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Evidence - Wiretapping and the Congress

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EVIDENCE—WIRETAPPING AND THE CONGRESS—The familiar cry that "there ought to be a law" is frequently raised concerning the practice which Justice Holmes long ago characterized as "dirty business"[1]—the tapping of telephone wires. Although existing legislation on both federal[2] and state[3] levels deals with interception of telephone messages, the almost universal conclusion of commentators on the subject has been that many of the present day statutes are inadequate. It is particularly apparent that the famous section 605 of the Federal Communications Act of 1934 has long been in need of replacement or thorough revision. The purpose of this comment is to examine the past and possible future handling of the wiretapping problem by Congress.

I. *The Problem in the Supreme Court*

Schwartz v. State[4] is the most significant recent wiretapping case in a series of Supreme Court decisions which began in 1928.[5] Wiretapping law has developed in such a crazy-quilt pattern that in recent years various executive departments have simultaneously interpreted and applied the present federal statute on wiretapping in several different ways.[6] In terms of favorable and unfavorable treatment, Supreme Court decisions involving wiretapping can be separated into three periods. From 1928 to 1937 the controlling principles were those laid down by the majority opinion in *Olmstead v. United States*,[7] which held that tapping does not amount to an illegal "search" prohibited by the Fourth Amendment, and consequently that evidence acquired by telephone taps was admissible in federal criminal proceedings. The dissenters (Holmes, Brandeis, Stone, and Butler) argued that there

[1] Olmstead v. United States, 277 U.S. 438 at 470, 48 S.Ct. 564 (1928).

[2] 48 Stat. L. 1103 (1934), 47 U.S.C. (1946) §605.

[3] Statutes are collected in Rosenzweig, "The Law of Wire Tapping," 33 CORN. L.Q. 73 at 73-75 (1947). See also note 13 to Brandeis' dissenting opinion in Olmstead v. United States, 277 U.S. 438 at 479-481, 48 S.Ct. 564 (1928), and 1931 survey prepared at the request of the attorney general, Hearings before House Committee on Expenditures in Executive Departments, 71st Cong., 3d sess., pp. 5-16 (1931).

[4] 344 U.S. 199, 73 S.Ct. 232 (1952). See also Schwartz v. State, (Tex. Crim. App. 1952) 246 S.W. (2d) 174.

[5] A complete analysis of case law on wiretapping up to 1947 may be found in Rosenzweig, "The Law of Wire Tapping," 32 CORN. L.Q. 514, 33 CORN. L.Q. 73 (1947).

[6] See statement in "Congressional Wiretapping Policy Overdue," 2 STAN. L. REV. 744 at 744 (1950): "The Attorney General believes Section 605 does not prohibit wiretapping; the Acting Secretary of the Treasury states that it does and that no wiretapping is used in Treasury Department investigations; the Postmaster General declines to comment because of the pending debates on the matter in Congress." See also criticism of Justice Department vacillations as to wiretapping policy in Helfeld, "A Study of Justice Department Policies on Wiretapping," 9 LAW. GUILD REV. 57 (1949).

[7] 277 U.S. 438, 48 S.Ct. 564 (1928).

had been a violation of the Fourth and Fifth Amendments, and also that the government should not use evidence obtained by acts violative of state law.[8] The *Olmstead* decision was followed in the lower courts.[9]

The second era of wiretapping jurisprudence was opened in 1937 when the Supreme Court, in the first *Nardone* case,[10] interpreted section 605 of the Federal Communications Act of 1934[11] to require the exclusion of testimony by federal agents in a federal court as to the contents of an intercepted telephone message, since such testimony constitutes a "divulgence" of information contrary to the prohibition of the statute. Two other Supreme Court decisions in this period indicated a continuing desire to follow in spirit the stirring advice of the dissenters in the *Olmstead* case. The second *Nardone* case,[12] decided in 1939, extended the prohibition of section 605 to exclude evidence constituting "fruit of the poison tree" (information obtained through wiretap leads) from federal court proceedings, and in *United States v. Weiss*[13] the Court ruled that section 605 prohibits evidence in federal courts obtained by interception and divulgence of *intrastate* messages.

Since 1942, however, Supreme Court decisions have narrowed the seemingly broad protection granted to defendants by the trend in earlier interpretations of section 605. Thus the Court has decided that only parties to the intercepted conversation have a right to object to the unlawful use of the information,[14] that neither section 605 nor the Fourth Amendment bars evidence obtained by use of a detectaphone[15] or radio transmitter concealed on one of two conversants,[16] and that section 605 does not operate to exclude evidence from state court proceedings.[17] At various times in the latter two stages of this history,

[8] Holmes in dissent did not deal with the constitutional issue; he thought that the government should not use evidence which in this case was obtained in violation of a Washington statute prohibiting wiretapping. The impassioned constitutional argument of Brandeis sought exclusion of evidence obtained by wiretapping, in accordance with the doctrine of Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341 (1914).

[9] Cases are collected in Rosenzweig, "The Law of Wiretapping," 32 CORN. L.Q. 514 at 533, n. 70 (1947).

[10] Nardone v. United States, 302 U.S. 379, 58 S.Ct. 275 (1937).

