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Pennsylvania Alien Registration Act Unconstitutional

The United States Supreme Court[1] with three Justices dissenting, has affirmed the decision of a three Judge District Court declaring the Pennsylvania Alien Registration Act[2] of 1939 unconstitutional. The Court's opinion, written by Mr. Justice Black, turned on the single issue of the state's power to legislate in the field, once Congress had acted—as it did in the Alien Registration Act of 1940.[3] The appellees (one an alien, and the other a naturalized citizen who cited the prejudice that might result to him under the operation of the act by virtue of his foreign name and appearance) had claimed, in addition, as Mr. Justice Black noted in the opinion, that the act was "invalid, for the reasons that it 1) denies equal protection of the laws to aliens residing in the state; 2) violates section 16 of the Civil Rights Act of 1870;[4] 3) exceeds Pennsylvania's constitutional power in requiring registration without Congressional consent." None of these questions was passed on in the majority opinion. Mr. Justice Stone, writing for the dissent, viewed the Pennsylvania statute as entirely con-

(*Continued on page* 108)

1. *Hines, Secretary of Labor, etc.* v. *Davidowitz,* etc., Oct. Term 1940, Docket No. 22, Jan. 20, 1941, affg. the decision below, 30 Fed. Supp. 470, reported in 8 I.J.A. Bull. 54 (Dec. 1939). Dissenting opinion by Stone, J., concurred in by Hughes, C. J., and Reynolds, J.

2. Pa. Stats. Ann. (Purdon, Supp. 1940) tit. 35, §§1801-06. All aliens were required to register except those who were the parents of an individual who had served in the service of the United States during any war, or who had resided in the United States since December 31, 1908 without acquiring a criminal record, or who had filed application for citizenship. The latter exception was qualified by the proviso that aliens in that category had to register if they had not become naturalized within a period of three years after applying for citizenship.

3. Public No. 670, 76th Cong., 3d Sess., in effect June 28, 1940, discussed in 8 I.J.A. Bull. 6 (July 1940).

Earlier decisions had held registration statutes of Michigan and California unconstitutional: The Michigan statute in *Arrowsmith* v. *Voorhies,* 55 F.(2d) 310; and the California statute in *Ex parte Ah Cue,* 101 Cal. 197, 35 Pac. 556. In addition, several other states have dormant on their statute books laws passed in 1917-18 empowering their Governor to require registration when a state of war exists, or when public necessity requires. E.g., Conn. Gen. Stats. (1930) tit. 59, §6042; Fla. Comp. Gen. Laws (1927) §2078; Iowa Code (1939) §503; La. Gen. Stats. (Dart, 1939) tit. 3, §282; Me. Rev. Stats. (1930) ch. 34, §3; N. H. Pub. Laws (1926) ch. 154; N. Y. Cons. Laws (Executive Law) §10. Other states, like Pennsylvania, have passed registration laws more recently. *E.g.,* S. C. Acts (1940) No. 1014, §9, p. 1939; N. C. Code (1939) §§193 (a)-(h). In several states, municipalities have recently undertaken local alien registration.

4. 8 U.S.C. §41, providing:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

Wiretapping, Congress and the Department of Justice

It has become a commonplace to note the increasing invocation of the national defense to justify policies which in war as well as peace have usually been regarded as inimical to the interests of the American people. The tendency is particularly disturbing when the proposal stems from sources which have over long periods sought to achieve the same objectives, and to which the national defense is not a new circumstance requiring new action but a new opportunity for securing long-desired ends.

Now pending in the House of Representatives are two bills which would authorize the federal police to engage in wiretapping.[1] It is particularly instructive in this connection to examine the significance of wiretapping as an investigative technique and the history of the attitude of Congress, the courts and the Department of Justice during the past two decades.

Wiretapping as an Investigative Technique

Wiretapping was held constitutional in a five to four decision rendered in the case of *Olmstead* v. *United States*[2] in 1928. Justices Brandeis, Holmes, Butler and Stone dissented.

Justice Brandeis contended that wiretapping constitutes an unlawful search and seizure in violation of the Fourth Amendment and that the use in a criminal proceeding of evidence so obtained constitutes compulsory self-incrimination in violation of the Fifth Amendment. The dissent deserves to be read in full even by those uninterested in the legality of wiretapping for it is one of Justice Brandeis' greatest dissents, inspired not only with legal clarity and constitutional understanding but with an eloquence he employed only when he considered the issue critical. He wrote:

". . . Force and violence were then [at the time of the adoption of the Bill of Rights] the only means known to man by which a Government could directly effect self-incrimination. It could compel the individual to testify—a compulsion effected, if need be, by torture. It could secure possession of his papers and other articles incident to his private life—a seizure effected, if need be, by breaking and entry. Protection against such invasion of 'the sanctities of a man's home and the privacies of life' was provided in the Fourth and Fifth Amendments, by specific language. Boyd v. United States, 116 U.S. 616, 630. But 'time works changes, brings into existence new conditions and purposes.' Subtler and more far-reaching means of invading privacy have become available to the government. Discovery and invention have made it

1. H. R. 2266, sponsored by Representative Hobbs and H. R. 3099, sponsored by Representative Walter. Mr. Hobbs is better known as the author of the "concentration camp" bill (discussed in *Alien Legislation,* 7 I.J.A. Bull. 126 at 127 (May 1939) and Mr. Walter is better known as co-sponsor of the Logan-Walter bill (discussed in *The Logan-Walter Bill,* 8 I.J.A. Bull. 101 (April 1940)).

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

possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.

"Moreover, 'in the application of a constitution, our contemplation cannot be only of what has been, but of what may be.' The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping. 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."[3]

Turning to wiretapping itself he wrote:

"... The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded and all conversations between them upon any subject, and although proper, confidential and privileged, may be overheard. Moreover, the tapping of one man's telephone line involves the tapping of the telephone of every other person whom he may call, or who may call him. As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire-tapping."[4]

And in dealing with wiretapping as an invasion of the right of privacy, he 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 beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.

"Applying to the Fourth and Fifth Amendments the established rule of construction, the defendants' objections to the evidence obtained by wire-tapping must, in my opinion, be sustained. It is, of course, immaterial where the physical connection with the telephone wires leading into the defendants' premises was made. And it is also immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."[5]

Justice Holmes was moved to write a separate dissent in which he advanced additional grounds for excluding the wiretapped evidence. Wiretapping itself he called "dirty business."

Even supporters of the practice have recognized the evils of wiretapping. Their contention has been, however, that just as searches and seizures are limited by the prerequisite of a court warrant, so wiretapping can be regulated.[6] Thus in the bills now pending it is proposed that wiretapping be employed by the police only on the order of a court[7] or a high administrative official.[8]

Those who make these proposals overlook two factors inherent in the very nature of wiretapping as an investigative technique: (1) It is impossible to limit it to the gathering only of relevant evidence, or, indeed, to limit in any way what the police shall overhear or their devices record once the apparatus is attached to the telephone; and (2) the victim has no way of knowing, and in many instances will never know, that his wires are tapped.

It requires no familiarity with the various methods employed[9] to appreciate that the wiretapper cannot know or limit in advance what he will overhear or record. Matter intercepted cannot be limited to that which is relevant or to that which comforms to other specifications of any court order. The wiretapper inevitably overhears all the communications of anyone who uses a given telephone, including persons other than its owner.[10]

Even more significant is the second consideration. The victim of a physical search and seizure *knows* that his privacy has been invaded and his property taken from him. If there has been an abuse of process, remedies are available to him to secure return of his property or to exclude evidence improperly gathered against him.[11] The essence of wiretapping, however, is secrecy. The victim ordinarily cannot know of it while it is being carried on[12]—so that he has no opportunity to examine into the existence, nature and limits of any requisite court authorization. He will learn that his wires have been tapped only if and when the police attempt to use a transcription of his words as evidence against him in court.

