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Public Security and Wire Tapping

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THE PUBLIC SECURITY AND WIRE TAPPING

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Wire tapping has been a matter of public concern, challenge and raging controversy for more than twenty-five years. Since it invades the privacy of the individual, it presents a problem that touches each of us. Everyone agrees that unrestrained and unrestricted wire tapping by private persons for private gain is "dirty business" which should be stopped. Many persons believe that even if wire tapping is properly controlled and authorized, it is an intolerable instrument of tyranny, impinges on the liberties of the people and should not be sanctioned anywhere in a free country. To many other persons, surveillance of the wires by law enforcement officers under strict official supervision in cases involving national security and defense as well as other heinous crimes, such as kidnapping, is an essential and reasonable adjustment between the rights of the individual and the needs and interests of society.

In our search for a new solution to this old problem, we are aided somewhat by recent experience and disclosures of successful communist espionage penetration in our government and by betrayal of our vital secrets. Yet it is precisely at such a time as this when popular opinion and passion run so high that we must be most careful that reason and justice prevail and that the law alone shall provide the test by which evidence is obtained and men are tried. Only in this way may we avoid totalitarian techniques and tactics in preserving our democratic ideals and freedom.

There is now pending in Congress a number of bills to regulate wire tapping. Before discussing these, I plan to trace briefly the history and background of wiretap laws; the construction placed on these laws both by the courts and my predecessors at the Justice Department; the way in which these laws have thwarted prosecution of spies, subversives and espionage agents; and pending proposals before Congress which will remedy existing defects in the law.

* See Contributors' section, Masthead, p. 271, for biographical data.

Earliest references to laws relating to listening devices are found in the penal provisions of state laws during the last half of the nineteenth century.[1] At that time the development of telegraph facilities created a need for the protection of this form of communication. However, these statutes were more concerned with protecting the property of the telegraph company rather than the privacy of the individual. Prosecutions were few, with little resort to the law. With the rise of organized crime during prohibition days, and perfection of monitoring devices, wire tapping was used widely by enforcement officers to detect crime.

Apparently, widespread and indiscriminate wire tapping was of particular concern for security reasons to the Secretary of War in 1918. He feared that "what was whispered in the closet would soon be proclaimed from the housetops." As a result, Congress placed an absolute ban on wire tapping near the end of the First World War.[2] It was revived in the post-war period, the device playing an important role in Attorney General Palmer's raids on prohibition violators.[3] The Department of Justice continued to use the technique until 1924 at which time Attorney General Stone and later Attorney General Sargent prohibited it. This policy was adhered to until January 1931.

Meanwhile in 1928, the Supreme Court by a narrow margin of five to four in *Olmstead v. United States*[4] held that introduction of wire tapping evidence against the defendant, a bootlegger, neither violated his rights against unlawful search and seizure under the Fourth Amendment nor his rights against self-incrimination under the Fifth Amendment. Speaking for the majority, Chief Justice Taft said that "A standard which would forbid the reception of evidence if obtained by other than nice ethical conduct by government officials would make society suffer and give criminals greater immunity than has been known heretofore."[5] Mr. Justice Holmes, in a famous dissent, declared that wire tapping was "dirty business," and that it was "a less evil that some criminals should escape than that the Government should play an ignoble part."[6] In another landmark dissent, Mr. Justice Brandeis said, "Writs of assistance and general warrants are but puny instruments of tyranny and oppression compared with wire tapping."[7]

1 Rosenzweig, "The Law of Wire Tapping," 32 Cornell L.Q. 73, 74, 514 (1947).

2 Westin, "The Wire Tapping Problem: An Analysis and A Legislative Proposal," 52 Col. L. Rev. 165, 172 (1952); 40 Stat. 1017 (1918).

3 Id.

4 277 U.S. 438 (1928).

5 Id. at 468.

6 Id. at 470.

7 Id. at 476. Cf. Warren and Brandeis, "The Right to Privacy," 4 Harv. L. Rev. 193 (1890).

During the next few years, several bills were introduced in the Congress to prohibit wire tapping, but none of these bills was passed. In 1931, Attorney General William D. Mitchell recognized that the Government was operating at a considerable disadvantage in coping with the modern scientific weapons used by gangsters. He declared that tapping of wires by an agent of a department would be permitted but only upon the personal direction of the Chief of the Bureau involved, after consultation with the Assistant Attorney General in charge of the case. In 1933, Attorney General Cummings defended this policy as necessary in the public interest.[8]

In 1934, six years after the *Olmstead* case, Congress enacted the Federal Communications Act. Section 605[9] provided in part that "no person not being authorized by the sender shall intercept any communication *and* divulge or publish the existence, contents, substance . . . of such intercepted communication to any person."

The question soon arose as to whether mere interception by federal agents of messages was forbidden by Section 605. The Attorney General at that time took the view that what the law prohibited was *both* interception *and* divulgence, and that mere report of the intercepted message to public officials by FBI or other federal agents did not constitute divulgence.[10]

Repeatedly thereafter, the position was taken by the Department of Justice that section 605 was designed to prevent unauthorized persons from intercepting radiograms or telephone conversations, and to penalize telegraph and telephone operators who divulge the contents of messages, rather than to bar federal agents from obtaining necessary information in the public interest.