[11] 48 Stat. L. 1103 (1934), 47 U.S.C. (1946) §605.

[12] Nardone v. United States, 308 U.S. 338, 60 S.Ct. 266 (1939). This result was reached on the theory controlling in search and seizure cases, as propounded in Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182 (1920).

[13] 308 U.S. 321, 60 S.Ct. 269 (1939).

[14] Goldstein v. United States, 316 U.S. 114, 62 S.Ct. 1000 (1942).

[15] Goldman v. United States, 316 U.S. 129, 62 S.Ct. 993 (1942).

[16] On Lee v. United States, 343 U.S. 747, 72 S.Ct. 967 (1952). The Court also ruled that the practice did not violate the Fourth Amendment.

[17] Schwartz v. State, 344 U.S. 199, 73 S.Ct. 232 (1952).

dissenters have expressed a desire to reconsider the constitutional issue, uproot the *Olmstead* decision, and declare wiretapping violative of the Fourth Amendment.[18]

II. *Intent and Policy of Congress as to Section 605—Meaning of Schwartz v. State*

The intention of Congress in enacting section 605 has never been ascertained with much success. The broad language of the statutory prohibition—"no person . . . shall intercept any communication . . . and divulge [its contents] . . . to any person"—appears to ban wiretapping and require exclusion of wiretapping evidence, but these very matters were seriously disputed in the first *Nardone* case.[19] Nothing in the debates or committee reports on the Federal Communications Act of 1934 indicates that a rule of evidence pertaining to wiretapping was contemplated by the restrictions of this long unnoticed section of the statute. The committee report on the bill stated simply that section 605 "is based upon Section 27 of the Radio Act and extends it to wire communications."[20] The committee report on section 27 of the Radio Act of 1927[21] is not helpful in analyzing the congressional intention motivating adoption of section 605. The fact that many bills dealing specifically with wiretapping had been introduced in Congress in the interval between the *Olmstead* case in 1928 and the enactment of section 605 in 1934[22] seemed to be good support for the argument pressed in the first *Nardone* case that legislative history demonstrated

[18] A Texas statute involved in Schwartz v. State, 344 U.S. 199, 73 S.Ct. 232 (1952), which provides that evidence obtained in violation of the Constitution of the United States should be inadmissible in court [Tex. Code Crim. Proc. (Vernon, 1948) art. 727a], gave Justices Frankfurter, concurring, and Douglas, dissenting, an opportunity to mention the constitutional point. Justice Douglas was of the opinion that the case should have been decided on the constitutional issue. Both justices referred to their dissents in On Lee v. United States, 343 U.S. 747, 72 S.Ct. 967 (1952), in which they argued for the unconstitutionality of evidence obtained by a concealed walkie-talkie set. A similar opportunity to overrule Olmstead was rejected by the Court in Goldman v. United States, 316 U.S. 129 at 135, 62 S.Ct. 993 (1942) (three of the eight participating justices expressed a willingness to overturn Olmstead).

[19] Nardone v. United States, 302 U.S. 379, 58 S.Ct. 275 (1937). See criticism of the decision in 53 HARV. L. REV. 863 (1940).

[20] S. Rep. No. 781, 73d Cong., 2d sess. (1934). The purpose of the Federal Communications Act of 1934 was to supersede the Federal Radio Commission Act and to bring wire and radio communications under the control of the Federal Communications Commission.

[21] H. Rep. No. 404, 69th Cong., 1st sess. (1927).

[22] These bills, evidencing protest at the policy established by the Olmstead case, either prohibited wiretapping or proscribed the use of evidence obtained by tapping. E.g., H.R. 4139, H.R. 5416, 71st Cong., 1st sess. (1929); S. 3344, S. 6061, 71st Cong., 3d sess. (1930); H.R. 23, H.R. 5305, H.R. 9893, S. 1396, 72d Cong., 1st sess. (1931-1932).

section 605 was not intended to apply to such a practice. The Supreme Court dismissed this contention, however, with a brisk reference to the broad language of the statute.[23]

Another aspect of congressional intention was the decisive issue in the recent Supreme Court pronouncement on wiretapping, *Schwartz v. State*: was section 605 intended to ban wiretapping evidence in *state* courts? The Court answered in the negative, thereby affirming previous determinations of the issue by several state courts.[24] In support of the view that the statute applied to state tribunals, it has been argued that the literal wording of the statute covers *any* interception and divulgence, whether such "divulgence" occurs in a federal or a state court. It has been contended that nothing in the statute, nor any policy consideration, indicates that "no person" was drafted with the intention of including witnesses in federal but not state courts. The strength of the statute has been said to be vitiated by inapplicability to state courts, since it is in the state tribunals that most criminal prosecutions, and hence most wiretapping questions, arise. On the other hand, the Supreme Court reasoned in the *Schwartz* case that there had not been a clear-cut expression of congressional intention to impose rules of evidence on state courts, and that a statute should not be extended by implication so as to supersede the exercise of state power. In handing down its first opinion on the inapplicability of section 605 to state proceedings,[25] the

[23] "True it is that after this court's decision in the Olmstead case Congressional committees investigated the wire-tapping activities of federal agents. Over a period of several years bills were introduced to prohibit the practice, all of which failed to pass. . . . 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 communication to the newly constituted Federal Communications Commission. But these circumstances are, in our opinion, insufficient to overbear the plain mandate of the statute." Nardone v. United States, 302 U.S. 379 at 382-383, 58 S.Ct. 275 (1937). It might also be pointed out that the two previous statutes which dealt with wiretapping specifically used the words "wiretap" or "tap." 47 Stat. L. 1381 (1933); 40 Stat. L. 1017 (1918).

