THE CASE FOR WIRE TAPPING

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WIRE tapping and the use in federal courts of evidence obtained through or as a result of wire tapping are among the controversial subjects with which the 83d Congress has come to grips during the current session.[1] Although it is not easy to strike a proper and satisfactory balance between individual rights and liberties on the one hand, and public needs and interests on the other, it is essential that every effort be exerted toward the immediate enactment of a measure which will come as close to such a goal as is possible.

The modern law of wire tapping is customarily recorded as commencing with the decision of the Supreme Court in 1928 that wire tapping and the use in a criminal trial in a federal court of evidence obtained by wire tapping are not violations of either the Fourth or Fifth Amendment to the Constitution.[2] Since that date, Congress has enacted only one so-called wire tap law—Section 605 of the Communications Act of 1934. Section 605 stipulates, in pertinent part, that "no person not 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."[3] Although no further legislation has been enacted during the twenty years

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1. On April 8, 1954, the House of Representatives passed an amended H.R. 8649. This bill, as reported out of committee, provided in part, that:

> "[I]nformation heretofore or hereafter obtained by the Director of the Federal Bureau of Investigation of the Department of Justice; the Assistant Chief of Staff, G-2 of the Army General Staff, Department of the Army; the Director of Intelligence, Department of the Air Force; and the Director of Naval Intelligence, Department of the Navy, 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, or any plans or attempts to interfere with or endanger, the national security or defense of the United States by treason, sabotage, espionage, sedition, seditious conspiracy, violations of chapter 115 of title 18 of the United States Code, violations of the Internal Security Act of 1950. . . , violations of the Atomic Energy Act of 1946. . . , and conspiracies involving any of the foregoing, shall, notwithstanding the provisions of section 605 of the Communications Act of 1934. . . , 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."

The House amended H.R. 8649: Wire tap evidence "heretofore" obtained with the approval of the Attorney General would be admissible in court, but wire tap evidence "hereafter" obtained would not be admissible unless a federal district or circuit judge had also approved the wire tap. 100 Cong. Rec. 4635 (April 8, 1954).

2. Olmstead v. United States, 277 U.S. 438 (1928).

3. 48 STAT. 1103 (1934), 47 U.S.C. 605 (1946).

which have elapsed, the law has steadily developed as cases posing varying questions involving Section 605 have been adjudicated.[4] For example, in reversing a judgment of conviction on an indictment charging the violation of the Anti-Smuggling Act and conspiracy, the Supreme Court in the first *Nardone* case held that "no person" as used in Section 605 embraces federal agents and "divulge . . . to any person" embraces testimony in a federal court.[5] In the second *Nardone* case,[6] it held that not only were the intercepted conversations to be excluded from evidence, but evidence procured through the use of knowledge gained from such conversations was likewise to be excluded.[7] On the same day, a unanimous Court reversed a judgment of conviction for mail fraud, holding that Section 605 applies to intrastate as well as interstate communications.[8]

It has long been the position of the Department of Justice that the mere interception of telephone communications is not prohibited by federal law. Assuming that this interpretation of the statute is correct,[9]—there has been no judicial holding to the contrary—the law is "thoroughly unreasonable and unrealistic."[10] It permits the interception of communications by business competitors, private detectives, busybodies, and others without federal restraint. Yet, law enforcement officials possessed of intercepted information vital to the security of the nation may not use such information in bringing spies and saboteurs to justice in our federal courts.

The Need for Wire Tapping

Wire tapping by law enforcement officials is a necessary concomitant of our present-day pursuit of spies, saboteurs, and other subversives. It is no

4. *E.g.*, United States v. Polakoff, 112 F.2d 888 (2d Cir.), *cert. denied*, 311 U.S. 653 (1940) (§ 605 prohibits the use in evidence of information intercepted with the consent of one party to a telephone conversation); Goldstein v. United States, 316 U.S. 114 (1942) (§ 605 does not render inadmissible the testimony of witnesses who were induced to testify by the use, in advance of trial, of intercepted communications to which the defendants were not parties); Goldman v. United States, 316 U.S. 129 (1942) (use of a detectaphone on wall of adjoining room is not an "interception" within prohibitions of § 605); Schwartz v. Texas, 344 U.S. 199 (1952) (§ 605 does not preclude use of wire tap evidence in criminal proceedings in state courts). See also Rosenzweig, *The Law of Wire Tapping*, 32 Cornell L.Q. 514; 33 Cornell L.Q. 73 (1947).

5. Nardone v. United States, 302 U.S. 379 (1937).

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

7. Mr. Justice Frankfurter, speaking for the Court, termed such derivative evidence as "fruit of the poisonous tree." *Id.* at 341.

