IN THE SUPREME COURT OF THE UNITED STATES

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GLORIA BARTNICKI AND :

ANTHONY F. KANE, JR., :

Petitioners :

v. : No. 99-1687

FREDERICK W. VOPPER, : No. 99-1728

AKA FRED WILLIAMS, ET AL.; :

:

and :

:

UNITED STATES, :

Petitioner :

v. :

FREDERICK W. VOPPER, :

AKA FRED WILLIAMS, ET AL. :

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Washington, D.C.

Tuesday, December 5, 2000

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 a.m.

APPEARANCES:

JEREMIAH A. COLLINS, ESQ., Washington, D.C.; on behalf of the Private Petitioners.

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SETH P. WAXMAN, ESQ., Solicitor General, Department of Justice, Washington, D.C.; on behalf of Petitioner United States.

LEE LEVINE, ESQ., Washington, D.C.; on behalf of Respondents Vopper, et al.

THOMAS C. GOLDSTEIN, ESQ., Washington, D.C.; on behalf of Respondent Yocum.

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C O N T E N T S

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P R O C E E D I N G S

[11:03 a.m.]

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 99-1687, Gloria Bartnicki and Anthony Kane v. Frederick Vopper.

Mr. Collins.

ORAL ARGUMENT OF JEREMIAH A. COLLINS

ON BEHALF OF PRIVATE PETITIONERS

MR. COLLINS: Mr. Chief Justice and may it please the Court:

In a society that values personal freedom and autonomy, there is a vital interest in securing the ability of individuals to exclude unwanted intruders from their private activities. And where the private activity consists of speech there is a particularly vital interest in preventing intrusion so that individuals may conduct their private communications freely and securely. And for that reason, Congress and the legislatures of virtually every state in this country have made it unlawful to gain access to a private communication.

QUESTION: Well, let me stop you right there and ask you why should the question of whether private information about someone is published turn on how the information was obtained? Why don't you just look at what it is and focus there? Why does it become secondarily

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such an important interest to focus on how it was obtained?

MR. COLLINS: Because I think Justice O'Connor what Congress and the state legislatures and in some respects the common law have recognized that separate and apart from the question about whether there is certain information that is so private that it should or shouldn't be revealed which raises content discrimination problems among other things, there is a vital interest in people having private places in their lives where a stealthy intruder cannot come in whether or not the individual --

QUESTION: Well -- well, it ought to turn on the public significance perhaps of the information and presumably the state can prevent unlawful tapping of wires directly and get at the bad actor, but why should it extend to the subsequent user who didn't do anything wrong?

MR. COLLINS: Because Your Honor, as Congress and some forty states have reasoned, if there is intrusion into an individual's private communications, a tap, a bug, a scanner, whatever, and then what is obtained is broadcast to all the world or under these statutes exploited in any other way, the same interests that are harmed by the initial intrusion are harmed again and all the more severely because in essence, you have invited in

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this instance a hundred thousand people to eavesdrop, and as petitioner Bartnicki stated in her deposition, when she, having no idea that anyone had intruded into her communication with Mr. Kane, when she heard on the radio it being broadcast she felt that she had been violated in front of a hundred thousand people and that is true I believe independent of the content. If I, riding home today, hear a radio station broadcasting a conversation where I convey my grocery list to my wife or vice versa, a feel a violation of my person autonomy. Just as if someone --

QUESTION: But you want to say that if I also hear that and tell my wife that I'm committing a crime. That's what this statute says.

MR. COLLINS: If you --

QUESTION: Because the statute goes downstream without end. Now maybe there'll be some creative suggestion for when it's in the public domain or something like that. But that's not what the statute says.

MR. COLLINS: Well, the far downstream uses are not at issue --

QUESTION: Oh, but it seems to me with all respect that they are because the respondents can raise those issues on an overly-broad statute under the Thornhill doctrine even if this does not apply to them.

MR. COLLINS: Well they -- I think Your Honor, first of all they can't raise it when they they've brought explicitly an as-applied challenge and at no point in the litigation until this Court have they started raising the other applications that they now posit, and secondly this Court in The Florida Star and all the preceding case emphasize that in the very difficult area and it is difficult of conflicts between privacy-type interests and First Amendment interests the Court should decide only as much as it needs to decide in a particular case.

QUESTION: I suppose it's very difficult, is it not, to enforce the prohibition against wire tapping against the person who actually -- who actually does the tapping. In other words, that person is usually not going to come to light or publicize the thing. The way that person does the work is to push it on to somebody else who will do the disclosure.

MR. COLLINS: That is certainly true in this very case --

QUESTION: Which is what happened here, right?

MR. COLLINS: That's what happened in this case.

QUESTION: An anonymous tape was sent to the radio station which is almost always the way it will happen.

MR. COLLINS: And Congress -- that is what

happened in this case and Congress was told in both 1968 and '86 that it happens very frequently. I think --

QUESTION: Well, let's change the facts just a little bit. Suppose what the conversation revealed was not some conversation about we're going to have to commit some violent acts but let's suppose it revealed that in fact, a murder had been committed because of this very situation. And the anonymous tape then is passed on to the police and your going to punish the person who passed on that tape when a very serious crime has been committed. Now how is the public interest served by that?

MR. COLLINS: Your Honor, I believe the same -- I think there are two responses to that.

QUESTION: Oh, I actually had that very situation as a trial court judge in a murder case. I had a hard time understanding how the public interest was served by punishing the person who passed on the information.

MR. COLLINS: I think there are two responses to the question, Your Honor. The first is there is in the law, as the Government's reply brief points out a doctrine of necessity which in some narrow circumstances, and it's not precisely clear how far it extends, in essence privileges what would otherwise be a violation of a statute. If the statute doesn't rule that defense out.

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So an action to protect life and limb may be an exception.

The second answer though, is that -- because it is a very hard question, but there are -- when there are content-neutral laws that say that because of the way in which information came to someone, that information is not to be revealed be it these statutes or be it for example a protective orders in the Seattle Times, that generally the fact that what was revealed is a matter of public importance does not automatically say that the interests that are being served by the content-neutral law that says either you should not have this information at all or you should not be able to use it, they don't necessarily give way. And that's indeed if this exact tape had been received in discovery I believe under Seattle Times the press could again be prevented from making use and publishing the tape. And the key is that --

QUESTION: Well, but in Seattle Times and Rhinehart and in the Aguilar case, we were controlling the people who received the information under a court order. They were within our immediate control. The Rhinehart case would be as if somebody surreptitiously took this tape and gave if to a person and then that person gave it to the newspapers.

