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NOTES

ELECTRONIC SURVEILLANCE: NEW LAW FOR AN EXPANDING PROBLEM

INTRODUCTION

In the last fifty years, the world has been the benefactor of an "electronic revolution." Aided by the use of electronic technology, spacemen are able to journey to the moon, and the population of the earth is able instantaneously both to observe and to communicate with the astronauts. This "revolution" also permits men to secretly observe and record the private actions of their fellow man. Both America and the rest of the world are presently confronted with the problem of unsolicited and, in many instances, uncontrolled electronic surveillance.

WIRETAPPING

Neither wiretapping nor electronic eavesdropping are new. Both probably started during the American Civil War, for "Both Union and Confederate spies 'tapped' telegraph lines in order to secure military information."¹ By 1900 telegraph and elementary telephone eavesdropping had been developed into an art. "Indignation over the interception of news led to legislation in Illinois in 1895, and in California in 1905 to prohibit telephone wiretapping."² This legislation provided the courts with a new area of litigation:

In the days when the Constitution was written, the methods of invasion of privacy were direct and sometimes even brutal. Arrests and physical searches and seizures made up the bulk of the invasions. In these cases, the victim was fully aware of the officer's actions, and could take steps to correct the situation. The private citizen then, had at least a reasonable opportunity to take what shelter he could under the provisions of the Constitution. . . . The Supreme Court and the other courts had had notable difficulty in trying to clarify the area of wiretapping, bugging, and the ever more refined electronic developments. These techniques have introduced a new concept of privacy invasion, further complicating an already difficult area. The thing seized in such cases is conversation, and the seizure may not involve physical entry, if the appropriate technique is used.³

*Olmstead v. United States*⁴ was the first wiretapping case to reach the Supreme Court of the United States. Federal agents in Seattle were attempting to enforce the National Prohibition Act, and in the course of their investigation Federal officers tapped several telephone lines and compiled written notes on the conversations that were over-

¹SENATOR EDWARD V. LONG, *THE INTRUDERS* 36 (1967).

²*Id.*; Ill. Stats, Telegraph and Telephone, Ch. 134, § 16, and West. Cal. Penal Codes § 474 (West 1970).

³LONG, *supra* note 1.

⁴*Olmstead v. United States*, 277 U.S. 438 (1927).

heard. At the trial the defendants objected to the admission of this evidence on the grounds that wiretapping is a violation of the Fourth and Fifth Amendments to the Constitution of the United States. The trial court allowed the admission of this evidence, and the U. S. Supreme Court, by a 5-4 decision upheld the ruling of the trial court. Chief Justice Taft stated:

The United States takes no such care of telegraphic or telephone messages as of mailed sealed letters. The amendment [4th] does not forbid what was done here. 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.⁵

Congress may, of course, protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials, by direct legislation, and thus depart from the common law of evidence. But the courts may not adopt such a meaning to the Fourth Amendment.⁶

In response to this decision, Congress passed the Federal Communications Act of 1934.⁷ Section 605 of this act prohibited any person not authorized by the sender from intercepting and divulging the contents of any communication. Federal Agencies immediately started to dispute the wording of this statute. The Justice Department interpreted a violation of Section 605 to require both an interception and a divulgence outside of the Federal Government. Federal Agencies, under this interpretation, believed that wiretapping was permissible

⁵*Id.* at 464.

⁶*Id.* at 465, 466. The Fourth Amendment to the Constitution states: "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."

⁷Federal Communications Act of 1934, 47 U.S.C. § 605 (1934). This Act exempted such matters as routine work by communications workers and transmissions relating to ships in distress. § 605. No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person 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; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress."

provided that the contents of the intercepted message were not divulged to agencies or persons outside of the Federal Government.⁸

The public record shows that during the period from 1934 to 1939, the Department of the Interior, too—engaged in the tapping of wires. . . . It seems safe to conclude that, during this period, wire-tapping was a routine law enforcement technique among federal agencies.⁹

In May of 1940, the future existence of the United States appeared to be in jeopardy. Although, officially, wiretapping was illegal, President Roosevelt, who was concerned with national security, issued this confidential memorandum to Attorney General Jackson:

I am convinced that the Supreme Court never intended any dictum in the particular case [Olmstead] which it decided to apply to the grave matter involving the defense of the Nation.

