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Article 9

Note: Eavesdropping - Legal and Moral Problems; Recent Decision: Determination of Citizenship Status

NOTES AND COMMENTS

NOTE: EAVESDROPPING— LEGAL AND MORAL PROBLEMS

Introduction

Although the problem of eavesdropping is widely discussed today, it is not a problem peculiar to our society. Eavesdropping was considered a crime at common law,[1] and as early as 1881 New York adopted its first eavesdropping statute.[2] With the invention of the telegraph and telephone, wiretapping, which is really only a specialized form of eavesdropping,[3] came into existence.[4] The use of these practices was not limited to law-enforcement officers; businessmen, newspaper reporters, private detectives, and criminals all found them extremely helpful means of obtaining information.[5] Revelations of the type and extent of eavesdropping became shocking; the need for legislation, apparent. When Congress enacted Section 605 of the Federal Communications Act,[6] it forbade wiretapping, but not eavesdropping. It made the section all-inclusive, so that even law-enforcement tapping is forbidden.

Apart from the statutory prohibition of wiretapping, a further question arises when law-enforcement officers obtain evidence through eavesdropping or wiretapping and attempt to introduce such evidence in a criminal trial. Basic constitutional and moral rights are involved. The purpose of this note is to discuss the legal and moral problems connected with law-enforcement eavesdropping and wiretapping.

Status of the Law

Before wiretapping was forbidden by statute, the objection was raised that police wiretapping to obtain evidence to be used against an accused in a criminal trial violated the fourth and fifth amendments to the federal constitution. This argument was rejected by the Supreme Court in the historic case of *Olmstead v. United States*.[7] Relying upon the literal meaning of the provision that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ,"[8] Mr. Chief Justice Taft, writing for a majority of the Court, determined that wiretapping does not violate the fourth amendment. There can be no infringement upon

[1] 4 BLACKSTONE, COMMENTARIES 169 (1769); 2 WHARTON, CRIMINAL LAW § 1718 (12th ed. 1932).

[2] 33 ST. JOHN'S L. REV. 387, 388 (1959).

[3] Eavesdropping may be defined as "surreptitious fact-collecting affecting individual privacy." DASH, SCHWARTZ & KNOWLTON, THE EAVESDROPPERS 7 (1959). Eavesdropping, when used in this note, does not include wiretapping.

[4] *Id.* at 23-25.

[5] *Id.* at 23-34.

[6] 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1958).

[7] 277 U.S. 438 (1928).

[8] U.S. CONST. amend. IV.

a citizen's fourth amendment rights "unless there has been an official search and seizure of his person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house 'or curtilage' for the purpose of making a seizure."[9] Moreover, the Chief Justice reasoned that one who installs a telephone in his house intends to project his voice outside the house, and there is no constitutional protection afforded to the wires beyond his house nor the messages carried over them.

Eavesdropping may or may not be forbidden by the fourth amendment, depending upon whether there has been a trespass. *Goldman v. United States*[10] determined that use of a detectaphone, which does not require any physical intrusion into the room from which the sounds are being picked up, does not violate a person's constitutional rights. The Court felt that this method of obtaining evidence could not be distinguished from wiretapping, and reaffirmed the rationale of the *Olmstead* case. However, prior to their using the detectaphone, the agents had entered the defendant's office in order to place microphones there. The microphones did not function properly, and thus they used the detectaphone. The Court indicated that had the agents obtained evidence by means of these microphones, the original trespass might have constituted this an illegal search and seizure. Since the trespass did not materially aid in the use of the detectaphone, no impairment of the accused's constitutional rights took place. However, where the trespass materially aids or is connected with the eavesdropping, there is a violation of fundamental constitutional rights.[11] This is true whether the police officers commit a trespass in order to "plant" the listening device,[12] or whether the device itself intrudes into a constitutionally protected area.[13]

To protect rights not guaranteed by the Constitution, Congress, faced with public protest against wiretapping,[14] passed the Federal Communications Act in 1934.[15] Section 605 provides: "[N]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purpose, effect, or meaning of such intercepted communication to any person. . . ." The scope of the section is all-inclusive; no exception is made for federal or state police officers. *Any* interception and divulgence by *any* person without the permission of the sender is forbidden. It is not clear whether the mere interception of a telephone message, without divulgence of its contents, violates the statute.[16] The Attorney General of the United States, however, has interpreted the section as allowing wiretapping in certain cases, so long as there is no divulgence.[17] Another problem that has arisen under the statute

[9] Olmstead v. United States, 277 U.S. 438, 466 (1928).

[10] 316 U.S. 129 (1942).

[11] Silverman v. United States, 365 U.S. 505 (1961); Irvine v. California, 347 U.S. 128 (1954).

[12] Irvine v. California, *supra* note 11.

[13] Silverman v. United States, *supra* note 11.

[14] 35 ST. JOHN'S L. REV. 163, 165 (1960).

[15] 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1958).

[16] See Benanti v. United States, 355 U.S. 96, 100 (1957); Rathbun v. United States, 355 U.S. 107, 108 n.3 (1957); Weiss v. United States, 308 U.S. 321, 322 (1939) (dictum).