[24] Bratburd v. State, (Md. 1952) 88 A. (2d) 446; Leon v. State, 180 Md. 279, 23 A. (2d) 706 (1942); Rowan v. State, 175 Md. 547, 3 A. (2d) 753 (1939); Black v. Impelliterri, 201 Misc. 371, 111 N.Y.S. (2d) 402 (1952); People v. Stemmer, 298 N.Y. 28, 83 N.E. (2d) 141 (1948) (see note 25 infra); Harlem Check Cashing Corp. v. Bell, 296 N.Y. 15, 68 N.E. (2d) 854 (1946); People v. Channell, 107 Cal. App. (2d) 192, 236 P. (2d) 654 (1951). Prior to the Channell case the California courts had decided several cases on the assumption that §605 does apply to the state courts. People v. Onofrio, 65 Cal. App. (2d) 584, 151 P. (2d) 158 (1944); People v. Barnhart, 66 Cal. App. (2d) 714, 153 P. (2d) 214 (1944); People v. Vertlieb, 22 Cal. (2d) 193, 137 P. (2d) 437 (1943); People v. Kelley, 22 Cal. (2d) 169, 137 P. (2d) 1 (1943).

[25] The Supreme Court had before it the same issue (applicability of §605 to state courts) in 1949, when it affirmed by an equally divided bench (4-4) the holding in People v. Stemmer, 298 N.Y. 728, 83 N.E. (2d) 141 (1948). Stemmer v. New York, 336 U.S. 963, 69 S.Ct. 936 (1949). In accordance with Supreme Court practice, no opinion was filed, so that the factors motivating the individual justices in that case are

Court skirted the constitutional issue which had intrigued commentators,[26] i.e., the existence of congressional power to enact rules of evidence binding on the state courts. In view of Congress' previous reluctance to adopt any sort of wiretapping legislation, it is questionable whether the issue thus by-passed in the opinion will arise in the near future.

Although the question of congressional power in this area has been rendered temporarily moot, the problem will lurk in the background should Congress some day become indignant at abuse of wiretapping by state police and attempt to outlaw the use of such evidence in state courts. Before the *Schwartz* case law review writers were in general accord that Congress does have the necessary power, if section 605 were to be held applicable to state courts.[27] Any constitutional issue of federal-state relationships naturally involves complicated questions of policy and the balancing of local and national interests. However, it would seem that control of telephone communications, especially in view of the decision in the *Weiss* case,[28] is a sufficiently compelling objective of federal concern to warrant supersedure by Congress, should it attempt such an exercise of the commerce power in the future. Support for this proposition might be found in other areas in which Congress has passed laws, under various constitutionally granted powers, which have been held to regulate to some extent the rules of evidence in state courts. Thus, under the full faith and credit clause, Congress has enacted legislation prescribing certain rules of admissibility for public and judicial records in state courts.[29] Under the tax power, former federal laws excluding from evidence documents not bearing a revenue stamp have been held to apply in state courts[30] (although the weight of authority is contra[31]). Section 25(a)(9) of the Bankruptcy Act, which provides that no testimony of the bankrupt

not ascertainable. This affirmance was not cited in Schwartz v. State, 344 U.S. 199, 73 S.Ct. 232 (1952), although reference was made to the decision of the New York Court of Appeals (also reported without opinion).

[26] E.g., 33 CORN. L.Q. 73 at 78 (1947); 37 ILL. L. REV. 99 at 108, n. 23 (1942); 40 J. CRIM. L. 476 (1950); 3 MIAMI L. REV. 604 at 610 (1949); 34 ILL. L. REV. 758 at 760 (1940); 18 N.C. L. REV. 229 (1940). Cf. 25 MINN. L. REV. 382 (1941).

[27] Ibid.

[28] United States v. Weiss, 308 U.S. 321, 60 S.Ct. 269 (1939).

[29] For judicial records, 62 Stat. L. 947 (1948), 28 U.S.C. (Supp. V, 1952) §1738; nonjudicial records, 62 Stat. L. 947 (1948), 28 U.S.C. (Supp. V, 1952) §1739. The same point may be made as to other sections of title 28, e.g., §1740.

[30] Chartiers & Robinson Turnpike Co. v. McNamara, 72 Pa. 278 (1872); Muscatine v. Sterneman, 30 Iowa 526 (1870).

[31] See 1 WIGMORE, EVIDENCE, 3d ed., §205, n. 2 (1940); 18 N.C. L. REV. 229 at 230, n. 6 (1940).

