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# The Wiretapping- Eavesdropping Problem: A Legislator's View

Thomas C. Hennings, Jr. \*

## INTRODUCTION

The ethics of wiretapping has been vehemently debated for many years — at least since the famous case of *Olmstead v. United States*,<sup>1</sup> where the Supreme Court of the United States divided five-to-four in upholding the constitutionality of wiretapping. Clearly the most widely quoted judicial utterance on the subject was made in dissent by Mr. Justice Holmes in *Olmstead* when he condemned wiretapping as “dirty business.”<sup>2</sup> However, often overlooked in the wake of this highly descriptive language of the eminent Justice are his more judicially-toned words which immediately preceded that strong rebuke of improper police activity:

I think . . . that the Government ought not to use evidence obtained and only obtainable by a criminal act. . . . [W]e must consider the two objects of desire, both of which we cannot have, and make up our minds which to choose. It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. . . . We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part.<sup>3</sup>

In retrospect, we can see that these words of more than thirty years ago foreshadowed the bitter controversy which continues today, with the proponents of tapping on the one hand pleading that it is a necessary weapon with which to combat modern crime, and the opponents on the other hand charging that the resulting deprivations of privacy of innocent persons reek of totalitarianism.

Concurrent with this continuing debate over the *ethics* of wiretapping has been a running discussion concerning its *legality*. Over

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\* United States Senator from Missouri; Chairman, Senate Subcommittee on Constitutional Rights.

1. 277 U.S. 438 (1928).

2. *Id.* at 470.

3. *Id.* at 469-70.

the last several years, a considerable body of literature has developed on the subject of wiretapping, particularly with respect to analysis of judicial constructions of section 605 of the Communications Act of 1934<sup>4</sup> and related state statutes. Although many analysts interpret section 605 as imposing a total prohibition on wiretapping, some federal officers in fact do engage in tapping.<sup>5</sup> And according to a recent study directed by Mr. Samuel Dash, wiretapping by state officers is widespread.<sup>6</sup> A few states have even enacted legislation *authorizing* wiretapping by law enforcement agencies under court regulation.<sup>7</sup>

Within this confused ethical and legal framework, questions have frequently arisen regarding the amount of wiretapping actually being done and the effectiveness of the attempts to proscribe or control it. In *The Eavesdroppers*, Samuel Dash, Robert Knowlton, and Richard Schwartz attempt to provide some answers, and I believe they have made an extremely valuable contribution toward an understanding of the problems raised by wiretapping and "bugging." The book was of particular interest to me as chairman of the Senate Subcommittee on Constitutional Rights, because we have made our own study of possible infringements on the Bill of Rights through wiretapping and other electronic eavesdropping, and in many respects the two studies tend to complement and corroborate each other. *The Eavesdroppers* describes the operations of those who listen in on conversations to which they are not parties. The study partly reflects examination of evidence already gathered by other groups, but it also introduces extensive new material gathered by Dash and his associates. Dash contends that, while he generally does not name the sources of this information, none of it is hearsay for it was supplied to him by persons actually engaged in eavesdropping. Dash appears to have successfully avoided any prejudgments; at least, he arrives at no explicit conclusions and makes no recommendations. The book is essentially a matter-of-fact recitation of the information he and his associates gathered over many months of study and investigation.

The gathering of the information for *The Eavesdroppers* was accomplished with some difficulty—a difficulty with which we on the Senate Subcommittee which continues to study the subject of wiretapping and eavesdropping have some acquaintance. The majority of those engaged in wiretapping and other forms of eavesdropping

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4. 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1958).

5. Letter from Attorney General William P. Rogers to the Author, July 2, 1959.

6. See generally DASH, KNOWLTON & SCHWARTZ, *THE EAVESDROPPERS* (1959) [hereinafter cited as DASH].

7. See, e.g., N.Y. CONST. art I, § 12; N.Y. CODE CRIM. PROC. § 813-a; LA. REV. STAT. § 14:322 (West 1950).

are not inclined to talk freely about their trade. Dash explained his research difficulties as follows:

At first, we attempted to do this by the use of investigators who had had prior connections, whether through the Federal Bureau of Investigation or State Police connection.

As it turned out, the matter is so controversial, and the people who had at one time been connected with this topic were so concerned, that although they originally agreed to serve as investigators, during the course of the investigation they failed to disclose any fact worthwhile and indicated that they did not desire to continue with the investigation.<sup>8</sup>

Dash has recited instances of the usefulness of electronic eavesdropping as a law enforcement tool<sup>9</sup> along with examples of its many abuses, both by law enforcers and private investigators. I am inclined to believe that for most readers the recitation will be a disturbing experience. Even the reader who accepts the claim—which I do not—that wiretapping is an indispensable tool for the control of crime, will have difficulty in escaping the conclusion reached by Mr. Justice Holmes that it is a “dirty business.” And agreement with Holmes’ condemnation of wiretapping becomes even more unavoidable when one recognizes, as Dash did by the very title of his book, that the “electronic” threats to personal privacy are not confined to wiretapping, which has been well-publicized. From the Subcommittee’s investigation, it is my judgment that, of the electronic devices presently in use, the concealed microphone or “bug” is actually the more insidious, for it can intercept *all* private conversations and in effect is capable of destroying the privacy of man’s ultimate retreat, the rooms of his home. Moreover, it provides a substantial practical danger, for it can be easily and inexpensively installed and concealed. And, further, as Dash observed when he testified before the Subcommittee in a public hearing on Wiretapping, Eavesdropping and the Bill of Rights: “[W]hereas so much attention has been put to wiretapping, the widest use of eavesdropping by private people and law enforcement today is through the use of microphones, transmitters, automatic cameras, closed-circuit television. . . .”<sup>10</sup>

Admittedly, law enforcement has become increasingly difficult, particularly in concentrated urban areas where crime has become a large and well-organized business. Law enforcement officials complain bitterly when attacks are made on their use of the wiretap and the “bug” in the performance of their duties. For instance, Edward

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8. *Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 86th Cong., 1st Sess., pt. 3, at 512 (1959) [hereinafter cited as *1959 Hearings*].

9. As a former prosecutor, Dash has advocated wiretapping in criminal investigation.

10. *1959 Hearings* pt. 3, at 519.

S. Silver, District Attorney for Kings County, New York, and President of the National Association of County and Prosecuting Attorneys, observed in his appearance before the Subcommittee on Constitutional Rights:

[O]ne of our leading newspapers in New York every once in a while would write an editorial about this "dirty business" of wiretapping. . . .

