

enforcement to protect itself from espionage and subversion, from murder and kidnapping, and from organized crime and racketeering.

Senator SCOTT. I offer it together with a statement by the former Attorney General Kennedy appearing in an article called "Attorney General's Opinion on Wiretaps."

"He believes they can and should be regulated with due regard for both law enforcement and the right of privacy."

(The material referred to follows:)

ATTORNEY GENERAL'S OPINION ON WIRETAPS

(By Robert F. Kennedy)

In 1959, while inspecting a firealarm station, the Fire Chief of a large Western city made a startling discovery. The recording system had been rigged to record not only firealarm calls but also all calls on the Chief's private line. The Chief looked further. He found a recording tape on which was transcribed a personal telephone conversation between him and a United States Senator.

The Department of Justice discovered the identity of the wiretapper—but was forced to close the file on this case last September without any action against him. He could not be prosecuted under the present Federal wiretapping statute, which should protect against such gross invasion of individual privacy, but does not.

Last fall, District Attorney Frank Hogan of New York City developed a strong case against seven of the top narcotics distributors in the country—men who had operated a multi-million dollar narcotics ring in the New York City area for more than five years. Yet on Nov. 14, Mr. Hogan abandoned his prosecution of the seven men. Much of his evidence came from wiretapping and—although the wiretaps had been authorized by a court, as is permissible in New York—he felt he could not introduce this evidence without committing a Federal crime.

In other words, the men could not be prosecuted because of the present Federal wiretapping statute, which should permit reasonable use of wiretapping by responsible officials in their fight against crime, but does not.

Clearly, there is almost no one who believes this law, which enhances neither personal privacy nor law enforcement, to be satisfactory. Indeed, bills to change it—Section 605 of the Federal Communications Act—have been introduced in virtually every session of Congress since it was passed in 1934. But the present law has remained on the books, the beneficiary of the stalemate resulting from an emotion-hardened debate on the question of wiretapping that has gone on between absolutists for decades.

It is easy to take an absolute position on wiretapping. Some, concerned with encroachments on individual rights by society, say wiretapping of any kind is an unwarranted invasion of privacy. Others, concerned with a rapidly rising crime rate say law-enforcement officers should be free to tap telephone wires to gather evidence.

The heart of the problem—a proper balance between the right of privacy and the needs of modern law enforcement—is easy to see. It is not so easy to devise controls which strike this balance. But it is not impossible, either, and I believe that in the wiretapping bill which the Department of Justice has proposed to Congress we have formed such a balance.

There is no question that the telephone is an important asset to criminals. Here is an instantaneous, cheap, readily available and *secure* means of communication. It greatly simplifies espionage, sabotage, the narcotics traffic and other major crimes.

I do not know of any law-enforcement officer who does not believe that at least some authority to tap telephone wires is absolutely essential for the prevention and punishment of crime. There are over 100 million phones in the United States and the bulk of business is transacted over the telephone. Increasingly, this business includes crime—the organized criminal and racketeering activities, involving millions of dollars, which are among our major domestic problems. Without the telephone, many major crimes would be much more difficult to commit and would be more easily detected.

Last year, Congress enacted five of eight crime bills proposed by the Justice Department. One of these laws recognized that the telephone is a major tool of organized crime and prohibited the use of the telephone for interstate transmission of gambling information. The President signed the bill on Sept. 13. Almost im-

mediately, several operators of major gambling services went out of business or curtailed their activities. The result has been that organized crime has been dealt an effective blow where it hurts—in the pocketbook.

This experience underscores the need for wiretapping legislation. Wiretapping often may be the only way of getting evidence or of getting the necessary leads to break up major criminal activity.

Yet, on the other hand, most people feel strongly about the privacy of their telephone conversations. None of us likes to think that some unknown person might be listening to what we have to say. There is no doubt that the Constitution confers on each individual a right of privacy—what the late Justice Louis Brandeis called “the right to be let alone.”

The Fourth Amendment specifically protects “the rights of the people to be secure in their persons, houses, and papers, and effects against unreasonable searches and seizures.” In the famous *Olmstead* case of 1928, involving a Seattle bootlegging ring, the Supreme Court held that to intercept telephone calls by wiretapping did not violate the Fourth Amendment because the law-enforcement officers did not enter the house, touch the person or seize the papers and effects of the people whose wires were tapped.

