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Admissibility of Wiretap Evidence in Criminal Cases

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Section 3. It shall be unlawful for a labor organization or its members or employees to engage in a strike, boycott or other concerted activities where an object thereof is to compel any employer to enter into a contract or agreement prohibited by Section 2, *provided* that nothing contained in this Act shall be deemed to prohibit a labor organization from excluding an employer from the market as an incident of a current dispute with such employer concerning the association or representation of employees or their terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

ADMISSIBILITY OF WIRETAP EVIDENCE IN CRIMINAL CASES

THE NATIONAL GOVERNMENT AND WIRETAPPING

Wiretapping became a matter of public concern early in the twentieth century when the development of mechanical and electrical devices enabled a third party secretly to overhear and record conversations transmitted over a telephone wire.[1] In 1918 Congress authorized the President, whenever he deemed it necessary for national security, to assume control of the telephone system for the duration of World War I.[2] When it became apparent that the telephone wires could be secretly tapped, Congress placed an absolute ban on wiretapping for the duration of governmental operation of the lines.[3]

During the 1920's wiretapping was conducted by federal agents to enforce the prohibition legislation. In 1928 a case arose in which evidence of a conspiracy to violate the National Prohibition Act was obtained by government agents by tapping a telephone line and overhearing the parties to the conspiracy. A conviction was secured on the basis of this evidence, and the United States Supreme Court granted certiorari to determine whether the use of wiretap evidence in federal courts violates the fourth amendment.[4] Chief Justice Taft, speaking for a majority of the Court in *Olmstead v. United States*,[5] ruled that wire-

1. Westin, *The Wire-Tapping Problem: An Analysis and a Legislative Proposal*, 52 COLUM. L. REV. 165, 172 (1952).
2. 40 Stat. 904 (1918).
3. 40 Stat. 1017 (1918).
4. U.S. CONST. amend. IV: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."
5. 277 U.S. 438 (1928).

tapping does not constitute a search or seizure within the meaning of the fourth amendment. Justice Taft noted that the Court in previous cases had construed the fourth amendment liberally, but this did not "justify enlargement of the language employed [in the amendment] beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words search and seizure as to forbid hearing or sight."[6] In other words, since wiretapping does not involve an actual physical invasion of the premises, it does not come within the protection of the fourth amendment.

After the *Olmstead* decision, wiretapping was neither unconstitutional nor a federal crime,[7] and evidence obtained by intercepting telephone conversations was admissible in federal courts. However, in 1934 Congress enacted the Federal Communications Act,[8] which created the Federal Communications Commission and invested the Commission with jurisdiction over radio, telegraph, and telephone communications. Included in this act was a section pertaining to the interception and divulgence of messages. Section 605 declared, among other things, that "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. . . ."[9] It is doubtful that Congress intended for section 605 to prohibit law-enforcement wiretapping.[10] In any event, in 1937 the Supreme Court in *Nardone v. United States*[11] ruled that the Federal Communications Act bans wiretap evidence from criminal cases in the federal courts. Justice Roberts, speaking for the majority, explained that "no person" in section 605 includes federal agents and that the barring of communications to "any person" precludes recitation of the contents of intercepted messages as testimony in court.[12] Justice Sutherland, dissenting, argued that "person" in section 605 should not be construed to include a federal agent acting in his official capacity.[13]

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6. *Id.* at 465.

7. Westin, *supra* note 1, at 173.

8. 48 Stat. 1064 (1934), 47 U.S.C. §§151-609 (1958).

9. 48 Stat. 1103 (1934), 47 U.S.C. §605 (1958).

10. Alan Westin, Professor of Government at Columbia University, in 1961 told the Senate Subcommittee on Constitutional Rights that "having looked at every page and at every hearing and at the public comment on the Radio Act of 1927 and the Communications Act of 1934, I personally am persuaded that Congress never had the intention of dealing with law enforcement wiretapping in that statute." *Hearings on Wiretapping and Eavesdropping Legislation Before a Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 87th Cong., 1st Sess. 243 (1961).

11. 302 U.S. 379 (1937).

12. *Id.* at 382.