MR. COLLINS: But in both instances, though,

Justice Kennedy, we are saying that a person has information, it is of public importance, and because of interest bound up in the way in which they received it, we will not allow them to distribute. The interests are different granted. And the Court did not say in Seattle Times that the fact that this information is coming in discovery means there is no First Amendment concern. Quite the contrary. The Court said the Court has to conclude that there will be harm to privacy interests and the like if it is disclosed and the Court applied intermediate scrutiny. But the Court said that because of interests of the justice system that are served by being able to limit disclosure of that which is given in discovery we can tolerate the fact that the press cannot tell the public something of great importance.

Here we again have very vital interests, different interests, but the interests of people knowing that they will not come home some day and have a hundred thousand people hearing a phone call that they made. And I submit that what unites those cases and in essense solves the problem here is the fact that we're dealing with a totally content-neutral statute and one which as applied does not unduly interfere with the ability of the press --

QUESTION: But merely because it's content-neutral does not mean you can't regulate it. This isn't

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seditious. It isn't obscene. And there is no category that I know of which allows you to regulate it. It's intercepted which is now going to be a new category under your rule and there is no precedent for that.

MR. COLLINS: Your Honor, I don't know of any case in which this Court has struck down a statute which is content-neutral in the full sense that this one is except in some rare circumstances where the Court in essence has determined that too much speech is going to be supressed. In other words, we are not saying, we don't have to say, that some of this is a category of speech of no First Amendment significance whatsoever. What we are saying is that there are important governmental interests harmed not only by the interception but by the disclosure.

If those are then taken into account through a content-neutral statutory regime, we believe and we have argued that that in essence exhausts the First Amendment concerns both as to level of scrutiny and as to satisfying scrutiny as long as we are not in one of the rare situations such as City of Ladue, for example, where the Court would say granted it's content-neutral, but you're just restricting too much speech and we think in this case the question would be, the concern about whether this content-neutral law -- and let me just pause for a moment

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because I think it's essential to emphasize when I say content-neutral this law is neutral in a way that absolutely requires a determination of content neutrality. It's neutral as to viewpoint. It's neutral as to subject matter. It doesn't allow liability to turn on disagreement with a particular message. It doesn't even target speech specifically. It targets all uses of what has been unlawfully intercepted, so there is no case in this Court that would characterize this law as content-based.

QUESTION: Is this an as-applied challenge in this suit --

MR. COLLINS: Absolutely.

QUESTION: -- or is it attacking it facially?

MR. COLLINS: It's as applied, Your Honor. And that's clear in the question certified in the court of appeals. It's clear in the briefs below. And it's clear from the fact --

QUESTION: Well, would there be a difference on an as-applied challenge if the person you're talking about is the person who made the wrongful tapping as opposed to the person who just passes it on?

MR. COLLINS: Well, certainly, the question in this case is properly presented as to whether the statute can apply to those who are not involved in the

interception.

QUESTION: Well would it matter if it's a newspaper at the end of the day commenting on the information that's been disclosed? Does that alter the result?

MR. COLLINS: We submit that it does not for two reasons. That first of all, there is -- we are applying a content-neutral statute based on important government interests and secondly -- and I do think this is critical, we then have to ask ourselves is this one of the very rare cases in this Court's jurisprudence where one would say that even though a statute is totally neutral, doesn't lend itself to Government thought control, to supression of ideas in any way, it's not reshaping public debate, totally neutral, does it in some way restrict too much speech? And one area where one would worry is, does it prevent the press from doing what it needs to do? We believe this is not such a narrow -- one of those rare situations because as the Court says Branzburg --

QUESTION: Although this had to do with negotiations, did it not with a public school board in a a labor union context, you don't think that's sufficiently important to warrant newspaper discussion of it?

MR. COLLINS: We don't deny that matters of public concern are involved. What we say is that under

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Branzburg, for example, the Court says that we know the press could get important information of public concern through wire tapping. We know the press could get important information of public concern by having a system of private informants. We say to the press, you cannot do that. Even if you know that behind that wall is someone communicating matter of utmost public importance, you can't pierce that wall. So why then is it crucial to the press to say we can't ourselves go out and try to obtain this information of public concern through wire tapping but if serendipitously some third person has done it, it's vital us to be able to then use the information. And even the amici, Your Honors, do not submit --

QUESTION: Well, the difference is in one case they're acting unlawfully and in the other case they have information that they just came across because someone else acted unlawfully and that'd be a big difference?

MR. COLLINS: I think in the final analysis, no, Your Honor, because as I understand Florida Star and this Court's jurisprudence, the question here is whether there are sufficient Government interests to justify a content-neutral application of these laws in this manner. It's not a question of is the press a bad actor or not to be punished. One has to be concerned undoubtedly will the press, by the rule that we advocate, be chilled from

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performing its function and we argue no because as we have briefed the way that the reason to factor can be construed under this statute, but I don't think that the proper analysis of the issues here can ultimately turn simply on did the press violate a law when they received the information or not, otherwise of course Congress could take a jab with the pen and say, oh, and also it's illegal -- to be receiving any that has been intercepted.

QUESTION: Mr. Collins, may I ask you if I understand your First Amendment boundaries theory correctly, that Pentagon Papers which was a prior restraint case, if Congress so provided, the Times or anybody else who published the materials could after the publication be held responsible in money damages.

MR. COLLINS: Possibly, Your Honor, but Pentagon Papers would be different not only for the reason you gave but because it's arguably content-based. It's the Government itself determining what information by subject matter --

QUESTION: A general statute.

MR. COLLINS: Well if it applied to -- but it wouldn't be general because it's by definition talking only about Government information which is arguably a content base.

QUESTION: Yes.

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MR. COLLINS: And it runs -- there you do get into of the risk of shaping debate.

QUESTION: Thank you, Mr. Collins.

General Waxman, we will hear from you.