I . . . spent a couple of hours with one of their editors and I am glad to say that they published an editorial soon thereafter in which they said wiretapping is a dirty business, but so is narcotics and so is murder and labor racketeering. In this modern world it doesn't make sense to say to the District Attorney, "you keep on with your horse and buggy system; don't you use automobiles and modern devices."<sup>11</sup>

W. H. Parker, Chief of Police in Los Angeles, has described police work in general in a similar vein:

It is often a dirty business—a very dirty business—because of the warped nature of the criminals with whom the police must often deal. But history has shown and is continuing to show that it is a necessary business, and that the responsibility must be placed on someone. The men of the police service are aware of this responsibility, and in choosing their profession voluntarily assume it. They can discharge that responsibility only to the extent that society supports them. If society chooses, for reasons of its own, to handicap itself so severely that it cannot or will not deal effectively with the criminal army, it is doubtful that free society as we now enjoy it will continue; for either crime will increase until there is no internal security worthy of the name, or the police force will be so expanded that the crushing financial and moral burden of a police state will be here whether we like it or not.<sup>12</sup>

As a former prosecuting attorney in the City of St. Louis, I can sympathize to some extent with District Attorney Silver, Chief Parker, and other concurring members of the law enforcement fraternity. However, in the light of testimony given before the Senate Subcommittee on Constitutional Rights, the House Committee on the Judiciary, the Savarese Committee in the New York State Legislature, and other groups which have studied this problem, I cannot escape the conclusion that wiretapping and bugging have frequently been used to make gross invasions on the privacy of innocent persons and that they pose a serious threat to the civil liberties which distinguish our democratic society from authoritarian regimes.

#### I. AMBIGUITY OF PRESENT WIRETAPPING LAW

State and federal laws bearing on wiretapping are diverse and often conflicting. As a result, a determination of when, where, and to

11. *Id.* at 543-44.

12. Parker, *Surveillance by Wiretapping or Dictograph: Threat or Protection?*, 42 CALIF. L. REV. 727, 728 (1954).

what extent—if at all—wiretapping is lawful is difficult, if not impossible to make. This confusion began in 1928 when the Supreme Court of the United States held in the *Olmstead* case<sup>13</sup> that wiretapping and the use in a criminal trial in a federal court of evidence procured by tapping were not per se violations of either the fourth or fifth amendments. Some students of the law, however, are inclined to believe that, were that issue to be argued again, the present Court would hold to the contrary—at least with regard to the fourth amendment. They note the high quality and vigor of the dissents in *Olmstead*,<sup>14</sup> the predictions of wiretapping abuses then yet to come—which have in fact become commonplace in the generation since *Olmstead*—and the need for resistance to destroying a person's privacy in an age which has seen individual rights undermined and eroded severely.

Current confusion, however, stems mainly from the lack of uniformity of pertinent statutory provisions. Section 605 of the Federal Communications Act of 1934 prohibits the interception and divulgence of any communications by wire or radio—a seeming proscription of all wiretapping. Nevertheless, wiretapping with certain restrictions is authorized in some states by statute. But statutes in some other states impose total bans on tapping. And still others have no definitive legislation on the subject.<sup>15</sup> Moreover, this confusion has been multiplied by varied and often inconsistent judicial interpretations of statutes which supposedly are similar. The consequences of the disarray of the law are pungently set forth by Dash:

People are not to be blamed if they do not understand the laws about wiretapping. There is no uniformity among states and there is conflict between the laws of several states and the federal law. Picture the dilemma of the New York City police officer. The New York Constitution and the statutes of New York authorize him to wiretap if he first obtains a warrant from a judge. This is all familiar to him. It is the same procedure he follows in search and seizure. Yet the Supreme Court of the United States, interpreting the Federal Communications Act which prohibits wiretapping, has told him that the supreme law of the land is the United States congressional prohibition against wiretapping, embodied in the Federal Communications Act, and that the New York constitutional and statutory authorization of police wiretapping is invalid.

In 1953, Pennsylvania police officers who knew that the Federal Communications Act prohibited wiretapping were told by the Supreme Court of Pennsylvania not to heed that Act, since Congress could not have intended to interfere with local police wiretapping for use in state prosecutions.

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13. 277 U.S. 438 (1928).

14. Justices Brandeis, Butler, Holmes, and Stone dissented in *Olmstead*. *Id.* at 469-88.

15. For a discussion of all three types of jurisdictions, see generally DASH 35-285. He characterizes them as "permissive," "prohibition," and "virgin" jurisdictions respectively.

There is still another paradox. From what we have said of the Supreme Court's ruling outlawing all wiretapping in the United States, it would be fair, would it not, for the people to think that, in Massachusetts or New York, a defendant could not be convicted of a crime on the basis of wiretap evidence? But, in fact, wiretap evidence is legally admissible in these states, though the police may go to jail for doing the wiretapping itself.<sup>16</sup>

As disheartening as the lack of uniformity of the law is, an even more appalling characteristic of the current law is the lack of enforcement where wiretapping prohibitions do exist. Unfortunately, the operations of law enforcement officials under these diverse statutes appear to be amazingly uniform: they all engage in wiretapping, including illegal wiretapping. For example, Dash testified to the following before the Subcommittee:

[In] every major city we looked at, illegal wiretapping was practiced.

It was done on the theory that the community needed the protection, the law enforcement officer was given the job of doing the protecting and the people didn't know what was good for them. The law enforcement officers would have to do it anyway.

As I said, in those cities where it was illegal, it was done, as an aid to investigation and not for evidence and usually employing the aid of a private specialist.<sup>17</sup>

It is this fact which I find most disturbing in any consideration of wiretapping and other forms of eavesdropping. *Regardless of the applicable law*—outright prohibition or authorization by court order—wiretapping and bugging are reported to be routine tools of police investigation in all large cities and in many smaller jurisdictions. Understandably, law enforcement agencies absolutely deny, or at least minimize, their use of electronic eavesdropping. Under these circumstances it is obvious that accurate information on the extent of wiretapping and bugging is difficult to obtain. There is ample evidence, however, that they are practiced far more extensively than official admissions indicate.

This muddled picture—the conflict of the law, the lack of definitive information, the reluctance of law enforcement agencies to discuss the subject frankly—is probably symptomatic of the doubts and indecision of both the public and the lawmakers of our country on how best to deal with wiretapping and eavesdropping. An examination of the varying state approaches to wiretapping will be useful in appraising the problem as a whole.