[17] Kennedy, *Attorney General's Opinion on Wiretaps*, N.Y. Times, June 3, 1962, § 6 (Magazine), p. 21, at p. 80.

is whether the permission of both parties is necessary before the contents of an intercepted telephone conversation may be communicated to others. The Supreme Court in *Rathbun v. United States*[18] decided that where one party to the conversation allows a police officer to listen in by using an extension, the statute is not violated. The Court, however, emphasized the fact that extensions are quite commonly used, and that it did not want to extend the interpretation of the act to the point of forbidding persons from allowing others to "listen in" on extensions.[19] It has also been determined that the statute applies to intrastate as well as interstate communications.[20]

Having established that wiretapping is not forbidden by the fourth amendment, but only by statute, and that eavesdropping does violate the fourth amendment when a trespass is involved, the next question is whether evidence obtained by such means is admissible in criminal trials. *Weeks v. United States*[21] established the rule that evidence obtained in violation of the fourth amendment is inadmissible in federal courts. Thus evidence obtained by eavesdropping involving a trespass is inadmissible.[22] This would apply whether the evidence were obtained by federal or state officials.[23] This rule was extended to state courts by the recent decision of *Mapp v. Ohio*,[24] in which the Supreme Court held that unconstitutionally obtained evidence cannot be admitted in state criminal trials.

Wiretapping presents a somewhat different problem, since no infringement of constitutional rights is involved. Yet the Supreme Court has interpreted the Federal Communications Act as forbidding the introduction of wiretap evidence into federal courts.[25] This rule was extended to exclude evidence derived indirectly through the use of wiretaps—"a fruit of the poisonous tree"[26]—and also wiretap evidence obtained by state officials.[27] The Supreme Court has construed this exclusionary rule as a federal rule of evidence, and refused to extend it to state courts.[28] In New York wiretap evidence is admissible in criminal trials.[29] Moreover, New York and some other states, specifically allow wiretapping by law-enforcement officers under certain circumstances.[30] However, the validity of these statutes has become somewhat doubtful because of the language in *Benanti v. United States*.[31] In that case the Court stated: "[W]e find that Congress, setting out a prohibition in plain terms, did not mean to allow state legislation which would contradict that section. . . ."[32] Irrespective

[18] 355 U.S. 107 (1957).
[19] *Id.* at 109-10.
[20] Weiss v. United States, 308 U.S. 321 (1939).
[21] 232 U.S. 383 (1914).
[22] Silverman v. United States, 365 U.S. 505 (1961).
[23] Elkins v. United States, 364 U.S. 206 (1960), 35 ST. JOHN'S L. REV. 139 (1961).
[24] 367 U.S. 643 (1961).
[25] Nardone v. United States, 302 U.S. 379 (1937).
[26] Nardone v. United States, 308 U.S. 338, 341 (1939).
[27] Benanti v. United States, 355 U.S. 96 (1957).
[28] Schwartz v. Texas, 344 U.S. 199 (1952).
[29] People v. Dinan, 11 N.Y.2d 350, —— N.E.2d ——, —— N.Y.S.2d —— (1962).
[30] N.Y. CONST. art. I, § 12 authorizes interception under certain prescribed conditions. The procedure for this is found in N.Y. CODE CRIM. PROC. § 813-a.
[31] 355 U.S. 96 (1957); see Matter of Interception of Tel. Communications, 9 Misc. 2d 121, 170 N.Y.S.2d 84 (Sup. Ct. 1958), wherein Judge Hofstadter indicated he could no longer issue wiretap orders.
[32] Benanti v. United States, *supra* note 27, at 105-06.

of the validity of such state legislation permitting wiretapping under certain circumstances, there is no doubt that such conduct is a violation of Section 605 of the Federal Communications Act.[33]

Since *Mapp v. Ohio*[34] extended the exclusionary rule to state courts in cases where evidence was obtained in violation of the fourth amendment, the question arises what effect this decision has on the admissibility of wiretap evidence in state courts. In *People v. Dinan,*[35] a recent New York Court of Appeals case, the appellant argued that *Mapp* overruled *Schwartz v. Texas*[36] "by reading the exclusionary rule into section 605 of the Federal Communications Act, as, by analogy, it was read by *Mapp* into the Fourth Amendment,"[37] which applies to the states. The court would not accept this argument. It emphasized the fact that wiretapping does not violate the constitutional protection against unreasonable search and seizure and stated that "a statute may not possess the sanction of a constitutional inhibition protecting against fundamental rights granting immunity from unreasonable search and seizure."[38] The exclusionary rule, the court continued, is a rule of public policy adopted by the federal courts, and applied to the states by *Mapp* in order to aid in the enforcement of the fundamental law. The wiretapping cases left it to the states to determine whether such a rule should be applied by them to help enforce the Federal Communications Act. There is some indication, the court reasoned, that the Supreme Court agrees with this view, since it cited the *Schwartz* case as authority for refusing to enjoin the admission of wiretap evidence into a state court several months prior to its famed *Mapp* decision.[39] Thus wiretap evidence remains admissible in New York state courts unless and until the Supreme Court decides otherwise.

Legal—Moral Problems

The Founding Fathers of our nation, realizing the horrors of tyranny, sought to protect American citizens from tyrannical practices on the part of government.[40] The fourth and fifth amendments to the Constitution play a fundamental role in this plan. The protection afforded by the fourth amendment might be summed up as the protection of the right of privacy. Mr. Justice Brandeis expressed this clearly in his dissent in the *Olmstead*[41] decision. He stated:

> They [the makers of our Constitution] conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.[42]

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[33] See text accompanying note 15 *supra*. Admission of such evidence in a criminal trial could lead to the prosecution of the District Attorney, police officials, and perhaps the presiding judge. MARKS & POPERNO, CRIMINAL LAW IN NEW YORK § 425-c, at 533 (1961).

[34] 367 U.S. 643 (1961).

[35] 11 N.Y.2d 350, —— N.E.2d ——, N.Y.S.2d —— (1962).

[36] 344 U.S. 199 (1952).

[37] People v. Dinan, 11 N.Y.2d 350, 354, —— N.E.2d ——, ——, ——N.Y.S.2d ——, —— (1962).

