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# Wiretapping--A History of Federal Legislation and Supreme Court Decisions

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# WIRETAPPING*
# A HISTORY OF FEDERAL LEGISLATION AND SUPREME COURT DECISIONS

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## ORIGIN OF FEDERAL LEGISLATION AND SUPREME COURT DECISIONS

A war-time measure enacted in 1918, at a time when the Federal Government was operating the nation's telephone system, was the first federal legislation concerning wiretapping. Fearful that indiscriminate wiretapping during this period would jeopardize vital government secrets and facilitate espionage activities, Congress provided that "whoever . . . shall, without authority and without the knowledge and consent of the other users . . . tap any telegraph or telephone line" would thereby commit a federal crime.[1] This absolute prohibition was only effective for the duration of World War I, since the statute, by its own terms, expired when the Government relinquished control of the telephone system in July of 1919.[2]

The immediate post-war era reflected an increase in wiretapping, including its use by the Department of Justice. In 1924, however, Attorney General Stone banned wiretapping by the Federal Bureau of Investigation and labelled it "unethical tactics."[3] Thus, when *Olmstead v. United States*[4] was decided in 1928, wiretapping was not sanctioned by the Department of Justice as a permissible method of investigation, but it was not thought to be an illegal practice.[5]

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1. Act of October 29, ch. 197, §1, 40 Stat. 1017-1018 (1918).
2. Act of July 11, ch. 10, §1, 41 Stat. 157 (1919).
3. See *Hearings before Senate Select Committee on Investigation of the Attorney General pursuant to S. Res. 157*, 68th Cong., 1st Sess., vol. III, pp. 2489-2490; Statement of Attorney General Jackson, N. Y. Times, March 18, 1940, p. 1, col. 3.
4. 277 U.S. 438, 72 L.Ed. 944 (1927).
5. A statement attributed to Mr. J. Edgar Hoover, Director of the FBI, by Senator Wayne Morse (100 CONG. REC. 8048) may be regarded

*The Olmstead Decision*

*Olmstead v. United States, supra,* involved a conviction for conspiracy to violate the National Prohibition Act. As part of its case in chief the Government had introduced wiretap evidence. In affirming the convictions by a vote of 5-4, the Court resolved the constitutional issue raised by restricting the application of the Fourth Amendment to "tangible material effects" and "actual physical invasion[s]," and concluded:

> 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.[6]

Although not within the scope of the grant of ceritiorari, the Court also held that the rule of exclusion, as to evidence obtained in violation of the Fourth Amendment, did not apply to evidence obtained by wiretapping, even though the law of the state involved prohibited this practice.[7]

Vigorous dissents were delivered by Justice Holmes, Brandeis, Butler and Stone. While "not prepared to say that the penumbra of the Fourth and Fifth Amendments covers the defendant," Mr. Justice Holmes believed that "the Government ought not to use evidence obtained and only obtainable by a criminal act." He closed by characterizing the wiretapping situation disclosed by the record as a "dirty business."[8] Mr. Justice Brandeis, on the other hand, did grapple with the constitutional issue and his dissent putting wiretapping within the orbit of the Fourth and Fifth Amendments became the starting point of all legal argument against legislation permitting wiretapping. "When the Fourth and Fifth Amendments were adopted," argued Mr. Justice Brandeis, " 'the

as a reliable statement of this position. The statement actually made in 1929 after the Olmstead decision, was before any change in departmental policy: "We have a very definite rule in the Bureau that any employee engaged in wiretapping will be dismissed from the service of the Bureau. While it may not be illegal, I think it is unethical, and it is not permitted under the regulations of the Attorney General."

This quotation appears to have been taken from *Hearings before the House Committee on Expenditures in the Executive Departments,* 71st Cong., 3rd Sess., p. 26.

6. 277 U.S. 438, 466; 72 L.Ed. 944, 951 (1927).
7. *Id.* at 466-469; 72 L.Ed. 944, 951-952.
8. *Id.* at 469-470; 72 L.Ed. 944, 952-953.

form that evil had theretofore taken' had been necessarily simple." Now, however, "subtler and more far-reaching means of invading privacy [than were imagined by the Founding Fathers] have become available to the Government. Discovery and invention have made it possible for the Government . . . to obtain disclosure in court of what is whispered in the closet." Reasoning that the Fourth and Fifth Amendments were intended to forbid any unwarranted intrusion into individual privacy, he concluded that the Fourth Amendment forbids interception of telephone communications, while the Fifth Amendment forbids the use as evidence of information learned as the result of the interception.[9]

While the immediate effect of the *Olmstead* decision was to establish that wiretapping was neither unconstitutional nor a federal crime, and that the evidence procured thereby was admissible in federal courts regardless of any state prohibition, it stimulated the introduction of legislation in both Houses of Congress to make wiretap evidence inadmissible in federal courts.[10] These legislative proposals, however, were uniformly unsuccessful.

It is also fair to suppose that the *Olmstead* holding was a factor in Attorney General Mitchell's decision, in 1931, to let it be known that the Department would countenance wiretapping in criminal cases of "extreme importance" when authority to tap was requested by the director of the bureau concerned. Interception of telephone messages was not to be allowed "in minor cases nor on Members of Congress, or any citizen except where charge of a grave crime had been lodged against him."[11] Meanwhile, many government officials appeared before Congress to voice opposition to the practice of wiretapping and to assure the members that, other than as indicated above, they were not utilizing wiretapping in their work.[12]

In 1932, further legislation was introduced in Congress, forbidding wiretapping by federal employees and prohibiting

9. *Id.* at 473, 478-479; 72 L.Ed. 944, 954, 956-957.
10. H. R. 5416, 71st Cong., 1st Sess.; S. 6061, S. 3344, 71st Cong., 3rd Sess.; see 71 CONG. REC. 5968.
11. Statement of Attorney General Jackson, *supra* note 3.
12. *Hearings before a Subcommittee of the House Committee on Appropriations on the Department of Justice Appropriation Bills*, 72nd Cong., 3rd Sess., pp. 65-73; *id.*, 72d Cong., 2d Sess., pp. 33, 72-73; *id.*, 72d Cong., 1st Sess., pp. 42, 251.

the introduction of any wiretap evidence in federal courts.[13] Although this legislation failed to pass, the general attitude of Congress, clearly demonstrated during this period, finally culminated in the second piece of federal legislation on this subject, enacted in 1933. Attached as a rider to an appropriation bill, there appeared the following language: "No part of this appropriation shall be used for or in connection with 'wiretapping' to procure evidence of violations of the National Prohibition Act."[14]

*Enactment of Section 605 Federal Communications Act*

At the same time a joint committee of Congress was busily engaged in preparing legislation to transfer jurisdiction over all radio, telegraph and telephone facilities to the newly created Federal Communications Commission. An amendment to the Radio Act of 1927 was prepared, and in 1934 the bill as proposed passed Congress with few changes.[15] Included, and hardly considered a worthy subject of debate at the time of passage, was a relatively minor section, section 605, dealing with the interception and divulgence of messages. This section, with pertinent language underlined, follows:

> §605. Unauthorized publication or use of communications.
>
> No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning, thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its distination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and *no person not being authorized by the sender shall intercept any*

13. H. R. 9893, H. R. 5305, H. R. 23, 72d Cong., 1st Sess.; S. 1396, 73d Cong., 1st Sess.; see 74 CONG. REC. 3928, 75 CONG. REC. 4541.
14. Act of March 1, ch. 144, 47 Stat. 1371, 1381 (1933).
15. Federal Communications Act, 48 Stat. 1064, 1103, 47 U.S.C. 605 (1934).