13. *Id.* at 385 (dissenting opinion). For other critiques of the Court's decision see 38 MICH. L. REV. 1097 (1940); Note, 6 GEO. WASH. L. REV. 326 (1938).

After the *Nardone* defendants were reconvicted in the lower court, the Supreme Court granted certiorari and again reversed their convictions, extending the rule of inadmissibility not only to intercepted messages but also to evidence procured through knowledge gained from such messages.[14] In the majority opinion, Justice Frankfurter, reasoned that "to forbid the direct use of methods . . . characterized [as inadmissible in the previous case] 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.' "[15]

On March 18, 1940, Attorney General Robert H. Jackson issued a statement[16] that the Justice Department would "completely abandon" wiretapping in order to comply with the *Nardone* decisions. President Roosevelt, however, directed a confidential letter to the Attorney General, authorizing him to approve wiretapping when necessary for the defense of the nation.[17] In 1941 Attorney General Jackson, to justify wiretapping by the Justice Department, advanced an interpretation of section 605 of the Federal Communications Act. The phrase "intercept . . . and divulge," Jackson maintained, is an inseparable unit; therefore, the statute does not prohibit wiretapping if the intercepted information is not subsequently divulged. Jackson contended further that the Federal Bureau of Investigation is a single "person" under the statute and, therefore, sharing of wiretap information among the personnel of the Bureau does not constitute a divulgence in the sense that the statute makes illegal.[18] Justice Department wiretapping was continued after

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14. Nardone v. United States, 308 U.S. 338 (1939).

15. *Id.* at 340. Although the Court disposed of this case with a short opinion and only one dissent (McReynolds), the ruling seems highly significant, for wiretap information may be more valuable as leads than as evidence in court. See statement of Samuel Dash, Attorney at Law, *Hearings on Wiretapping, supra* note 10, at 105. Mr. Dash maintains that police officers generally use wiretap information only as leads, for they have found that convictions on wiretap evidence result in pressures by bar association groups and civil liberty organizations on the legislatures to prohibit police wiretapping. On the other hand, the ruling may have little impact, for wiretapping is probably practiced extensively today, and the information obtained is unlikely to turn up in court. See statement of Charles A. Reich, Yale Professor of Law, *Hearings on Wiretapping, supra* note 10, at 190. The second *Nardone* case was peculiar in this regard because the use of wiretap information in the case had already been revealed in the first hearing of the case.

16. 86 Cong. Rec. 1471-72 (1940) (statement of the Attorney General).

17. Letter from J. Edgar Hoover to *Yale Law Journal*, Feb. 25, 1949, 58 Yale L.J. 423 (1949).

18. See Westin, *supra* note 1, at 168-69. Justice Roberts' opinion in the first *Nardone* case did not mention Weeks v. United States, 232 U.S. 383 (1914), in which the Court formulated the federal rule that evidence secured illegally must on motion be excluded from the pending trial in federal courts. This suggests that the

World War II[19] and is a current practice.[20]

On the same day of the second *Nardone* ruling, the Supreme Court ruled in *Weiss v. United States*[21] that the provisions of section 605 apply to intrastate as well as interstate and foreign commerce and bar admission in the federal courts of evidence obtained by interception of such intrastate telephone communications.[22]

The Court limited the federal exclusionary rule in two cases decided in 1942. In *Goldstein v. United States*[23] testimony of two prospective witnesses had been secured by government agents by confronting the witnesses with recordings of their telephone conversations and threatening to prosecute them on the basis of this evidence if they refused to testify. When the witnesses testified, the defendants protested, contending that the testimony had been obtained in violation of section 605 of the Federal Communications Act. The Supreme Court by a five-to-three vote sustained the conviction. Justice Roberts, speaking for the majority, stated that one not a party to a tapped conversation has no standing to object to its use by the government to obtain evidence.[24] In *Goldman v. United States*[25] the Court held that the overhearing with a dictaphone of one end of a telephone conversation involved neither an "interception" nor a "communication" within the purview of section 605, and, therefore, the evidence obtained was admissible.[26]

In the 1957 case of *Benanti v. United States,*[27] the Court unanimously ruled that section 605 bars wiretap evidence from federal courts, regard-

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justices may have anticipated the Attorney General's argument that a mere interception would not be illegal under §605 and, thus, be inadmissible under the *Weeks* rule.