#### A. Jurisdictions Permitting Wiretapping

In 1938, the State of New York amended its constitution to permit the tapping of telephones by law enforcement officials upon the is-

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16. DASH 4.

17. 1959 *Hearings* pt. 3, at 520.

suance of a court order authorizing the tap. Proponents of the legislation argued that surveillance of wiretapping by the courts would assure protection against indiscriminate tapping and other abuses.

What in fact has been the result? Reports of district attorneys and the New York City Police Department would indicate that wiretapping has been used with considerable restraint. For example, District Attorney Silver stated to the Senate Subcommittee on Constitutional Rights that in 1952 all five district attorneys in New York City and the police department procured a total of only 480 orders.<sup>18</sup> Here is the breakdown, as he reported it:

New York County.....	60
Kings County.....	54
Bronx County.....	14
Queens County.....	12
Richmond County.....	2
New York Police Department.....	338

However, testimony from Allan F. Westin, then a professor in the Department of Government at Cornell University and an authority on wiretapping, casts doubt on the accuracy of these figures as a measure of the extent of wiretapping in New York City. Professor Westin told the Subcommittee: "I think there has been evidence that there has been, particularly at the police department level, a good deal of wiretapping without obtaining court orders."<sup>19</sup> And in his appearance before the Subcommittee, Dash emphatically supported Westin's view. His direct observation of the checking out of wiretapping equipment by police department employees supplemented by reports from plainclothesmen led him to conclude that, in the course of a year, the New York police alone operated at least 13,000 taps and possibly twice that number.<sup>20</sup> Furthermore, a former telephone company employee who had worked with plainclothesmen on the New York City Police Department informed Dash that for every ten taps authorized by court order there were ninety illegal taps made without court orders.<sup>21</sup>

Police evasion of the requirement for wiretap orders from the courts appears to be only a part of the breakdown of judicial surveillance. Dash reports that his study indicated that the courts have exercised little real control over wiretapping. Evidently, few judges are sufficiently conscientious so as to inquire concerning the details

18. *Id.* at 546.

19. *Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 85th Cong., 2d Sess., pt. 2, at 206 (1958) [hereinafter cited as *1958 Hearings*].

20. *1959 Hearings* pt. 3, at 521.

21. DASH 68.



of an application for a tap; and, furthermore, those who do inquire are subsequently avoided. As a result, "in Manhattan two or three judges of the Court of General Sessions receive most of the district attorney's business. It is practically unheard of for a judge to fail to grant a wire tap order for the district attorney."<sup>22</sup>

In 1955, Mr. William Keating, a former member of District Attorney Hogan's staff and later counsel to the New York City Anti-Crime Committee, made a similar report in testimony before the House Committee on the Judiciary. Not only did he testify that few New York judges exercise their right to inquire about the details of wire-tapping applications, but he pointed to some of the other abuses which have resulted from this casual attitude on the part of the courts. For example, he said: "I was amazed to find that a number of different wiretap orders were drawn on different phones in different investigations, all using the same case head, or the same investigation, as the basis on which the wiretap order was sought."<sup>23</sup>

Even Attorney General William P. Rogers has admitted that, on the basis of his experience as assistant district attorney in New York, he feels very little is gained by the requirement of a court order. He pointed out that in New York the court usually does not probe into the question whether a crime has been or is being committed but merely accepts the prosecutor's assertion in this respect. And, as he further pointed out, the prosecutor's application for a warrant is ordinarily not factual but includes only a very general allegation of a criminal violation. He summed up the matter succinctly: "I don't recall any difficulty in getting the permission of the court. My own experience is that it's pretty easy."<sup>24</sup>

Dash called the attention of the Senate Subcommittee to another facet of abusive police wiretapping. Police investigators often first tap a telephone without a court order to sample the conversation and thereby determine the type of evidence which can be procured. Then only if the sampling is good do they seek a court order. Apparently, this practice is followed only where the prosecution plans to introduce the product of the tap as evidence in court. Unfortunately, the practice permits the police to build an excellent, though misleading, case to support the effectiveness of wiretapping in securing convictions.<sup>25</sup>

### *B. Jurisdictions Prohibiting Wiretapping*

New York's permissive wiretapping under the supervision of the courts would appear to be somewhat less than ideal. But the prac-

22. *Id.* at 45.

23. *Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary*, 84th Cong., 1st Sess., ser. 2, at 218 (1955) [hereinafter cited as 1955 *Hearings*].

24. *Hearings on H.R. 408 Before Subcommittee No. 3 of the House Committee on the Judiciary*, 83d Cong., 1st Sess., ser. 7, at 37 (1953).

25. 1959 *Hearings* pt. 3, at 521-22.

tical situation in California, where wiretapping is in theory almost totally prohibited,<sup>26</sup> appears no more attractive than that in New York. Dash described it as follows:

[I]n a state like California where wiretapping is illegal, the police department and the district attorney's office cannot show in their budgets wiretap equipment. . . . The police used the device of employing private specialists. . . .

They . . . did wiretapping and bugging for the police, and in turn received a sort of *carte blanche* protection for themselves. . . . They made their money in domestic relations and industrial tapping.<sup>27</sup>

This practice seems to me to be a particularly vicious one—and it is by no means restricted to California. When police actively collaborate with private persons—in this case private detectives—to nullify the law, an atmosphere is created which encourages other forms of corruption.

## II. PRIVATE WIRETAPPING

I know of no public official who takes a position advocating or defending private wiretapping. Furthermore, private tapping is prohibited by section 605 of the Federal Communications Act and by the laws of many states. Yet, it is reliably reported to be practiced extensively throughout the United States. And prosecutions for illegal private tapping are almost nonexistent. Where the private wiretappers are employed by the police—as in California—the absence of arrests and prosecutions would appear to be a foregone conclusion. And in states such as New York, if law enforcement officials frequently violate the wiretapping laws themselves, vigorous prosecution is hardly to be expected.

Dash described the situation well in his testimony before our Subcommittee:

One private detective caught in Los Angeles tapping the telephones of the Attorney General was given a 30-day suspended sentence. . . . I don't think there has been more than a handful, half a dozen cases in California, of prosecution in 100 years of prohibition.