But in another sense, wiretapping involves a greater interference with privacy than does the conventional search and seizure. Every telephone conversation involves at least two persons, one of whom may be wholly innocent. And in many cases the telephone that is used by a suspected criminal may also be used by a large number of other persons.

Indeed, many professional criminals typically transact their criminal business over public telephones. A tap set up to catch the criminal may necessarily overhear hundreds of conversations by persons who are totally unsuspected of crime, but whose privacy is nonetheless violated.

Even though the Fourth Amendment is not literally applicable—and the *Olmstead* decision is still the law—the principles underlying it are important in considering wiretapping. The framers of the Constitution did not outlaw all searches of a man's house and seizures of his papers and effects. They only prohibited “unreasonable” searches and seizures.

In particular, they recognized that Government officials could search a man's house and seize his papers. But first they required these officials to obtain a warrant from a court upon a showing of probable cause to believe that illegal material was on the premises to be searched. In other words, the framers of the Constitution attempted to balance two objectives that criminals be caught and convicted, and that the privacy of innocent persons be protected.

This is precisely our objective today.

Wiretapping is not authorized in most states. Section 605 of the Federal Communications Act provides: “No persons not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person.”

To the layman, this certainly sounds like an absolute prohibition of wiretapping except where one of the parties to the conversation consents to it. Yet wiretapping is practiced by Federal law-enforcement officers, at least some state and local governments, and—as in the case of the Fire Chief's phone—by many private individuals. Indeed, the laws of the six states, such as New York, specifically authorize wiretapping by law-enforcement officials under court order.

How can this be? The legal answer is that the Communications Act does not prohibit interception alone; it prohibits interception and disclosure. For this reason, every President since Franklin D. Roosevelt has authorized the Attorney General to permit wiretapping in cases involving the national security. In 1941, Attorney General Robert H. Jackson indicated that “disclosure” within the Federal Government—among officials—also was not prohibited by the act. Yet, disclosure in court—using the lawfully obtained evidence to convict a criminal—has been regarded itself to be a criminal act.

This is unsatisfactory. There is no guarantee of privacy in the use of the telephone under the existing law because anyone can listen in without violating that statute. To convict someone of illegal wiretapping we have to prove both the tap and an unlawful disclosure. That is a very difficult burden indeed.

At the Federal level, wiretapping is limited to a small number of cases involving the national security and criminal cases in which the life of a victim is at stake. It is done only with the express approval of the Attorney General.

The extent of wiretapping by state and local law enforcement officers is very difficult to determine. In those states which have legislation permitting wiretapping under court order, the records indicate that it is fairly common. A poll conducted

in New York State showed that between 1950 and 1955, 2,392 wiretap orders were obtained—about 400 taps a year. Some investigators contend that several times as many wires were tapped illegally. At that time there were well above 6,500,000 telephones in use in New York State.

In states where there is no law permitting wiretapping, the indications are that a certain amount of police wiretapping goes on, nevertheless. There also are assertions that some corrupt police officers may use information obtained from wiretaps for purposes of blackmail, enforcing payoffs, and for other motives of personal profit.

No figures are available as to the extent of private wiretapping. Most people who have studied the matter believe that private investigators and other individuals tap wires extensively to obtain evidence in divorce cases, stock-market tips, information about competitors, and the like.

This is a shocking situation. When law-enforcement officials themselves violate the law, violations by other, go unpunished, and everyone's respect for law is seriously damaged. Further, no one's privacy is protected.

The critics of all wiretapping quote Justice Holmes to the effect that wiretapping is "dirty business" and use this as a slogan against the method of gathering evidence. To give Justice Holmes' words a modern application, it is the present state of law, the present chaos, which is really the "dirty business." And the solution is a coherent law which, with stringent safeguards, permits the gathering of evidence by wiretapping in vital cases but at the same time effectively forbids other wiretapping, public or private.

Only Congress can clear up the present chaotic situation. Certainly we ought to put an end to a law which:

(1) Fails to prevent illegal action—indiscriminate wiretapping—by law-enforcement officials and private individuals; and

(2) Fails to recognize the legitimate needs of law enforcement for limited authority.

I don't think it is possible—or workable—to attempt to deal in absolutes. I cannot agree with those who say that wiretapping should not be permitted in any circumstances and that the right to privacy outweighs any other considerations. If a child were kidnapped and there were any possibility of getting that child back unharmed by the use of wiretaps, I would feel that this strongly outweighed anyone's right to a private conversation. I take the same view with respect to protecting the security of the United States from espionage, sabotage and other possible acts of foreign agents.

