

# Electronics and the Bill of Rights

THE MOST distressing thing about wiretapping is that the moral and legal problems it raises are still the same as when this malignant practice was first brought to public attention. Years have gone by, but no one has equaled—not to say surpassed—the words of Justice Holmes and Justice Brandeis in excoriating wiretapping. Ever since, there has been a not-too-broad area of disagreement among those who were trying to find a practical line of demarcation between unconditional outlawing of wiretapping and its controlled, limited use. Yet the line of demarcation has not been found. While the theoretical debate has never stopped, the ugly practice has proceeded unabated.

Our Federal law-enforcement authorities have gotten into the habit of violating a Federal law regularly enough to be paralyzed by bad conscience whenever the same law is violated, to a far greater extent and for less justifiable purposes, by local authorities and private citizens. Each one of the branches of the Federal government has a share of responsibility: the Executive for laxity in the enforcement of an existing statute; Congress for not providing remedial legislation that the Executive itself has repeatedly demanded; the Judiciary for paying more attention to the hesitations of the Executive and of Congress than to the spirit of the Fourth Amendment.

When a law is unenforced and no other law is enacted to fill the gap, the outcome is lawlessness, and lawlessness is a cancerous disease. *The Reporter's* investigation proves how far this disease has spread. Yet there is no reason to feel helpless, and to think that nothing can be done about it, just because the three branches of the government have so far failed to act. The government of our democracy can be made to act if enough citizens realize how great and how imminent is this threat to our freedoms.

## ***The Wires We Don't Control***

We eagerly bring into our homes and into the places where we work electronic devices which infinitely broaden the reach of what we can hear and see.

Radio and television have now joined the telephone as household equipment available to nearly everybody. With these gadgets the outside world breaks through the walls of our homes. With radio and television we see and hear the sounds and images other people have prepared for us. With the telephone we can talk and listen, just as we are listened to and talked to by exactly the person we wish to reach, but we are still at the mercy of the infinitely complex technological apparatus.

Radio and television bring entertainers, news analysts, and advertising straight into our homes. We turn a switch, and our tastes, our dreams, our buying habits are exposed to the persuasive influence of private agencies that are subjected to only a moderate amount of governmental control. The telephone offers to people with whom we scarcely wish to converse the chance to reach us. It may be merely the call of a new neighborhood laundry or it may be that of a malicious crank. When the telephone service suffers a stoppage, it is as if we had become deaf and dumb, for our hearing aid, our person-to-person loudspeaker, has gone out of order. Of course, our telephone wire can be tapped, and whatever we say in a business transaction, or just think out loud while talking with a friend, can be played back and used against us.

From time to time we read of a recluse—a poor wretched creature who lived barricaded in a secluded house, without gas or electricity, and with no milkman ever stopping at the door. Somehow, these cases of total retreat from society, and from all that society offers, are covered in great detail by the newspapers and arouse lively curiosity among the public. Perhaps this curiosity comes from the obscure feeling that these recluses are the last quixotic defenders of absolute privacy. A great deal of this privacy too many Americans have given up—the people who keep the radio blaring all day, or who, whenever they don't know what to do with their children, park them in front of a television screen.

Radio and television put us at the mercy of powers that we are scarcely able to recognize or control, just as our telephone wires make us the easy prey

of blackmailers. We are still like children in dealing with those extraordinary gadgets that have immeasurably enriched our lives; we have not learned to master them, to defend ourselves from the harm that they can do. We can be sucked into a mob while we are sitting at home in front of a radio or television set. Eavesdroppers may tamper with our privacy or we ourselves may thoughtlessly throw it away. The time has come to grow up, to learn fast what a precious thing it is. For privacy is the negative yet essential pole of our freedom. We cannot actively use our freedom to make something better of ourselves or of the world we live in unless we are left, or leave ourselves, alone to work, brood, or just not care. Privacy is to an active, free life what sleep is to our waking hours.

Unless we learn to defend our privacy and obtain from government the assistance we need, the day is not far removed when the keys to our front doors will become just about as symbolic as the keys to our cities sometimes offered to visiting celebrities.