[I]n New York, there have been very few private detectives who have been prosecuted. . . . Since the law-enforcement officers themselves want to wiretap and don't want any scandal, they would rather not pros-

26. In *People v. Malotte*, 46 Cal. 2d 59, 292 P.2d 517 (1959), the Supreme Court of California allowed what seemed to be only a slight inroad on the blanket prohibition against wiretapping—that the police may tap when they obtain the consent of one of the *parties* to the conversation. However, the police have interpreted this exception to cover the vast area of tapping and other eavesdropping with the *subscriber's* permission, whether or not the subscriber is a party to the conversation. See DASH 171, 213.

27. 1959 *Hearings* pt. 3, at 515–16. Dash said that he had been unable to turn up evidence of law enforcement wiretapping in Los Angeles since 1950 when William Parker became chief of police, although it has been rumored that some still takes place there. *Id.* at 515.

ecute because the law will that way remain uninterpreted and they themselves are not involved in a prosecution.<sup>28</sup>

However, as evidence of the improved diligence of law enforcement authorities in preventing abuses under the New York statute, District Attorney Silver told the Senate Subcommittee about two New York police officers convicted in 1958 for tapping a wire without a court order. The Savarese Committee on Privacy of Communications of the New York Legislature regarded this event of similar importance. In its report for 1958-1959, it noted that the two policemen were convicted and sentenced to serve one year, with the sentence suspended. It also noted the conviction of two private operatives, also sentenced to one year—one sentence being suspended. This portion of the Committee's report concluded with the somewhat wry observation that: "Neither of these 1958 incidents was banner-headline material, but they make an interesting contrast to the situation when this committee was created in 1955. As of then, no one for a generation had been successfully prosecuted for wire-tapping."<sup>29</sup> Such "successful" prosecutions may represent steps toward enforcement of existing wiretapping bans, but obviously they leave much room for progress.

### III. LAW ENFORCEMENT WIRETAPPING

#### A. *How Necessary is Wiretapping to Law Enforcement?*

District Attorney Silver, one of the most ardent proponents of law enforcement wiretapping, made the following statement at our hearings: "All the district attorneys of New York State, and all district attorneys that I have come in contact with in the national association, feel most strongly that wiretapping is absolutely necessary if they are to be able to cope with the modern criminal."<sup>30</sup> He emphasized its importance against organized crime—vice, gambling, prostitution, narcotics. These activities, he argued, are the principal sources of income for the underworld and serve to finance the groups responsible for most serious criminal activity. In support of his position, he included the Presentment of the Second Additional March 1958 Grand Jury of Kings County, New York.<sup>31</sup> Interestingly, however, the Presentment cites only *one* instance of wiretapping which contributed substantially to successful police action! Moreover, a portion of the presentment indicates that *conventional* forms of police activity may be most effective against organized crime:

28. *Id.* at 527.

29. REPORT OF NEW YORK JOINT LEGISLATIVE COMMITTEE ON PRIVACY OF COMMUNICATIONS, ELECTRONIC EAVESDROPPING 15 (1959).

30. 1959 *Hearings* pt. 3, at 547. This point is developed more fully in Silver, *The Wiretapping-Eavesdropping Problem: A Prosecutor's View*, 44 MINN. L. REV. 835, 844-51 (1960).

31. See *id.* at 843-44.

We have pointed out that the work of investigating gambling crimes is detective work by its very nature. Yet, it is also true that tremendous help can be given to the detective squads in rooting out gambling crimes by the uniformed force. There is no individual in the police department who should be and is better acquainted with gambling and vice conditions than the patrolman actually assigned to walk a beat. In some cases the patrolman may have only one block to cover, particularly in congested areas where there is a high incidence of crime. The testimony adduced before us indicates that the patrolman on the beat knows who the bookmakers are on his beat; who the policy men are; who are the pimps and junkies. Yet it is a rarity for a patrolman on the beat to make a gambling arrest. In our entire county of 3 million people during all of 1957, only 13 arrests for bookmaking and 20 for policy were made by the uniformed force.

It is an interesting circumstance that, for example, in the city of Philadelphia, where patrolmen through their precinct commanders are specifically told to make arrests and where this matter is constantly followed up, the overwhelming majority of gambling arrests are made by patrolmen. More arrests for policy violations are made by uniformed Philadelphia patrolmen in 1 week than the uniformed force in New York City makes in an entire year.<sup>32</sup>

William Keating corroborated this view in his testimony before the House Judiciary Committee in 1955, and he added a further note:

Now from the little experience I have had in law enforcement, knowing policemen and having friends who are cops and detectives, I would say, without any doubt in my mind, that if there is one field of crime where the police have less difficulty in getting information on the culprits, it is in the field of bookmaking and prostitution. I think it would be safe to say that the dogs in the street know — at least in the city of New York — who the bookmakers are. The cops know who the bookmakers are. Everybody who bets knows who the bookmakers are.

Now I say that the reason that the police not only in New York but in all these other states where they are begging for the right to tap wires, I say there is a logical reason why wiretapping is used in the field of bookmaking, and this reason hasn't yet been advanced officially. The reason is that the police have to find out how much business the bookmakers are doing so that they have a check on whether they are getting the proper payoff. . . . The police are always on a sharp lookout for the cheaters, the outlaws, so called, the bookmakers who are not paying. And that is where they use the wiretap equipment on the telephones of the customers of the bookmakers to get a line on where the bookmakers are operating from. I think it is ridiculous to use an invasion of the privacy such as you have in the case of wiretapping, for purposes like these.<sup>33</sup>

And Keating further asserted during these hearings, "I don't know of a serious case in my recollection in the city of New York, where a conviction was obtained on wiretap evidence."<sup>34</sup>

Thomas McBride, formerly Attorney General of the Commonwealth of Pennsylvania, disagreed with Keating concerning the ef-

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32. 1959 *Hearings* pt. 3, at 555 (Presentment reprinted).

33. 1955 *Hearings* ser. 2, at 193.

