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**TESTIMONY SUBMITTED BY
ANDY HOOVER, LEGISLATIVE DIRECTOR
AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA
TO
SENATE JUDICIARY COMMITTEE
RE: REVISIONS TO THE WIRETAP ACT
STATE CAPITOL, HARRISBURG
MARCH 13, 2012**

Chairman Greenleaf, Chairman Leach, and members of the committee, thank you for the opportunity to present testimony today on revisions to Pennsylvania's Wiretap Act. My name is Andy Hoover. I am the legislative director of the American Civil Liberties Union of Pennsylvania. Founded in 1920, the ACLU is one of the nation's oldest and leading civil rights organizations. The ACLU of Pennsylvania is one of 53 affiliates of the organization and includes a membership of 19,000 citizens and residents of the commonwealth.

As you know, multiple revisions to the Wiretap Act ("the Act") have been proposed, and there is already legislation introduced or at least announced in both the House and Senate. In this testimony, I'd like to address several of those ideas, including changes to two-party consent, so-called "roving wiretaps," recording on school buses, and clarifying the definition of "oral communications" in the Act. I offer this testimony with the caveat that our legal team will continue to analyze these issues as more legislation is introduced and reserves the opportunity to comment further in the future.

Pennsylvania's Wiretap Act provides strong protections of the people's right to privacy and provides boundaries between the people and their government. Wiretaps can be conducted in a way that promotes public safety and protects privacy. This discussion provides an opportunity to protect privacy in a robust way.

Perhaps the most important provision of the Act is that which requires all parties in a private conversation or setting to consent to recording. Sometimes it is called "two-party consent," though it is probably more accurate to call it "all-party consent."

The importance of this provision cannot be overstated. Imagine any private conversation or situation you have on a daily basis. Now imagine that any private conversation you have at anytime could be recorded without your knowledge. That is the value of two-party consent. It ensures that the presumption of privacy is real.

In the past and the present, legislation has been introduced to repeal two-party consent. House Bill 204 would allow a recording if only one party consents in a situation in which there is a presumption of privacy. The same bill was introduced in the previous session as

House Bill 1308 and never received consideration. It seems that there is no appetite in the General Assembly for repealing this legal boundary.

However, there are numerous ways to do an end-run around two-party consent. Some of those ideas are currently being considered by the legislature. For example, it has been suggested that an exception should be written into the Wiretap Act to allow law enforcement to use illegal civilian recordings when the person who creates the recording has a “reasonable suspicion” that a crime is occurring. According to the articulation of this idea by supporters, this type of recording would continue to remain illegal when all parties that are subject to the recording have a presumption of privacy. However, law enforcement could use the recording in an investigation and prosecution.

The ACLU of Pennsylvania opposes this initiative. There are several problems with this proposal. First, it places a great deal of responsibility on the civilian to undertake a legal interpretation of “reasonable suspicion.” These civilians would become untrained, pseudo police officers, wielding a video camera or audio recorder instead of a badge and a firearm. Can we reasonably expect that civilians will know when they do and do not have “reasonable suspicion”?

Second, wiretaps can be misleading because they give a false sense of reliability. People will tend to believe what they hear in a wiretap, even though wiretaps are no more reliable than other testimony and there is less ability to interrogate the veracity of admissions heard on a recording. People may be predisposed to believe the truth of the contents of recordings when, in fact, there’s no guarantee that the contents are true and the person speaking can’t necessarily be interrogated about what was being said.

Finally, while this legislation may ultimately be written to maintain the illegality of recordings of private situations without consent, in practice, no one can reasonably believe that a district attorney will prosecute the producer of an illegal civilian wiretap for a felony after the DA used the recording in an investigation. That will not happen, and this type of wiretap will become legal in practice, if not by the letter of the law.

A second way to undercut two-party consent in the Act is to allow wiretaps from other states and the federal government to be used in the course of investigations and prosecutions in Pennsylvania. Some states and certainly the federal government do not have nearly the level of protection for the people’s privacy as Pennsylvania law does. Some states allow one-party consent, as articulated in HB 204. Federal law has numerous provisions allowing surveillance without a warrant.

In 2007, Representative Marsico introduced legislation, House Bill 1817, to allow the introduction of recordings obtained from other states and the federal government. When he introduced the bill again in 2009 as HB 72, he added a key provision. HB 72 of 2009

allows the introduction of wiretaps from other states and the federal government if “the interception was authorized by a court upon a finding of probable cause that the target of the surveillance is engaged or will engage in a violation of the criminal laws of the Federal Government or any state.”

The ACLU of Pennsylvania appreciates Representative Marsico’s inclusion of this provision in the 2009 bill. If this provision remains in any new legislation that the legislature considers on this issue, the ACLU of Pennsylvania will have no position on this initiative.

The General Assembly is also considering target-specific wiretaps or what are sometimes called “roving wiretaps.” As you know, this proposal would allow law enforcement to conduct electronic surveillance on an individual person and, thus, could move its surveillance from location to location. The example that is typically used to describe roving wiretaps is a situation in which a suspect uses prepaid phones and discards them regularly, in an attempt to elude detection.