You are therefore authorized and directed in such cases as you may approve, after investigation of the need in each case to authorize the necessary investigating agents that they are at liberty to secure information by listening devices directed to conversations or other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies. You are requested further more to limit these investigations so conducted to a minimum and to limit them insofar as possible to aliens.¹⁰

At the close of World War II, President Truman reinstated this memorandum, and this Presidential Order has provided the legal basis for federally conducted wiretaps. In national security cases, wiretapping is tacitly approved; however, the Federal Communications Act of 1934, which has been somewhat limited by the Omnibus Crime Control Act of 1968,¹¹ does not permit the introduction into a trial as evidence of information obtained by the use of wiretaps.

In *Nardone v. United States*,¹² the Supreme Court developed the "fruit of the poisonous tree" doctrine. Any evidence, directly or indirectly, obtained through the use of an illegal wiretap, is inadmissible. In order for evidence to be admissible at the trial, the prosecution must show that a causal connection did not exist between the illicit wire-tapping and the Government's proof. All evidence presented by the Government must be obtained from an "independent source" and be free from the "taint" of an illegal wiretap.¹³

⁸LONG, *supra* note 1 at 138.

⁹*Id.* at 87.

¹⁰*Id.* at 89.

¹¹Omnibus Crime Control and Safe Streets Act of 1968, Title III, 18 U.S.C.A. Chapter 119, § 2510-2520.

¹²*Nardone v. United States*, 308 U.S. 338 (1937).

¹³*Id.* at 341.

*ELECTRONIC INVASIONS OF PRIVACY
BY MEANS OTHER THAN WIRETAPPING*

Section 605 of the Federal Communications Act of 1934 was construed in *Goldman v. United States*¹⁴ to apply only to telephonic and telegraphic communications. Invasions are still possible by use of hidden microphones or "by wiring" an acquaintance of the suspect in order to obtain incriminating evidence. The suspect will, hopefully, trust and openly converse with the "wired" informer, and the concealed microphone or tape recorder will relate the intentions of the suspect to the police.

It was held in *Silverman v. U.S.*¹⁵ and in *Clinton v. Commonwealth*¹⁶ that an invasion of the suspect's home actually takes place when the police drive an electronic device, *i.e.*, a "spike mike," into the wall of a house. This action is considered to be a violation of the suspect's Constitutional rights that are guaranteed by the Fourth and Fifth Amendments to the Constitution of the United States.

The Supreme Court has taken a different position when the police use an informer who is "wired for sound." Police will usually attach a hidden microphone to an informer in hopes that the informer will be successful in engaging the suspect in an incriminating conversation, which will be either recorded on tape or transmitted to a police officer located away from the vicinity of the conversation. In *On Lee v. United States*,¹⁷ the Supreme Court, in a 5-4 decision, held that this type of police action was not an unreasonable search and seizure; therefore, the conviction of On Lee, based on this evidence, was affirmed.

In *Lopez v. United States*,¹⁸ one Lopez, in attempting to conceal a tax liability, offered to Davis, who was a Federal Revenue Agent, a \$420 bribe to conceal this tax problem. Davis reported this attempted bribe to his superiors, who instructed Davis to play along with the scheme. Davis was then given a pocket recorder that enabled him to obtain incriminating evidence against Lopez. The Supreme Court held that the recording was not unconstitutionally obtained. The government did not commit an unlawful invasion of the premises of Lopez.

¹⁴*Goldman v. United States*, 361 U.S. 129 (1942).

¹⁵*Silverman v. United States*, 365 U.S. 505 (1961).

¹⁶*Clinton v. Commonwealth*, 204 Va. 275, 130 S.E.2d 437 (1963).