### **1984 in the 1950's?**

Moreover, technology in the field of electronics, as in that of atomic power, moves at its own irresistible pace. Already there are new, extraordinary gadgets on the market. For example there is one that offers better vision, from a central observation post, than that of hundred-eyed Argus. "Wired television," it is called, or "Utiliscope," produced by the Diamond Power Specialty Corporation of Lancaster, Ohio. In their advertisements the makers announce: "If you have any operation too remote, dangerous, or inaccessible to observe directly . . . or if you need to have a single observer watch a number of widely scattered operations. . . ." the machine is available, and it is not expensive. Obviously, there is nothing wrong in such a machine. It can be of great use to industry—and to police control. Neither is there anything wrong with those compact television transmitters, easily carried by TV reporters, which brought to our screens the faces and voices of many politicians from the Convention floors.

At present, the Utiliscope is not peering through too many cracks in the walls, and there are no secret TV transmitters lying around. But the telephone, when Alexander Graham Bell was struggling to get it accepted as a reliable means of communication, had to wait some time before it became widely used. When Bell and his associates tried to sell their invention to the Western Union Telegraph Company, they were told that Western Union could not use "an electrical toy." Certainly, the technological

means to spy on people described by Orwell in his *Nineteen Eighty-Four* can, within a very few years, start coming in mass production from the assembly lines.

Justice Brandeis was quite right when he wrote: "the progress of science in furnishing the Government with means of espionage is not likely to stop with wiretapping. Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home." The wiretapping of today is the harbinger of infinitely worse tools that may disastrously encroach on our freedom. This is why it is imperative that the intolerable abuse of wiretapping be stopped—and only the government can do it.

The words of the Fourth Amendment, considering the times when they were written, still offer us the best guidance: "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." Of course the writers of the Fourth Amendment were concerned with "papers and effects," not with electricity.

Will freedom—will our Bill of Rights—win the race with electronics? There is enough strength and power in our Constitution to make it certain that freedom will be energized rather than crushed by technology—if only we recognize the danger that lies ahead of us. Wiretapping and all similar devices human ingenuity may invent must be used under the strictest Federal supervision, and then only for the detection of three crimes: treason, sabotage, and espionage. For the detection of all other crimes, no matter how heinous, wiretapping must be outlawed—and outlawed for good.

ONCE more, with its own private means, without power of subpoena, *The Reporter* has done an investigating job. We suggest that a Congressional committee, with the immensely more effective facilities at its disposal, take a look at the facts, at the latest developments of electronic technology—and at the Bill of Rights. If the investigation is conducted in a spirit of devotion to our freedom, there is no doubt as to the law that Congress will finally pass. It will be a law that, by re-establishing the purposes of the Fourth Amendment, will show that in the race between the two—freedom and electronics—freedom has the lead.

## A SUMMARY OF CHAPTERS I-IV

**W**IRETAPPING, unfortunately, is one of the facts of modern life—an electronic invader that allows others to peer into our private lives and to overhear the words we speak in the supposed privacy of our offices and our homes. It is a furtive practice, impersonal and indiscriminate as a bullet, affecting alike the criminal and the innocent, the public figure and the law-abiding citizen whose business should be his own concern.

In earlier years, the legality of wiretapping was vigorously questioned by such men as Supreme Court Justices Oliver Wendell Holmes, Louis D. Brandeis, Harlan F. Stone, and Pierce Butler. These interpreters of our democratic rights maintained that wiretapping was a basic invasion of the rights of privacy enunciated in the Fourth Amendment, which guarantees "The right of the people to be secure . . . against unreasonable searches and seizures . . ." But when the first wiretapping case reached the Supreme Court in 1928, these four Justices lost to their five colleagues, who stuck to a strict interpretation of the Constitution. The Fourth Amendment, it was held, applied only to "actual physical invasions" of privacy, not to "projected voices."

In 1934, the first Roosevelt Congress decided to recognize the electronic facts of life. The Federal Communications Act of that year included a section specifically intended to outlaw all wiretapping. In layman's language, Section 605, as interpreted by later court decisions, stated that no person could intercept a telephone conversation and divulge the contents to another person, nor could he use the contents for his own benefit or for the benefit of another—unless the interceptor had prior permission from both parties to the conversation. Violators were made subject to a two-year prison term, a \$10,000 fine, or both.

