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THE WIRETAPPING ENTANGLEMENT: HOW TO STRENGTHEN LAW ENFORCEMENT AND PRESERVE PRIVACY

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During the dog days of July 1958 the nation was diverted by the highly irregular and equally comic attempt by an investigator of the House Subcommittee on Legislative Oversight to eavesdrop by means of an electronic "bug" or detectaphone on the private conversations of Mr. Bernard Goldfine, a gentleman whose affairs were then under the subcommittee's scrutiny. It was somewhat less amusing, however, for the average citizen to learn, on the authority of a United States Attorney, that such activity was under no federal restraint.[1] He was informed, on the other hand, that although actual wiretapping of a *telephone* conversation is forbidden under federal law, no offense is committed even in that situation until there has been a divulgence of the information so obtained.[2] Furthermore, the prohibition against telephone tapping extends to federal law enforcement agents[3] and apparently to state police officers armed with court orders for that express purpose who might be seeking evidence against felons of the most odious variety.[4]

The outmoded state of law which admits of such paradox would be obvious to any thoughtful reader. However, as a layman, he could not be expected to know that he was in contact with an area of our law that is not only antiquated and paradoxical, but almost hopelessly confused because of the failure of Congress to recast the law in consonance with the requirements of a technologically advanced and democratic society.[5]

† See Contributors' Section, Masthead, p. 232, for biographical data.

1 N.Y. Times, July 8, 1958, p. 14, col. 1.

2 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1952) makes it illegal to intercept telephone communications and to divulge or use them.

3 Rathbun v. United States, 355 U.S. 107 (1957); Nardone v. United States, 308 U.S. 338 (1939); Nardone v. United States, 302 U.S. 379 (1937).

4 Benanti v. United States, 355 U.S. 96 (1957).

5 The report of the Senate Committee on the Judiciary remarks that ". . . No problem is more perplexing, the source of more legal confusion, or more laden with controversy." S. Rep. No. 1478, 85th Cong., 2d Sess. 28 (1958).

THE BACKGROUND

The interception of private communications is not a new problem. Eavesdropping was the basis of a crime at common law,[6] and over two hundred years ago Parliament forbade the opening of any letter except by an official armed with a specific warrant for the purpose.[7] Incidentally, the power of the sovereign to intercept letters for the purpose of "discovering many dangerous and wicked designs" had been recognized from much earlier times.[8] With the introduction of the telegraph and later the telephone, attempts were made to safeguard the privacy of communication in these areas. New York State, for example, has had a statute since the last century that makes it a crime to intercept a message by connivance with a telephone or telegraph employee.[9] Technological advances swiftly outmoded such laws and a number of the states, including New York, passed statutes prohibiting wiretapping.[10] However, the law still lags behind electronic progress and, as we have seen from the farce in Mr. Goldfine's Washington hotel room, at least one side of a telephone conversation may be intercepted without actual wiretapping.

Wiretapping is ordinarily accomplished by connecting the tapper's receiver by wire to the subscriber's line at one of the so-called "bridging points" on the circuit at some distance from the tapped phone. The procedure is simple enough, but the tapper must be familiar with the circuits and the location of bridging points and have the ability to distinguish which of the many wires found at these points belongs to the telephone he intends to tap. Once the connection has been made a recording device may be employed to relieve the tapper of the necessity of personal monitoring.[11]

New developments in the electronic field are rapidly eliminating the need for even this much effort by the wire tapper. Induction coils and high-gain amplifiers make it possible to intercept telephone communications without any physical contact of wires. An induction coil hidden near a telephone will pick up both sides of a conversation for the benefit

6 Wharton, Criminal Law § 1718 (12th ed. 1932); Blackstone tells us "Eavesdroppers, or such as listen under walls or windows or the eaves of a house to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance . . .," Black. Comm. Bk. IV, Ch. 13, § 168.

7 Report of the Committee of Privy Councillors Appointed to Inquire into the Interception of Communications, London, H. M. Stationary Office, Cmnd. 283 Octoher, 1957, p. 12, ¶ 32.