¹⁷*On Lee v. United States*, 343 U.S. 747, 749 (1952). "Chin Poy, an old acquaintance and former employee of petitioner, entered the latter's laundry and engaged him in conversation, in the course of which petitioner made incriminating statements which led to his conviction for narcotic offenses. Unknown to petitioner, Chin Poy was a 'wired for sound' under-cover agent and the small microphone concealed on his person transmitted all sounds to a narcotics agent . . . stationed outside the laundry with a receiving set. Chin Poy was not called to testify about petitioner's incriminating statements—probably because 'the very defects of character and blemishes of record which made On Lee trust him with confidences would make a jury distrust his testimony'—but the narcotics agent was allowed to relate the conversation as heard with the aid of his receiving set."

¹⁸*Lopez v. United States*, 373 U.S. 427 (1963).

The recording merely substantiated the testimony of the agent's memory, and the conversation between the agent and Lopez should be disclosed with the recording as proof of the actual contents of the conversation.

The Supreme Court reaffirmed the *Lopez*¹⁹ decision in *Osborn v. United States*.²⁰ Osborn was an attorney for Teamster President James Hoffa. Osborn hired one Vick, who had gained the confidences of Osborn and Hoffa but in reality was an under-cover police officer, to make background investigations of prospective jurors for Hoffa's criminal trial. Osborn discovered that Vick's cousin was a prospective member of Hoffa's jury, and Vick was told by Osborn to approach this cousin to see if he would be susceptible to a bribe. Vick reported this incident to government officials. Government attorneys obtained a federal district court's permission to conceal a tape recorder on Vick in order to determine whether Vick's allegation about Osborn was true. Vick then reported to Osborn that the cousin of Vick would be "susceptible to money for hanging the jury." Osborn offered the cousin, through Vick, \$10,000 for "hanging" the jury. The Supreme Court held (7-1) that on these facts the use of the recording device was permissible and consequently the recording itself was properly admitted.

U.S. v. White,²¹ which was decided on April 5, 1971, is the latest case law in this area. In a 6-3 decision, the Supreme Court held that government agents may send informers into the homes of narcotics suspects with hidden radio transmitters and use this recorded conversation as evidence for the prosecution.

*CURRENT CASE LAW AND TITLE III OF THE FEDERAL OMNIBUS CRIME CONTROL ACT*²²

In *Berger v. New York*,²³ the Supreme Court of the United States held that any evidence obtained by means of electronic surveillance would be inadmissible unless the police had (1) obtained authorization from a court of competent jurisdiction; (2) established strong probable cause that a crime had been, was being, or was about to be committed; and (3) shown strong necessity for immediately obtaining the evidence. The Court further required that the person to be subjected to electronic surveillance be specifically identified, and required that a definite time limit be set for the surveillance period. If these requirements were not satisfied, the suspect's Constitutional "right to privacy," derived from

¹⁹*Id.*

²⁰*Osborn v. United States*, 385 U.S. 323 (1966).

²¹*U.S. v. White*, 39 U.S.L.W.4387, U.S. (April 5, 1971). The Supreme Court, with Justice Byron R. White delivering the opinion, stated at 4389 that this electronic surveillance was not within "expectations of privacy [that] are constitutionally 'justifiable'—what expectations the Fourth Amendment will protect in the absence of a warrant."

²²Omnibus Crime Control and Safe Streets Act of 1968, Title III, 18 U.S.C.A. Chapter 119, § 25-10-2520.

²³*Berger v. New York*, 388 U.S. 41 (1967).

the Fourth and Fourteenth Amendments to the Constitution, would be violated and the evidence would not be admissible in any subsequent prosecution. In *Katz v. United States*,²⁴ decided shortly after *Berger*, the Supreme Court extended the Fourth Amendment's²⁵ protection to the entirety of the individual's surroundings. In *Katz*²⁶ the F.B.I. had an electronic listening and recording device located in the roof of a public telephone booth from which Katz made phone calls, and his interstate gambling activities were recorded and used during Katz's trial as evidence. In a decision consistent with the rationale in *Berger*,²⁷ the Supreme Court held that the recordings were unlawfully obtained and were therefore inadmissible as evidence.

Title III of the Federal Omnibus Crime Control Act²⁸ now governs the use of all electronic surveillance in the United States at both the federal and local levels. The Act, passed shortly after the *Berger*²⁹ case, embodies most of the *Berger*³⁰ requirements. The provisions of this Act apply to both private persons and law enforcement personnel. All surveillances not authorized by these provisions are strictly prohibited, and severe criminal and civil penalties are provided for violations.³¹

²⁴*Katz v. United States*, 389 U.S. 347 (1967).