A victim of tapping may never know that the police have invaded his right to privacy. Indeed the more innocent he is, the less probable it is that he will learn of the wiretapping through its use as evidence in court. In other instances, the conversations overheard may not be brought to light in court but may simply yield information used to obtain other evidence.[13] Nor is the use of information secured by wiretapping limited to the acquisition of evidence. It can obviously be used for a host of collateral oppressions, unfortunately not infrequent in employer-employee relationships, without any knowledge on the part of the victim as to the source or, indeed, the existence, of the information.[14]

3. 277 U. S. at pp. 473-474.
4. *Id.*, at p. 476.
5. *Id.*, at pp. 478-479.
6. See, *e.g.*, the hearings on the instant proposals before the House Judiciary Committee, not yet printed. The Harvard Law Review suggests the same analogy in *Wire Tapping and Law Enforcement*, Vol. 53, pp. 863-871 (March 1940). Wiretapping is practiced in New York under such a requirement. New York Constitution, Art. I, Sec. 12. See note 132, *infra*.
7. H. R. 3099.
8. H. R. 2266.
9. For an article dealing with the devices used by the FBI see Alfred Stedman, *St. Paul Pioneer Press*, Mar. 31, 1940. See also *Popular Science*, Dec. 1938, pp. 104-105. An excellent informal article by Meyer Berger appeared in the *New Yorker* for June 18, 1938, pp. 41-47.
10. It is because of this inability of a wiretapper to determine what conversations he will overhear that Congress has the power to forbid wiretapping on intrastate telephone conversations as well as on interstate conversations. In *Weiss* v. *United States*, 308 U. S. 321 (1940), the Supreme Court in holding that Congress was constitutionally able to forbid, in Section 605 of the Communications Act of 1934, the interception of intrastate conversations reasoned that it was impossible for a wiretapper to overhear only intrastate conversations. It pointed out that a wiretapper could not know in advance what he would overhear and that to prevent him from overhearing interstate conversations, it was reasonable for Congress to forbid all tapping.
11. *Weeks* v. *United States*, 232 U. S. 383 (1914); *Boyd* v. *United States*, 116 U. S. 616 (1886).
12. See letter of Acting Secretary of War Crowell to the Senate, Senate Document 207, 65th Cong., 2nd Sess., and letter of Secretary of War Baker to the Senate, Senate Document 227, 65th Cong., 2nd Sess. Both letters stated, in response to requests from the Senate, that no device had been discovered by the Army Signal Corps or the telephone companies which made it possible to detect that a telephone wire had been tapped. See also Senate Report No. 1304, 76th Cong., 3rd Sess., of the Senate Committee on Interstate Commerce recommending an investigation of wiretapping against Government officials.
13. See statement of Attorney General Cummings, *infra* note 123.
14. See *infra* note 53.

The analogy to search warrants is thus false. The nature of the wiretapping technique makes it inherently subject to abuse. The victim cannot protect himself against practices of which, in most instances, he is unaware, and no preliminary court or administrative order can give him adequate protection.

The United States Senate Committee on Interstate Commerce, in recommending an investigation of wiretapping carried on against public officials, placed emphasis on this aspect of wiretapping:

"The wire-tapping, dictographing and similar devices are especially dangerous at the present time because of the recent resurgence of a spy system conducted by Government police. Persons who have committed no crime, but whose economic and political views and activities may be obnoxious to the present incumbents of law-enforcement offices, are being investigated and catalogued. If information gathered in such investigations is being obtained by wire-tapping, dictographing, or other reprehensible methods, and if it is some day offered as evidence in a Federal criminal trial, the courts may have an opportunity to apply the principles of the *Boyd case* and of the *Nardone cases*. But on the other hand, the information may perhaps never be offered in such a case, because the victims of wire-tapping and similar methods may perhaps never be charged with a crime. In this event, the information may be used in extra-legal controversies where the courts may have no opportunity to adjudicate the matter. Wire-tapping and other unethical devices may lead to a variety of oppressions that may never reach the ears of the courts. They may, for example, have the effect of increasing the power of law-enforcement agencies to oppress factory employees who are under investigation, not for any criminal action, but only by reason of their views and activities in regard to labor unions and other economic movements; this is no fanciful case—such investigations are a fact today. In short, unauthorized and unlawful police objectives may be aided by wire-tapping and dictographing practices, the extent of which we are not in a position to estimate without a careful inquiry into all the facts."[15]

It is this combination of secrecy in use and access to the victim's most personal affairs that has made wiretapping the preferred weapon of the blackmailer, the unscrupulous politician, the private detective, the "red" squad and the anti-union employer.

In recent years, the wires of the Attorney General of Rhode Island,[16] a mayor in the same state[17] and prominent Philadelphia Democratic leaders[18] have been tapped and microphones have been planted in the office of the Governor of Colorado[19] and the hotel bedroom of the Speaker of the California State Assembly.[20] A National Labor Relations Board trial examiner has found that the wires of Ford employees at the Dallas, Texas, plant have been tapped.[21] In Tulsa, Oklahoma, testimony has been given that an oil company, with the cooperation of city detectives, the county prosecutor and Oklahoma National Guard, tapped the wires of the Oil Workers International Union.[22] The telephones of the Farmers Producers Association were tapped in Toledo, Ohio, during the course of a "milk war" for better prices for the farmer.[23] Attorneys hired by the cities of Columbus and Toledo to sue the Ohio Fuel Gas Company for an alleged $42,000,000 overcharge were "investigated" by a wiretapper hired by the company.[24] In New York, two attorneys were indicted on a charge of tapping the telephone of opposing counsel.[25] The use of "listening-in" devices is apparently accepted as a normal aspect of the work of the private detective.[26] Indeed, the telephone wires of the White House have been tapped[27] and they may still be tapped.[28]

But wiretapping by private persons does not compare either in intensity or in frequency with the systematic espionage conducted by the federal police. They have been able in the course of a single investigation, to tap a telephone wire for months at a time.[29] They have, in the course of one investigation, made thousands of mechanical recordings.[30] They have even tapped the wires of the public telephone booths of a large hotel in the hope of obtaining evidence against suspects who sometimes used those telephones.[31] The F.B.I., with the aid of large appropriations for its "scientific" laboratory, has converted wiretapping from a haphazard affair to scientific espionage.[32] The federal police have even sought to give wiretapping the dignity of a profession by calling their eavesdropping by the more pleasant name of "supervision."[33]