8 Id. at ¶ 31.

9 N.Y. Penal Law § 552.

10 Nineteen states have anti-wiretapping statutes, and in ten of these no exception is made for wiretapping by law enforcement authorities. The majority of the remaining states rely on malicious mischief laws which merely prohibit damage to the property of public utilities. Joint Legislative Committee to Study Illegal Interception of Communications, Report 26-29 (N.Y. Legislative Doc. No. 53, March 1956) app. B 54-71.

11 Fairfield and Clift, "The Private Eye," Reporter, Feb. 10, 1955, p. 24.

of a tapper equipped with a short wave radio who may be literally miles from the telephone itself. Modifications of these supersensitive microphones and transmitters have become so varied that it has been estimated that $25,000 worth of equipment would be required to check a room for hidden electronic eavesdropping devices; even then, there would be no absolute guarantee that the room was clear. Vis-a-vis communication is not a sure protection from the modern eavesdropper either, for a conversation held in a rowboat 300 yards from shore could be picked up and relayed by radio to any point desired.[12]

Efforts are being made to meet the new conditions, and New York's revised statute, for instance, being addressed to eavesdropping whether the communications are in person or by wire, includes microphonic "bugging" as well as wiretapping.[13] However, the only federal statute in the field is the patently inadequate section 605 of the Federal Communications Act which states,

> . . . [N]o 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. . . .[14]

The courts have generally restricted the scope of section 605 to the employment of devices actually in contact with the telephone system.[15] However, some decisions have taken a more flexible attitude,[16] and it appears to be beyond question that the Supreme Court would apply the section to electronic interception of telephone communications where there had been no actual contact with the wires themselves.[17] In the recent case of *Rathbun v. United States*[18] the Court held that interception by police officers using an existing extension was not a violation of section 605; however, the decision turned not on the technical question

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12 Shaffer, "Eavesdropping Controls," Editorial Research Reports, Jan. 25, 1956, p. 67 ff.
13 N.Y. Penal Law § 738.
14 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1952).
15 Goldman v. United States, 316 U.S. 129 (1942), listening device attached to the wall not interception; Rayson v. United States, 238 F.2d 160 (9th Cir. 1956), listening from adjoining room by electronic device not interception; United States v. Guller, 101 F. Supp. 176 (E.D. Pa. 1951), interception must be effected by intervention of a listening device in the telephone system. In Lee v. United States, 343 U.S. 747 (1952), evidence obtained by concealment of a radio transmitter is admissible because that technique is outside of § 605.
16 United States v. Polakoff, 112 F.2d 888 (2d Cir.), cert. denied, 311 U.S. 653 (1940), where receiver of telephone message had a third party intercept by use of a recording machine, held within purview of § 605 because of absence of consent of sender; United States v. Hill, 149 F. Supp. 83 (S.D.N.Y. 1957), use of microphone constituted interception whether in contact with the telephone or not.
17 The requirement of physical contact with the wires as an indispensable element of the crime of wiretapping is obviously unrealistic and obsolete. Fairfield and Clift, supra note 11; see Mellin, "I Was a Wire Tapper," Saturday Evening Post, Sept. 10, 1949, p. 57; Shaffer, supra note 12.
18 355 U.S. 107 (1957).

of whether this constituted a wiretap but rather on the point that a party to the conversation has the right to authorize a third party to listen in on an existing extension. Speaking for the Court, Chief Justice Warren stated that "the communication itself is not privileged, and one party may not force the other to secrecy merely by using a telephone."[19] He analogized the use of the extension to holding out the headset itself so that a third party might overhear. Mr. Justice Frankfurter, in a penetrating dissent, pointed out that the statute speaks of ". . . no person not being authorized by the sender . . .," and argued that the majority was twisting the plain meaning of the section by holding that the police officers listening in on the extension with the "consent of one party" were, in effect, not "another person" but the *alter ego* of the receiver himself.[20] His dissent immediately raises the question as to the Court's attitude in a case where, no extension being handy, the invited police officers employ a lead into the subscriber's wire or an induction coil placed near his phone. Presumably the Court would hold such a practice to be forbidden under the statute and yet, considered realistically, the difference involved is most superficial.

