St. John's Law Review

Volume 32, December 1957, Number 1 Article 9

Some Aspects of Wiretapping in the Federal and New York Jurisdictions

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Undoubtedly there is a strong belief among many that judicial reversals on procedural errors in informal proceedings would deter the administrative process. Even if that be true, the court ought not to be so liberal in protecting public rights where individual rights and liberty are involved. Rather, the objections to informal hearings must be closely subject to the Court's scrutiny. This judicial guardianship would guarantee our constitutional rights, and thereby, more effectively balance the scales between our need for the independence of administrative procedures and the preservation of individual property and liberty.

SOME ASPECTS OF WIRETAPPING IN THE FEDERAL AND NEW YORK JURISDICTIONS

Introduction

Wiretapping, a problem of our electronic civilization, has in recent years received widespread publicity. Wholesale invasions of privacy have been the order of the day. The seriousness of the situation has engendered unrestrained comment both in legal and non-legal publications.[1]

The treatment of wiretapping in its social aspects is, of course, beyond the limited bounds of this article. Its purpose is merely to sketch the evolution and present status of the law in the federal and New York jurisdictions with respect to the admissibility of wiretap material in evidence.

The Law in the Federal Jurisdiction

In *Olmstead v. United States*,[2] the United States Supreme Court faced the issue of whether wiretapping constituted an illegal search and seizure within the meaning of the fourth amendment. The defendants there were convicted of violating the National Prohibition Act. The information resulting in their conviction was obtained chiefly through the interception of the defendants' telephone conversations by federal prohibition agents. Defendants contended that the

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[1] See Westin, *The Wire-Tapping Problem: An Analysis and A Legislative Proposal*, 52 COLUM. L. REV. 165 (1952); Note, 31 N.Y.U. L. REV. 197 (1956); Note, 58 W. VA. L. REV. 268 (1956); Time, March 19, 1956, p. 67; Life, March 7, 1955, p. 45; America, Dec. 5, 1953, p. 90; The Reporter, Jan. 6, 1953, p. 6; The Reporter, Dec. 23, 1952, p. 8.

[2] 277 U.S. 438 (1928).

wiretapping involved was violative of the fourth amendment provision against unreasonable searches and seizures as well as the fifth amendment guarantee against compulsory self-incrimination. The Court held that the Constitution was not violated in either instance. The majority said that the language of the fourth amendment could not validly be ". . . extended and expanded to include telephone wires reaching to the whole world from defendant's house or office." [3] Likewise the terms of the fifth amendment were not violated since defendants were in no way compelled to carry on incriminating conversations over their telephones.

The *Olmstead* decision meant wiretap evidence would be admitted in federal courts where no trespass could be shown. Widespread opposition to this situation developed and a series of bills was introduced in Congress to outlaw wiretap evidence.[4] In 1934 while bills professedly designed to deal with wiretapping were being debated and ultimately defeated, the Federal Communications Act became law.[5] Unobtrusively embedded therein was Section 605 of that Act which forbade the interception and divulgence by any person of information derived from radio or wire communications.[6] It is questionable whether the framers of this statute ever intended to legislate on the admissibility of wiretap evidence.[7]

The possibilities inherent in the statutory language were first caught sight of three years later in *Nardone v. United States*.[8] Defendants had been convicted for the illegal smuggling of liquor. The Court found that the government's case, to a substantial degree, was grounded on intercepted telephone messages. Section 605 was construed to forbid the divulgence of these communications in federal court by anyone, including federal agents. The *Nardone* result was widely criticized as based on an uncalled-for statutory construction.[9]

Two years later the government was once more before the Court in an attempt to sustain Nardone's conviction. On this occasion the prosecution's case was based not on direct wiretapping evidence but on leads obtained therefrom. Mr. Justice Frankfurter, writing for the majority, referred to this evidence as "fruit of the poisonous tree." [10] The Court said:

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[3] Olmstead v. United States, 277 U.S. 438, 465 (1928).