*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 for the benefit of another not 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; *Provided,* That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.[16]

### *The Nardone Decision*

Any notion that section 605 was innocuous or inconsequential was dissipated in 1937 when the case of *Nardone v. United States*[17] was decided by the Supreme Court. The *Nardone* case involved several defendants who had been convicted of liquor violations and a vital part of the proof rested upon telephone conversations intercepted by federal agents. The Court scrutinized the following operative language of section 605, *supra:* ". . . No person not being authorized by the sender shall intercept any communication and divulge or publish the . . . meaning of such intercepted communication to any person." Reversing the convictions and remanding the case for retrial, the Court held that a prohibition of the use of wiretap evidence in federal courts was clearly within the language of the statute, and the phrase "no person" included federal agents. The net result was that federal agents were precluded from testifying in federal courts to the contents of intercepted messages since section 605 barred divulgence

16. Act of June 19, ch 652, §605, 48 Stat. 1103 (1934).
17. 302 U.S. 379, 82 L.Ed. 314 (1937).

of intercepted communications to "any person." "To recite the contents of the message in testimony before a court is to divulge the message."[18]

The decision was criticized in many quarters as being an example of judicial legislation and some said that the Court had read more into the statute than the bare expression of congressional intent had indicated.[19] That the Court was aware that this contention might be forthcoming may be inferred from its statement in the opinion that "It is also true that the committee reports in connection with the Federal Communications Act dwell upon the fact that the major purpose of the legislation was the transfer of jurisdiction over wire and radio communications to the newly constituted Federal Communications Commission."[20] The Court disposed of this argument by concluding that "these circumstances are, in our opinion, insufficient to overbear the plain mandate of the statute."[21]

*Second Nardone Decision*

Upon retrial, the Nardone defendants were again convicted and the case reached the Supreme Court in what is commonly referred to as the second *Nardone* case.[22] At the second trial, intercepted communications were not used as evidence, but defense counsel were denied the right to question prosecution witnesses about the use which the police had made of the wiretaps. The Supreme Court, upon reexamination of section 605 of the Federal Communications Act, decided that not only were the contents of intercepted messages inadmissible as evidence in federal courts, but the statutory prohibition extended to any evidence based upon knowledge and information gained or derived from intercepted messages. The Court stated its position in these words:

> [T]o reduce the scope of section 605 to exclusion of the exact words heard through forbidden interceptions, allowing these interceptions every derivative use that they may serve . . . would largely stultify the policy which compelled our decision in *Nardone v. United States*.[23]

18. *Id.* at 382; 82 L.Ed. 314, 316.
19. At the time the amendment to the Radio Act was up for passage in the Congress the managers of the bill assured that "the bill on the whole does not change existing law." See 78 CONG. REC. 10313.
20. 302 U.S. 379, 382-383, 82 L.Ed. 314, 316-317 (1937).
21. *Id.*
22. Nardone v. United States, 308 U.S. 338, 84 L.Ed. 307 (1934).
23. Id. at 340; 84 L.Ed. 307, 311.

*Weiss v. United States*

This phase of judicial interpretation of the scope of section 605 was completed when the Supreme Court rendered its decision in *Weiss v. United States*.[24] The issue presented to the Court in the *Weiss* case was whether section 605, in the light of the *Nardone* decisions, applied to intrastate telephone messages. Basing its view squarely upon the constitutional principle that Congress may regulate intrastate transactions when necessary to protect interstate commerce, the Court concluded that the interdiction found in the second clause of section 605 was not limited solely to interstate and foreign communications.[25]

In view of the decisions in both *Nardone* cases and in the *Weiss* case, it seemed apparent that Mr. Justice Brandeis' dissent in the *Olmstead* case had had a marked influence upon the Court's course of decision. While *Olmstead* remained the law on the constitutional issues involved in wiretapping, the Court had construed section 605 as extending a remedy normally reserved for invasions of Fourth and Fifth Amendment rights to certain instrusions by federal officers into another kind of privacy. The privacy of telephone communications, although not protected by the Fourth and Fifth Amendments, was held to be protected by statute from invasion by federal officers, in much the same way as this privacy would have been protected if these amendments did apply. By force of law, evidence obtained, directly or indirectly, by federal officers through interception of telephone communications was excluded just as surely and just as completely as would have been the case if the remedy had been found in the Constitution.

*Changing Congressional Attitude*

Although the judicial view regarding wiretapping was, in 1938-1939, one of prohibition, the attitude of Congress was changing course. Shortly after the first *Nardone* case, a bill was introduced to avoid the effect of that decision. Surprisingly enough, that bill came closer to enactment than any subsequent measure introduced in Congress. Versions of it were approved by both Houses of Congress and the unparal-

24. 308 U.S. 321, 84 L.Ed. 398 (1939).
25. *Id.* at 329; 84 L.Ed. 398, 302-303.

leled success of this measure is even more striking when consideration is given to its broad features. It provided that the head of any executive department or agency could authorize wiretapping if he had reason to believe that a felony against the United States was about to be committed, the prevention of which was within his jurisdiction. This bill died in Congress because minor differences between the House and Senate versions could not be resolved before adjournment.[26]

In March, 1940, Attorney General Jackson apparently concluded that he could no longer ignore the two *Nardone* decisions and the holding in *Weiss v. United States*. In announcing a return to the 1924 policy forbidding wiretapping by the FBI, Jackson stated that "under the existing state of the law and decisions," wiretapping "cannot be done unless Congress sees fit to modify the existing statutes."[27] In taking such action, however, the Attorney General underestimated the determination of those who believed that, because of increased international tensions, authority to intercept at least some communications was essential to national survival. A House Joint Resolution was approved giving the Federal Bureau of Investigation authority to wiretap in certain situations relating to national security.[28] While this measure failed to win Senate approval, Attorney General Jackson, early in 1941, was forced to reverse his position. In a change of policy commonly attributed to intervention by President Roosevelt,[29] Jackson announced that he had given the Federal Bureau of Investigation authority to intercept communications during the course of certain investigations. To justify such a shift in policy, however, it was believed necessary to attempt to reconcile governmental wiretapping with the Supreme Court's interpretation of section 605. In a letter to the House Judiciary Committee dated March 19, 1941, urging

26. S. 3756, 75th Cong., 3rd Sess. (1938). The variation in the bill as it passed each House resulted when the House of Representatives added to the Senate version a paragraph prescribing a penalty for unauthorized tapping or divulgence by federal employees. 83 CONG. REC. 7054, *cf.* 83 CONG. REC. 9452-9453, 9636-9637.