In the past, wiretapping for the purpose of crime detection has generally been considered lawful. Federal authorities customarily made use of the technique during the early decades of this century, and in 1928 the Supreme Court ruled in *Olmstead v. United States*[21] that admission of evidence so obtained was not in violation of the Fourth or Fifth Amendments because it did not constitute illegal search or seizure. In 1934 section 605 became law and thereafter the Court held that wiretap evidence is not admissible in federal courts.[22] Intrastate as well as interstate telephone communications were covered by the decisions since the Court quite reasonably concluded that it was impossible for the interceptor to segregate one from the other.[23] In the second *Nardone* case, in 1939, the Court went further and prohibited the use of evidence indirectly obtained by wiretapping, characterizing it as the "fruit of the poisoned tree."[24]

However, the statute speaks of interception *and divulgence,* and the decisions do not hold that interception by federal officers in and of itself is illegal under section 605. There must be interception coupled with divulgence to constitute a violation of the Act. No federal officer has

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19 Id. at 110.
20 Id. at 111 ff.
21 277 U.S. 438 (1928).
22 Note 3 supra.
23 Weiss v. United States, 308 U.S. 321 (1939).
24 308 U.S. at 341.

ever been prosecuted under the law, and the Justice Department, adopting the view that it is a unity, has declared that divulgence to a superior is not unlawful. Constructively, it is the superior and not the subordinate who does the wiretapping.[25] Attorney General William P. Rogers has stated that ". . . wiretapping by law enforcement officials is . . . necessary . . . and . . . it is no worse . . . when used by proper officials and subject to adequate safeguards, than is the use of informants, decoys, dictaphones, . . . and the like—all of which have been accepted practices for many years."[26]

The loose draftsmanship and inadequacy of the statute, therefore, have combined with the pressure of necessity upon federal authorities, to produce a ridiculous paradox. For example, an officer of the Justice Department in Washington, D. C., may lawfully make a wiretap and overhear a narcotics racketeer arranging for a shipment of heroin. Action is taken immediately and the drugs and a group of underlings who will surely be convicted under the narcotics laws are seized. However, the only evidence to link the vicious mastermind of the operation to the crime which he directed is the wiretap, and under the decisions it may not be used. The "boss" is free to carry on. As long as he confines himself to the telephone, the law will protect him no matter how widespread is the knowledge of his guilt.

Until recently, the several states were clearly within their rights if they chose to permit their law enforcement officers to make use of wiretapping evidence in obtaining convictions. Within the limits of the Fourteenth Amendment the states alone have the authority to regulate police matters and formulate rules of evidence for their courts.[27] New York by constitutional amendment in 1938 guaranteed the privacy of wire communications, but provided for interceptions by police officers where an *ex parte* court order had been obtained for the purpose.[28] Thereafter, the legislature provided a procedure for obtaining the court orders,[29] and made it a misdemeanor for an individual to possess wiretapping equipment with the intention of using it for unauthorized wiretaps.[30]

The situation in New York was complicated in 1950 by the decision in the *Applebaum* case. Mr. Applebaum sued for divorce upon evidence

25 Statement of Attorney General Francis Biddle, N.Y. Times, Oct. 9, 1941, p. 4, col. 2.
26 63 Yale L.J. 792 (1954).
27 Schwartz v. Texas, 344 U.S. 199 (1952); Rochin v. California, 342 U.S. 165 (1952); Wolf v. Colorado, 338 U.S. 25 (1949); Palko v. Connecticut, 302 U.S. 319 (1937); Twining v. New Jersey, 211 U.S. 78 (1908); People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926), cert. denied, 270 U.S. 657 (1925).
28 N.Y. Const. art. I, § 12, ¶ 2.
29 N.Y. Code Crim. Proc. § 813-a.
30 N.Y. Penal Law § 552(a).