²⁵Olmstead, *supra* note 4 at 465, 466.

²⁶*Katz*, *supra* note 24.

²⁷*Berger*, *supra* note 23.

²⁸Omnibus Crime Control and Safe Streets Act of 1968, Title III, 18 U.S.C.A. Chapter 119, § 2510-1520.

²⁹*Berger*, *supra* note 23.

³⁰*Id.*

³¹Omnibus Crime Control and Safe Streets Act of 1968, Title III, 18 U.S.C.A. Chapter 119, § 2510-2520. "§ 2511. Except as otherwise specifically provided in this chapter any person who (a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication; (b) willfully uses, endeavors to use, or procures any person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or (ii) such device transmits communications by radio, or interferes with the transmission of such communication; or (iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or (iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States; (c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or (d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; shall be fined not more than \$10,000 or imprisoned not more than five years, or both."

The telephone company provides a signal for your protection as the "use of a recorder without recorder-connector equipment containing a tone-warning device is contrary to the company's tariffs and is not permitted. If you do not want a record made of what you are saying, ask the person with whom you are talking to disconnect the recording machine. When it is disconnected you will no longer hear the

The manner of obtaining authorization for "interception of wire or oral communication" is governed by Sections 2516 and 2518. Section 2516³² provides that the Attorney General of the United States, or his designated assistant, may apply to a Federal judge of competent jurisdiction for authorization for such interception by the F.B.I. or other Federal agency having investigative responsibility under Section 2518 (7). Application prior to interception is dispensed with in certain "emergency situations." Such surveillance may be used in the investigation of a large number of enumerated Federal Crimes, including conspiracy to commit any of those enumerated.

In order to secure authorization, the application section 2518³³ must also be complied with. This section requires that the application for an electronic surveillance must include (1) the identity of the officer making the surveillance; (2) a statement of the facts giving rise to probable cause to believe that a crime has been, is being, or is about to be committed; (3) a description of the nature of the intended surveillance; (4) a description of the location or place of the surveillance; (5) the identity of the person, if known, committing the offense and whose communications are to be intercepted; (6) a statement as to what other investigative procedures have been tried and failed or why they would appear likely to fail or to be too dangerous if tried; and (7) a statement as to the period of time for which the surveillance will be maintained.

Upon such application, the judge *may* allow such surveillance³⁴ if he determines that: (1) there is probable cause to believe that the surveillance will uncover evidence of such crime; (2) normal investigative procedures have been tried and have failed or would be dangerous or likely to fail if tried; and (3) there is probable cause to believe that

'beep' tone." This is an administrative provision and failure to comply may result in the loss of your telephone.

"§ 2520. Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person—(a) actual damages but not less than liquidated damages computed at the rate of \$100 a day for each day of violation or \$1,000, whichever is higher; (b) punitive damages; and (c) a reasonable attorney's fee and other litigation costs reasonably incurred. A good faith reliance on a court order or on the provisions of section 2518 (7) of this chapter shall constitute a complete defense to any civil or criminal action brought under this chapter."

³²*Id.* at § 2516 (1), (2). These crimes include espionage, treason, riots, atomic energy, murder, kidnapping, robbery, extortion, bribery in sporting contests, transmission of wagering information, bribery of public officials, witnesses or jurors, obstruction of criminal investigation, Presidential assassinations, interference with commerce by threats or violence, interstate and foreign travel or transportation in aid of racketeering enterprises, offer, acceptance or solicitation to influence operations of employee benefit plan, theft from interstate commerce, embezzlement from pension and welfare funds, interstate transportation of stolen property, counterfeiting, illicit drug traffic, and extortionate credit transactions.

³³*Id.* at § 2518 (1-10).

³⁴*Id.* at § 2518 (2).

the place subject to surveillance is being used, or is about to be used, in connection with the offense or is either leased to or commonly used by the suspect.