27. Statement of Attorney General Jackson, *supra* note 3.

28. H. R. J. Res. 553, 76th Cong., 3rd Sess.

29. Testimony of Attorney General Brownell, *Hearings Before a Subcommittee of the Senate Committee on the Judiciary*, 83rd Cong., 2d Sess., on S. 832, S. 2753, S. 3229, and H.R. 8649, p. 16; Rogers, *The Case for Wiretapping*, 63 YALE L. J. 792, 795; Statement by J. Edgar Hoover, 58 YALE L. J. 422-423; Statement of Congressman Yates of Illinois on April 7, 1954, 100 CONG. REC. 4797; DASH, SCHWARTZ & KNOWLTON, THE EAVESDROPPERS (1960), p. 32. Compare, however, Donnelly, *Comments and Cavcats On The Wire Tapping Controversy*, 63 YALE L. J. 799, 800, fn. 7.

the adoption of pending wiretapping legislation, the Attorney General offered the following rationale:

> There is no Federal statute that prohibits or punishes wiretapping alone. The only offense under the present law is to intercept any communication and divulge or publish the same. Any person, with no risk of penalty, may tap telephone wires and eavesdrop on his competitor, employer, workman, or others, and act upon what he hears or make any use of it that does not involve divulgence or publication.
>
> To use evidence obtained by wiretapping for the protection of society against criminals often requires that it be divulged in open court. It is this divulging in law enforcement that court decisions hold to violate the statute. . . .[30]

The statutory measures introduced in 1941 and 1942 to authorize wiretapping in the interests of national security were not passed by the Congress.[31] In 1942, House Joint Resolution 310,[32] to authorize the Federal Bureau of Investigation and the intelligence units of the armed services to wiretap in investigations of suspected sabotage, treason, seditious conspiracy, espionage and violations of the neutrality laws, passed the House but died in the Senate.

With the congressional attitude tending to favor limited wiretap authority under proper safeguards, the Supreme Court decided two more cases involving alleged violations under section 605 as embodying the essence of the constitutional right of privacy, so it now added a limitation appropriate to that right. The Court also clarified the meaning of the word, "interception."

### *Third Persons Not Protected*

In 1942 the case of *Goldstein v. United States*[33] determined the status of a third person to object to the use of wiretap evidence to persuade his co-conspirators to testify against him. Nothing that a person not the victim of an unlawful

30. 87 CONG. REC. 5764.
31. H. R. 4228, H. R. 3099, and H. R. 2266, 77th Cong., 1st Sess.; H. R. 6919, H. R. J. Res. 273, H. R. J. Res. 304, 77th Cong., 2d Sess.
32. 77th Congress, 2d Sess., 88 CONG. REC. 4594-4597.
33. 316 U.S. 114, 86 L.Ed. 1312 (1941).

search and seizure has no right to object to the introduction of evidence seized thereunder,[34] the Court concluded that third parties lacked standing to object to the admissibility of evidence thus indirectly obtained by wiretapping. "[E]ven though the use made of the communications . . . to induce the parties to them to testify were held a violation of the statute, this would not render the testimony so procured inadmissible against a person not a party to the message.[35]

*"Interception" Defined*

In the case of *Goldman v. United States,*[36] which involved a conspiracy to violate the Bankruptcy Act, the Court defined the word "interception," as used in section 605 of the Federal Communications Act. In *Goldman,* federal agents were able to record a defendant's telephone conversations by the use of a detectophone, a sensitive electrical listening device placed against the wall of an adjoining room. The Court concluded that section 605 was not applicable because eavesdropping upon one end of a telephone conversation is not an interception of that communication, holding:

> What is protected is the message itself throughout its transmission by the instrumentality or agency of transmission. . . . Words spoken in a room in the presence of another into a telephone receiver do not constitute a communication by wire within the meaning of the section. . . . [Interception] 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 possession of the intended receiver.[37]

*Interception Alone Is Not a Crime*

A sort of uneasy truce between the friends and foes of wire-tapping prevailed for the duration of World War II and

34. FED. R. CRIM. P. 41(e) embodies the principle that "a party will not be heard to claim a constitutional protection unless he 'belongs to the class for whose sake the constitutional protection is given.'" Jones v. United States, 362 U.S. 257, 261-264, 4 L.Ed.2d 687, 701-704 (1960); see Raines v. United States, 362 U.S. 17, 22, 4 L.Ed.2d 524, 530 (1960). *Cf.* NAACP v. Alabama, 357 U.S. 449, 459-460, 2 L.Ed.2d 1488, 1497-1498 (1958).

35. 316 U.S. 114, 122, 86 L.Ed. 1312, 1318 (1941).

36. 316 U.S. 129, 86 L.Ed. 1322 (1941).

37. *Id.* at 133-134; 86 L.Ed. 1322, 1326-1327.

the early years of the cold war. It was a federal offense to intercept and divulge both interstate and intrastate telephone communications, and evidence so obtained by federal officers — or obtained as the fruit of such activities — was not admissible in federal trials. On the other hand, it was not an offense to eavesdrop, even when the investigator used a scientific device to enhance his natural faculties, for only the means of communication itself was within the ambit of protection. Standing as the person aggrieved was a prerequisite to the assertion of any complaint. Furthermore, the Department of Justice continued to adhere to the position formulated in 1941 — that the prohibition spelled out in section 605 applied only where there was an interception and a subsequent divulgence of the communication.

This interpretation of section 605, which has been called "strained and overtechnical,"[38] essentially reduces to two propositions. First, since the section uses the terms "intercept . . . and divulge or publish," both events must occur before there is a violation. Second, the entire Department of Justice is an entity. Therefore, an investigator does not "divulge or publish" when he passes wiretap information on to his associates and superiors inside the Government. Thus, Attorney General Biddle found it possible to state that to prohibit divulgence was not to prohibit an investigator from reporting to his superiors.[39] The logic of the theoretical justification for this administrative policy is outside the scope of this paper. For present purposes, it is enough to note that those who advocated wiretapping seemed to believe that they could live with the then existing situation.

The state of tacit cease-fire ended as the nation entered the new decade in 1950. Among the reasons for renewed interest in this field was the fact that wiretapping by private individuals in the District of Columbia became the subject of congressional scrutiny. An investigation revealed that a local police official had wiretapped as a private venture. At one point, this officer apparently was employed by a Senator to tap the telephones of private attorneys; on another occasion he intercepted the telephone messages of another Senator.[40] Another significant development occurred when Judith Coplon became the subject of criminal prosecution.

38. S. REP. No. 2700, 81st Cong., 2d Sess., p. 5.
39. N. Y. Times, Oct. 9, 1941, p. 4, col. 2; see 100 CONG. REC. 8052
40. *Supra* note 38, at 2-4.

*The Coplon Cases*

As a result of an intensive investigation, Judith Coplon, a former employee of the Justice Department, was indicted separately in two cases, one arising in the Southern District of New York, and the other in the District of Columbia, each charging her with conspiracy to defraud the United States and attempting to deliver defense information to a foreign agent. At her trial on the New York indictment, it was shown by defense counsel that agents of the Federal Bureau of Investigation had intercepted many of Miss Coplon's telephone communications. District Judge Ryan, commenting on the scope of the prohibition in section 605, noted:

> This is still the law; it has not been repealed or modified, it contains no exemptions. . . . The fact these interceptions were carried on under written authorization of the Attorney General imparts no sanctity to them; they remain unlawful and prohibited.[41]

Relying in part upon records which the trial court withheld from the defendant on grounds of national security, he held, however, that the interceptions had in no way furnished the leads to the evidence which was introduced at trial. Miss Coplon's conviction followed as a matter of course.

