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FEB 26 1958

Afternoon Session

STATEMENT

F O U R T H P U B L I C H E A R I N G

JOINT COMMITTEE OF THE LEGISLATURE TO INQUIRE
INTO AND INVESTIGATE WIRE TAPPING AND THE
UNAUTHORIZED RECORDING OF SPEECH GENERALLY BY
MECHANICAL OR ELECTRONIC DEVICES OR ANY OTHER
APPARATUS - CREATED PURSUANT TO SENATE CONCURRENT
RESOLUTION NO. 4 (1956)

Held:
Assembly Chamber, State House
Trenton, New Jersey
November 21, 1956

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MEMBERS OF COMMITTEE

Present:

Senator Malcolm S. Forbes, Chairman
Senator Donal C. Fox
Assemblyman Dominic A. Cundari
Assemblyman Joseph M. Thuring

Absent:

Senator Frank W. Shershin
Assemblyman Paul M. Salsburg

APPEARANCES:

Russell T. Kerby, Jr., Esq., counsel to
the committee

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Afternoon Session

SENATOR MALCOLM S. FORBES (THE CHAIRMAN:

We will open the afternoon session of the hearing with the statement and comments of Mr. Patrick Murphy Malin on behalf of the Civil Liberties Union.

We appreciate your being here, Mr. Malin, and will turn over the seat of honor to you.

MR. PATRICK MURPHY MALIN: My full name for the record is Patrick Murphy Malin.

Senator Forbes and members of the staff of the Committee: Both for myself and for the American Civil Liberties Union, I want to express thanks for being allowed to make these comments here this afternoon. They are in extension of the memorandum which we filed through our New Jersey State Correspondent in March of 1955 when the Attorney General and the County Attorneys of the State began their inquiry into this matter and, in order to save your time and be more responsive to the comments already made here today, I would be glad to leave with you, either to read into your record or for such other use as you may want, a sustained analysis of the problem which I did a year ago.

What we tried to do in this analysis was to point up the need, which I should like to stress this afternoon at the beginning, for a comprehensive study of the extent of wire tapping as it now stands, official at the federal and state and local levels, and unofficial, both legal and illegal. Obviously, an organization like our own cannot possibly produce that kind of comprehensive statement, especially as it must rely on a good deal of inside

information.

The second thing we tried to do in the statement which I am handing you was to stress the necessity of a clear understanding of what the mechanics of wire tapping and related techniques are at the moment. I, of course, as a former banker and teacher of money and banking, haven't the slightest ground for independent judgment on the Buck Rogers features that have so much publicity whenever this subject is discussed in the newspapers or the magazines, but it would seem to me highly pertinent for any inquiry such as yours to move somewhat toward elucidating and ventilating that kind of research.

The next thing that we tried to do in this analysis was to depict the stages through which the law and the constitutional interpretation have gone in respect of this particular department of search and seizure. Then I put down as best I could the arguments for wire tapping and related practices and the arguments against them and drew my own conclusions. Those conclusions are, in a sense, dogmatic. I am against any kind of wire tapping - official, unofficial, legal or illegal, but I am against--

SENATOR FORBES: When you say "I", do you mean you, personally?

MR. MALIN: Representing the Union.

SENATOR FORBES: That is the opinion of your organization?

MR. MALIN: That's right. But I want to return to that in a minute because it is instructive to know how we reached

this conclusion on ballots. The conclusion is--

SENATOR DONAL C. FOX: Did you say "ballots"?

MR. MALON: On ballots. The conclusion is a conclusion reached on ballots. Vic Blanc, who identified himself as a member of our Board, in Philadelphia, and I, taken together, typify the kind of balancing act which the American Civil Liberties Union goes through in determining its stand on wire tapping and related practices and, if you looked inside of Vic Blanc's mind and you looked inside my mind, you would find that separately, each of us, goes through that kind of a balancing act in an effort to come to a conclusion, whether that conclusion be on his side of the fence or on my side of the fence.

Now, the last thing I tried to do in this article on behalf of the American Civil Liberties Union was to list the minimal safeguards, as Vic was doing this morning. If you are going to have any kind of official legalized wire tapping, what particular protection to those who may be affected by the wire tapping, incidentally to criminal investigations- what protection should you throw around the practice?

Now, let me just comment on some of the matters that were raised by you in your questioning and by those who appeared here this morning. It seems to me that all of them, as I, were dealing with the whole question of how you determine, at any stage in a country's history or state history, what is a reasonable search and seizure and what is an unreasonable search and seizure. This has been

a problem from the very beginning. It hasn't just cropped up. The framers of the Bill of Rights did not put into the Fourth Amendment a categorical prohibition of any search or seizure. They put in that word "reasonable," which has had to be interpreted by courts ever since. Nowadays, in the middle of the Twentieth Century, as distinct from the latter part of the Eighteenth Century, the circumstances in which that interpretation has to be made as to what is reasonable and what is unreasonable have changed and it is perfectly natural that we go through a lot of agonizing reappraisals, to use a phrase now common in this country's life. It is perfectly natural that we go through a great deal of agonizing reappraisal, both on the law enforcement side and on the side of protection of individual civil liberty.

I am going to be talking, by comparison with Mr. Hogan and Mr. Blanc, in relative intangibles, but I am going to talk about plain symbols by which people live, as well as by the techniques of their individual and corporate life. I do this against a background of a lot of governmental experience, as well as nongovernmental experience, in this country and abroad in administration. From 1924 to 1954, the first 30 years of my adult working life, I spent a great deal of it abroad in countries that are still flourishing democracies, in some that were then flourishing democracies and now are decadent democracies, in some that were already allegedly dictatorships, and in some that were consolidated dictatorships - all the way from the Volga to Caracas - and what I say comes possibly against a background of that kind of experience in law enforcement and individual liberty.

I don't happen to be one of the alarmists; I don't think that because we have in six of our States, for example, legalized official wiretapping, that we are on the brink of fascism or whatever; I just don't believe that. There are too many components in American life resisting any pell mell defense into disaster, but we always have to worry about any individual component that departs from strict individual liberty. This is a field in which it is very difficult for a layman to be at all sure of himself. We just don't have, yet, comprehensive evidence gathered, disclosed, clear, as to the extent of official, unofficial, legal, illegal wire tapping. You heard this morning from men who talked from the inside that what they have, at best, were informed guesses as to how much there is. The investigations that were spoken of, undertaken, for example, by the American Bar Association and the Police Chiefs' Association and the County Prosecutors' Association--- all of those investigations ought to edge us measurably toward knowing what degree of dependence there is now, or perhaps should be, in the view of Police Chiefs and Prosecutors and other law enforcement officers, on what kind of detection, both with respect to the gathering of clues and with respect to the gathering of evidence.

Now, as we assemble, and we are in the earliest stages of assembling that kind of information-- as we assemble that kind of information, we have to test it at each stage by its cost. Every last one of us would rally sympathetically and thankfully to the demonstration that Mr. Hogan gave, for

example, of the results, salutary to a decent society that have flowed in his experience from the use of these techniques of gathering clues and gathering evidence, but of course he, as a professional, is no more equipped than I or than you to weigh the costs in terms of society in the use of such techniques. We can be delighted at the ostensible and immediate results and still have to test what it does to a free society under a democratic government to have that kind of elastic interpretation of the constitutional provision for reasonable searches and seizures.