obtained by means of recorded wiretaps on his own home telephone, and it was held that a subscriber was within his rights if he tapped his own phone "so that his business may not be damaged, his household relations impaired or his marital status disrupted."[31] A prosecution against the professional wiretapper hired by Applebaum was dismissed and the way was open for unscrupulous individuals to enter the field wholesale. That they promptly did so was amply shown by the investigation of a Joint Legislative Committee in 1956.[32] The procedure was being employed not only in the more unsavory variety of divorce matters, but also as a weapon among business competitors of all types and sizes. These abuses led the Committee, under the Chairmanship of Assemblyman Anthony P. Savarese, to recommend remedial legislation which was signed by Governor Harriman and became law on July 1, 1958. As a result, eavesdropping by microphone or electronic "bug" is now a crime as well as wiretapping of telephone communications.[33] The prohibition extends to the subscriber of the phone as well as outsiders, overturning the rule of the *Applebaum* case. In addition, the court must satisfy itself of the existence of reasonable grounds before issuing a permissive order to law enforcement authorities, and the order may not run for more than two months.[34] Finally, evidence obtained through illegal wiretapping or electronic eavesdropping is inadmissible in any civil action.[35] It is to be noted that such evidence is not made inadmissible in criminal cases, New York continuing to adhere to the rule of the *Defore* case.[36]

However, the decision of the United States Supreme Court in *Benanti v. United States*[37] in December of 1957 places the wiretapping statutes of the several states under a cloud. Benanti was suspected of peddling narcotics by the New York police, who obtained a warrant under state law to tap the telephone of a bar he frequented. They discovered that it was not narcotics but untaxed spirits that were involved. The evidence was turned over to the Federal authorities and Benanti was subsequently convicted of bootlegging.[38] The Supreme Court reversed, holding that section 605 precludes the use in a federal prosecution of wiretap evidence even where obtained by state officers pursuant to state

31 People v. Applebaum, 277 App. Div. 43, aff'd without opinion, 301 N.Y. 738, 95 N.E.2d 410 (1950).
32 Note 10 supra.
33 Note 13 supra.
34 Note 29 supra.
35 N.Y. Civ. Prac. Act § 345-a.
36 242 N.Y. 13, 150 N.E. 585 (1926), cert. denied, 270 U.S. 657 (1925). Court of Appeals unanimously held that evidence obtained as a result of illegal arrest and search may be admitted in a criminal case.
37 355 U.S. 96 (1957).
38 United States v. Benanti, 244 F.2d 389 (2d Cir. 1957).

law. Going further, the Court said in reference to the New York provisions for police wiretapping ". . . 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."[39] Taken on its face, this would seem to bar state legislation that goes beyond the federal statute.[40]

It was this consideration that led Justice Hofstadter of the New York Supreme Court to refuse to entertain any further applications for wiretap orders under section 813(a) of the New York Code of Criminal Procedure.[41] On the other hand, the refusal of the United States Supreme Court in *Schwartz v. Texas*[42] to bar the use of wiretap evidence in state proceedings makes it uncertain, *Benanti* notwithstanding, that the Court would now overturn a state conviction based on wiretap evidence.[43] Indeed, the Court went out of its way to state that there was no conflict with the earlier *Schwartz* case.[44] Rather, it would seem, the Court expects or hopes that the state courts will of their own volition bring their evidentiary rules in this area into line with those of the federal judiciary.[45]

Law Enforcement and Civil Rights

In respect to federal law enforcement, evidence obtained as a result of wiretapping is clearly inadmissible in federal prosecutions whether obtained by federal or local authorities. However, federal officers apparently may lawfully wiretap so long as there is no divulgence, and the same applies, insofar as any federal restraint is concerned, to private detectives, business competitors and busybodies, as well as to blackmailers and other criminals. State police officials, even where authorized by the state constitution, are clearly violating federal law when information obtained by wiretapping is divulged in any manner, including, of

39 355 U.S. at 105.

40 U.S. Const. art. VI, cl. 2; N.B.C. v. United States, 319 U.S. 190 (1943), affirming, 47 F. Supp. 940 (S.D.N.Y. 1942). Federal Communications Act pre-empts the field of radio broadcasting. However, in Goldman v. United States, 316 U.S. 129, 133 (1942), the court indicated that the purpose of § 605 was protection of the communications system rather than individual privacy, thus apparently leaving room for state regulation concerned with the question of secrecy of communications.

41 Matter of Interception of Telephone Communications, 170 N.Y.S.2d 84, 9 Misc. 2d 121 (Sup. Ct., N.Y. County 1958).

42 344 U.S. 199 (1952).

43 The Court, at 355 U.S. 110, cited with approval the F.C.C. regulations which presuppose the right of either party to record a telephone conversation. The gravamen of the Benanti decision is concerned with the integrity of the system rather than the secrecy of the communications. See note 40 supra.