[38] *Id.* at 354-55, —— N.E.2d at ——, —— N.Y.S.2d at ——.

[39] Pugach v. Dollinger, 365 U.S. 458 (1961) (per curiam).

[40] See Olmstead v. United States, 277 U.S. 438, 478-79 (1928) (dissenting opinion); Waldman & Silver, *The Ethics, Morals and Legality of Eavesdropping,* 9 BROOKLYN BARRISTER 147, 148 (1957).

[41] 277 U.S. 438, 471 (1928) (dissenting opinion).

[42] *Id.* at 478 (dissenting opinion).

Although a majority of the Court did not agree with Mr. Justice Brandeis, and held that wiretapping does not violate any *constitutional* right to privacy, the question may be raised whether this practice, and that of eavesdropping, are in reality any less an invasion of an individual's privacy than an unreasonable search and seizure. When a police officer enters a home or office, he may take tangible items which would prove incriminating. He may also examine private letters and papers for evidence of the commission of a crime. But by the use of a detectaphone, which is not constitutionally forbidden,[43] he may hear the most intimate family conversations, or privileged communications between attorney and client, doctor and patient, and confessor and penitent. Some feel that eavesdropping is even worse than an unreasonable search and seizure.[44] Although a wiretap may be less revealing because the investigator's "eavesdropping" is limited to telephone conversations, the rights of other parties may be infringed. This is particularly true when a public telephone is tapped, for then every person who uses the phone is subjected to the wiretap.

At first glance the observation might be made that unless a person has something to hide, the fact that a police officer is listening to his conversation should not disturb him. However, it must be remembered that our constitutional guarantees are a recognition of man's spiritual nature. Each man's thoughts, emotions and sensations are his own, and should not be unreasonably subjected to government interference.[45] Even though the mere interception of a citizen's expression of his thoughts does not directly interfere with them, there is an indirect interference. The right to freely express one's thoughts depends in large measure upon the preservation of the right to express them with the confidence that no one is surreptitiously eavesdropping on the conversation.[46] Once this confidence has disappeared, man's willingness to express himself openly to those to whom he chooses to reveal his thoughts diminishes. The unrestricted use by police officers of listening devices, especially if widespread, is a tactic to be expected in a tyrannical society, but certainly not in democracy.

The general right of privacy closely resembles the moral right that each individual has to his secrets. "A secret is a matter (*e.g.*, an invention, valuable information, concealed virtues, *the fact that a crime has been committed)* known privately by only one person or by so few that it is neither public property nor notorious."[47] There are three types of secrets — 1) a natural secret, which arises from the very nature of the matter, and cannot be revealed without causing injury or annoyance to another; 2) a promised secret, wherein a person promises not to reveal the matter after he has learned of it, no matter from whom; and 3) an entrusted secret, in which there is an antecedent promise not to reveal the matter. The entrusted secret is implicit when demanded by the confidential nature of the communications, such as those between confessor and penitent, doctor and patient, or even between

[43] See text accompanying note 10 *supra*.

[44] See Mr. Justice Frankfurter's dissent in Irvine v. California, 347 U.S. 128, 145-46 (1954).

[45] See Olmstead v. United States, *supra* note 40, at 478 (dissenting opinion); Goldman v. United States, 316 U.S. 129, 137 (1942) (dissenting opinion).

[46] *Ibid.*

[47] 2 MCHUGH & CALLAN, MORAL THEOLOGY § 2408 (rev. ed. 1958) (emphasis added).

friends.[48] The right to one's secrets is a strict property right[49] which is violated when others, who have no right to it, seek to learn the secret, or reveal it, or use secret knowledge.[50] The state, however, may investigate when there is a question whether a crime has been committed, or will be committed, in order to prevent harm to the public or private good.[51] But this right does not justify the use of unlawful means of investigation.[52] Wiretapping, eavesdropping, and the disclosing of information obtained thereby, can be justified on the part of public officials because these officials have the right to seek after the information.[53] However, when the stealth or force is excessive in its manner or produces unnecessary harm, then it becomes sinful and there is a duty of restitution.[54]

This right of the state to investigate secrets does not give it a blanket permission to probe into anyone's private affairs. Since wiretapping and eavesdropping are analogous to opening a person's mail, or reading an opened letter, the moral principles involved there would also seem to apply in this case. Public authorities may open and read an individual's personal mail when this becomes necessary to avoid grave harm to the state.[55] As long as there is sufficient indication that the public good demands such investigation, it is permissible.[56] Thus, in time of war the state may censor all mail as a means of self-defense.[57] But how can public officers determine whether there is sufficient reason for opening an individual's mail in a given case? Since private individuals may also violate a person's right to the secrecy of his letters as a matter of self-defense when there is prudent reaon for thinking a letter contains something gravely and unjustly harmful,[58] this same reasoning would seem to apply to public officials. So long as there is sufficient reason for believing the letter contains information which these officials have a right to know, such as evidence of the commission of a crime, and the public good demands an investigation of the matter, there would seem to be no unjust violation of the individual's right to his secrets.

The extent of a person's right to privacy is not the only problem encountered in the use of surreptitious listening devices; some have objected that the use of such evidence amounts to self-incrimination.[59] The courts, however, have emphasized the fourth amendment arguments, without fully discussing the fifth amendment objections. The Supreme Court indicated that there is a close relationship between the two amendments, when it determined that the compulsory production of documents compelled a person to be a witness against himself, and was the equivalent of an illegal search and seizure.[60] Could it not also be

[48] *Ibid.*; DAVIS, MORAL AND PASTORAL THEOLOGY 117-18 (1952).

[49] 2 MCHUGH & CALLAN, *op. cit. supra* note 47, at § 2409.