19. See N.Y. Times, Jan. 9, 1950, p. 9, cols. 5-6.

20. The Justice Department maintained seventy-eight wiretaps during 1960 and eighty-five to the date of the hearings in May 1961. See the statement of Herbert J. Miller, Jr., Assistant Attorney General in charge of the Criminal Division, Department of Justice, *Hearings on Wiretapping, supra* note 10, at 363, 366.

21. 308 U.S. 321 (1939).

22. The Court further ruled that the prosecutors had not obtained "authorization of the sender" under §605 by confronting one of the conversants with offers of leniency and persuading him to turn state's evidence. The wiretap information remained inadmissible. Weiss v. United States, *supra* note 22, at 329-30.

23. 316 U.S. 114 (1942).

24. Justice Murphy, speaking in dissent for himself, Justice Frankfurter, and Chief Justice Stone, argued that the decision in this case should have been controlled by *Nardone* and *Weiss* and the evidence held inadmissible. 316 U.S. 114, 126 (1942) (dissenting opinion).

25. 316 U.S. 129 (1942).

26. Justices Stone and Frankfurter, dissenting, could not distinguish in principle between the instant case and *Olmstead, supra* note 5. However, they were prepared to overrule *Olmstead* if the majority had been willing. 316 U.S. 129, 140-41 (1942) (dissenting opinion).

27. 355 U.S. 96 (1957).

less of whether it was obtained by state or federal agents. However, the Court did not restrict the limitations that had been placed on the exclusionary rule by the *Goldstein* and *Goldman* cases.

In summary, it can be said that there is no constitutional prohibition or limitation on wiretapping. Section 605 of the Federal Communications Act of 1934 bars from federal courts evidence obtained by tapping interstate or intrastate telephone wires, regardless of whether the wiretap was conducted by federal or state agents. This exclusionary rule extends to evidence obtained through knowledge gained from such wiretaps. Limitations to this rule include rulings that one not a party to a tapped conversation has no standing to object to its use by the Government to obtain evidence, and that evidence obtained by overhearing only one end of a telephone conversation is admissible in federal courts.

THE STATES AND WIRETAPPING

Wiretapping constitutes a problem in federalism for two reasons. First, wiretap statutes in many states differ in substance from the Federal Communications Act as it has been construed by the Supreme Court. Second, the rules of evidence in many states differ from the Court's construction of section 605 of the Federal Communications Act, and from the federal rule formulated by the Court in *Weeks v. United States*,[28] whereby evidence illegally obtained is inadmissible in federal courts.

Thirty-three states have statutes that prohibit wiretapping. Six states have statutes that permit wiretapping by police officers; five of these statutes require a court order for wiretapping; Louisiana permits police wiretapping without a court order. Eleven states have no statutes on wiretapping. Twenty-four states admit as evidence in their courts wiretap information obtained by state officers. Included in these twenty-four states are five states that have no statutes on wiretapping and thirteen states that prohibit wiretapping.[29]

The discrepancy between state wiretap prohibition statutes and the admission of wiretap evidence in their courts is explainable on two counts. First, the rule in *Weeks v. United States* represented an exercise by the Supreme Court of its supervisory power over lower federal courts, and therefore is not applicable to the rules of evidence followed by state courts on matters not relating to the rights of the parties under the federal constitution. Second, several states that prohibit wiretapping by

28. 232 U.S. 383 (1914); see note 18 *supra*.

29. STAFF OF SUBCOMM. ON CONSTITUTIONAL RIGHTS, SENATE COMM. ON THE JUDICIARY, 87TH CONG., 1ST SESS., STATE STATUTES ON WIRETAPPING (Comm. Print 1961). For an analysis of the wiretapping legislation of the various states see *Hearings on Wiretapping*, *supra* note 10, at 540-42.

statute do not apply these statutes to law-enforcement officers acting in their official capacity.[30]

In *Schwartz v. Texas*,[31] the Supreme Court considered the application of the Federal Communications Act to the admissibility of wiretap evidence in state courts. The Court ruled eight-to-one that section 605 does not bar the admission of wiretap conversations as evidence in a criminal proceeding in a state court. Justice Minton added that[32]

> indeed, evidence obtained by a state officer by means which would constitute an unlawful search and seizure under the Fourth Amendment to the Federal Constitution is nonetheless admissible in a state court. . . . [I]n the absence of an expression by Congress [Section 605] is simply an additional factor for a state to consider in formulating a rule of evidence for use in its own courts.