15. Senate Report No. 1304, 76th Cong., 3rd Sess., 1940 at pp. 4-5.
16. See Hearings before a subcommittee of the Senate Committee on Interstate Commerce investigating wiretapping, pursuant to S. Res. 224, 76th Cong., 3rd Sess., 1940, Vol. 1, pp. 3-31. The wiretapper was a former F.B.I. agent, employed in his capacity of private detective and wiretapper by the Governor of the State.
17. *Ibid.*
18. *Id.*, at pp. 63-82.
19. Editor and Publisher, Jan. 29, 1938, p. 10; see also statement of U. S. Senator Edwin C. Johnson in Washington Post, Mar. 17, 1940. The microphone was planted by a newspaper man and remained undiscovered for three months.
20. San Francisco Examiner, Mar. 6 and 8, 1940.
21. N. Y. World-Telegram, Apr. 20, 1940, p. 2, c. 2.
22. Hearings before N.L.R.B. in *Oil Workers International Union* v. *Midcontinent Petroleum Company*, 1940; Tulsa Daily World, Mar. 28, 29 and 31, 1940; 86 Cong. Rec., pp. 4759-4761, Mar. 19, 1940.
23. N. Y. Times, Sept. 25, 1932, p. 2, c. 2.
24. Hearings before a subcommittee of the Senate Committee on Interstate Commerce investigating wiretapping, not yet printed but reported in Labor, Feb. 25, 1941; also reported in N. Y. World-Telegram, Feb. 14, 1941, p. 6, c. 5.
25. N. Y. Times, Jan. 26, 1939, p. 14, c. 5; also N. Y. Times, Feb. 1, p. 2, c. 2., and Feb. 8, p. 2, c. 2.
26. The New York City Classified Telephone Directory, Feb. 1941, pp. 299-300 lists two firms, under a separate classification "Detective Listening-In Devices," advertising sale of such devices. One page contains advertisements of four private detective agencies declaring themselves able to use dictographs and "listening-in devices," a service available according to one advertisement in "criminal, civil, industrial and domestic investigations." *Id.* at 300.
27. Hearings before the Senate Committee on Public Lands and Surveys on Appointment of E. K. Burlew, 75th Cong., 3rd Sess., 1938. At page 95, Louis B. Glavis, former director of the Department of Interior investigating staff, testified:

"Senator Steiwer. Was there any eavesdropping on calls between the Interior Department and the White House?

"Mr. Glavis. We had attachments on certain phones. Conversations coming in over those were recorded, regardless of whether it was the White House or you or anybody else calling."

28. John O'Donnell and Doris Fleeson, N. Y. Daily News, Jan. 27, 1941.
29. *United States* v. *Bernava*, 95 F. (2d) 310 (C.C.A. 2, 1938), Rec. on App. p. 70. The agency here involved was the F.B.I.
30. *Weiss* v. *United States*, 308 U. S. 321 (1939), Rec. on App. pp. 74-83. The agency here involved was the Post Office Department.
31. *Nardone* v. *United States*, 302 U. S. 379 (1937), Rec. on App. p. 168. The agency here involved was the Treasury Department.
32. See Alfred Stedman, St. Paul Pioneer Press, Mar. 31, 1940.
33. *Sablowsky* v. *United States*, 101 F. (2d) 183 (C.C.A. 3, 1938). At page 211a of the Record on Appeal, Treasury Agent Teeson, after speaking at great length about "supervision of telephone wires" and of his work as a "wire technician", was asked:

"Q. By 'wire technician', 'supervising wires', you mean

The F.B.I. has trained not only its own agents in wiretapping, but the hundreds of local police who attend its school.[34] The Treasury Department maintained at least two wiretapping schools, one in Detroit[35] and another in New Orleans.[36] Wiretapping has been one of the standard investigatory techniques of the F.B.I.,[37] the Post Office Department,[38] the Narcotics Bureau,[39] the Alcohol Tax Unit,[40] the Internal Revenue Bureau,[41] the Customs Bureau[42] and the Department of the Interior.[43] In addition, federal wiretappers have worked for local police in the detection of local crimes[44] and local police have done wiretapping for the F.B.I.[45] On less happy occasions, the F.B.I. and the local police have tapped each other's wires.[46]

There are no reported cases where wiretapped evidence has resulted in conviction of a single spy, saboteur, kidnapper, murderer or extortionist.[47] The F.B.I. has been able to obtain convictions with the aid of wiretapping in prosecutions for perjury,[48] interstate theft,[49] obstruction of justice,[50] bribery[51] and Mann Act violations.[52] There is, in addition, a possibility that wiretapping may have enabled J. Edgar Hoover to supply employers with information about the "subversive records" of prospective employees.[53] Available evidence suggests that a list of professional wiretappers now working for the federal government and former F.B.I. men who have become privately employed as wiretappers would reach substantial proportions.[54]

Department of Justice v. Congress

With this background of the nature and extent of the wiretapping technique, it is enlightening to examine the history of Congressional action on the subject and the attitude of the Department of Justice.

Congress has long and continuously exhorted the federal police to abandon the use of wiretapping.[55] Victory should have rested finally with Congress in 1934, when, its patience exhausted, it enacted a penal statute outlawing wiretapping.[56] The F.B.I., however, through its parent, the Department of Justice, was given an immunity from the operation of the prohibition against wiretapping. Instead of enforcing the statute, the Department of Justice presented to the courts theory after theory for emasculating the statute.[57] The courts—notably the Supreme Court—found no basis for these theories and refused to open loopholes in the prohibition. In each of these cases, the appellate courts reversed convictions based on wiretapped evidence.

These mounting defeats in the courts, followed by the issuance of a report in March 1940 by the Senate Committee on Interstate Commerce[58] which fastened public attention on the illegal wiretapping activities of the F.B.I. finally convinced the F.B.I. that it had no legal power to tap wires. J. Edgar Hoover and the Attorney General issued a statement pledging themselves to abandon the practice.[59]

tapping telephones?
"A. Yes, sir."
Meyer Berger states in the article cited in note 9 that wiretappers were "grateful when one of the instructors in a wiretapping school conducted by the Treasury Department introduced the term 'wire supervising' to describe the work. That gave the calling a new dignity and the phrase is used a lot now when tappers are called upon to testify in court." F.B.I. tappers, who are college graduates, use the more genteel term of "surveillance".

34. William Kelly, a Tulsa, Oklahoma policeman who tapped a union's wires in collusion with an employer, testified that he had received his wiretapping training at J. Edgar Hoover's Police Academy. See Hearings before N.L.R.B. in *Oil Workers International Union* v. *Midcontinent Petroleum Corporation*, at p. 14251.

35. *U. S.* v. *Bruno*, 105 F. (2d) 191 (C.C.A. 2, 1939), Rec. on App. p. 137.

36. *Id.* at p. 161.

37. See, in addition to pp. 102 and 103 *infra*, press release of J. Edgar Hoover, Mar. 13, 1940, in which he said:
"The Federal Bureau of Investigation has utilized wire tapping . . . where the activities of persons under investigation were of such an aggravated criminal nature as to justify the use of extraordinary means to detect their activities and cause their apprehension."

38. See Rec. on App. in *Weiss* v. *United States*, *supra*, at p. 90 where Post Office Inspector Frank Shea testified he had been regularly tapping wires for the Post Office Department "for the past 20 to 25 years".

39. See for example, *U. S.* v. *Bruno*, n. 35, *supra*; *U. S.* v. *Ginsberg*, 96 F. (2) 433 (C.C.A. 5, 1938); *U. S.* v. *Yee Ping Tong*, 26 F. Supp. 69 (D.C.W.D. Pa. 1939).

40. See for example *Sablowsky* v. *U. S.*, n. 33, *supra*; *Nardone* v. *U. S.*, *supra*; *U. S.* v. *Klee*, 101 F. (2d) 191 (C.C.A. 3, 1938); *U. S.* v. *Jennello*, 102 F. (2d) 587 (C.C.A. 3, 1939).

41. See for example, N. Y. Times, Sept. 3, 1938, p. 5, c. 1, for an account of the activities of Internal Revenue agents in the Hines prosecution in New York. See also statement of Secretary of Treasury Morgenthau, N. Y. Times, Oct. 16, 1934, p. 1, c. 3.