[50] 2 NOLDIN-SCHMITT, SUMMA THEOLOGIAE MORALIS § 666.2 (1951).

[51] 2 MCHUGH & CALLAN, *op. cit. supra* note 47, at § 2410.

[52] *Ibid.*

[53] See *id.* at § 2420.

[54] 2 MCHUGH & CALLAN, *op. cit. supra* note 47, at § 2420.

[55] 2 NOLDIN-SCHMITT, *op. cit. supra* note 50, at § 672.

[56] *Ibid.*

[57] DAVIS, *op. cit. supra* note 48, at 119; 2 MCHUGH & CALLAN, MORAL THEOLOGY § 2411 (rev. ed. 1958).

[58] 2 MCHUGH & CALLAN, *op. cit. supra* note 57.

[59] See Olmstead v. United States, 277 U.S. 438 (1928).

[60] Boyd v. United States, 116 U.S. 616 (1886).

said that evidence obtained by an illegal search and seizure, such as by eavesdropping coupled with a trespass, is compelling a person to be a witness against himself? In the eavesdropping and wiretapping area, conversations and not merely documents, are being introduced as evidence against the accused. Where a violation of the constitutional guarantees of the fourth amendment has been found, the exclusionary rule has protected the accused,[61] and thus the self-incrimination argument has not been necessary.

While considering some of the evils of wiretapping and eavesdropping, and especially their resemblance to illegal searches and seizures, it must be borne in mind that the fourth amendment forbids only unreasonable searches and seizures. To this extent, the Federal Communications Act protects the public against wiretapping even more than the fourth amendment would have, had it been found applicable. Thus even if the Supreme Court should find at some later date that wiretapping does violate the fourth amendment, this would not necessarily preclude all wiretapping under all circumstances. What constitutes a reasonable use of wiretapping would be the next problem to be solved. It would seem that a strictly controlled use of wiretaps under court authorization would be quite reasonable for constitutional purposes.[62]

Since personal rights are held in such high regard, government interference with these rights should not be tolerated unless a greater good will be obtained. Personal rights are not absolute; they must yield when the good of the community as a whole demands this. The good to be obtained in this case is the protection of the community from criminals. The primary question should be whether the good to be obtained from the use of wiretapping and other listening devices justifies the impairment of individual privacy which must follow. Law-enforcement officers insist that surreptitious listening devices are invaluable aids in the detection and apprehension of criminals. The Federal Bureau of Investigation uses wiretaps in national security cases and cases which involve human life.[63] It considers such use indispensible. On the local level, district attorneys find the use of wiretaps invaluable in combating organized crime, especially crimes connected with gambling and narcotics.[64] One district attorney stated that "telephonic interception is the single most valuable weapon in the fight against organized crime."[65] The feeling of law-enforcement officers in this regard is quite general. Since not all eavesdropping violates the fourth amendment, there is probably less discussion of this problem. However, the use of surreptitious listening devices is analagous to wiretapping, and it can be presumed that it is also a valuable aid to law-enforcement officers.

The mere fact that wiretapping and eavesdropping are helpful to police officers does not justify their use. The good to be obtained from the utilization of such devices is being balanced against fundamental human and moral rights. The apparent

[61] See text accompanying notes 21-24 *supra*.

[62] Kamisar, *The Wiretapping - Eavesdropping Problem: A Professor's View*, 44 MINN. L. REV. 891, 912 (1960).

[63] Kennedy, *Attorney General's Opinion on Wiretaps*, N.Y. Times, June 3, 1962, § 6 (Magazine), p. 21, at 80.

[64] *Hearings on S. 1086, 1221, 1495, and 1822 Before the Subcommittee on Constitutional Rights of the Senate Committee of the Judiciary*, 87th Cong., 1st Sess. 20 (1961).

[65] *Id.* at 430.

need for the employment of such devices by police officers, however, is a reasonable ground for sacrificing some rights under very limited and closely controlled circumstances.

In discussing the moral problems involved, it should be noted that the violation of secrets is justified only to prevent grave harm to the state.[66] "The violation of secrets is a harm to the public good and a greater harm than ordinary evils against the community (such as the escape of a guilty person); but it is a less harm than serious evils against the people (such as menace to public health, sedition, or treason)."[67] Thus the moral justification for violating a person's right to his secrets also depends upon the good to be achieved, or the evil to be avoided. Certainly the investigation and revelation of secrets is justified in cases of treason.[68] It would also seem to be justified in cases wherein the use of such methods is necessary to save human life, or in crimes which involve the general public welfare to a great extent, such as the peddling of narcotics. Whether the use of such methods can be justified in gambling cases is a bit more difficult, and must be determined by moral theologians.

One of the most disturbing aspects of the wiretapping problem is that each time wiretap evidence is introduced in a criminal trial, a federal crime is committed.[69] The very officers who are sworn to uphold the law, violate the law in order to convict a criminal. The crime is not committed before the trial, or if it is, still another crime is committed by the act of divulging the contents of the conversation in open court. The tribunals created to administer justice, condone the crime committed in their presence. When the government condones the commission of a crime in its very halls of justice, can it reasonably expect others to hold the law in respect? Mr. Justice Brandeis expressed this thought quite forcefully in his dissent in the *Olmstead* case. He stated:

> In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.[70]

Conclusion

The present status of the law with regard to wiretapping and eavesdropping is the result of rather technical legalistic reasoning. A fair analysis of the principles embodied in the fourth amendment should indicate that its purpose is to protect the very fundamental human right of privacy. It seems clear that it was not intended to be restricted in its interpretation to a literal application of the words "persons, houses, papers, and effects." The words of Mr. Justice Frankfurter concerning the fourteenth amendment are also applicable to the fourth: "Since due process is not a mechanical yardstick, it does not afford mechanical answers."[71] The *Olmstead* decision is a "mechanical answer" to a citizen's demand for the protection of rights

[66] See 2 McHUGH & CALLAN, *op. cit. supra* note 57; 2 NOLDIN-SCHMITT, SUMMA THEOLOGIAE MORALIS § 672 (1951).