34. *Id.* at 194.

fectiveness of wiretapping in police work, but even he felt that tapping was more harmful than beneficial. McBride stated to our Subcommittee:

When you get to the area of crime, I think that wiretapping is effective. I am not one of those who believe that wiretapping does not catch criminals. The only question is whether the use of wiretapping is so essential in enforcement of law that it overbalances the greater good, undoubtedly, that comes from the feeling of freedom that people have that they are not being listened to. It must be remembered, and it is not just raising a *bete noire* to say, that indiscriminate wiretapping in the totalitarian countries is practically their hallmark; and the attempt to eradicate that was thought desirable, apparently, both by the Congress of the United States in enacting the Federal Communications Act and by the Commonwealth of Pennsylvania in enacting its statute.<sup>35</sup>

My personal view is that wiretapping should be banned, that there isn't sufficient good done by it to overcome the harm that is done by that feeling of loss of freedom of decent people.<sup>36</sup>

Another noted prosecutor, Thomas F. Eagleton, Circuit Attorney for the City of St. Louis, concurred in McBride's view in testifying before our Subcommittee:

The district attorneys of this Nation can make an impressive case in support of wiretapping by detailing to you the dozens of cases they have cracked by use of wiretap — without which such cases could not have been made. . . . But to me there is involved a far more significant matter than practicality which I feel is being overlooked. . . . This matter, this transcendent issue, is the protection of the constitutional rights of all persons in the United States.<sup>37</sup>

### *B. How Useful is Wiretap Evidence in Court?*

Admittedly, the opinions of Keating, McBride, and Eagleton are representative of a small minority of law enforcement officials. The remainder are generally ardent advocates of permissive legislation authorizing the use of wiretapping information as evidence in the courts. However, there is serious question that wiretapping evidence is the principal objective of these advocates. It appears they are far more interested in its use as an investigative tool than as a means of gathering evidence.

Dash reports in his book that:

Police in Philadelphia are now generally of the opinion that the use of wiretap transcripts in court only jeopardizes the case, because it brings with it the danger of technical arguments concerning the source of the telephone information and the qualifications of the wiretapper which obscure the real issue before the jury, the guilt or innocence of the

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35. In 1957, Pennsylvania enacted a statute totally prohibiting wiretapping. PA. STAT. ANN. tit. 15, § 2443 (Purdon 1958).

36. 1958 *Hearings* pt. 1, at 25.

37. *Id.* pt. 2, at 259.

defendant. Also police believe divulgence of wiretaps panics the lawyers and the community, resulting in efforts to restrict law-enforcement wiretapping.<sup>38</sup>

In Chicago, Dash found a somewhat different situation. He discovered that the police department's intelligence unit was simply uninterested in wiretapping for the purpose of gathering evidence. In fact, they were

not eager to have any attempt made to have the legislature legalize wiretapping. [Illinois prohibits wiretapping.] They say that even if wiretapping is illegal, they are going to tap anyhow, and therefore can't see any reason to make it legal. Raising the question in the legislature, they believe, would only stir up controversy and direct the attention of the legislature and the public to police wiretapping.<sup>39</sup>

In San Francisco, he found that "police say that even if they were allowed to use wiretapping evidence, they would prefer not to do so, but to use their wiretapping only to obtain leads."<sup>40</sup> In New Orleans, he found that

Although evidence obtained by wiretapping is admissible in Louisiana Courts, law-enforcement agencies in Baton Rouge wiretap only as an aid to investigation and never for the purpose of using what they get in evidence. This law-enforcement policy was established principally at the insistence of the telephone company.<sup>41</sup>

Dash also mentioned a further deterrent to the use of wiretap evidence in court. He told the Subcommittee that technicians on his staff were able to successfully edit tape recordings, thereby completely distorting the meaning of the statements originally recorded. And he added that these editings, recorded on new tape, defied detection either by ear or by oscillograph.<sup>42</sup> Another witness before the Subcommittee, however, stated that such editings were detectable with precision instruments operated by skilled personnel.<sup>43</sup>

It appears at best that the use of wiretap information, if admitted as evidence in the courts, is subject to serious limitations as an aid to prosecution. On the other hand, it seems also that legislation proscribing wiretapping has been ineffective in preventing its use as a police practice where state rules of evidence permit the use of illegally obtained information in criminal prosecutions.

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38. DASH 251.

39. *Id.* at 221-22.

40. *Id.* at 165.

41. *Id.* at 129.

42. 1959 *Hearings* pt. 3, at 509-10.

43. *Transcript of Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 86th Cong., 1st Sess., at 160 (Dec. 15-16, 1959) (testimony of Ralph H. Bertsche, electronic technician for Harold K. Lipset) [hereinafter cited as 1959 *Transcript*].

## IV. LEGALITY OF STATUTES AUTHORIZING WIRETAPPING

Despite the lack of persuasive proof of a need for wiretapping and the limited utility of evidence obtained by tapping, a few states have enacted legislation authorizing wiretapping by law enforcement officials. The legality of such legislation has been challenged on several occasions since the 1957 Supreme Court decision in *Benanti v. United States*, where evidence obtained by state officers while wiretapping was held inadmissible in federal court as a violation of section 605 of the Federal Communications Act even though state law authorized the tapping.<sup>44</sup> The real impact of holding such statutes unconstitutional would be on state courts where, under *Schwartz v. Texas*,<sup>45</sup> wiretapping evidence procured by state officers is admissible even though such divulgence still constitutes a violation of section 605.

Two New York state judges have expressed the view that a state law authorizing wiretapping no longer has validity. Supreme Court Justice Samuel Hofstadter has relied on *Benanti* to refuse to grant warrants for wiretaps.<sup>46</sup> And early this year, General Sessions Judge Irwin Davidson also announced that, for the same reason, he would disapprove all wiretapping applications submitted to him.<sup>47</sup>

However, some police officers, prosecutors, and judges apparently feel that state legislation permitting wiretapping is still valid.<sup>48</sup> For instance, in July 1958, James Warren, general manager of an independent telephone company in Coxsackie, New York, when presented with a warrant authorizing a tap on one of his company's subscribers, informed the subscriber that his line was about to be tapped.<sup>49</sup> As a result, Warren was arrested. However, I have received no information concerning prosecution.

Also in 1958, Westchester County Judge Hugh Coyle dismissed charges against the defendants in two cases<sup>50</sup> in which wiretapping evidence had been used by the prosecution, on the grounds that the *Benanti* decision had made such evidence inadmissible. The New York Court of Appeals, however, reversed Judge Coyle, holding that the *Benanti* decision did not disturb the New York rule which permits the admission of evidence obtained by wiretapping.<sup>51</sup> The de-

44. 355 U.S. 96 (1957). An obvious practical effect of this decision is to make a state officer guilty of a federal crime although complying with the state law.

45. 344 U.S. 199 (1952).