The court of appeals reversed, holding, *inter alia,* that the trial judge erred in denying to the defense the opportunity to inspect all of the wiretap records relied upon by Judge Ryan in concluding that wiretapping had not tainted the evidence introduced at trial. The appellate court reasoned that the prosecution was obliged "to convince the trial court that its proof had an independent origin"[42] once it was shown that wiretapping had occurred. The prosecution failed to carry this burden by failing to reveal, for the record, the nature of all of the intercepted communications. In other words, the prosecution had to choose between full disclosure and failure of the prosecution. The court of appeals also held that the lower court had unduly restricted defense counsel's inquiry into the question of whether the information which initiated the investigation was procured by wiretapping. In disposing of the case the court of appeals, in an opinion by Judge

41. United States v. Coplon, 88 F.Supp. 921, 925 (S.D.N.Y. 1950).
42. Nardone v. United States, 308 U.S. 338, 341, 84 L.Ed. 307, 312 (1939).

Learned Hand, posed the problem which confronts those who oppose all forms of wiretapping: "For all the foregoing reasons, the conviction must be reversed; but we will not dismiss the indictment for the guilt [of espionage] is plain. . . ."[43]

The final chapter in the Coplon matter took place in the District of Columbia. Brought to trial on the second indictment against her, Miss Coplon was convicted and the conviction was affirmed. She subsequently moved for a new trial on the grounds of newly discovered evidence relating to wiretapping. The trial court denied this motion, but was reversed by the court of appeals.[44]

The New York indictment against Judith Coplon has not been dismissed but the possibility of retrial seems remote at the present time. So far as the District of Columbia indictment is concerned, her motion for a new trial is still pending a hearing on the allegations raised in that motion. Technically, the defendant is free on $60,000 bail.[45]

### *On Lee v. United States*

Consideration must be given to *On Lee*[46] and *Schwartz v. Texas*,[47] both of which were decided in 1952, before returning to the story of developments in the Congress. We shall also deal with *Irvine v. California*.[48]

If the other cases which have been discussed are important to an understanding of what is wiretapping, then the *On Lee* case and *Goldman, supra,* help to explain what it is not. In *On Lee,* a federal agent engaged the defendant in conversation, during the course of which the defendant made incriminatory statements. Unknown to the defendant, the agent had a small radio transmitter concealed on his person, and the defendant's admissions were thus communicated to another federal agent stationed nearby with a radio receiver. The Supreme Court did not find it difficult to conclude that these facts did not show a violation of section 605:

43. United States v. Coplon, 185 F.2d 629, 640 (2d Cir. 1950), *cert. denied* 342 U.S. 920, 96 L.Ed. 688 (1951).
44. United States v. Coplon, 91 F. Supp. 867 (D.D.C. 1950), *rev'd* 191 F.2d 749 (D.C. Cir. 1951), *cert. denied* 342 U.S. 926, 96 L.Ed. 690 (1951).
45. Washington Evening Star, April 7, 1961, p. A-2, col. 1.
46. On Lee v. United States, 343 U.S. 747, 96 L.Ed. 1270 (1951).
47. 344 U.S. 199, 97 L.Ed. 231 (1952).
48. 347 U.S. 128, 98 L.Ed. 561 (1953).

> Petitioner had no wires and no wireless. There was no interference with any communications facility which he possessed or was entitled to use. He was not sending messages to anybody or using a system of communications within the Act.[49]

### *Schwartz v. Texas*

Considerations of federalism were important in *Schwartz v. Texas*.[50] In that case, local police used a wiretap to listen in on telephone calls between the defendant and one Jarrett. Records of these telephone conversations were admitted in evidence against defendant during his trial in the state court, although defense counsel made timely objection. The question before the United States Supreme Court was "whether these communications are barred . . . from use as evidence in a criminal proceeding in a state court."[51]

Passing the question of the power of Congress to regulate the use of wiretap evidence in state courts, the Court refused to find an attempt to exercise any such power in section 605. The exercise of such a power even where constitutionally permissible "is not lightly to be presumed,"[52] and no pattern of regulation having been expressed in section 605, it followed that Congress had made no attempt to require the States to impose the sanction of exclusion when it enacted the statute. "Where a state has carefully legislated so as not to render inadmissible evidence obtained and sought to be divulged in violation of the laws of the United States, this Court will not extend by implication the statute of the United States so as to invalidate the specific language of the state statute."[53]

The holding in *Schwartz* is not only important in its own right, it is also an illustration of the danger of attempting to push too far any analogy between cases involving the Fourth Amendment and cases involving wiretapping. Certain commentators[54] raised theoretical objections to the Court's position in *Schwartz*, since by hypothesis, there is a fresh divulgence within the very presence of the state court, and the

49. 343 U.S. 747, 354, 96 L.Ed. 1270, 1275 (1951).
50. 344 U.S. 199, 97 L.Ed. 231 (1952).
51. *Id.* at 201; 97 L.Ed. 231, 234.
52. *Id.* at 203; 97 L.Ed. 231, 235.
53. *Id.* at 202; 97 L.Ed. 231, 235.
54. See, for example, Bradley and Hogan, *Wiretapping: From Nardone to Benanti and Rathbun*, 46 GEO. L. J. 429.

commission (if not the repetition) of a federal crime at that time. The *Schwartz* situation, so it was argued, is thus easily distinguishable from the Fourth Amendment problem resolved in identical fashion in *Wolf v. Colorado*,[55] where it was held "that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure."[56] Moreover, the holding in *Wolf* was expressly reversed during the October, 1960, term, in *Mapp v. Ohio*.[57] "We hold," said the Court in *Mapp*, "that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."[58] In detail, then, it is contended that if the privacy protected by section 605 is analogous to the individual right to be protected against unreasonable searches and seizures under the Fourth Amendment, then the ban against the use in state tribunals of evidence obtained by an unreasonable search or seizure should be regarded as a precedent for the imposition of a similar ban against the use in state courts of evidence obtained in violation of section 605. Alternatively, if the remedy applied when an unreasonable search and seizure has occurred is not regarded as strictly applicable to state cases involving interception and divulgence of telephone communications, then the latter problem should be regarded as the more deserving of an extreme remedy, since the offense against federal law is committed or repeated in the state court itself.