[67] 2 McHUGH & CALLAN, MORAL THEOLOGY § 2417 (rev. ed. 1958).

[68] See *ibid.*

[69] See text accompanying note 16 *supra.*

[70] Olmstead v. United States, 277 U.S. 438, 485 (1928) (dissenting opinion).

[71] Irvine v. California, 347 U.S. 128, 147 (1954) (dissenting opinion).

embodied in the fourth amendment

Since wiretapping and eavesdropping are so closely related, it would have been illogical to allow one and ban the other. The line is drawn only when there has been an initial or concurrent trespass. Thus the legality of eavesdropping depends upon the position of the apparatus, and not upon the end result of the deed. Is the use of a detectaphone less harmful than the use of a "spike-mike," when we consider that both achieve the same result?

Because of the technical state of the law, we are now faced with two extremes. Legally all wiretapping is forbidden, but at least some eavesdropping is permitted. No matter how helpful or essential the use of a wiretap might be to the police, the law forbids it; but no restriction is placed upon the use of a detectaphone or other device which does not require a physical trespass.

Several bills have been proposed in Congress to remedy this situation.[72] In general these bills would authorize the use of wiretap evidence in criminal trials when state law permits wiretaps pursuant to a court determination that certain conditions exist. One bill would also prohibit eavesdropping, except under the same conditions that apply to wiretapping.[73] The bills differ in determining what are valid reasons for granting such permission.

Remedial legislation of this type, especially if eavesdropping were placed under the same restrictions as wiretapping, would provide an adequate remedy to the present confusion. It would protect basic human rights, and at the same time allow limited police interference when the public good demands this. Such a rule is more consistent with constitutional guarantees, and with the moral right of each individual to his secrets. Eavesdropping and wiretapping cannot be justified morally when the police are dealing with crimes which do not have a grave effect on the public good. Exactly where to draw the line is a difficult problem and requires study by moral theologians and law-enforcement officers alike.

If Congress does nothing else in this field, it should at least permit the divulgence in criminal trials of information obtained by wiretapping when state law permits this. We have tolerated the commission of a crime in our courts too long already. The government must encourage respect for the law, and open defiance of the law does not have this effect. The law may be unwise; but then the law should be changed, not openly violated. Such a change is essential, and let us hope, imminent.

[72] See S. 1086, 1221, 1495 and 1822, 87th Cong., 1st Sess. (1961).

[73] S. 1221, 87th Cong., 1st Sess. (1961).

Recent Decision:
Determination of Citizenship Status

"Not only is United States citizenship a 'high privilege', it is a priceless treasure,"[1] Mr. Justice Black has remarked. To this might be added the observation, *"no one's* right to this status should be finally adjudicated or determined except by the Courts in a judicial proceeding."[2] Whereas will-

[1] Johnson v. Eisentranger, 339 U.S. 763, 791 (1950) (dissenting opinion).

[2] Mah Ying Og v. Clark, 81 F. Supp. 696, 697

ing acceptance of the former comment may be given by all, the latter expresses a sentiment subject to qualifications and varying views on the proper form and scope of judicial proceeding.[3]

Recently, in *Rusk v. Cort*,[4] the United States Supreme Court denied on appeal the Secretary of State's motion to dismiss and *held* that a person outside the United States who has been denied a right of citizenship is not confined to the procedures prescribed by the Immigration and Nationality Act of 1952 [hereinafter referred to as the Act of 1952],[5] but rather may pursue an action for declaratory and injunctive relief. The Secretary had contended that the Act of 1952 provided the exclusive procedure for attack on the administrative determination that plaintiff was not a citizen. After the State Department's Board of Review on Loss of Nationality had upheld the Passport Office's denial of a passport to the plaintiff, a physician born in Massachusetts, but residing in Czechoslovakia, he sought a declaratory judgment on his citizenship status to overcome the Board's ruling that he had been denationalized. The ruling was based on a finding that plaintiff had remained abroad for purposes of evading or avoiding military service—conduct proscribed by Section 349(a)(10) of the Act of 1952[6] which dictates loss of citizenship as a consequence.

Loss or denial of citizenship can mean not only a deprivation of liberty but also "loss of property and life; or all that makes life worth living."[7] Thus fundamental and vital problems arise when the right of the sovereign power to absolute control over aliens[8] seems to clash with the personal guarantees afforded by the fifth amendment.

In 1905 the Supreme Court in *United States v. Ju Toy*,[9] a habeas corpus proceeding, held that an adverse administrative determination, in accordance with a statute making the executive decision final in exclusion proceedings, was binding on one seeking admission into this country under a claim of citizenship. The fact of citizenship was treated as any other disputed fact in the proceedings. Moreover, Mr. Justice Holmes announced, "the petitioner, although physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction and kept there while his right to enter was under debate."[10] Furthermore, he continued, "due process of law does not require judicial trial"[11] with respect to the petitioner, even assuming that the fifth amendment is applicable and that to deny a citizen entrance is a deprivation of liberty.

In 1922 the *Ng Fung Ho v. White*[12] case affirmed *Ju Toy*, but added that where the proceeding was to *deport* an alien rather than *exclude* him, due process of law required a judicial trial on the fact of citizen-

(D.D.C. 1948) (emphasis added).

