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Electronic Eavesdropping

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civil liberties. We cannot insist on the strict enforcement of laws relating to gambling, narcotics and prostitution on the one hand, and then proceed to paralyze the very agencies that must enforce these laws. Either we give law enforcement agencies the power to enforce the laws properly or we should forget about their enforcement.

H. Citizen crime commissions should be organized in every large community in order to keep close watch on local law enforcement.

An aroused public opinion is a necessary basis for the enforcement of gambling, prostitution and narcotics laws. Such a public opinion would, in the first instance, prevent the election of officials who are beholden to the interests of organized crime. It would demand that sheriffs, police officers and prosecuting attorneys do something about the open violation of state laws. It would not be impressed with the failure of the police to find violations of gambling laws and prostitution laws which are known to any taxi driver or man about town. It would not be taken in by the myth propagated by gamblers and owners of houses of prostitution, as to the benefits resulting from the so-called "open town." It would not accept the "pay-off" as a necessary fact of official and police life.

One of the instruments by which a community can be aroused to demand decent law enforcement is the Citizens' Crime Commission. In the past such crime commissions, in places like Chicago, Miami, New Orleans and New York, have done yeoman service in combatting organized crime and in keeping the public informed concerning the activities of law enforcement agencies. Such watchdog commissions are vital in every community. Unfortunately they have too frequently been organized after a crisis in law enforcement and have been allowed to die after the crisis has passed. Adequately financed and supported crime commissions in every large city can go a long way toward keeping our cities clean of the menace of organized crime.

Conclusion.

As we have indicated, there are no simple solutions or simple panaceas for the evils of organized crime. We have examined some new and old approaches to this age-old American problem. Organized crime requires all the effort and all the attention that courts, law enforcement agencies and an aroused citizenry can muster.

4. ELECTRONIC EAVESDROPPING

by Richard C. Donnelly

An urgent problem of our time is the harmonization of man's mastery over nature with freedom and human dignity. The quest for omnipotence poses the question of the peril in which traditional respect for privacy stands in the

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modern world. Should privacy be abandoned altogether or should we attempt to salvage as much as possible from what is perhaps a sinking ship?

Privacy is threatened on two fronts. One is the intensity with which certain demands for invasion are generated. Scientific and technological developments become irrevocable traits of the culture — however difficult and vexatious are the resulting problems of assimilation and adjustment. Privacy is threatened, secondly, by the phenomenal but frightening increase in scientific and technical knowledge about how it can be invaded. Modern science and invention have developed a host of means for penetrating the traditional zones of privacy. Thirty-five years ago Mr. Justice Brandeis made this prophecy:

The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping. Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions. . . . Can it be that the Constitution affords no protection against such invasions of individual security?¹

Today we have parabolic microphones that can beam in on conversations from hundreds of feet away. Resonator radio transmitters the size of match boxes can be planted under a table or bed to send conversations to receiving sets a mile away. Telephone tap connections no longer need be made by crude wire-splicing. Tapping can be done by refined induction coil devices and even by metallic conductor paints applied close to the telephone connection and matched to the wall color to defy detection. Tape recorders small enough to fit into a coat pocket have been invented as have "television eyes" small enough to be hidden in a heating duct or light fixture. Tiny automatic cameras are able to photograph in the dark with infrared film.²

These developments, as well as others in the behavioral sciences, portend a time when all private thoughts and feelings will be vulnerable to disclosure. When this day arrives, privacy, from a scientific and technical point of view, will be a thing of the past.

Given the cold war, the continual rise in the crime rate, and the pervasiveness of organized crime, the burden of surveillance and detection put upon police agencies is unusually heavy. There are strong inducements and pressures to utilize these instruments of permeation.

THE PRESENT SITUATION

The emergence of organized crime during the Prohibition Era stimulated extensive wiretapping. It was during this period — in 1928 — that the United States Supreme Court made its first pronouncement on the subject. In *Olmstead v. United States*³ the evidence disclosed "a conspiracy of amazing magnitude

¹ *Olmstead v. United States*, 277 U.S. 438, 474 (1928).

² DASH, KNOWLTON, AND SCHWARTZ, *The Eavesdroppers* 373 (1959). Also see, WESTIN, *Wiretapping: The Quiet Revolution*, 29 *Commentary* 333 (1960).

³ 277 U.S. 438 (1928).

to import, possess and sell liquor unlawfully."⁴ The information leading to the discovery of the conspiracy and its operations was largely obtained by wiretapping carried on for many months by federal officers. Small wires were inserted along the ordinary telephone lines from the residence of four of the defendants and also those leading from the central business office. The insertions were made without trespass upon any property of the defendants. They were made in the streets near the residences and in the basement of the office building where the central business office was located.

The Supreme Court, in a five to four decision, sustained a conviction based, for the most part, on the wiretap evidence. Mr. Chief Justice Taft ruled that tapping was not an unreasonable search and seizure within the meaning of the fourth amendment. He emphasized that the tappers had seized nothing tangible nor had they trespassed.

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.⁵

The Chief Justice continued:

The reasonable view is that one who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside, and that the wires beyond his house and messages while passing over them are not within the protection of the Fourth Amendment. Here those who intercepted the projected voices were not in the house of either party to the conversation.⁶

Justices Brandeis, Butler, Stone and Holmes dissented — the latter on nonconstitutional grounds. Mr. Justice Brandeis, in a famous tribute to privacy, found violations of both the fourth and fifth amendments. In adopting these amendments, he said:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. . . . They conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.⁷

Also, it was immaterial to him where the federal officers made the physical connection with the telephone wires leading into the defendants' premises.

Although the Court has been urged on several occasions to overrule the *Olmstead* case and several Justices, such as Murphy, Frankfurter, and Douglas, have been willing to do so, a majority has never been assembled. The case still stands for the proposition that off the premises wiretapping is not within the fourth amendment. There is one aspect of the opinion, however, that is no

⁴ *Id.* at 455-56.

⁵ *Id.* at 464.

⁶ *Id.* at 466.

⁷ *Id.* at 478.

longer the law, namely, that only tangible matter is subject to seizure. In *Wong Sun v. United States*,⁸ a non-eavesdropping case decided last January, the Court said:

The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of, an unlawful invasion. It follows from our holding in *Silverman v. United States*, 365 U.S. 505 . . . , that the Fourth Amendment may protect against the overhearing of verbal statement as well as against the more traditional seizure of "papers and effects." . . . Nor do the policies underlying the exclusionary rule invite any logical distinction between physical and verbal evidence. Either in terms of deterring lawless conduct by federal officers . . . or of closing the doors of the federal courts to any use of evidence unconstitutionally obtained . . . the danger in relaxing the exclusionary rules in the case of verbal evidence would seem too great to warrant introducing such a distinction.⁹

With the passage of the Federal Communications Act of 1934,¹⁰ the plane of legal controversy moved from the constitutional to the statutory level. This act purported to re-enact the Radio Act of 1927, to make it applicable to wire communication, and to transfer control to the newly formed Federal Communications Commission. Included in the Act was Section 605, the pertinent clauses of which are as follows:

. . . 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; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or the benefit of another not being entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: . . .¹¹

In addition, Section 501 of the Act imposes a fine or imprisonment or both for wilful and knowing violations of its provisions.¹²

The first case before the Supreme Court involving Section 605 came in 1937. In *Nardone v. United States*,¹³ it was decided that direct wiretap evidence obtained by federal agents was inadmissible in federal criminal trials. Two years later the *Nardone* case was before the Court again¹⁴ and the "fruit of

8 83 S.Ct. 407 (1963).