44 Id. at 102.

45 The thought was expressed by the court in Irvine v. California, 347 U.S. 128 (1954). Later, the Supreme Court of California reversed its own previous rule and held that evidence obtained by use of an illegally concealed microphone in defendant's house should have been exeluded, and noted that the change in the rule was based upon the re-examination suggested in the Irvine case; People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955).

course, its use as evidence in court. Nevertheless, several attorneys general of the states, among them C. Ferdinand Sybert of Maryland and Louis Lefkowitz of New York, have indicated that they will continue to approve wiretapping activities by law enforcement officers until their state courts declare such activity to be unlawful.[46] District Attorney Frank Hogan of New York has also pointed out that Justice Hofstadter, in refusing to issue further wiretap orders after the *Benanti* case, has actually extended its scope since under section 605 wiretapping is not illegal until coupled with a divulgence.[47] To further complicate the picture in New York, the Westchester County Court recently held, in a case now being appealed, that wiretapping with divulgence was illegal, even though it had been done pursuant to court order.[48] On the other hand, state authorities are probably outside of section 605 if techniques more subtle than physical tapping of wires are employed.

Such confusion in the law, with its attendant damage to law enforcement and encouragement to criminals, is due in large measure to an unthinking response to the natural repugnance with which honest men traditionally regard eavesdropping. It is an area where judgments are more apt to be emotional than objective. For many people, wiretapping and electronic interception of communications have the odor of the police state.[49] However, without adequate judicial safeguards, so also have search and seizure, arrest, imprisonment, money fines, the revocation of licenses, and other normal procedures that all societies employ in the protection of their citizens. The United Kingdom, surely not generally associated in our minds with harsh, arbitrary or totalitarian police procedures, permits wiretapping by police officers under the authority of special warrants. So also, subject to certain safeguards and restrictions, do Denmark, Norway, Sweden, Switzerland, Italy, West Germany, Austria and France.[50] In the United States, despite an alarmingly rapid increase in the incidence of major crime,[51] law enforcement officers may not avail themselves of the technique or, if they do, the evidence obtained is inadmissible. In our concern with the freedom of the individual we are permitting the law in this area to become a shield for the wrongdoer, forgetting that the freedom of the individual is meaningless if he is to be the prey of criminals.

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46 S. Rep. No. 1478, 85th Cong. 2d Sess. 29 (1958).

47 N.Y.L.J. Jan. 7, 1958, p. 1, col. 5.

48 People v. Dinan, 172 N.Y.S.2d 496 (Westchester County Ct. 1958). See N.Y.L.J. Feb. 19, 1958.

49 Committee of Privy Councillors Report 30, ¶ 134(ii). See note 7, supra.

50 G. Dobry, "Wiretapping and Eavesdropping; a Comparative Survey," J. Int'l Comm'n Jurists, Vol. I, No. 2, 320 (1958).

51 The national crime rate increased 9.1% from 1956 to 1957 and 23.9% over an average of the previous five years. Uniform Crime Reports, Vol. XXVIII, No. 2, Jan. 1958.

Cornelius W. Wickersham, Counsel to the Grand Jury Association of New York County, has pointed out that gangster domination of our national life depends on the ability of criminal combinations to operate beyond reach of the law, and states that ". . . One of the greatest triumphs for organized criminal activity would be the continued prevention of any enactment of wiretapping legislation for law enforcement purposes."[52] The late Mr. Justice Jackson, then Attorney General of the United States, declared in 1941 that

> . . . monitoring of telephone communications is essential in connection with investigations of foreign spy rings. It is equally necessary for . . . solving such crimes as kidnapping and extortion . . ., [and] the interception of communications should in a limited degree be permitted to Federal law enforcement officers.[53]

Former Attorney General Herbert P. Brownell has asserted that every attorney general from 1932 onward has favored and authorized wiretapping by federal officers where serious crimes were involved, and that both Presidents Franklin D. Roosevelt and Harry S. Truman approved of that policy.[54] In some quarters, on the other hand, there is a flat refusal to accept the need for wiretapping under any circumstances. The American Civil Liberties Union, for example, adheres to its position of unalterable opposition to wiretapping for any purpose.[55]