"shall be offered in evidence against him in any criminal proceeding," has been held applicable to the state courts.[32] And, in accordance with former Treasury Department regulations, Internal Revenue agents could not be compelled by state courts to testify as to certain matters.[33] There is, of course, a strong states'-rights argument in opposition to this view.

The opinion in the *Schwartz* case eliminated the touchy constitutional problem on the fairly solid ground that Congress had manifested no intention to make section 605 applicable to the states. As its meaning sifts down to the state police systems, however, the opinion may well be one additional factor in making more attractive the use, and eventual abuse,[34] of wiretapping in the fight against crime. This might have the long-run result of arousing protest against invasion of the individual's privacy to the point where Congress or the state legislatures will find it desirable to respond with remedial legislation. Indeed, the experience in New York, where police tapping authorized by court order is permitted, has shown that wiretapping easily lends itself to abuse.[35] During the 1952 legislative session several bills curbing the present scope of legal wiretapping passed one of the two houses of the state legislature.[36]

[32] People v. Lay, 193 Mich. 17, 159 N.W. 299 (1916); People v. Elliott, 123 Misc. 602, 206 N.Y.S. 54 (1924). See Clark v. State, 68 Fla. 433, 67 S. 135 (1914); State v. Singleton, 85 Ohio App. 245, 87 N.E. (2d) 358 (1949).

[33] Boske v. Comingore, 177 U.S. 459, 20 S.Ct. 701 (1900). Instances where Congress has regulated other aspects of procedure in state courts are cited in 34 ILL. L. REV. 758 at 761-762 (1940).

[34] The New York experiment, originated by constitutional amendment in 1938, authorizing limited wiretapping on the same basis applicable to the issuance of search warrants, has proved an initial disappointment to some, in terms of safeguarding individual liberties. See Westin, "The Wire Tapping Problem," 52 COL. L. REV. 165 at 192-197 (1952). As to the inefficiency of the system, see news report of testimony by Harry Gross, famed Brooklyn gambler, who stated that he was tipped off in advance as to every tap the police placed in Brooklyn and New York. N.Y. TIMES, March 25, 1952, p. 14:2. Gross obtained his information through a policeman who knew a stenographer working for the telephone company. See testimony of Miles F. McDonald, District Attorney of Kings County, Brooklyn, N.Y., in Hearings before Subcommittee No. 3, [House] Committee on the Judiciary, on H.R. 408, H.R. 477, H.R. 3552, and H.R. 5149, 83d Cong., 1st sess., p. 75 (1953).

[35] See note 74 infra. And see Mellin, "I was a Wire Tapper," 222 SATURDAY EVENING POST, Sept. 10, 1949, p. 19 at 57; 52 COL. L. REV. 165 at 195 (1952).

[36] The objectives of these bills were to permit judges to revoke their orders authorizing legal tapping after examination of results of the tapping; to prohibit judges from issuing, and other persons from seeking, warrants for tapping outside the immediate jurisdiction; and to ban the use of evidence obtained by illegal tapping in any criminal proceedings. See N.Y. TIMES, Feb. 6, 1952, p. 22:5; Feb. 19, 1952, p. 19:2; March 8, 1952, p. 30:1; March 14, 1952, p. 17:1.

III. *Congressional History Prior to 1934*

Section 605 was the third of the three laws which Congress has passed concerning wiretapping. The first piece of legislation was a wartime measure enacted in 1918 at a time when the government was operating the telephone system. This statute prohibited in broad terms all wiretapping.[37] The motivation behind the adoption of the statute was apparently a congressional fear that the secrecy of governmental activities was being jeopardized by tapping.[38] The statute by its own terms expired when the government returned control of the telephone system to its private owners, which occurred in July 1919.[39] The second federal statute was passed in the form of a rider to an appropriation bill in 1933, stating that "no part of this appropriation shall be used for or in connection with 'wiretapping' to procure evidence of violations of the National Prohibition Act."[40] This act followed unsuccessful attempts during the four years following the *Olmstead* case (1929-1932) to get bills through Congress prohibiting tapping by federal authorities.[41] The third and last federal law on the subject was section 605. It thus appears that through 1934 all congressional efforts in the wiretapping area were directed toward *forbidding* interception.

IV. *Congressional History Since the Nardone Decision*

Since the ruling in the first *Nardone* case in 1937 more than thirty bills, resolutions, and joint resolutions dealing with wiretapping have been introduced in Congress.[42] The nature of these bills has been the opposite of the early series of proposals, for the most of the proposed wiretapping legislation introduced in the 75th Congress through the

[37] "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 offense. 40 Stat. L. 1017 (1918).

[38] See "Wiretapping, Congress and the Department of Justice," 9 INT. JURID. ASSN. BUL. 97 at 101 (1941).

[39] 41 Stat. L. 157 (1919).

[40] 47 Stat. L. 1381 (1933).

[41] See note 22 supra.