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[8] Hearings on Department of Justice Appropriations Bill before Subcommittee of House and Senate Committees on Appropriations, 72nd Cong., 2d Sess. 33, 72-73 (1933).

[9] 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1946).

[10] The debate on the Federal Communications Act was strangely silent on section 605. Not one word is said about making evidence obtained by wire tapping inadmissible in evidence or about prohibiting wire tapping. Even the Olmstead case is not mentioned. See 73 Cong. Rec. 4138, 8822-8837, 8842-8854, 10304-10332 (1934). From the Senate and House Reports, it appears that the purpose of the bill was merely to create a Communications Commission with regulatory power over all forms of electrical communications, whether by telephone, telegraph, cable or radio. It was also to extend to wire communications the almost identical provisions of section 27 of the Radio Act of 1927 which were thought neither to apply to Federal officers nor to bar testimony as to the contents of radio messages intercepted by them. See, Hearings before Committee on Expenditures in Executive Departments on Wire Tapping, etc., 71st Cong., 3d Sess. 24 (1931). See also, Sen. Rep. No. 781, 73d Cong., 2d Sess. 1 (1934); H.R. No. 1850, 73d Cong., 2d Sess. 3 (1934); Notes, 53 Harv. L. Rev. 863, 865-866 (1940); 1 Bill of Rights Rev. 48, 49 (1940); 2 J. of Pub. L. 199, 201 (1953); 45 Ill. L. Rev. 689 (1950).

In 1937, section 605 had its first test before the Supreme Court in *Nardone v. United States*.[11] Conviction of the defendants, who were liquor smugglers, was reversed upon the ground that section 605 rendered inadmissible in criminal proceedings in the Federal court wiretap evidence even when obtained by federal officers. In the opinion by Mr. Justice Roberts, the court concluded that "Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty."

In 1939, section 605 was extended by the Supreme Court to apply not only to ban direct wiretap evidence, but also evidence obtained from intercepted leads, the "fruit of the poisonous tree;"[12] and to intrastate as well as interstate telephone conversations.[13] In 1940, a court of appeals applied the law to cases where only one party consented to the interception.[14]

None of these decisions rendered by the Supreme Court held that wire tapping by federal officers in and of itself was illegal, absent divulgence. This may have accounted for the continued adherence to the position taken by the Justice Department until 1940 that mere interception of wire communications is not prohibited by section 605 so long as there is no subsequent public divulgence of the contents of the interception.[15]

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[11] 302 U.S. 379 (1937). Referring to that part of section 605 which provides "No person not being authorized by the sender shall intercept . . . and divulge the . . . contents . . . to any person," the court said at 381, "Taken at face value the phrase 'no person' comprehends Federal agents, and the ban on communication to 'any person' bars testimony to the content of an intercepted message."

[12] Nardone v. United States, 308 U.S. 338 (1939).

> The burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that wire-tapping was unlawfully employed. Once that is established . . . the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin.

Id. at 341.

[13] Weiss v. United States, 308 U.S. 321 (1939).

[14] United States v. Polakoff, 112 F.2d 888 (2d Cir. 1940), cert. denied, 311 U.S. 653 (1940). Contra: United States v. Sullivan, 116 F. Supp. 480 (D.D.C. 1953); United States v. Guller, 101 F. Supp. 176 (E.D. Pa. 1951); United States v. Lewis, 87 F. Supp. 970 (D.D.C. 1950), rev'd on other grounds, 184 F.2d 394 (D.C. Cir. 1950).

[15] Two decisions by the Supreme Court in 1942 appeared to lend support to the Department's position. In one case, Goldstein v. United States, 316 U.S. 114 (1942), a mail fraud, the Court held that one not a party to tapped conversations by Federal officers, had no standing to object to their use by the Government to obtain testimony. See 55 Harv. L. Rev. 141 (1941). In the other case, Goldman v. United States, 316 U.S. 129 (1942), a conspiracy to violate the Bankruptcy Act, the court held that neither section 605 nor the Fourth Amendment were violated, when Federal officers obtained recordings

In 1940, Attorney General Jackson revised the policy once again, ordered that the wire tapping technique was no longer to be used and that cases based on such evidence were not to be prosecuted.[16] Attorney General Jackson's action, which was one of short duration, appears to have been based on the opinion that interception of conversations was illegal under section 605 of the Communications Act. This view was altered soon thereafter when President Roosevelt authorized Attorney General Jackson to approve wire tapping, when necessary, in security cases.[17]

In 1941, Attorney General Jackson said:

> Experience has shown that monitoring of telephone communications is essential in connection with investigations of foreign spy rings. It is equally necessary for the purpose of solving such crimes as kidnapping and extortion. In the interest of national defense as well as of internal safety the interception of communications should in a limited degree be permitted to Federal law enforcement officers.[18]

In 1942, Attorney General Francis Biddle testifying before the House Committee on the Judiciary was asked whether he believed that wire tapping should end when the emergency expired. Mr. Biddle replied:

> I personally think wire tapping is important to discover those types of subversive crimes that I do not believe will be ended when the emergency is ended. So I do not think it should be limited to the emergency.[19]

From 1945 to 1949, Attorney General Clark favored interception of communications in cases vitally affecting the domestic security or where human life was in jeopardy. In 1949, he said, "It seems incongruous that existing law should protect our enemies and hamper our protectors."[20]

In 1951, and again in 1952, Attorney General McGrath declared that he fully supported a wiretap law because the Department of Justice had been seriously hampered in fulfilling its statutory duty of prosecuting

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of the defendant's conversation over the phone with the aid of a detectaphone placed over the wall of an adjoining room. See 91 U. of Pa. L. Rev. 82 (1942).