46. N.Y. Times, Jan. 3, 1958, p. 1, col. 7.

47. See N.Y. Times, March 14, 1960, p. 20, col. 4.

48. See, e.g., Savarese, *Eavesdropping and the Law*, 46 A.B.A.J. 263 (1960).

49. See Wash. Post & Times Herald, July 24, 1958, § A, p. 12, col. 2.

50. *People v. Dinan*, 15 Misc. 2d 211, 172 N.Y.S.2d 496 (Westchester County Ct.), *rev'd* 7 App. Div. 2d 119, 181 N.Y.S.2d 122 (1958), *aff'd mem.*, 6 N.Y.2d 715, 185 N.Y.S.2d 806, 158 N.E.2d 501, *cert. denied*, 361 U.S. 839 (1959); *People v. Variano*, not reported below, *rev'd*, 5 N.Y.2d 391, 185 N.Y.S.2d 1, 157 N.E.2d 857 (1959).

51. See note 50 *supra*. In the *Variano* case, the New York Court of Appeals spe-

fendant in one case then petitioned the Supreme Court of the United States for a writ of certiorari, but the Court denied the petition without comment in October 1959.<sup>52</sup>

In February 1960, in another New York case based on evidence obtained by wiretapping, the defendant applied to the federal district court for an injunction to prevent the district attorney from using the wiretap evidence in a prosecution in a state court. The district court denied the application, but when the matter was carried to the United States Court of Appeals for the Second Circuit the restraining order was granted. In granting the order, Judge Medina commented:

Here the very act of the police officers in testifying and divulging the contents of the wiretap will constitute the commission of a separate federal crime *in futuro*. We do not think we lack power to prevent this. Unless we act now it may well be too late. Surely the delicate balance between federal and state functions does not require the federal courts to sit idly by and countenance or acquiesce in persistent and repeated violations of federal law. Moreover, the fact that the wiretapping is authorized pursuant to the Constitution and legislation of the State of New York, pursuant to which New York judges continue to order wiretapping and police officers do the wiretapping and divulge the contents of the wiretaps in their testimony even after the Supreme Court has held these constitutional and legislative provisions to be an invasion of a field preempted by the Congress, makes the position of defendants even more untenable.<sup>53</sup>

This decision was vacated just recently, however, by the Second Circuit, sitting *en banc*, on the ground that a federal court should not intervene in a state criminal proceeding to enjoin the use of

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cifically said that it reached this conclusion despite the fact that it *assumed* for purposes of argument that the wiretaps were illegally obtained. It relied on the distinction drawn in *Benanti* between a "state rule of evidence" and a "federal conviction brought about in part by a violation of federal law." The Supreme Court of the United States had made that distinction in differentiating *Benanti* from *Schwartz v. Texas*, 344 U.S. 199 (1952). In the *Dinan* case, the New York Supreme Court rejected the applicability of the *Benanti* decision on the same basis. The court did say that "the [*Benanti*] holding *might justify* a New York court in refusing to grant an application for an order . . . ."  
7 App. Div. 2d at 121, 185 N.Y.S.2d at 125. (Emphasis added.) However, it denied that *Benanti* required a reversal where such evidence was admitted in the state trial court.

52. *Dinan v. People*, 361 U.S. 839 (1959).

53. *Pugach v. Dollinger*, 28 U.S.L. WEEK 2418 (2d Cir. Feb. 11, 1960). The court quoted the following language from the *Benanti* case: "In light of . . . the public policy underlying Section 605 . . . , we find that Congress, setting out a prohibition in plain terms, did not mean to allow state legislation which would contradict that section and that policy." 355 U.S. at 105-06, quoted at 28 U.S.L. WEEK 2418.

The concurring opinion of Judge Waterman was more limited, however. He said: If we deny the stay and the wiretap evidence is introduced at the trial . . . , the important question presented by this application will not have been *timely* ruled upon, and . . . it is probable that nothing can be done thereafter to revive it. As soon as the wiretap evidence is offered and received at the trial and the contents of the wiretaps are thus divulged, the question now before us will have become moot. On the other hand, the granting of the stay will maintain the status quo



evidence claimed to have been procured by the use of wiretapping.<sup>54</sup> At the very least, this case dramatizes how unsettled the law is in this area and suggests that the issue apparently resolved in *Schwartz* is still very much alive. There is no reason to believe that the Supreme Court, which has yet to be heard from on the current problem, will not accept what appears to be the better position—the view of Judge Medina.

Even before the confusion arising from the *Pugach* case, advocates of the New York statute had expressed their concern about the threat of the *Benanti* decision to their state's wiretapping statute. Anthony P. Savarese, Jr., Chairman of the State Legislature's Joint Committee on Privacy of Communication, actually conceded that the *Benanti* decision probably invalidated the New York law.<sup>55</sup> His complaint appears to be more with Congress than with the Supreme Court. He asserted that section 605,

a brief, obscure, and undebated clause in that Act—truly a needle in a legislative haystack—has become the sole basis for a vast superstructure of law and ethical views as declared in Supreme Court opinions, each erected firmly on its own previous opinions, by the rule of *stare decisis*.<sup>56</sup>

Savarese contends that Congress never intended "to strike down

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pending appeal to our Court from the decision below. If we err in so doing, the stay will be promptly vacated by the . . . Supreme Court, . . . and defendants will then be free to tender the wiretaps in evidence at the trial. . . .

28 U.S.L. WEEK 2418. (Emphasis added.)

54. *Pugach v. Dollinger*, 28 U.S.L. WEEK 2527 (2d Cir. April 14, 1960), *vacating* *Pugach v. Dollinger*, 28 U.S.L. WEEK 2418 (2d Cir. Feb. 11, 1960), and *affirming* *O'Rourke v. Levine*, 28 U.S.L. WEEK 2434 (E.D.N.Y. Feb. 29, 1960) (denying injunction where criminal trial had already been in progress seventeen days). However, the Second Circuit split 3-1-1. Chief Judge Clark was the dissenter, adhering to Judge Medina's earlier position; Medina, of course, was not sitting when the court sat *en banc*. And the split may be even greater, for Judge Waterman concurred only because he found it "presumptuous to assume that any New York State trial judge will acquiesce to the commission of a crime against the United States in his presence in his courtroom by a witness testifying under oath." 28 U.S.L. WEEK at 2528. If subsequent state court action no longer renders this thought "presumptuous," Judge Waterman apparently will align himself with the dissenter.