9 *Id.* at 416.

10 Ch. 652, 48 Stat. 1064 (1934) (codified in 11 U.S.C., 15 U.S.C. and scattered sections of 47 U.S.C.).

11 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1958).

12 48 Stat. 1100 (1934), 47 U.S.C. § 501 (1958).

13 302 U.S. 379 (1937).

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

the poisonous tree" doctrine was applied to exclude evidence obtained from wiretap leads. At the same time the *Nardone* doctrine was extended to intrastate as well as interstate telephone conversations.¹⁵

As of 1939, then, the Supreme Court had construed Section 605 as embracing a congressional intention to protect telephone privacy — excluding from the federal courts wiretap evidence obtained directly or derivatively from either interstate or intrastate calls. Nevertheless, the situation today is most unsatisfactory and telephone users are not protected from wiretapping by either police officers or private persons.¹⁶ There are several reasons for this state of affairs.

In 1941, Attorney General Jackson announced the surprising position that the Department of Justice considered itself an autonomy.¹⁷ Consequently, divulgence of wiretapped conversations within the Department is not a divulgence within the meaning of Section 605. Although this view has never been exposed to a legal test, it is still endorsed by the Justice Department. The interpretation finesses the literal language of the statute which forbids publication to "any person." Also, it seems contrary to the holding in the second *Nardone* case, which adopted the "fruit of the poisonous tree" doctrine. Why should evidence obtained by wiretap leads be inadmissible under Section 605 unless the original interception and divulgence are a violation?¹⁸

Furthermore, the interpretation of the Department of Justice contradicts the "use for benefit" clauses of Section 605. It has been argued that this phrase means a use for personal advantage of monetary gain only: that a use for law enforcement purposes is not forbidden.¹⁹ The question has never been decided by the Supreme Court. Three dissenting justices in *Goldstein v. United States*,²⁰ however, responded to the question as follows:

There is no merit in the Government's contention that the unequivocal language of the "use for benefit" clause should be construed as condemning only such uses as are designed to result in some monetary or other similar benefit of a private nature, for the prohibitions of § 605 are applicable to the Government and its officers, as well as to private persons. . . . The prohibition in this last clause of § 605 by Congress of the "use" of outlawed evidence is so unequivocal and controlling that the failure of the court below even to refer to this clause can only be explained on the assumption that it was overlooked.²¹

The Department of Justice has also taken the position that Section 605 forbids interception *and* divulgence, not interception alone.²² This interpretation

15 *Weiss v. United States*, 308 U.S. 321 (1939).

16 The literature on wiretapping is overwhelming. For a selective bibliography see PAULSEN AND KADISH, *Criminal Law and its Processes* 900 (1962).

17 *Hearings before Subcommittee No. 1 of the House Committee on the Judiciary on H.R. 2266 and H.R. 3099*, 77th Cong., 1st Sess. 18 (1941). See also, Donnelly, *Comments and Caveats on the Wire Tapping Controversy*, 63 *YALE L.J.* 799, 800 n. 7 (1954).

18 MORELAND, *MODERN CRIMINAL PROCEDURE* 144 (1959).

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

20 316 U.S. 114, 122 (1942).

21 *Id.* at 125.

22 Kennedy, *Attorney General's Opinion on Wiretaps*, *The New York Times Magazine*, June 3, 1962, p. 21. See also, Donnelly, *Comments and Caveats on the Wire Tapping Controversy*, 63 *YALE L.J.* 799, 800 (1954).

is disputable. Language in both *Nardone* cases suggests that the prohibition applies to wiretapping alone as well as divulgence. Moreover, recent opinions of the Court carefully note the issue as unsettled. In *Benanti v. United States*,²³ the Court wrote:

Because both an interception *and* a divulgence are present in this case we need not decide whether both elements are necessary for a violation of § 605. . . .²⁴

The first divulgence appearing on the record occurred in court, but we do not mean to imply that an out-of-court violation of the statute would not also lead to the invalidation of a subsequent conviction.²⁵

And in *Rathbun v. United States*²⁶ the Court remarked:

We do not decide the question of whether § 605 is violated where a message is intercepted but not divulged since the police officers did divulge the contents of the overheard conversation when they testified in court.²⁷

By these two readings of the legislation, i.e., (1) there must be both interception and divulgence before Section 605 is violated and (2) interdepartmental communication is not a divulgence, the Department has convinced itself that its wiretapping activities are within the law until someone outside the Department is told about the intercepted message or its contents.

Another difficulty is the proper construction of the clause of Section 605 requiring the authorization of the "sender" before the "interception" is lawful. Two questions emerge. Who is a sender and is the use, for example, of an extension telephone, an interception? Judge Hand dealt with the matter in this fashion:

The word, "sender," in § 605 is less apt for a telephone talk than a telegram. . . . [E]ach party is alternately sender and receiver and it would deny all significance to the privilege created by § 605 to hold that because one party originated the call he had power to surrender the other's privilege. . . . [A]nyone intercepts a message to whose intervention as a listener the communicants do not consent; the means he employs can have no importance; it is the breach of privacy that counts.²⁸

A conflict in the lower federal courts regarding this problem, prompted the Supreme Court to undertake its resolution in *Rathbun v. United States*.²⁹ The case involved a prosecution for transmitting an interstate message threatening murder. The police, with the consent of the person threatened, listened in on a regularly used extension telephone and utilized the substance of the conversation as evidence. The Court held this not to violate Section 605. Mr. Chief Justice Warren, after commenting upon the wide use of telephone extensions in home and office, referred to the "use for benefit" clause of Section 605.

23 355 U.S. 96 (1957).

24 *Id.* at 100 n. 5.

25 *Id.* at 102 n. 9.

26 355 U.S. 107 (1957).

27 *Id.* at 108 n. 3.

28 *United States v. Polakoff*, 112 F.2d 888, 889 (2d Cir. 1940).

29 355 U.S. 107 (1957).

The clear inference is that one entitled to receive the communication may use it for his own benefit or have another use it for him. The communication itself is not privileged, and one party may not force the other to secrecy merely by using a telephone. It has been conceded by those who believe the conduct here violates § 605 that either party may record the conversation and publish it. The conduct of the party would differ in no way if instead of repeating the message he held out his handset so that another could hear out of it. We see no distinction between that sort of action and permitting an outsider to use an extension telephone for the same purpose. . . .