At the other extreme, some law-enforcement officials feel there must be an extensive use of wiretapping with little or no supervision by courts or high administrative authority.

With this I also disagree strongly. If we are to authorize wiretapping for law-enforcement and prevention of crime, we must subject it to the most rigorous checks against abuse which we can devise. To put it simply, we should not lightly invade the privacy of individuals.

The details of new wiretapping legislation will have to be worked out by Congress. However, I believe that it should include—as drafted in our proposed law—the following features:

(1) Wiretapping should be prohibited except under clearly defined circumstances and conditions involving certain crimes. Because wiretapping potentially involves greater interference with privacy than ordinary search and seizure, it is proper to limit it narrowly and permit it only where honestly and urgently needed.

Wiretapping is absolutely required in cases involving national security, human life, narcotics and interstate racketeering. Under our bill, other, unauthorized interception or disclosure of wire communications would be punishable by a maximum penalty of two years in prison and a \$10,000 fine.

(2) In general, I believe wiretapping should be authorized only by court order and that even then the right to apply to the court should be limited to relatively few responsible officials. We would make one necessary exception. In cases involving serious threats to national security, it is extremely important that the identity of suspects be tightly held within the F.B.I. The fewer who know our suspicions, the more effective our security. For this reason, we would continue the present practice of having the Attorney General, in person, authorize wiretapping in these cases.

(3) Uniform rules for the Federal Government and the states should be established. We are dealing here with an interstate communication network whose integrity is a matter of importance to everyone using it. The maximum extent

to which state officials may be authorized by state law to tap interstate facilities should be regulated by Congress.

(4) Applications for wiretapping orders to a court necessarily should be made in secret since it would be useless to tap if suspected criminals were alerted. This should not mean that orders would be issued as a matter of course by judges. Any wiretapping statute should—as does our proposal—spell out in detail the findings a judge must make on the basis of evidence presented to him and should state the duration of any order which he can issue. When a case is brought to trial, I believe the defendant should be given the opportunity to see the order authorizing the tap and to challenge its validity as, is now done in the case of search warrants.

(5) Even though wiretapping would be authorized by court order, or, in some national security cases, by the Attorney General, the law should limit the disclosure and use of the wiretap information. Limiting the use of wiretap information to proper discharge of official duties would effectively prevent corrupt officers from using it for personal benefit and would confine any disclosure and use to legitimate law enforcement purposes.

(6) Finally, the law should continue, and extend to state courts, the rule at present applied in Federal courts that any evidence derived by means of an unlawful wiretap should be excluded.

To enact legislation along these lines will be a difficult job. Opinions differ as to each of the points I have listed and as to many details relating to them. But these difficulties should not be allowed to stand in the way of enactment of comprehensive legislation by Congress.

The need for such legislation is real. It would help us maintain the national security and stamp out organized crime. And, equally important, it would put an end to the violation of law by law-enforcement officers and, less excusably, by private individuals, including blackmailers.

It would, in fact, protect the privacy of all of us who use the telephone.

The CHAIRMAN. Senator Cook.

Senator COOK. Mr. Rehnquist, for the benefit of the record I would like to give to the reporter at a later date the remarks that were made by you at a panel discussion on "Privacy and the Law in the 1970's," at the American Bar Association meeting in London.

Contrary to some of the remarks that were made yesterday, I do not see here where you become a great advocate for wiretapping other than in the strictest sense under the statute which was passed by the Congress of the United States and which the Justice Department is empowered to enforce.

If I may, I would like to read into the record what I think sums up your opinion.

Whatever may be the ultimate decision by our highest court on the merits of the question, I believe that a refusal of the Justice Department in its role as advocate before the courts or the executive branch of the Government to vigorously argue in favor of its legality would be a wholly unwarranted abdication of the Department's responsibility.

You then go into a discussion of surveillance, not only from the standpoint of wiretapping but also from the standpoint of visual surveillance. In regard to the discussion yesterday relative to probable cause, it is very interesting, I think almost essential, and I think most lawyers in this room would concur, "probable cause for an arrest or specific search is hopefully to be found at the conclusion of an investigation and ought not to be required as a justification for its commencement."

You said those words then. Do you agree with them now?

Mr. REHNQUIST. Yes, I do.

Senator COOK. I certainly agree with them also.

Getting back to another discussion of yesterday, I feel that great emphasis was made of how you completely and absolutely condoned, and were enthusiastic about, or words to that effect, the Government