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COMMENTS

THE PROBLEM OF WIRETAPPING AND PROPOSED LEGISLATIVE REMEDIES

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A most delicate problem is now confronting the Congress: Should Congress authorize wire-tapping by federal officers, and should the evidence so obtained be admissible in the federal courts? It is felt that it is not only desirable, but imperative that criminals threatening the national security be detected and prosecuted with the utmost diligence. Yet, it is no less imperative that constitutional rights of privacy be protected from unwarranted invasions. Somewhere between these two conflicting objectives lies a balance that the Congress must strike.

Historical Background.

Perhaps the first important recognition was given to the wire-tap problem near the termination of World War I, when the Congress placed an absolute ban on wire-tapping.[1] But this was shortlived; wire-tapping was again revived shortly after hostilities ceased and continued until 1924, when Attorney-General Stone and later Attorney-General Sargent prohibited its use. January, 1931, Attorney-General Mitchell reopened the use of this method to agents of the Justice Department, but only upon direction of the chief of the bureau involved. This policy was bolstered in 1933 by Attorney-General Cummings, who defended it as necessary in the public interest.

During this period, in 1928, the case of *Olmstead v. United States*[2] was decided. The court, in a 5 to 4 decision, held that neither the fourth or fifth amendments were violated by the use of wire-tap evidence; that is, its use was neither compelling a defendant to incriminate himself nor was the taping itself an illegal search and seizure. The court, conceding the evidence had not been obtained in conformity with the "highest ethics," stated that any ban on evidence obtained by such means must emanate from the Congress. Justice Holmes, in a powerful dissent, claimed wire-tapping to be a "dirty business" and in so doing reflected what was to be the future attitude of the court.

The catalyst for this future attitude came from Congress in section 605 of the Communications Act of 1934,[3] which in essence stated: *"no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance . . . of such intercepted communication to any person."*

In the case of *Nardone v. United States*,[4] the court held that the ban of section 605 applied to federal agents, and that evidence obtained by them

1 40 STAT. 1017 (1918). Also see 52 COL. L. REV. 165 (1952).
2 277 U.S. 438 (1928).
3 48 STAT. 1103, 47 U.S.C. 605 (1934).
4 302 U.S. 379 (1937).

through the tap was inadmissible in federal courts. This was contrary to the belief of many that section 605 was intended only to establish the regulatory powers of the Federal Communications Commission.[5] Nevertheless, the court's deep concern over the moral issues involved seemingly influenced their decision, the majority opinion stating in part:

> "For years controversy has raged with respect to the morality of the practice of wire-tapping by officers to obtain evidence. It has been the view of many that the practice involves a grave wrong Congress may have thought it less important that some offenders should be unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty "[6]

This decision was soon to be extended even further by the second *Nardone* case.[7] The court now decided that section 605 was not only a bar to evidence obtained *directly* from the wire-tap, but to *any* evidence gained through its use, no matter how indirect; section 605 barred the "fruit of the poisonous tree."

Since the decisions in the two *Nardone* cases, it has been conceded that section 605 remains a bar to the introduction of evidence obtained through use of the tap. The bulk of subsequent cases have dealt only with the technicalities of the section, *i.e.,* the question whether section 605 is a bar to state action;[8] what interpretations are to be given to the terms "intercept"[9] and "authorization",[10] and upon whom are placed the burdens of persuasion and of producing evidence.[11]

Merits—Pro and Con.

These cases have spawned many arguments both for and against the desirability of wire-tapping by authorized federal agents and admissibility of evidence so gained in federal courts. Dominating the arguments are four main issues:

1. Whether use of the wire-tap is "dirty business"?[12]

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[5] Goldman v U.S., 316 U.S. 129 (1942), Weiss v. U.S., 308 U.S. 321 (1939), SEN. REP. No. 781, 73d Cong., 2nd Sess. (1934)

[6] 302 U.S. at 383, 384.

[7] Nardone v. U.S., 308 U.S. 338 (1939).

[8] Schwartz v. Texas, 344 U.S. 199 (1952).