However, in the 1957 *Benanti* case, Chief Justice Warren, speaking for the entire Court, advanced a dictum that admission of wiretap evidence in a state court contrary to section 605 would constitute a federal crime.[33]

> [K]eeping in mind [the] comprehensive scheme of interstate regulation and the public policy underlying section 605 as part of that scheme, 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.

The *Benanti* dictum implied that admission of wiretap information as evidence in state courts would not be tolerated. Consequently, in 1961 a suit was filed in a federal court to enjoin the use of evidence obtained by court-ordered wiretaps in a New York state criminal trial.[34]

30. The courts of Florida have followed *Schwartz v. Texas*, and held §605 of the Federal Communications Act inapplicable to proceedings in the state courts of Florida. Williams v. State, 109 So. 2d 379 (2d D.C.A. Fla. 1959), *cert. denied* 113 So. 2d 836 (1959); Griffith v. State, 111 So. 2d 282 (1st D.C.A. Fla. 1959). Although FLA. STAT. §822.10 (1961) prohibits wiretapping, the court in *Griffith* further held that evidence obtained through wiretapping is not inadmissible because obtained in violation of the statute. Griffith v. State, *supra* at 287. However, the court considered wiretapping violative of §12 and §22 of the Declaration of Rights of the Florida Constitution, and held that "the use as evidence of conversations overheard through wiretapping in effect compels a defendant in a criminal case to be a witness against himself, in violation of Section 12 of the Declaration of Rights." Griffith v. State, *supra* at 287. This ruling would seem to render wiretap evidence excludable from future criminal cases in the state courts of Florida.

31. 344 U.S. 199 (1952).

32. *Id.* at 201.

33. Benanti v. United States, *supra* note 27, at 105-06.

34. N.Y. CODE CRIM. PROC. §813 (a) authorizes court-order wiretapping by

The Supreme Court received the case on certiorari and delivered a one-sentence, per curiam opinion. Citing *Schwartz,* and *Stefanelli v. Minard,*[35] the Court in *Pugach v. Dollinger*[36] ruled that "a federal court may not enjoin the use in a criminal trial in a state court of evidence obtained by wiretapping in violation of section 605 of the Federal Communications Act."

Despite the Court's ruling in *Pugach,* several judges of New York state criminal courts have subsequently said they will no longer sign wiretap orders, since they consider this a federal crime under section 605 as construed in *Benanti* by the Supreme Court.[37] And, it has been argued that private individuals or public officials may be hesitant to come into a state court with wiretap information because of the possibility of self-incrimination under the Federal Communications Act or under state wiretap prohibition statutes where the common-law rule of evidence is followed.[38]

The Supreme Court's 1961 ruling in *Mapp v. Ohio,*[39] although not concerned with wiretapping per se, might indicate the direction in which the Court is moving on wiretapping. In the *Mapp* case, the Court

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law-enforcement officers.

35. 342 U.S. 117 (1951). The Court ruled that federal courts should not intervene in state criminal proceedings to enjoin the use of evidence even when claimed to have been secured by unlawful search and seizure.

36. 365 U.S. 458 (1961), Justice Douglas, speaking for himself and Chief Justice Warren, dissented, maintaining that the Court in *Benanti* "held that the proscription of wiretapping contained in §605 forbade wiretapping by an authorized executive officer of the State, acting under the explicit terms of a state statute and pursuant to a warrant issued by the state judiciary." Pugach v. Dollinger, *supra* at 459-60.