There is, furthermore, a widespread misconception as to the frequency of police wiretaps. In a recent book Mr. Justice Douglas of the United States Supreme Court asserted that in 1952 at least 58,000 wiretap orders had been issued in New York City alone.[56] Actually, in that year, all five district attorneys and the police department in New York procured a combined total of only 480 orders![57] In the United Kingdom, where wiretapping is employed in criminal cases where warrants are issued, the number of such warrants averaged slightly under 200 per year from 1952 through 1956, and never exceeded 241 in any one year.[58]

Wiretapping is of very little use in connection with ordinary felonies and crimes of violence. There is lacking in this sporadic sort of crime the pattern of continuity necessary for effective wiretap operation by police officers. It is generally in the more sinister field of large scale, highly organized and more or less permanent types of criminal activity

52 The Panel, Vol. 27, No. 1, June, 1958, p. 5, col. 2.
53 Hearings Before The Committee on The Judiciary on H.R. 2266 and H.R. 3099, 77th Cong. 1st Sess. 16-20 (1941).
54 39 Cornell L.Q. 195, 200 (1954).
55 Letter of Sept. 18, 1958 from George E. Rundquist, Executive Director of the New York Civil Liberties Union, to Peter Megargee Brown.
56 Douglas, Almanac of Liberty, 355 (Doubleday 1954).
57 From a survey conducted by District Attorney Edward S. Silver of Kings County, New York.
58 Committee of Privy Councillors Report, Appendix I.

alone that wiretapping is worthwhile. Labor racketeering,[59] gambling, narcotics and espionage are among the chief categories where it is most useful. Kidnapping and other extortion schemes, because of their dependence on telephone contacts, are also vulnerable to swift, intelligent employment of wiretaps.

CONCLUSION

The American public is often impatient because known criminals go unpunished while living in the extreme luxury their illicit operations provide. The answer is, of course, that law enforcement authorities must have evidence to obtain convictions. They may *know* a man is a criminal, but they cannot *prove* it. Wiretapping provides a most effective tool toward obtaining suitable evidence against today's powerful and ubiquitous criminal combinations.

The first step toward making this valuable weapon again available against them is federal legislation amending section 605 to authorize wiretapping by state authorities under state law. Such a bill was introduced by Senator McClellan in January of 1958,[60] but after a second reading was referred to the Senate Interstate and Foreign Commerce Committee which took no action on it. A year earlier Representative Emanuel Celler of New York introduced a more comprehensive bill which would permit federal officers to wiretap under *ex parte* court order, and make evidence so obtained admissible in federal criminal cases and grand jury proceedings.[61] Although favorably reported to the full Committee on the Judiciary in May, 1958,[62] the bill was not acted upon before adjournment.

Unquestionably, the time for Congressional action in this area is long overdue. The real need is for comprehensive legislation of the general type proposed by Representative Celler. The federal law must be brought up to date on three bases:

1. There must be a clear and unmistakable prohibition against wiretapping which will include the latest electronic devices that have been devised for the purpose, whether actual contact with the telephone wire is made or not.

2. Wiretapping must be made available to federal law enforcement officers proceeding under *ex parte* orders. Safeguards such as those provided by the present New York law are an indispensable concom-

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59 See "The Anti-Racketeering Act: Labor and Management Weapon Against Labor Racketeering", 32 N.Y.U.L. Rev. 965-79 (1957).

60 S. 3013, 85th Cong. 2nd Sess. (1958).

61 H.R. 104, 85th Cong. 1st Sess. (1957).

62 Letter from Hon. Emanuel Celler, Chairman, House Committee On The Judiciary, to F. V. Langan, Exec. Dir., Grand Jury Ass'n of New York County, May 16, 1958.

itant, and the procedure should be restricted to specified types of criminal activity.

3. The states should immediately have restored to them their traditional right to have legislation permitting legal interception on court order of telephone communications involving major crime.

Such legislation will remove the doubt and confusion pervading this area of the law, discourage crime, and hearten law enforcement authorities. It is certain that under the supervision of the courts such reform of the law will result in not the slightest diminution of the individual liberties which today's federal courts so zealously guard. Criminal elements alone will be the losers.