Common experience tells us that a call to a particular telephone number may cause the bell to ring in more than one ordinarily used instrument. Each party to a telephone conversation takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation. When such takes place there has been no violation of any privacy of which the parties may complain. Consequently, one element of § 605, *interception*, has not occurred.³⁰

Justices Frankfurter and Douglas dissented. To them "intercept" is synonymous with "listen in." It means "an intrusion by way of listening to the legally insulated transmission of thought between a speaker and a hearer."³¹ By "sender" they apparently mean the person placing the call.

Since this Court, in *Nardone*, read "no person" to mean no person, it is even more incumbent to construe "sender" to mean sender, as was the petitioner here, and not to read "sender" to mean one of the parties to the communication, whether sender or receiver.³²

The *Rathbun* case raises a number of questions. Suppose the defendant, instead of placing the call, receives it? Does it make any difference whether the extension is installed at the suggestion of the police solely for the purpose of the eavesdrop? Is it of any legal consequence that instead of a telephone extension, a tap in the usual sense of the word is used? Suppose the eavesdrop is accomplished not by the human ear but by a recording device operated either by one of the parties to the call or by a third person having his permission?³³

In *United States v. Williams*,³⁴ the 7th Circuit recently answered these questions in the negative.

Each party to a telephone conversation takes the risk that the other party may allow another to overhear conversation. . . . That such eavesdropping is accomplished with the aid of a tape recorder (connected to an induction coil), as here used, does not serve to distinguish *Rathbun*.³⁵

Still another problem in construing "interception" appears in eavesdropping situations where an electronic device requiring no direct contact with telephone equipment is used. Generally, where a police officer listens without the aid of

30 *Id.* at 110.

31 *Id.* at 113.

32 *Id.* at 113.

33 Bradley and Hogan, *Wiretapping: From Nardone to Benanti and Rathbun*, 46 *Geo. L.J.* 418, 436 (1958).

34 311 F.2d 721 (7th Cir. 1963).

35 *Id.* at 725. (Material in parentheses added.)

an extension or wiretap device, Section 605 is not violated and the communication is admissible in evidence, unless there has been trespass in the installation of the equipment. This is so even though the consent of neither party is obtained. *Goldman v. United States*³⁶ is the leading case on this point. There, an electronic device known as a detectaphone was placed against a partition wall. It picked up what was said on the telephone as well as other conversations. The Court held there was no interception within the meaning of the statute. Mr. Justice Roberts expressed the view that if the listening in occurred at either end of the telephone line, there was no interception.

As has rightly been held, this word (intercept) indicates the taking or seizure by the way or before arrival at the destined place. It does not ordinarily connote the obtaining of what is to be sent before, or at the moment, it leaves the possession of the proposed sender, or after, or at the moment, it comes into the possession of the intended receiver.³⁷

Finally, the Supreme Court's treatment of the impact of Section 605 upon state wiretapping practices has resulted in an unsavory situation. A majority of the states have some sort of wiretapping legislation which Mr. Samuel Dash has classified as "permissive," "prohibition" and "virgin."³⁸

In *Schwartz v. Texas*,³⁹ the Court had the question of whether Section 605 forbids the use of wiretap evidence in a state criminal proceeding. It was held

. . . that § 605 applies only to the exclusion in federal court proceedings of evidence obtained and sought to be divulged in violation thereof; it does not exclude such evidence in state court proceedings. Since we do not believe that Congress intended to impose a rule of evidence on the state courts, we do not decide whether it has the power to do so.⁴⁰

The Court pointed out that while the statute had been violated, this was "simply an additional factor for a state to consider in formulating a rule of evidence for use in its own courts."⁴¹

Five years later in *Benanti v. United States*,⁴² the issue was whether evidence derived from a wiretap interception by state officers, without participation by federal authorities, was admissible in a federal court. New York police officers had obtained a warrant in accordance with state law authorizing them to tap the wires of a bar which the defendant was known to frequent. It was ruled that a correct application of the *Nardone* principle "dictates that evidence obtained by means forbidden by Section 605, whether by state or federal agents,

36 316 U.S. 129 (1942).

37 *Id.* at 134. (Material in parentheses added.) This formalistic reasoning has been followed in *Irvine v. California*, 347 U.S. 129 (1954) and *Silverman v. United States*, 365 U.S. 505 (1961).

38 DASH, KNOWLTON AND SCHWARTZ, *The Eavesdroppers* 35, 161, 231 (1959). See also, Comment, *Wiretapping: The State Law*, 57 J. CRIM. LAW C. & P.C. 534 (1961).

39 344 U.S. 199 (1952).

40 *Id.* at 203.

41 *Id.* at 201.

42 355 U.S. 96 (1957).

is inadmissible in federal court."⁴³ The Court distinguished *Schwartz* as involving a state court and state law enforcement officers.

The rationale of that case is that despite the plain prohibition of Section 605, due regard to federal-state relations precluded the conclusion that Congress intended to thwart a state rule of evidence in the absence of a clear indication to that effect. In the instant case we are not dealing with a state rule of evidence. Although state agents committed the wiretap, we are presented with a federal conviction brought about in part by a violation of federal law, in this case in a federal court.⁴⁴

But the Court's opinion is much broader than its holding:

[The] Federal Communications Act is a comprehensive scheme for the regulation of interstate communication. . . . [H]ad Congress intended to allow the States to make exceptions to Section 605, it would have said so. In light of the above considerations, and keeping in mind this 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.⁴⁵

After the *Benanti* decision, federal and state courts were placed in a quandary as to the status of state rules of evidence permitting the use of wiretap evidence. The Supreme Court had clearly stated that admission of evidence in a state court contrary to Section 605 constitutes a federal crime. Implied in that decision was an intolerance of state rules of admissibility. The *Schwartz* and *Benanti* cases thus put the trial judge in a state admitting wiretap evidence in the unsavory dilemma of either allowing a federal crime to be committed in his court and in his presence or of not following the state's rule of evidence.

Unfortunately, this dilemma was not resolved in *Pugach v. Dollinger*.⁴⁶ *Pugach* had been indicted by a New York grand jury for several serious crimes. The indictment was based in part upon information obtained by wiretapping conducted in accordance with state law. *Pugach* sought to enjoin the District Attorney and others "from proceeding . . . upon the indictments . . . on any grounds in which they may use wire tapping evidence, or on any grounds or investigations resulting from or instituted as a result of the aforesaid illegal wire taps."⁴⁷ Relief was denied by the Federal District Court, affirmed by the Court of Appeals, and affirmed *per curiam* by the Supreme Court. A majority of the Court relied, in part, upon the *Schwartz* case. Mr. Justice Douglas and the Chief Justice dissented. They would have overruled *Schwartz*. It should be noted that the *Pugach* case merely refused an injunction in advance of trial. Whether a state conviction based upon wiretap evidence would be reversed was left open.