42. See for example, *U. S.* v. *Bonanzi*, 94 F. (2d) 570 (C.C.A. 2, 1938.

43. See for example, Hearings, n. 27, *supra*.

44. See for example, *Hitzelberger* v. *State*, 174 Md. 152, 197 Atl. 604, 1938 (F.B.I. and Baltimore, Md., police).

45. See for example, *U. S.* v. *Reed*, 96 F. (2d) 785 (C.C.A. 2. 1938) (New York City Police and F.B.I.). For a related example of the use of local police by the F.B.I. see *Cofer* v. *U. S.*, 37 F. (2d) 677 (C.C.A. 5, 1930), Rec. on App. pp. 169-170.

46. See for example, Miami Herald, Jan. 18, 1940, p. 1 and Miami Herald, Jan. 24, 1940, p. 1 (F.B.I. and Miami, Fla. police).

47. This statement is based on a study of all cases reported arising under these statutes and under Section 605.

48. *U. S.* v. *Fallon*, 112 F. (2d) 894 (C.C.A. 2, 1940).

49. *U. S.* v. *Bernava*, cited in n. 29, *supra*.

50. *U. S.* v. *Polakoff*, 122 F. (2d) 888 (C.C.A. 2, 1940).

51. *Hitzelberger* v. *State*, n. 44, *supra*.

52. *U. S.* v. *Reed*, n. 45, *supra*; *U. S.* v. *Bernava*, n. 29, *supra*; *Hitzelberger* v. *State*, n. 51, *supra*.

53. See press interview of J. Edgar Hoover, reported in Washington Post, Mar. 14, 1940, p. 2, c. 7, in which he stated that he tapped wires "only to obtain information and not as a basis for criminal prosecution" and compare with his statement that he supplies information to employers on "criminal or subversive" records of potential employees, Hearings before Sub. of H. Com. on Appr., 76th Cong., 3rd Sess., p. 153.

54. Rarely does the F.B.I. use less than five or six wiretappers in even a theft case, such as the one cited in note 29. At least four former F.B.I. men have been involved in wiretapping as private detectives. See Hearings, n. 16, *supra*, V. I, p. 8, where Attorney General Jackvony of Rhode Island testified on availability of former F.B.I. men as private detectives.

55. Congress abolished wiretapping as early as the World War, *infra*, note 65. See the following investigations: Sen. Doc. 198, 69th Cong., 2nd Sess., 1926 in pursuance to H. Res. 352 of the same Congress; Hearings on Wire Tapping in Law Enforcement, before House Committee on Expenditures in the Executive Departments, Feb. 19, 1931. Appropriations committees have frequently used their opportunity to question departmental heads to make sure that wiretapping was not being used. See Hearings on Department of Justice Appropriations Bills before the following committees: House Sub. of Comm. on Appr., 71st Cong., 1st Sess., pp. 63-64; Subcom. of H. Com. on Appr., 71st Cong. 3rd Sess., pp. 116-117; Subcom. of H. Com. on Appr., 72nd Cong., 1st Sess., pp. 251-255; Subcom. of Sen. Comm. on Appr., 72nd Cong., 2nd Sess., pp. 65-73. Congress abolished wiretapping in prohibition enforcement in 1933 and all wiretapping in 1934, *infra*, notes 92 and 96. In 1940, the Senate unanimously authorized an investigation of wiretapping, S. Res. 224, 76th Cong., 3rd Sess. not yet completed.

56. Sec. 605 of the Communications Act of 1934, 47 U. S. C. §605, 48 Stat. 1103.

57. *Infra*, pp.

58. Senate Report 1304, 76th Cong., 3rd Sess.

59. Press statement of the Department of Justice released for March 18, 1940, dated March 15, 1940, containing notice of discontinuance of wiretapping. Mr. Jackson gave the F.B.I. two additional weeks of grace in which it might continue wiretapping. This is the only instance known in which the Attorney General of the Unted States decided that a law would not be enforced until a later date which he selected in preference to the one chosen by Congress.

Within a few months, however, another exception to the statute banning wiretapping was offered by the Department of Justice to the courts in behalf of the F.B.I.[60] But again the courts construed the statute literally and consequently the F.B.I. lost two more cases by reversal of convictions based on intercepted conversations.[61]

These comparatively subtle methods of thwarting the will of Congress having failed, their abandonment became necessary and direct attack was decided upon. At the subsequent session of Congress a bill to legalize wiretapping "in the interests of national defense" was introduced.[62] The bill died in committee[63] and the present proposals to legalize wiretapping represent a second effort to "safeguard national defense."[64]

This struggle between Congress and the Department of Justice has been so sharp and the strategy of the F.B.I. in avoiding obedience to the law so devious that a fuller account of the proceedings summarized above may be desirable.

Congress first outlawed wiretapping in 1918.[65] Some twenty states, New York included, had already done so[66] and prosecutions for violation of these statutes were not uncommon.[67] The federal statute, however, arose directly out of the war in which the United States was then engaged. Some months prior to the passage of the statute, Congress had become apprehensive that wiretapping threatened the necessary secrecy of governmental activity.[68] The Army Intelligence and the Signal Corps had informed the Senate that it was impossible to ascertain whether the government's telephones were being tapped.[69]

In deciding to protect the secrecy of government communications, Congress decided to go further by prohibiting all wiretapping. The statute so provided, and the debates and committee report make it abundantly clear that Congress sought thereby to protect the privacy of the citizen's communications.[70]

This statute provided for its own termination, however. Its operation was confined to the "period of governmental operation of the telephone and telegraph systems."[71] In July 1919, Congress returned these properties to their owners[72] and the first federal prohibition against wiretapping expired. No prosecutions had been brought under the statute, although the war period was one of promiscuous wiretapping directed chiefly against aliens.[73]

It was the *Olmstead* case,[74] a federal prosecution for conspiracy to violate the prohibition laws, which recalled Congressional attention to wiretapping.[75] The wholesale wiretapping by the Treasury agents attracted the attention of the public and the press as well. By tapping eight telephones over a period of nearly five months, six federal wiretappers had filled a volume of 775 typewritten pages with their notes on intercepted conversations.[76] Some of the conversations overheard and received in evidence by the trial court included privileged communications between lawyer and client.[77] The telephone companies found it advisable to submit briefs as friends of the court attacking wiretapping.[78] While the court, by a 5 to 4 vote held that wiretapping was not unconstitutional, even the majority stated that Congress could outlaw wiretapping by statutory prohibition.[79]

Within ten days after the argument in the *Olmstead* case, and as a direct result of it,[80] J. Edgar Hoover, the chief of the Bureau of Investigation of the Department of Justice, issued the following order to his agents:

"Wire-tapping, entrapment, or the use of any illegal or

60. In *U. S.* v. *Fallon* and *U. S.* v. *Polakoff*, cited in n. 48 and 50, *supra*, the Department of Justice argued for the admissibility of recordings of telephone conversations in which one of the two conversants had "consented" to the interception.

61. *Ibid.*

62. H. J. Res. 571, 76th Cong. 3rd Sess., 1940. The bill proposed by Representative Celler and drafted by Alexander Holtzoff, legal adviser to the F.B.I., provided that the F.B.I. could tap wires in the "conduct of investigations in the interests of national defense". See H. Report 2574 of the same Congress.