I suppose you all remember that in the Olmstead case, in 1928, a wiretapping case in the prohibition enforcement context, Justice Brandeis, in dissenting, didn't use the "Holmesian" phrase "dirty business." He said that the right most prized by civilized man is the right to be let alone. Now, here is an extension of the Fourth Amendment insistence on reasonable searches and seizures. What Brandeis was pointing to was the forgotten amendments, the ninth and the tenth.

SENATOR FOX: And he went on to point out severally the electronic devices that are now in existence--

MR. MALIN: That's right.

SENATOR FOX: And that might take place.

MR. MALIN: He was speculating accurately at that time, and the amendments that he really was pointing toward as being the core of the American free society in democratic government, the ninth and tenth, are very brief. They almost never get referred to and I would like

just to refer to them here: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

The tenth: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Now, this is the whole theory of the American Government, that the Government isn't the original repository of power, conferring it on the people. The Government gets what share of power it does get by limited, enumerated delegation from the people. Well, Brandeis is talking about that kind of thing. It is not just search and seizure; it is a matter of the quality of the society which surrounds the necessary delegation of law enforcement power. I'll bet dollars to doughnuts that we have to delegate more in 1956 to our police and prosecuting authorities than they have had to delegate in 1791. I just haven't much doubt on that. I grew up in Joplin, Missouri - the southwest corner of the State, in a town of 35,000 people. The police methods of that time and place would be quite inadequate where I live now, at the corner of Eighteenth Street and Eighth Avenue in New York. There is no question about our having to redefine the delegated power and the limit of reasonable search and seizure, but at each step of the way you have got the problem of making sure that the game is worth the candle and to test yourself, not just by criminals apprehended and convicted, though this is a highly important

component in the complex society, but you test yourself by the other things that happen flowing from the methods that you use.

I am not only grateful for the result which District Attorney Hogan and Vic Blanc obtained in combatting organized crime and official corruption, but knowing both of them, one of them very close at hand, I am also grateful for the limit that they put by scrupulous conscience on the methods which they employed, and I have, as you might guess, an ethnic affinity for all metropolitan police; they are always named Murphy or Monahan, Kennedy or Hogan, and I have, in addition to that affinity, a respect for the insuperable obstacles that they confront. Here are men, most of whom none of us ever know in personal acquaintance; here are men whom we hire to do what we take for granted; namely, the preservation of rudimentary order. These men are understaffed as a whole, they are underpaid, they are under-instructed, and then, when anything goes wrong, either on the side of law enforcement or on the side of civil liberties, we hold them up instead of holding ourselves up, and it is holding ourselves up that I am interested in doing in the remainder of this time. I think that the police have to make use of guile as one technique, whether mechanically or not, in combatting something that I should hate to have to be responsible for combatting in a metropolitan area, but I am quite unashamed to say that I want, as a citizen - and I'll bear my share of the cost of this - I want, as a citizen, something else too, beside efficient police and prosecution work.

I am the father of three college athletes, who are honest. I am delighted when Frank Hogan gets rid of dishonest purveyors of college athletics. I am a banker by origin and a teacher of money and banking, and I am delighted when Frank Hogan gets rid of securities bought. Of course, I am. But I want also something else from my society. I want a society which is open and confident in the minds of people who aren't criminals, and here I want to refer specifically to one of Frank Hogan's statistics. He said, in response to one of your questions, that around 50 per cent, he would guess, of the applications for wire tapping granted did not result in any apprehension for crime, that out of some undeclared percentage of that per cent, he got clues as to other crimes. What came out of the remaining percentage, of course, neither he nor anybody else can guess.

Now, I am mindfully and unashamedly worried about that percentage of non-utility. I would be in some measure worried about the technique of wire tapping and related techniques even if I were assured that out of every single one of the wire taps there came some evidence or some clue directly related to the originally-suspected crime. I would be worried somewhat anyhow for reasons I'll mention in a minute, but I am particularly worried when a man as sober and as conscientious and as reasonable as Frank Hogan has to tell us that 50 per cent of the granted applications issue in nothing directly related to the crime, to get evidence on which they were instituted. Now, police people,

prosecutors, are just like you and me - if a technique fails to produce what they think it ought to produce or is going to produce, they naturally want to justify it by its incidental by-products, but in American law this is no justification, and in a free society it represents a temptation to fishing expeditions which have the embryo of police state in them.

Once again let me remind you that I am not talking now about alarmism. I don't think this is around the corner, but I didn't live in Russia and Germany and Italy and Spain, and assorted South American countries, without realizing that one of the ways by which you begin to open the door to irresponsible officialdom is by this kind of post-facto incidental justification of a police method. I think that the question of how in the world you total up the abuses - several of you kept asking that this morning - how you find out whether there are abuses even within a restricted system - this question is one that you have to keep probing on. Most of the people who know of abuses don't talk about them, and those who don't know of the abuses may nonetheless have had abuses practiced against them. We are dealing here with something that lay people, and if I may include you momentarily among them, lay people like us, have not yet come to grips with. But leaving the gross aspects of this aside, leaving the abuses with a capital A aside, I would remind you of the sort of thing that J. Edgar Hoover was talking about in 1940, when the Department of Justice abandoned, for a few years, wire tapping even on the federal

level, even with respect to espionage and kidnaping. At that time, Hoover, in reporting to Congress why he had abandoned the use of this technique, said that discredit and suspicion of the law enforcing branch which arises from the occasional use of wire tapping more than offset the good which is likely to come of it. In a democracy, for all of its rough and readiness, there has to be some kind of correspondence between the practice of officialdom and the ethical standards of the people, and if there is a repugnance on the part of the people generally to a particular law or method of law enforcement, you muddy the waters of official efficiency. And that was the sort of thing that J. Edgar Hoover was talking about then. He later came to feel, as you all know, that he had to revert to the use of wire tapping in the great federal crimes of espionage and kidnaping.

I want to conclude by mentioning something that I, as a citizen, have got just as much authority to mention as the authority that I have quoted in his official connection: I want to talk about the indiscriminate, the necessarily indiscriminate character of wire tapping and similar techniques. A public telephone station is of course a prime example, but it doesn't have to be limited to that. Whenever a wire is tapped, you tap perforce the wires of those who are called or who call that wire during the duration of the tap. Now, some of those conversations may be suspects or criminals; also, some of them may be innocent as to subject matter and as to personnel, and yet they go into the record, and the record now is not typically

made by somebody sitting at the end of the tap with a pencil and writing down the conversation in shorthand; the record is made by a tape recording device. And those of you who are lawyers know what an increase in the problem of false records there is because of what can be done to a tape recording of these things. I was aghast when I began to learn what you could do by deletion, what you could do by insertion, what you could do even by the change of syllables; I still don't quite understand how that is accomplished, but I am reliably told that that can be accomplished. I worry about a government which piles up dossiers of any sort on people in general; I worry particularly about a government which piles up tape-recorded conversations susceptible both of the troubles that any raw material is susceptible of and susceptible of theft, even with the safeguards that Vic Blanc and I would offer as the minima; even with the safeguards, note the troubles he has got. One of his staff, or maybe more than one of his staff, while he was not there, released to the newspapers the records of conversations involving people not connected with the matter under inquiry at all, but people who nonetheless over night were subjected to the derogation that comes through being publicized in any connection with a criminal case.