[16] Press Statement of Department of Justice released for March 18, 1940, dated March 15, 1940.

[17] May 21, 1940. See also Statement of J. Edgar Hoover in 58 Yale L.J. 423 (1949).

[18] Report to the Senate Committee on the Judiciary on a Wiretap Bill, February 10, 1941, Hearings before the Committee on the Judiciary on H.R. 2266 and H.R. 3099, 77th Cong., 1st Sess. 16-20 (1941).

[19] Testimony of February 18, 1942 on H.J. Res. 283, 77th Cong., 2d Sess. 1, 5 (1942). See also, statement in N.Y. Times, Oct. 9, 1941, p. 4, col. 2, indicating that wiretapping was authorized in security cases. More recently on January 11, 1954, Mr. Biddle is reported to have urged a "realistic acceptance of the use of wiretapping in certain criminal cases." Washington Post, January 12, 1954.

[20] 95 Cong. Rec. 442 (Jan. 18, 1949). See also N.Y. Times, Jan. 15, 1949, p. 1, col. 8.

those who violate the federal defense and security laws.[21] In 1952, Attorney General McGranery was of the same opinion.

Thus you can see that except for a short period during 1940, every Attorney General over the last twenty-two years has favored and authorized wire tapping by federal officers in security cases and other heinous crimes such as kidnapping. Moreover, this policy adhered to by my predecessors has been taken with the full knowledge, consent and approval of Presidents Roosevelt and Truman.

Although monitoring of telephone communications by the FBI upon authority of the Attorney General and under specific safeguards to the individual has been established practice for many years, yet the rule in the federal court since the first *Nardone* decision in 1937 has been that evidence obtained through this technique is inadmissible to establish the guilt of the accused. This rule of evidence persists, not because of any provision or right contained in the Constitution, but solely because of section 605 of the Federal Communications Act.

Under section 605, as construed by the Supreme Court, the wiretaps might disclose that the accused has stolen and peddled important bomb secrets, or that he was plotting the assassination of a high government official, or that he was about to blow up a strategic defense plant or commit some other grave offense, but neither the information obtained thereby, or other information or clues to which the wiretaps indirectly led could be introduced to convict this defendant. Indeed, if either all the evidence or any part of the vital evidence was obtained through this means, the defendant would go scot-free.

It was this loophole in our federal law of evidence that led to reversal of the conviction in the *Coplon* case[22] even though Judge Learned Hand,

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21 Statement prepared for delivery before the Third Annual Institute of the Smith County Bar Association in Tyler, Texas, April 7, 1951. See also letter of Feb. 2, 1952, from Mr. McGrath to Chairman of the House Committee on the Judiciary on H.R. 1947.

22 United States v. Coplon, 185 F.2d 629 (2d Cir. 1950), cert. denied, 342 U.S. 920 (1952). In this case, Judith Coplon, a former employee of the Department of Justice was convicted of an attempt to deliver certain government documents to a Russian agent. Upon appeal to the Court of Appeals for the Second Circuit, the defendant urged that her conviction should be reversed. Of the grounds for reversal two were that the prosecution had failed to prove that the "taps" of her wires, conceded to have been made, did not "lead" to any part of the evidence on which she was convicted; and that the trial court improperly cut short her effort to prove that telephone talks to which she was a party had been intercepted before the time when the conceded "taps" began to be made. Some of the "tap" records were withheld from scrutiny by defense on the ground that disclosure would be of peril to national security. These "secret" taps were examined by the judge alone. On the basis of all the records, including those which the defense could not see, on the basis of oral testimony upon the hearing, the judge decided that none of the Government's trial evidence stemmed from wiretapping, and that it was admissible. The

speaking for the court of appeals, refused to dismiss the indictment because the "guilt is plain."[23]

Everyone agrees that invasion of privacy is repugnant to all Americans. But how can we possibly preserve the safety and liberty of everyone in this nation unless we pull federal prosecuting attorneys out of their strait-jackets and permit them to use intercepted evidence in the trial of security cases and other heinous offenses such as kidnapping?

Let us not delude ourselves any longer. We might just as well face up to the fact that the communists are subversives and conspirators working fanatically in the interests of a hostile foreign power. Again and again they have demonstrated that an integral part of their policy is the internal disruption and destruction of this and other free governments of the world. That they penetrated our diplomatic corps was shown by the lesson learned from Alger Hiss and others. That they had even greater success in atomic espionage and in stealing crucial secrets was shown by the lesson learned from Klaus Fuchs, the Rosenbergs and others. That they wove their interlocking web of intrigne in the State, Treasury, Labor and Agriculture Departments, on Capitol Hill, in national defense and in the U.N. is shown by many others now in the communist hall of infamy.[24]

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court of appeals held that the judge's failure to disclose all the "taps" to the defendant violated the Sixth Amendment, which requires the accused to be confronted with the witnesses against him. See, "The Coplon Case: Wiretapping, State Secrets and National Security," 60 Yale L.J. 736 (1951).