[4] H.R. 5416, H.R. 4139, 71st Cong., 1st Sess. (1929); S. Rep. No. 6061, S. Rep. No. 3344, 71st Cong., 3d Sess. (1931). See 74 CONG. REC. 3928 (1931).

[5] 48 STAT. 1064 (1934), 47 U.S.C. §§ 7-609 (1952).

[6] 48 STAT. 1103 (1934), 47 U.S.C. § 605 (1952).

[7] The courts ignored § 605 and continued to permit the introduction of wiretap evidence. See, *e.g.*, Smith v. United States, 91 F.2d 556 (D.C. Cir. 1937); Beard v. United States, 82 F.2d 837 (D.C. Cir.), *cert. denied*, 298 U.S. 655 (1936); *In re* Milburne, 77 F.2d 310 (2d Cir. 1935).

[8] 302 U.S. 379 (1937).

[9] See, *e.g.*, 53 HARV. L. REV. 863 (1940); 34 ILL. L. REV. 758 (1940); 25 MINN. L. REV. 382 (1941).

[10] Nardone v. United States, 308 U.S. 338, 341 (1939).

To reduce the scope of Section 605 to exclusion of exact words heard through forbidden interception, allowing these interceptions every derivative use they may serve . . . would largely stultify the policy which compelled our decision in Nardone v. United States. . . .[11]

Another Court decision in the same year rendered still more far-reaching the application of Section 605. In *Weiss v. United States*,[12] the question presented was whether the statute was applicable to strictly intrastate communications. The Court held that the statutory interdiction extended to intrastate as well as interstate messages. The rationale was that a tapper would find it impossible to establish beforehand whether a given telephone call would cross state lines and consequently, a blanket prohibition would have to be imposed. The *Weiss* case further held that defendant's consent to disclosure of wiretap conversations obtained only by the government's promise of leniency did not constitute "authorization by the sender." [13]

In *Goldstein v. United States*,[14] an interesting fact pattern gave the Court an opportunity to limit somewhat the scope of Section 605. The case involved fraud by mail wherein federal agents persuaded two men, after they heard recordings of their telephone conversations, to testify in the prosecutions of three accomplices. In affirming the convictions, the Court held that a person who is not a party to tapped conversations is without standing to object to their use by the government in obtaining testimony. The fact that federal officers committed a crime in persuading the two recalcitrant witnesses to testify was treated as an immaterial circumstance.

The case of *Goldman v. United States* [15] placed another restriction on the employment of Section 605. There federal agents entered defendant's law office at night and installed a detectaphone in an adjoining room which was sensitive enough to pick up his telephone conversations. Conviction for conspiracy to violate the Federal Bankruptcy Act ensued. The Court affirmed the conviction on the theory that the Communications Act was not violated since there was neither a "communication" nor "interception" within its terms. Had there been an actual trespass to defendant's office, the Court stated, the fourth amendment would have been violated.

The next major case in the wiretap area arose against the background of national security and involved the problem that lay at the core of the more recent and celebrated case of *Jencks v. United States* [16]—to what extent is the government required to divulge information imperiling national security in order to secure a conviction.

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[11] *Id.* at 340.
[12] 308 U.S. 321 (1939).
[13] If there is in fact "authorization by the sender," the statute is not violated. See 48 STAT. 1103 (1934), 47 U.S.C. § 605 (1952).
[14] 316 U.S. 114 (1942).
[15] 316 U.S. 129 (1942).
[16] 353 U.S. 657 (1957).