I am in the company of the Wall Street Journal in this matter. The Wall Street Journal has put it that there are many methods in every age which the police might employ to make their job easier and our protection from crime more effective, but one of the hallmarks of a free society under a democratic government is limitation, not without risk, but

in a choice between risk and among the things on the side of absolute prohibition, it seems to me, though I say this by a thin whisker of preference, among the things on the side of absolute prohibition is this plain symbol of living without a dossier, a police force recording conversation indiscriminately.

SENATOR FORBES: Mr. Malin, do you have copies of your statement?

MR. MALIN: The one I have just now made, I did during the noon hour, in order to be as responsive as possible to this morning's comments, but this is the one that I was referring to as having been prepared.

SENATOR FORBES: We are very grateful to you. Does anybody have any questions? (No response)

Well, thank you very much. We appreciate your comments and your presence here today.

Now, we would like to hear from and I will call on the members of the Prosecutors' Committee. I had been under the impression initially that the Committee desired to be heard on behalf of the Prosecutors. I gather that that is not necessarily so, but as long as you are here, the members of our Committee would be interested in asking a few questions of the Prosecutors present in connection with some of the comment and testimony made here today. I will call on Mr. Vincent P. Keuper.

Mr. Keuper, you are Prosecutor of Monmouth County and Chairman of the Prosecutors' Committee or Association?

MR. VINCENT P. KEUPER: Of the Committee, yes, sir.

SENATOR FORBES: In the first place, do you believe that you need to have wire tapping to enforce the laws in Monmouth County?

MR. KEUPER: In some cases, yes.

SENATOR FORBES: Would you specify, please?

MR. KEUPER: Well, I know of a case now, an abortion case, that we would like to break if I had the use of a wire tap, and I know of several bookmakers who are operating and whom I can't catch without wire taps.

SENATOR FORBES: Have you ever used wire taps in Monmouth County?

MR. KEUPER: You mean, have I ever used them?

SENATOR FORBES: Have they ever been used to your knowledge?

MR. KEUPER: Not to my knowledge, no.

SENATOR FORBES: Do you feel that Monmouth has a higher than normal crime rate, or that you have any--

MR. KEUPER: No. Oh, no.

SENATOR FORBES: Aside from the abortion case and the bookies that you mentioned, do you think that there is a question of wide-spread or syndicated crime in Monmouth County?

MR. KEUPER: No, there is not.

SENATOR FORBES: My recollection is that you have a very high rank in terms of not having a lot of crime.

MR. KEUPER: Thank you very much.

SENATOR Forbes: And you have been able to achieve this without wire tapping?

MR. KEUPER: Yes. We have been able to make raids on certain bookies but there are some that we know are operating and if we had the use of a wire tap, we could probably lay the foundation for the issuance of a search warrant and raid the place.

SENATOR FORBES: Are there any others besides those and the abortion case you mentioned?

MR. KEUPER: No, they are the only two crimes now where I feel it might be needed at the present time.

MR. KERBY: About how many times a year do you feel that wire tapping would be useful to you?

MR. KEUPER: I can't tell that.

MR. KERBY: I mean, in the last year.

MR. KEUPER: How many times during the year?

MR. KERBY: You say, perhaps twice at the present time.

MR. KEUPER: There are two classes of crime; the crime of abortion, I know of one right now where, if I could tap the wire, I could get any information I need to make an arrest.

MR. CUNDARI: Why don't you do so, Mr. Prosecutor?

MR. KEUPER: Why don't I do so? I don't think I am entitled to.

SENATOR FORBES: So that, as far as a practical matter in Monmouth County is concerned, you feel there are only two instances, the type of thing you have mentioned, where wire tapping would be helpful to the prosecution of specific crimes.

MR. KEUPER: I mean, presently. I don't know what may come up in the future.

SENATOR FORBES: But in the past years you feel that Monmouth has been able to achieve a reasonably high level of law enforcement without wire tapping?

MR. KEUPER: Yes.

MR. CUNDARI: Mr. Prosecutor, under your interpretation of the present statute, I understand that you don't think you are entitled to or privileged to conduct a wire tap.

MR. KEUPER: Well, let me qualify that: I take the same stand that our Attorney General takes. I don't think any Prosecutor should put himself in a position where he may be subjected to criminal prosecution. Now, I am familiar with the wording of the present statute, and I don't think that any Prosecutor who used it would do so wilfully or maliciously.

MR. CUNDARI: Even though you felt that you had every right in the world to do so and that an indictment would not lie, you wouldn't do it?

MR. KEUPER: I would not do it, no. If I had to subject myself to criminal prosecution, I would not do it. I think it would weaken my prestige as Prosecutor.

MR. CUNDARI: You also include eavesdropping as well as wiretapping in that general category?

MR. KEUPER: Yes.

SENATOR FORBES: Are there any questions from the committee members, or have you any comments you would like to make, Mr. Keuper.

MR. KEUPER: No. I just wanted to clarify this misunderstanding that I think occurred between you and me, that this Committee was formed only for the purpose of having presented to this Committee a program or a suggested list of witnesses that we may suggest to be called for the purpose of presenting the law enforcement agency side of this picture.

SENATOR FORBES: Right. Which is what we have done.

SENATOR FOX: What do you mean by that, Mr. Prosecutor?

MR. KEUPER: Well, we didn't know whether or not you were going to call such men as District Attorney Hogan, who has had experience in the use of wire tapping, or District Attorney Silver of Brooklyn or Victor Blanc of Philadelphia, but you have called them and that answers the purpose of our committee being formed.

SENATOR FORBES: There was one reason, frankly, that some of us were anxious to talk to the Prosecutors here present, and when you arrived this morning there was no feeling one way or another as to whether we would or not, but I think that one of the conclusions that people might have arrived at in the State of New Jersey, on the basis of the comments by both the District Attorneys of our two neighboring key cities, particularly the gentleman from Philadelphia, was that they rely for law enforcement almost entirely, or to an immense degree, on wire tapping.

MR. KEUPER: Yes, because there is no prohibition--

SENATOR FORBES: Right. We in New Jersey have

I think, a high level of law enforcement without wire tapping. That's not to say it wouldn't, maybe add to the percentage or be a great help, but the implication is that without it, crime might be running rampant. You are responsible for the county and I was wondering whether you felt it was running rampant without wire tapping, and it boils down to two specific instances that you have in mind now - not to preclude the fact that there might be others from time to time, where it would be very helpful and without it you feel handicapped - one the case of a bookie and the other a specific abortion case. But in years past you don't feel that it has hampered a high degree of law enforcement in Monmouth County.

SENATOR FOX: Well, Mr. Prosecutor, summing it up, you are in accordance with the view of Mr. Hogan and as outlined by Mr. Blanc, is that correct?

