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Wiretapping--The Right of Privacy versus the Public Interest

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Wiretapping—The Right of Privacy versus the Public Interest

Wiretapping, a method of secretly listening to telephone conversations through perfected mechanical apparatus,[1] has been subject to attack in recent years as a violation of the right to privacy.[2] In states where the possession of wiretapping equipment is not limited, its possible use for blackmail and business espionage purposes is obvious.[3] Even where only police officers may possess this equipment, the necessities of law enforcement may not counter-balance the danger to privacy. Wiretapping is not the work of a day; it is usually carried on for weeks, sometimes months, on the telephones of various people, many of whom are innocent of any offense.[4] In New York the greatest number of convictions from wiretapped evidence are misdemeanors ("bookie rackets" and "vice rings"); it is sometimes felt, therefore, that the value of law enforcement in this type of offense is not commensurate with the danger to privacy.[5] Thus wiretapping is said to be a "dirty business"[6] and a "disclosure in court of what is whispered in the closet."[7]

Despite these criticisms, wiretapping has been permitted in those states where strict enforcement of the criminal law is considered more

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1 For a discussion of the mechanics of wire tapping, see N. Y. Times, Dec. 12, 1948, p. 17, col. 2.

2 Jones v. Herald-Post Co., 230 N. Y. 227, 18 S. W. (2d) 972, (1922) where the court said, "the right of privacy is the right to live one's life in seclusion, without being subjected to unwarranted and undesired publicity. In short, it is the right to be let alone." *Accord,* Rhodes v. Graham, 238 Ky. 225, 37 S. W. (2d) 46 (1931); Comment (1929) 43 Harv. L. Rev. 297.

3 N. Y. Times, Dec. 12, 1948, p. 51, Col. 1: "For example, a lawyer may be curious about what a prospective court opponent is up to. A politician may be interested in a rival's plans. Or a man might listen in on another person's private life in the hope of obtaining juicy items with sales value—to give it the nasty name—for blackmail."

4 *Ibid:* "If a tapper waits long enough he can piece together a lead here and there—not enough, perhaps, to make worth-while evidence in court, but enough to lead police to places where evidence can be found." In Olmstead v. United States, 277 U. S. 438 (1938), six agents tapped for nearly five months before they secured sufficient evidence.

5 165 N. Y. Supp. 41 (1917). N. Y. Times, Dec. 12, 1948, col. 1: "An estimated 75 to 90% of the authorized taps . . . are in cases of prostitution and bookmaking."

6 Olmstead v. United States, 277 U. S. 438, 470 (1928). Holmes, J., dissenting: "no distinction can be taken between the Government as prosecutor and the Government as judge. If the existing Code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such iniquities to succeed."

7 *Ibid* at 473, Brandeis, J., dissenting: "Subtler and more far-reaching means of invading privacy have become available to the Government. Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet."

important than the violation of privacy.[8] They argue that the use of the telephone is not a guarantee of privacy, as it carries messages over outlets peculiarly susceptible to wiretapping, the risk of interception is assumed.[9] Since the police only tap the wires of suspects, the danger to the privacy of innocent persons is more imagined than real. Moreover, eavesdropping,[10] the use of disguises by an officer posing as a member of a criminal gang,[11] and the concealment of a microphone in a room,[12] all clear violations of the right of privacy, are permitted. There is no substantial distinction between wiretapping and these other invasions of privacy. Why then prohibit only the one device?

Comparison of these views indicates that, in the final analysis, the issue is the relative value of privacy and investigative efficiency. The conflict of values may be seen in the private remedies available, the rules concerning the admissibility of such evidence, and the proposed Congressional solution to the problem.

Private Remedies

In situations where wiretapping is thought to be undesirable, there are private tort remedies available.[13] In some jurisdictions actual damage

8 The greater number of states have provisions aimed specifically at wire tapping. See: Ala. Code, tit. 14, §84 (18) (1940); Ark. Dig. Stat. §14255 (Pope, 1937); Colo. Ann. Stat. §129 (Michie, 1935); Conn. Gen. Stat. §6148 (1930); Ill. Rev. Stat., c. 134, §16 (Smith-Hurd, 1936); Iowa Code §13121 (Reichmann, 1939); Kan. Gen. Stat. §17-1908 (Corrick, 1935); Ky. Rev. Stat. §433.430 (Cullen, 1946); La. Code Crim. Law & Proc. §1183 (Dart, 1943); Mass. Ann. Laws, c. 272, §99 (Michie, 1933); Neb. Rev. Stat. §86-328 (1943); N. M. Stat. Ann. §41-3705 (1929); N. C. Gen. Stat. §140155 (Michie, 1943); Tenn. Code §10863 (Michie, 1938); Va. Code §4477 (Michie, 1942); Wash. Rev. Stat. Ann. §2656 (18) (Remington, 1932); Wis. Stat. §348.37 (Brossard, 1945).