This line of reasoning ignores an essential difference between Fourth Amendment and wiretapping situations. In the case of unreasonable searches and seizures the Supreme Court has held that the Fourth Amendment, in and of itself, requires State courts to apply the remedy of exclusion.[59] The protection against interception and divulgence of telephone communications, however, is purely statutory. Congress need not — and the Supreme Court held in *Schwartz* that it did not — require the states to apply the remedy of exclusion in state prosecutions. While the Supreme Court has the authority to enforce a remedy of exclusion in the lower federal courts, it does not have a similar general supervisory authority over

55. 338 U.S. 25, 93 L.Ed. 1782 (1948).
56. *Id.* at 33; 93 L.Ed. 1782, 1788.
57. 367 U.S. 643, 6 L.Ed.2d 1081 (1961).
58. *Id.* at 655; 6 L.Ed.2d 1081, 1090.
59. Mapp v. Ohio, *supra* note 57.

the state courts. It should not be surprising, therefore, that the Supreme Court reaffirmed *Schwartz v. Texas* in *Pugach v. Dollinger, et al.*[60]

Petitioner Pugach was charged, in a New York state court, with the commission of several serious crimes. He sought an injunction in federal court against, *inter alia,* the district attorney of Bronx County, alleging that agents of the district attorney had tapped his telephone pursuant to a state court warrant and obtained information which the district attorney had used before the grand jury and intended to use in the pending trial. Pugach therefore asked that the defendant be enjoined "from proceeding . . . upon the indictments . . . on any grounds in which they may use wiretapping evidence, or on any grounds or investigations resulting from or instituted as a result of the aforesaid illegal wire taps."[61] The lower federal courts denied relief.[62]

The Supreme Court affirmed *per curiam,* "on the authority of *Schwartz v. Texas,* 344 U.S. 199, and *Stefanelli v. Minard,* 342 U.S. 117." Mr. Justice Brennan "would also affirm but solely on the authority of *Stefanelli v. Minard,* 342 U.S. 117" — that is, solely as an exercise of equitable discretion.[63] It would appear, therefore, that a majority of the Supreme Court still regards *Schwartz v. Texas* as sound.[64]

### *Irvine v. California*

In *Irvine v. California*[65] local police officers honeycombed defendant's home with an elaborate network of microphones which they used to listen in on virtually every word spoken within the house. Relying on the definition of interception adopted in *Goldman v. United States,*[66] the Supreme Court concluded, *inter alia,* that section 605 was not applicable. The Court said:

> Here the apparatus of the officers was not in any way connected with the telephone facilities, there was no inter-

60. 365 U.S. 458, 5 L.Ed.2d 678 (1959).
61. *Id.* at 461; 5 L.Ed.2d 678, 680.
62. Pugach v. Sullivan, 180 F.Supp. 66 (S.D.N.Y. 1960), *stay granted* 275 F.2d 503 (2d Cir. 1960), *aff'd* 277 F.2d 739 (2d Cir. 1960). See also Pugach v. Dollinger, 280 F.2d 521 (2d Cir. 1960).
63. 365 U.S. 458, 5 L.Ed.2d 678 (1959).
64. See also O'Rouke v. Levine, 181 F.Supp. 947 (E.D.N.Y. 1960), *cert. denied,* O'Rouke v. New York, 362 U.S. 980, 4 L.Ed.2d 1015 (1960).
65. 347 U.S. 128, 98 L.Ed. 561 (1953).
66. 316 U.S. 129, 86 L.Ed. 1322 (1941).

ference with the communications system, there was no interception of any message. All that was heard through the microphone was what an eavesdropper, hidden in the hall, the bedroom, or the closet, might have heard. We do not suppose it is illegal to testify to what another person is heard to say merely because he is saying it into a telephone.[67]

*The Push For Legislation*

A determined effort was made in 1953-1954 to enact wiretap legislation. The House Judiciary Committee held hearings on a number of bills concerning wiretapping.[68] Attorney General Brownell took the position that wiretapping by government agents should be expressly authorized and that the control of such practices should be vested solely in the Attorney General. When pressed to the extreme, however, the Department of Justice expressed the view that legislation authorizing wiretapping only on condition that it be controlled by judicial procedures was preferable to no legislation at all. Deputy Attorney General William P. Rogers was asked point blank during the above hearings before the House Judiciary Committee:[69]

Mr. Keating: . . . You feel the application to the court would throw such a cumbersome burden upon the Attorney General that you would rather not see any bill than a bill with such provision?

Mr. Rogers: No; I do not, Mr. Chairman, I do not. I mean if it comes down to a question of whether we can have a bill passed and we have to get permission, certainly we would prefer that.

Subcommittee No. 3 favorably reported H. R. 477 to the House Judiciary Committee. Congressman (now Senator) Keating, the author of H. R. 477, proposed an amendment to his original bill. This was adopted by the full committee and ordered reported in the form of a clean bill, H. R. 8649.[70] At the same time, the Committee stated the case for authorized interceptions in these terms:

67. 347 U.S. 128, 131, 98 L.Ed. 561, 568 (1953).
68. See *Hearings before Subcommittee No. 3, House Committee on the Judiciary*, on H. R. 408, H. R. 477, H. R. 3552, H. R. 5149, 83rd Cong., 1st Sess.
69. *Id.* at 38.
70. See H. R. REP. No. 1461, 83rd Cong., 2d Sess., p. 1.

> The existence of an international conspiracy to destroy our form of government is so notorious that it needs no comment. The fact that the agents of this conspiracy are dedicated solely to the overthrow of our Government by force and violence and are engaged in the commission of such crimes as espionage, sabotage, treason, and other subversive crimes, is patent. The record of our courts substantiate the accuracy of that statement . . .
>
> Here are subversive zealots, dedicated to a cause hostile to the very existence of our Government, who are expertly trained to operate within the confines of our country, in secrecy and stealth. They are equipped with the latest technological equipment that science can devise to further their work . . .
>
> Our Nation needs today, more than ever, every weapon it can use to destroy those who seek to destroy it. The immunity which the present law gives to these spies and traitors in using a telephone conduit to carry out their plans of intrigue and subversion must be stopped.[71]

As approved by the House of Representatives on April 8, 1954,[72] H. R. 8649 authorized interception in cases affecting the national security and defense and enumerated the offenses deemed to fall in this category. It also provided that each wiretapping installation had to be expressly approved by both the Attorney General *and* an appropriate district court. The court was authorized to permit such an installation only upon an *ex parte* showing of reasonable cause.[73]

When H. R. 8649 (together with other proposals) was considered by a subcommittee of the Senate Committee on the Judiciary, Attorney General Brownell again sought to have the authority to grant wiretap orders vested in the hands of the Attorney General alone.

He argued strongly that by limiting this non-delegable power to authorize wiretapping in his hands alone, the responsibility for any abuse could easily be fixed, unauthorized leaks of security information would be minimized, and the required secrecy necessary to insure a successful wiretap would be more apt to be maintained. In addition, he pointed out that

71. *Id.* at 4-5.
72. 100 CONG. REC. 4913-4914.
73. 100 CONG. REC. 4911-4912, see generally, 4890-4914.

uniform criteria for the issuance of any wiretap order could be established and easily followed, but, on the other hand, if judicial authority was required to validate a wiretap order, individual federal judges empowered to pass upon a wiretap application would not be guided by any uniform standard in granting or withholding approval. He was of the further opinion that the court order procedure would be constitutionally questionable, contending that it was doubtful that Congress could give a federal judge sitting in one judicial district the authority to order a wiretap effective in another judicial district.[74] The effect which this statement had is problematical. What is certain is that H. R. 864 died in the Senate.