[9] In U.S. v Yee Ping Jong, 26 F.Supp. 69 (W.D. Pa. 1939), the court held that where the phone was tapped by federal agents at the informer's end there was no interception within the meaning of the section. The import of the decision was that interception was held to mean a seizure before arrival at a destined place, and here there was a mere recording at one end of the line as it was received by a consenting informer. A later case, U.S. v. Polakoff, 112 F.2d 888 (2d Cir. 1940), *cert. denied,* 311 U.S. 653 (1940), decided on similar facts that section 605 was violated, stating that the word "sender", as used in the section applied to both parties and that therefore both must consent. Yet, in U.S. v. Sullivan, 116 F Supp. 480 (D.D.C. 1953), the court reverted to its former holding in U.S. v Yee Ping Jong, which would appear to be the present view.

[10] U.S. v. Yee Ping Jong, *supra* note 8.

[11] Nardone v U.S., 308 338 (1939), U.S. v Coplon, 91 F.Supp. 867 (D.C.D.C. 1950), U.S. v. Pillon, 36 F.Supp. 567 (E.D.N.Y. 1941).

[12] See note 2 *supra.*

2. Whether wire-tapping is an unreasonable invasion of privacy?[13]

3. Whether there is an undue probability that wire-tapping may be used to harm innocent persons?

4. Whether the authority, in whomsoever vested, will be abused?

Since Justice Holmes' dissent in the *Olmstead* case, it has been argued with much vigor that wire-tapping is "dirty business"—that it would be a far greater evil that the government should play an ignoble part than that some criminals should be permitted freedom. Yet, to the protagonists of wire-tapping, this argument has seemed inconsistent with the present state of the law. In point are the many cases admitting evidence obtained by eavesdropping or by recording devices attached to an adjoining wall.[14] Are these methods of obtaining evidence any the less "dirty business" than the wire-tap? And again, is it any the less noble to use the telephone as a means of hampering a criminal who has himself taken advantage of the instrument to further his own mischievous ends? On the contrary, it would seem to be but a common sense solution to an exigency.

Undoubtedly, even a carefully restricted legalization of wire-tapping would be an invasion of privacy But those pressing Congress to maintain the status quo appear to have overlooked the prevailing state of the law. To tap another's telephone and listen to the conversation *is not a violation of section 605,* which reads: "intercept . *and* divulge." This is the present state of the law—only where *both* interception and divulgence are present is the law violated.[15] At least one proposed bill in Congress makes interception alone, except where authorized, criminally punishable.[16] Thus, relatively, such an enactment would be far less onerous than the existing condition. The "status quo view" would seem to be naive, since even present law is inadequate to assure complete freedom from invasions of privacy

Another criticism of legalized wire-tapping is the possibility that the device might be used to harm innocent persons. There is the ever present possibility that certain portions of a wire-tap recording could be deleted, and result in a seemingly criminal conversation. However, the procedural and evidential safeguards here seem to be adequate. A grand jury would first weigh any evidence before indicting an alleged wrongdoer. Then the judge would next determine the relevancy and reliability of the evidence, similar to evidence gathered in any other manner, before allowing it to come before a petit jury The general rule is that *all* the relevant evidence of a particular transaction should be admitted or none at all.[17] Since the matter

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[13] U.S. v. Polakoff, *supra* note 8; GREENMAN, WIRE TAPPING, ITS RELATION TO CIVIL LIBERTIES (1938).

[14] Goldman v. U.S., 316 U.S. 129 (1942), Schoborg v. U.S., 264 Fed. 1 (C.C.A. 6th 1920), dictograph; People v. Schultz, 18 Cal.App.2d 485, 64 P.2d 440 (1937), dictaphone; People v. Cotta, 49 Cal. 166 (1874), police officer listened to conversation in defendant's cell; Kidd v. People, 97 Colo. 480, 51 P.2d 1020 (1935), dictograph, State v. Hester, 137 S.C. 145, 134 S.E. 885 (1926), police used detectaphone to eavesdrop on conversation in defendant's cell.

[15] *Supra* note 4.

[16] S. 3229, as proposed with amendments by the late Senator McCarran of Nevada.