MR. KEUPER: Yes, sir, I am.

SENATOR FOX: In accordance with the views of Mr. Hogan and Mr. Blanc, the use of wiretapping and electronic devices can be helpful as far as the enforcement of criminal law is concerned, but you feel that it should be strictly regulated.

MR. KEUPER: For the detection of crime, yes.

SENATOR FORBES: I would imagine that there is nobody in their right mind who would argue that it would not be helpful in the detection of crime. The question of course is a broad one as to whether or not it is so helpful that it outweighs the threat to civil liberties, and so forth. That is the basic question, I should think.

As far as being helpful, everybody would agree that it probably would be.

MR. CUNDARI: Just one question, Mr. Chairman: You seem to have placed a lot of emphasis on the fact that the District Attorney of Philadelphia uses wire tapping to a high degree and that in your county it doesn't necessarily follow that you have to use it except in these two isolated cases that you told us about. I can't seem to fix in my mind why the necessity arises in Philadelphia to use wire tapping so extensively and here in Monmouth you don't require wire tapping.

MR. KEUPER: Well, Monmouth County is a rural county. We don't have the amount of crime that they have in the large city of Philadelphia.

MR. CUNDARI: Well, Mr. Hogan spoke about New York State where they have judicial legislation covering how extensive the wire tapping should be in his experience so that he doesn't have to utilize it too much. I can't see the connection.

MR. KEUPER: There is no comparison between Monmouth County and the City of New York or the City of Philadelphia.

MR. CUNDARI: But there would be between New York and Philadelphia.

MR. KEUPER: I would say so, yes.

MR. CUNDARI: One uses wire tapping extensively in order to obtain convictions and New York City doesn't have to utilize wire tapping.

MR. KEUPER: Now, you must go back to Mr. Blanc's statement this morning that Pennsylvania does not prohibit

wire tapping and in New York they have to apply for an order.

SENATOR FOX: Yes, but Mr. Blanc also said he thinks it should be surrounded by very stringent regulations.

MR. KEUPER: That's right, yes.

SENATOR FORBES: Well, thank you very much, Mr. Keuper. We appreciate it a lot, and is your Vice Chairman here.

FREDERICK T. LAW, Prosecutor of Hudson County:
Mr. Chairman--

SENATOR FORBES: You are the Vice Chairman of this Prosecutors' Committee?

MR. LAW: Well, I am a member of the Committee. I am not sure I am Vice Chairman but I am a member.

SENATOR FORBES: Well, one thing I wanted to ask was the same sequence of questions: In your case, you do have a very large city in your jurisdiction. Do you feel that syndicated and organized crime runs rampant in your bailiwick?

MR. LAW: Well, Senator, first, I think we have a number of large cities and I think the whole county is rather heavily populated. I don't think we can limit it only to the larger cities.

SENATOR FORBES: Well, I meant the metropolitan area.

MR. LAW: That is correct, Senator. And, secondly, you asked about crime, I hope, and as far as I have been able to-- I hope we do not have any crime wave as you indicate or that it is syndicated. Our biggest problem, very frankly, ever since I have been in office, has been the bookmaking or the gambling problem, and we have had any number of

matters, both as referred to by the Attorney General and by anonymous letters, and things of that nature, indicating that there was gambling. I keep a staff working on it and at times we are frustrated. I think every law enforcement officer is. The bookmaker particularly now knows that he can use the telephone with rather perfect safety and he knows we can't do a great deal about it, so he uses that method, and it would help very materially in our county if I could-- now, I don't mean by that that we would eliminate it. I think it's like sin - I don't think you are ever going to eliminate crime, but I do think it would be a tremendous weapon in the hands of a law enforcement agency.

SENATOR FORBES: You put particular emphasis on book-making?

MR. LAW: I do, because I think that particular problem has faced Hudson County and is the one that there has been a great deal of criticism about, and it seems to be the one that I get the most complaints about both from the citizens and from the Attorney General's Office. Now, I think it would be most helpful in other cases. Of course, it is terrifically hard to evaluate it when you have never used it and how valuable it would be to you. I listened with a great deal of interest to what was said here this morning by the District Attorney from New York and from Philadelphia, and there isn't any question in my mind that it would be a big help in other types of cases. How much, I frankly don't know until we have had an opportunity to use it.

SENATOR FORBES: Well, in terms of New York, Mr. Hogan's bailiwick, which considerably exceeds the size of Hudson County in concentration of population problems, focal point, pressures, etc., in the gambling field, for instance, in the statement that he gave us here this morning, they have only used it in 37 cases, pertaining to gambling.

MR. LAW: Well, Senator, if I may correct you, I don't think that was his statement. I think he said that the Prosecutor's Office, or the Attorney General's Office there-- or I mean the District Attorney, didn't bother with that particular phase of it; he left that to the local police.

SENATOR FORBES: Organized is what I meant.

MR. LAW: Organized.

SENATOR FORBES: He used the term organized or syndicated gambling.

MR. LAW: Organized or syndicated, but he left the average bookmaker, or the little case, to the local police, I think he indicated.

SENATOR FORBES: Is that the system you use?

MR. LAW: No, no, we don't use that system. We try to use it and, where we feel that the local police haven't done a sufficiently thorough job, we try to supplement it and both work with them and in addition to them.

SENATOR FORBES: Do any other members of the Committee have any questions?

MR. CUNDARI: I would like to know if he would recommend, as Mr. Hogan does, as District Attorney of New York, judicial coverage on this--

MR. LAW: Yes, by all means, and I think the meetings that we have had with the Prosecutors over the past four years where we have discussed this matter - I think all of them more or less agree that there ought to be very stringent rules and regulations placed by way of legislation and that it should only be permitted where, shall we say most all other means fail, and that seems to be the only method that you can use to get the information that you need, or where the crime is sufficiently important or where the problem is sufficiently important. I wouldn't limit it to the crime itself; I think that where a problem such as gambling can become a great problem-- I think in those cases, upon proper application, it would be helpful. I think the last suggestion we had was even a further limitation than anything that has been said here today, to make it only members of the Supreme Court and the Assignment Judges of the various counties and make them the only ones able to sign an order to permit this wire tapping.

SENATOR FORBES: To your knowledge, has wire tapping ever been used in Hudson County in law enforcement?

MR. LAW: To my knowledge, it has never been used; I have never used it; we don't have any sort of recording devices of any type. We have never used it.

SENATOR FORBES: One other thing: I guess you were there at the meeting when we discussed this once with the Attorney General-

MR. LAW: Yes, Senator, I was there.

Senator Forbes: It is perfectly understandable, with the immense responsibilities that any Prosecutor has, as pointed out in connection with the presentation that you have just heard, that you need every tool and want every tool to carry out that responsibility; you get brickbats in both directions. However, taking a broad aspect and aside from your own responsibility in your job, what is your comment on the civil liberties aspect of it, the invasion of privacy, the possibilities of abuse outweighing the virtues of the convictions that may result?

MR. LAW: Now, Senator, I presume you are asking me my person opinion?