In *United States v. Coplon*,[17] the defendant was accused and convicted of an attempt to deliver "defense information" to a Soviet national as well as conspiracy to defraud the United States. Defendant showed that FBI agents had tapped her telephone conversations for two months prior to her arrest. The government placed records of all the tapped conversations before the trial judge who examined them and permitted defense counsel to examine all but those he thought injurious to the national security. The trial judge found as a fact that the wiretaps had not led to any material evidence at the trial.[18] The Court of Appeals set aside the conviction and held that the defendant had a constitutional right to see wiretap records even though they contained security information. Judge Hand said in part:

> . . . the refusal to allow the defence to see them [the wiretap records] was . . . a denial of their constitutional right, and we can see no significant distinction between introducing evidence against an accused which he is not allowed to see, and denying him the right to put in evidence on his own behalf.[19]

Any thought that acquittal would follow merely because wiretap evidence was involved was dispelled by two cases reaching the Supreme Court in 1952. In *On Lee v. United States*[20] defendant ran a laundry in Hoboken, N.J. A former acquaintance engaged him in conversation in his shop, during the course of which defendant made incriminating remarks relative to the sale of narcotics. Defendant did not know that his friend was in fact an undercover agent for the Bureau of Narcotics. Nor did he realize that he was carrying a concealed microphone which was transmitting the conversation outside the building. The Court sustained defendant's conviction, taking the position that what had been done did not fall within the prohibition of the Federal Communications Act. As Mr. Justice Jackson stated:

> It would be a dubious service to the genuine liberties protected by the Fourth Amendment to make them bedfellows with spurious liberties improvised by farfetched analogies. . . . He [the federal officer] was not sending messages to anybody or using a system of communication within the Act.[21]

In *Schwartz v. Texas*,[22] defendant sought to set aside his conviction in a state court as an accomplice to robbery on the ground that evidence vital to the establishment of his guilt was inadmissible in evidence by reason of the Federal Communications Act. Incriminating telephone conversations with a betraying former accomplice had been recorded by means of an induction coil apparatus. A Texas statute rendered inadmissible evidence obtained in violation of the constitution or laws of Texas or of the Constitution of the United

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[17] 185 F.2d 629 (2d Cir. 1950).
[18] United States v. Coplon, 88 F. Supp. 921 (S.D.N.Y. 1950).
[19] United States v. Coplon, 185 F.2d 629, 638 (2d Cir. 1950).
[20] 343 U.S. 747 (1952).
[21] On Lee v. United States, 343 U.S. 747, 754 (1952).
[22] 344 U.S. 199 (1952).

States but not evidence obtained in violation of federal statutes.[23] The Supreme Court held that Congress, in enacting Section 605, had not evinced an unmistakable intent to make it a rule of evidence applicable to state court proceedings.

> Where a state has carefully legislated so as not to render inadmissible evidence obtained and sought to be divulged in violation of the laws of the United States, this Court will not extend by implication the statute of the United States so as to invalidate the specific language of the state statute.[24]

The latest developments in the federal wiretap picture center around three second circuit cases decided this year. *United States v. Benanti*[25] provided at least a tentative answer to the recurring question of whether evidence obtained by a state officer in violation of Section 605 would under any circumstances be admissible in a federal prosecution. In that case New York City police tapped a telephone in a bar frequented by defendants. The tapping was done pursuant to a state court order in the belief that defendants were dealing in narcotics in violation of state law. Operating on information secured through the taps and on the supposition that the narcotics law was being violated, the police stopped the defendants' car. They found no narcotics but instead discovered cans of alcohol which failed to bear the required tax stamps. Federal prosecution followed and defendants sought to exclude the wiretap evidence. The court held that since no collusion with or participation by federal officers was involved the evidence was admissible.

