Hon. Otto E. Lang (Minister of Justice): No, Mr. Speaker, I am rising to take part in the debate on the amendment to the amendment. I appreciate the continuing efforts of all members of the House to arrive at positions, on the protection of privacy bill, which will meet the needs of our society in assuring its security, with due regard for individual privacy, and at the same time allow a very carefully controlled minimum availability of electronic intrusion devices to the law enforcement officers.

The amendment proposed by the hon. member for St. Paul's (Mr. Atkey) in my view would be extremely narrowing in the extent to which it would allow a judge to admit evidence in a case which came before him. It is clear that when evidence before a judge is relevant, and when he deems it necessary in the interests of justice to admit it, he would still have to exclude that evidence if we adopted the amendment proposed by the hon. member for St. Paul's unless it also, in addition to this qualification, fell within the situation of having been kept out only by reason of a technical defect. In other words, it would be only in that very special situation that the amendment would play any part in allowing the judge to admit the evidence.

The logical counterpart of that is that when there was not a technical defect in the way in which an authorization was sought, notwithstanding that the evidence was relevant, notwithstanding that the judge felt that in the interests of justice the evidence ought to be admitted, there would not be admissibility. It is to cure that that I propose to move an amendment to the amendment moved by the hon. member for St. Paul's.

Mr. Nielsen: An amendment to the amendment to the amendment!

Mr. Lang: I have emphasized that the law itself contains important sanctions to deal with the conduct of policemen who might be tempted to obtain evidence in an illegal fashion. Last night I referred to the fact that there is a penalty of up to five years in prison for anyone who engages in unlawful conduct in connection with a wiretapping. I think five years in prison is certainly a stiff penalty. In addition to that, there is provision in the bill for punitive damages of up to $5,000 which can be awarded against a person who engages in unlawful wiretapping, and which can be awarded at the discretion of the judge, in a fairly interesting and unusual way, to the person who has been the subject of or has suffered from the basic illegality of the wiretapping.

I do not want to repeat the arguments in favour of the introduction in court of evidence which is important to it. However, I would refer to the words of Mr. Justice Cardozo who, in looking at this question in the contest of the American rule, said, if it is evidence which is relevant:

> The criminal is to go free because the constable has blundered . . . A room is searched against the law, and the body of a murdered man is found . . . The privacy of the home has been infringed, and the murderer goes free.

Mr. Nielsen: That is in connection with a search warrant.

Mr. Lang: For the benefit of the hon. member for Yukon (Mr. Nielsen), I am talking about a situation where a constable has blundered and the murderer has to go free. It is quite clear that this was in the context of a warrant rather than a wiretap; but the point and the principle are the same, that justice is denied in the court relating to the murder because of some other matter that has gone on. I quote another United States case, *Irvine v. California,* in 1954, where the court said this:

> Rejection of the evidence does nothing to punish the wrongdoing official, while it may, and likely will, release the wrongdoing defendant. It deprives society of its remedy against one lawbreaker because he has been pursued by another. It protects one against whom incriminating evidence is discovered, but does nothing to protect innocent persons who are the victims of illegal but fruitless searches.

That is really the gist of the argument to allow evidence that is relevant to come before the court when it is extremely important that it be admitted.

Mr. Fairweather: Could we have the citation?

Mr. Lang: The citation is 347 U.S. 128, 136 (1954). It was the judgment of the court. I can get the names of the judges for the hon. member later. The hon. member for Windsor-Walkerville (Mr. MacGuigan) quite rightly pointed out to me that my original motion had perhaps too broad a sweep in two respects. In the first place, it would allow even the private communication itself in certain circumstances, which our original bill would not have done. Secondly, the words in my original amendment would indicate the judge was to consider just the case before him, whereas it would be better if the view were taken that the honourable judge, in considering whether evidence should be admitted, looked both at the question of the case before him and the question of deterrence arising from the exclusion of evidence, to the extent that that is a deterrent.

It is really to meet those needs that I propose to move an amendment which would have the effect of allowing the judge to admit evidence, but not the private communication itself, in circumstances where there was a taint of illegality concerning the way in which the evidence was obtained, particularly through wiretapping. I do so particularly because I remain concerned about the problem for a court which is faced with cross-examination by defence counsel trying to assert that there may have been something illegal in the background of the evidence.

● (1540)

I emphasize to hon. members my great concern about this, that we might let ourselves fall into the dangers that exist in some of the jurisdictions where a court is faced with having to allow defence counsel to explore for a negative, that is, whether or not there is something in the background of the evidence. If we allow the judge to say in any case that this evidence is so necessary that it will be admitted, then he can eliminate the fishing expedition of defence counsel in those circumstances.

I propose, therefore, Mr. Speaker, to move the following amendment, seconded by the Minister of National Health and Welfare (Mr. Lalonde):

> That the motion of November 27, 1973, by Mr. Atkey to amend motion No. 13, a motion to amend Bill C-176, be amended by
>
> (a) adding after paragraph (a) of the substituted text the word "and",