SENATOR FORBES: Yes, your opinion.

MR. LAW: I have given a great deal of thought to this. I think, as has been stated here a number of times today, there are times in any society when it is necessary that certain private rights must give way to the general good of the public, and I feel today that we are living in a more modern society and when you know that criminals have certain weapons, I think you have to give law enforcement officers the same type of equipment to catch the people that they have in order to perpetrate the crime. I mean, there are abuses with guns and we all know it, but we wouldn't think of sending the police out without guns just because there have been abuses of it. I think that is one of the weights that have to be measured in order to determine this and, so far as I personally am concerned, I think that under proper supervision wire tapping should

be permitted where the court feels that it's justified.

SENATOR FOX: Would you say that it ought to be limited to high misdemeanors?

MR. LAW: Well, no, I don't say so necessarily. I think crime can be on a lower level and be more of a problem sometimes than on a higher level, if I may state it that way, Senator. For example, I say to you that I don't think there is a great moral issue perhaps in bookmaking, yet it is a tremendous problem to us, and I think wire tapping would help to eliminate that problem. So, therefore, I am not using the degree; I am using more of the problem that faces a particular county, and in Hudson County it has been one of our big problems, and that is where I think I would ask for it the most, because we have more complaints there.

SENATOR FORBES: If there are no other questions, I would like to thank you very much.

Mr. Calissi?

GUY CALISSI, Prosecutor of Bergen County, takes the stand.

SENATOR FORBES: Mr. Calissi, with the same things in mind in terms of the extent to which you feel you have a problem of law enforcement in Bergen County which would be insolvable without the use of wire taps, would you comment on that? I mean, would you comment on that general thing in terms of your own specific experience. It hasn't been legal, or at least ^{general} in/use - we will put it that way. Do you feel unable to cope with crime in your bailiwick by virtue of not being able to tap wires?

MR. CALISSI: Well, Senator, it is not a question of being able to cope with crime; it's a question of how quickly and how efficiently you can cope with a particular crime. I am speaking specifically of bookmaking. I think this Committee knows the background of Bergen County and the investigation and, not to be egotistical, but it has been changed, not totally due to my efforts or the efforts of my office, but others who were there before me, and the so-called big bookmakers are, in my opinion, not operating in Bergen County to any degree.

SENATOR FORBES: Has wire tapping been used to bring that about?

MR. CALISSI: No, sir, but I want to be fair and say that I don't think those people have gone into legitimate businesses. I think what I have accomplished and those before me have accomplished is to just have them move from one county to another.

SENATOR FORBES: Where are they now?

MR. CALISSI: Well, I can't be sure, so I shouldn't really give an answer to that question, if you don't mind. I am not positive. I have an idea where they are.

SENATOR FORBES: Where do you think?

MR. CALISSI: Well, frankly, I think that some of them have moved into poor Prosecutor Law's bailiwick.

SENATOR FORBES: He seems to confirm that.

MR. CALISSI: The only proof that I have here is that in several cases, when we questioned persons suspected of bookmaking, they gave us telephone numbers which were

Hudson County numbers.

SENATOR FORBES: Do you think the same methods you used to run them out of Bergen County could be effectively applied to the rest of the State to run them out of New Jersey? Short of a wire tap?

MR. CALISSI: Well, it would just be a question of ring around the rosy. I am just wondering when they are coming back to Bergen, frankly, because these fellows never stop and they are very, very intelligent people and if they had gone into legitimate businesses they would have all been, in my opinion, industrial tycoons. You are not dealing with morons and they are a certain segment of our population who just want to make a living in that fashion.

SENATOR FORBES: Do you think that being able to use wire tapping has eliminated bookmaking and organized gambling in New York City and Philadelphia?

MR. CALISSI: Well, I can only go by the testimony I heard this morning, Senator, from District Attorney Hogan. All I know is that some of the information which I received from New York involving bookmaking, and which I presume came as a result of wire tapping, has been of assistance to me. In fact, on Thursday of last week, I made a raid on a place in the southern part of Bergen County on information received from New York, from Commissioner Kennedy's Office, which was a place I had been working on a long time. Now, I confess that when we got down there, we found nothing, but on the strength of the fact that Commissioner Kennedy had given me the information - well, now, don't laugh, Senator - we got

an indictment because we visited the plants surrounding this particular establishment, we questioned some of the people, and finally got one fellow to admit that he had made one bet at this place and, after working three or four hours, - it so happened that the Grand Jury was in session that day - we brought him up before the Grand Jury and we got evidence. Now, if I had made that particular raid and found nothing, without any corroboration of the fact that something was there, I would probably stop, because if I had no confirmation I would figure it was another one of these cases where somebody gave us information that wasn't accurate.

SENATOR FORBES: Tell me this: You and your colleagues have all emphasized that one of the key problems where you feel wire tapping is most important is in the field of book-making and gambling.

MR. CALISSI: Well, it so happens that there are a lot of bettors in Bergen County, I will say, and in other parts of New Jersey--

SENATOR FORBES: And I assume in the entire State.

MR. CALISSI: Yes, and it does become a problem because there are a lot of people around who make their living on that type of an operation, and we are so close to the metropolitan area that they feel that Bergen County, for example, is a perfect field for people who like to place their money on horse bets, basketball games, football pools, and the like.

SENATOR FOX: Well, Mr. Calissi, what Senator Forbes I think is driving at is this: The emphasis seems to have

been placed on bookmaking. I think, if I am not mistaken, he would like to get observations with respect to other crimes.

SENATOR FORBES: Yes, that's right. What we are trying to get at is this: There is, many of us feel, and I think it is probably wise, a statute on the books that presumably outlaws wire tapping in this State and that, while it may be a convenient and a useful tool in most of these instances we have heard about, in bookmaking and gambling, in providing leads and probably doing a more thorough job of rounding them all up, is that outweighed in your mind by the potential abuses. You are not unaware that sometimes Prosecutors and Judges emerge from the field of politics and that there are potential abuses that make most people leery of wire tapping; why there is this long judicial history of comment about it, and why the courts view it apparently with some suspicion, and so forth. Do you think that the convenience that it might be to you in rounding up certain bookmaking cases outweighs the possibility of abuse in this whole field of civil liberties?

MR. CALISSI: Yes, I do, Senator, providing there are very rigid safeguards in the obtaining of the order for wire tapping. Like the other Prosecutors, I am just as much interested in the safeguarding of the right of privacy of individuals as anyone else, and I believe that with rigid restrictions, we could get, for example, in bookmaking cases people whom we haven't been able to get; now, by that I mean,

when you make a raid in bookmaking cases, you don't get the banker, because the banker is the smart fellow who is never around; you get the little fellow, the sitter or his aider and abettor, but the real big man is usually some place else, and there is a peculiar loyalty that exists in that kind of society and you just don't get those people and they will go to jail rather than give you the name of the top man or the top men involved. I think, with the proper supervision and very rigid control, it would be of assistance.

SENATOR FORBES: And it outweighs any possibilities of abuse?