The following states prohibit wire tapping as well as divulgence: Ariz. Code §43-5405 (1939); Cal. Pen. Code §591, 619, 640 (Derring, 1940); Del. Rev. Code 5232, §52 (1935); Fla. Stat. Ann. §822.10 (1944); Idaho Code §17-4505 (1932); Mich. Stat. Ann. §28.808 (Henderson, 1938); Mont. Rev. Code §11518 (Anderson & McFarland, 1935); Nev. Comp. Laws §7680 (Hillyer, 1929); N. J. Stat. Ann. §2:171-1 (1939); N. D. Comp. Laws §10231 (1913); Ohio Gen. Code Ann. §13402 (Page, 1939); Okla. Stat. §1782 (1941); Ore. Comp. Laws Ann. §510 (1940); Pa. Stat. Ann. §4688 (Purdon, 1939); R. I. Gen. Laws c. 609, §73 (1938); S. D. Code §13.4511 (1939); Utah Code Ann. §103-46-11 (1943); Wyo. Gen. Stat. §32-356 (Courtright, 1931).

9 Olmstead v. United States, 277 U. S. 438, 465 (1928) "By the invention of the telephone fifty years ago, and its application for the purpose of extending communications, one can talk with another at a far distant place . . . the intervening wires are not part of his house or office any more than are the highways along which they are stretched."

10 United States v. Harnish, 7 F. Supp. 305 (D.C. N.D., 1934) (radio direction finder); People v. Cotts, 49 Cal. 166 (1874) (police officer listened to conversation in defendant's cell); Goode v. State, 158 Miss. 616, 131 So. 107 (1930) (sheriff overheard conversation from road); Hunter v. State, 111 Tex. Cr. App. 252, 12 S. W. (2d) 566 (1928) (police listened at window).

11 Note (1946) 32 Cornell Law Quarterly 514.

12 Schoborg v. United States, 264 F. 1 (C.C.A. 6th, 1920) (dictograph); People v. Schultz, 18 Cal. App. (2d) 485, 64 P. (2d) 440 (1937) (dictaphone); United States v. Goldman, 118 F. (2d) 310 (C.C.A. 2d, 1941) (planting detectaphone in room); Commonwealth v. Wakelin, 230 Mass. 567, 120 N. E. 209 (1918) (conversation in defendant's cell overheard by dictograph).

13 The common law provides actions for damages against the searching officer. Boeger v. Langenberg, 97 Mo. 390, 11 S. W. 223 (1935); Doane v. Anderson, 15 N. Y. Supp. 459 (1911); Southwestern Telegraph & Telephone Co. v. Priest, 31 Tex. Civ. App. 345, 72 S. W. 241 (1903); Young v. Young, 56 R. I. 401, 185 Atl. 901 (1936) (court stated that no part of the wire was destroyed, the free transmission of the messages was preserved, and the communication was not distorted).

to property must be shown as in an action for trespass. This is hard to prove, however, for wiretapping ordinarily does not result in property damage.[14] Punitive damages are also available, but they are usually based on malice which would be difficult to show in the case of an officer[15]. Even if substantial damages for humiliation and mental anguish were ascertained,[16] they would be difficult to recover against a municipality which is usually not liable in tort without its consent, when acting under the police power.[17] Where the offender is not an officer, full recovery is allowed subject to the actual and punitive damage rules of each jurisdiction.

If an individual knows that his wires are being tapped, he may seek to have such practices enjoined in the future. Since the success of wiretapping is dependent on secrecy, however, this opportunity will seldom occur. The problem of injunctive relief from wiretapping only arises where law enforcement officials are permitted to engage in this practice, the key to the availability of this remedy being "reasonable cause."[18] Unless such cause can be shown, equity will enjoin continued tapping by officials. Where such cause is shown, however, equity will prefer to await the outcome by saying that the remedy at law, damages for the invasion of privacy, is adequate. In the jurisdictions favoring strict enforcement of the criminal law, therefore, it is to be expected that injunctive relief would be extremely difficult to obtain.