At this point an analogy to search and seizures is apropos. In the first *Nardone* case, Mr. Justice Roberts suggested that the considerations moving Congress to adopt Section 605 were the same that evoked the guaranty against

43 *Id.* at 100

44 *Id.* at 101-02.

45 *Id.* at 104-06.

46 365 U.S. 458 (1961).

47 *Id.* at 461.

practices and procedures violative of privacy embodied in the fourth and fifth amendments of the Constitution. Section 605 thus confers a statutory right of privacy equivalent to the constitutional right of privacy conferred by the fourth amendment. In 1949 in *Wolf v. Colorado*,⁴⁸ the Supreme Court held that unreasonable searches and seizures by state law enforcement officers violate the due process clause of the fourteenth amendment. However, the states were not required to adopt the exclusionary rule. In 1960, in *Elkins v. United States*,⁴⁹ the Court ruled evidence obtained by an unconstitutional search and seizure conducted by state officers without federal participation inadmissible in a federal court. Then, in 1961, in *Mapp v. Ohio*,⁵⁰ the Court overruled the *Wolf* case in part, and held evidence obtained by an unreasonable search and seizure inadmissible in both federal and state courts.

Will the Court next overrule *Schwartz* and hold that Section 605 forbids the admission of wiretap evidence in state courts? It recently had an opportunity to resolve this question in a case arising in New York. In *People v. Dinan*,⁵¹ the New York Court of Appeals held that wiretap evidence obtained pursuant to court order was admissible in a state court prosecution notwithstanding the fact it was obtained in violation of Section 605. It was argued by the defendants that, by analogy, the *Mapp* case had overruled *Schwartz*. The New York court divided four to three, the majority saying:

The identical result does not necessarily follow in case of divulging telephone conversations in violation of section 605 of the Federal Communications Act, inasmuch as a statute may not possess the sanction of a constitutional inhibition protecting against fundamental rights granting immunity from unreasonable search and seizure.⁵²

The minority felt that irrespective of whether or not *Mapp* applied the evidence should not be admissible. This is so in order "to avoid commission of a criminal act within the very room where the trial is being held."⁵³

Unfortunately, the Supreme Court denied certiorari, Justice Douglas dissenting.⁵⁴

So far, wiretapping, a specialized form of eavesdropping, has been stressed, as the federal statute as well as most state statutes are limited to it. Eavesdropping with modern electronic devices is a far newer and far graver problem than wiretapping. One can guard against the wiretap by not using the phone. The seriousness of the issue is well illustrated by the facts in *Irvine v. California*.⁵⁵ Irvine was suspected of violating the California gambling laws. On December 1, 1951, while Irvine and his wife were absent from their home, a police officer arranged to have a locksmith go there and make a door key. Two days later, again in the absence of occupants, officers and a technician entered the home

48 338 U.S. 25 (1949).

49 364 U.S. 206 (1960).

50 367 U.S. 643 (1961).

51 N.Y.2d 350, 183 N.E.2d 689, 229 N.Y.S.2d 406 (1962), *remittitur amended*, 11 N.Y.2d 1057, 184 N.E.2d 184, 230 N.Y.S.2d 212 (1962). *People v. Dinan* is noted in 63 COLUM. L. REV. 369 (1963). See also, *Williams v. Ball*, 294 F.2d 94, 95-96 (2d Cir. 1961).

52 *People v. Dinan* at 183 N.E.2d 690.

53 *Id.* at 691.

54 *People v. Dinan*, 371 U.S. 877 (1962), *cert. denied*.

55 347 U.S. 128 (1954).

by the use of this key and installed a concealed microphone in the hall. A hole was bored in the roof of the house and wires were strung to transmit to a neighboring garage whatever sounds the microphone might pick up. Officers were posted in the garage to listen. On December 8, police again made surreptitious entry and moved the microphone, this time hiding it in the bedroom. Twenty days later they again entered and placed the microphone in a closet, where the device remained until its purpose of enabling the officers to overhear incriminating statements was accomplished. None of these repeated entries was with a search warrant. The Supreme Court affirmed the conviction on the basis of *Wolf v. Colorado*.⁵⁶ Although a contrary result would now be reached under *Mapp v. Ohio*,⁵⁷ the case does illustrate the use and abuse of these modern devices.

Whether there is an unconstitutional search and seizure when electronic devices are used depends upon whether there was a trespass in their installation. This doctrine goes back to *Goldman v. United States*⁵⁸ where a detectaphone was placed against a partition wall. The petitioners there sought to distinguish *Olmstead* on the ground that one who talks in his own office intends his conversation to be confined within the four walls of the room and does not assume the risk of someone's eavesdropping as he does when using the telephone. The Court thought the distinction "too nice for practical application of the Constitutional guarantee. . . ."⁵⁹

Mr. Justice Murphy, dissenting, agreed there was no physical entry —

But the search of one's home or office no longer requires physical entry, for science has brought forth far more effective devices for the invasion of a person's privacy than the direct and obvious methods of oppression which were detested by our forebears and which inspired the Fourth Amendment. Surely the spirit motivating the framers of that Amendment would abhor these new devices no less. Physical entry may be wholly immaterial. Whether the search of private quarters is accomplished by placing on the outer walls of the sanctum a detectaphone that transmits to the outside listener the intimate details of a private conversation, or by new methods of photography that penetrate walls or overcome distances, the privacy of the citizen is equally invaded by agents of the Government and intimate personal matters are laid bare to view. Such invasions of privacy, unless they are authorized by a warrant issued in the manner and form prescribed by the Amendment, or otherwise conducted under adequate safeguards defined by statute, are at one with the evils which have heretofore been held to be within the Fourth Amendment, and equally call for remedial action.⁶⁰

In *On Lee v. United States*,⁶¹ an informer had entered On Lee's laundry and engaged him in a conversation. Unbeknown to On Lee, there was a small radio transmitter concealed upon the informer which broadcast their discussion to Lee, a government agent, some distance away. No recording was made of

56 338 U.S. 25 (1949).

57 367 U.S. 643 (1961).

58 316 U.S. 129 (1942).

59 *Id.* at 135.

60 *Id.* at 139-40.

61 343 U.S. 747 (1952).

the conversation but the agent was allowed to testify as to the contents of the purported conversation. The majority of the Court first held there was no trespass, stating that "the further contention of petitioner that agent Lee, outside the laundry, was a trespasser, because by these aids he overheard what went on inside verges on the frivolous."⁶² The Court then continued:

The presence of a radio set is not sufficient to suggest more than the most attenuated analogy to wiretapping. Petitioner was talking confidentially and indiscreetly with one he trusted, and he was overheard. This was due to aid from a transmitter and receiver, to be sure, but with the same effect on his privacy as if agent Lee had been eavesdropping outside an open window. The use of bifocals, field glasses or the telescope to magnify the object of a witness' vision is not a forbidden search or seizure, even if they focus without his knowledge or consent upon what one supposes to be private indiscretions. It would be a dubious service to the genuine liberties protected by the Fourth Amendment to make them bedfellows with spurious liberties improvised by farfetched analogies which would liken eavesdropping on a conversation, with the connivance of one of the parties, to an unreasonable search or seizure.⁶³

Justice Burton dissented and would make the test of a fourth amendment violation depend upon where the words are picked up.