ORAL ARGUMENT OF SETH P. WAXMAN

ON BEHALF OF PETITIONER UNITED STATES

GENERAL WAXMAN: Mr. Chief Justice and may it please the Court:

I think perhaps I'll -- I've had enough questions in the first 15 minutes to keep me fully occupied --

QUESTION: So you don't want anymore.

(Laughter.)

MR. WAXMAN: I would welcome any and all questions as always. I want to start first by -- I do want to address the Pentagon Papers point and the point that Justice Kennedy made about using information obtained on the radio to talk with his own wife or make his own decisions and Justice O'Connor's question about what difference does it make how get it. I first want to make the point because there is been some suggestion I think here that it is the Government's position that the First Amendment does not -- the First Amendment interests here don't require heightened scrutiny. That's not our position. We do recognize that there is an important

burden on First Amendment rights here, but we submit that the appropriate level of scrutiny is intermediate-level scrutiny because this is a totally content-neutral law of general applicability that protects fundamental values of privacy and private speech and denies third parties nothing that they otherwise would have had if the act's prohibition on interception itself was fully effective --

QUESTION: General, isn't the problem with the easy analogy to the other intermediate-scrutiny cases that here there in effect is a complete suppression of speech, whereas in the paradigmatic intermediate-scrutiny cases, somebody can speak somewhere, sometime. O'Brien can tell what he thinks about the draft without burning his card, you can speak at some other time or some other place in the time, place, and manner cases. That's not so here.

MR. WAXMAN: Well, I think that is so here, and I also think that that is not an accurate characterization of all the intermediate-scrutiny cases. I mean, it was not true, for example, in Cohen v. Cowles Media or in Zacchini and Harper & Row.

QUESTION: But you also and I think you're right there but you also had a very different kind of general statute in Cohen and Cowles --

GENERAL WAXMAN: That's exactly right and that's

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QUESTION: In contract law and not speech law.

GENERAL WAXMAN: Right. And that's why -- that's why we think that unlike Cohen v. Cowles Media where the Court applied no heightened First Amendment scrutiny and the dissenters objected on that ground, we think that heightened scrutiny is appropriate here, because there is a restraint on speech. But it is not a restraint on -- with respect to any topic, any viewpoint, any speaker. If these -- anybody who gets wire tapped information or information from a bug planted in my home or my conference room -- gets the information otherwise, the identical information is fully available for speech or other use. In other words, what's missing here --

QUESTION: Well, it may be it, it may not be depending on other circumstances, but, I mean, there is no question that if we didn't have the neutrality that you emphasize this would be a much easier case. It's still true that when you do the balancing, whether you call it intermediate scrutiny or you figure out some other level to put it on, you're -- what you've got to balance is that if this law is good, then the disclosure which apparently has no other source of information which is of concern to the public is absolutely forbidden and we've got to accept that as one of the prices that will be paid. Maybe as you

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say not in every case but it will be paid if the statute is going to be enforced across the board.

GENERAL WAXMAN: That is absolutely true and that is why heightened scrutiny applies. It is our submission that it's significant that if the same information comes from any other source, it can be used or disseminated with impunity which is another way I think, of what I'm trying to suggest, which is that there is no suggestion here, unlike the Pentagon Papers case, or the Florida Star line of cases of a censorial motive by the Government, an effort to take certain facts off the table, and the reason that the --

QUESTION: Yeah, yeah, but -- to say that we've, as your colleague did, it's very rare to strike down statutes that are content-neutral. That's not accurate. Miami Press v. Tornado, the reply statute case -- taxes on newspapers are content-neutral, the parade cases are content-neutral. What you're doing here is you're suppressing speech that is valuable to the public.

GENERAL WAXMAN: Justice Kennedy, I'm not suggesting that we win because intermediate-level scrutiny applies. I have three reasons that I'd like to articulate why we think we do, but I certainly acknowledge the fact that the -- a restriction on speech under intermediate-level scrutiny may fail just as heightened scrutiny like

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in cases like Bursen v. Freeman and Austin v. Michigan Chamber of Commerce can sometimes prevail. My point here is, and this goes to the distinction with the Pentagon Papers case and I think to Justice O'Connor's initial question about why we should care how the information came to be, is that the knowing use of illegally intercepted private expression implicates other constitutional values as this Court recognized in Cox and Florida Star and in particular the distinction between information that is leaked from the Government or otherwise that is leaked as the result of a failure of a trusted responsibility, which was at issue in Florida Star and perhaps at issue in Landmark and certainly was at issue in the Pentagon Papers case, where this Court has said repeatedly that in that instance, where we're talking about information that was not unlawfully obtained, but instead was disclosed to the public as a result of a failure of a trust relationship, there is quote, almost -- there are almost always less drastic means of resolving the problem, both because you can be more careful about who you trust, and secondly, there is a much smaller universe of potential violators. Here we're talking about an interception which almost by definition is impossible of detection. People don't even know that their conversations at home or at work are being overheard, let alone who did it and this case is a perfect

--

QUESTION: My problem is that in order to make this -- no one questions, we can assume that, that you can punish the interceptor, but what you're doing is you're taking a class of speech and saying this is now tainted speech and it can't be repeated by anybody. And there is simply no precedent for that in the cases of this Court.

GENERAL WAXMAN: Well, I don't think -- I do understand your point Justice Kennedy, I would quarrel with your characterization of this as tainted speech that you can't do anything about. Again, because it doesn't look at the topic or the subject or anything. It simply says that if you know that this is the result of an illegal intrusion into a zone of conversational privacy, you cannot use it until it becomes publicly known. And I also -- I'm not sure that it is fair to say that there is no precedent for taking speech like this off the table. I think we have talked about Seattle Times and Cowles and Harper & Row and Zacchini but there is also the San Francisco arts case involving use of the word Olympic. There is trade secret law which relates to fact and not expression. There are grand jury secrecy rules and rules under the Conic Pickering test about what employers --

QUESTION: May I ask you a question?

GENERAL WAXMAN: -- and employees may or may not

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say.

QUESTION: Mr. Solicitor General, the strongest argument that I think Judge Pollack made in his dissent is that you want to dry up the market for this sort of thing so you get -- just sort of like child pornography and the majority said, well, there's really no evidence that this will accomplish that goal. And I would kind of like you to comment on that because it does seem to me that an awful lot of this illegal activity will continue to go on by people who just use it for their own private illicit purposes no matter whether you apply this particular rule. And I think the scarcity of cases suggest that enforcing this rule really would not do very much to dry up the market but maybe you'd comment on that.