63. The Celler bill specifically stated, Section 2, H. J. Res. 571, that it was an exception to the ban on wiretapping in Section 605 of the Communications Act. The bill was sent in the Senate to the Interstate Commerce Committee, to which previous bills affecting wiretapping or the Communications Act have been sent. Senator Wheeler, chairman of this Committee, has frequently expressed his personal opposition to any kind of wiretapping. Consequently, the present proposals to permit wiretapping were drafted as amendments to the Judicial Code, thereby attempting to prevent reference of the bills to the Interstate Commerce Committee. Paul Mallon, Washington columnist wrote in his "Behind the News", Washington Times Herald, Feb. 17, 1941:
"The new Hobbs Bill was dressed in a judicial disguise to keep it away from the Commerce Committee . . . . Whether the judiciary committee will be any more willing [than the Commerce Committee was in 1940] to turn the private communication system of the United States over to Government spies cannot yet be ascertained."
Far a fuller discussion of this maneuver see Raymond P. Brandt, St. Louis Past-Dispatch, February 21, 1941, p. 60, col. 3-5.

64. One of the present proposals, H. R. 2266, provides for wiretapping in all kinds of federal crimes; see *infra*. But at the hearings before the House Judiciary Committee, the sponsors of the bills stated explicitly that they are willing to limit wiretapping to the investigation of kidnapping, extortion, and violations of the espionage and sabotage laws.

65. 40 Stat. 1017 (1918).

66. These and later statutes are collected in note 13 of Mr. Justice Brandeis' dissent in *Olmstead* v. *U. S.*, 277 U. S. 438 (1928).

67. See, for example, *State* v. *Behringer*, 19 Ariz. 502, 172 Pac. 660 (1918); *People* v. *Hebberd*, 86 Misc. 617, 162 N. Y. Supp. 80 (1916).

68. See note 12, *supra*.

69. *Ibid.*

70. 56 Cong. Rec. 10761, 10764-10765.

71. See n. 65, *supra*.

72. 41 Stat. 157.

73. See Meyer Berger, The New Yorker, June 18, 1938, p. 41 at p. 44.

74. 277 U. S. 438 (1928).

75. There has been no space here for discussion of Congressional statutes enacted in the interim protecting the privacy of radio communications. Shortly before the *Olmstead* case, Congress prohibited the divulgence of any radio message. Radio Act of 1927, Sec. 107, 44 Stat. 1182. The earlier radio laws of 1912 and 1913 which this superseded had forbidden the employees of radio stations to divulge messages. Act. of Aug. 13, 1912, c. 287, sec. 4, 37 Stat. 304; Act of March 4, 1913, c. 141, sec. 1, 37 Stat. 736.

76. 277 U. S. 438 at 471.

77. This is not discussed in the majority opinion in the Supreme Court, but was discussed by the District Court on a preliminary motion to suppress evidence. See *U. S.* v. *Olmstead*, 7 F. (2d) 760, 763 (D. C. Wash., 1925).

78. The argument for the telephone companies is summarized at 277 U. S. 438, 452-455.

79. *Ibid*, at 465:
"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 at 468:
"Nor can we, without the sanction of congressional enactment, subscribe to the suggestion that the courts have a discretion to exclude evidence . . . because unethically secured."

80. Hearings on Wire Tapping in Law Enforcement before House Committee on Expenditures in the Executive Departments, Feb. 1931, p. 25.

unethical tactics in procuring information will not be tolerated by the Bureau."[81]

In 1929, under questioning before a House Appropriations Committee apparently opposed to the use of any funds for wiretapping, he stated:

"We have a very definite rule in the Bureau that any employee engaged in wire-tapping will be dismissed from the service of the Bureau. . . . While it may not be illegal, I think it is unethical and it is not permitted under the regulations by the Attorney General."[82]

Shortly after this, prohibition enforcement was transferred from the Treasury Department to the Department of Justice. The Department of Justice made even more extensive use of wiretapping in prohibition enforcement.[83]

Two rules thus existed in the Department of Justice. The prohibition enforcement unit was hiring and the F.B.I. was firing wiretappers. Attorney General Mitchell solved the problem by directing Mr. Hoover to amend his ban on wiretapping.[84] As amended in 1931, the regulation governing wiretapping by F.B.I. agents read:

"Telephone or telegraph wires shall not be tapped, unless prior authorization of the Director of the Bureau has been secured."[85]

Although Mr. Hoover later protested that he tapped wires only because Attorney General Mitchell had so directed,[86] the regulation on its face was not calculated to establish wiretapping as a normal practice, except to the extent to which the Director of the Bureau authorized it. No F.B.I. agent could tap wires without the authorization of Mr. Hoover who was already on record as opposed to the "unethical" if not "illegal" practice.

With the issue between Congress and the Department of Justice finally drawn and explicit, legislation was offered to prevent wiretapping. In December 1931, a bill was introduced in the House, making it a crime for any federal employee or official to tap wires and outlawing any evidence obtained in violation of the statute.[87] Another bill, offered almost simultaneously, was introduced in both House and Senate to exclude evidence "obtained directly or indirectly" by wiretapping.[88] Both bills, however, died in committee.

In 1932 a bill was again introduced in the House,[89] substantially the same as the 1931 proposal, to forbid federal employees and officials to tap wires and to render wiretapped evidence inadmissible. It, too, died in committee.

In 1933, however, the next attempt to limit wiretapping was successful.[90] The action of Congress was directed against the prohibition agents of the Department of Justice, who were the worst offenders—or at least the open offenders.[91] The form which Congressional action in 1933 took was that of a rider on an appropriation bill, reading:

". . . no part of this appropriation shall be used for or in connection with 'wire-tapping' to procure evidence of violations of the National Prohibition Act. . . ."[92]

Very shortly thereafter, however, it had become an open secret that the F.B.I. was engaged in wiretapping, using the conversations intercepted to obtain "leads" to other evidence. Both branches of Congress were aware of this in 1933. Attorney General Cummings that year defended F.B.I. wiretapping before a subcommittee of the House Committee on Appropriations.[93] Before the Senate, too, it was admitted that the F.B.I. was engaged in wiretapping.[94]

Congress did not take long to reply. Within a year it passed an act for the regulation of the radio, telegraph and telephone industries.[95] Included in that act, the Communications Act of 1934, was a concise but all-inclusive section (Section 605) which forbade wiretapping.[96] In scope, it was the broadest of all prohibitions against wiretapping ever enacted or even considered by Congress. It went beyond rendering such evidence inadmissible and even went beyond making wiretapping and use or divulgence of information obtained thereby a crime. It undoubtedly made it a crime for a police agent even to testify in court regarding intercepted conversations.[97]

Punishment for violation of this prohibition was also more severe than any previously considered or enacted by Congress. A maximum of two years' imprisonment or $10,000 fine or both was provided.[98]

In various ways the purpose of the statute was unfulfilled. Three aspects of the Department of Justice's reaction to it are significant:

First: Mr. Hoover continued to make public attacks on wiretapping, but the 1931 regulation[99] of the F.B.I. remained in force despite the 1934 Congressional ban; he continued to act as though he had the power claimed in that regulation to authorize F.B.I. wiretapping, and such authorizations were given;

Second: the Department of Justice brought no prosecutions for violations of the law; and

Third: in the various cases in which the admissibility of wiretapping evidence was challenged, whether the tapping was done by the F.B.I. or other federal police, the Department of Justice tried to obtain court interpretations