[17] CALIF. CODE OF CIVIL PROCEDURE, § 1854.

of relevancy is subject to the court's discretion, this in the ordinary instance should be an adequate shield to the innocent.

Perhaps the most valid criticism of legalized wire-tapping is the possibility that the authority, in whomsoever vested, would be abused. But is this not true of any delegation of authority regardless of the purpose? That the Congress, who will have created the authority, has the inherent power to destroy it promptly in cases of abuse would seem to be an adequate safeguard.

Objectives of Pending Legislation.

Before commencing with an evaluation of the various proposed wire-tap bills and of a suggested bill, it would seem proper to examine the congressional motives. What evils does the Congress hope to alleviate, and what affirmative objectives are they desirous of achieving?[18] Namely,

1. To permit the government in cases involving national security to offer into evidence materials gained through wire-tapping by federal officers.
2. To criminally penalize all other unauthorized wire-tapping.
3. To place the authority to wire-tap in an agency that will use it with the greatest efficiency and yet not abuse it.
4. To make evidence already gathered through the wire-tap method presently admissible.

Let us now examine, in substance, the texts of the bills pending in Congress before passing on their virtues or lack of them.

H.R. 8649 (Passed H.R. on April 8, 1954)

"Be it enacted That information obtained prior to the effective date of this act through or as a result of the interception of any communication by wire or radio upon the express written approval of the Attorney General of the United States and in the course of any investigation to detect or prevent any interference with or endangering of the national security or defense of the United States by treason, sabotage, espionage, sedition, seditious conspiracy, be deemed admissible, if not otherwise inadmissible, in evidence in any criminal proceedings in any court established by Act of Congress, but only in criminal cases involving any of the foregoing violations.

"SEC. 2. That information obtained after the effective date of this Act , through or as a result of the interception of any communication by wire or radio upon the express written approval of the Attorney General of the United States shall, notwithstanding the provisions of section 605 of the Communications Act of 1934 (48 Stat. 1103), be deemed admissible: *Provided,* That prior to intercepting the communications from which the information is obtained, an authorized agent of any one of said investigatorial agencies shall have been issued an ex parte order by a judge of any United States Court of Appeals or a United States district court, authorizing the agent to intercept such communications. Upon appli-

[18] See Senate bulletin, WIRETAPPING FOR NATIONAL SECURITY. Hearings before a subcommittee of the Committee on the Judiciary; U.S. SENATE; 83rd CONGRESS; 2nd SESSION.

cation . . a judge . . . may issue an ex parte order, . if the judge is satisfied that there is reasonable cause to believe that such crime or crimes have been or are about to be committed and that the communications may contain information which would assist in the conduct of such investigations."

S. 3229:[19]

"Be it enacted . That Chapter 13 of title 18 of the United States Code, entitled "Civil Rights", is amended by— . . Inserting . . the following new section: . . Whoever, without authorization from the sender and the recipient of any wire communication by common carrier, willfully intercepts, or attempts to intercept . such wire communication, except in compliance with State law or, in any case of an interception by a Federal officer or employee, in compliance with the second paragraph of this section, shall be fined not more than $5000 or imprisoned not more than 10 years, or both.

"Whenever the Attorney General has reason to believe on the basis of a request by the head of any Federal investigative agency for action pursuant to this section that evidence of the commission of any crime punishable under chapter 37, chapter 105, or chapter 115 of this title, or under section 4 or section 15 of the Subversive Activities Control Act of 1950, may be obtained, or that the commission of any such crime may be prevented, through the interception of any wire communication, he may so certify, in writing and designate in such certificate any United States Attorney, Assistant United States Attorney, or officer or attorney of the Department of Justice authorized by him to make application for an order allowing such interception pursuant to this paragraph. Any officer or attorney so authorized may file with any judge of the United States Court of Appeals for the District of Columbia Judicial Circuit an application for an ex parte order allowing such interception. Such application shall be supported by . . . reasonable ground for belief that such interception will result in the procurement of evidence of, or the prevention of, the commission of any such crime. If the judge determines that such ground has been shown, he shall issue an order allowing such interception. Each such order shall specify the circuit or circuits upon which communications may be intercepted . . No such order shall be effective for a period longer than 6 months unless renewed . . after a new determination by the judge in the case of each renewal that reasonable ground for continued interception has been shown . .