A new Congress, the 84th, saw new attempts at legislation on the subject. By this time many of the congressional leaders sitting on the committees that controlled the destiny of all wiretap legislation were deeply committed to the type of procedure which should be followed if wiretapping was to be allowed by statute. Congressman Celler, then as now the Chairman of the Committee on the Judiciary, House of Representatives, had formerly championed the cause of the Attorney General on wiretap proposals.[75] By 1955, however, he was firmly of the view that investigative agents ought not to be permitted to intercept communications until after judicial approval had been obtained. "I personally believe," said Congressman Celler,

> that all wiretapping must be declared unlawful and subject to severe penalties except in authorized cases like treason. . . . In such cases wiretaps should be permitted but then only after an order has been obtained from a federal judge approving the tap. All other wiretaps shall be declared unwarranted and illegal.[76]

Senator Keating, in 1955 a minority member on the House Judiciary Committee who already had introduced several wiretapping measures, had adopted the same position. In speaking of his own bill,[77] Senator Keating said:

74. *Supra* note 17, at 15-19.
75. See, *i.e.*, 100 CONG. REC. 4912.
76. *Hearings before Subcommittee No. 5 of the House Committee on the Judiciary*, 84th Cong., 1st Sess., on H. R. 762, H. R. 867, H. R. 4513, H. R. 4728, H. R. 5096, p. 2. H. R. 762 and 867 were identical to H. R. 8649, 83rd Cong., 2d Sess., discussed *supra;* while H. R. 5096 was similar to H. R. 8649.
77. H. R. 5906, 84th Cong., 1st Sess.

> [This bill requires] that as to the future it would be necessary to go to a court and show that there was reasonable cause to believe that one of the designated crimes has been or is about to be committed and that the communications may contain information which would assist in the conduct of such investigations . . .[S]uch an approach is the only one likely to be successful in this Congress.[78]

Meanwhile Congressmen Willis and Forrester sponsored H. R. 762[79], a bill which also required prior court authorization of all interceptions.[80] Congressman Walter, the second ranking majority member of the Committee, had also introduced wiretap measures requiring the court-order type of procedure to give wiretapping authority to federal law enforcement officials.[81]

In the Senate, the same approach was advocated by the late Senator McCarran, former Chairman of the Senate Judiciary Committee, and the ranking minority member at the time the Committee held extensive hearings on his wiretap bill and others during the second session of the 83rd Congress.[82]

The action of the Senate Committee on the Judiciary in regard to S. 3760,[83] is also significant in this connection. S. 3760[84] was one of the forerunners to the Narcotic Control Act of 1956[85] since the bill which eventually became law[86] was passed, after conference, in lieu of the Senate bill.[87] As reported unanimously by the Committee on the Judiciary, S. 3760, *inter alia,* would have caused 18 U. S. C. 1407 to provide

78. *Supra* note 28 at 23.
79. 84th Cong., 1st Sess.
80. *Id.* at 17-18.
81. As long ago as 1941, Congressman Walter said (87 CONG. REC. 5766):

> I recognize that there are cases when it might be quite helpful in the detection of the perpetrators of the heinous offenses enumerated in this bill to tap wires. I have introduced a bill that if it is ever necessary to tap a wire we ought to compel the agent who intends to invade the privacy of our lives to go before a representative of the courts and make out a case of probable cause, demonstrating to the court the necessity for invading the privacy of our lives.

82. See Senator McCarran's remarks at the time when he introduced S. 3229, 100 CONG. REC. 4156-4157.
83. 84th Cong., 2d Sess.
84. *Id.*
85. 70 Stat. 567.
86. H. R. 11619, 84th Cong., 2d Sess.
87. See 102 CONG. REC. 10807.

that federal officers investigating narcotics offenses would be authorized to intercept telephone communications and testify in court to the contents of such communications if such officers obtained, before interception, a district court order authorizing the interception. The district court was directed, by the terms of the proposal, to issue the order allowing interception only if it was shown that reasonable grounds existed to believe that the contemplated interception was necessary in the public interest to gather information of a violation of the narcotics laws. "The procedure to be followed in order to obtain authorization to intercept telephone conversations is similar to the procedure followed to procure a search warrant."[88] The Senate Committee on the Judiciary in the 84th Congress, 2d Sess., numbered among its members Senators James O. Eastland, Estes Kefauver, Olin D. Johnston, John J. McClellan, and Everett Dirksen. All of these Senators are members of the Senate Judiciary at the present time.

It was against this background that the Supreme Court decided *Benanti v. United States*.[89]

### *Benanti v. United States*

The State of New York, by constitutional provision and statutory enactment, permits the interception of telephone communications where law enforcement officials first obtain a warrant authorizing the procedure.[90] In 1956, the New York City police, acting in full compliance with state law, intercepted a telephone communication between Salvatore Benanti and another person. What they heard gave them reason to believe that the defendant intended to transport narcotics that evening. When they arrested Benanti, however, they found not the expected packages of narcotics, but instead a substantial number of cans containing untaxed alcohol. A federal prosecution for the illegal possession and transportation of untaxed distilled spirits followed. A timely motion to suppress, based on the above facts, was denied and Benanti was convicted.

The Supreme Court reversed. Pointing out that the Federal Communications Act was "a comprehensive scheme for the

88. S. REP. No. 1997, 84th Cong., 2d Sess., p. 14, see also pp. 31-32.
89. 355 U.S. 96, 2 L.Ed.2d 126 (1956).
90. N. Y. CONST., art. 1, §12; N.Y. CODE OF CRIM. P. §813-a.

regulation of interstate communication"[91] which did not admit of "state legislation which would contradict"[92] either section 605 or its underlying policy, the Court held that "evidence obtained by means forbidden by section 605, whether by state or federal agents, is inadmissible in federal court."[93] In short, the Court not only reaffirmed the basic principles of the second *Nardone* case,[94] *supra,* it also branded all state laws authorizing wiretapping, however circumscribed, as no more than ineffectual state licenses to commit a federal crime.

### *Rathbun v. United States*

It is rather interesting to note that both *Benanti v. United States* and *Rathbun*[95] were announced on the same decision Monday, December 9, 1957. As we have seen, the former case decided that the "silver platter" doctrine[96] did not apply to cases where section 605 had been violated, thus giving more "bite" to its prohibitions. The latter decision, however, limited the scope of the word "interception." In *Rathbun,* the defendant had telephoned a former business associate and threatened the latter's life. Anticipating further calls, the associate summoned the local police, who listened at a telephone extension when the defendant called a second time to repeat in substance and embellish in detail his earlier threat. The testimony of the local officers as to the content of this long distance telephone call was introduced at defendant's trial for the offense of transmitting a threat to do personal harm in interstate commerce.