Upon another appeal, Coplon v. United States, 191 F.2d 749 (D.C. Cir. 1951), cert. denied, 342 U.S. 926 (1952), the Court suggested a further restriction on wiretapping in holding that interception of telephone calls between a defendant and her attorney during the trial violated the due process clause of the Fifth Amendment by denying to defendant the effective aid of counsel.

[23] Yet in a number of states, wiretap evidence is used in local courts in prosecution of even mild offenses. Westin, supra note 2. See Notes, 40 J. Crim. L. and Criminology 476, 477 (1949); 53 A.L.R. 1485 (1928); 66 A.L.R. 397 (1930); 134 A.L.R. 614 (1941). See also, 71 A.L.R. 5, 61 (1931); 105 A.L.R. 326 (1936). However, this rule may prevail in those state courts principally because at common law evidence was admissible even if obtained through unlawful means. Olmstead v. United States, 277 U.S. 438, 466-467 (1928). See On Lee v. United States, 343 U.S. 747, 755 (1952); 8 Wigmore, Evidence §§ 2183, 2184(b) (3d ed. 1940). In Schwartz v. Texas, 344 U.S. 199 (1952), the Supreme Court held that section 605 of the Communications Act did not bar wiretapped conversations as evidence in a state court. In Wolf v. Colorado, 338 U.S. 25 (1949) the Court held that in a criminal prosecution in a state court the Fourteenth Amendment does not forbid admission of relevant evidence even though obtained by an unlawful and unreasonable search and seizure. See also, Note, 13 Md. L. Rev. 235 (1953).

[24] "Interlocking Subversion in Government Departments," Report of Subcommittee on the Judiciary, 83rd Cong., 1st Sess. (July 30, 1953); Report of Special Senate Subcommittee on Security Affairs, 83rd Cong., 1st Sess. (April 17, 1953); Report of House Committee on Un-American Activities, "The Shameful Years," (Dec. 30, 1951); Report of Senate

It is almost impossible to "spot" them since they no longer use membership cards or other written documents which will identify them for what they are. As a matter of necessity, they turn to the telephone to carry on their intrigue. The success of their plans frequently rests upon piecing together shreds of information received from many sources and many nests. The participants in the conspiracy are often dispersed and stationed in various strategic positions in government and industry throughout the country. Their operations are not only internal. They are also of an international and intercontinental character. The Senate Subcommittee on the Judiciary recently reported that "Thousands of diplomatic, military, scientific and economic secrets of the United States have been stolen by Soviet agents in our government and other persons closely connected with the Communists."[25] When the enemy will strike next, who will be its next victim, what valuable government secret will be the subject of a new theft, where a leading fugitive conspirator is being concealed, are all matters communist agents can freely talk about over the telephone today without fear that they may ever be confronted in a criminal proceeding with what they said.

Moreover, if you get a communist or fellow-subversive on the witness stand, you cannot expect him to tell the truth of his own treachery or that of his confederates. It is his duty as a Communist to lie under oath; to throw every obstacle in the way of conviction of these fellow party members; to defend these members by all possible means; and to refuse to give testimony for the state in any form.[26]

Since these enemy agents will not talk in court or speak the truth, and since federal agents are forbidden from testifying to what they heard over the phone, the Department of Justice is blocked from proving its case and sending these spies and espionage agents to jail where they belong. The result is that many of the persons responsible for these grave misdeeds are still at large.

Now you would not think of releasing a mad dog to prey on our children. You would put him away where he could do no future harm. So, too, it is not enough merely to uproot and dismiss the disloyal from government or out of other sensitive positions in industry or commerce. They should be tried fairly with all the constitutional safeguards to an accused

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Committee on the Judiciary, Sen. Rep. 2230, 81st Cong., 2d Sess. 10-12, 16, 24-25 (1950) on Internal Security Act [(8 U.S.C. 22 (Supp. 1950))]. And see Harisiades v. Shaughnessy, 342 U.S. 580 (1952); Carlson v. Landon, 342 U.S. 524 (1952).

25 "Interlocking Subversion," etc., supra note 24, at 49.

26 See Hook, "The Fifth Amendment—A Moral Issue," New York Times Magazine Section, Nov. 1, 1953, p. 9.

that our law provides. But if the evidence establishes their guilt, be it from their overt actions or from the lips of their confederates, or from intercepted evidence obtained by federal officers as authorized, these wrongdoers too should be put away where they will no longer continue to prey on the liberty and freedom of this nation. The mere fact that they have cleverly resorted to the telephone and telegraph to carry out their treachery should no longer serve as a shield to punishment. The rule of evidence which has protected them all these years should now be abolished. Surely this nation need not wait until it has been destroyed before learning who its traitors are and bringing them to justice.[27]

There is evidence in the hands of the Department as the result of investigations conducted by the FBI which would prove espionage in certain of these cases. If the law is changed so as to admit evidence obtained through wire tapping, the Department will be in a position to proceed with a re-examination of these cases to determine which shall be prosecuted.

We turn now to the contentions raised by the opponents to pending bills authorizing wire tapped evidence to be admitted in the Federal courts. There is, of course, one group of persons who will oppose these pending bills only because they will seal the fate of many spies and subversives who have heretofore found refuge in our existing wiretap law. Unquestionably, these persons will loudly deplore the need of any change in the law; they will piously predict dire results to the freedom they themselves are seeking to destroy; and they will attempt to engage the aid of unsuspecting liberal forces in order to keep the hands of enforcement officials tied. These are typical tactics of our internal enemies with which we are all familiar. Aware of them, we may be on our guard.