Admissibility as Evidence

Although private remedies seek to protect the right of privacy and furnish some deterrent force to indiscriminate tapping, the most crucial question is raised when information so gained is offered in evidence. Under the common law rule of admissibility, the judge will not delay the trial to determine the collateral issue of its legality.[19] The opponents

14 Wolf v. Colorado, 338 U. S. 25 (1949) Murphy, J., dissenting: "in a trespass action the measure of damages is simply the extent of the injury to physical property . . . if the officer searches with care, he can avoid all but nominal damages."

15 *Id.* at 43, 4643; 44 Harv. L. Rev. 1173 (1931), Fay v. Parker, 53 N. H. 342 (1872); Ross v. Clark, 35 Ariz. 60, 274 Pac. 639 (1929); McCormick, Damages, (1935) §78.

16 Brents v. Morgan, 221 Ky. 765, 299 S. W. 967 (1920) where the court said, "He is entitled to recover substantial damages, although the only damages suffered by him resulted from mental anguish. The fact that the damages cannot be measured by a pecuniary standard is not a bar to his recovery." *Accord,* Rhodes v. Graham, 238 Ky. 225, 37 S. W. (2d) 46 (1931); Gatzner v. Buening, 106 Wis. 1, 81 N. W. 1003 (1900); McCormick, Damages, (1935) §88.

17 The categorial rule, subject to many limitations, is that municipalities are not liable for the acts of their officers and employees when engaged in the performance of governmental or public duties, Hagerman v. City of Seattle, 189 Wash. 694, 66 P. (2d) 1152 (1937); Snook v. City of Winfield, 144 Kan. 375, 61 P. (2d) 101 (1936), but are liable for their acts when performing duties consequent upon the exercise of the corporate or private powers, Hannon v. City of Waterbury, 106 Conn. 13, 136 Atl. 876 (1927); City of Baltimore v. State, 168 Md. 619, 179 Atl. 169 (1935); Husband v. Salt Lake City, 92 Utah 449, 69 P. (2d) 491 (1937).

18 New York Rev. Const., Art. I, §12 (1938). "The right of the people to be secure against unreasonable interception of telephone and telegraph communication shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained."

19 1 Greenleaf, Evidence (12th ed. 1941) §254(a) "though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid

of wire tapping have, therefore, endeavored to apply the Federal Rule[20] of exclusion to this kind of evidence.

In *Olmstead v. United States*,[21] an attempt was made to declare wiretapping a violation of the Fourth Amendment. Chief Justice Taft, speaking for a divided Court, said that wiretapping was neither a "search nor seizure" and since there was no trespass or taking of papers and effects, evidence obtained by the "sense of hearing only" would not be prohibited.[22] The history of the Fourth Amendment shows that it was intended to protect the right of privacy, and telephone messages would seem as deserving of protection as letters or papers. The Court, however, preferred to construe the amendment strictly, leaving further determination of the question of legality to Congress.[23]

In 1934 Congress enacted, as Section 605 of the Federal Communications Act, a provision which prohibited the interception of "any communication" and divulgence of messages to any party not entitled thereto unless authorized by the sender.[24] Under that section, the Supreme Court, in *Nardone v. United States*,[25] rejected evidence exposing a smuggling ring because it was secured by wiretapping, an unauthorized interception. Although the legislative history of this section indicates that its primary purpose was to amend Section 27 of the Radio Act, extending the jurisdiction of the Federal Communications Commission to wire messages,[26] the Court was willing to recognize a possible subsidiary intention to discourage wiretapping which it alleged was "inconsistent with ethical standards and destructive of personal liberty."[27]

A further objection to the application of Section 605 to wiretapping was the contention that it only prohibited tapping on interstate communications. In *Sabalowsky v. United States*,[28] violators of the tax law on spirits were apprehended by federal agents who had secured evidence

objection to their admissibility, if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue, to determine that question." 8 Wigmore, Evidence (3d ed. 1940) §2183. Adams v. New York, 192 U. S. 585 (1904).

20 In Weeks v. United States, 232 U. S. 383 (1914) the United States marshall took papers from the defendant's house without a warrant. The Supreme Court reversed the conviction saying that the admission of such evidence, when timely application has been made for its return, would constitute an invasion of defendant's rights under the Fourth Amendment. The rule requiring a preliminary motion to supress illegally seized evidence has become known as the Federal Rule.

