaps are subject to court supervision once the initial authorizing court order is obtained.

From these historical numbers we applied growth factors determined by past trends to predict what level of capacity should be preserved as of October, 1998--the actual capacity--and what level of capacity should be preserved beyond October, 1998--the maximum capacity. For those counties and market service areas with no activity, we assigned a historical baseline number of one. This was done simply to ensure that some level of capacity will be preserved in each area to cope with grave crimes should they occur. While this may have the appearance of artificially increasing the total of all areas combined, it was necessary because otherwise the ability of law enforcement to obtain court-authorized pen registers, trap and traces, and wiretaps in over 2,200 counties and service areas would likely be lost.

The columns of numbers in the capacity notice reflect the results of that process. We believe these estimates are prudent and conservative, neither too large nor too small, and will enable law enforcement to protect the public without placing any unfair burdens on the telephone companies.

It is also important to point out that this is not a story about columns of numbers. This is a story about fighting crime and protecting people.

Telephone systems are routinely used by the worst and most violent criminals to commit the worst and most violent crimes. Long-standing federal law allows for the tightly controlled use of court-authorized electronic surveillance in the investigation of the most serious violent offenses only when other investigative techniques will not work, when other investigative techniques are too dangerous, and when there is probable cause to believe that telephone communications are being used to carry out serious crimes.

In many cases, there is no substitute of electronic surveillance in gathering evidence, preventing crimes, solving crimes, and bringing the violent to justice. In the past 14 years, court-approved electronic surveillance has been directly responsible for obtaining the conviction of more that 26,000 dangerous felons. This does not include the hundreds of thousands of other successful investigations that have been greatly aided by pen registers and trap and traces.

There should be no civil liberties concerns over these estimates because, as we want to stress again and again, the Act and the steps flowing from it do not give law enforcement any new powers to conduct electronic surveillance.

We do not expect there to be any increase in the amount of electronic surveillance nationally because of CALEA itself, because CALEA does not give any new authority to law enforcement. Any increases would be related to growth of crime and unexpected crime emergencies that would have to be met with appropriate enforcement measures. But as CALEA mandates, we must be prepared to meet grave crime problems that could erupt in any part of the nation--urban, suburban, rural.

It is important to note that the terms "actual capacity" and "maximum capacity" do not mean the actual number of wiretaps, pen registers and trap and trace devices that will or are expected to be conducted. Rather, the estimates of actual and maximum capacity set forth in this notice are only intended to establish sufficient interception-related technology capacity to accommodate those interceptions authorized by the various federal and state courts at any location throughout the United States should the need arise in the future. As there is no way to predict for

most locations if and when the need will arise, the only safe approach from a public safety standpoint is to at least preserve this ability in case it is ever needed.

The concept of estimating future electronic surveillance capacity requirements can be compared to another public safety program in use today - ensuring that a sufficient number of fire hydrants are positioned in the correct locations throughout the country to guarantee a hydrant's availability when needed by the fire department. Fire hydrants are placed in communities not because they necessarily represent the number of fires that are expected to occur, but are deployed so that, in the event a fire should occur in a particular location, there is a hydrant available for use by the fire department.

Likewise, the "Second Notice of Capacity" should not be misinterpreted as somehow representing the total estimated amount of electronic surveillance that law enforcement plans to conduct. Just as it would be incorrect to add up all of the fire hydrants in existence today and assert that the total represents the number of fires that the fire department anticipates it will encounter, so would it be incorrect to add up the actual or maximum capacity numbers set forth in this notice and assert the number reflects the total number of electronic surveillances that law enforcement wants to conduct.

Further, while both the actual and maximum capacity columns set forth in the appendices of the notice can be totaled, those numbers are not relevant for comparison purposes. For example, there are currently over 140 million telephone lines in the United States. Had new technology not have been developed, all of them would have continued to be fully capable of supporting a court-approved wiretap or other interception--that is, to support 100 percent capacity to do 160 million plus intercepts. When you total the actual and maximum capacity columns in today's notice, you find numbers that are tiny by comparison. The sum of each, respectively, is 39,767 and 57,749 and, although these future capacity numbers are larger than the historical numbers, they are not significantly larger and are based entirely on analysis of past trends and the projected growth in telephone systems.

In essence, the entire national capacity to conduct court-approved wiretaps and call tracing is going from 160 million lines to less than 60,000 lines. The new, low figures represent capacity to be available should a crime occur that warrants court-authorized intercepts or should some other crisis such as a terrorist bombing or kidnaping occur. Neither capacity total represents or has relevance to the number of intercepts that will occur in the future. That number will be determined by the happenstance of serious or grave crimes, and will be severely but appropriately limited by what the law permits and resources allow.

Finally, even though calea requires law enforcement to estimate its future interception capacity requirements, doing so has the effect of establishing limitations on the number of simultaneous interceptions that can be conducted in a specific county or area regardless of what crime happens to occur there. We believe that the capacity requirements in the notice are reasonable, responsible and sufficient to maintain law enforcement's current ability to protect the public from serious crime. If anything, a conservative approach has been taken based on the historical data collected. The public must recognize, however, that it is possible in a given crisis situation that the immediate needs of law enforcement may not be met by the capacities identified in the notice. It is possible, as crime trends change or as new crime problems develop in specific areas of the country, that these estimates may prove to be too conservative for particular counties or market

service areas and the public safety will dictate revisiting the capacity requirements in those areas. CALEA envisions that possibility and provides a process though which it can be addressed.