**M**EANWHILE Federal agencies, including the Department of Justice and the Treasury Department, had found wiretapping a useful tool in crime detection. They began to seek loopholes in Section 605—loopholes that would allow their own agents to continue tapping. Their early efforts were fruitless; one attempted evasion after another was blocked by the Supreme Court—until, in 1940, Attorney General Robert H. Jackson announced that "the law on wiretapping is now clear and precise; and all future cases of wiretapping will be subject to prosecution in the Federal courts."

A month after Jackson's statement, however, with the United States slowly being drawn into the Second World War, President Roosevelt sent a memo to the Department of Justice which was never made public but which allegedly approved wiretapping "when necessary in situations involving national defense."

By the end of the year, the Department

had come up with another tenuous construction of Section 605—a construction which held that the only crime was to intercept and divulge. A Federal agency that tapped but did not divulge the information could thus be considered within the law.

Since announcing this interpretation of Section 605, the Justice Department has allowed its FBI agents to continue tapping in an increasingly wide variety of cases. The various military intelligence agencies have followed suit. And in the fields of local police tapping and private tapping, the Justice Department, charged with enforcing Section 605, has continued to follow a principle that Attorney General Jackson once candidly stated: "I do not feel that the Department of Justice can in good conscience prosecute persons . . . for a practice . . . engaged in by the Department itself, and regarded as legal by the Department." Only one man—back in 1941—has ever been prosecuted and sentenced for wiretapping, a fact that substantially increases the confidence of the tappers who ply their trade in politics, in business, and in private realms such as divorce cases.

**D**ESPITE rumors to the contrary, the techniques of wiretapping remain much the same as they were ten years ago. The Federal agent has little trouble, for telephone-company co-operation is nearly always forthcoming. In some cases the company will even install taps for the agency on the "main frame" at the exchange, stringing them to a central recording location. But the state or local police tapper (to whom the telephone company today gives its full co-operation only with extreme reluctance) can still be assured that his tap won't be removed if found by company repairmen. Although the private tapper must, of course, operate completely without the company's knowledge, he is nearly always a former phone-company employee. He knows not only the science of tapping but also enough company lingo to bluff regular employees out of the normally confidential information that will give him the location of a certain circuit's "bridging points"—the terminal boxes that link a telephone to the exchange and offer the most convenient locations for installing a tap.

### O'Dwyertapping

The private wiretapper, whose fee often runs as high as \$1,000 a week, has in recent years found in political rivalries the occasion for some of his most lucrative employment. Republicans have found wiretapping a startlingly effective method of collecting dirt on Democrats, and vice versa.

The former Republican Governor of Rhode Island, William H. Vanderbilt, once paid a New York detective agency some \$11,000 to tap the phones of the Democratic Mayor of Pawtucket, Thomas P. McCoy, and of State Attorney General Louis V. Jack-

vony, the latter a political rival within the state Republican Party.

On the city level, Clendenin Ryan, the would-be reformer, used John ("Steve") Broady's detective agency in 1949 to collect a mountain of information on Mayor William O'Dwyer of New York and his régime. O'Dwyer learned of the scheme and later had Broady and one of his men indicted for tapping the phone of Manhattan Borough President Hugo Rogers. The indictment fell through not long before O'Dwyer resigned as mayor and accepted the post of Ambassador to Mexico.

**N**ATURALLY, political wiretapping has reached its peak in Washington, D. C. As stated in the previous issue of *The Reporter*, Cyrus Ching, the labor mediator, has said that during his mediation of a strike last year his telephone was tapped by both company and union agents. Charges have been made that Robert La Borde, a professional tapper in New York, went to Washington in the pay of private power interests to tap the wires of Supreme Court Justices during hearings on a TVA case.

Perhaps the most serious case—one that would appear to justify immediate Congressional investigation—involves rumors recently spread by an Army Signal Corps Intelligence Agency employee named Edwin Y. Webb. According to these rumors, Webb had listened in on the telephone of Central Intelligence Agency chief Walter Bedell Smith after Webb had made charges of pro-Communism against a dozen-odd fellow employees in SCIA and CIA.