Lee's overhearing of petitioner's statements was accomplished through Chin Poy's surreptitious introduction, within petitioner's laundry, of Lee's concealed radio transmitter which, without petitioner's knowledge or consent, *there* picked up petitioner's conversation and transmitted it to Lee outside the premises. The presence of the transmitter, for this purpose, was the presence of Lee's ear. While this test draws a narrow line between what is admissible and what is not, it is a clearly ascertainable line. It is determined by where the "effects" are seized or, as here, where the words are picked up. In this case the words were picked upon without warrant or consent *within* the constitutionally inviolate "house" of a person entitled to protection there against unreasonable searches and seizures of his person, house, papers and effects.⁶⁴

In *Silverman v. United States*,⁶⁵ a "spike mike" was used by the police. This instrument consisted of a microphone with a spike attached to it, together with an amplifier, a power pack, and earphones. The spike was driven into a wall until it made contact with a heating duct, which converted the entire heating system into a conductor of sound. The Supreme Court unanimously held this conduct a violation of the fourth amendment. Mr. Justice Stewart emphasized that "eavesdropping was accompanied by means of an unauthorized physical penetration into the premises occupied by the petitioners."⁶⁶ He concluded that "decision here does not turn upon the technicality of a trespass upon a party wall as a matter of local law. It is based upon the reality of an actual intrusion into a constitutionally protected area."⁶⁷

62 *Id.* at 752.

63 *Id.* at 753-54.

64 *Id.* at 766-67.

65 365 U.S. 505 (1961).

66 *Id.* at 509.

67 *Id.* at 512.

Mr. Justice Douglas, concurring, thought this limitation misconceived.

The depth of the penetration of the electronic device — even the degree of its remoteness from the inside of the house — is not the measure of the injury. There is in each such case a search that should be made, if at all, only on a warrant issued by a magistrate.⁶⁸

He continued that “the command of the Fourth Amendment” should not “be limited by nice distinctions turning on the kind of electronic equipment employed. Rather our sole concern should be with whether the privacy of the home was invaded.”⁶⁹

PROPOSALS FOR CHANGE

Most responsible observers agree that, notwithstanding federal and state legislation, wiretapping is carried on virtually unimpeded in the United States today. The present situation is entirely unsatisfactory, if not chaotic, and corrective measures are needed now. Three approaches to the problem have been suggested. The first is that eavesdropping and wiretapping be recognized as a search and seizure. As matters now stand, under the *Olmstead*, *Goldman* and *Silverman* cases, the safeguards of the fourth and fourteenth amendments do not include protection against electronic eavesdropping unless there is a trespass or “an actual intrusion into a constitutionally protected area.” But even if invasion of privacy, however accomplished, be made the test of constitutional inclusion, many problems would remain. The fourth amendment prohibits “unreasonable searches and seizures” and requires that a warrant be based upon probable cause and that it describe “the place to be searched, and . . . things to be seized.”⁷⁰ Can an eavesdropping search and seizure ever be reasonable? Is it possible to describe the “things to be seized”? In other words, is eavesdropping such a drastic interference with privacy that it is constitutionally impermissible even under a search warrant?

The Supreme Court has held that objects of “evidentiary value only” can never be seized even though an otherwise valid search warrant has been issued for the objects and a properly conducted search has taken place.⁷¹ There is probably nothing more purely evidentiary than an intercepted conversation. Eavesdropping is unavoidably a hunt for evidence, for incriminating admissions. In addition, it is impossible to forecast when an incriminating admission will be made. The hunt may continue for weeks as contrasted with the specific and limited temporal authority granted by the ordinary search warrant for tangible things.

Eavesdropping, no matter how strict and careful the controls, is more intrusive than a search for tangibles for the additional reason that the subject is unlikely to know of the intrusion. This element of secrecy carries even court-authorized eavesdropping beyond the traditional limitations upon a proper search. Search with a warrant involves notice to the individual and affords him

68 *Id.* at 513.

69 *Id.* at 513.

70 U.S. CONST. amend IV.

71 Comment, *Limitations on Seizure of “Evidentiary” Objects — A Rule in Search of a Reason*, 20 U. CHICAGO L. REV. 319 (1953). See also, Kamisar, *The Wiretapping-Eavesdropping Problem: A Professor’s View*, 44 MINN. L. REV. 891, 914 (1960).

an immediate opportunity to protest. Not so the victim of eavesdropping. There is no notice, the search is continuous and surreptitious.

Unlike the usual search and seizure, a wiretap cannot be specific in its quest for evidence nor confined to matter relevant to crime. It is an exploratory dragnet. It is nonselective and indiscriminate as to whom it searches and what it seizes. As Mr. Justice Brandeis observed in his *Olmstead* dissent:

Whenever a telephone is tapped, the privacy of the persons at both ends of the line is invaded and all conversations between them upon any subject, and although proper, confidential and privileged, may be overheard. Moreover, the tapping of one man's telephone line involves the tapping of the telephone of every other person whom he may call or who may call him. As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire-tapping.⁷²

Mr. Edward Bennett Williams describes one of his experiences as follows:

I received a full exposure to the problems and evils of wire-tapping in 1956 when I agreed to represent Frank Costello in his denaturalization case. As we prepared for trial, it became evident that much of the government's case was built on wiretapped evidence . . . As we delved more deeply into the matter, we discovered that there had been a tap on Costello's home telephone at intermittent intervals over many years.

During the period of the taps, six policemen sat in eight-hour shifts, working in teams of two. They listened to and transcribed every conversation over Costello's telephone, whether he was a participant or not

The transcripts included conversations between Costello and his wife, his doctor and his lawyer; conversations between Mrs. Costello and members of her family, her doctor and her friends; conversations between one of the Costellos' maids and her husband, baring the most confidential and intimate family secrets . . .

Literally scores of persons who were suspected of no crime and who had committed no crime were subjected to this kind of surveillance . . .

But the persons victimized by these wiretaps were not just persons who used Costello's telephone. Taps were placed on public telephones in restaurants frequented by him. Everyone who used those pay-station telephones had a hidden third party listening to every word he said. Confidential business matters between wholly honest and unsuspecting businessmen were invaded. The tender words of sweethearts were heard by a third ear . . .

When we talk about wiretapping, it is important to remember that we are not talking about a wiretap on a particular telephone to pick up the conversations of a particular man. The Costello taps picked up a hundred conversations of other people for every one to which Costello was a party. There is just no way to circumscribe the number of innocent victims of any tap.⁷³

The use of microphones and other nonwiretapping devices is even more suspect. As the late Judge Jerome Frank once wrote:

⁷² *Olmstead v. United States*, 277 U.S. 438, 475-76 (1928).