21 277 U. S. 438 (1928).

22 *Id.* at 440. "The Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants."

23 *Id.* at 453. "Congress may of course protect the secrecy of telephone messages by making them, where intercepted, inadmissible in evidence in federal criminal trials, by direct legislation, and thus depart from the common law of evidence."

24 48 Stat. 1103 (1934), 47 USCA §605 (Supp. 1946). "and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . ."

25 302 U. S. 379 (1937) (Petitioners were charged with smuggling of alcohol, possession and concealment of the smuggled alcohol, and conspiracy to smuggle and conceal it).

26 44 Stat. 1172 (1927).

27 302 U. S. 379, 383 (1937). "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."

28 101 F. (2d) 183 (C.C.A. 3d 1938).

by wiretapping. Both the violations and the wire taps occurred in New York. Counsel for the Government contended that by the first and third clauses of Section 605, only tapping of interstate communications was prohibited.[29] The court replied that while the first and third clauses refer to "interstate or foreign communications" they are intended to include only telegraph companies and their employees; the second and fourth clauses, being unrestricted, prohibit all intercepted communications. This is logical because of the practical impossibility of separating the two types when an agent is listening in on an instrumentality of interstate commerce.

When the *Nardone* case reached the Supreme Court a second time, Justice Frankfurter extended the statute to exclude any derivative use of "wiretapped evidence."[30] The application of the federal rule[31] of exclusion in this case was necessary to prevent a circumvention of the statutory policy.

The broad rule declaring that evidence obtained by violation of Section 605 is inadmissible has been subject to certain limitations since the decisions in the two *Nardone* cases. The prohibition of the section is not absolute in itself, but is a personal privilege available only to the sender. In *Goldstein v. United States*,[32] federal agents tapped the wires of certain persons suspected of defrauding insurance companies by fake claims for disability benefits. The information obtained did not come from tapping the wires of the accused; instead it was secured by taps on the wires of his confederates. The agents, informing certain members of the conspiracy of this evidence, persuaded them to turn Government's witnesses by a promise of immunity from prosecution. The accused invoked Section 605 which was held inapplicable since he was not a party to the wire tapped communications. This is a departure from the prohibitive policy of the previous cases and shows that the Court may not be unwilling to adopt a construction of the section that will admit "wiretapped evidence."

Since the section confers a personal privilege on the sender, it may be waived by his consent. By this means, in *United States v. Polakoff*,[33] a further inroad on the rule of the *Nardone* cases was attempted. A conspirator who was involved in a smuggling ring reported its activities to federal agents. Under a carefully devised plan, he telephoned his coconspirators from the office of the Federal Bureau of Investigation whose agents recorded the conversation. Counsel for the government alleged that the "sender" authorized divulgence of the message. The Circuit Court of Appeals, however, held that in a telephone conversation each party is alternately sender and receiver and it would be impossible to

29 Id. at 185. "The first and third clauses of the section deal with employees of communication agencies. The second and fourth clauses constitute a rule of evidence in the purest sense . . . . Congress in Section 605 prohibited intrastate as well as interstate communications in a district court of the United States." Diamond v. United States, 108 F. (2d) 859 (C.C.A. 6th 1938); United States v. Klee, 101 F. (2d) 191 (C.C.A. 3d 1938); Weiss v. United States, 308 U.S. 321 (1939).

30 308 U. S. 338, 341 (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."

31 See note 20 *supra*.

32 316 U. S. 114 (1942).

33 112 F. (2d) 888 (C.C.A. 2d 1940).

dissect a conversation so that one party could consent without destroying the other's privilege. Thus the waiver exception to the *Nardone* case, though recognized, is limited to mutual consent, thereby depriving it of any practical effect.