[42] In addition to those mentioned in the notes infra, see H.R. 9898, 75th Cong., 3d sess. (1938); H.R. 4048, 81st Cong., 1st sess. (1949); H.J. Res. 553, 76th Cong., 3d sess. (1940) (amended by H.J. Res. 571); H.J. Res. 41, 78th Cong., 1st sess. (1943); S. 595, 81st Cong., 1st sess. (1949) (reported back without the wiretapping provision); S. 4154, 81st Cong., 2d sess. (1950) (this bill, applying only to the District of Columbia, was drafted on the model of the New York statute); H.R. 4404, 82d Cong., 1st sess. (1951) (this bill prohibited the recording of telephone messages by federal employees). Note also that the Senate Crime Investigating Committee recommended wiretap-authorizing legislation. S. Rep. No. 725, 82d Cong., 1st sess., p. 5 (1951).

83d Congress has attempted in some limited manner to *authorize* tapping by federal officials. Throughout this period the Federal Bureau of Investigation and other federal agencies have carried on the practice of intercepting messages in certain kinds of cases,[43] with varying interpretations of how much leeway section 605 allows federal authorities outside of the well-settled ban against use of wiretapping evidence in the courts.[44] Most of the bills introduced in this period have been drafted in the interests of national security and many have been administration-sponsored. The bills proposed in the current Congress are basically similar to those of previous years.[45]

These thirty some proposals have not met with overwhelming success. Four of them, however, have passed at least one house. The first of these came the closest to enactment, in 1938, when a bill designed to avoid the result of the first *Nardone* decision was approved in both houses.[46] This proposal authorized wiretapping by federal employees if the head of any executive department or independent agency reasonably believed that a felony against the United States was about to be committed, prevention of which was under his supervision. Because of a minor variation in terms, which was not cured before adjournment, this bill never became law.[47] In the following Congress, the Senate, acting upon complaints that the wires of political leaders were being tapped, passed a resolution directing an investigation into such practices.[48] Hearings held in accordance with this resolution produced over 1,000 pages of testimony.[49] During this same session of the 76th Congress, in 1940, a House joint resolution authorizing the FBI to wiretap in certain situations in the interest of national de-

[43] Of many examples which might be offered on this point, see as illustrative the findings of Ryan, J., in United States v. Coplon, (D.C. N.Y. 1950) 88 F. Supp. 921 at 924-926, and the reading of Bureau of Internal Revenue memoranda on recorded telephone conversations in the House Ways and Means Committee investigation into the recent tax scandals, N.Y. TIMES, March 28, 1952, p. 12:3.

[44] See criticisms of executive department handling of the problem expressed in the articles cited in note 6 supra.

[45] S. 832, H.R. 408, H.R. 477, H.R. 3552, 83d Cong., 1st sess. (1953). See also H.R. 5149, 83d Cong., 1st sess. (1953), drafted by the Department of Justice.

[46] S. 3756 (see S. Rep. No. 1790, H. Rep. No. 2656), 75th Cong., 3d sess. (1938). Passage: Senate, 83 CONG. REC. 7053 (1938); House, 83 CONG. REC. 9453 (1938) (debate at 9636). The bill also made it criminal to use communications facilities in the commission of any felony against the United States.

[47] The House added to the Senate version a paragraph prescribing a penalty for unauthorized tapping or divulgence by federal employees.

[48] S. Res. 224 (see also S. Res. 323, which was defeated), 76th Cong., 3d sess. (1940). This resolution ripened into an investigation of wiretapping in Rhode Island, Philadelphia, and New York.

[49] Hearings before a Subcommittee of the [Senate] Committee on Interstate Commerce, 76th Cong., 3d sess., parts I and II (1940), 77th Cong., 1st sess., part III (1941).

fense passed the House but died in the Senate.[50] The mounting tension in international affairs in 1941 and the entrance of the United States into war, together with subsequent allegations that the Pearl Harbor disaster could have been avoided if wiretapping by federal authorities had been permitted,[51] stimulated a flock of bills and resolutions during the 77th Congress.[52] In the 1941 hearings on these proposals, the proponents were generally personnel from the Justice Department and the opponents were generally persons representing various civil rights and labor groups.[53] In June 1941, a House bill came up for a vote but was defeated.[54] In the following year, however, a joint resolution authorizing tapping by the FBI and the intelligence units of the armed forces in investigations of suspected sabotage, treason, seditious conspiracy, espionage, and violation of the neutrality laws, passed the House;[55] but again the bill died in the Senate. No floor action was ever taken on any of the bills proposed since that time.

The content of these thirty legislative proposals has not varied a great deal from bill to bill. (1) As to the persons authorized to intercept messages, the bill referred to above which passed both houses (in slightly different form) was, oddly enough, one of the most far-reaching proposals, in that it permitted tapping upon the issuance of a certificate by the head of any executive department or independent agency. Later bills specifically limited the agencies whose employees were permitted to tap (generally restricted to the FBI and the intelligence units of the armed forces[56]), although other bills gave authorization to "any in-

[50] H.J. Res. 571 (see H. Rep. No. 2574 and H. Res. 537), 76th Cong., 3d sess. (1940).

[51] In the 77th Cong., 1st sess., Senator Truman vigorously defended Senator Wheeler, chairman of the Interstate Commerce Committee (to which most wiretapping bills were referred) against criticisms on this point. See 88 CONG. REC. 947 (1942).