[3] Shaughnessy v. Pedreiro, 349 U.S. 48 (1955); McGrath v. Kristensen, 340 U.S. 162 (1950); Ng Fung Ho v. White, 259 U.S. 276 (1922); United States v. Ju Toy, 198 U.S. 253 (1905); Ly Shew v. Acheson, 110 F. Supp. 50 (N.D. Cal. S.D. 1953).

[4] 369 U.S. 367 (1962).

[5] § 360, 66 Stat. 273 (1952), 8 U.S.C. § 1503 (1958).

[6] 66 Stat. 267 (1952), 8 U.S.C. § 1481(a) (1958).

[7] Ng Fung Ho v. White, *supra* note 3, at 284.

[8] The Chinese Exclusion Case, 130 U.S. 581, 603 (1889).

[9] 198 U.S. 253 (1905).

[10] *Id.* at 263.

[11] *Ibid.* See AUERBACH, IMMIGRATION LAWS OF THE UNITED STATES 366-68 (2d ed. 1961).

[12] 259 U.S. 276 (1922).

ship. *Ng Fung Ho* concluded that a claim of citizenship supported by evidence sufficient, if believed, to warrant a favorable decision was entitled to be tested in the courts because the claim is a "denial of an essential jurisdictional fact."[13] Otherwise any *resident* after being adjudged an alien by an administrative board might be deported on a purely executive order. This is so because "where there is jurisdiction a finding of fact by the executive department is conclusive," said Mr. Justice Brandeis.[14] Although citizenship is an "essential jurisdictional fact" in exclusion no less than in deportation proceedings, the Court ignored the inconsistency, and a distinction between exclusion and deportation proceedings was created and has remained—these cases have never been overruled. Congress, however, in the Nationality Act of 1940[15] [hereinafter referred to as the 1940 Act] created an alternate avenue for judicial determinations other than the habeas corpus proceedings which *Ju Toy* and *Ng Fung Ho* involved.

This act allowed a person to institute an action for a judgment declaring him to be a national of the United States "regardless of whether he is within the United States or abroad."[16] This procedural right was to a trial *de novo,* or an original action, to determine the fact of citizenship wherever and whenever denied by administrative authority. Furthermore, it provided that one abroad could obtain from an American consular officer a certificate of identity entitling him to enter the United States to litigate personally. If the action failed he then became subject to deportation.[17]

Opening up access to the courts, however, ultimately led to abuses commencing after the repeal of the Chinese Exclusion Act and the Communist successes in China; notably the increase in fraudulent entries facilitated by instituting sham declaratory judgment citizenship actions.[18] The alien would gain entrance under the certificate of identity and abandon the suit while disappearing into the mainstream of the population. Neither the bar nor the courts initially appreciated the breadth of the opportunities lurking in the 1940 Act. In the first five years after its passage only four actions were brought, but by the end of 1952 some 1,288 suits had been instituted.[19]

To curb these abuses Congress enacted section 360 of the Act of 1952, evincing in subsection (a): (1) an intent to confirm the rule stated in *Ju Toy* that an administrative determination of the fact of citizenship in exclusion proceedings is not subject to trial *de novo;* and (2) an intent to limit the right to institute actions for judicial declaration of nationality to those physically within the United States, — which in effect, codified the *Ng Fung Ho* case.[20]

[13] *Id.* at 284.

[14] *Ibid.*

[15] Ch. 876, § 503, 54 Stat. 1137 (1940).

[16] Ch. 876, § 503, 54 Stat. 1171 (1940).

[17] *Ibid.*

[18] Rusk v. Cort, 369 U.S. 367, 390 (1962).

[19] Zimmerman, *Judicial Versus Administrative Determination Of Controverted Claims To United States Citizenship,* 43 GEO. L.J. 19, 46 (1954); Note, *The Right To Judicial Review Of An Administrative Finding On The Fact Of Citizenship In Exclusion Cases,* 1950 WIS. L. REV. 677.

[20] § 360(a), 66 Stat. 273 (1952), 8 U.S.C. § 1503(a) (1958): "(a) *If any person who is within the United States* claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action

In addition, section 360(b) provides for the issuance of certificates of identity to two classes of persons not within the United States: those physically present in this country at a prior time and those under sixteen years of age, born abroad of a United States citizen parent.[21] Appeal from a denial of these certificates is made only to the Secretary of State, as their issuance is purely an administrative matter. Further, section 360(c) directs that upon arrival such persons apply for admission to the United States under normal alien proceedings, and that a final adverse determination of the claim to citizenship by the Attorney General shall be reviewable "in habeas corpus proceedings and not otherwise."[22]

Section 10(a) of the Administrative Procedure Act, however, states that declaratory judgment is available as a form of judicial review of any agency action causing a legal wrong.[23] Whether the plaintiff at bar could avail himself of an action for declaratory judgment through the relief provisions of section 10 became the major question in the present case. The majority contended that section 360 of the Act of 1952 was fashioned to circumscribe the easy-entry provisions of the 1940 Act and to apply normal immigration procedures,

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under the provisions of [the Declaratory Judgments Act, 28 U.S.C. § 2201 (1958)], against the . . . department or . . . agency for a judgment declaring him to be a national of the United States, *except that* no such action may be instituted in any case if the issue of such person's status as a national of the United States (1.) *arose by reason* of, or in connection with any *exclusion* proceeding . . . or (2.) *is in issue in any such proceeding.* An action . . . may be instituted only within five years after the final administrative denial. . . . [J] urisdiction over such officials in such cases is conferred upon [the district courts of the United States]." (Emphasis added.)