SEC. 2. The proviso contained in section 605 of the Communications Act of 1934 . . is amended to read as follows: "Provided, that this section shall not apply . nor be deemed to prohibit the use by Federal law enforcement officials, in connection with the prosecution or prevention of any crime affecting the internal security of the United States, of any information obtained as a result of any interception, not in violation of section 245 of title 18 of the United States Codes, of any wire or radio communication."

S. 2753:[20]

"Be it enacted . . . That section 605 of the Communications Act of 1934 . . is hereby amended by changing the period at the end thereof to a colon

[19] Pending before the Senate.
[20] Pending before the Senate.

and by adding thereafter the following words: 'Provided further, that this section shall not apply to any future or past reception or interception of any communication nor to any future or past divulging, publishing, or use of the existence, content, substance, purport, effect, or meaning of any communication (a) if such reception, interception, divulging, publishing, and use, whether occurring heretofore or hereafter, was or is for the purpose of aiding a prosecution in the Federal courts of the United States for treason, espionage, or any other crime involving the national security, or (b) if such communication, whether occurring heretofore or hereafter, is relevant or material to the prosecution in such courts of any person charged with any such crime' "

S. 832:[21]

"Be it enacted That (a) the Director of the Federal Bureau of Investigation of the Department of Justice; the Director of the Military Intelligence Division of the Department of the Army; the Director of Intelligence, United States Air Force; and the chief of the Office of Naval Intelligence of the Navy Department are authorized under rules and regulations as prescribed by the Attorney General, in the conduct of investigations, to ascertain, prevent, or frustrate any interference or any attempts or plans for interference with the national security and defense, to require that telegrams, cablegrams, radiograms, or other wire or radio communications and copies or records thereof, or, upon the express written approval of the Attorney General, that any information obtained by means of intercepting communications, be disclosed and delivered to any authorized agent , without regard to the limitations contained in section 605 of the Communications Act of 1934 (48 Stat. 1103). The information thus obtained shall be admissible in evidence Provided, That prior to acquiring or intercepting the communications from which the information is obtained, an authorized agent shall have been issued a permit by a judge of any United States court, authorizing the agent to acquire or intercept such communications.

(b) Upon application by any authorized agent a judge of any United States court shall issue a permit , if the judge is satisfied that there is reasonable cause to believe that the communications may contain information which would assist in the conduct of such investigations."

Just where do these bills fall short of the objectives previously enumerated and are these objectives proper? A critical examination of the objectives in relation to the legislation can go far toward answering this query

1. The primary objective is to allow the government to offer evidence gathered through the process of wire-tapping in cases affecting the national security [22] The inability of the government to do so presently and in the past has allowed many acknowledged criminals to escape justice. Yet this objective has been restricted to those crimes only which threaten the secur-

[21] Pending before the Senate.

[22] See note 17 *supra.*

ity of the nation. Some have expressed the wish to extend the weapon to kidnapping and extortion cases as well.[23] Perhaps restricting the privilege to cases involving national security is wise, since it will enable the Congress to appraise the merits of wire-tapping before extending it further to such crimes as kidnapping and extortion. This view will undoubtedly aid the legislation in passing successfully through both houses of the Congress. As can be observed from reading the foregoing bills, all fulfill the first objective except for slight deviations concerning the limits of what is national security.

2. A failing of the present federal law is that no criminal penalties exist as to private individuals who have made use of the wire-tap to suit personal or business ends. That criminal penalties should attach to such conduct has not been denied by any faction in the controversy Yet only one bill, S. 3229, criminally penalized this practice, the remainder failing to even touch upon such conduct.

3. One of the most difficult objectives is to place the authority in some agency which will not abuse it, and still maintain a speed of action not inconsistent with the utmost secrecy of operation.