GENERAL WAXMAN: Well, I think that that's wrong; that is the scarcity of cases shows it because if you look at the cases, for example, that are reprinted in the appendix to our reply brief and in respondent Vopper's brief, a very large number of those cases involved use -- at least if you take out the marital cases -- involved use by third persons, and the deterrence or disincentive point which is one of the three points that we make support the importance of the use and disclosure provisions as a means of protecting conversational privacy, I think, depends just by the way just as the

statute's exclusionary rule in 2515 does, it depends on the -- the common sense point that if you prohibit all means of exploiting stolen information, whether they are expressive means or not, you will lessen the incentive materially for many people to engage in the interception. Now, it's true there will be people who as a hobby just like to eavesdrop or intercept other people's conversations and the use --

QUESTION: General Waxman, what about the situation, this is broadcast over a radio station in Wilkes-Barre, as I understand it. Now supposing the Wilkes-Barre newspaper wants to do a story about the fact that this was broadcast, how far down the line does it go?

GENERAL WAXMAN: Well, we think, as we indicate in our brief that both the meaning of the word disclose which is in the statute and the legislative history demonstrates that the statute no longer applies once it is public information or common knowledge. And we also think -- we also think that -- well, that's our answer with respect to how far it goes, and it would also be an answer to Justice Kennedy --

QUESTION: I can't tell my next door neighbor?

GENERAL WAXMAN: Excuse me?

QUESTION: If I innocently hear this tape, and I'm the second one to hear it, but I just hear it at

Yocum's house, then I can't tell my neighbor?

GENERAL WAXMAN: That's the -- the statute precludes that use of it. It's not addressed in this case, but the statute precludes all use of it. Now --

QUESTION: I wouldn't think of doing --

GENERAL WAXMAN: Now, if there was --

QUESTION: I wouldn't think of doing that, of course, if somebody sent me a tape that I knew had been illegally taken, I certainly wouldn't run around talking to people about it. That doesn't seem to be so outrageous.

GENERAL WAXMAN: Well I -- there has never been a case, a reported case which is --

QUESTION: And Justice Kennedy lives in my neighborhood, too.

GENERAL WAXMAN: There has never been a reported case in which there was either a prosecution or a civil suit brought here, and of course the plaintiffs in this case did not sue the school board members that were told about it. But the point it seems to me, is that what Congress was trying to protect here was not private facts and not to restrain speech on its own, but to protect the sanctity of what we all know to be critical to our society, which is the ability to speak in an uninhibited candid fashion. May I reserve the balance of my time.

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QUESTION: You may. Mr. Goldstein.

MR. LEVINE: Mr. Levine, Your Honor.

QUESTION: Mr. Levine, I'm sorry.

ORAL ARGUMENT OF LEE LEVINE

ON BEHALF OF RESPONDENTS VOPPER, ET AL.

MR. LEVINE: Mr. Chief Justice, and may it please the Court:

Respondents are before the Court this morning because they disseminated to the public the contents of a telephone conversation in which the president of a public teacher's union apparently threatened to blow off the the front porches of the homes of members of the local school board. Petitioners contend that such an act of pure speech is not protected by the First Amendment because that information was at some prior time unlawfully acquired by someone else.

QUESTION: Well, I think -- I think that the other side would have acknowledged that if it was indeed it was a clear threat to blow off somebody's porches there might have been an exception to the statute. I don't want to decide this case on the assumption that this was a threat to blow off somebody's porch. It's at least ambiguous in the record and if all you want is a decision that you can disseminate it if it's a threat to blow off somebody's porch, I'll give you that, that's an easy case.

But you want us to go beyond that and you want us to say even if it wasn't a threat to blow off somebody's porch, it can't be disseminated; isn't that correct?

MR. LEVINE: So long as --

QUESTION: Okay. So let's forget about blowing up the porch.

MR. LEVINE: Your Honor, I --

QUESTION: Well, I think your argument is that blowing off -- the willingness to blow off porches is a matter of some public concern in viewing the labor crisis.

MR. LEVINE: That is correct, Your Honor, and that is why I gave the context to explain why this speech that was disseminated by the respondents here was truthful and involved a matter of public concern.

QUESTION: Now, I don't understand there to be any exception in the statute for speech that threatens to blow off somebody's porch.

MR. LEVINE: That is correct Justice Stevens. On its face, the statute applies to any information concerning the content of an intercepted communication. And content is defined in the statute as any information concerning the substance, purport or meaning of that communication.

QUESTION: And you would be content for a holding that says that a statute that does not contain

such an exception is unconstitutional; is that what you're asking us for?

MR. LEVINE: I'm asking Your Honors to apply the principle.

QUESTION: You want us to decide this case on the basis that this statute does not have any exception for threatened criminal action?

MR. LEVINE: No, Your Honor.

QUESTION: I didn't think so.

MR. LEVINE: The except -- what it doesn't have an exception for, Your Honor, is the dissemination of truthful speech about a matter of public concern.

QUESTION: You really don't care whether you win or not, you just want to win on the right grounds, is that what you want?

MR. LEVINE: Your Honor, I'll take it any way I can get it.

QUESTION: I'm sure.

QUESTION: Well then stop giving out your case.

MR. LEVINE: But the principle that we're advocating because it derives from this Court's case law is the Daily Mail principle. And the Daily Mail principle holds that where, as here, a speaker has lawfully acquired the information he disseminates and that information is accurate and involves a matter of public concern, his

speech is protected by the First Amendment, absent a demonstrated need to vindicate an interest of the highest order.

QUESTION: Why isn't my ability to speak over the phone with some assurance of confidentiality an interest of the highest order. I mean you have speech involved on both sides of this bear in mind. That to the extent the position you urge renders the enforcement of the criminal prohibition against intercepting my telephone conversations less effective. It inhibits my speech. And indeed it does. I mean I don't use my home -- what is it it-- wire free phone --

THE SPEAKER: Cordless.

QUESTION: -- whenever I talk to anything involving the court, because, you know, I don't know, I don't know who is picking it up. And you're saying it's perfectly okay for somebody not only to pick it up but to publish it in the Washington Post so long as, you know, so long as they didn't actually do the tap, just make a tape and mail it to the Post.