37. See statement of Daniel Gutman, Dean, New York Law School, *Hearings on Wiretapping, supra* note 10, at 80-81.

38. See statement of Robinson O. Everett, Professor of Law, Duke University, *Hearings on Wiretapping, supra* note 10, at 268. An editorial in the Buffalo (New York) Courier-Express, Nov. 19, 1961, stated that District Attorney Frank Hogan, New York County, New York, dropped prosecution of seven defendants accused of being top men in a multi-million dollar narcotics ring. The assistant prosecutor advanced the opinion that the wiretap evidence established the guilt of the men, but the decision was made not to submit the evidence because submission would have made the district attorney liable for prosecution under the Federal Communications Act. 108 CONG. REC. A716 (daily ed. Jan. 31, 1962) (remarks of Representative Dulski). However, the Department of Justice has prosecuted no state officials for violation of the Federal Communications Act. The Department has initiated fourteen prosecutions under the act since 1952—all private detectives. Statement of Herbert J. Miller, Jr., Assistant Attorney General, *Hearings on Wiretapping, supra* note 10, at 364.

39. 367 U.S. 643 (1961). Justice Harlan, in his dissent, noted that Justice Black, concurring in the decision of the Court, was unwilling to subscribe to the view that the federal exclusionary rule derives from the fourth amendment itself, but joined the majority on the premise that its end could be achieved by bringing the fifth

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was presented with the question whether evidence obtained by an unreasonable search and seizure was inadmissible in a state court. The Court, in *Wolf v. Colorado*,[40] had held that the fourth amendment protection against unreasonable searches and seizures was applicable to the states through the fourteenth amendment. However, the holding was qualified to the extent that the exclusion of evidence thus obtained was held not to be an essential element of due process of law. In *Mapp*, the Court struck down this qualification and applied the same sanction of exclusion of such evidence as was applied in the federal courts by the *Weeks* case.[41]

The *Mapp* ruling does not presently affect the status of wiretapping in the states because of *Olmstead v. United States*, which ruled that wiretapping does not constitute a search or seizure within the meaning of the fourth amendment. However, *Olmstead* was a five-to-four decision, and the dissenting justices, particularly Justice Brandeis, foresaw the development of more intricate wiretap devices and suggested the complexity that the wiretap issue would assume in subsequent years.[42] This suggests that the present Court could subordinate the importance of continuity in the law to the desirability of making the law responsive to changes in wiretapping methods and, thus, overrule *Olmstead*. In this event, wiretapping would constitute a search and seizure within the meaning of the fourth amendment, and "reasonable," court-order wiretaps by state law-enforcement officials might be permitted.[43]

THE WIRETAP PROBLEM TODAY AND POSSIBILITIES FOR REFORM

The legal aspects of the wiretap problem are discussed above. The wiretap problem also has certain non-legal ramifications.[44] For instance,

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amendment to the aid of the fourth. Mapp v. Ohio, *supra* at 672. It is probably relevant to note with an eye to the present Court's view on the *Mapp* holding that Frankfurter and Whittaker, who joined in Harlan's dissent in *Mapp*, are no longer on the Court.

40. 338 U.S. 25 (1949).

41. Weeks v. United States, *supra* note 28.

42. Olmstead v. United States, 277 U.S. 438, 473-74 (1928) (dissenting opinion).

43. See Note, 12 SYRACUSE L. REV. 361, 383-85 (1961) in which the author proposes three means by which the Supreme Court or Congress may alleviate the wiretap problem: (1) expansion of the scope of the fourth amendment to the states via the fourteenth, (2) rigid enforcement of §605 of the Federal Communications Act, (3) passage of new legislation. Since this article was written before *Mapp*, the author notes that implementation of the first proposal would involve overruling *Olmstead* and *Wolf*.

44. For an extended discussion of some of these non-legal ramifications see WILLIAMS, ONE MAN'S FREEDOM 106-21 (1962).

it presents the necessity of balancing the individual's right to privacy while using the telephone against the advantages that accrue to society through the use of wiretaps to enforce its criminal laws. Civil liberty groups have voiced their opposition to all types of wiretapping.[45] Telephone companies are interested in maintaining the privacy of their lines.[46] On the other hand, law-enforcement agencies and officials argue that wiretapping is essential for effective law enforcement. The Department of Justice regards wiretapping as indispensable in national security cases, and New York state district attorneys contend that they must conduct wiretaps.[47]