Each order authorizing electronic surveillance must specify the identity of the person subject to surveillance, the place where the surveillance is to occur, the nature of the communications to be intercepted, and the period during which surveillance is authorized. No surveillance may be authorized for a period longer than necessary to obtain the object of the authorization, nor for more than thirty days. Extensions may be granted in some cases.³⁵

Sections 2516 and 2518 (10) (a) provide for the suppression of evidence obtained by unauthorized surveillance, by surveillance not in conformity with the authorization, or by surveillance made pursuant to an authorization order insufficient on its face. This provision applies to trials, hearings, or proceedings before any court, agency or authority of the United States, any State, or political subdivision thereof.

Section 2518 (8) (d) requires that the person subjected to surveillance be notified of that fact within ninety days of the surveillance. Such notification may be delayed for good cause shown to a judge of competent jurisdiction.

The Omnibus Crime Control Act also prohibits the manufacture, distribution, possession and advertising of wire or oral communication intercepting devices³⁶ to the general public.

Section 2510 provides for the recovery of civil damages. Damages are to include actual as well as punitive damages, and the plaintiff is also permitted to recover attorney's fees.

ELECTRONIC SURVEILLANCE IN MONTANA AND MONTANA HOUSE BILL 384³⁷

At present a Montana prosecutor is unable to use evidence obtained through electronic surveillance by state or local law enforcement officers. Section 2516 (2) of Title III of the Omnibus Crime Control Act provides that:

The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that state to make application to a state court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement

³⁵*Id.* at § 2518 (4-5).

³⁶*Id.* at § 2512.

³⁷H.B. 384, 42nd Session (1971). Introduced by Representatives Lucas (Republican from Custer County) and Lanthorne (Republican from Lewis and Clark County).

officers having responsibility for the investigation of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marijuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

As noted above, evidence obtained by unauthorized interception is inadmissible and can be suppressed in criminal prosecutions in state courts. Montana does not have a statute authorizing the prosecutor to apply for a court order authorizing such interception.

In deed, the Revised Codes of Montana have only six sections that could be construed to pertain to electronic surveillance. Three of these, R.C.M. 1947, Sections 94-3321, 94-3322 and 94-35-220 are concerned with telegraphic communications. Sections 94-3321 and 94-3322 prohibit the disclosure or alteration of a telegram without a court order or permission of the addressee. Section 94-35-220 prohibits the learning of the contents of a telegram by machine, instrument, contrivance, or any other manner. The fourth section 94-3203 prohibits the tapping of telephone or telegraph lines by any means and by any persons, apparently including law enforcement officers. The last two statutes, Sections 94-35-274 and 94-35-275,³⁸ have not been construed and are evidently relatively unknown. Section 94-35-275 probably should be construed as providing an exception to a law enforcement official from the misdemeanor sanctions of Section 94-35-274. Under the Omnibus Crime Control Bill, any wiretap that a county attorney might attempt to establish under this statute would be illegal for failure to comply with the requirements of *Berger*³⁹ and *Katz*⁴⁰.

Even though the prosecutor in Montana is precluded by the provisions of 18 U.S.C. 2510 *et seq.* from using evidence gathered by local law enforcers through the use of electronic surveillance techniques, knowledge of the statutes' authorization provisions may still be relevant in some cases. For example, a Montana prosecutor may have occasion to use such evidence which has been gathered by federal law enforcement officers investigating suspected federal crimes.

Under the state option that is provided for in Title III⁴¹ states may adopt statutes that permit wiretapping on the state and local level. On

³⁸REVISED CODES OF MONTANA, § 94-35-274 (1947). [Hereinafter cited as R.C.M. 1947.] This section states: "It shall be unlawful to record or cause to be recorded by use of any hidden electronic or mechanical device which reproduces a human conversation without the knowledge of all parties to the conversation. Violation hereof shall constitute a misdemeanor." R.C.M. 1947, § 94-35-275. (This section states: "Section 94-35-274 shall not apply to duly elected or appointed public officials or employees when such transcription or recording is done in the performance of official duty; and persons speaking at public meetings or given warning of such recording.")

³⁹*Berger*, *supra* note 23.

⁴⁰*Katz*, *supra* note 24.

