

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   GLORIA BARTNICKI AND                   :

4       ANTHONY F. KANE, JR.,               :

5                   Petitioners               :

6               v.                               : No. 99-1687

7   FREDERICK W. VOPPER,                   : No. 99-1728

8       AKA FRED WILLIAMS, ET AL.;         :

9                                               :

10   and                                       :

11                                               :

12   UNITED STATES,                         :

13                   Petitioner               :

14               v.                               :

15   FREDERICK W. VOPPER,                   :

16       AKA FRED WILLIAMS, ET AL.         :

17   - - - - - x

18                                               Washington, D.C.

19                                               Tuesday, December 5, 2000

20               The above-entitled matter came on for oral  
21   argument before the Supreme Court of the United States at  
22   11:03 a.m.

23   APPEARANCES:

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

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

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

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

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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

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

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

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

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

1     this instance a hundred thousand people to eavesdrop, and  
2     as petitioner Bartnicki stated in her deposition, when  
3     she, having no idea that anyone had intruded into her  
4     communication with Mr. Kane, when she heard on the radio  
5     it being broadcast she felt that she had been violated in  
6     front of a hundred thousand people and that is true I  
7     believe independent of the content.  If I, riding home  
8     today, hear a radio station broadcasting a conversation  
9     where I convey my grocery list to my wife or vice versa, a  
10    feel a violation of my person autonomy.  Just as if someone  
11    --

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

15                 MR. COLLINS:  If you --

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

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

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

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

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

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

20                  QUESTION: Which is what happened here, right?

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

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

25                  MR. COLLINS: And Congress -- that is what

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

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

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

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

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



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

2

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

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

25 MR. COLLINS: But in both instances, though,

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

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

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

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

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

15

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

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

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

13                MR. COLLINS:  Absolutely.

14                QUESTION:  -- or is it attacking it facially?

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

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

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

1 interception.

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

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

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

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

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

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

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

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

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

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

20 QUESTION: A general statute.

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

25 QUESTION: Yes.

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

3 QUESTION: Thank you, Mr. Collins.

4 General Waxman, we will hear from you.

5 ORAL ARGUMENT OF SETH P. WAXMAN

6 ON BEHALF OF PETITIONER UNITED STATES

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

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

12 QUESTION: So you don't want anymore.

13 (Laughter.)

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



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

8

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

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

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

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

1       --

2                   QUESTION:  In contract law and not speech law.

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

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

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

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

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

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

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

1       --

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

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

24              QUESTION:  May I ask you a question?

25              GENERAL WAXMAN:  -- and employees may or may not

1 say.

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

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

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

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

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

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

23 GENERAL WAXMAN: Excuse me?

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

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

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

5 QUESTION: I wouldn't think of doing --

6 GENERAL WAXMAN: Now, if there was --

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

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

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

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



1 QUESTION: You may. Mr. Goldstein.

2 MR. LEVINE: Mr. Levine, Your Honor.

3 QUESTION: Mr. Levine, I'm sorry.

4 ORAL ARGUMENT OF LEE LEVINE

5 ON BEHALF OF RESPONDENTS VOPPER, ET AL.

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

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

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

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

4 MR. LEVINE: So long as --

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

7 MR. LEVINE: Your Honor, I --

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

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

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

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

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

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

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

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

8                 MR. LEVINE:   No, Your Honor.

9                 QUESTION:    I didn't think so.

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

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

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

18                QUESTION:    I'm sure.

19                QUESTION:    Well then stop giving out your case.

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

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

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

13 THE SPEAKER: Cordless.

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

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

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

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

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

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

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

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

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

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

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

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

18            QUESTION:   Do you lose if intermediate scrutiny  
19    is applied?

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

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

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

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

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

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

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

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

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



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

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

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

16          QUESTION: No. No. It does.

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

19          QUESTION: Yes.

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

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

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

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

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

8             MR. LEVINE:   Right.

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

10            MR. LEVINE:   That person can be prosecuted.

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

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

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

21            MR. LEVINE:   Your Honor --

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

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

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

9                   MR. LEVINE: Justice Breyer --

10                  QUESTION: If I disagree with that you lose --

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

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

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

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

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

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

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

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

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

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

1 it was trying deal with.

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

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

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

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

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

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

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

14 MR. LEVINE: That's right.

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

17 MR. LEVINE: That's correct.

18 QUESTION: Thank you, Mr. Levine.

19 Mr. Goldstein, we'll hear from you.

20 ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

21 ON BEHALF OF RESPONDENT YOCUM

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

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

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

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

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

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

6 QUESTION: So is it a fact --

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

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

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

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

22 MR. GOLDSTEIN: The Court has --

23 QUESTION: Can you answer the question yes or  
24 no?

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



1 presented, Mr. Chief Justice and I would --

2 QUESTION: And you're presenting it now.

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

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

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

10 QUESTION: Well, it's no longer --

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

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

17 QUESTION: I hope you will.

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

25 QUESTION: Is that expressed in the Government's

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

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

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

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

13            QUESTION:   It sure does.

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

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

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

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

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

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

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

4 QUESTION: Well, I don't understand that.

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

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

1 stolen something like intellectual property.

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

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

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

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

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

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

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

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

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

18 MR. GOLDSTEIN: He did.

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

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

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



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

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

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

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

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

25 MR. GOLDSTEIN: Has reason to know.

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

3                   MR. GOLDSTEIN: That's correct.

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

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

14                  QUESTION: I thought you did say that.

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

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

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

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

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

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

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

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

1 QUESTION: Thank you, Mr. Goldstein.

2 General Waxman, you have three minutes  
3 remaining.

4 REBUTTAL ARGUMENT OF SETH P. WAXMAN  
5 ON BEHALF OF PETITIONER UNITED STATES

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

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

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

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

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

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

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

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

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

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