⁷³ *Williams, One Man's Freedom* 107 (1962).

A dictaphone, by its very nature, conducts an exploratory search for evidence of a house-owner's guilt. Such exploratory searches for evidence are forbidden, with or without warrant, by the Fourth Amendment. . . . A search warrant must describe the things to be seized, and those things can be only (1) instrumentalities of the crime or (b) contraband. Speech can be neither. A listening to all talk inside a house has only one purpose — evidence-gathering. No valid warrant for such listening or for the installation of a dictaphone could be issued. Such conduct is lawless, an unconstitutional violation of the owner's privacy.⁷⁴

On the other hand, Mr. Justice Murphy, one of the strongest advocates of bringing eavesdropping within the fourth amendment believed that:

A warrant can be devised which would permit the use of a detectaphone. . . . And, while a search warrant, with its procedural safeguards has generally been regarded as prerequisite to the reasonableness of a search in those areas of essential privacy, such as the home, to which the Fourth Amendment applies . . . some method of responsible administrative supervision could be evolved for the use of the detectaphone which, like the valid search warrant, would adequately protect the privacy of the individual against irresponsible and indiscriminate intrusions by Government officers. . . .

While the detectaphone is primarily used to obtain evidence, and while such use appears to be condemned by the rulings of this Court . . . I am not prepared to say that this purpose necessarily makes all detectaphone "searches" unreasonable, no matter what the circumstances, or the procedural safeguards employed.⁷⁵

Assuming that eavesdropping and wiretapping are brought within the fourth amendment but, in keeping with technological change, some searches and seizures are reasonable, legislation would still be needed. The courts alone would be unequal to the task. First of all, the fourth amendment does not apply to searches by private persons.⁷⁶ Surely, the pestilential practice of eavesdropping by private persons should be prohibited. Moreover, searches are permitted in connection with any offense. Eavesdropping, if authorized at all, should be limited to a few offenses of major importance. Finally, a federal search warrant may be applied for by any law enforcement officer and issued by a United States Commissioner. Persons authorized to apply for a warrant should be limited in number and court approval should be required.

The course legislation should take has been debated for many years. There is a consensus that Section 605 is inadequate whether one is in favor of a complete and effective banning of all wiretapping or whether he favors the view that limited tapping should be authorized. The impotency of Section 605 is due, in part, to the vagueness and ambiguity of such terms as "sender," "intercept" and "divulge" which have permitted the Department of Justice to take the position that mere interception is not a crime, nor is interdepartmental disclosure. The rights of the states regarding wiretapping remain uncertain.

Unquestionably, Congress has the power to legislate comprehensively insofar as wiretapping is concerned. As the Attorney General has said:

74 *United States v. On Lee*, 193 F.2d 306, 313 n. 17 (2d Cir. 1951).

75 *Goldman v. United States*, 316 U.S. 129, 140 n. 7 (1942).

76 *Burdeau v. McDowell*, 256 U.S. 465 (1921).

A national telephone system requires a national policy. It is the responsibility of Congress to protect the integrity of the interstate telephone network and the privacy of its users. Hence, we believe Congress should define the conditions by which any wire-tapping by federal or state officials will be permitted.⁷⁷

With respect to other forms of eavesdropping, neither the rules of trespass nor the concept of "an actual intrusion into a constitutionally protected area" afford meaningful guides for adjusting the interest of society in apprehending lawbreakers and the rights of the individual to privacy. Furthermore, rapid developments in the techniques of electronic detection and amplification of sound indicate that soon almost every significant invasion of privacy may be just as effective without as with a technical trespass.

The powers of Congress to legislate regarding electronic eavesdropping are less clear cut, but the constitutional questions are sufficiently open to reasonable dispute to justify legislation. When the conversation is that of a speaker on a telephone whose words are intercepted by a microphone, as in *Goldman* and *Silverman*, the interception may clearly be regulated. Also, under its primary authority over radio waves, Congress could control eavesdropping by radio transmitter which would get at the most common and the most efficient means of electronic eavesdropping now in use. Furthermore, in view of *Mapp v. Ohio*,⁷⁸ section five of the fourteenth amendment may support legislation. Prohibiting the shipment of electronic eavesdropping devices in interstate commerce would be another means of regulation as would the taxing power.

The arguments of those in favor of a complete and total banning of eavesdropping are essentially the same as those urged in support of the opinion that the techniques fall under the fourth amendment and no reasonable search and seizure are possible. They start with the assumption that eavesdropping is an invasion of privacy that cannot be controlled within permissible limits. This view seems persuasive insofar as electronic eavesdropping is concerned. If eavesdropping were authorized, even under stringent controls, a person's life would be subject to complete surveillance without his knowing it. Surely liberty is worth the price of allowing some criminals to go unapprehended when the alternative posed by legalizing eavesdropping would make everyone vulnerable to such an intolerable invasion of his privacy. Judge Jerome Frank expressed this feeling as follows:

[I] believe that, under the Amendment, the "sanctity of a man's house and the privacies of life" still remain protected from the uninvited intrusion of physical means by which words within the house are secretly communicated to a person on the outside. A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty — worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some

⁷⁷ Statement of the Honorable Robert F. Kennedy, Attorney General of the United States, Before the Committee on the Judiciary, United States House of Representatives, in Support of H.R.10185, 87th Congress, Second Session, May 22, 1962.

⁷⁸ 367 U.S. 643 (1961).

shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle.⁷⁹

Wiretapping raises a more difficult problem. Here, as opposed to the situation in eavesdropping, the criminal is using a modern scientific development to make himself a more effective lawbreaker. To deny the police the right to wiretap enables the criminal to exploit the development of modern electronic communications while denying society the right effectively to counter this use.

I wish I could say that all wiretapping should be outlawed. Perhaps such a view is unrealistic and sentimental and a carefully controlled system can be justified, but surely only by great necessity and the burden of establishing this necessity must be upon the proponents.

How necessary is wiretapping to law enforcement? Virtually every prosecutor in a large urban area believes it vital and that a great number of crimes would go unpunished if wiretapping were not utilized. The Attorney General has called for limited wiretapping legislation as necessary to protect the national security and to implement the federal effort to combat organized crime. On the other hand, there are some distinguished dissenters from this view. Senator Thomas C. Hennings Jr., whose Constitutional Rights subcommittee made an exhaustive study of the subject, says the verdict as to need is "not proven."