In *United States v. Costello,*[26] the federal government sought to cancel the citizenship of the defendant on the ground of illegality and fraud in its procurement. To support this contention, counsel for the government submitted an affidavit of good cause particularly detailing the fraudulent statements supplied by defendant in his 1925 petition for naturalization. On the third day of the trial the district judge granted defendant's motion to dismiss on the ground that the government evidence was permeated with the fruit of illegal wiretaps. The wiretaps concededly had been made by federal officers in 1925 and 1926 and by state officers in 1943. The Court of Appeals held that the government should have been given the opportunity to submit a new affidavit based on untainted evidence.[27] It further held as to the 1925 and 1926 wiretaps that Section 605 was not intended to operate retroactively and that it was not a crime to republish information which was lawfully intercepted and divulged prior to that section's passage. As to the 1943 wiretaps the court followed the *Benanti* holding that since they were effected by state officers without federal

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[23] TEX. CODE CRIM. PROC. art. 727a (1941).
[24] Schwartz v. Texas, 344 U.S. 199, 202 (1952).
[25] 244 F.2d 389 (2d Cir. 1957).
[26] 145 F. Supp. 892 (S.D.N.Y. 1956), *rev'd,* 247 F.2d 384 (2d Cir. 1957).
[27] United States v. Costello, 247 F.2d 384 (2d Cir. 1957).

connivance they were admissible in federal court. The case was remanded for further action.

United States v. Gris[28] involved a prosecution for violation of Section 605. Defendant, a private detective, had been retained to secure evidence against his client's wife in a divorce action brought by the client. An elaborate wiretap apparatus was fabricated and employed. The United States Court of Appeals sustained defendant's conviction despite the fact that New York, the jurisdiction where the tapping took place and in which the divorce suit was brought, admits such evidence. It was pointed out that even if the defendant met New York's statutory requirements for authorized wiretapping, which was not the case, his conduct would still be violative of the overriding federal statute.

New York Statutory Law on Wiretapping

No understanding of New York case law relative to wiretapping is possible without an appreciation of the statutory enactments which underlie the decisions. It is important to realize that in New York, unlike the federal jurisdiction, major modifications in the law have been undertaken by the legislature rather than by the courts.

The earliest statutes on the subject in New York as in most states were designed primarily to protect property from trespass and only secondarily to protect the privacy of communications. Thus in 1892 the legislature enacted the provision which is now subdivision 6 of Section 1423 of the Penal Law.[29] That section prohibits the breaking or cutting of a telephone wire as well as the unauthorized reading or copying of any message coming over the same. This statute apparently was not intended to have any application to wiretapping by public officers acting in their official capacity since their activity would not possess the statutory requisites of unlawfulness and wilfulness. Another early statute prohibited the unauthorized obtaining of messages through collusion with a telephone or telegraph employee.[30]

The only other statute relevant to wiretapping by private persons prior to the wholesale revision which took place in 1957 was Section 552-a of the Penal Law enacted in 1949.[31] This section prohibited the possession of wiretap instruments under circumstances evincing an intent to make use of them illegally.

Prior to 1957 the only pieces of legislation designed to regulate wiretapping by public officers were a constitutional provision enacted in 1938 and a statute designed to implement its policy.

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[28] United States v. Gris, 138 N.Y.L.J. 1, col. 1-2 (U.S. Court of Appeals. 2d Cir., Sept. 12, 1957).
[29] Laws of N.Y. 1892, c. 372.
[30] Laws of N.Y. 1895, c. 727.
[31] Laws of N.Y. 1949, c. 519.

Section 12 of Article I of the New York State Constitution was a compromise arrived at after spirited debate at the constitutional convention.[32] It provides that orders authorizing public wiretapping shall issue only where there are reasonable grounds for believing that evidence of crime may thereby be obtained. The amendment likewise requires the setting forth of the name of the person whose wire is to be tapped, the particular means of communication involved and the purpose for which the tap is being made.[33]

Section 813-a of the Code of Criminal Procedure, enacted by the legislature in 1942, was designed to implement the constitutional provision and to spell out the exact requirements that would have to be met to secure an interception order. By the terms of the statute anyone above the rank of sergeant in any police force in the state is permitted to apply for a wiretap order by making application to a Supreme Court or County Court judge. The order, if granted, is to be effective for the time specified therein or, in any case, for a period not longer than six months unless the judge granting the original order is satisfied that extension or renewal is in the public interest.[34]