81. Manual of Rules and Regulations, Bureau of Investigation, 1928, Sec. 14.
82. Hearings on 1931 Appropriation Bill for Department of Justice, House Committee on Appropriations, pp. 63-64.
83. See for example, records on appeal in *Morton* v. *U. S.*, 60 F. (2d) 696 (C.C.A. 7, 1932); *Foley* v. *U. S.*, 64 F. (2d) 1 (C.C.A. 5, 1933); *Bushouse* v. *U. S.*, 67 F. (2d) 843 (C.C.A. 6, 1933). In the *Foley* case, which is typical, seven Department of Justice employees were engaged in tapping wires and the manuscript transcriptions of the intercepted conversations totalled 3,325 pages. A few months earlier, the Chief Clerk and Administrative Assistant to the Department of Justice, James W. Baldwin, testified before a House Appropriations Committee that no part of the Justice appropriation could be used for wiretapping. See Hearings, n. 82, *supra*, at p. 27.
84. See Hearings, n. 80, *supra*, at p. 2.
85. Manual of Rules and Regulations, Bureau of Investigation, 1931, section 14.
86. Washington Star, Mar. 13, 1940, p. A-3.
87. H. R. 23, 72nd Cong., 1st Sess.
88. H. R. 5305 and S. 1396, 72nd Cong., 1st Sess.
89. H. R. 9893, 72nd Cong., 1st Sess.
90. 47 Stat. 1381.
91. The F.B.I. was not using the intercepted conversations as evidence in open court.
92. 47 Stat. 1381.
93. Hearings on Department of Justice Appropriation Bill, before subcommittee of House Committee on Appropriations, 72nd Cong., 2nd Sess., 1933 at p. 33.
94. Hearings on Department of Justice Appropriation Bill, before subcommittee of Senate Committee on Appropriations, 72nd Cong., 2nd Sess., 1933, at pp. 72-73.
95. Communications Act of 1934, 47 U.S.C. §151 et seq., 48 Stat. 1064.
96. Section 605 of the Act, 47 U.S.C. §605, 48 Stat. 1103.
97. In *Nardone* v. *U. S.*, 302 U. S. 379 (1937), the Supreme Court, in forbidding the use of evidence obtained by wiretapping, stated:

". . . the plain words of Section 605 forbid anyone, unless authorized by the sender, to intercept a telephone message and direct in equally clear language that 'no person' shall divulge or publish the message or its substance to 'any person.' To recite the message in testimony before a court is to divulge the message."

98. Section 501 of the Act, 47 U.S.C. §501, 48 Stat. 1100.
99. *Supra*, n. 85: "Telephone or telegraph wires shall not be tapped, unless prior authorization of the Director of the Bureau has been secured."

weakening or limiting the Congressional prohibition against wiretapping.

F.B.I. Statements v. F.B.I. Actions

Mr. Hoover's public attacks on wiretapping were quite numerous in the six years following the enactment of Sec. 605. During this period, while he frequently authorized his agents to tap wires and even trained his agents and local police in this activity, he called wiretapping an

". . . archaic and inefficient practice"

which

". . . has proved a definite handicap or barrier in the development of ethical, scientific, and sound investigative technique."[100]

He let it be represented that he was

". . . the first Federal official to oppose wire-tapping . . . and he has never in court used evidence so gathered."[101]

In a press interview he declared that

". . . he consistently had opposed the practice."[102]

He said in a formal press release:

"Statements have . . . appeared to the effect that wiretapping has been used by representatives of the Federal Bureau of Investigation in violation of existing laws. At no time has there been a single instance of any action of this kind on the part of any representative of the Federal Bureau of Investigation since I have been Director of the Bureau."[103]

He informed the Department of Justice itself:

"While I concede that the telephone tap is from time to time of limited value in the criminal investigative field, I frankly and sincerely believe that if a statute of this kind were enacted the abuses arising therefrom would far outweigh the value which might accrue to law enforcement as a whole."[104]

It was formally stated by the Attorney General to be the belief of himself and Mr. Hoover that:

". . . the discredit and suspicion of the law enforcing branch which arises from the occasional use of wire-tapping more than offsets the good which is likely to come of it."[105]

It was claimed by Washington columnists that:

". . . Hoover wrote a confidential memo opposing a bill then in Congress at the instance of the Treasury Department, giving government agencies the right to tap wires.

"Hoover's report was one of the most vigorous defenses of civil rights recently written. He said he had men who were experts in tapping wires, but if he let them practice it to any extent they would turn crooks in no time."[106]

Under cover of these statements, Mr. Hoover continued wiretapping, in disregard of the statutory prohibition. In most instances the F.B.I. used its illegal interceptions only to uncover leads as to non-testimonial evidence.[107] It is difficult, therefore, to estimate the total number of times wiretapping has been used. But enough cases exist in which the F.B.I. went so far as to use in open court stenographic transcriptions of the conversations to indicate the regularity of the practice.[108] The testimony of F.B.I. agents who qualified themselves under oath as expert wiretappers is especially illuminating.

One such case, *Bernava* v. *United States*,[109] involved a prosecution for interstate transportation of stolen bank notes. One F.B.I. agent, Ernest V. McCain, swore:

"I am a special agent of the Department of Justice, Federal Bureau of Investigation. During the spring of 1936 I spent considerable part of the time tapping wires."[110]

Edward R. Davis, to qualify himself as an expert, swore:

"During my duties as agent I have installed possibly twenty taps. I am still an agent."[111]

F.B.I. agent Joseph D. Milensky testified on direct examination:

"Q. In fact, you didn't do very much else [besides wiretapping] for several months during the spring?
"A. That is right.
"Q. How long were you on the job?
"A. On occasions twenty-four hours a day.
"Q. Sleep there [at the 'listening-post']?
"A. Yes.

* * *

"Q. How did you keep awake?
"A. We knew a call was coming in because we had a machine rigged up on Espy's [a suspect's] telephone and every time a call was coming it clicked and it made such a racket at night you couldn't help wake up."[112]

In all, five F.B.I. agents were used as wiretappers in this one case of interstate theft.[113]

In another case, *United States* v. *Reed*,[114] the actual wiretapping was done by two New York City patrolmen[115] assigned from the police "wiretapping squad"[116] to cooperate with the F.B.I. The intercepted conversations received in evidence fill 93 pages of the record. That Mr. Hoover had an additional source of knowledge of the illegal wiretapping is indicated by the testimony of an F.B.I. agent in this case which makes it clear that Mr. Hoover received a report from each of his agents on each day's activities.[117]

In one case,[118] the government paid $35.00 a week to a person who called a suspect on the telephone and engaged him in conversation while the F.B.I. mechanically recorded the conversation.[119] In a perjury case, the Circuit Court of Appeals stated:

"A recording apparatus was interposed in the telephone circuit in the house of prosecution's chief witness, Reilly, who was then acting in conjunction with Agents of the Federal Bureau of Investigation. After all had been arranged Reilly called up the accused and their talk was recorded. This was repeated at another time and from another house."[120]

In a case involving violations of the Mann Act, the F.B.I. wiretappers filled two volumes with transcripts of intercepted telephone conversations.[121] J. Edgar Hoover not only authorized the wiretapping but personally supervised the investigation.[122]

Again it must be emphasized that these instances of known wiretapping by the F.B.I. are not more than a small fraction of the cases in which wiretapping has been employed. Former Attorney General Cummings estimated