We must be careful, however, not to confuse these persons with loyal statesmen, lawyers, judges and others who sincerely believe that the country stands to lose more than to gain from admitting wire tapped evidence in federal criminal cases. It would be a sad day in America if a person becomes suspect merely because he does not see eye-to-eye with us on how best to resolve the ever-present conflict between the rights of society on the one hand, and the rights of the individual on the other.

What Chief Justice Warren recently said needs frequent reminder:

> When men are free to explore all avenues of thought, no matter what prejudices may be aroused, there is a healthy climate in the nation. . . . The

[27] Senator Ferguson in Newsweek, Jan. 11, 1954, p. 20, col. 1; 100 Cong. Rec. A. 56 (Jan. 7, 1954).

> founding fathers themselves were not orthodox either in thought or expression. They recognized both the right and value of dissent in their generation.[28]

And Chief Justice Hughes speaking for the Supreme Court has said:

> The greater the importance of safegnarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need . . . for free political discussion to the end that government may be responsive to the will of the people, and that changes, if desired, may be made by peaceful means.[29]

In sum, the principal reasons for opposition by this latter group to the pending bills are that wire tapping is still "dirty business;" that we should not fight Communist spies by imitating their methods; that wiretaps will be used to harm innocent persons; that privacy will be invaded, and people will be apprehensive about using the phone; and that the authority conferred upon federal officers to wiretap may be abused. While these arguments are persuasive on their face, they do not stand up on analysis.

First, consider the claim that intercepted evidence should not be admissible in Federal courts because wire tapping is "dirty business." Unquestionably, this is a strong argument. Inherently, we people have little liking for eavesdropping of any kind. Fair play and freedom mean so much to us. Wiretap snooping reminds us of the methods employed by the Nazi Gestapo and the Soviet OGPU.

Yet while some of these people would ban such evidence, they seem to be unaware that the law presently admits evidence which is obtained by informers; by eavesdroppers at someone's keyhole or window or party line;[30] by an officer concealed in a closet; by installation of a recording device on the adjoining wall of a man's hotel or office;[31] by transmitters concealed on an agent's person;[32] by authorized search and seizure. Moreover, under the law, a Government witness may testify to every word of his telephone conversation with a defendant, and his testimony may even be distorted by an imperfect memory or character. Yet the federal court would not admit an exact transcription of an inter-

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28 Address "Free Investigation and Faithful Experiment" before Association of the Alumni of Columbia College, New York Times, January 15, 1954, p. 8, col. 2.

29 De Jonge v. Oregon, 299 U.S. 353, 365 (1937).

30 Cohn v. State, 120 Tenn. 61, 109 S.W. 1149 (1908) (peeping); DeLore v. Smith, 67 Ore. 304, 136 Pac. 13 (1913) (eavesdropping on party line).

31 Goldman v. United States, 316 U.S. 129 (1942). And see Schoberg v. United States, 264 Fed. 1 (6th Cir. 1920), cert. denied, 253 U.S. 494 (1920). Irvine v. California, 347 U.S. 128 (1954) (microphone in hall and closet).

32 On Lee v. United States, 343 U.S. 747 (1952).

cepted conversation in the form of a phonograph recording.[33] And the Supreme Court only recently held that although evidence is unlawfully seized, it is admissible in a federal criminal proceeding to establish that the defendant lied.[34]

There is little, if anything, to distinguish between these approved methods of obtaining and admitting evidence, and wiretaps which are not admissible.[35] In these modern times, society would be severely handicapped unless it could resort to these methods to combat crime and to protect itself from internal enemies.

In his monumental work on evidence, Professor Wigmore has dealt with the argument that wiretap evidence should be inadmissible because it is unethical and dirty business. His answer is:

> But so is likely to be all apprehension of malefactors. Kicking a man in the stomach is "dirty business," normally viewed, but if a gunman assails you and you know enough of the French art of savatage to kick him in the stomach and thus save your life, is that dirty business for you?[36]

Professor Wigmore advocates legislation which would permit wire tapping by federal law enforcement agencies with the approval of the highest official of the department.

Re-evaluation of the critical situation today makes it clear that authorized wire tapping under careful restrictions in cases involving our national security is not "dirty business" at all, but a common sense solution by Congress which will protect the liberty and security of all the people from those who wish to see it impaired.

Prior to the invention of the telephone and telegraph, you could track a criminal down by shadowing him and checking his contacts. These days, most spies, traitors, and espionage agents are usually far too clever and devious in their operations to allow themselves to be caught walking down the street with their accomplices.[37] Trailing them or trapping them is difficult unless you can tap their messages. Convicting them is practically impossible unless you can use these wiretaps in court. And it is, of course, too late to do anything about it after sabotage, assassinations and "fifth column" activities are completed.[38]

It is therefore neither reasonable nor realistic that Communists should

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33 Bernstein, "Fruit of the Poisonous Tree," 37 Ill. L. Rev. 99, 112-113 (1942).

34 Walder v. United States, 347 U.S. 62 (1954).

35 See Note, 40 J. Crim. L. & Criminology 476, 477 (1949); Foley v. United States, 64 F.2d 1 (5th Cir. 1933) cert. denied, 289 U.S. 762 (1933).