MR. CALISSI: It would outweigh any possibility of abuse if the rigid, proper safeguards were part of the laws. There is a certain amount of faith, I think, and confidence that the people have to have in the persons who have been appointed Prosecutors, and there are all kinds of abuses that can take place in the enforcement of the law, and it is only when you have people who are people of integrity and people who know what the American system of government means, and it's possible that you won't have those abuses. I am sure that none of the Prosecutors want wire tapping for the purpose of finding out anything else than that someone is committing a crime. I am sure of that. We don't have time.

SENATOR FORBES: Are there any other questions? If there are none, I guess this concludes the hearings. In winding up, I would just like to reiterate to you that I certainly admire the sentiments you have expressed and

to the other Prosecutors, the point being that the Committee's whole approach to this problem of wire tapping has been one, under directive, to determine if there was wire tapping in the State of New Jersey and thereby the adequacies of the State laws and whether or not they should be broadened, expanded or changed, and in the conduct of these hearings and this whole investigation that has been the objective, and not to arrest, harass, or persecute law enforcement, but to deal with the problem that on the statute books, at least, the question has arisen as to whether it is adequate or should be expanded, and I hope that you and your colleagues understand the Committee's motivations, and we have been appreciative of the help that has been provided.

MR. CALISSI: Well, I certainly do, but may I say this, that I don't think that this Committee or any law is going to prevent those persons who are illegally using wire tapping. Suppose you should pass a law which will permit wire tapping under certain restrictive conditions. I'm sure that you will agree that those persons who want to use wire tapping illegally aren't going to be deterred in any way by the passage of any law.

MR. CUNDARI: Do you think there is much of that being done?

MR. CALISSI: I don't think so.. I think some of the hoodlums who are using the wire tapping, and I don't have any direct evidence but I have circumstantial evidence based on the fact that I get certain information, and I am

the only one who knows about it, and I don't talk in my sleep, I'm sure of that, and I am sure from circumstantial evidence that my wire has been tapped on occasion, and those people won't stop no matter what kind of a law you impose, so what you are doing, I think, is permitting the people who are enemies of society - not permitting them - but they will continue and you will be depriving law enforcement officers, and I say again, under rigid safeguards, to use an instrument which will be of help to society in general.

SENATOR FORBES: In other words, you do concur then that, in your opinion at least, I'll put it that way, wire tapping does exist in the State of New Jersey.

MR. CALISSI: I don't have any direct proof. I say from circumstantial evidence, I believe--

SENATOR FORBES: Well, illegal. What I mean is that your reference is not to law enforcement agencies, whether legal or not; it is used by other people, private citizens.

MR. CALISSI: That's right.

SENATOR FORBES: For no good purpose.

MR. CALISSI: For no good purpose at all.

MR. CUNDARI: Well, may I direct one question: You heard the testimony of the Prosecutor from Monmouth that he would under no circumstances allow a wire tap because he didn't want to be subjected to a possible indictment. I assume you must have read about the testimony of the Prosecutor from Union County where he did engage in a tap on several occasions, subjecting himself to indictment. Do you subscribe to the Prosecutor from Monmouth's viewpoint, who agrees with the Attorney General of the State?

MR. CALISSI: I do. I definitely do.

MR. CUNDARI: And you wouldn't, under any circumstances, though you had all possible reason to stop a certain crime which was to be committed and could do so by wire tapping, you wouldn't do so because you would subject yourself to indictment?

MR. CALISSI: To a possible indictment and, if not an indictment, to a lot of adverse publicity. I mean, the law might be ambiguous at this particular point.

SENATOR FORBES: In your opinion, is the law ambiguous now?

MR. CALISSI: I think it is ambiguous, yes, I do think so.

SENATOR FORBES: So that, if we intended it to prohibit wire tapping - now, this isn't asking you to concur in that conclusion or say that we have arrived at it, but if this law is intended to prohibit wire tapping, you feel that its present language doesn't do that?

MR. CALISSI: I do not. I think the inclusion of the word "malicious" leaves room for interpretation.

MR. CUNDARI: Such interpretation, however, which you wouldn't care to take advantage of.

MR. CALISSI: No, I wouldn't take advantage, no, sir.

SENATOR FORBES: Well, thank you very, very much, Prosecutor. We certainly appreciate it, and, as we conclude the hearings I would like to thank all of you who have testified here today, and we will wind up the fourth open hearing.

HEARING CONCLUDED.

Is Wire Tapping Justified?

By PATRICK MURPHY MALIN

THE Fourth Amendment to the federal Constitution reads: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

In 1928, in a dissenting opinion from within the minority of four in the *Olmstead* prohibition wire-tapping case, the late Justice Brandeis said: "The makers of our Constitution . . . conferred, as against the Government, the right to be let alone—the most comprehensive of the rights of man and the right most valued by civilized men."¹ He had not forgotten what often seem to be the most forgotten amendments, the Ninth and Tenth, which not only conclude the Bill of Rights but also succinctly declare the American faith in a free society with a limited government: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people" and "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

But in 1954, Attorney General Brownell posed this question: "How can we possibly preserve the safety and liberty of everyone in this Nation unless we pull Federal prosecuting attorneys out of their strait-jackets and permit them

to use intercepted evidence in the trial of security cases?"²

In dealing with this problem, I shall first refer briefly to the extent and mechanics and legal status of wire tapping. Then I shall outline the arguments for and against legalized police wire tapping, and my conclusions.

EXTENT AND MECHANICS OF WIRE TAPPING

No one knows how much wire tapping there is—official and unofficial, legal and illegal. But occasional formal and informal revelations—of which the most recent widely publicized one is that of the privately organized New York City Anti-Crime Committee—indicate that each day there are many thousands of wire taps in operation throughout the country, most of all in the larger cities.

As for mechanics, it is apparently still true that there is only one way to tap a telephone secretly, and that is by having an expert cut into the wire itself some distance from the instrument. But there are already electronic devices which, despite difficulty of concealment and other imperfections, considerably facilitate the practice. And the phone tap need not now have a listener taking notes, but may be connected to an automatic wire recorder. A recording can be edited by deletion, rearrangement, or even addition of words or even syllables; and thus may increase the problem of false evidence to terrifying proportions. But I am dealing here,

² "Statement by Honorable Herbert Brownell, Jr. . . . Prepared for Testimony before a Subcommittee of the [Senate] Judiciary Committee, April 20, 1954," p. 3.

¹ *Olmstead v. United States*, 277 U. S. 438, 478 (1928).

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not with that related problem, but with wire tapping itself, even if the evidence is accurate and fair.

LEGAL STATUS

Consideration of the legal status of wire tapping may begin with the 5 to 4 decision of the United States Supreme Court in the 1928 *Olmstead* case, which held that official federal wire tapping did not violate the Fourth Amendment, and that evidence so obtained could constitutionally be used in federal courts. In handing down that decision, the late Chief Justice Taft said: "The Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants."³ Literalism won, but by a slim margin, and not for long.