A recent survey of editorial views on wiretapping by Professor Alan Westin, reveals general agreement that the present legal situation is "intolerable." About two-thirds of the newspapers favored new laws providing for limited, court-order systems of official wiretapping while outlawing all private tapping; about one-third of the newspapers had adopted editorial positions opposing legalized wiretapping.[48]

Opponents and proponents of court-order wiretapping disagree on whether the court-order wiretap is analogous to the search warrant. Professor Westin favors the use of the analogy of reasonable search and seizure in the fourth amendment as applied to search warrants and the establishment of a court-order system of police wiretapping in the telephone area.[49] Others have pointed out that a search warrant is issued for a specific place, is usually executed within a short time, and indicates the object of the search. They argue that a wiretap necessarily covers a longer period of time and allows an evidentiary hunt, which is not permitted under the search warrant. And, the search warrant allows a search only for the implements or products of a crime that will be introduced in court, whereas the wiretap is primarily a search for leads. Thus, it is likely that nothing tangible will show up in court in order that the legality of the wiretap might be tested.[50]

The desirability of admitting recordings of tapped telephone conversations as evidence has also been debated. Professor Westin suggests

45. See statements of representatives of the Americans for Democratic Action and the American Civil Liberties Union, *Hearings on Wiretapping, supra* note 10, at 390-97, 406-29 [hereinafter cited as 1961 *Hearings*].

46. See statement of W. Coles Hudgins, vice president, Mountain States Telephone and Telegraph Company, Denver, Colorado, 1961 *Hearings* 246.

47. See 1961 *Hearings* 18-19, 327-34, 354-59, 429-47.

48. 1961 *Hearings* 211-22. This survey included about seventy newspapers and covered the period 1958-1961.

49. 1961 *Hearings* 195. Herbert Miller, Jr. told the Subcommittee that the Attorney General should be authorized to issue wiretap orders in the area of national security, since speed and absolute secrecy are essential. 1961 *Hearings* 358.

50. See statements by Charles Reich, Yale Professor of Law, and Edward Williams, Attorney at Law, Washington, D.C., 1961 *Hearings* 190, 383.

that the advantages that might accrue to a defendant by the use of such recordings may balance the dangers inherent in their admission. For example, a highly respected police officer may testify in good faith to a conversation that he has heard, but which he misconstrued when the defendant engaged in it. If the defendant has a bad reputation and the officer is respected by the jury, this would place the defendant at a disadvantage. The defendant's lawyer might be able to defend more effectively in such a case if the conversation is submitted as a recording (assuming the tape has not been altered), thus allowing the jury to consider the remarks in context.[51] However, others have argued that the possibility of alterations of the tape outweighs any advantage that could accrue to the defendant from its admission as evidence.[52]

Congress has encountered administrative problems in drafting wiretap bills. Who should administer a federal wiretap statute? Professor Westin prefers the Federal Communications Commission because the Justice Department is itself conducting wiretaps.[53] Should wiretap information be admissible only in criminal suits, or should it be transferable to civil suits, such as tax controversies? If a court-order wiretap bill is desired, should all federal judges be empowered to issue wiretap orders, or does the danger of "judge shopping" make it desirable to designate particular judges for their issuance? Finally, would it be possible to enforce a court-order wiretap statute? It has been observed in this regard that it is relatively difficult to tap a line without the aid of the records in the telephone offices, giving technical information such as the cable and pair members of the wire and the location of the terminal boxes to which the tap may be secured.[54]

Virtually all informed groups agree that Congress should legislate on the wiretap problem, for wiretapping today "flourishes as a wide-open operation at the federal, state, municipal, and private levels."[55] Although

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51. 1961 *Hearings* 227.

52. *Id.* at 119. Samuel Dash, Philadelphia attorney, played a recording to the Subcommittee and then played a recording of the same conversation after it had been altered by cutting and splicing the tape. The second recording conveyed motives of the speaker contrary to those expressed in the original conversation. Dash maintained that not only whole words but also individual letters within words could be altered; for example, "fill" might be changed to "kill" by extracting a "k" from another word, omitting that word, and inserting the "k" in place of the "f" in "fill."