36 8 Wigmore, Evidence § 2184(b), p. 50. See also, Note by Wigmore, 23 Ill. L. Rev. 377 (1928).

37 See Time, Jan. 5, 1953, p. 13, col. 1.

38 See Senator Ferguson, supra note 27.

be allowed to have the free use of every modern communication device to carry out their unlawful conspiracies, but that law enforcement agencies should be barred from confronting these persons with what they have said over them.

Some opponents to wire tapping also claim that they are concerned with the protection of innocent persons who through no fault of their own may have become enmeshed with spies and subversives. This argument has no real validity. The proposed laws will not permit the use of this evidence against innocent persons. Its use will be confined solely to criminal proceedings initiated by the Government against those criminals who seek to subvert our country's welfare. No innocent person would be hurt by legislation authorizing wiretaps to be admissible against our internal enemies. No intercepted evidence could ever be made public until a grand jury had indicted the accused for espionage, sabotage or related crimes. Even upon a trial, no conversation or evidence obtained by wiretap could be introduced in court until a Federal judge had concluded that it was relevant material and obtained with the approval of the Attorney General.

Testifying in recent hearings on wire tapping, Miles F. McDonald, former Assistant United States Attorney and District Attorney of Kings County, New York, said the following on this point:

> I have never seen any case where an innocent person was harmed by a wiretap order, and I have been at the business for 14 years. If you do not give the people the right to tap a wire, you are just giving the enemies of our country the right to a secret dispatch case that you cannot possibly find out about. . . . You are giving to the enemy every bit of technological progress.[39]

Opponents of wire tapping also charge that it encourages invasion of the individual's privacy; that the principle is wrong; that it violates the spirit if not the language of the First Amendment safeguarding freedom of speech, in that people are made fearful of using the telephone;[40] and that a person would have to mind his speech over the phone lest a wire tapper would be waiting for him "to put his foot into his mouth."[41] It would be just as reasonable to claim that people are afraid of walking in the street because policemen carry clubs and guns.

Contrary to general impression, authorizing the introduction of inter-

[39] Hearings on Wiretapping for National Security before Subcommittee No. 3, House Committee on the Judiciary on H.R. 408, 83rd Cong., 1st Sess. 86 (1953).

[40] Wall Street Journal, Nov. 19, 1953; Arnold, "Wire Tapping: The Pros and Cons," New York Times, Magazine Section, Nov. 29, 1953, p. 12. Hearings supra note 39, at 53-65.

[41] Saturday Evening Post, Dec. 12, 1953, p. 27.

cepted evidence in the federal court would not interfere in any way with telephone privacy. As the law stands now, it does not stop people from tapping wires. It is still useful to those who make private use of it for personal gain. What has been stopped is the use of such evidence to enforce the laws against criminals. As Mr. Justice Jackson observed while Attorney General, the decisions only protect those engaged in incriminating conversations from having them reproduced in court. These decisions merely lay down rules of evidence. He said:

> Criminals today have the free run of our communications systems, but the law enforcement officers are denied even a carefully restricted power to confront the criminal with his telephonic and telegraphic footprints.[42]

It is also claimed that even controlled, restricted monitoring of the wires should not be permitted since the authority may be abused by irresponsible and indiscriminate use of it.[43] This apprehension is entirely understandable. Unfortunately, wire tapping has been brought into disrepute because of widespread abuse of it by private peepers in marital investigations; by snoopers in labor, business, and political rivalries; and by some unscrupulous local enforcement officers in shaking down racketeers, gamblers and keepers of disorderly houses.[44] The stigma and taint which has accompanied improper use of wire tapping for private gain has contributed in large measure to the distrust and distaste which many people now have for lawful use of it by federal officers in the public interest.

The fact that the technique has been abused by private persons and some local enforcement officers for private benefit affords no reason for believing that it will be abused by the Federal Bureau of Investigation. Experience demonstrates that the Federal Bureau of Investigation has never abused the wiretap authority. Its record of "nonpartisan, nonpolitical, tireless and efficient service over the years gives ample assurance that the innocent will not suffer in the process of the Bureau's alert protection of the Nation's safety."[45] Mr. Hoover, himself, opposes wire tapping as an investigative function except in connection with crimes of the most serious character, such as offenses endangering the

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[42] Attorney General Jackson's letter of March 19, 1941 to Hon. Hatton W. Sumners, Chairman, House Committee on the Judiciary on H.R. 2266; see also his letter of Feb. 10, 1941 on H.R. 3099; Hearings before House Subcommittee on the Judiciary on H.R. 2266 and H.R. 3099, 77th Cong., 1st Sess. 18-20 (1942).

[43] See, Senator Morse in Newsweek, Jan. 11, 1954, p. 20, col. 1; 100 Cong. Rec. A. 57 (Jan. 7, 1954). Also see dissent of Mr. Justice Frankfurter in On Lee v. United States, 343 U.S. 747, 760-761 (1952); Arnold, supra note 40.

[44] Westin, supra note 2 at 167-172.