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

9. "The congressional act as construed by the Supreme Court does not make wiretapping an offense, but the interception and disclosure of the contents of the message constitute the crime. Both acts are essential to complete the offense." United States v. Coplon, 91 F. Supp. 867, 871 (D.D.C. 1950), *rev'd on other grounds*, 191 F.2d 749 (D.C. Cir. 1951).

10. Attorney General Herbert Brownell, Jr., in identical letters of May 7, 1953, to the Speaker of the House of Representatives and the Vice President, transmitting a wire tap legislative proposal.

worse, when used by proper officials and subject to adequate safeguards, than is the use of informants, decoys, dictaphones, peeping, and the like—all of which have been accepted practices for many years. Moreover, every Attorney General, commencing with William D. Mitchell in 1931, has endorsed the desirability and need for the use of wire tapping as an investigative technique in certain types of cases.

Attorney General Mitchell reversed the policy which had been established by his predecessors, Harlan Fiske Stone and John G. Sargent, and permitted wire tapping under certain circumstances. In doing so, he expressed the view that the tapping of wires should be permitted "when efforts are being made to detect the perpetrators of heinous offenses or to apprehend and bring to punishment desperate gangs of criminals. In such cases the criminals are usually equipped with all modern scientific inventions such as the radio, the telephone, and the automobile, and the Government is at a considerable disadvantage in any event in dealing with them."[11] He also stated that in order to reach a decision as to the desirability of wire tapping under any circumstances he would want to study all available information bearing on the question. One year later, apparently having given careful thought to the matter, he advised a congressional subcommittee that he considered wire tapping proper in a limited class of cases provided such technique was used upon the express advance authorization of the Director of the Bureau of Investigation or of the Prohibition Bureau and with the approval of the appropriate Assistant Attorney General.[12]

Attorney General Homer Cummings also recognized that the technique of wire tapping was essential in certain types of cases and that the indiscriminate use thereof should not be practiced by law enforcement officers. He sought congressional determination of the proper balance between the individual's right of privacy and the interests of society.[13]

The policy of Mitchell and Cummings was only temporarily reversed by Attorney General Robert H. Jackson. In March 1940, although recognizing

11. Department of Justice order of January 19, 1931. "No tapping of wires should be permitted to any agent of the Department without the personal direction of the Chief of the Bureau involved, after consultation with the Assistant Attorney General in charge of the case." *Ibid.* See *Hearings before House Committee on Expenditures in the Executive Departments on Wire Tapping in Law Enforcement*, 71st Cong., 3d Sess. 2 (1931).

12. *Hearings before Subcommittee of the House Committee on Appropriations in charge of Departments of State, Justice, Commerce, and Labor Appropriations Bill for 1953, H.R. 9349*, 72d Cong., 1st Sess. 42 (1932).

13. "Whether a criminal or suspected criminal should be completely protected in his right of privacy, or whether, in the interests of society, an invasion of such right of privacy should be permitted under the restrictions and limitations proposed in the pending measure, involves a question of balance which is peculiarly within the province of the legislative branch of the Government." Letter of April 19, 1938, to the House Committee on Interstate and Foreign Commerce on H.R. 9898, and identical letter of April 26, 1938, to the Senate Committee on Interstate Commerce on S. 3756. See SEN. REP. No. 1790, 75th Cong., 3d Sess. (1938); H.R. REP. No. 2656, 75th Cong., 3d Sess. (1938).

the desirability of wire tapping in "a limited class of cases, such as kidnapping, extortion, and racketeering, where the telephone is the usual means of conveying threats and information," he ordered that wire tapping was no longer to be used by the Department of Justice and that the Department would no longer handle cases of other agencies if such cases had been developed in whole or in part as the result of wire tapping.[14] But, after receipt of a confidential Presidential directive of May 21, 1940,[15] Attorney General Jackson reinstated the Department's policy of intercepting communications in cases involving subversive activities against the Government of the United States.[16] Attorney General Francis Biddle reaffirmed the position taken by Mr. Jackson.[17]

Thereafter, Attorney General Tom C. Clark, in writing to President Truman on July 17, 1946, quoted the Presidential directive of May 21, 1940, and said: "This directive was followed by Attorneys General Jackson and Biddle, and is being followed currently in this Department. . . . It seems to me imperative to use [wire tapping] in cases vitally affecting the domestic security, or where human life is in jeopardy."[18] On submitting a proposed internal security bill to the 81st Congress, he wrote: "It seems incongruous that existing law should protect our enemies and hamper our protectors."[19]

Attorney General J. Howard McGrath submitted wire tap legislation for introduction in the 82d Congress. In doing so he repeated the last quoted statement of Attorney General Clark and indicated that such legislation would "enable the prosecution of present, future, and past violations of laws endangering our internal security, not barred by the statute of limitations, which would otherwise go unpunished to the detriment of the Nation."[20] Addressing the Chairman of the House Committee on the Judiciary and the Chair-

14. Department of Justice Order No. 3343, March 15, 1940, and Order No. 3346, March 18, 1940. See also, N.Y. Times, Mar. 18, 1940, p. 1, col. 3; p. 10, col. 6; reprinted in full in 86 CONG. REC. APP. 1471-2 (1940). Mr. Jackson stated that "Under the existing state of the law and decisions, [wire tapping] cannot be done unless Congress sees fit to modify the existing statutes."