I wish to emphasize a tentative conclusion. Both as to the cries from the law officers of one state (New York) for federal permission to maintain state and local wire tapping and as to the interest in legislation to authorize wiretapping by federal officers, I think judgment on the alleged need in each area resembles a Scotch verdict: not proven.⁸⁰

Other opponents concede that wiretapping helps the police but believe the price is not worth paying. Thomas McBride, former Attorney General of Pennsylvania and Justice of the State Supreme Court, told the Hennings subcommittee that tapping does not catch enough criminals to outweigh the loss of "the feeling of freedom that people have that they are not being listened to."⁸¹ Surely, in order to judge whether wiretapping should be authorized we ought to know more about its social cost. Nor can the question of necessity be resolved simply by the testimony of law enforcement officers as to usefulness. That wiretapping is useful to the police seems obvious. But, in the cases in which it is successfully used, is it the only investigative technique available? Is an equally efficient method of detection available? Would the crime go undetected without the wiretap? Can it be detected at greater expense?⁸²

Another argument of those who favor official wiretapping is that, under modern conditions, respect for privacy is insufficient as an exclusive basis for policy. Society and the individual himself have interests aside from privacy, and one of them is protection from crime. This position was strongly asserted by Mr. Justice Sutherland dissenting in the first *Nardone* case:

79 *United States v. On Lee*, 193 F.2d 306, 315 (2d Cir. 1951).

80 Hennings, *The Wiretapping-Eavesdropping Problem: A Legislator's View*, 44 MINN. L. REV. 813, 833 (1960).

81 *Id.* at 824.

82 Paulsen, Book Review: *The Eavesdroppers*, 14 RUTGERS L. REV. 636, 637 (1960).

My abhorrence of the odious practices of the town gossip, the Peeping Tom, and the private eavesdropper is quite as strong as that of any of my brethren. But to put the sworn officers of the law, engaged in the detection and apprehension of organized gangs of criminals, in the same category, is to lose all sense of proportion. In view of the safeguards against abuse of power furnished by the order of the Attorney General, and in the light of the deadly conflict constantly being waged between the forces of law and order and the desperate criminals who infest the land, we well may pause to consider whether the application of the rule which forbids an invasion of the privacy of telephone communications is not being carried in the present case to a point where the necessity of public protection against crime is being submerged by an overflow of sentimentality.⁸³

Legislation committing this nation to a policy of limited wiretapping should be adopted only after careful study and investigation. To accommodate the conflicting claims of society in law enforcement and the individual in his privacy, such legislation should, at a minimum, (1) specify a limited number of situations in which wiretapping will be permitted, (2) prescribe definite and restrictive procedures for obtaining permission to wiretap, and (3) impose effective sanctions upon unauthorized wiretapping.⁸⁴

Of the many bills introduced in Congress in this area, the one sponsored by the Department of Justice and introduced in the Second Session of the 87th Congress, is by far the best.⁸⁵ At the outset there is a general criticism. The bill does not treat electronic eavesdropping in general but is limited to wiretapping. As indicated, Congress has the power to legislate in this field and electronic eavesdropping should be outlawed completely. One practical reason for this position is that the police may side-step wiretapping laws by switching more and more to electronic eavesdropping equipment.

Section 5 of the bill establishes procedures authorizing certain interceptions by law enforcement officers. Subsection (a) empowers the Attorney General to permit the Federal Bureau of Investigation to tap wires if in his discretion he determines there is reasonable ground for belief that certain crimes affecting the national security — espionage, sabotage, treason, sedition, subversive activities, unauthorized disclosure of atomic energy information, or conspiracy to commit any such offense — have been, are being, or are about to be committed. In order to proceed under this subsection, the Attorney General must find and certify there is reasonable ground for belief that the commission of such an offense presents a serious threat to the security of the United States; that facts concerning that offense may be obtained through such interception; that obtaining a court order would be prejudicial to the national interest; and that no other means are readily available for obtaining the information.

Section 5 (b) empowers the Attorney General, or any Assistant Attorney General of the Department of Justice specially designated by the Attorney General, to authorize application to a federal judge for a wiretap order and

83 *Nardone v. United States*, 302 U.S. 379, 387 (1937).

84 Donnelly, *Comments and Caveats on the Wire Tapping Controversy*, 63 *YALE L.J.* 799, 807 (1954).

85 See H.R. 10185, S.2813, 87th Congress, 2d Session (1962).

confers upon the judge authority to issue an order permitting the FBI or any federal agency having investigative responsibility for the crimes set forth in the subsection to intercept wire communications in cases involving the security offenses enumerated in subsection (a), or involving murder, kidnaping, extortion, bribery, transmission of gambling information, travel or transportation in aid of racketeering enterprises, narcotics, and any conspiracy to commit any of these offenses.

Section 5 (c) provides that the Attorney General of any state or the principal prosecuting attorney for any political subdivision thereof, if authorized to do so by state statute, may petition a state judge for leave to wiretap for the crimes of murder, kidnaping, extortion, bribery, dealing in narcotic drugs or marihuana or any conspiracy involving these offenses.⁸⁶ The bill thus leaves it entirely up to each state to decide whether it wants to authorize wiretapping or to ban it entirely. If a state wishes to authorize wiretapping the bill imposes limits beyond which it cannot go. Congress occupies the field.

Section 8 sets out procedures for applications for, and issuance of, court orders on both the federal and state levels. Each application for a court order must be in writing, under oath, and must contain a full and complete statement of the facts relied on to show probable cause, the location and nature of the telephone facilities involved, and information concerning all previous wiretapping applications involving the same telephone or the same person. The judge may require additional evidence in support of the application. The judge may then issue an *ex parte* order to tap a telephone within the territorial jurisdiction of his court if he finds probable cause for belief that: an offense for which such an application is filed is being, has been, or is about to be committed; facts concerning that offense may be obtained through such interception; no other means are readily available for obtaining that information; and the facilities from which communications are to be intercepted are being used or about to be used in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by, a person who has committed, is committing, or is about to commit such offense.

Section 8 also requires that each court order specify the location of the facility; each offense as to which information is sought; the investigative agency involved; and the period of time during which the tap is authorized. Taps may continue for no more than 45 days and may thereafter be renewed only upon further application and findings for periods of not more than 20 days.

⁸⁶ The exclusion of gambling may seem strange. The Attorney General gives this explanation:

Many state prosecutors feel that the states should be authorized to tap wires for gambling offenses also. They are entirely correct in saying that gambling is central to the problem of organized crime. On the other hand, to permit tapping the wires of every two-dollar bettor would be to permit very extensive wiretapping. We have thought it best to limit the authority to tap wires for gambling to those offenses which involve interstate transmission of gambling information, in the thought that this would be sufficient to reach the large organized operators.

Statement of The Honorable Robert F. Kennedy, Attorney General of the United States, before The Committee on the Judiciary, United States House of Representatives, in Support of H.R. 10185, May 22, 1962, p. 5.