[52] S. Res. 97, H.R. 2266, H.R. 3099, H.R. 4228, H.R. 6919 (related problem), H.J. Res. 273, H.J. Res. 283, H.J. Res. 304, H.J. Res. 310, H. Res. 222, H. Res. 487 (procedural), 77th Cong., 1st and 2d sess. (1941-1942).

[53] Hearings before Subcommittee No. 1, [House] Committee on the Judiciary, on H.R. 2266 and H.R. 3099, 77th Cong., 1st sess. (1941). After the United States entered the war, representatives of both of these groups voiced approval of some restricted governmental tapping necessary for prosecution of the war. See letters of Phillip Murray, president of the C.I.O., and the American Civil Liberties Union, in Hearings on H.J. Res. 283, 77th Cong., 2d sess., p. 13 (1942).

[54] H.R. 4228, 77th Cong., 1st sess. (1941), defeated by a 154-147 vote, 87 CONG. REC. 5793 (1941).

[55] H.J. Res. 310, 77th Cong., 2d sess. (1942); passed House, 88 CONG. REC. 4602 (1942).

[56] E.g., H.R. 4228, 77th Cong., 1st sess. (1941); H.J. Res. 273, H.J. Res. 283, H.J. Res. 304, H.J. Res. 310, 77th Cong., 2d sess. (1942) (H.J. Res. 273 included the intelligence unit of the State Department also); S. 595, H.R. 3563, H.R. 4124, 81st Cong., 1st sess. (1949); H.R. 406, H.R. 479, H.R. 1947, 82d Cong., 1st sess. (1951); S. 832, H.R. 408, H.R. 477, H.R. 3552, 83d Cong., 1st sess. (1953).

vestigatorial agency forming a part of [any executive] department,"[57] to "any person employed in the investigation, detection, or prevention of offenses against the United States,"[58] to "departments and agencies designated by the President,"[59] and to any "law-enforcement officer."[60] (2) Most of the bills have required that some official permission operate as a condition precedent to authorized tapping. Some of the early bills gave such responsibility to the head of the particular department or agency, while most have vested this function wholly or partly in the attorney general. One early proposal required governmental tappers to obtain permission from the judge of any United States or state court or a United States commissioner.[61] Some bills in the most recent Congresses have required, in addition to supervision by the attorney general, permission granted by a federal judge.[62] (3) The crimes which are considered to be of such import as to legitimatize governmental tapping have varied somewhat. Originally the offenses included in the proposals were violations of "any criminal law of the United States,"[63] but this was cut down in one bill to any federal "felony,"[64] and in another to federal felonies "relating to the national defense."[65] The eventual practice became one of listing the specific offenses. This began with kidnapping, extortion, espionage, and sabotage, but today the category usually consists of sabotage, treason, seditious conspiracy, espionage, violations of the act requiring registration of agents of foreign principals, violations of the act requiring registration of organizations carrying on certain activities, and, in some bills, violations of the Atomic Energy Act of 1946.[66] One bill included "offenses punishable by death." (4) Certain other aspects have been dealt with in some of the proposals. For example, interception itself (as opposed to the conjunctive "intercept and divulge") would be illegal unless in accordace with statutory authorization, or else divulgence would be singled out as the forbidden conduct. Section 605 would be specifically amended, or tapping authorizations would be

[57] H.R. 2266, 77th Cong., 1st sess. (1941).
[58] H.R. 3099, 77th Cong., 1st sess. (1941).
[59] S. 2833, 80th Cong., 2d sess. (1948). This bill covered only communications of or to foreign governments.
[60] H.R. 3644, 81st Cong., 1st sess. (1949).
[61] H.R. 3099, 77th Cong., 1st sess. (1949).
[62] The first of these was H.R. 3563, 81st Cong., 1st sess. (1949).
[63] S. 3756, 75th Cong., 3d sess. (1938).
[64] H.R. 2266, 77th Cong., 1st sess. (1941).
[65] H.R. 3099, 77th Cong., 1st sess. (1941).
[66] E.g., H.R. 1947, 82d Cong., 1st sess. (1951). The three specific statutes referred to may be found at 52 Stat. L. 631 (1938), 54 Stat. L. 1201 (1940), and 60 Stat. L. 755 (1946).

made "without regard to Section 605." Evidence obtained by interception would be admissible in criminal and civil proceedings to which the United States is a party, or else the information would be made admissible in criminal actions only. Unauthorized possession of tapping equipment would be declared unlawful. Interception, by negative implication, would be permissible if authorized by *one* of the parties to the communication.[67] Tapping would be permitted "in the conduct of investigations involving the safety of human life." Tapping of the wires of foreign governments would be allowed. Most of the bills have proposed effective sanctions for compliance with their terms, with the penalty for unauthorized or abusive wiretapping in contravention of the law generally $10,000 and two years imprisonment or both. None of the bills have purported to deal with evidence in the state courts.