New York Case Law on Wiretapping

As a general proposition, New York law on admissibility of wiretap evidence has paralleled the New York rule on admissibility of evidence secured by illegal search and seizure. In the leading case of *People v. Defore*,[35] defendant was found guilty of carrying a blackjack after previously having been convicted of the unlawful possession of a firearm. Defendant had been arrested for stealing an overcoat but a search of his room revealed the blackjack. The court sustained his conviction despite the fact that the search and seizure prerequisite to the same was illegal, holding that, in New York, evidence however seized is admissible.

A case specifically dealing with wiretapping had anticipated this result. In *People v. McDonald*,[36] defendant's conviction for bookmaking was sustained over the contention that some of the evidence used to convict had been obtained in violation of statute. The court took the position that wiretapping should not be treated differently

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[32] See Rosenzweig, *The Law of Wiretapping*, 33 CORNELL L.Q. 73, 84 (1947).

[33] The relevant portion of the provision is as follows:

"The right of the people to be secure against unreasonable interception of telephone and telegraphic communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof." N.Y. CONST. art. 1, § 12.

[34] Laws of N.Y. 1942, c. 924.

[35] 242 N.Y. 13, 150 N.E. 585 (1926).

[36] 177 App. Div. 806, 165 N.Y. Supp. 41 (2d Dep't 1917).

than any other search and seizure with reference to the admissibility of evidence obtained thereby.

Some doubt on New York's position was engendered by the decision of the Appellate Division in the case of *In re Davis*.[37] Here the court admitted wiretap evidence in disbarment proceedings despite the fact that the tapping involved violation of a New York statute. The court stressed the point that the tapping had been done by federal agents with no thought of the instant proceedings and intimated that a different result would have followed had the tapping been initiated with respondent in mind. However, subsequent cases ignored the suggested caveat.

In *Martinelli v. Valentine*,[38] New York City police seized six telephones without court order. Defendant sought an order of mandamus requiring the Police Commissioner to return the telephones. The commissioner contended that the telephones were being employed in illegal gambling transactions and that replevin would afford defendant an adequate remedy. The court held that seizure of the telephones was a violation of the New York State Constitution and felt that mandamus provides an appropriate remedy for a wrong that would be continued and condoned if the order were refused.[39]

A case that reached the Court of Appeals involved the application of Section 605 of the Federal Communications Act to a state proceeding.[40] There petitioner obtained a license to cash checks. In a hearing by the Superintendent of Banks to determine whether the license should be revoked, intercepted telephone communications, obtained pursuant to an *ex parte* order, were introduced. Petitioner contended that such introduction violated his constitutional rights as well as Section 605 of the Federal Communications Act. The Court of Appeals held that petitioner's constitutional rights were not violated and that Section 605 was not applicable. Employing a rationale which anticipated a subsequent federal case, the court said:

> The State of New York having provided, by Constitution and statute, certain specific methods by which it may exercise its fundamental power of gathering evidence of criminality and of prosecuting crime, it surely is not to be assumed that Congress intended to circumscribe that power unless it unequivocally indicated such an intent. A Federal statute, it is recognized, must be presumed to be limited in effect to the Federal jurisdiction and not to supersede a State's exercise of its police power unless there be a clear manifestation to the contrary.[41]

In *People v. Appelbaum*,[42] the Appellate Division held that a telephone

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[37] 252 App. Div. 591, 299 N.Y. Supp. 632 (1st Dep't 1937).

[38] 179 Misc. 486, 39 N.Y.S.2d 233 (Sup. Ct. 1942).

[39] The difficulty with the remedy of replevin was the time element.

[40] Harlem Check Cashing Corp. v. Bell, 296 N.Y. 15, 68 N.E.2d 854 (1946) (per curiam).

[41] *Id.* at 17, 68 N.E.2d at 855.