I have several reservations about sections 5 and 8 of the bill. The list of national security offenses where wiretapping would be permitted includes sedition and subversive activities. Both of these offenses affect the political process and are fraught with danger to freedom of speech. This difficulty is aggravated when police officers are empowered to pursue subversive talk on the privacy of the telephone. When it comes to these offenses many of the previously discussed objections to wiretapping operate in their most acute form. Evanescent or impulsive antigovernment remarks taken out of context can easily be made to sound more subversive than their true import. The conspiracy dragnet is at its widest. Political organizations, both left and right, and the amorphous group called fellow travelers become targets of surveillance.⁸⁷

Next, there are alternative procedures for cases involving national security. When the Attorney General finds that the commission of such an offense presents a serious threat to the security of the United States, and that obtaining a court order would be prejudicial to the national interest, he is given the executive authority to issue the order himself. This unusual procedure is justified in terms of the sensitivity of the information involved and the danger of leaks if the court procedure is used. It is also argued that in some instances speed is essential and the time consumed in obtaining a court order might result in the loss of important evidence. The forebodings of "leaks" through the judiciary is not supported by actual experience under the New York law, where wiretapping is permitted pursuant to an ex parte court order. It should also be noted that Section 8 (h) requires that all applications made to a federal or state court and all orders granted by such courts be sealed and they may only be made public by order of the court or as provided for in the act. If there are instances where there is not time to obtain a court order a procedure similar to the New York "hot pursuit" provision might be adopted.⁸⁸ While a warrant is normally required in New York a law enforcement officer may eavesdrop without a warrant when he has reasonable grounds to believe (1) that evidence of crime may be thus obtained, and (2) that in order to obtain such evidence time does not permit an application to be made for a court order before the eavesdropping must commence. If he does so an application for a court order must be made within twenty-four hours after the eavesdropping commences. If there is not time to obtain a court order the Attorney General could authorize the tap as the bill provides but within twenty-four hours thereafter make application for a court order.

In connection with the issuance of an executive order the Attorney General must have "reasonable ground for belief" whereas a judge before he may enter an order, must make a finding of "probable cause." Do these terms mean the same or is the Attorney General held to a lower quantum of proof? If wiretapping is brought within the fourth amendment it is doubtful whether any executive warrant would be constitutional in this context. Even so, a finding of probable cause would surely be required.

⁸⁷ Schwartz, *On Current Proposals to Legalize Wiretapping*, 103 U. PA. L. REV. 157, 160 (1954).

⁸⁸ N.Y. CODE CRIM. PROC. § 813-b (1958).

Both the executive order and the court order are authorized when an offense "is about to be committed." In other words, a wiretap order may be issued not only to *detect* crime but to *prevent* it. Such an authorization for invasion of privacy is unknown in the case of a search warrant.⁸⁹ An officer cannot, under the fourth amendment, obtain a warrant to prevent crime or to search premises because a crime is "about to be committed."

Finally, the Attorney General or the judge must find that "no other means are readily available for obtaining such information." The "readily available" standard is very weak. It sounds as if wiretapping is to be permitted whenever it is the most convenient method of investigation. In Great Britain one of the prerequisites for obtaining a warrant is that "normal methods of investigation must have been tried and failed, or must, from the nature of things, be unlikely to succeed if tried."⁹⁰ This is a more meaningful standard.

Section 8(f) provides that before the contents of an intercepted communication may be introduced in evidence in a federal criminal trial the defendant, not less than 10 days before trial, must be served with a copy of the court order or other authorization for the wiretap. Under Section 8 (g) a defendant in a federal criminal trial may move to suppress the use as evidence the contents of any intercepted communication or evidence derived therefrom on the grounds that: the communication was unlawfully intercepted; the order or other authorization was invalid; there was no probable cause for issuance of the court order; or the interception was not made in conformity with the order or other authorization.

All authorized taps should be recorded. Neither the prosecution nor the defense should have to rely solely upon the agent's recollection of the content of intercepted messages. Moreover, since recordings can be easily and undetectably edited and altered, legislation should assure the integrity of the recording. This could be done by requiring the original recordings to be sealed until returned to the custody of the authorizing agency.

Where intercepted communications are to be introduced in a criminal trial, defense counsel should have access in reasonable terms to the original recordings. Section 8 (f) should be amended to permit this. Furthermore, the section applies only when the contents of the intercepted wire communication are to be offered in evidence. It is apparently inapplicable when the evidence to be offered is derived from the wiretap. Since the motion to suppress includes derivative evidence it would seem that Section 8 (f) should also apply when the government plans to offer derivative evidence. Another reason for this suggested change is that under existing law the defendant has the burden of proving that a wiretap in fact took place.⁹¹ Frequently this is most difficult. The defendant may be completely unaware that his telephone had been tapped. Circumstantial evidence of tapping is insufficient. Although some federal courts seem to place a heavier burden upon the defendant than others, generally the motion for a hearing must request suppression of specific evidence. If the de-

89 PAULSEN AND KADISH, *Criminal Law and its Processes* 397-98, fn. qq (1962).

90 DASH, KNOWLTON AND SCHWARTZ, *The Eavesdroppers* 289 (1959).

91 61 YALE L.J. 1221 (1952).

fendant is successful in establishing the fact of the wiretap, the burden shifts to the prosecution to show that the evidence to be presented had an origin independent of the wiretap.

Section 8 (g) apparently permits a defendant to move to suppress wiretap evidence even though he was not a party to the intercepted communication. This is a desirable change in existing law. In *Goldstein v. United States*,⁹² the Court, after referring to the cases denying standing to one not the victim of an unconstitutional search and seizure to object to the introduction in evidence of that which was seized, said:

A fortiori the same rule should apply to the introduction of evidence induced by the use of disclosure thereof to a witness other than the victim. . . .

We think no broader sanction should be imposed upon the Government in respect of violations of the Communications Act.⁹³

The dissenting justices took the position that it is immaterial, considering the purposes to be served by Section 605 of the Communications Act, whether objection is made by the one sending the communication or by another who is prejudiced by its use.

The rule that evidence obtained by a violation of § 605 is inadmissible is not a remedy for the sender; it is the obedient answer to the Congressional command that society shall not be plagued with such practices as wire-tapping.⁹⁴

Other sections of the bill should be mentioned briefly. Section 3 provides that it shall be a felony, punishable by a fine of not more than \$10,000 or imprisonment for not more than two years or both, for a person willfully to intercept, disclose or use the contents of any wire communication except as specifically authorized by the Act. Section 4 provides that no part of the contents of an unlawfully intercepted wire communication and no evidence derived therefrom may be received in evidence in any judicial, administrative, legislative or other proceeding of the United States, or of any State or any political subdivision thereof. The only exception is that if the wiretap was lawfully authorized, then evidence obtained from it may be admitted in a federal or state court in a criminal proceeding, or before a federal or state grand jury.

Section 9 requires copies of all of the applications made and orders issued under the Act to be transmitted to the Administrative Office of the United States Courts and to the Department of Justice. The Administrative Office is instructed to report annually to the Congress.

CONCLUSION

All responsible citizens must be acutely aware of threats to the national security and the cancerous growth of organized crime. There is a danger, however, of losing perspective. As Mr. Justice Frankfurter once said:

Loose talk about war against crime too easily infuses the administration of justice with the psychology and morals of war. It

⁹² 316 U.S. 114 (1942).

⁹³ *Id.* at 121.

⁹⁴ *Id.* at 127.