Opposition to that decision, as to prohibition enforcement practices generally, led Congress, when it passed the Communications Act of 1934, to provide in Section 605 that ". . . no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, meaning, [etc.], of such intercepted communication to any person. . . ."⁴

That is still the law, and on its basis the United States Supreme Court has held that wire tapping—though not unconstitutional—is illegal and that evidence so obtained (or even evidence obtained upon clues discovered by wire tapping) is inadmissible in federal courts. The Supreme Court has also held that Section 605 extends to intrastate communications, and thus would seem to have made assurance doubly sure that even such wire tapping as is authorized by the laws of a half-dozen

³ *Olmstead v. United States*, 277 U. S. 438, 464 (1928).

⁴ 47 U. S. C. §605 (1952).

states is illegal. But it has not yet explicitly said so, and it has explicitly said that evidence obtained in violation of Section 605 is admissible in state courts—because Congress did not intend to enact a rule of evidence for such courts, which often admit evidence obtained in violation of even their respective state laws regarding wire tapping or other methods.

Moreover, though the Department of Justice in 1940 announced its complete abandonment of wire tapping, it almost at once reversed itself, and it continues to operate on the basis of a narrow interpretation of Section 605. From the time of the late Robert Jackson onward, it has argued that wire tapping is forbidden only if followed by divulgence and that sharing of wire-tap information among officials of a single government is not divulgence from one "person" to another "person"! (No wonder there has been only one federal prosecution of even unofficial wire tapping, and only a few state prosecutions.) With all the respect I can muster for such arguments, I must say that I find the Supreme Court more convincing in its interpretation: "We nevertheless face the fact that the plain words of Section 605 forbid anyone . . . to intercept a telephone message."⁵

VALUES AND RISKS

So much for extent and mechanics and legal status. Let me now outline the arguments for and against legalized police wire tapping, and my conclusions. In doing so, I hope it will be clear from the beginning that—though I am on balance strongly opposed to all wire tapping—I take that position, not in disregard of its risks, but in considered choice of those risks as against the risks

⁵ *Nardone v. United States*, 302 U. S. 379, 382 (1937); the "first Nardone case." Also *United States v. Coplon*, 88 F. Supp. 921, 925 (S. D. N. Y. 1950).

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involved in even a small amount of wire tapping. Also, I hope everyone will note that I have some excellent company—including the *Wall Street Journal*, which has said this in a recent editorial:

We see no need for chipping away at the rights and privileges of people who are not Communists in order to catch Communists. Perhaps the latter can be more easily trapped through wiretapping; certainly it will make the job of our police easier. . . . The job of the police would be made easier also if they could go about arresting anyone they chose and if they could break down any door and if they could hold in prison a suspect as long as they wished. But restraints were placed on Government and on police so that these things could not happen.⁶

Put it another way: All life is a choice among values, and among risks; and a free society—to remain free—must take almost all of its risks on the side of freedom.

ARGUMENTS PRO

The arguments for legalized wire tapping may be conveniently grouped under three headings:

No-novelty argument

Attorney General Brownell points to the fact that the law already admits evidence obtained by an informer, an eavesdropper, or a policeman hidden in a closet; even evidence obtained by means of a transmitter concealed on an agent's person. And, he says, "There is little, if anything, to distinguish between these approved methods of obtaining and admitting evidence, and wiretaps which are not admissible."⁷

Great-need argument

Mr. Brownell points to the fact that criminals may go free if wire tapping is

⁶ January 19, 1955.

⁷ "Statement by . . . Brownell . . .," p. 5.

the only way to obtain evidence against them, and it is forbidden; this may jeopardize national security, as in the case of Judith Coplon. Next to national security, the most frequently emphasized area of need is the prevention and punishment of kidnaping; about it, Mr. J. Edgar Hoover, the director of the Federal Bureau of Investigation, says: "I dare say the most violent critic of the FBI would urge the use of wire-tapping techniques if his child were kidnaped and held hostage."⁸

Little-danger argument

Even among persons who fully recognize the risks involved in wire tapping, there are those who believe that the actual danger of abuse is slight. They point out that our federal and state and local governments are kept reasonably trustworthy by a combination of the ballot and freedom of speech and the press. They also stress that police officials have not thus far been guilty of much abuse of power, and are unlikely to be so guilty in the predictable future.

ARGUMENTS CON

The arguments against legalized wire tapping may also be conveniently grouped under three headings:

Immense-difference-in-degree argument

Many opponents turn Mr. Brownell's argument against him by pointing out that even some other methods of obtaining and admitting evidence, now fully approved by the courts, are bad and should be eliminated; then, they point out, how much more should wire tapping be opposed. As Justice Hofstadter of the Supreme Court of New York County said on January 11 of this year:

⁸ "Wiretapping: The Pros and Cons," *New York Times Magazine*, November 29, 1953, p. 32.

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A tapped wire is the greatest invasion of privacy possible. . . . A telephone interception is a far more devastating measure than any search warrant. A search warrant is confined to a definite place and to specific items, or, at least, to items of a stated class or description. Those in possession of the searched premises know the search is going on and, when the officer has completed his search, whether successfully or not, he departs. Not so in the case of telephone interception. The interception order is obtained *ex parte*, and the person whose line is to be tapped is, of course, in ignorance of the fact. The tap is maintained continuously, day and night. Everything said over the line is heard, however foreign to the stated objective of the law-enforcement officers. The most intimate conversations, personal, social, professional, business, or even confidential, of an unlimited number of persons may be laid bare. In effect, the line of everyone who is called from or makes a call to the tapped line at any time is being tapped during the maintenance of the tap. When a line in a public telephone booth is tapped, as has on occasion been done, the conversations of people having no relation of any kind to the operator of the place in which the booth is situated or the person whose line is tapped are overheard.⁹

Thus, as Brandeis said in 1928, even "general warrants are but puny instruments of tyranny and oppression when compared with wire tapping."

Inadequate-result argument

Many opponents have pointed out that, even if there were known to be absolutely no wire tapping of any sort, the very nature of espionage and sabotage would cause spies and saboteurs to do practically all their work by personal presence and contact; and that the records of espionage and sabotage cases suggest, not only that little actual help has been gained from wire tapping in

⁹ "In the matter of an application . . .," text of opinion, *New York Law Journal*, January 12, 1955, p. 2.

apprehension and conviction but also that other methods can be sufficiently effective. Remember that it was only one of the two Coplon cases in which the conviction was upset because the government's evidence derived from wire tapping; in the other case, there was a conviction on non-wire-tap evidence, and it was upset only because of a post-arrest wire tap on telephone conversations between the defendant and her lawyer.

As for kidnaping, even opponents of wire tapping acknowledge that the nature of the crime allows more scope for the use of the telephone, and therefore the possibility of greater help to be gained from wire tapping in apprehension and conviction. But they point out that, even if there were known to be absolutely no wire tapping of any sort, the mails would probably still be the chief means employed in attempts to extort ransom; and that, as would be true of police interception without consent of the mail received or dispatched by the distraught parents of a kidnaped child, the problem for a free society in the use of wire tapping is whether the gains would sufficiently overbalance the losses.