The best-publicized political wiretapping in Washington has involved the efforts of Metropolitan Police Lieutenant Joseph W. Shimon, who tapped wires for various Republican Congressional figures and who has just been cleared of dismissal charges on the ground that his superiors on the force actually knew of his tapping activities all the time. Shimon, who met Senator Owen Brewster through the good offices of Henry ("The Dutchman") Grunewald and Senator Styles Bridges, worked for Brewster in 1945 and again in 1947, during which periods Brewster engaged in a series of efforts strongly approved by Pan American Airways and just as strongly opposed by P.A.A.'s chief overseas rival, Howard Hughes's Trans World Airlines. In 1945, Shimon tapped the home phone of the late Senator Josiah Bailey when Bailey was the leading Senate opponent of a P.A.A.-favored bill. In 1947, while again working for Brewster, Shimon installed taps on the telephone lines of, among others, Hugh Fulton and Thomas Slack, attorneys for T.W.A., and Noah Dietrich, a Hughes executive.

Wiretapping in Washington, of course, involves various Congressional committees and an assortment of Federal agencies, as will be seen in the following chapter.

# The Wiretappers

WILLIAM S. FAIRFIELD and CHARLES CLIFT

## V. Listening In With Uncle Sam

THE RECENT movie "Walk East on Beacon," based on an article by J. Edgar Hoover and produced in cooperation with the Federal Bureau of Investigation, proved once again that stealing United States military secrets does not pay. In the process, the film also offered vivid testimony as to the technical ingenuity of the FBI, which has apparently adapted every sort of modern device to the needs of scientific detection.

Still cameras hidden in auto spotlights traced the movements of Russian agents. Radar located a boat they were using. At an indoor rendezvous a concealed microphone and a camera which needed no light televised ensuing events directly to FBI headquarters. At outdoor meetings movie cameras with telescopic lenses substituted for television, recording lip movements for later translation at a school for the deaf. Nowhere in the picture, however, was there the slightest suggestion of wiretapping.

Generally, the subject of FBI tapping was avoided by portraying the Russian agents as too smart to use a telephone. Still, an occasional well-timed tap would have simplified the FBI's task—and incidentally shortened the picture—a good deal.

IN THE LIGHT of periodic statements by various Attorney Generals and by Hoover himself, all admitting that FBI agents did tap telephone wires, the obvious avoidance of the practice in "Walk East on Beacon" may seem somewhat strange—at least until it is

recalled that these periodic official admissions have only been made after some public disclosure of Federal wiretapping. Each admission has been quickly coupled with a claim that the government taps only in a limited number of especially serious cases. Federal investigative agencies are always unhappy about disclosures of their wiretapping activities, partly because they don't want their current targets to become suspicious, but mainly because they fear the public reaction to this particular type of invasion of privacy, and because they have not been really sure of their right to tap since the passage of the Federal Communications Act of 1934.

Today the FBI is the only Federal agency that openly admits to any wiretapping, and it insists that the practice is limited to cases of kidnaping and of espionage, sabotage, and other "grave

risks to internal security." But if it is a fact that FBI regulations do restrict tapping to certain "grave" cases, then it must also be a fact that the question of what is grave and what isn't is often left to the discretion of individual agents and officials, some of whom seem to cruise over a wide latitude of judgment.

There is further evidence that other Federal agencies, including the Central Intelligence Agency and various military intelligence units, have been avidly tapping away. J. Edgar Hoover, who should know, has said that his is not the only Federal agency employing wiretapping. While the others strongly deny the practice, some will frankly admit that they would deny it even if it were true; others admit that they would not hesitate to tap "in the interest of national defense."

### •Never Heard of It!

Elsewhere in Washington, official denial of wiretapping is even more emphatic. The Treasury Department's Alcohol Tax Unit, Narcotics Bureau, and Bureau of Internal Revenue all claim they haven't tapped wires since 1939, although they do say that they gladly accept wiretap information contributed by the FBI or local police.

Sometimes private professional tappers are hired for specific assignments. Sometimes the FBI or local police are requested to do the tapping. But generally, Federal wiretapping is done by a regular member of the agency in question, a man whose skill is the result of former telephone-company em-