The common thread running through these measures which have been presented to Congress in the past fifteen years, with the exception of several resolutions directing investigations into certain specific instances of alleged wiretapping,[68] has been the desire on the part of the sponsors to obtain congressional *sanction* of limited governmental tapping, generally in the name of national security. In none of the proposals has there appeared the apprehension which motivated the anti-wiretapping bills thrown into the hopper before 1934, and which prompted Congress to adopt the 1933 appropriation rider forbidding federal funds to be used for wiretapping purposes in enforcement of prohibition laws. It should be noted that the draftsmen of the more recent proposals have taken the care to define in fairly broad terms the word "person" which has caused so much difficulty in interpreting section 605.[69] Also of interest is a provision in recent proposed legislation which successfully avoids one of the major problems of section 605, in that it expressly outlaws interception alone, as distinguished from interception plus divulgence, unless authorized by the act.[70]

[67] See, in this connection, the interesting difference in view in the opinions of Judges Clark and Learned Hand in United States v. Polakoff, (2d Cir. 1940) 112 F. (2d) 888, as to the meaning of the terms "sender" and "interception" in §605 when one party to a conversation has consented to a recording. These radio terms were included in the Radio Act from which §605 came, which perhaps helps to explain why application to wiretapping, at least in the case of the word "sender," is so difficult of interpretation.

[68] H.R. 359, 75th Cong., 2d sess. (1937); S. Res. 224, 76th Cong., 3d sess. (1940).

[69] H.R. 408, 83d Cong., 1st sess. (1953), is typical: "Sec. 9. For purposes of this Act the term 'person' shall include any individual, partnership, association, business trust, corporation, or any organized group of persons, whether incorporated or not."

[70] "No person, other than those authorized pursuant to this Act shall intercept, listen in on, or record telephone, telegraph, cable, radio, or any other similar message or communication, unless transmitted for the use of the general public or authorized by one of the parties to such message or communication, or his employment as a part of the message

However, it is doubtful that any of these measures were drafted with a conscious intention to provide a workable wiretapping law applicable to all persons, including state officials as well as federal employees. The extent to which state law permits limited tapping has not been dealt with in the bills. In view of the holding in the *Schwartz* case, any contemplated statute establishing a comprehensive wiretapping law binding on state officers should be explicit in expressing legislative intention to include such persons.

V. *Conclusions*

Wiretapping always has been an exceedingly controversial subject. Certain facets of tapping have often been discussed in the committee rooms and on the floor in Washington. In answer to demands made by administrators for limited authorization to tap, the critics find their most persuasive weapon in the ringing warning of Justice Brandeis:

> "And it is also immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."[71]

Despite this flag of caution, it is understandable why, during recent years of constant international tension, demands for some authorized wiretapping in the interests of national security have continued; the climate prevailing in earlier periods has changed.[72] Limitations in the present law on wiretapping have hamstrung the federal government in its efforts to bring to punishment persons guilty of serious crimes against the United States.[73]

or communication system requires such action." H.R. 408, 83d Cong., 1st sess. (1953). Despite this all-inclusive language, it is questionable whether this section would be construed by the courts in such a way as to reach a result contrary to the Schwartz case.

[71] Dissenting opinion in Olmstead v. United States, 277 U.S. 438 at 479, 48 S.Ct. 564 (1928).

[72] "The committee would hesitate to allow wires or short wave messages to be tapped in times of normalcy. We are, however, in a national emergency. Some sacrifices must be made. Some rights have to be yielded." H. Rep. No. 2574 (accompanying H.J. Res. 571), 76th Cong., 3d sess., p. 2 (1940).

[73] Attorney General Brownell has stated publicly that the Justice Department has evidence against "several people who have betrayed the United States," but cannot legally prosecute them because of the ban on wiretap evidence. N.Y. TIMES, July 27, 1953, p. 10:4. Typifying the difficulties faced by the government are the results in the Judith Coplon cases. Coplon v. United States, (2d Cir. 1950) 185 F. (2d) 629; Coplon v. United States, (D.C. Cir. 1951) 191 F. (2d) 749.

The reluctance of many to acquiesce in the demands for legalized tapping, unless thoroughly reliable safeguards are provided at the same time, may largely be traced to a fear that governmental tapping, although designed with the good intention to ferret out disloyal offenders, will be one more efficient instrument in the gradual invasion by the state of the individual's privacy. In addition, the probability that governmental interception of communications, even though narrowly confined and strictly regulated, will have the contagious effect of spreading to others the desire to use this effective but somewhat unethical means of obtaining information has no doubt played an important role in obstructing passage of any federal wiretapping legislation since 1934.

Congress will be confronted with many considerations of policy and practice, whether its next attempt to enact a wiretapping statute is wide or narrow in scope. At present, two competing ideas dominate the scene: the need and desire of the government for tapping authorization in certain pin-pointed areas of crime against the nation, and the need and desire of the public for realistic protection against all unauthorized or abusive tapping.[74] These two ideas could be harmonized in a single statute.[75] Any such statute, however, should emerge as the product of intense congressional scrutiny of *all* aspects of wiretapping;

[74] It should be anticipated that abuse may some day flow from permitted use. E.g., police in New York occasionally have used wiretapping methods for improper purposes. "We found in the course of our investigation in the Gross case . . . that police officers without any instruction were buying their own wiretapping equipment. They would sit on a telephone such as a coin booth near a baseball park or near a race track, and when they heard people call up to make a bet they would forward that to another plainclothes detective, who would then go and shake that bookmaker down. But that was all unauthorized tapping." Testimony of Miles F. McDonald, District Attorney of Kings County, Brooklyn, N.Y., in Hearings before Subcommittee No. 3, [House] Committee on the Judiciary, on H.R. 408, H.R. 477, H.R. 3552, and H.R. 5149, 83d Cong., 1st sess., p. 86 (1953).