15. President Roosevelt authorized the use of wire tapping in security cases provided in each case the Attorney General gave his specific approval.

16. In his Annual Report to the Congress, January 3, 1941, he said: "Experience has shown that monitoring of telephone communications is essential in connection with investigations of foreign spy rings. It is equally necessary for the purpose of solving such crimes as kidnapping and extortion." See *Hearings before Subcommittee No. 1 of Committee on the Judiciary on H.R. 2266 and H.R. 3099*, 77th Cong., 1st Sess. 16 (1941).

17. "The stand of the Department of Justice would be, as indeed it had been for some time, to authorize wire tapping in espionage, sabotage, and kidnapping cases when the circumstances warranted." Quoted in Department of Justice Release, January 8, 1950. Also N.Y. Times, Oct. 9, 1941, p. 4, col. 2.

18. At the foot of the letter appears: "I concur July 17, 1947, Harry S. Truman."

19. Identical letters of January 14, 1949, to the Speaker of the House of Representatives and the Chairman of the Senate Committee on the Judiciary. The proposal was thereafter introduced in the Senate as S. 595, 81st Cong., 1st Sess. (1949), 95 CONG. REC. 440 (1949).

20. Identical letters of January 17, 1951, to the Speaker of the House of Representatives and the Chairman of the Senate Committee on the Judiciary. On January 23,

man of a special Senate subcommittee in identical letters dated February 2, 1951, in which he urged early enactment of his proposed wire tap legislation, Attorney General McGrath wrote: "The Department of Justice has been seriously hampered in fulfilling its statutory duty of prosecuting those who violate the Federal laws relating to national defense and security because of the failure of Congress to enact legislation of this type." There was no change in the wire tapping policy of the Department of Justice during the brief tenure of Attorney General James P. McGranery.

Attorney General Herbert Brownell, Jr., pointed up the need for amendatory legislation in this field when he wrote: "It is quite unrealistic and thoroughly unreasonable that, though evidence is obtained showing clear violations of the laws against subversion, the hands of the prosecuting officers are tied and their efforts to maintain the security of the Nation are thwarted."[21] Again, on November 17, 1953, Attorney General Brownell advised a congressional committee that the work of the Department of Justice has clearly shown the need for legislation which would permit the use of wire tap evidence in espionage cases. He advised that there are cases of espionage presently in the Department of Justice but that since some of the important evidence was obtained by wire tapping, such cases could not be brought to trial so long as the law remains in its present state.[22]

Others of high office and respected position have supported wire tap legislation. In 1941, President Franklin D. Roosevelt wrote to the House Judiciary Committee:

> "I have no compunction in saying that wire tapping should be used against those persons, not citizens of the United States, and those few citizens who are traitors to their country, who today are engaged in espionage or sabotage against the United States. . . . I would confine such legislation to the Department of Justice and to no other department. I would also require that the Attorney General be acquainted with the necessity for wire tapping in every single case, and that he himself sign a certificate indicating such necessity. . . ."[23]

Mr. J. Edgar Hoover, Director of the Federal Bureau of Investigation, told the same committee that wire tapping as an investigative function is of considerable importance in cases of espionage, sabotage, kidnapping, and extortion.[24] Again, in 1950, Mr. Hoover asserted that "modern techniques must be used in dealing with treason, espionage, sabotage, and the

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1951, the proposal was introduced as H.R. 1947, 82d Cong., 1st Sess., 97 CONG. REC. 612 (1951).

21. See note 10 *supra.*

22. Statement before the Internal Security Subcommittee of the Senate Committee on the Judiciary.

23. Letter of February 21, 1941, to Honorable Thomas H. Eliot, Member of Congress, reprinted in *Hearings before Subcommittee No. 1, House Committee on the Judiciary, on H.R. 2266 and H.R. 3099*, 77th Cong., 1st Sess. 257 (1941).