[45] "No More Coplon Fiascos," Colliers for Aug. 21, 1953, p. 110.

safety of the nation or the lives of human beings. In addition he has insisted that the technique be conducted under strict supervision of higher authority exercised separately in respect to each specific instance.[46]

As President Franklin D. Roosevelt said in answer to the same objection:

> This power may, of course, be abused; abuse is inherent in any governmental grant of power. But to prevent that abuse [wire tapping] so far as it is humanly possible to do so, I would confine such legislation to the Department of Justice and to no other department.[47]

And the Supreme Court has declared in this connection:

> It is always easy to conjure up extreme and even oppressive possibilities in the exertion of authority. . . . Congress which creates and sustains these agencies must be trusted to correct whatever defects experience may reveal.[48]

So too, should abuse ever arise in the administration of the wire tapping laws, then, as has happened with other federal laws, Congress may be counted on to withdraw or restrict the power so that the abuse is ended, and the public protected.[49]

The answer to all these fears is summed up by the forceful statement which J. Edgar Hoover, Director of the FBI, once made:

> I dare say that the most violent critic of the FBI would urge the use of wire tapping techniques if his child were kidnapped, and held in custody. Certainly there is as great a need to utilize this technique to protect our country from those who would enslave us and are engaged in treason, espionage, and subversion and who, if successful, would destroy our institutions and democracy.[50]

Surely Congress is not wedded to a law of its own making which passage of time has shown to be unworkable and detrimental both to the individual and the common good. What Judge Learned Hand once said respecting another law is apt here: "There no doubt comes a time when a statute is so obviously oppressive and absurd that it can have no

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[46] 58 Yale L.J. 423-424 (1949); Hearings on H.R. 2266 to authorize wiretapping, 77th Cong., 1st Sess. 112 (1941). Hearings on H.J. Res. 283, 77th Cong., 2d Sess., pp. 28-37 (1942).

[47] Letter of President Roosevelt, Feb. 21, 1941 to Hon. Thomas H. Eliot of the House of Representatives on H.R. 2266, Hearings supra note 18, at 257. Reprinted in Washington Post, Feb. 26, 1941.

[48] Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134, 146 (1940); Luther v. Borden, 7 How. 1, 44 (U.S. 1849).

[49] "It must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as courts." Missouri, K. & T. Ry. v. May, 194 U.S. 267, 270 (1904).

[50] Statement before Subcommittee of the House Appropriations Committee, Jan. 13, 1950, p. 230.

justification in any sane polity."[51] In light of new conditions and its experience, Congress may properly curb abuse of the existing law; "plug" up a serious gap in enforcement so that those guilty of espionage and related offenses will no longer escape punishment; and thereby remove the roadblock that now exists between society and its security. A recent editorial framed the question in these words:

> We've got wire tapping now. Why not use it where it will do the most good—against our national enemies?[52]

This is the aim of the various proposals pending in Congress.[53] These proposals seek to strike a fair balance between the rights of the individual and society in permitting intercepted communications to be admissible in Federal criminal proceedings under certain safeguards and in specific cases involving the Nation's security and defense, as well as kidnapping.

The authors of these bills represent two different schools of thought. One believes that the technique should be resorted to only after court permission; the other after authorization of the Attorney General alone.[54]

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[51] Hand, "Due Process of Law and the Eight Hour Day," 21 Harv. L. Rev. 495, 508 (1908).

[52] Washington, D. C., "News" Dec. 1, 1953.

[53] The pending bills authorizing wiretapping are H.R. 477 (Congressman Keating), H.R. 3552 (Congressman Walter), H.R. 408 (Congressman Celler), H.R. 5149 (Congressman Reed), H.R. 7107 (Congressman Clardy), S. 2753 (Senator Potter) and S. 832 (Senator Wiley). There is also one bill introduced on February 18, 1953 by Congressman Chudoff, H.R. 3155, which prohibits interception of telephone conversations by any officer or employee in the Executive Branch of the Government.

[54] H.R. 477, introduced by Congressman Keating on January 3, 1953 and its counterpart S. 832, introduced by Senator Wiley on February 6, 1953, are illustrative of Bills which authorize the admissibility of wiretap evidence provided prior court order of a Federal judge is obtained. These bills also authorize the FBI and the various military intelligence services, under rules and regulations to be prescribed by the Attorney General, to wiretap or intercept or acquire telegrams, radiograms or other communications without regard to the limitations contained in section 605 of the Communications Act of 1934. Wiretapping would be permitted only to prevent interference with the national security and defense by treason, sabotage, espionage, seditious conspiracy, violations of neutrality laws, or violations by foreign agents and related acts. A federal judge would be authorized to grant an order to intercept such information only upon a showing that there is reasonable cause to believe that the communications may contain information which would assist in the conduct of investigations of violations of such laws.

These bills further provide that no person shall divulge or use any information thus intercepted for other than authorized purposes. Violation of these requirements is punishable as a felony. H.R. 5149, introduced by Congressman Reed on May 12, 1953, provides simply that information "heretofore or hereafter" obtained by the FBI, upon express approval of the Attorney General, in the course of any investigation involving the national security or defeuse, shall be admissible in evidence in criminal proceedings in any court established by Act of Congress.