At the moment, the ACLU of Pennsylvania is reserving judgment on this proposal until more details are forthcoming. In his co-sponsorship memo dated January 13, 2012, Representative Marsico described in some detail how a court would issue a roving wiretap under his proposal. According to the memo:

The wire would simply follow the suspect and not a particular location or phone number. To obtain a Target Specific wiretap order, the court requires law enforcement to prove why specificity is not feasible, who the target is and the stated purpose. A court must then make a judicial finding that specification is not practical. This is a much heavier burden than is required for an ordinary order under existing law.

This is a positive first step. But roving wiretaps come with one particular pitfall. The wiretap must truly be “target specific.” The law must be clear that surveillance can be conducted on the suspect and only on the suspect. If the subject of the warrant shares a phone with his spouse or children, for example, it must be clear that the government is outside its boundaries if it continues to conduct surveillance on the phone when someone other than the person named in the warrant is using it. If the suspect stays in a hotel room, as another example, surveillance on that room must cease when the suspect is gone.

One might reasonably conclude that ending surveillance without the suspect present is the entire point of this initiative. But this legislation should not be written with the assumption that people in government will follow their better angels. When a government wants to watch its own people, the law must be written in a way that draws clear boundaries. Without clear boundaries on government, our freedoms are lost.

An additional proposal that has been drafted and is under consideration in the Senate would allow the government to intercept a communication from a consenting third party and then not inform the person on the other end of the communication that the person possessing the communication device is from the government. If this is allowed, an informant could give his mobile phone to a law enforcement official and that official could then communicate with other parties without revealing his identity.

The ACLU of Pennsylvania opposes this idea. This proposal essentially allows the government to intercept communications without a warrant and crosses a dangerous line. Combined with the proposal to allow civilians to record private communications without consent from all parties, it creates an Orwellian environment in which neighbors are encouraged to spy on each other.

On the subject of video and audio recording on school buses, the ACLU of Pennsylvania agrees with the Pennsylvania School Boards Association that an exception to the Act is not necessary. The Act and subsequent case law have made clear that all parties do not need to consent to recording when there is no expectation of privacy. It is difficult to argue that there is an expectation of privacy on a school bus.

Our one suggestion for a revision to the law on recording on school buses is to require schools to post a notice that it is recording. This post could be published in the student handbook or on the wall of the bus, as two possible examples. It is my understanding that notice is part of PSBA's recommended protocol for recording on buses. Giving students and parents notice of surveillance not only promotes an environment of openness and transparency but also could serve as a deterrent to students' bad behavior.

This issue provides a segue into the final point I'd like to articulate in my testimony. The ACLU of Pennsylvania has litigated numerous cases in which police officers have arrested persons who filmed the officers while they conducted their duties in public. In 2009, a University of Pittsburgh police officer arrested Elijah Matheny, a resident of Pittsburgh's Hill District, for recording the officer on duty in public. Matheny was eventually charged with violating the Wiretap Act.

Over the course of the lawsuit, it was learned that the Allegheny County District Attorney's office had erroneously told law enforcement that recording the police in public is a violation of the Act. It is not. The Pennsylvania Supreme Court has ruled that recording police officers in public while they perform their duties does not violate the Act because the officers have no expectation of privacy, and federal courts have ruled that this

type of recording is protected expression under the First Amendment to the federal constitution.¹

If this is a moment in which the legislature will make numerous adjustments to the Wiretap Act, this is a perfect opportunity to clarify the definition of “oral communications” in the Act to reflect case law. Currently, oral communications is defined as “(a)ny oral communication uttered by a person possessing an expectation that such communication is not subject to interception under circumstances justifying such expectation. The term does not include any electronic communication.”²

The PA Supreme Court has held that a person possesses “an expectation that such communication is not subject to interception under circumstances justifying such expectation” only where the speaker has an expectation of privacy in the contents of the conversation.³ This expectation of privacy generally exists only if it is objectively reasonable to believe that no one can overhear your conversation and that you have the kind of relationship with the person you are speaking with where you would not expect them to record your conversation. Thus, a police officer does not have an expectation of privacy if he is questioning a suspect and a student does not have an expectation of privacy in a conversation on a school bus that other students or the driver can hear (or if there is a sign posted saying that audio recording is used on the bus).

A better definition of “oral communication” would be “any oral communication uttered by a person possessing an expectation of privacy in such communications.” By adjusting this definition, the legislature can save police, district attorneys, and residents of Pennsylvania the kind of trouble that occurs when police incorrectly arrest people for recording them while they perform their work.

In conclusion, the ACLU of Pennsylvania appreciates the opportunity to discuss ways in which to adjust the Wiretap Act. As technology evolves, law enforcement finds new challenges. When considering revisions, the General Assembly must properly balance public safety interests and the privacy interests of Pennsylvanians. The people have a right to be free from government surveillance. Public safety can be achieved while protecting that right. Chairman Greenleaf, thank you for the opportunity to be here today.

¹ *Pomycacz v. Borough of W. Wildwood*, 438 F.Supp. 2d 504, 513 (D.N.J. 2006); *Robinson v. Fetterman*, 378 F.Supp. 2d 534, 542 (E.D.Pa. 2005); *Glick v. Cuniffe*, 655 F.3d 78 (1st Cir. 2011); *Smith v. Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995); *Jean v. Mass. State Police*, 492 F.3d 24, 30 (1st Cir. 2007)

² 18 Pa.C.S. 5702 (defining “oral communication”)

³ *Agnew v. Dupler*, 717 A.2d 519 (Pa. 1998).