[42] 277 App. Div. 43, 97 N.Y.S.2d 807 (2d Dep't), *aff'd mem.*, 301 N.Y. 738, 95 N.E.2d 410 (1950).

subscriber may determine if his line is being used to his detriment by those whom he permits to use it, and that he may have his line tapped or checked so that his business may not be damaged, his household relations impaired or his marital status disrupted.

A novel attack on public wiretapping was attempted in *Black v. Impelliteri.*[43] In that case petitioner, relying on Section 51 of the General Municipal Law,[44] sued as a taxpayer to enjoin an alleged waste of funds by officers of New York City. He contended that maintenance of equipment for wiretapping was a violation of the federal wiretap statute which superseded any New York policy to the contrary. The court, relying on *Harlem Check Cashing Corp. v. Bell,*[45] held that the federal statute does not extend to contravene state policy to the contrary and, further, that since wiretapping, even if illegal, results in the apprehension of criminals it cannot be regarded as a waste of funds.

The 1957 New York Wiretap Statutes

In 1955 the New York Legislature decided that the time had come for a detailed and dispassionate analysis of the situation as it then existed so that appropriate remedial legislation might be formulated. To accomplish this end the legislature created the Joint Legislative Committee to Study Illegal Interception of Communications.[46] The Committee interviewed people ranging from professional wiretappers to the Police Commissioner of New York City. At length, it submitted a report calling for sweeping changes in the then existing law. Five basic proposals were made:[47]

(1) An amendment of the Penal Law making eavesdropping by instrument illegal as to all private persons including a subscriber seeking to tap his own telephone.

(2) Amendment of the Civil Rights Law to make the disclosure of information or evidence secured through eavesdropping by instrument a misdemeanor and provide both injunctive

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[43] 201 Misc. 371, 111 N.Y.S.2d 402 (Sup. Ct.), *aff'd,* 281 App. Div. 671, 117 N.Y.S.2d 686 (1st Dep't 1952), *appeal dismissed,* 305 N.Y. 724, 112 N.E.2d 845 (1953).

[44] The relevant portion of the statute reads as follows: "All officers, agents, commissioners and other persons acting, or who have acted, for and on behalf of any county, town, village or municipal corporation in this state, and each and every one of them, may be prosecuted, and an action may be maintained against them to prevent any illegal official act on the part of any such officers, agents, commissioners or other persons, or to prevent waste or injury to, or to restore and make good, any property, funds or estate of such county, town, village or municipal corporation. . . ." N.Y. GEN. MUNIC. LAW § 51.

[45] 296 N.Y. 15, 68 N.E.2d 854 (1946) (per curiam).

[46] See MCKINNEY'S SESSION LAWS OF NEW YORK 1519, 1522 (1955).

[47] See REPORT ON ILLEGAL INTERCEPTION OF COMMUNICATIONS, MCKINNEY'S SESSION LAWS OF NEW YORK 1348, 1374, 1375 (1956).

relief and an action for money damages for those whose privacy is invaded.

(3) An amendment to the Civil Practice Act prohibiting the use of evidence obtained by eavesdropping with instrument in any trial or proceedings, civil or criminal, unless a court order had first been obtained.

(4) An amendment requiring the telephone company to provide direct connection between any line authorized by court order to be tapped and law enforcement headquarters.

(5) An amendment to the Code of Criminal Procedure requiring a court order for eavesdropping with an instrument of any kind.

The 1957 New York Statutes as Adopted

The statutory overhauling undertaken by the legislature this year fell somewhat short of carrying out the Committee's sweeping recommendations but nevertheless constitutes a significant change in the law.

Section 813-b of the Code of Criminal Procedure makes wiretapping by a law enforcement officer without a court order a felony punishable by imprisonment for a term of not more than two years.[48]

An amendment to the Civil Practice Act prohibits the admissibility in civil actions of evidence obtained by illegal wiretapping or eavesdropping as redefined in Article 73 of the Penal Law, whether done by private persons or public officers.[49] An exception is made to permit the admissibility of such evidence in a disciplinary hearing or administrative proceeding by or on behalf of any governmental agency. It is to be noted that evidence obtained in violation of the new statutes remains admissible in criminal actions.