H.R. 408 introduced by Congressman Celler on January 3, 1953, provides for interception of communications both in cases involving the safety of human life as well as

The objections to vesting authority to permit wire tapping in the Attorney General are that he should not be allowed to police his own actions; that the authority may be abused when Government prosecutors turn out to be overzealous; that the court is more likely to be objective and curb indiscriminate wire tapping than the Attorney General; and that wire tapping is somewhat like a search into the privacy of an individual's affairs, and as in the case of a search, requires supervision by the courts.[55]

The provision requiring an order by a Federal judge permitting wire tapping on a showing that there is reasonable cause for the order is patterned after a similar law in force in the State of New York for several years.[56]

During the hearings on some of these bills, important objections to the requirement of a court order as a condition to wire tapping were crystallized. It was claimed that greater secrecy, uniformity, speed, and better supervision by Congress over the administration of wire tapping could be secured if no court order was necessary, and that abuse of the technique would be avoided by requiring the approval of the Attorney General alone.[57]

Unquestionably, secrecy is essential for the success of wire tapping. It has been wisely said that "three men can keep a secret only if two men die."[58] There is indeed strong danger of leaks if application is made to a court, because in addition to the judge, you have the clerk, the stenographer and some other officer like a law assistant or bailiff who may be apprised of the nature of the application.[59]

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those cases involving national security and defense. Under this bill too, merely the approval of the Attorney General is required. Like H.R. 5149, H.R. 408 also permits the use of wiretap evidence obtained in the past with the express approval of the Attorney General. Such a law would not offend the Ex Post Facto provisions of the Constitution since it would not authorize conviction upon less proof in amount or degree than was required when the crime was committed, but merely change the rules of evidence. Cf. Thompson v. Missouri, 171 U.S. 380 (1898).

55 Hearings on Wire Tapping, supra note 39, at 56, 63, 66, 80-81.

56 Harlem Check Cashing Corp. v. Bell, 296 N.Y. 15, 68 N.E.2d 854 (1946); N.Y. Const. Art. 1, § 12; N.Y. Code Crim. Proc. § 813(a); N.Y. Penal Law § 552(a). Westin supra note 2, at 194-197 indicates that the New York Law has been abused. Westin recommends wiretapping under a similar but more strictly controlled system under court supervision and order. See too, Woodring, Wire Tapping 188, 191-192 (1949); Note, 1953 Wash. U.L.Q. 340, 349-350. On the other hand, the view has also been expressed that the New York law has worked well. See Hearings supra note 39, statement of Congressman Keating, p. 5; Testimony of Miles F. McDonald of July 8, 1953, pp. 71-90. See too, Greenman, Wiretapping and Civil Liberties 44-45 (1938).

57 Hearings supra note 39, at 14-19.

58 Id. at 18.

59 Id. at 19.

It was also pointed out that court consideration and permission would make for lack of uniformity. There are about two hundred and twenty-five different Federal district judges, each of whom would have his own measure of what constitutes "reasonable cause." These differences among various judges would make for considerable confusion as well as uneven and patchwork application of the wire tapping law.[60]

Another objection to the requirement of the court order was that it would be difficult for members of the Congress to exercise any supervision over so many Federal judges to determine whether they are properly discharging their duty under the law. It would make it far easier for Congress to watch the situation without going too far afield, if the authority were centralized in the Attorney General. This was also the view of Mr. Justice Jackson while Attorney General in opposing the search warrant procedure which would authorize over two hundred Federal judges to permit wire tapping. He was not only concerned with the loss of precious time involved in obtaining a court order, but felt that probable publicity and filing of charges against persons as a basis for wire tapping before investigation was complete might easily result in great injury to such persons. He too concurred in the opinion that "a centralized responsibility of the Attorney General can easily be called in question by the Congress, but you cannot interrogate the entire judiciary."[61]

There are still other considerations which seem to support the bills to permit wire tapping upon authority of the Attorney General rather than by the court.

First, the Attorney General is the cabinet officer primarily responsible for the protection of the national security. This duty, of course, extends throughout the entire United States, and is not limited to any particular district or area of the country. He is the officer of the Government in the best position to determine the necessity for wire tapping in the enforcement of the security laws. Because the Attorney General is charged with the responsibility of law enforcement, he should be given the authority to use his judgment and discretion within constitutional limits to obtain evidence necessary to protect our national security.

Second, security cases do not lend themselves to investigations on a limited area basis. They often extend through numerous judicial districts. In that connection, it should be recalled that the Gold espionage network extended from New York to New Mexico, covering many points in

[60] Id. at 19.

[61] Letter of March 19, 1941, Hearings, supra note 18, at 20.

between. The Attorney General, whose responsibility of law enforcement is nation-wide, is more likely to have a better over-all picture of the need for granting the authority to wiretap than a judge in any one district. For these reasons, a bill permitting designated Government agents to wiretap upon authority of the Attorney General in security cases where secrecy and speed are so vital, would, in my opinion, be most effective in achieving these aims.

The essential thing is that we do not put off any longer authorizing the admissibility of wire tapped evidence obtained by Government agents in those cases involving the national security or defense, and kidnapping. If our free and democratic country is to endure, we must not delay any further making those who plot against it pay for their betrayal. If we are to be safe, the wires of America must cease being a protected communications system for the enemies of America.

Subversives, spies and the espionage agents are unquestionably hoping that Congress will engage in such a heated squabble on this issue as again to end up in hopeless stalemate as it has in the past. I know that Congress at this critical time will not permit treachery and intrigue to flourish and to continue unabated over the wires free from punishment. I feel confident that Congress will fully reflect the great unity and strength of the entire country and take the necessary action without delay. It will do so without regard to partisanship as it has so often done in the past, when the people's security and safety are at stake.