Even with its limitations, the statute is a remedy against a practice considered to be "unethical" but the question is whether it applies to state courts. In those states which follow the common law rule of admissibility of evidence,[34] the attempt to apply the statute to them under the force of the Fourteenth Amendment has been a failure. Even though the Fourth Amendment has now been read into the Fourteenth,[35] wiretapping cannot be called an "unreasonable search and seizure" because the *Olmstead* case is still good law.[36]

It may be argued that the second clause of Section 605 providing that "no person . . . shall intercept any communication and divulge or publish . . . to any person . . ."[37] prohibits wire tapped evidence in state courts in the same manner in which it is forbidden in federal courts.[38] Failure to so construe the section would practically nullify its protection of privacy since the bulk of criminal prosecutions occur in state courts and many criminal offenses, usually prosecuted in federal courts, could, by technical changes in the indictments, be prosecuted in state courts.[39] This argument is opposed by the states, who claim that Congress cannot constitutionally impose restrictions on their procedure, and that they have traditionally been free to make their own rules of evidence, providing the accused is given a fair and impartial trial.[40]

Congress, however, has the power to prohibit such evidence in the state courts by means of the commerce clause on the ground that, in order to protect interstate commerce, the part of intrastate commerce relating thereto can be regulated.[41] Precedent for Federal invasion of

34 See note 19 *supra.*

35 Wolf v. Colorado, 338 U.S. 25, 27 (1949). Justice Frankfurter replied, "the security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore 'implicit in the concept of ordered liberty' and as such enforceable against the states through the Due Process clause."

36 See note 22 *supra.* Olmstead v. U.S., 277 U.S. 438 (1928). Wolf v. Colorado, 338 U.S. 25 (1949). The court reasoned that the Federal Rule is the creation of the judiciary and need not be followed by the states even where an unreasonable search and seizure is involved.

37 48 Stat. 1103 (1934), 47 USCA §605 (Supp. 1946).

38 Nardone v. United States, 302 U.S. 370 (1937). The Supreme Court held that the second clause of §605, cited *supra* note 24, comprehends federal agents and the ban on communication bars testimony to the content of an intercepted message. *Accord,* Weiss v. United States, 308 U.S. 321 (1939); Goldstein v. United States, 316 U.S. 114 (1942).

39 Note (1947) 33 Cornell Law Quarterly 73.

40 People v. Kelley, 22 Cal. (2d) 169, 137 P. (2d) 1 (1943) appeal dismissed *sub. nom.* Kelley v. State, 320 U.S. 715 (1944). The Court said, "Section 606 was intended for the activities of officials and courts of the federal government and for no others. In matters involving solely procedure, state courts are not effected by acts of Congress." *Accord,* People v. Vertlieb, 22 Cal. (2d) 193, 137 P. (2d) 437 (1943); Rowan v. Maryland, 175 Md. 547, 3 A. (2d) 753 (1938); note (1941) 25 Minn. L. Rev. 382; Note (1943) 18 N.C.L. Rev. 222.

41 Southern Railway Co. v. United States, 222 U.S. 20 (1911) (in a civil action to recover penalties for violation of Safety Appliance Act, the court applied the commerce clause to control intrastate traffic having a direct effect on interstate traffic). The court said, "interstate traffic . . . will be promoted in a real or substantial sense by applying the requirements of these acts to vehicles used in moving the traffic which is intrastate." *Accord,* East & West Texas Ry. Co. v. United States, 234 U.S. 342 (1914); Wickard v. Filburn, 317 U.S. 111 (1942).

state court procedure exists in the provision in the Bankruptcy Act that no testimony by the bankrupt shall be used against him in any criminal proceeding,[42] and the use of the supremacy clause of the United States Constitution to compel state courts to enforce claims under the Emergency Price Control Act.[43] This question, however, has not yet been determined and as a result there has been a wide variation among the states that follow the statute and those that do not.[44]

Thus the passage of Section 605 of the Federal Communications Act has not solved the problem. The limitations which have been placed around the statute and its uncertain applicability to the states, have left a considerable degree of variation in the judicial and legislative attitudes toward wiretapping. It is still not certain how far courts should go in excluding evidence of crimes nor is there a clear concept of the privacy of the telephone. As a result, legislators, judges, lawyers, and laymen are asking: at what point, if any, does the end begin to justify a "dirty" means?

Legislative Proposals

The answer to this question is reflected in the recently proposed legislation amending Section 605. The bill allows wiretapping in cases concerning national security and defense.[45] Treason, sabotage, espionage, violation of neutrality laws and others are specifically enumerated, and under the comprehensive phrase, "in any other manner," all crimes affecting national security are intended to be included.[46] This limitation of the subject matter of wiretapping eliminates the criticism that tapping has its major use in relatively unimportant cases.[47] Under this statute, only national security is considered to be paramount to the right of privacy.