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[48] "Unlawful wire tapping by law enforcement officers. Any law enforcement officer, not being a sender or receiver of a telephonic communication, who wilfully and by means of instrument intercepts, overhears or records a telephonic communication, or who aids, authorizes, employs, procures or permits another to so do, without the consent of either a sender or receiver thereof, and without an order as provided for under section eight hundred thirteen-a of this code, shall be guilty of a felony punishable by imprisonment for not more than two years." N.Y. CODE CRIM. PROC. § 813-b.

[49] N.Y. CIV. PRAC. ACT § 345-a. The provision reads as follows: "Eavesdropping evidence inadmissible. Evidence obtained by any act of eavesdropping, as defined in section seven hundred thirty-eight of the penal law, or by any act in violation of Section Eight Hundred Thirteen-b of the code of criminal procedure, and evidence obtained through or resulting from information obtained by any such act, shall be inadmissible for any purpose in any civil action, proceeding or hearing; provided, however, that any such evidence shall be admissible in any disciplinary trial or hearing or in any administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local governmental agency." *Ibid.*

The most important addition to the law involves the enactment of a new Article 73 of the Penal Law entitled "Eavesdropping." [50] The key section of the article proscribes three courses of conduct, all involving eavesdropping by instrument. One clause forbids the overhearing or recording of a telephone or telegraph communication without the consent of the sender or receiver thereof. The second clause prohibits the overhearing or recording of a conversation without the consent of a party thereto by one not present during the conversation. The final clause safeguards the deliberations of a jury from being overheard or recorded.[51] In a separate proviso, one who taps his own phone and who otherwise falls within the terms of the statute is declared to be an eavesdropper.[52]

Under another section of Article 73 possession of instruments commonly employed for eavesdropping, under circumstances evincing an intent to use them illegally, is a misdemeanor. One found in such possession who has previously been convicted of *any* crime is guilty of a felony.[53]

Another section in the article deals with divulging telephone and telegraph company information and impersonating employees.[54] By its terms the following conduct is subjected to punishment as a felony:

(1) Obtaining knowledge of a telephone or telegraph communication by connivance with telephone or telegraph employees.

(2) Divulgence by a telephone or telegraph employee to anyone but the intended recipient of the contents of a message which he has been entrusted to deliver or of which he is otherwise possessed.

(3) Neglect on the part of a telephone or telegraph employee to transmit or deliver messages received, save where they are being used for criminal purposes.

(4) Failure on part of an officer or employee of a telephone or telegraph company to furnish information in his possession relating to unlawful enterprise being carried on through telephone or telegraph employees, to the appropriate law enforcement agency.

The same statute makes it a misdemeanor for one, who through trick, false representation or impersonation, obtains information about

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[50] Laws of N.Y. 1957, c. 881.
[51] N.Y. PEN. LAW § 738.
[52] This is so by reason of the definition of the word "person" provided in Penal Law § 741.
[53] N.Y. PEN. LAW § 742.
[54] *Id.* § 743.

apparatus used in furnishing service or access to telephone or telegraph company premises or installations.[55]

Furthermore, if one makes a disclosure to an unauthorized person of information concerning the granting or denial of an order for wiretapping as provided for in Section 813-a of the Code of Criminal Procedure, he is guilty of a misdemeanor.[56] The legislature also repealed various statutes, including one that had outlawed eavesdropping in the classic sense.[57]

Conclusion

The only ultimate solution to the wiretap problem would be its complete prohibition to public authority and private persons alike. It is always difficult to enforce a law which the Sovereign finds necessary to break.