100. Letter to Harvard Law Review, op. cit, *supra*, note 6, at p. 863 fn. 53.
101. Arthur Krock, N. Y. Times, Apr. 3, 1940.
102. Washington Star, March 13, 1940, p. A-3, c. 8.
103. Press release, March 13, 1940.
104. Press release, Department of Justice, March 15, 1940.
105. *Ibid.*
106. Pearson and Allen, *Washington Merry-Go-Round*, March 25, 1940.
107. Arthur Krock, N. Y. Times, April 3, 1940; see also statement of Attorney General Cummings, N. Y. Times, Dec. 23, 1937, p. 16, c. 6.
108. See notes 48-52 *supra*.
109. 95 F. (2d) 310 (C.C.A. 2d 1938).
110. *Id.*, Record on Appeal p. 74.
111. *Id.* at p. 70.
112. *Id.* at p. 86.
113. *Id.* at pp. 69-74, 86, 101.
114. 96 F. (2d) 785 (C.C.A. 2d, 1938).
115. The F.B.I. has also used the wiretapping facilities of the Pinkerton National Detective Agency, Inc., which specializes in labor espionage. See Hearings, Subcommittee of Senate Committee on Education and Labor on Violations of Free Speech and Rights of Labor, Part 5, pp. 1585-1588.
116. New York City has its own police "wiretapping squad". From the *Reed* case and the *Weiss* case, cited note 30, *supra*, it is certain that this squad has been in continual existence for the last thirty years and that it numbers at least five full-time wiretappers.
117. Rec. on App., p. 50 *et seq.*
118. *U. S.* v. *Polakoff*, note 50, *supra*.
119. *Id.*, Rec. on App. pp. 50-67.
120. *U. S.* v. *Fallon*, note 48, *supra*.
121. *Hitzelberger* v. *State*, note 44. *supra*.
122. N. Y. Times, May 16, 1937, p. 35, c. 6; May 17, 1937, p. 3, c. 6.

that, of all prosecutions based upon wiretapping by the F.B.I., the evidence obtained thereby "has been utilized in only 5% of the cases."[123] The Attorney General volunteered no estimate as to the percentage borne by these cases to the total number of investigations in which wiretapping was used but from which no prosecutions resulted.

The Department of Justice v. Section 605

Until 1940, not a single prosecution for violation of the law is discoverable.[123a] Although numerous instances of wiretapping, including those described above, were reported in the public press and although many of the violators were private persons or private detectives,[124] and hence not objects of the immunity arbitrarily granted by the Department of Justice to the F.B.I., the Department took no action. As late as April, 1940, Attorney General Jackson ordered the United States Attorney at Rhode Island to drop an investigation of the violation of this law. He stated that the Department could not "in good conscience" prosecute the wiretappers because federal investigators had themselves used wiretapping.[125]

The Department was not content with failing to prosecute violators of Section 605 of the Communications Act. It actively resisted the application of the section when the law was invoked by defendants who had been convicted on the basis of wiretapped evidence and who raised the objection that a penal statute was being violated by federal police in procuring such evidence. The first such case to reach the Supreme Court was *Nardone* v. *United States* in 1937,[126] three years after the enactment of Section 605 of the Communications Act.

Two objections were raised by the Department of Justice to the operation of the ban against wiretapping. It contended, first, that the statute did not apply to federal police—although the statute forbade "any person" to tap wires. It also contended that even if the statute did apply to the federal police, there was no ban on the use of intercepted conversations as evidence. The Supreme Court found no merit in either contention.

But the federal police and the Department of Justice were not easily discouraged. Upon the reversal of the conviction in the *Nardone* case, a second prosecution was instituted against the same defendant. This time the federal police did not offer the intercepted conversations in evidence but presented evidence gained by following "leads" in the intercepted conversations. The theory of the Department of Justice was that only the intercepted conversations were banned as evidence and that "the prosecution [was] free to make every other use of the proscribed evidence."[127] In 1939 the Supreme Court reversed the conviction. The language of the Court was a rebuke to the Department:

> "A decent respect for the policy of Congress must save us from imputing to it a self-defeating, if not disingenuous purpose." [128]

Meanwhile, following the decision in the first *Nardone* case, Attorney General Cummings stated he would probably request amendment of Section 605.[129] A bill was introduced in the Senate and received the approval of the committee to which it was referred.[130] The report accompanying the bill stated:

> "The enactment of this bill is desired and recommended by all departments and agencies of the Federal Government engaged in law-enforcement activities. In addition, your committee is advised that the legislation is not in conflict with the program of the President."[131]

In spite of the pressure on Congress thus exercised to secure the passage of the bill, the legislation was dropped. Senator Wagner explained why the Senate refused to pass the bill:

> "It was deliberately withheld in the Senate when it came back for amendment, when some of the Senators, including myself, discovered what the purpose of the bill was . . . the introducer of it, after conference with me and others said he hadn't any appreciation of the nature of the legislation which passed in the rush of one of those days of unobjected calendar bills, and he refused to bring it up again and abandoned the legislation."[132]

The attempt of the Department of Justice in the second *Nardone* case to limit the application of Section 605 was not the only attempt during that period. Another theory to weaken Section 605 was prepared. This theory was that the protection of Section 605 extended only to interstate and foreign communications. In December 1939 the Supreme Court in *Weiss* v. *United States*[133] rejected this theory. Not long thereafter the Court refused to grant the Department's request for certiorari in two more wiretapping cases it had lost in the Circuit Court of Appeals.[134]

In 1940 the Department of Justice concentrated again on an attempt to amend Section 605. At the next session of Congress following the Supreme Court's decision in the *Weiss* case, a bill was introduced for this purpose.[135] After a brief hearing, the bill was recommended for passage.[136] Passed by the House,[137] the bill died in the Senate Committee on Interstate Commerce.

Wiretapping—For What?

Such is the background of the present proposals to legalize wiretapping by the federal police. One further inquiry is instructive: what indications are there of the uses to which a grant of wiretapping power would be put?

Quite significant, in this connection, is the confusion of purposes which the Department of Justice has stated in support of the various bills proposed to legalize wiretapping. In 1938, after the Supreme Court had rejected the Department's first attempt to open a loophole in Section 605 of the Communications Act,[138] a bill to permit wiretapping in the investigation of *any* federal crime[139] received the Department's approval.[140]