⁴¹Omnibus Crime Control and Safe Streets Act of 1968, Title III, 18 U.S.C.A. Chapter 119, § 2510-2520.

February 11, 1971, Bill No. 384⁴² was introduced in the Montana House of Representatives. This bill fulfilled all of the U.S. Supreme Court requirements as set forth in *Katz*⁴³ and *Berger*,⁴⁴ and compiled with Title III of the Omnibus Crime Control Act. The Montana House of Representatives passed the bill by a vote of 65-39; however, on February 22, 1971 the Montana Senate, by adopting an unfavorable Senate Judiciary Committee report, killed Bill No. 384.⁴⁵

This proposed bill would have authorized the Attorney General of Montana and the 56 county attorneys, under certain specified conditions, to engage in limited electronic surveillance. House Bill 384 incorporated various requirements and safeguards so that the privilege of electronic surveillance would not be abused.

Either the Attorney General or the county attorney would have been compelled to show that reasonable grounds existed to justify a belief that a serious offense had been or would be committed,⁴⁶ and that electronic surveillance was the only feasible method to obtain the necessary evidence for a conviction.⁴⁷ Electronic surveillance, as stated in House Bill 384, would have been limited to crimes involving bribery, extortion, influencing, threatening or injuring a public officer including jurors or witnesses. The bill also would have authorized electronic surveillance for crimes involving serious bodily harm and the sale of dangerous drugs.⁴⁸ The Montana bill was slightly more restrictive than the Omnibus Crime Control Act in that it did not provide, as does Title III, for electronic surveillance in situations involving threats to property.⁴⁹ The Montana bill also provided for a maximum fine of \$500 and/or confinement for up to six months in the county jail for any unauthorized electronic surveillance.⁵⁰

In order to obtain an authorization for electronic surveillance, either the county attorney or the Attorney General would have been compelled to comply with the application section of House Bill 384.⁵¹ This section required that the application for an electronic surveillance must include: (1) the identity of the officer making the surveillance; (2) a statement of the facts giving rise to the belief that electronic surveillance

⁴²H.B. 384, 42nd Session (1971).

⁴³*Katz*, *supra* note 24.

⁴⁴*Berger*, *supra* note 23.

⁴⁵H.B. 384, 42nd Session (1971). Members of the Senate Judiciary Committee are: Leonard Vainio, Jean Turnage, Stan Stephens, James Shea, Jack Rehberg, Jim Moore, William Hafferman, John Sheehy and P. J. Gilfeather. According to Governor Anderson's Office, the only votes that were recorded were the third reading's floor vote, which is an oral vote of yea and nay.

⁴⁶*Id.* at § (4) (d) (i-ii).

⁴⁷*Id.* at § (4) (d) (iii).

⁴⁸*Id.* at § (4) (d) (i).

⁴⁹*Id.*

⁵⁰*Id.* at § (3).

⁵¹*Id.* at §§ (5) (a) (i-v), (b), (c) (i-iv), (d) (i-v), and (e).

is necessary; (3) a statement why other procedures of investigation would lead or have led to failure; (4) a statement concerning whether other applications have been previously submitted concerning electronic surveillance in the particular situation; (5) the identity of the persons for whom the surveillance is planned; (6) the nature and location of the surveillance equipment; (7) description of the type of communication sought to be intercepted; (8) the identity of the agency attempting to establish the surveillance; and (9) a statement detailing the period of time for which the electronic surveillance is to be authorized. Although a time limit of 30 days was the maximum period of time for which any electronic surveillance could be conducted, the bill provided that an extension of this time period could be granted upon proof of the necessity of such extension.⁵²

The defeated bill is similar to an electronic surveillance bill that was to be submitted to the 1973 Montana legislature as part of the new criminal law proposals that were drafted by the Montana Criminal Law Revision Commission. Due to the defeat of Bill No. 384, the Montana Criminal Law Revision proposals will not include a "wiretap" bill. For the present at least, any electronic surveillance that is done in Montana must be under the authority of the Omnibus Crime Control Act, and the fruits of any unauthorized state surveillance will not be admissible into evidence at a trial.