New York has this year made a significant attempt to eliminate or at least assuage the evils of wiretapping and eavesdropping by instrument. It is felt that two additional, unenacted recommendations of the Joint Legislative Commission should be adopted. One would make injunctive relief and an action for money damages available to anyone whose right of privacy is invaded by the disclosure of information acquired through eavesdropping with instrument. Another would limit law enforcement officers authorized to wiretap to connections effected for them by the telephone company. Such a limitation would make easier the enforcement of prohibitions against wiretapping. With the adoption of these recommendations New York law would become a model for the regulation of tapping in other parts of the country.

It is felt that a re-evaluation of the federal wiretap picture is in order. The controlling statute there is now twenty-three years old and was enacted in an offhanded manner and without any thorough analysis of the problem.

Legislative action should include at least the following:

(1) Prohibition of unauthorized interception of communications by wiretapping or eavesdropping instruments regardless of whether there is a subsequent divulgence.

(2) Authorization of wiretapping by federal agents if a court order is secured.

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[55] *Id.* § 743(2), (3).

[56] *Id.* § 745.

[57] Thus the legislature repealed §§ 552, 552-a and 721 of the Penal Law. Sections 552 and 552-a were substantially re-enacted by §§ 743 and 742 respectively. Section 721, now discarded, had provided: "A person, who secretly loiters about a building, with intent to overhear discourse therein, and to repeat or publish the same to vex or annoy or injure others, is guilty of a misdemeanor."

(3) Protection of the sanctity of the jury room by a provision prohibiting the disclosure of communications emanating therefrom whether overheard or recorded.

THE SUPREME COURT, THE SMITH ACT, AND THE "CLEAR AND PRESENT DANGER" TEST

Introduction

Recent developments in the law have emphasized a need for reconciling the freedoms of the individual citizen with the recognized right of a lawfully-constituted sovereign to protect itself from violent overthrow. Among these freedoms, none deserves greater attention at the present time than the freedom of speech protected by the first amendment of the Constitution of the United States.

Like all rights, freedom of speech ". . . is not absolute at all times and under all circumstances." [1] But to admit that this freedom is not absolute is not severely to limit it. Rather, it is to recognize that there will be times when ". . . restriction . . . is required in order to protect the State from destruction or from serious injury, political, economic or moral." [2]

Occasions for limitation arose early in our history. Soon after our nation had freed itself from England, threats to its life appeared.[3] To meet them Congress passed the much-criticized Alien and Sedition Acts.[4] It was not until 1917 that the next major federal curtailment of speech occurred. This time it was an act which sought to curb interference with the war effort.[5] Forty years later, in 1957, contro-

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[1] Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942). For decisions where abridgements of this freedom have been upheld, see, *e.g.*, Chaplinsky v. New Hampshire, *supra* (statute prohibited addressing others in offensive, derisive or annoying language in public places); Whitney v. California, 274 U.S. 357 (1927) (statute prohibited organization of groups to advocate and teach criminal syndicalism); Gitlow v. New York, 268 U.S. 652 (1925) (statute prohibited advocacy of criminal anarchy).

[2] Whitney v. California, 274 U.S. 357, 373 (1927) (concurring opinion).

[3] One author has estimated that in 1798, when war with France appeared inevitable, there were some 30,000 unfriendly Frenchmen organized into groups within our borders. 1 HARPER'S ENCYCLOPAEDIA OF UNITED STATES HISTORY 101 (1905). For background material on our relations with France during that period, see BASSETT, THE FEDERALIST SYSTEM 218-29 (Hart ed. 1906); Carroll, *Freedom of Speech and of the Press in the Federalist Period; The Sedition Act*, 18 MICH. L. REV. 615 (1920).

[4] Act of July 6, 1798, c. 66, 1 STAT. 577; act of July 14, 1798, c. 74, 1 STAT. 596.

[5] Espionage Act of 1917, 40 STAT. 217, repealed, 62 STAT. 862 (1948).