One faction[24] proposes that permission to wire-tap should be granted only to duly authorized agencies upon application to a judge of any United States Court of Appeals or District Court. Here if the judge is satisfied that reasonable cause exists that a crime against the national security has been or may be committed he may issue an ex parte order authorizing the tap. Although the chances of abuse are nominal by this procedure, it has been suggested that the machinery fails to fulfill the requirements of speed and secrecy so necessary in such undertakings, and that no uniform criterion exists concerning the facts sufficient to authorize the tap. For example, if federal agents learn facts which indicate that immediate authority to tap is needed, it might take some time to get the ex parte order, for such reasons as vacations, illness, etc. The delay might well prove disastrous to the operation. When contacted, the application would pass through many hands, such as clerks and stenographers who have no security clearances, thus endangering the secrecy Because there are over two hundred federal judges eligible to sign such orders, an enormous variance in opinions as to what "reasonable cause" is would prevail.

The alternative solution is that the authority should be vested alone in the office of the Attorney-General.[25] Although an abuse of authority through over-zealousness is more likely through this method, this danger would seem to be more than compensated for by the speed, secrecy, and uniformity gained. And what agency is better equipped to decide whether a threat to the national security is in the offing than the chief law enforcement body in government?

[23] *Ibid.*

[24] Senators Wiley, Keating, and McCarran, who have drafted three of the bills discussed herein.

[25] 39 CORNELL L. Q. 195, 211 (1954).

Three of the bills proposed take the view that a court order should first issue before wire-tapping may be authorized. The fourth, S. 2753, is completely silent upon the issue. On the arguments just mentioned it would seem that the lack of efficiency of this procedure would impair the functioning of the investigative agencies involved, and that perhaps those advocating the court order procedure should reconsider their stand in the light of the practical necessities involved.

4. The question whether the new legislation should validate the admissibility of wire-tap evidence already obtained as well as that gathered after passage of positive legislation has plagued the Congress. The primary problem appears to be whether such legislation would be unconstitutional as an ex post facto law Since only a rule of evidence would be altered, and not the ablity to convict upon less proof in amount and degree than was required when the crime was committed, such a law would in all likelihood be held constitutional.[26]

A Suggested Bill and Conclusion.

An attempt is here made to draft a bill which, in substance, fulfills the objectives hereinbefore mentioned:

"Be it enacted That Chapter 13 of Title 18 of the United States Code entitled "Civil Rights", is amended by—

(a) Inserting, at the end of the sectional analysis preceding section 241 thereof, the following new section caption: "245. Interception and divulgence of wire-communications."

(b) Inserting immediately after section 244 thereof, the following new section: "§245. Interception and divulgence of wire-communications.

"Whoever, without authorization from the sender and the recipient of any wire communication by common carrier, willfully intercepts or divulges, or attempts to intercept or divulge, or procures any other person to intercept or divulge or attempt to intercept or divulge such wire communication, except in compliance with the second paragraph of this section, shall be fined not more than $5000 or imprisoned not more than ten years or both.

Whenever the Attorney General has reason to believe on the basis of a request by the head of any Federal investigative agency for action pursuant to this section that evidence of the commission of any crime involving the national security of the United States may be obtained, or that the commission of any such crime may be prevented, through the interception of any wire communication, he is thereby authorized to so act, such authority to intercept remaining valid where reasonable ground for continued interception exists.

Evidence obtained in this manner, both prior and subsequent to this Act, shall be deemed admissible, if not otherwise inadmissible, for the purpose of aiding any prosecution in the Federal courts of the United States

[26] U.S. v. Lovett, 328 U.S. 303, 315 (1945), also see Thompson v. Missouri, 171 U.S. 380 (1898), where the statute making admissible evidence that was not admissible when the crime was committed was held not to be an ex post facto law.

for any crime involving the national security, notwithstanding the provisions of section 605 of the Communications Act of 1934 (48 Stat. 1103)."

The shortcomings of each of the bills pending in the Congress, and of the present law, are apparent to this writer. Perfection cannot be attained because it does not exist. Yet the wisdom of the Congress can overcome many existing deficiencies and perhaps mold the virtues of each bill into one workable tool with which to enhance the efficiency of the federal courts without a sacrifice of justice.