MR. LEVINE: Your Honor, let me make clear it is not perfectly okay to pick it up. That is violated by the statute.

QUESTION: No, it is perfectly okay to give the person who picked it up exactly what that person wanted,

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that is, dissemination of my private conversations. I -- you enable the criminal to achieve the object of his criminality.

MR. LEVINE: And Your Honor, if there was any act of collaboration between the criminal and the fence, as has been called in some amicus briefs, then that person may be held liable for his own conduct.

QUESTION: There is no collaboration but this is an essential instrument for the criminal's achieving what he wanted to achieve. And that is disseminate to the world information which he has unlawfully obtained. It doesn't seem to me unreasonable for the Government to say no, we're not going to let the criminal get the advantage of his criminality. We do the same thing where the highest function of Government of all is involved, the criminal law. We prevent information from being introduced, even told to the jury when it has been obtained illegally. I find it --

MR. LEVINE: Justice Scalia, I'm not suggesting that it's not unreasonable, but that's not the standard when you're talking about prohibition on the dissemination of truthful speech about a matter of public concern.

QUESTION: Well, Mr. Levine, you agree that there is an exception for matters of the highest priority. How about our decision in Hill against Colorado last year,

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which involved, you know, protected speech on one hand but said nonetheless the state could permit a strong interest in privacy to triumph.

MR. LEVINE: Your Honor, Hill versus Colorado was a time, place or manner restriction, and the court, because of that properly analyzed the case under intermediate scrutiny. This case is controlled by the Daily Mail principle. This statute, unlike the one at issue in the Hill v. Colorado case, is a direct prohibition of speech itself. It is not a time, place or manner restriction. It is not a regulation of conduct that has --

QUESTION: Well, it may nonetheless deserve intermediate scrutiny because of its content neutrality.

MR. LEVINE: Your Honor, I don't believe that content neutrality is a factor when you're talking about application of the Daily Mail principle.

QUESTION: Do you lose if intermediate scrutiny is applied?

MR. LEVINE: No, your Honor, we do not. The statute does not even survive intermediate scrutiny. And in that regard, let me get to a point that both Justice Scalia and the Chief Justice made earlier. This notion of the laundering rationale somehow being enough to make the statute survive intermediate scrutiny. That rationale, we

submit, is not persuasive when you're talking as we are here about matters of public concern. In the Internet age, an interceptor doesn't need the press to disseminate anonymously information to a mass audience. Even if he did, there is no evidence that that provides that person with an incentive to intercept in the first place, especially where, as in this case money does not drive the market hypothesized by the petitioner. There may well be the occasional case in which an anonymous interceptor gratuitously throws the contents of an intercepted communication over the transom, but there is no evidence that this is a systemic problem or that --

QUESTION: Well, something like that happened here, didn't it? I mean there is an anonymous interceptor who gave if to a radio station.

MR. LEVINE: But Your Honor, there is no evidence that the identity of the interceptor in this case could not have been uncovered.

QUESTION: Well, I presume that the Government ought to have some presumption. They are saying that it's very -- they enforce these laws. They are just saying it's just very difficult to find this person, the initial interceptor.

MR. LEVINE: Your Honor, that is, with all due respect to the Government, purely conjecture. There is

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nothing in the legislative history to support that. The scores of prosecutions under the Acts Interception Provision suggest that that's not true. And in all of the cases, applying the acts, use and disclosure prohibitions which are cited in the appendix to our briefs.

QUESTION: Well, shouldn't the Government at least have a chance to -- I mean, the Government here was cut off. there hasn't been any trial. There were 1292-B. certifications. The third circuit said the statute is no good. If the question is, is it really difficult to get out -- get after interceptors, shouldn't the Government have had a chance to show that indeed it is?

MR. LEVINE: Your Honor, in light of the ample evidence that is contained in the record and available to the Court, that at least when you're talking about matters of public concern as you are here, where money doesn't drive the market to the interception, that that is not the case. I think warrants a conclusion that the Government doesn't need to be able to do that, and of course if the Court applies the Daily Mail principle, we don't reach that question because the Daily Mail principle obviates the need to show that, especially whereas here there are so many less restrictive alternatives to prohibiting the dissemination of information, like meaningful criminal penalties against the interception itself.

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In this case, your Honors, the maximum criminal penalty that could be applied against the interceptor of this communication was a nominal fine with no possibility of incarceration. In the Baynor case, another one of the cases that is pending before this Court, the interceptor of that conversation was fined $500.

QUESTION: In -- in -- suppose that a stranger goes into your house, trespassing, puts his ear to the bedroom door and hears your private conversation or goes in and steals your diary and turns it over to a newspaper, knowing all this publishes it, is it constitutional not to forbid the publication, but to collect damages from the newspaper?

MR. LEVINE: Your Honor, if the information did not involve a matter of public concern --

QUESTION: No. No. It does.

MR. LEVINE: If it involves a matter of public concern --

QUESTION: Yes.

MR. LEVINE: -- and there is no unlawful conduct of any kind by the person who publishes the information --

QUESTION: All right. So you're saying that its unconstitutional to prohibit trespassers from coming into your house, steal your diaries, and listen to your most private conversations and then publish them in mass

circulation dailies and you can't get damages from that as long as the newspaper itself didn't do the trespass, just knew all about it?

MR. LEVINE: Your Honor, I think I misunderstood your question. The person who broke into your house and listened in --

QUESTION: Is not a -- is not a reporter.

MR. LEVINE: Right.

QUESTION: It's just someone -- it's a stranger.

MR. LEVINE: That person can be prosecuted.

QUESTION: No, I'm asking if you can get damages from the newspaper and I think your answer straightforwardly is no.

MR. LEVINE: That's correct, Your Honor. That's correct, Your Honor.

QUESTION: Then I don't see how you're going to have privacy left. I mean, what kind of privacy is there if people can break into your house, steal all your information, can be published in the newspaper that knows it and you can't get any damages from the newspaper?

MR. LEVINE: Your Honor --

QUESTION: It goes with trade secrets, copyrighted books and your most private information.

MR. LEVINE: Your Honor, you can go after the person who intercepted.