[75] Cf. discussion of Congressman Keating, chairman of the subcommittee, and William P. Rogers, Deputy Attorney General of the United States, in 1953 hearings, id. at 39:

"MR. KEATING: How do you feel about the imposition of penalties for unauthorized interception of communications?

MR. ROGERS: . . . The difficulty now is that the law is so nebulous that it's very difficult to obtain successful prosecutions under it. . . .

I do think, though, that if we can avoid tying it up here we'd prefer it. . . .

. . . if we had a clear-cut law, we certainly would proceed against wiretappers.

MR. KEATING: It would seem to me that it would be appropriate to deal with this problem in a single piece of legislation. . . . The purpose in mind, I believe, of the authors of all these bills is definitely two-fold:

(1) To lay down the narrow class of cases in which this wiretapping will be permitted and the very definite procedures which must be followed to obtain permission; and

(2) On the other hand, to say, after those lines have been laid down, anybody that steps outside those bounds is going to face stiff and severe penalties.

And I think it would facilitate the passage of the legislation to have both of those problems at a single time, regardless of the language of any particular bills before us."

in recent years, and especially in the 1953 hearings on the subject, much the heavier accent seems to have been placed upon the immediate goal—authorization of governmental tapping. The likelihood that Congress will consider only the limited objective of governmental tapping was probably strengthened by developments in the November 1953 investigation into the so-called "Harry Dexter White case," in which Attorney General Herbert Brownell, Jr., repeated earlier requests to make admissible wiretap evidence in cases involving violations of the espionage laws.[76] Although the recognized desirability of such authorization is great, it will be unfortunate if the first federal wiretapping law in approximately twenty years is hastily considered legislation dictated by the temper of the times and enacted without effective complementary safeguards.

Many facts essential to intelligent formulation of legislative policy have not been completely brought to light in congressional hearings. The hearings held three days in the summer of 1953 before a subcommittee of the House Committee on the Judiciary[77] were enlightening, but technically this committee did not have authority to consider amendment of section 605.[78] Thus it seems fair to conclude that not all the ramifications of a revamped congressional position on wiretapping were examined. For example, the problem of whether the federal government should affirmatively attempt to regulate interception of communications at the state and private level, neglected to a great extent by Congress in recent years, did not receive extensive treatment. Not until the decision in the *Schwartz* case was the issue determined whether Congress *already* had dealt with wiretapping in state legal systems; this may explain the unconcern of some who might otherwise have sought legislative limitation of abusive tapping by state operators. Although the issue of the *Schwartz* case has become a dead letter as a matter of judicial determination, it persists as an object of congressional concern.

A new wiretap law based on inadequate study might well raise a host of problems as confusing as those which have been litigated under section 605. That Congress has sufficient power to enact effective

[76] Testimony before [Senate] Internal Security Subcommittee, November 17, 1953. Reported in N.Y. TIMES, Nov. 18, 1953, p. 22:2. And see note 73 supra.

[77] Hearings before Subcommittee No. 3, [House] Committee on the Judiciary, on H.R. 408, H.R. 477, H.R. 3552, and H.R. 5149, 83d Cong., 1st sess. (1953).

[78] Properly the concern of the [House] Committee on Interstate and Foreign Commerce. The five bills introduced in the 83d Congress, 1st sess. (1953) would permit governmental tapping "notwithstanding" or "without regard to the limitations contained in" §605.

legislation seems sure; that it has the desire and patience to do so is a much different matter. Commentators have urged that Congress fill the gaping breaches in wiretapping law, and have offered specific legislative proposals.[79] It is to be hoped that Congress will discard the limited type of study of proposed laws on wiretapping which has marked legislative history in the past decade and a half, and will instead attempt a penetrative inquiry into the possibilities of a comprehensive overhauling of the rather mysterious section 605.[80] The appearance in the 1953 hearings of the district attorney of Kings County, New York, in which he explained in precise detail the mechanics and effectiveness of New York procedure for obtaining court orders authorizing state wiretapping, represents a firm step in the right direction.

If such a full-scale inquiry were to yield a statutory law drafted in clear terms and with well-defined scope, the public as well as the executive and judicial branches of the government would no longer be obliged to scrape to find a nonexistent congressional intent. Then for the first time it would be possible to point to a proclaimed legislative policy on the many phases of wiretapping, and the courts would no longer have to throw up their hands in dealing with nebulous legislation.

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[79] Westin, "The Wire Tapping Problem," 52 COL. L. REV. 165 (1952); 2 STAN. L. REV. 744 (1950).

[80] A proposed scope schedule for congressional investigation was offered by Helfeld, "A Study of Justice Department Policies on Wiretapping," 9 LAW. GUILD REV. 57 at 68-69 (1949).