Presumably, Judge Waterman will not be put to this choice, however, for in the initial trial court response to this *en banc* decision, Nassau County Court Judge Paul J. Widlitz, presiding over the *O'Rourke* case, *supra*, barred the use of wiretap evidence by the prosecution. He said that the majority and dissenting opinions in the *en banc* decision revealed "that the Court is unanimous and unequivocal in its opinion that the introduction of wiretap evidence would constitute a violation of a Federal criminal statute." *N. Y. Times*, April 20, 1960, p. 34, col. 2. And after quoting from Mr. Chief Justice Warren's opinion in *Benanti* to the effect that Congress, in passing section 605 of the Communications Act of 1934, "did not mean to permit contradictory state legislation," *id.* at col. 3, Judge Widlitz said:

Accordingly, this Court will not permit any divulging of wiretap evidence in this trial, for to permit otherwise would, in the words of Judge Waterman . . . , constitute an "extraordinary affront" to the Federal court.

*Id.* at col. 4.

55. Savarese, *Eavesdropping and the Law*, 46 A.B.A.J. 263, 266 (1960).

56. *Id.* at 336.

the police power of our fifty states. This would break down our entire structure of criminal law."<sup>57</sup>

I would agree with Saverese that Congress had no intention of striking down the police power of the states. However, his implication that wiretapping is the foundation of police power and the entire structure of criminal law, appears to me to be an obvious exaggeration and unsupported on the record to date.

I believe two observations are pertinent here. First, at least one other state, Pennsylvania, with concentrated urban areas and therefore presumably with police problems comparable to those of New York, prohibits wiretapping and yet appears to be about as successful as New York in maintaining law and order. Second, it appears that in New York wiretapping is used most extensively in the prosecution of gambling and bookmaking, both of which are dependent upon widespread patronage among the public. Such activities cannot be carried on extensively without the knowledge and acquiescence of the police. As William Keating told the House Committee on the Judiciary, "the dogs in the street know . . . who the book-makers are."<sup>58</sup>

During the course of our hearings on wiretapping, I have been struck by the remarkable lack of *specific* information on a case-by-case basis, demonstrating the indispensability of wiretapping to the solution and prosecution of crime. The advocates of wiretapping would do much to advance their case if they would come forward and support their claims of need with more specific evidence.

Not only has there been a conspicuous lack of proof of the need for wiretapping, but some prominent law enforcers have even conceded that whatever need exists is overridden by the possible consequences of allowing tapping. In 1939, for instance, Mr. J. Edgar Hoover gave the following advice to then Attorney General Robert H. Jackson:

While I concede that the telephone tap is from time to time of limited value in the criminal investigative field, I frankly and sincerely believe that if a statute of this kind [authorizing wiretapping] were enacted the abuses arising therefrom would far outweigh the value which might accrue to law enforcement as a whole.<sup>59</sup>

At the time Mr. Hoover expressed this opinion, the federal government had already been a wiretapper for many years. Telephonic

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57. *Ibid.*

58. 1955 *Hearings* ser. 2, at 193.

59. CONG. REC. (App.) 1471-72 (1940) (extension of remarks of Senator Ashurst). Mr. Hoover modified his position in 1941 and supported the use of wiretapping in cases of espionage, sabotage, kidnapping, and extortion. *Hearings on H.R. 2266 and 3099 Before Subcommittee No. 1 of the House Committee on the Judiciary*, 77th Cong., 1st Sess., at 112 (1941).

communication then was essentially the same as it is today, though improvements have been made in quality and speed of service. Moreover, criminal activity, including organized crime, does not appear to me to have been markedly different two decades ago than it is today. The old gangs also had fast cars, speedboats, planes, and short-wave radio receivers to intercept police communications—and they probably had their own wiretappers.

What, then, in the present scene is there to support a rebuttal of Mr. Hoover's statement of 1939?

I am inclined to believe that it is not a change of *fact* but, unfortunately, one of *attitude*—a subtle relaxation of our concepts of civil liberties—concepts which hold that the invasion of privacy may be justified only under most serious and compelling circumstances and then only in accordance with basic standards of due process of law. Such a showing ought to be made before Congress is requested to modify the existing statute. In wiretapping, the invasion of privacy is so extensive and so intrusive that its authorization could be justified only when established by the most compelling evidence.

#### V. WIRETAPPING ON THE FEDERAL LEVEL

Unfortunately, an area of considerable interest both to the Subcommittee and the public, the wiretapping activities of the *federal* enforcement agencies, was expressly avoided in *The Eavesdroppers*. Nevertheless, I feel it deserves mention here.

In 1937 in the First *Nardone* case, the Supreme Court ruled, that the plain words of § 605 forbid anyone, unless authorized by the sender, to intercept a telephone message, and direct in equally clear language that "no person" shall divulge or publish the message or its substance to "any person."<sup>60</sup>

The Court went on to find the application of the statute "to include within its sweep federal officers as well as others."<sup>61</sup>

Despite this decision of the Court, Attorney General Jackson advised the House Judiciary Committee in 1941 that no federal statute prohibited the mere act of intercepting a communication but only interception plus divulgence or publication.<sup>62</sup> Succeeding Attorneys General have adhered to essentially the same view, and wiretapping by federal officers has been authorized on the ground that transmission of wiretap information to other persons in government does not constitute a "divulgence." Attorney General Rogers recently restated the Jackson position: "The interpretation by the

60. *Nardone v. United States*, 302 U.S. 379, 382 (1937.)

61. *Id.* at 384.

62. *Hearings on H.R. 2266 and H.R. 3099 Before Subcommittee No. 1 of the House Committee on the Judiciary*, 77th Cong., 1st Sess. 18 (1941).

Department of Justice of Section 605 of the Communications Act of 1934 is that it prohibits the interception and divulgence of conversations, not interception per se.”<sup>63</sup>

Noted defense counsel Edward Bennett Williams, in his appearance before our Subcommittee, however, took sharp issue with the Attorney General and stated, “I think it is clear that they [the FBI] have been violating the criminal statutes of the United States.”<sup>64</sup> Mr. Williams asserted: “The Department [of Justice] has a case of myopia with respect to the end of the statute which outlaws not only tapping and divulging, but tapping and using the information.”<sup>65</sup> The frequently overlooked portion of section 605 to which Williams referred reads:

[N]o person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto. . . .<sup>66</sup>

Considerable support for Williams’ position can be found in the Supreme Court’s opinion in *Benanti*.<sup>67</sup> In that case state officials had tapped a telephone to secure evidence of a suspected narcotics operation. The wiretap disclosed information regarding a “shipment.” However, when the “shipment” was seized, it turned out to be alcohol rather than narcotics, and the case was turned over to federal officers. The conviction was reversed by the Supreme Court, as it had been “brought about in part by a violation of federal law.”<sup>68</sup> The Court stated:

This case is but another example of the use of wiretapping that was so clearly condemned under other circumstances in the *Second Nardone* decision:

“To forbid the direct use of [these] methods . . . but to put no curb on their full indirect use would only invite the very methods deemed inconsistent with ethical standards and destructive of personal liberty. What was said in a different context in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392, is pertinent here: “The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all.”<sup>69</sup>

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63. 1959 *Transcript* 226. He has also said that “in *Benanti v. United States* . . . the Court stated expressly that it was not passing upon that question [whether interception alone violated section 605].” Letter from Attorney General Rogers to the Author, Sept. 10, 1959, reprinted in 1959 *Hearings* pt. 4, at 1037.