QUESTION: Yeah, but we don't know who that person is, you know. He takes his money and runs, all right. So the only effective redress is to stop the entire United States from knowing your most secret information or your trade secrets or your copyrighted book which was obtained with the newspaper's full knowledge through trespass, breaking and entering, any kind of stealing you want. Is that not your position?

MR. LEVINE: Justice Breyer --

QUESTION: If I disagree with that you lose --

MR. LEVINE: Justice Breyer, if I understand your latest iteration of the hypothetical, you included a payment in there. If the newspaper paid for the information, that's a much closer question.

QUESTION: No. No. I'll take it out then.

MR. LEVINE: Your Honors, in the last analysis, this statute simply prohibits too much speech. In this case it prohibits respondent Yokum from notifying members of the school board that they might be in danger.

QUESTION: Are you permitted to raise an overbreadth challenge in this posture of the case?

MR. LEVINE: The answer is yes, Justice Kennedy, because if an intermediate scrutiny does apply, one of the prongs of the intermediate scrutiny test is that the statute at issue must not prohibit more speech than is

necessary. I don't see how a litigant in our position can make that point without making the arguments that we have here about the fact that this statute simply prohibits too much speech. The statute also prohibits the media respondents from sharing --

QUESTION: If the rationale of the statute is to dry up the market, it doesn't prohibit too much speech, it prohibits precisely the amount of speech that is the product of what the statute is aimed at.

MR. LEVINE: But if you focus on the speech itself, Justice Stevens, and it is truthful and it involves a matter of public concern, that speech has value. That's what the Daily Mail principle is all about.

QUESTION: No, but you're arguing about the quantity. The quantity is precisely tailored to the underlying criminal conduct. It's the fruits of that, just like the fruits of an illegal search, to take Justice Scalia's example.

MR. LEVINE: Not when -- not when the Congress was focused on other kinds of interceptions and disclosures involving things like industrial espionage, insider trading, contested divorce. Congress did not focus on things like speech involving matters of public concern. There is nothing in the legislative history to suggest that Congress thought that that was problem that

it was trying deal with.

QUESTION: No, the problem is illegal intercepts. And it covers the product of every illegal intercept. It doesn't cover any speech that is not the product of -- it seems to me their tailoring argument is not really very persuasive. It exactly fits, in terms of quantity, if you're just talking about quantity, the quantity is exactly the full market for this illegal activity.

MR. LEVINE: I think it's fairest to say that I'm talking about quantity and quality. Quality in the sense that the information involving truthful speech without matters of public concern is at the core of the First Amendment and that's what this statute prohibits in addition to whatever it may legitimately prohibit involving speech that doesn't involve a matter of public - concern.

QUESTION: Well, given that, then why is it worse? Why is it worse to receive a stolen diary than to steal the diary yourself? Why is it worse to receive with knowledge, the stolen diary? Do you see my point?

MR. LEVINE: I see your point and this may be a fine distinction in response, but I think it's an important one, Justice Breyer, the physical diary is property. Taking that, regardless of what's inside it, is

not the function of the First Amendment to speak to. If you're talking about the contents of the diary, the information and you're then penalizing someone for now knowing that information, having it in his brain and then disseminating it to other people, that is something that the First Amendment is concerned about, especially when you're talking about speech that is the truth and is a matter of public concern.

QUESTION: I guess the case points up that chattel analogies are difficult in a modern age of digitized speech, et cetera.

I mean you don't have an airline ticket anymore. It's just out there in a computer.

MR. LEVINE: That's right.

QUESTION: And what the Government is trying to do is to recognize that in this statute.

MR. LEVINE: That's correct.

QUESTION: Thank you, Mr. Levine.

Mr. Goldstein, we'll hear from you.

ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

ON BEHALF OF RESPONDENT YOCUM

MR. GOLDSTEIN: Mr. Chief Justice and may it please the Court:

Even if the petitioners are correct that the wire tap acts redisclosure prohibition and that's what

I'll call it, it's the second, third, fourth person to receive it, even if that prohibition, prophylactically adds some deterrent, as Justice Scalia and the Chief Justice have suggested, and Justice Breyer's concern about privacy identifies, even if it does add some deterrent, that prohibition is too crude a weapon, effectively a thermonuclear bomb of sorts to be sustained in the sensitive area of not property but free speech. It therefore should be invalidated at least under intermediate scrutiny.

QUESTION: Well, what you then presumably have other ideas as to how the Government might get at this problem, less drastic, perhaps? What are they?

MR. GOLDSTEIN: Mr. Chief Justice, we believe that the solution adopted by the Third Circuit, the narrow approach it took is the one that is appropriate under intermediate scrutiny and that is it left in place by and large the redisclosure prohibition but recognized that when the final disclosure is on a question of public significance, and is by a person completely uninvolved in the illegal interception, then the speech rights outweigh. So when you have only the circumstance where you have speech on a matter of public significance, not just what was happening on the phone, someone came in and just overheard my conversation in my bedroom, they adopted a

line -- this a -- a principle that exists in lots of this Court's cases, including in the defamation context, in Pickering balancing, when you're speaking on a matter of public importance, that's when the First Amendment interests are at their highest.

QUESTION: So is it a fact --

QUESTION: The newspaper's not going to publish it unless it has public interest? And is public interest and public significance the same thing? I mean, you know, somebody taps the phones of a prominent public official or of a prominent jurist and it turns out the guy swears like a trooper and this -- you know, and the whole conversation is published in the paper. Is that a matter of public significance?

MR. GOLDSTEIN: It is a matter of public interest. This Court --

QUESTION: But it may well not be a matter of public significance.

QUESTION: Well, now what's the difference if we -- do our cases articulate any difference between public significance and public interest.

MR. GOLDSTEIN: The Court has --

QUESTION: Can you answer the question yes or no?

MR. GOLDSTEIN: No, because it hasn't been

presented, Mr. Chief Justice and I would --

QUESTION: And you're presenting it now.

MR. GOLDSTEIN: Yes. Mr. Chief Justice, in three lines of cases, the Court has taken -- has drawn the line at public significance and I will identify them specifically. Defamation and libel, the Hustler Magazine case, the Philadelphia Newspaper v. Hepps case and Dun & Bradstreet all turn on whether or not the speech in question is on an issue of public significance. The same is true in the Pickering balancing cases, including particularly the Court's opinion in United States v. National Treasury Employee's Union which, too, was a content-neutral statute. But I need to return to what else we would say, what other strictures we would put on the statute in order to permit it to survive intermediate scrutiny and still fulfill what we agree is an important governmental interest and that is that no one wants people tapping phones and breaking into homes.