In its opinion, written by Chief Justice Warren, the Court held that "Section 605 was not violated in the case before us because there has been no 'interception' as Congress intended the word to be used."[97] "Common experience tells us," said the Chief Justice:

> 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 tele-

91. 355 U.S. 96, 104, 2 L.Ed.2d 126, 132 (1956).
92. *Id.* at 105; 2 L.Ed.2d 126, 133.
93. *Id.* at 100; 2 L.Ed.2d 126, 130.
94. 308 U.S. 338, 84 L.Ed. 307 (1939).
95. 355 U.S. 107, 2 L.Ed.2d 134 (1956).
96. See Lustig v. United States, 338 U.S. 74, 93 L.Ed. 1819 (1948); *cf.* Elkins v. United States, 364 U.S. 206, 4 L.Ed.2d 1669 (1958).
97. 355 U.S. 107, 109, 2 L.Ed.2d 134, 136 (1956).

phone 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 Section 605, *interception,* has not occurred.[98]

*Reaction to the Benanti Decision*

The decision in *Benanti v. United States, supra,* led to a strong reaction from local officials in states such as New York, which had authorized widetapping by statute. This reaction was voiced at hearings on wiretapping, eavesdropping, and the Bill of Rights conducted by the Senate Committee on the Judiciary in both 1958[99] and 1959.[100] The testimony of Mr. Edward S. Silver, District Attorney, Kings County, New York, before the subcommittee which actually conducted these hearings, was typical of those who regarded the situation following the *Benanti* decision as untenable. In his words:

> I have this right [to wiretap under New York law] as a trustee for 3 million people that I have to represent in fighting crime. If for any reason, the Senate or the Congress doesn't do something to correct the *Benanti* decision, we just will not be able to use wiretapping in our law enforcement, and it simply means that a lot of people who elected me to fight crime in our county. If I am compelled to hunt lions with a peashooter, so be it. I think the Congress has a serious responsibility in this matter,[101]

and,[102]

> The least that Congress should do is to amend section 605 of the Federal Communications Act to the effect that it will not be unlawful for law enforcing agencies to tap wires in states like New York which requires a court order on a sworn statement of reasonableness.[103]

Meanwhile, the Department of Justice adhered to its earlier position that interception alone is not an offense. In a letter

98. *Id.* at 111; 2 L.Ed.2d 134, 137-138.
99. S. Res. 234, 85th Cong., 2d Sess.
100. S. Res. 62, 86th Cong., 1st Sess.
101. *Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary,* 86 Cong., 1st Sess., p. 540.
102. *Id.* at 549.
103. The local New York officials are still interested in persuading Congress to act. In November, 1961, 98 gambling suspects were freed in General Sessions Court, Brooklyn, New York, as a result of District Attorney Hogan's decision not to attempt to use wiretap evidence to obtain convictions in the future until authorized to intercept communications by Congress. N. Y. Times, Nov. 16, 1961, p. 41, col. 1.

dated July 2, 1959, and addressed to the Senate Judiciary Committee, Attorney General Rogers stated that some 74 telephone taps were then being maintained "in cases involving the internal security of the nation or where a human life may be imperiled," and closed by noting that "there is, of course, no divulgence of the information obtained as prescribed by section 605 of the Communications Act."[104]

Meanwhile, numerous bills to deal with one or all of the aspects of wiretapping law were introduced. It is interesting to note that, of all the wiretapping bills introduced in the second session of the 85th Congress and the two sessions of the 86th Congress,[105] only H. R. 377 allowed the interception of telephone communications in the absence of a court order. All of the others either expressly required court approval of any interception or were intended to legitimatize an existing state procedure which vested control over wiretapping in the state courts.

*Silver v. United States*

Ever ingenious in adapting modern methods to the process of crime detection, local District of Columbia police in this instance used a microphone attached to a foot-long spike, together with an amplifier, a power pack, and earphones, to listen to all that went on within the defendant's house. The spike was inserted into a party wall until it made contact with a heating duct within the house which in turn converted the entire heating system into a conductor of sound. The Supreme Court had no difficulty in disposing of the case on Fourth Amendment grounds, having found as it did that the "eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by the

104. It is interesting to note that there was only one federal prosecution for violation of §605 during the first 20 years after its enactment — perhaps due to the fact that alleged violations were investigated by the Federal Communications Commission rather than by agencies more oriented toward criminal investigations (100 CONG. REC. 4801, 4803). In more recent times, however, it has been the policy to push prosecutions for violations of §605 more vigorously. See, *i.e.*, Elkins v. U. S., 364 U.S. 206, 4 L.Ed.2d 1669 (1958); Massicot v. U. S., 254 F.2d 58 (5th Cir 1958); *cert. denied* 358 U.S. 816, 3 L.Ed.2d 58 (1958); U. S. v. Gris, 247 F.2d 860 (2d Cir. 1957); Massengale v. United States, 240 F.2d 781 (6th Cir. 1957), *cert. denied* 354 U.S. 909, 1 L.Ed.2d 1428 (1957). Assistant Attorney General Miller recently stated that there has been a total of 15 such prosecutions. Washington Post, May 12, 1961, p. A1, col. 2-5.

105. S. 3013, H. R. 104, H. R. 12394, H. R. 12393, H. R. 13842, 85th Cong., 2d Sess.; H. R. 377, H. R. 70, S. 1292, H. R. 11589, S. 3340, 86th Cong.

petitioners."[106] The Court also held, however, that section 605 was not applicable. "While it is true that much of what the officers heard consisted of the petitioners' share of telephone conversations, we cannot say that the officers intercepted these conversations, within the meaning of the statute."[107] Thus, it may be said that *Silverman*[108] is cut from the same cloth as *Goldman* and *Irvine v. California*. In all three cases, the Court found that there was no prohibited interception. In each case, the determinative issue was whether or not there was a physical intrusion.

## CURRENT LEGISLATIVE PROPOSALS

Four bills, S. 1086, S. 1221, S. 1495, and S. 2813 have been introduced in the 87th Congress on the Senate side regarding wiretapping and the closely related problem of electronic devices which may be used for eavesdropping. S. 1086, introduced by Senator Keating, of New York, would permit state law enforcement officials to wiretap pursuant to court orders if state legislation authorizes the practice. The bill thus would strike directly at *Benanti v. United States*. S. 1221, also introduced by Senator Keating, would treat wiretapping as part of the larger problem of eavesdropping through the use of electronic instruments. S. 1495,, introduced by Senator Dodd of Connecticut, would permit wiretapping by both state and federal officers under court orders in certain cases.[109]

As introduced, S. 1086 provides that "no law of the United States shall be construed to prohibit the interception, by any law enforcement officer or agency of any state (or any political subdivision thereof) in compliance with the provisions of any statute of such state, of any wire or radio communication, . . . [where state law establishes a judicial procedure for determining before interception probable cause to believe that

106. 365 U.S. 505, 509, 5 L.Ed.2d 734, 738 (1959).
107. *Id.* at 508; 5 L.Ed.2d 734, 737.
108. Silverman v. U. S., 365 U.S. 505, 5 L.Ed.2d 734 (1959).
109. Hearings were held on these statutory proposals by the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary during the first session of the 87th Congress. Assistant Attorney General Miller, speaking for the Department of Justice, disclosed that the F. B. I. was operating 85 wiretaps as of May 10, 1961 — all involving national security cases. Mr. Miller endorsed legislation which would empower the Attorney General to authorize wiretaps without court order in national security and kidnaping cases. He also proposed that federal agents be authorized to wiretap after obtaining a court order when investigating such crimes as murder, extortion, bribery, gambling, and dealing in narcotics. Washington Post, May 12, 1961, p. A1, col. 2-5.

interception might disclose evidence of the commission of a crime.]" Second the bill provides that no law of the United States shall be construed to prohibit divulgence in a state court proceeding of the existence, contents, substance, purport, effect, or meaning of any communication intercepted in accordance with a state law which meets the standard set forth above.