The right to "tap" is further limited to the Director of the Federal Bureau of Investigation and the Director of the Intelligence Division of the Army, Navy, and Air Force.[48] Since the indiscriminate use of wiretapping is a fertile source of blackmail and sinister business practices, the possession of wiretapping equipment by anyone, with intent to use it or knowing it will be used in violation of the Act, is a felony.[49]

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42 30 Stat. 548 (1898), amended 52 Stat. 847 (1939), 11 USC §25 (a) (1940).

43 Testa v. Katt, 330 U.S. 386, 392 (1947) where the court said, "it repudiated the assumption that federal laws can be considered by the states as though they were laws emanating from a foreign sovereign. Its teaching is that the Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states, courts, and the people, 'anything in the Constitution or Laws of any State to the contrary notwithstanding.'"

44 See note 8 *supra*.

45 H.R. Rep. No. 4124, 81st Cong., 1st Sess. (1949) 2. "to ascertain, prevent, . . . any interference . . . with the national security and defense . . . and to require that . . . any information obtained by means of intercepting, listening in on, or recording telephone . . . be disclosed and delivered to any authorized agent of any one of said investigatorial agencies, without regard to the limitations contained in section 605 of the Communication Act of 1934. The information thus obtained shall be admissible in evidence . . ."

46 *Id.* at 3. "Treason, sabotage, espionage, seditious conspiracy, violation of neutrality laws, . . . or in any other manner . . ."

47 See note 5 *supra*.

48 H.R. Rep. No. 4124, 81st Cong., 1st Sess. (1949) 2.

49 *Id.* at 2. "No person shall possess any device, contrivance, machine, . . . used for the interception of wire communications . . . any person who wilfully violates any provision of this section shall be guilty of a felony . . ." To the same effect is N.Y. Penal Law, §552 (a) (1949).

Even the ordinary officer, intent on enforcing the law, cannot tap, so great is the protection to the right of privacy.

Securing permission to tap is the most uncertain provision in the proposed law. The initial proposal in the House of Representatives recommended that permission to tap be secured from any federal court on a showing of probable cause;[50] the recommendation of April 6th suggests the use of a warrant, adopting the requirements of the Fourth Amendment,[51] while the latest proposal requires the duly authorized agents of the various departments to act under rules and regulations prescribed by the Attorney General.[52] The common element of all three proposals is the necessity to show reasonable cause to believe that an injury to national security will occur if permission is not granted. Either proposal is designed to meet this need; the difference being that the latest one eliminates the time consumed in securing a warrant or permit and, provides greater convenience and efficiency in investigation.

Conclusion

The battle between administrative efficiency and the right of privacy has been renewed in Congress, apparently with a trend away from the wide protection given to the right of privacy by Section 605. Regardless of the merits of the proposed line which would place only the interest in the national security above the interest of the citizen in the secrecy of his telephone conversations, Congressional action in this field seems highly desirable since the courts are apparently willing to let the matter rest with the *Olmstead* case and thus avoid the issue of whether or not the Federal legislation can, by implication, control the rules of evidence in state courts. This legislative proposal does have the merit of imposing a uniform rule, attacking such evidence at its source instead of the point at which it is offered in court.

The principal area of contention at the present time is the mechanism by which wiretapping will be restricted to cases in which the national security is probably involved. The current proposal, that the practice be regulated under rules prescribed by the Attorney General, suggests a concession to administrative efficiency and expediency. The considerations involved here are the need for absolute secrecy as against the safety of a judicial hearing. Whatever the decision on that point, federal officers will be permitted greater latitude than they now have and the indiscriminate use of wiretapping in relatively unimportant situations will be further curtailed. Thus the present legislation represents certain concessions to each side but no final opinion as to the relative value of the policies advocated.

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50 H.R. Rep. No. 3563, 81st Cong., 1st Sess. (1949) 3. "A judge of any United States court shall issue a permit, . . . if the judge is satisfied that there is reasonable cause to believe that the communications may contain information which would assist in the conduct of such investigations."

51 H.R. Rep. No. 4048, 81st Cong., 1st Sess. (1949) 3. "the prohibition of this subsection shall not apply if such interception is authorized by a warrant . . . issued by a judge of the United States . . . upon an affidavit sworn to before the judge . . . that there is probable cause to so believe . . ."

52 H.R. Rep. No. 4124, 81st Cong., 1st Sess. (1949) 3.