The difficulty here is that there are a number of respects in which the statute is not tailored whatsoever. And so I want to get to Justice Stevens' point that really this does get to the heart of the matter. The real problem is that this is not a case like the Daily Mail case where it is a one-to-one trade off, we're going to reduce some speech in order to further some

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other interest. We have here a statute that is so broad that much speech that the Government has no interest or actual intent to stop from being published will in fact be published. The different -- I will identify five distinctions. The first is that it applies equally and I mean all the way down the line in terms of punishment whether or not you can put someone in jail, identical fines to the newspaper that is the 10th party down the line to receive the information as to the intercepting.

QUESTION: Well, it's no longer --

QUESTION: Not according to Soliciter General. He says the word disclosed means that once it has been publicly disclosed, the next person is not a discloser.

MR. GOLDSTEIN: That argument is not inconsistent with what I have just said. I will explain why.

QUESTION: I hope you will.

MR. GOLDSTEIN: The radio station here played the tape in this area of northeastern Pennsylvania, Mr. Chief Justice, the New York Times comes along and listens and says oh, my goodness, look what happened here. They then publish it nationally. Under the Soliciter General's interpretation, that is a violation of the statute because it wasn't known to the people in California.

QUESTION: Is that expressed in the Government's

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brief or is this just something that you're adding to the Government's brief?

MR. GOLDSTEIN: Well, Mr. Chief Justice, I'm in the difficult position that this argument is made in one sentence in the Government's reply brief and so this is my understanding.

QUESTION: Well, so your feeling is that if it's just disclosed in northeastern Pennsylvania, then someone who discloses it perhaps in northwestern Pennsylvania is disclosing it anew?

MR. GOLDSTEIN: Exactly. And as ridiculous as that sounds --

QUESTION: It sure does.

MR. GOLDSTEIN: And I -- I agree with you that it's ridiculous but it is what the statute says and it's completely consonant with what Congress was apparently attempting to do here. If you look through the petitioner's brief, time and again, they say each time it gets out it's like a hundred thousand people intercepting the communication.

QUESTION: You don't have to read statutes unreasonably. I mean if that's an unreasonable result, don't read disclose to mean that. I mean you usually reads statutes to produce both constitutional and reasonable results where that's possible.

MR. GOLDSTEIN: The plain text of the statute uses a much broader term than is suggested by the Solicitor General and let me continue with the other four problems with tailoring. The second is that it applies to any piece of information about the conversation, not merely the tape. The fact that, and Justice -- there was a question about talking to my neighbor. In this context if you receive innocently a tape recording and merely mention the fact that you have -- you know that there was a tape recording of the conversation, it applies equally because the definition of content is so broad. It's literally any datum about the conversation. The third is that it imposes civil and criminal liability and permits the commencement of litigation even when there has been no injury at all. And the plaintiffs in this case disavowed any claim that they had been actually been hurt. The fourth is that it applies equally no matter whether the information and indeed the conversation in question was even private. And this was Justice O'Connor's first question is that the information that was spoken and was heard and intercepted could have been a completely public fact but the fact that it was said in a conversation would be disclosed, and fifth and this one is the particularly troubling one that I began with, it applies even when the information is of vital public significance.

Now, the reason I mentioned these five is that you have to look at someone who is in the position of receiving a piece of information and there is the grave concern that when you get a piece of information notwithstanding the reason to know limitation which is what the Solicitor General points had to saving the statute, you had real doubts about the provenance of information. Because of the great breath of the statute, it's unlike Daily Mail and it's unlike Florida Star. You've got a rape victim's name and you know okay that's prohibited. I'm not going to say that if I followed the statute and its constitutional --

QUESTION: Well wouldn't a reporter or a news station ordinarily want to check out a story? Are they just going to get the tape and say gee, let's put it on?

MR. GOLDSTEIN: Mr. Chief Justice, if that's the case then I don't think that we have a problem. If you are going to have a situation where you attempt to discern the provenance of information, this case -- this statute operates only in the circumstance where the newspaper doesn't know the intercepting party. If the newspaper knows the intercepting party then the statute operates because the newspaper will be subpoenaed and will have to testify about who gave them the interception and that person will be prosecuted. In the situation where you

don't know and if the Court's point is that look, it simply won't be published in that instance we don't have a problem because the broader disclosure won't happen.

QUESTION: Well, I don't understand that.

QUESTION: That might be quite difficult. Is the -- I think that the Congress or States pass property laws in part to keep people away from my bedroom. And they are doing that in part for reasons better than trade secret law or copyright law because there is something about human dignity that requires it. Well, if they can keep people away from my bedroom to hear my private conversations, even about important matters, can't they try to protect that same kind of basic dignity in respect to the new world that will come through wireless communication? Now, do you see there's a lot involved there, but that's at the bottom of what I'm trying to work out in this case.

MR. GOLDSTEIN: Let me begin by stepping back to the variant on that question that you asked my colleague. And I do want to specify, that when it comes to things like diaries, the intellectual property laws still apply fully in the same way they did in Cowles, those sorts of copyright laws, and we don't doubt that if it's a diary and it's something that is your personal information, you have written it down, that you can claim that you have

stolen something like intellectual property.

Your version to me was, can't we try hard to reduce the incentives, and I think Congress is doing that here. There is no record that suggests there is a real problem, but I think we all agree intuitively, it will reduce somewhat the incentive to engage in the interception. Our problem is that it's a purely prophylactic ban on someone and could result in massive punitive damages or jail time on someone who hasn't engaged in the primary wrongdoing. Where the prophylaxis has broken down, my client has no idea who gave him this piece of information. He has it. It's of public significance. It's a legitimate threat on page.

QUESTION: He knows it was illegally obtained. He didn't know who illegally obtained it. Do you really think this phone conversation what, just dropped out of the air or something? It was obviously illegally obtained. Wasn't it an obvious phone tap?

MR. GOLDSTEIN: It was an obviously -- it was obviously recorded and very likely recorded by someone who wasn't a party to it.