That is the very problem which a free society faces in regard to what I suspect is the fundamental reason why many of our law officers argue so strenuously for wire tapping: namely, to keep track generally of the doings of suspected criminals, to discover and develop leads in run-of-the-mill crimes. Here again it is pertinent to quote Justice Hofstadter:

The application now made follows the general pattern of like applications heretofore made to me, which also, in the main, had as their objective the detection of gambling in some form. . . . Some years ago I instituted the requirement that . . . written reports of the results obtained from any interception ordered be thereafter sub-

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mitted to me. . . . These showed some arrests and fewer convictions and then rarely, if ever, for a heinous offense. . . . It is melancholy to behold [our city] rife with violence, an admittedly lawless community, its inhabitants no longer safe by night or day, in their persons or their homes. To be redeemed as part of the great American community, its police department needs external aid, i.e., a larger force, with more pay for the men, and a renewed spirit from within . . . but not more wire-taps!¹⁰

Overwhelming-danger argument

Many opponents start by pointing out that, given technological ingenuity and human nature, we should be in for bad trouble with unofficial and illegal wire tapping, even if the official and legal variety were completely removed from our society; and that official and legal wire tapping accentuates such trouble by stimulating technological development and by teaching more persons how to wire tap. Even now, according to Charles Grutzner of the *New York Times*:

Federal wiretapping is nothing compared to that of local police and private investigators across the country. A former law enforcement officer told this writer a few days ago: "Detectives use wiretaps on maybe half of all the important police cases in New York, and many use wiretaps as a routine thing to pick up leads on bookmaking, prostitution and other crimes without bothering to get court orders or even to let their captains know they're tapping." Not all police, and certainly not all private investigators, limit their use of eavesdropped talks to those conversations they set out to hear. Blackmail and sale of business secrets, though incidental, have been found lucrative to crooked operators.¹¹

Even if we could measurably solve the problem of unofficial and illegal

wire tapping, say the opponents, we should be in for bad trouble with official and legal wire tapping. We may thank our lucky stars that the present head of the FBI is a man of integrity, and no alarmist; but some future head of that bureau might not be so scrupulous and intelligent. The way in which a policeman uses his gun can be pretty well checked on by the citizens who employ him and authorize him to use it in guarding public order; the way in which he uses wire tapping can scarcely be checked on at all. Nor is it only police wire tapping, and the enormous amplification of dossiers implied in it, which constitute an incalculably large threat to the private citizens of a free society. Wire-tapping surveillance has already been considerably employed, more or less legally, in public affairs—for example, by a Congressional committee—and by a governor checking on a mayor.

This "dirty business," say the opponents in quotation from the late Justice Holmes, is—in quotation from the happily quite alive though retired Justice Roberts¹²—"inconsistent with ethical standards and destructive of personal liberty." It tends to corrode the morale and morality of a free society. Justice Hofstadter says: "As evil as an actual interception is the fear bred in the mind of the average citizen that he may at any time become the victim of one." Justice Brandeis said: "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their be-

¹² This paper was read before Mr. Owen J. Roberts' death on May 17, 1955.—EDITOR'S NOTE.

¹⁰ *Ibid.*, pp. 1, 2.

¹¹ February 27, 1955.

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liefs, their thoughts, their emotions and their sensations." Justice Frankfurter has warned us: "The contrast between morality professed by society and immorality practiced on its behalf makes for contempt of law." And J. Edgar Hoover said in 1940: "The discredit and suspicion of the law-enforcing branch, which arises from the occasional use of wiretapping, more than offsets the good which is likely to come of it."¹⁸ I appeal from Paul drunk to Paul sober!

DESIDERATA

My conclusions are simple to state, however difficult to apply. I am, in considered choice among values and among risks, on balance strongly opposed to all wire tapping—by anyone, at any time, for any purpose. Like Senator Wayne Morse, I want the United States Supreme Court to reverse its 5 to 4 decision of 1928 at the earliest opportunity, and declare official federal wire tapping to be unconstitutional under the Bill of Rights. In the meantime, I want the Court or the Congress to make absolutely clear that all wire tapping is illegal, even when practiced by the Department of Justice or authorized by a state. I want prosecution of everyone who engages in it, or orders or allows it. I want the states to make wire-tap evidence inadmissible in court.

MINIMAL SAFEGUARDS

If those desires prove impossible of attainment, or are postponed, then I want the following minimal safeguards:

1. Wire tapping should be permitted only to federal officials, in cases involving treason, sabotage, espionage, or kidnaping. (In kidnaping cases, parents'

¹⁸ Department of Justice release of March 15, 1940, quoted by Senator Wayne Morse, "Wiretapping Versus Freedom . . .," *Congressional Record*, June 11, 1954, 7610.

wires should be tapped only with their prior consent.)

2. The authority to grant permission for wire tapping should be vested in one federal judge assigned by the Supreme Court for a ten-year period for each district.

3. Only the Attorney General should be allowed to apply directly to the judge for permission to tap a wire. All requests for permission should be channeled through him.

4. No wire tap should be authorized except upon sworn statement of fact demonstrating reasonable basis for belief of actual, as distinguished from potential, treason, sabotage, espionage, or kidnaping.

5. An application should include the names of the suspect and of the telephone subscriber, and the number of people who use the line.

6. Complete records of all applications and approvals should be kept.

7. Only recordings, sealed and preserved in a central place, should be used in evidence. If so employed, all recordings made in connection with an investigation should be made available to the defendant at government expense. Irrelevant material that might injure innocent outsiders should be excised, upon agreement between government and defendant. Recordings should be destroyed only on court order.

8. Taps should be authorized for a maximum of ninety days, with a ninety-day renewal permitted.

9. Strict penalties should be provided for any person tapping a wire illegally, and each year a federal grand jury should be convened to consider possible illegal tapping.

10. The present provisions of the law should remain in effect against any unauthorized tapping or disclosure of information obtained by tapping, whether authorized or unauthorized.

11. The press and public should be

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informed by monthly and annual reports of the number of taps sought for each type of case; the number granted; the number resulting in prosecution; and other pertinent data.

INDEFEASIBLE RIGHT

But I am not satisfied with minimal safeguards; though not unmindful of the risks involved, I want all wire tapping abolished. I will bear my share of the risks involved in such abolition, as I have in the past—in peacetime and in wartime—borne some other risks for the American community and the American government, in token repayment of the vast debt I owe them and the immeasurable respect I have for them. I will gladly bear my share of those risks, not

so much in terms of “the nicely calculated less and more” of reasons for and against as in the last analysis, because of commitment by faith to the defense and expansion of the grandest political achievement I know—the Anglo-Saxon principle of justice. In 1765, the elder Pitt said: “The poorest man may, in his cottage, bid defiance to all the force of the Crown.” In 1885, the United States Supreme Court said:

It is not the breaking of his doors, and the rummaging of his drawers, that constitute the essence of the offence [by the government against a man's privacies of life]; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property.¹⁴

¹⁴ Boyd v. United States, 116 U. S. 616, 630 (1885).

Patrick Murphy Malin, LL.D., New York City, has been executive director of the American Civil Liberties Union since 1950. He is a former member of the Faculty of Economics, Swarthmore College, and was vice director of the Intergovernmental Committee on Refugees, London (1943-47), price executive, Chemicals and Drugs Branch, Office of Price Administration (1942-43), and American director of the International Migration Service (1940-42).