[21] 66 Stat. 273(1952), 8 U.S.C. § 1503(b) (1958): "(b) *If any person who is not within the United States* claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, *such person may make application* to a diplomatic or consular officer of the United States in the foreign country in which he is residing for a certificate of identity *for the purpose of travelling* to a port of entry in the United States and *applying for admission.* Upon proof to the satisfaction of [those] officer[s] that such application is made in good faith and has a substantial basis, he shall issue to such person a certificate of identity. From any denial of an application for such certificate the applicant shall be entitled to *an appeal to the Secretary of State* who, if he approves the denial shall state in writing his reasons for his decision. The Secretary of State shall prescribe rules and regulations for the issuance of certificates of identity as above provided. The provisions of this subsection *shall be applicable* only to a person who at some time prior to his application for the certificate of identity has been physically *present* in the United States, or to a person under sixteen years of age who was born abroad of a United States citizen parent." (Emphasis added.)

[22] 66 Stat. 274 (1952), 8 U.S.C. § 1503(c) (1958): "(c) A person who has been issued a certificate of identity [under subsection (b)] may apply for admission to the United States . . . and shall be subject to all the provisions of this Chapter relating to the conduct of proceedings involving *aliens* seeking admission to the United States. A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction *in habeas corpus proceedings and not otherwise.* Any person described in this section who is finally *excluded* from admission to the United States shall be subject to all the provisions of this Chapter relating *to aliens* seeking admission to the United States." (Emphasis added.)

[23] 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1958). Section 12 of this act provides that "no subsequent legislation shall be held to supersede or modify the provisions of this Chapter except to the extent that such legislation shall do so expressly." 60 Stat. 244 (1946), 5 U.S.C. § 1011 (1958).

with judicial review by habeas corpus only, to those abroad who choose to enter under a certificate of identity. It was not intended to apply to claimants who seek a determination of citizenship while still abroad, i.e., those who do not apply for admission to the United States before prevailing on their claims of citizenship. Thus the Court found that the broad remedial provisions of the Administrative Procedure Act[24] and the Declaratory Judgments Act[25] were available to the plaintiff.

In the dissent Mr. Justice Harlan took these conclusions to task. He declared that allowing the action in the present case to fall within the purview of the Declaratory Judgments Act and the Administrative Procedure Act denies that section 360 is the exclusive remedy available to nonresidents and is "plainly inconsistent with the Congressional purpose [and] refuted . . . by the background and legislative history of that section."[26] In recalling the legislative history of section 360, the dissent stressed the proposals of the Departments of State and Justice made before the Joint Hearings on the bill.[27] The State Department had suggested that declaratory relief for persons abroad be limited to those whose *original* citizenship status was not in doubt, but who were deemed to have *lost* it and that certificates of identity be permitted allowing these persons, if they chose, to enter the country in aid of their suits.[28] The Justice Department alternately recommended that normal immigration procedures be applied to all nonresidents, restricting certificate of identity holders to habeas corpus as the sole means of obtaining review of administrative decisions.[29] Thus, according to the dissent, in enacting section 360 "congress . . . squarely faced with making, or not making declaratory relief available to nonresident citizenship claimants, chose the latter course."[30]

The majority, however, pointed to its previous decisions in *Shaughnessy v. Pedreiro,*[31] and *Brownell v. Tom We Shung,*[32] as teaching that the Administrative Procedure Act also makes available judicial review of administrative decisions rendered under the Act of 1952, in the absence of clear and convincing evidence that Congress intended otherwise. In *Pedriero,* the Court granted declaratory judgment via Section 10 of the Administrative Procedure Act as an alternative to habeas corpus in testing the validity of a deportation order. There a resident alien was resisting a deportation order on the grounds that it was violative of due process and lacked sufficient evidence to justify it. In *Shung,* the Court said that it was broadening the form of judicial relief by allowing declaratory judgment via the Administra-

[24] 60 Stat. 237 (1946), 5 U.S.C. § 1001 (1958).

[25] 28 U.S.C. § 2201 (1958).

[26] Rusk v. Cort, 369 U.S. 367, 388 (1962) (dissenting opinion). After restating the traditional rules formulated by *Ju Toy* and *Ng Fung Ho,* the dissent attacked the contention that declaratory judgment relief had been available prior to the enactment of the Administrative Procedure Act as a remedy to secure determination of citizenship. The case of Perkins v. Elg, 307 U.S. 325 (1939) had been advanced by the majority to establish that proposition, but the dissent asserted that because the petitioner in *Elg* was a *resident* the case was distinguishable.

[27] Hearings on S. 716, H.R. 2379 and H.R. 2816 Before the Subcommittees of the Committees on the Judiciary, 82d Cong., 1st Sess. (1951).

[28] *Id.* at 710.

[29] *Id.* at 720.

[30] Rusk v. Cort, *supra* note 26, at 396 (dissenting opinion).

[31] 349 U.S. 48 (1955).

[32] 352 U.S. 180 (1956).

tive Procedure Act although this was in no way to enlarge the scope of review. Here the alien sought declaratory judgment review of an exclusion order on the basis of *Pedreiro*.[33]

Mr. Justice Harlan, however, brought out that these cases were strictly deportation and exclusion cases, neither involving a claim to citizenship. The distinction is that, whereas the sections to the Act of 1952 dealing with cases of this type provide for no specific relief, such is not the case in the sections of the act dealing with nationality.[34]

Despite this argument, the majority determined that section 360 is not an exclusive remedy for reviewing administrative decisions. Rather it was felt that the language of section 360(b), reading that one not in the United States who has been denied a right or privilege *may* make application for a certificate, connotes permissive, not mandatory, legislative intent. Thus, inasmuch as the plaintiff at bar did not choose to seek entry by means of such a certificate, the majority opinion, as delivered by Mr. Justice Stewart, declared him as not being within 360(b) and therefore free to avail himself of any alternate remedy extant.