QUESTION: Okay. Why do you have to know who did it?

MR. GOLDSTEIN: Because he is not engaged in anything that anyone believes is wrong. He has

information, a legitimate threat. The court of appeals, Justice Scalia, on page 26-A of the petition appendix explains that this is not just an idle threat. He says really, truthfully, we're going to have to do some work on these people, blow off --

QUESTION: But isn't it the case that by the time the publication which is the subject of this action occurred, the threat was over? This publication all occurred after the point at which the threat was going --

MR. GOLDSTEIN: With respect, that is not correct, particularly as to my client. Independently after receiving it, within a day, he published it, disclosed it in the sense of the statute by giving it to the radio station and notifying the people who were the subject.

QUESTION: Why didn't he just notify the people who were the subject of the threat?

MR. GOLDSTEIN: He did.

QUESTION: Once it goes to the radio station you're not talking about an exception for people who are performing the public service of warning victims.

MR. GOLDSTEIN: I think that there is something to be said of warning the public. But I agree --

QUESTION: Well, the public's porches weren't going to be blown off, the school committee's porches were

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going to be blown off, and they were notified. So that when it went to the radio station, we weren't worried about potential victims of porch blowings, were we?

MR. GOLDSTEIN: When he gave it to the radio station, yes, we were.

QUESTION: And at the same time, he was making it known, I forget how, but he was making it known to the victims so that the radio station was not necessary to make it known to the victims and the people who learn through the radio station weren't potential victims. That's correct, isn't it?

MR. GOLDSTEIN: That is correct. Our point is that when you have a piece of information and the prophylactic goals of the statute have broken down and it is a matter of public significance, you are not involved in anything that Congress attempted to stop. It is speech of the highest interest. When you have a limited holding like the third circuit did here under intermediate scrutiny, if it is only speech on matters of public significance and by someone who had nothing to do with the interception, has no idea who was, that speech is protected.

QUESTION: But who knows that someone upon whom he is depending acted illegally.

MR. GOLDSTEIN: Has reason to know.

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QUESTION: Has reason to know and certainly there is reason to know here.

MR. GOLDSTEIN: That's correct.

QUESTION: All right, and -- and Congress certainly did intend to stop that, it seems to me, contrary to what you said. Why do you suggest that this is outside of ambit of what concerned Congress. Congress wanted to dry up a market, and I can't think of a more obvious market than the market of a radio station which has reason to know that it is publishing illegally seized interceptions.

MR. GOLDSTEIN: Justice Souter, if I said this wasn't what Congress was trying to do, I misspoke.

QUESTION: I thought you did say that.

MR. GOLDSTEIN: We agreed that that was Congress' goal. Our point in that respect is twofold, is that neither the Congress nor the plaintiffs or the Government have attempted to develop any record that that was a series problem. And second is that --

QUESTION: Then they should have time to do it under the procedure as it has gone so far, they haven't. If that's the flaw --

MR. GOLDSTEIN: Justice Ginsburg, they had the opportunity to develop a record in this case and the other two cases that have come before you, that are the Peavey

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case and the Baynor case have gone through the courts and no one has suggested that they are going to develop any kind of record.

QUESTION: Then, but tell me if I'm wrong. I thought the district court kept the case there, certified questions to the third circuit. The third circuit didn't say but now you have a chance to show it, just cut him off. They prevailed in the district court.

MR. GOLDSTEIN: They did not attempt in this case to put forward any record regarding the efficacy of the statute.

QUESTION: If they knew they were required to do something beyond the intuitive judgment that people make that of course nobody is going to do this if nobody is going to touch it, if it's going to be treated like a hot potato.

MR. GOLDSTEIN: I think maybe you I, Justice Ginsburg, are speaking about two slightly different things. The first is a point you identified to my colleague before which is, is it really difficult to identify people and stop them when they are doing these kinds of interceptions. I think this Court can assume that to be the case. The point that I am making is that Congress when it legislated here did not operate on an understanding or any evidence that there was a problem.

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QUESTION: Thank you, Mr. Goldstein.

General Waxman, you have three minutes remaining.

REBUTTAL ARGUMENT OF SETH P. WAXMAN

ON BEHALF OF PETITIONER UNITED STATES

MR. WAXMAN: Thank you, Mr. Chief Justice.

Questions about the extent of the necessity defense which we mentioned in our reply brief or the meaning of the word disclosure are all, of course, questions of application that will be given judicial interpretation in appropriate cases where they arise. The salient point here is that the respondents have not made a case, either in their briefs or here, that going solely against the wiretapper is going to significantly protect privacy. And contrary to their representation, the legislative history does, in fact, reflect both great solicitude for the privacy rights involved and that's quoted at page 3 of our reply brief and also repeatedly the recognition that wiretapping and bugging and now of course we have hacking into e-mails is almost completely impossible of interception or even detection.

The nominal fine that Mr. Levine referred to Levine referred to is, of course, $5,000 which is not nominal with respect to most people, and in any event exists independent of the civil remedy under 2520 that

Congress thought was appropriate and Congress said in the legislative history was appropriate to vindicate the privacy rights of the people whose privacy interests were not vindicated.

The notion that there is a limiting principal for facts of public significance, I think, is fatal. First of all, if there were such an exception, that would not -- that would deprive the statute of being content neutral. And second of all, there is almost no way to draw the line, as Justice Scalia suggests, for what is publicly significant. This Court has already held twice that the name of a woman who has been raped, not the fact that there was a rape or the name of the perpetrator, but the victim is a matter of public significance and public interest. So we don't think that there is a constitutional way to draw a line here.

The Daily Mail principle that the other side bases its case on is distinguishable from this case and this law in five critical respects. Those were laws that applied only to the press and not to nonexpressive uses. They were content based laws reflected a determination that society should not know certain information. They reflect -- they dealt with information that came from the Government that is not in the hands of private parties and there are, we understand, reasons to respect a sensorial

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motive when the Government seeks to limit disclosure of information about its own activities. They did not -- they all obtained -- involved information that was lawfully obtained. Every single one of the persons who gave that information to the person got it lawfully.

CHIEF JUSTICE REHNQUIST: Thank you, General Waxman. The case is submitted.

(Whereupon, at 12:03 p.m., the case in the above-entitled matter was submitted.)

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