THE PRESENT STATE OF THE LAW IN REGARD TO ELECTRONIC SURVEILLANCE

In the last two years, the Supreme Court has handed down several decisions in regard to electronic surveillance. *Alderman v. United States*, *Ivanov v. United States*, and *Butenko v. United States*,⁵³ were decided in 1969. Alderman was convicted of conspiring to transmit murderous threats in interstate commerce, and Ivanov and Butenko were convicted of conspiring to transmit to the Soviet Union information relating to the national defense of the United States. In all of these cases, the Federal Government utilized information that had been obtained through the use of electronic surveillance. The government contended that no information was obtained through the use of electronic surveillance that was relevant to the decision of the defendants' guilt. For this reason, the government refused to permit the defendants to examine the evidence that was obtained through the use of electronic surveillance.

In a 6-3 decision the Supreme Court held that the electronic surveillance records of the Federal Government must be turned over to the defendants in order to determine whether or not the information obtained through the surveillance had made a substantial contribution

⁵²*Id.* at § (5) (f).

⁵³*Alderman v. United States*, *Ivanov v. United States*, and *Butenko v. United States*, 394 U.S. 165 (1969).

to the evidence that was used against the defendants. The Supreme Court stated that this would preserve the adversary system of criminal law. The prosecution would have to convince the trial court that all of the evidence that was produced against the defendants was independent in origin, and the defendants would have an ample opportunity to show that the evidence of the Government was "tainted" by an illegal electronic surveillance.⁵⁴

The Justice Department under the Nixon Administration has enlarged the statutory limitations of the Omnibus Crime Control Act by claiming the right to eavesdrop without judicial authorization in cases where it believes that domestic persons are trying to "attack and subvert the government by unlawful means."⁵⁵ This authority is alleged to arise from the duty of the President to defend the Nation's security, and is claimed to be independent of court supervision and the limitations of the Constitutional safeguards of the Fourth Amendment.

The department of Justice has revealed that the late Reverend Martin Luther King Jr.; Muhammad Ali; Elija Muhammad, head of the Black Muslims; Lawrence Plamondon, a white militant; and five of the Chicago Seven defendants: David Dellinger, Bobby Seale, Jerry Rubin, Tom Hayden, and Rennie Davis were victims of illicit electronic surveillance. By early 1971, federal district courts were asked to rule on this "new" policy of the Department of Justice.⁵⁶

The federal district courts, in the Chicago Seven case,⁵⁷ affirmed this position. However, other federal courts have ruled against the position of the government. The Justice Department asked the 6th Circuit Court of Appeals in Cincinnati on February 5, 1971, to set aside a ruling by U.S. District Court Judge Damon J. Keith of Detroit. Judge Keith ruled against the Justice Department's electronic surveillance policies in the case of an alleged bombing by White Panther Lawrence "Pun" Plamondon. Keith held that the Attorney General, acting for the President, has no authority to conduct electronic surveillance in domestic national security cases without prior court approval. On April 8, 1971, the Sixth Circuit Court of Appeals, in *United States v. United States District Court for the Eastern District of Michigan, Southern Division and Honorable Damon J. Keith*,⁵⁸ held that the federal government cannot conduct wiretaps of domestic groups without a court order.

⁵⁴Nardone, *supra* note 12.

⁵⁵Congressional Quarterly Weekly Report, Feb. 19, 1971, at 429-30. This article provides a comprehensive study of the current wiretapping issue.

⁵⁶*Id.* at 430.

⁵⁷*People v. Hoffman*, 260 N.E.2d 351 (1970).

⁵⁸*United States of America v. United States District Court for the Eastern District of Michigan, Southern Division, Damon J. Keith*, 39 U.S.L.W. 2574, F.2d (5th Cir. 1971). The court stated at 2575: "It should be noted that the Fourth Amendment judicial review requirements do not prohibit the President from defending the existence of the state. Nor does the Fourth Amendment require that law enforcement officials be deprived of electronic surveillance. What the Fourth Amendment does is to establish the method they must follow."

With regard to unauthorized "electronic surveillance" the Fifth Circuit Court of Appeals, in *United States v. Clay*,⁵⁹ held that foreign intelligence surveillance without judicial warrant was not a constitutional violation. The problem of unauthorized electronic surveillance of espionage agents will have to be resolved by the Supreme Court of the United States.