53. 1961 *Hearings* 232.

54. 1961 *Hearings* 261-62.

55. Westin, *The Wire-Tapping Problem: An Analysis and a Legislative Proposal*, 52 COLUM. L. REV. 165, 167 (1952). See also 1961 *Hearings* 105-22. Samuel Dash told the Subcommittee that his investigations indicate that in 1952 the New York City Police Department engaged in between 16,000 and 26,000 wiretaps, although they officially claimed only 338. However, subsequent inquiry by the Subcommittee

various types of wiretap bills have been before the Congress since the 1920's, no bill which pertains specifically to wiretapping has been enacted. Following the 1961 hearings of the Senate Subcommittee on Constitutional Rights, an "emergency" bill[56] was approved by the Judiciary Committee. The bill was intended to clarify the applicability of section 605 of the Federal Communications Act, and to protect against a construction of the act, such as that implicit in the dictum of the *Benanti* case, that would prohibit wiretapping by state law enforcement officers. Congress has taken no further action on this bill during 1961-1962. Meanwhile, on February 7, 1962, a wiretap bill drafted by the Justice Department was presented to the Congress. The bill provided for wiretapping in national security cases authorized by the Attorney General, federal court-order wiretaps by federal agents in regard to certain other major crimes, and court-order wiretaps by state officials, if authorized by state law. This bill had not emerged from committee at the time of this writing.[57]

Professor Westin in 1961 told the Subcommittee on Constitutional Rights that he was pessimistic concerning the possibility of enactment by Congress of wiretap legislation. He stated three reasons for his pessimism: (1) some congressmen in the minority party do not want to approve court-order wiretapping while the Attorney General is a member of the opposite party; (2) other congressmen believe that the Attorney General should have control over wiretapping without a court order; (3) other congressmen take the position that there should be no legalized wiretapping and they are prepared to filibuster to prevent it. These factions, Professor Westin maintains, prevent the formation of a majority needed for passage of wiretap legislation.[58]

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cast doubts on the validity of Mr. Dash's data-collection methods. For a critique of Mr. Dash's methods and conclusions, see Silver, *The Wire-Tapping–Eavesdropping Problem: A Prosecutor's View,* 44 MINN. L. REV. 813 (1960). Silvers contends that Dash has written a "thriller" instead of an objective appraisal of the wiretap situation. Some of the staunchest opponents of wiretapping believe that Congress should clarify the situation. See statement of Mark Lane, Americans for Democratic Action, 1961 *Hearings* 390.

56. S. 1086, 87th Cong., 1st Sess. (1961). This bill was introduced by Senator Kenneth Keating of New York. For text, see *Hearings on Wiretapping, supra* note 10, at 1. The Subcommittee on Constitutional Rights had decided that the situation in the states should be relieved in a separate bill, since the situation on the national level was not affected by the Supreme Court's ruling in *Benanti.*

57. S. 2813, H.R. 10185, 87th Cong., 2d Sess. (1962). See 108 CONG. REC. 1688-90 (daily ed. Feb. 7, 1962). Senator Keating told the Senate that this comprehensive (and, thus, more controversial) bill should not be allowed to delay action on S. 1086, which would relieve the wiretap problem in the states. See 108 CONG. REC. 1278 (daily ed. Feb. 2, 1962).

58. *Hearings on Wiretapping, supra* note 10, at 223.

Consequently, it is questionable whether Congress will enact wiretap legislation in the near future. If it does, the bill will probably be similar to the bill approved in 1961 by the Senate Judiciary Committee that was designed to clarify the applicability of section 605 of the Federal Communications Act to proceedings in state courts. If Congress does not act on wiretapping in the near future, it seems likely that the Supreme Court, if presented with the opportunity, will overrule *Olmstead v. United States*. If so, wiretapping would constitute a search and seizure within the meaning of the fourth amendment, and under the *Mapp* rule wiretap evidence would be excludable from state courts if secured in a manner deemed "unreasonable." The analogy of the search warrant could then be applied to wiretaps, and "reasonable," court-order wiretaps by law-enforcement officials would be permitted. The evidence obtained from such wiretaps would be admissible in state and federal courts.

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