By allowing nonresidents to institute declaratory judgment actions in the face of the provisions of section 360 of the Act of 1952, provided they do not attempt to enter the country, the Court apparently has interpreted the Administrative Procedure Act liberally, while strictly construing the provisions of the Act of 1952. The importance of the rights involved no doubt underlies this approach. As pointed out by Mr. Justice Brennan in his concurring opinion, to apply section 360(b) in the manner insisted upon by the dissent would force a citizen to reduce himself to the status of an alien in many circumstances in which he found himself outside the United States. He cast grave doubts whether the habeas corpus proceeding alone would satisfy constitutional due process of law, noting that in descending to the status of an alien, a citizen would necessarily, in this procedure, subject himself to arrest.[35]

In this connection it should be noted that when the *Ju Toy* and *Ng Fung Ho* cases were decided the number of American citizens travelling or working abroad was not near the level it is in today's world. Were Mr. Justice Brandeis writing for the Court today, the deportation-exclusion distinction would probably be assailed by him as an untenable basis for differing results. He would, no doubt, still insist that the issue of citizenship be decided by due process amounting to a full judicial trial whenever the credible evidence would support a finding of citizenship.[36] Certainly

[33] See generally Rubinstein v. Brownell, 206 F. 2d 449 (D.C. Cir. 1953), *aff'd*, 346 U.S. 929 (1954) (per curiam); Heikkila v. Barber, 345 U.S. 229 (1953); WASSERMAN, IMMIGRATION LAW AND PRACTICE 130-32b (1961).

[34] Rusk v. Cort, *supra* note 26, at 397 (dissenting opinion). This is no longer true by virtue of Pub. L. 87-301, 75 Stat. 650, 8 U.S.C.A. § 1105 (a) (Supp. 1962), which, according to the dissent, rejects the *Shung* case by making habeas corpus the sole judicial remedy in exclusion proceedings.

[35] Rusk v. Cort, *supra* note 26, at 381 (concurring opinion). The facts of this case are graphic on this point. Here the government conceded affirmatively, as well as in the procedural admission on the motion to dismiss, that the plaintiff *had been* a citizen. To compel a citizen to defend his right to continuing citizenship by undergoing arrest merely because he happens to be outside of the United States at the time seems a difficult morsel for the American system of due process to digest.

[36] Ng Fung Ho v. White, 259 U.S. 276 (1922).

the specious geographical distinctions, which resulted in the inconsistency of holding that the fact of citizenship commands different judicial rights depending on the part of the world the claimant finds himself, are hardly defensible in the modern world.

By employing the provisions of the Administrative Procedure Act as in *Rusk,* the Court appears to have restored much of the liberality of the 1940 Act. Fortunately, however, this does not require that the abuses which arose from that act are apt to be repeated. While recognizing that section 360(b)(c) applies to nonresidents who choose to enter the United States, the Court has nevertheless extended full judicial remedies to those abroad if they seek the remedy before attempting entrance. At the same time, fraudulent entrance can still be controlled by section 360(b).

Although the relief allowed is *de novo,* the claimant, it would seem, must still exhaust his administrative remedy since the relief provided by Sections 10 and 12 of the Administrative Procedure Act is from agency determinations.[37] In view of this, the district courts are not likely to be subjected to a plethora of suits reminiscent of the 1940 Act, which allowed direct actions to be instituted at anytime. Against this, of course, it is likely that the habeas corpus proceedings under 360(b)(c) are likely to be abandoned in favor of the alternate relief given here. Thus, although the *Ju Toy* and *Ng Fung Ho* decisions are still alive implicitly in section 360(b)(c), they may die on the vine from disuse.

Certainly, the affording of the fullest possible judicial determination on so fundamental an issue as a claim to citizenship is highly desirable under traditional American ideas of guaranteeing fundamental rights. It is unfortunate that the history of the legislation in this area forces the Court in the pursuit of this ideal to strain the language of statutes. Perhaps Congress might help by redrafting the Immigration and Nationality Act to protect the national interest in controlling aliens while safeguarding the personal liberties of citizens with the security of judicial review over administrative authority.

Against this thought, of course, is the fact that Congress enacted § 360 with the geographical distinctions as late as 1952 and has allowed them to remain. Further, the distinction between exclusion and deportation proceedings was the subject of notable litigation in the late 1940's; the Court of Appeals for the Second Circuit vigorously asserting the distinction, while the Ninth Circuit with equal vigor was attempting to liberalize the doctrines. In the case of Carmichael v. Delaney, 170 F.2d 239 (9th Cir. 1948), the court extended the guarantee of a court hearing on citizenship to a former resident who enlisted in the Merchant Marine during the war but was barred as an alien without a passport on his vessel's return in 1945. The *Delaney* case was a departure from the rule established by the *Ju Toy* and *Ng Fung Ho* decisions because it held that right to trial on the fact of citizenship is guaranteed when supported by substantial evidence provided the claimant is a resident. Contrasted with this, the Second Circuit, in Chu Leung v. Shaughnessy, 176 F.2d 249 (2d Cir. 1949), rejecting residence as a determinative factor of the right to a court trial, said that a returning resident claiming citizenship must be denied a judicial trial of the fact of citizenship. Interestingly, this court noted that the relator there did have a judicial avenue open to him via the provisions of the Nationality Act of 1940: in effect a trial *de novo* or an original action, regardless of whether he is within the United States or abroad. See United States *ex rel.* Medeiros v. Watkins, 166 F.2d 897 (2d Cir. 1948); 49 COLUM. L. REV. 702 (1949); Note, 1950 WIS. L. REV. 677.

[37] In the instant case, the majority makes the

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