S. 2813, which was drafted by the Department of Justice and introduced by Senators McClellan, Eastland, and Ervin, is a more comprehensive measure. It would outlaw all private wiretapping and all wiretapping by law enforcement officials which does not conform to the authority granted by the bill. As drafted, the proposal forbids the interception of a wire communication *or* the divulgence *or* the use of the intercepted information. The procedure contemplated by the bill may be summarized as follows:

1. In federal cases involving offenses affecting the national security—espionage, sabotage, treason, sedition, subversive activities, and unauthorized disclosure of Atomic Energy information—the Attorney General:

> (a) may authorize the F.B.I. to wiretap if he finds that there is reasonable ground to believe, *inter alia,* that the commission of the offense presents a serious threat to the security of the United States and that resort to the court procedure discussed *infra,* (b), would be prejudicial to the national interest; or
>
> (b) may authorize an application to a federal judge for an order, granted *ex parte* and on a showing of probable cause, allowing wiretapping by the F.B.I. or by any federal agency having investigative responsibility for the crimes named above. Leave to intercept wire communications granted under this procedure, or under 2 and 3 *infra,* would be effective for any period not to exceed 45 days. Permission to wiretap might be extended for periods of not more than 20 days upon further application.

2. In federal cases involving murder, kidnaping, bribery, transmission of gambling information, travel in aid of racketeering enterprises, offenses against the narcotics laws, and conspiracy to commit the foregoing, the Attorney General or Assistant Attorney General may authorize the F.B.I. or any

federal agency having investigative responsibility for the foregoing crimes to apply to a federal judge for an order, granted under the conditions set out in 1(b) *supra*, allowing wiretapping.

3. In state cases, the attorney general of the state or the principal prosecuting attorney for any political subdivision thereof, if authorized to do so by state law, may apply to a state judge for leave to wiretap for the crimes of murder, kidnaping, extortion, bribery, use or dealing in narcotics, and conspiracy involving these crimes. The state judge would be governed by the same criteria as would federal judges in passing on the application.

An important feature of this bill is found in section 6, which would permit persons who had made lawful interceptions to divulge and use the information so obtained. Moreover, testimony regarding information so obtained would be admissible in federal or state criminal trials or grand jury proceedings.

Copies of all the applications made the orders issued under the procedures specified in this bill would be transmitted by both state and federal judges to the Administrative Office of the United States Courts and the Department of Justice. In March of each year the Director of the Administrative Office would transmit to the Congress a full and complete report concerning the number of applications made, granted, and denied during the preceding calendar year.

## CONCLUSION

Several conclusions may be drawn in summary fashion from an evaluation of the study. The underlying conclusion, with strong support from both sides of the dispute, is that there is a pressing need for Congress to legislate in this field.[110] The opponents of wiretapping, of course, want Congress to prohibit altogether the practice, while its advocates want wiretapping, but under various safeguards.

110. Action by Congress to authorize the use of the fruits of wiretapping as evidence would not appear to create any *ex post facto* problems. There is no vested right in this kind of rule of evidence, and Congress may apply new rules to pending cases. Thompson v. Missouri, 171 U.S. 380, 43 L.Ed 204 (1898); Landay v. U. S., 108 F.2d 698 (6th Cir. 1939), *cert. denied* 309 U.S. 681, 84 L.Ed. 1024 (1940); Haas v. U. S., 93 F.2d 427 (8th Cir. 1938).

*Those law enforcement officials who seek authority to wiretap state their case in the following manner:*

1. Since wiretapping does not violate a citizen's constitutional rights, the present prohibition essentially is nothing more than an unreasonable rule of evidence in federal criminal procedure. It does not stop people from tapping wires—no one has ever been or under present law would be convicted of that by itself. What has been stopped is the use of certain evidence to enforce the laws against criminals.

2. Criminals and individuals who have been skillfully trained in the ways of espionage, sabotage and subversive activities employ the most modern scientific devices for communication and eavesdropping. In contrast, law enforcement officials are denied the use of these identical facilities in their efforts to maintain a successful campaign against these elements.

3. Wiretapping in criminal cases is no more reprehensible or morally repugnant than the sanctioned use by the courts of the testimony of eavesdroppers, informers, stool pigeons, and spies.

4. By channeling all wiretap activities into the hands of a relatively few federal and state law enforcement officials, unauthorized wiretapping would be minimized, and only those individuals who are engaged in criminal or subversive activities would have to fear any invasion of their privacy.

*The opponents of wiretapping, on the other hand, argue as follows:*

1. Wiretapping is an unwarranted invasion of an individual's privacy not justfied by the end desired in the field of law enforcement.

2. Wiretapping can never be effectively controlled by statute since the activity itself necessarily involves the interception of innocuous as well as incriminating conversations.

3. Because of the complexity of the telephone communication network, not only the conversations of a suspected criminal but also those of innocent persons would necessarily be intercepted.

4. Abuses of statutory authority to tap wires, and other unauthorized activities of this nature, would be difficult to detect since the victim would be unaware of an unlawful interception of his conversation unless he was charged with crime and brought to trial. Even then, he would have no judicial remedy available to suppress such activity.

5. Information not pertinent to a criminal investigation procured through wiretapping could be used for blackmail, extortion, the oppression of persons having unpopular views, for political purposes, or for the benefit of individuals who employ former government agents after they leave federal service.

*Federal case law as declared by the Supreme Court*:

1. Wiretapping, absent any physical intrusion into a protected area, does not violate the Fourth Amendment of the Constitution proscribing unreasonable search and seizures, nor does it violate the Fifth Amendment of the Constitution which affords protection against self-incrimination.

2. Section 605 of the Federal Communications Act forbids federal law enforcement officials from testifying to the contents of intercepted communications in any federal criminal case.

3. Any evidence which is a product or the derivative result of a wiretap is inadmissible in any federal criminal proceedings.

4. Intercepted intrastate communications fall within the prohibition of Section 605 of the Federal Communications Act.

5. The use of detectophones and other eavesdropping devices is not an interception within the meaning of that term as used in Section 605 of the Federal Communications Act.

6. A third person not the victim of an intercepted communication has no legal standing to challenge its admissibility as evidence when it is used against him in a federal criminal proceeding.

7. Section 605 of the Federal Communications Act does not constitute a binding rule of evidence upon state courts so as to exclude such evidence in state proceedings.

8. The use of an extension telephone to listen in on a telephone conversation, with the consent of one party to the conversation, is not an "interception" of the message within the meaning of Section 605.

9. Wiretapping by state officers seeking to enforce state law is not exempted from the operation of Section 605, even though state law purports to authorize the interception. Evidence so obtained is not admissible in a federal criminal prosecution, and the use of such evidence in state prosecutions involves the commission of a federal crime.