64. 1959 *Transcript* 204. For a more complete discussion of his argument, see Williams, *The Wiretapping-Eavesdropping Problem: A Defense Counsel’s View*, 44 *MINN. L. REV.* 855, 859-61 (1960).

65. *Id.* at 211.

66. 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1958).

67. 355 U.S. 96 (1957).

68. *Id.* at 102.

69. *Id.* at 102-03.

The import of the *Nardone* and *Benanti* decisions then is to clearly include federal officials in the ban on tapping and disclosure and also to prohibit the use in any way of information or evidence derived even indirectly from wiretapping.

As Edward Bennett Williams pointed out in his testimony before our Subcommittee: "[W]hen agencies of government, be they state or federal, wiretap, they are wiretapping because they propose to make use of the information that they get as a result of wiretapping."<sup>70</sup> Its usefulness, of course, is dependent on concealing from the courts the fact that it was derived from wiretapping.

Nevertheless, wiretapping by federal agencies has continued. J. Edgar Hoover, testifying before a House Appropriations Subcommittee on February 5, 1959, stated:

[W]e have at the present time 74 telephone taps. Any request to tap a telephone by the FBI is submitted in writing and personally approved in advance by the Attorney General. They are utilized only in cases involving the internal security of the nation or where a human life may be imperiled, such as kidnapping. We do not use telephone taps in any other types of investigation performed by the FBI.<sup>71</sup>

On other occasions Hoover has stated that the number of taps in operation at any one time by the FBI has never exceeded 200.<sup>72</sup> However, the Department of Justice seems loath to make public any more detailed information concerning its wiretapping activities. In 1955 the House Judiciary Committee requested information from the Department on the amount of electronic equipment possessed by the FBI. But the committee was informed by letter that "a complete inventory of the equipment which might or could be used in a wiretap is so closely related to confidential investigative techniques that it would be prejudicial to security to make a full disclosure."<sup>73</sup>

Wiretapping by federal agencies under such beclouded legal auspices is certainly not conducive to ideal law enforcement practices respecting individual rights of United States citizens. Most of the pertinent legislative proposals to come before Congress in recent years have been drafted under the assumption that wiretapping is a form of search and seizure and therefore subject to the provisions of the fourth amendment. The Department of Justice, however, has shown no enthusiasm for wiretapping pursuant to warrants issued by the federal courts. The position of the Department has been fairly consistent over the years. It would like to have legislation

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70. 1959 *Transcript* 216.

71. Statement Quoted in a Letter From Attorney General William P. Rogers to the Author, July 21, 1959.

72. 1955 *Hearings* ser. 1, at 37.

73. *Id.* at 42.

making wiretap evidence admissible in the federal courts, but insists that the authority to make wiretaps be vested in the Attorney General, not in the courts.

#### VI. THE PROBLEM OF NEW LEGISLATION

Few legislative problems pose greater difficulties than that of devising a system of legalized wiretapping which is not a serious threat to personal liberty. The difficulty of the problem has been stated with incisive clarity by Louis B. Schwartz, formerly an attorney with the Department of Justice and now a professor of law. In addition to noting the impossibility of confining a wiretap to conversations of "suspected" persons—since equally as many "innocent" individuals may use the tapped telephones—Professor Schwartz has pointed out:

Wire tapping is more intrusive than authorized search for tangibles for the additional reason that the subject is less likely to become aware of the intrusion. A citizen can take action against a Government agent who breaks into his house unreasonably or seizes property improperly. Not so the victim of wire tapping. Only in the unusual case where the tap yields evidence that is made public in court proceedings can a person whose privacy has been invaded learn of the fact. The restraining effect of complaints by injured parties is thus largely removed in wire tapping.<sup>74</sup>

Wiretapping and other forms of electronic eavesdropping are perhaps useful tools of law enforcement. However, as Allan Barth so forcefully pointed out:

If wiretapping is an aid to the police in frustrating foreign agents, so is rifling the mails, so is unrestricted search of private homes, so is summary arrest on suspicion—the ominous knock on the door by night that came to be the symbol of the Gestapo's terror. A great deal could be learned about crime by putting recording devices in confessionals and in physicians' consulting rooms, by compelling wives to testify against their husbands, by encouraging children to report the dangerous thoughts uttered by their parents. The trouble with these techniques, whatever their utility in safeguarding national security, is that a nation which countenances them ceases to be free.<sup>75</sup>

Even though a former prosecuting attorney myself, I am still not convinced that effective law enforcement is dependent on the use of wiretapping.

I wish to emphasize a tentative conclusion. Both as to the cries from the law officers of one state (New York) for federal permission to maintain state and local wiretapping and as to the interest in legislation to authorize wiretapping by federal officers, I think judg-

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74. Schwartz, *On Current Proposals to Legalize Wire Tapping*, 103 U. PA. L. REV. 157, 164. (1954).

75. BARTH, *THE LOYALTY OF FREE MEN* 174 (1952).

ment on the alleged need in each area resembles a Scotch verdict: not proven.

Much has been made by the advocates of wiretapping of the cursory consideration given by Congress to section 605 of the Communications Act of 1934 at the time of its enactment. But I cannot agree with these critics that the Supreme Court has built a towering anti-wiretap edifice on an insufficient legislative base. *If* Congress did not give detailed attention to section 605 at the time of its adoption, it has certainly remedied that lack of deliberation in the years since. The problem of wiretapping cannot properly be described as one growing from congressional neglect. Despite the criticisms of the present law, and intense study of numerous other proposals to replace it, Congress has as yet found no more attractive solution on which a majority could agree.

While we search for solutions, I prefer that history judge our time and our institutions in terms of our concern for the protection of civil liberties, constitutional rights, and individual freedom, rather than in terms of our unrestrained pursuit of transgressors.