24. *Id.* at 112.

kidnapping of little children."[25] Governor Dewey of New York recognized the need sixteen years ago when he said that wire tapping was "one of the best methods available for uprooting certain types of crimes."[26] Judge Augustus Hand of the Second Circuit has expressed the view that the state of the law of wire tapping imposes "great and at times insurmountable obstacles upon the prosecuting authorities in the detection and prosecution of crime."[27]

THE LEGISLATION NEEDED

It is clear that corrective legislation must be enacted if the Government is adequately to defend itself against those who would destroy it. However, although many people agree that there is an immediate need for legislative action, they disagree as to the precise kind of measure which should be enacted. For example, some of the recent bills provide that as a prerequisite to the use of wire tap evidence, the Attorney General shall have authorized the institution of the interception which resulted in the acquisition of the evidence;[28] others require prior court authorization;[29] still others have no such provision.[30] In some, the use of wire tap evidence obtained by intelligence units of the Department of Defense is authorized;[31] another restricts the admissibility of such evidence to that which was obtained by the Federal Bureau of Investigation;[32] others have no restriction of this type.[33] Some provide for the use of wire tap evidence "heretofore" obtained, provided such evidence was obtained with the express approval of the Attorney General.[34] One of the bills permits the use of wire tap evidence in cases affecting the safety of human life;[35] others restrict the use to national security or defense cases;[36] another has no such restriction.[37] These are among the more controversial differences.

The secrecy, uniformity, and speed essential to a successful security investigation are more likely to result if the Attorney General is given the sole responsibility for authorizing interceptions in such cases. With each additional person apprised of an intention to intercept, the likelihood of a security

25. Department of Justice Press Release, January 15, 1950.

26. 1 REVISED RECORD, NEW YORK STATE CONSTITUTIONAL CONVENTION 368, 372 (1938).

27. United States v. Polakoff, 112 F.2d 880, 890 (2d Cir.), *cert. denied*, 311 U.S. 653 (1940).

28. H.R. 408 and H.R. 5149. Also, H.R. 8649 as to evidence "heretofore" obtained.

29. H.R. 477, H.R. 3552, and S. 832. Also, H.R. 8649 as to evidence "hereafter" obtained.

30. H.R. 7107 and S. 2753.

31. H.R. 8649, H.R. 408, H.R. 477, H.R. 3552, and S. 832.

32. H.R. 5149.

33. H.R. 7107 and S. 2753.

34. H.R. 408 and H.R. 5149. H.R. 8649 requires express "written" approval.

35. H.R. 408.

36. H.R. 8649, H.R. 477, H.R. 3552, H.R. 5149, and S. 832.

37. H.R. 7107.

leak is increased. To prevent such an impairment of important security investigations, the Attorney General should have exclusive authority for instituting wire taps. Centralization of responsibility also insures a degree of uniformity. The Attorney General is the Government official most likely to have a comprehensive knowledge of the facts in any case under investigation, and of the need for the use of wire tapping in connection therewith. It is clear that the Attorney General acting alone can determine the need for, and desirability of, instituting a wire tap in any given case more quickly than he can if the concurrence of a judge is required. That there is little to fear from centralizing the responsibility and authority in the Attorney General is evidenced by the relatively few interceptions which Attorneys General have authorized in the past.

Attorney General Brownell has proposed safeguards for the individual. For example, he has suggested that only such evidence as has been acquired by the FBI or by the intelligence units of the Department of Defense shall be admissible. These are the agencies charged with legal responsibilities in the investigation of security offenses. Likewise, the Attorney General has proposed that intercepted information shall be made admissible in criminal cases only, and then only in such criminal cases as arise out of, or are related to, security offenses. While emphasizing the importance of providing that wire tap evidence *heretofore* obtained in any security investigation shall be admissible in criminal prosecutions *hereafter* undertaken, he would restrict this admissibility to interceptions that had the express approval of an Attorney General, providing further that the prosecutions in which the evidence is sought to be used have arisen out of, or relate to, such an investigation.

There are other safeguards for the protection of individual liberties. Before intercepted evidence could be made public through use in a criminal prosecution, a grand jury would have had to indict an accused for espionage, sabotage, or other subversive activities. Then if a particular case were brought to trial the presiding judge would have the duty of determining whether or not the evidence obtained through the interception of communications was material and relevant, and whether or not the interception had been accomplished with the approval of the Attorney General.

Conclusion

The immediate enactment of ameliorative legislation is essential. A law such as that which has been proposed by the Attorney General will minimize the potential invasion of privacy and will maximize the safety of the country. Congressman Kenneth B. Keating, chairman of the House subcommittee which considered the wire tap bills, has said: "Invasion of privacy is repugnant to all Americans. And it should be. Nevertheless, the safety of our Nation and its people must be paramount."[38] It is this paramount consideration which requires that Congress act immediately.

38. *Hearings before Subcommittee No. 3 of the House Committee on the Judiciary on H.R. 408, H.R. 477, H.R. 3552, and H.R. 5149*, 83d Cong., 1st Sess. 6 (1953).