Various arguments exist for and against legalized electronic surveillance.⁶⁰ Opponents to electronic surveillance usually argue that any evidence obtained in this manner is a clear violation of the Fourth and Fifth Amendments to the Constitution of the United States and is a pernicious invasion of the right to privacy. Opponents also claim that this is the first step towards a police state in that the "suspect" is completely unaware of this surveillance. Secret spying has no place in a democracy and is not consistent with the goals of our nation.

The proponents of this type of surveillance usually believe that law enforcement officials should be free to pursue all of the modern scientific inventions to aid the police in apprehending criminals. The proponents also claim that electronic surveillance is in the public interest, and that statutes can be passed which regulate against the possible abuses that may exist. The argument is also put forth that police are going to use electronic surveillance whether or not the information obtained is admissible at a trial, and therefore, statutes should be passed to regulate against this possible abuse.

Attorney General Mitchell is strongly in favor of the use of electronic surveillance and believes that this is one of the most effective tools of the modern law enforcement officer.⁶¹ Former Attorney General Ramsay Clark believes that electronic surveillance should be reserved for cases involving our national security.⁶² Mr. Clark believes that wiretapping is a waste of time, money, and talent and that any evidence obtained is of limited value in the courts.

Wiretapping is an emotionally charged issue, and no one seems to have a clear conception of its worth. A Gallup Poll,⁶³ in August of 1969, found the nation divided on wiretapping, with 46 per cent favoring the practice, 47 per cent opposed to the practice, and 7 per cent undecided. Only time, and the Supreme Court of the United States, will be able to answer all of the problems that have been raised by expanded use of electronic surveillance.

⁵⁹*United States v. Clay*, 430 F.2d 165 (5th Cir. 1970), *cert. granted*, limited to question 4, 39 U.S.L.W. 3297 (U.S. Jan. 11, 1971).

⁶⁰114 Cong. Rec. 14706-14745 (1968). (Debate of Title III of the Omnibus Crime Control Bill).

⁶¹Congressional Quarterly, *supra* note 55 at 430.

⁶²*Id.*

⁶³*Id.*

CONCLUSION

Do the benefits of legalized electronic surveillance outweigh the possible infringements that could take place to Fourth Amendment Rights? This is a question that one must answer for himself. Can anyone doubt that electronic surveillance is a desirable police weapon when used to apprehend the espionage agent, the radical bomber, and the kidnapper? On the other hand, should law enforcement officials be given the means to invade the homes of private citizens in order to search out these types of criminals? If permitted, are law enforcement officials, especially on the state and local level, able to use "electronic surveillance" with the necessary discretion or would these officials abuse this power?

As seen from the case law cited in this note, law enforcement agencies have conducted extensive "electronic surveillance" for the past 75 years. Perhaps mandatory training schools should be established for local, state, and federal law enforcement officials in order to instruct and to explain the potential advantages and the vast responsibilities that accompany "electronic surveillance." No one would doubt the competency of Federal Agencies, such as the Federal Bureau of Investigation, in establishing, maintaining, and removing an "electronic surveillance" device. State officials, if permitted by the enactment of electronic surveillance laws, would need instruction in the proper methods of establishing an electronic surveillance. The legal ramifications could be explained to the state and local police in order to insure that the evidence that is obtained by "electronic surveillance" is admissible as evidence for prosecution.

Each individual and each state must make their own policy judgment as to whether "electronic surveillance" is beneficial or detrimental to the public and to the law enforcement officials. If a state decides in favor of "electronic surveillance" then it must also set standards, as was done in Title III of the Omnibus Control Bill, to control the use of this electronic eavesdropping.

No statistical evidence is available to indicate whether or not electronic surveillance deters criminals or provides evidence that would enable the state to obtain more convictions. Perhaps urban states would benefit more from a state "electronic surveillance" statute than would a primarily rural state such as Montana. Do the "benefits" of crime control outweigh the possible infringements to Constitutional Rights? Before a wiretapping bill is enacted in any state, the state must make a judgment on this balancing of interests.

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