123. N. Y. Times, Dec. 23, 1937, p. 16, c. 6.
123a. Not only is none discoverable in the federal reports, but none has been cited by the Department of Justice in its Supreme Court briefs in the wiretapping cases; none is reported in the New York Times index from 1934 to 1940.
124. *Supra,* page 99. See also note 115, *supra.*
125. Washington Times Herald, April 10, 1940.
126. 302 U. S. 379.
127. 308 U. S. 338, at p. 340 (1939).
128. *Id.* at p. 341.
129. N. Y. Times, Dec. 23, 1937, p. 16. c. 6.
130. Senate Report 1790, 75th Cong., 3rd Sess., 1938.
131. *Id.* at p. 3.
132. Proceedings of New York Constitutional Convention of 1938, pp. 430-431. A number of wiretapping bills have been introduced in the current session of the New York Legislature. The most comprehensive are A. Int. 306 and A. Int. 309 (Steingut).
133. 308 U. S. 321.
134. See notes 48 and 50 *supra. Cert.* denied, Oct. 14, 1940.
135. See note 62, *supra.*
136. H. Rept. 2574, 76th Cong., 3rd Sess., 1938.
137. 86 Cong. Rec. (unbound) p. 15,198, 76th Cong., 3rd. Sess., Aug. 6, 1940.
138. The first *Nardone* case, *supra,* notes 31, 126.
139. S. 3756, 75th Cong., 3rd Sess., 1938, Section 1.
140. Letter from the Attorney General to the committee chairman, reported in H. Rept. No. 2656, 75th Cong., 3rd Sess., 1938, p. 4. The Senate report declared that the committee had been "advised that the legislation is not in conflict with the program of the President." (S. Rept. No. 1790, 75th Cong., 3rd Sess., 1938, p. 3) and that the Department of Justice "desired and recommended" it. (*Ibid.*)
141. Senate Rept. No. 1304, 76th Cong., 3rd Sess., 1940, p. 4. The report also recommended an investigation of wiretapping. *Cf.* press interview with Senator Wheeler, the Chairman of the Senate Committee on Interstate Commerce which issued the report and recommended the investigation, Washington Evening Star, March 12, 1940, p. 1; N. Y. Sun, March 12, 1940, p. 1; N. Y. Daily News, March 13, 1940, p. 2.
142. See, *e.g.,* Ludwell Denny, N. Y. World Telegram, March 11, 1940 and March 13, 1940; editorial, N. Y. Daily News, March 13, 1940; editorial, Washington News, March 13, 1940; editorial Pittsburgh Press, March 13, 1940; editorial Baltimore Sun, March 13, 1940; editorial Philadelphia Inquirer, March 13, 1940; Raymond Clapper, N. Y. World Telegram, March 14 and 16, 1940; editorial, Duluth News-Tribune, March 15, 1940; editorial, N. Y. Post, March 15, 1940; editorial New Orleans Tribune, March 15. 1940; editorial, Washington News, March 15, 1940; editorial Pittsburgh Press, March 15, 1940; editorial St. Louis Post-Dispatch, March 16, 1940; Henry C. Fleisher, C.I.O. News, March 18, 1940; Labor, March 19, 1940, p. 1.
143. *Supra,* note 59.
144. *Ibid.*
145. *Ibid.*
146. H. J. Res. 571, 76th Cong., 3rd Sess., 1940, Section 1.
147. See letter from Attorney General dated May 31, 1940, printed in the committee report accompanying the bill, H. Rept. No. 2574, 76th Cong., 3rd Sess., 1940, p. 3.
148. H.R. 2266, 77th Cong., 1st Sess., 1941, drafted by Mr. Alexander Holtzoff, legal adviser to the F.B.I. See N. Y. Daily News, Feb. 15, 1940, p. 4. See *infra,* note 151.
149. Testimony of Mr. Alexander Holtzoff, Hearings on H.R. 2266 before Subcommittee of House Committee on Judiciary, 77th Cong., 1st Sess., 1941, p. 70 (official typewritten transcript; the record is not yet printed).

By March 15, 1940, the Department's views had apparently been modified. On that date a Senate Committee's condemnation of illegalities,[141] reinforced by persistent press criticism,[142] resulted in the Attorney General's order to the F.B.I. to discontinue its law-violating wiretapping—in two weeks.[143] In the statement[144] accompanying the order, the Attorney General hinted that Congress should authorize wiretapping—but this time only for detection of "a limited number of cases, such as kidnapping, extortion, and racketeering."[145]

Ten weeks later on May 31, 1940, the Department's views changed radically. In a letter of that date, a bill before Congress to legalize wiretapping in the investigation of crimes against "the national defense," such as sabotage, treason, espionage, and violations of the neutrality laws,[146] received the approval and support of the Attorney General.[147] Forgotten, apparently, was the need of ten weeks earlier for wiretapping in "kidnapping, extortion and racketeering." Newly discovered, apparently in that ten week interval—since it had not been mentioned or even informally intimated on March 15—was the need for wiretapping in the investigation of crimes against "the national defense."

This bill failed to become law and the purpose for which the Department of Justice sought to obtain the power to tap wires grew more confused with the introduction of the bills now pending. On January 16, 1941, a bill was introduced to legalize wiretapping in the detection of all federal felonies.[148] In the course of the hearings on this bill, the Department of Justice spokesman for the bill stated that:

> ". . . the Attorney General favors this bill, and so does Mr. Hoover, of course."[149]

Department of Justice approval of this bill was also claimed by its sponsor in testimony before the subcommittee in charge of the bill:

> "Gentlemen, this bill has been carefully considered, drawn and redrawn, and approved by the Department of Justice, after the most careful scrutiny. . . . "[150]

The second of the current bills proposes legalized wiretapping in the detection of *all* federal crimes.[151] It differs principally from the first bill in that it proposes to place the power of authorization not in departmental heads but in Federal District Court Judges, United States Commissioners, and state judges in courts of record.[152]

In its original sponsorship of present legislation, therefore, the Department had apparently returned to its 1938 belief that wiretapping is desirable in the investigation of *all* crimes. Within a few days, however, Mr. Hoover voiced opposition to both bills and suggested that "wiretapping should not be permitted except as to such" crimes as "espionage, sabotage, kidnapping, and extortion."[153] One member of the committee[154] requested the views of the President. The latter wrote:

> "As an instrument for oppression of free citizens I can think of none worse than indiscriminate wiretapping."[155]

The President went on to state, however, that he believed wiretapping to be justified in cases involving the national defense and in the crime of kidnapping and extortion.[156]

Thus the Department has vacillated from an expressed desire for wiretapping in the detection of all crimes, to kidnapping and related crimes, to crimes against national defense and back to its original position. Mr. Hoover has abandoned his oft-stated opposition to wiretapping in favor of its use in crimes against the national defense and kidnapping, etc. The one factor which has remained constant is the desire to obtain the power to tap wires.

The object of current wiretapping proposals may thus be viewed with a certain amount of scepticism. The F.B.I. has tapped wires from 1931 to September 1940. From the date that the Supreme Court first refused to accept the Department of Justice's self-created exception to the ban on wiretapping,[157] the Department has sought Congressional permission for the practice it continued to use more than six years after it had become criminal.[158] Apparently the purposes advanced in justification for the successive requests for wiretapping have varied with what was deemed at the time most likely to win public and legislative approval. Today it is "national defense"; in prior years the same power was sought under other slogans.

During the course of the Committee hearings on the

150. *Id.*, statement of Representative Hobbs, p. 44 (official typewritten transcript).
151. H.R. 3099, 77th Cong., 1st Sess., 1941, Section 1.
152. *Ibid.*
153. Statement of Mr. Hoover to Subcommittee of House Judiciary Committee, Feb. 17, 1941.
154. Representative Thomas H. Eliot of Massachusetts.
155. Printed in full in the Washington Post, Feb. 26, 1941.
156. *Ibid.*
157. The first *Nardone* case, *supra,* notes 31, 126.
158. In the course of a radio debate on the legalization of wiretapping, Representative Hobbs, sponsor of H.R. 2266, and Mr. Alexander Holtzoff, legal adviser to the F.B.I., revealed another instance of wiretapping by the F.B.I. This tapping, according to Representative Hobbs, occurred in connection with the de Tristan kidnapping case. See printed copy of the debate, The American Forum of the Air, Vol. 3, No. 10, March 9, 1941. Although this wiretapping took place sometime in September, 1940, it was not revealed until the March 9, 1941 radio debate. On March 20, 1941, Attorney General Jackson stated in a letter to Chairman Sumners of the House Judiciary Committee, that he had "directed Mr. Hoover to put a recording device on that [telephone] line."

current bills, the legal adviser to the F.B.I. testified as a Department of Justice spokesman in support of the bill. He discussed its relation to national defense only in generalities.[159] Unanswered were specific questions of committee members as to the facts with respect to the need for wiretapping in the first World War, the frequency of its use during that period, its efficiency in detecting saboteurs and spies, the opinion of the Department of Justice at that time as to its need and the frequency with which wiretapping would be employed against spies or saboteurs today.[160]

Fortunately, some of these facts are available from other sources. Although wiretapping was illegal from October 29, 1918 to July 11, 1919,[161] the Department of Justice apparently tapped wires freely.[162] Yet the sum total of prosecutions under the Espionage Act brought against German agents or sympathizers was ten or twelve.[163] Not a single spy prosecution was brought under the Act.[164] Five treason cases were instituted during the war, but the defendants were acquitted or the charges were dropped before trial.[165] It would seem to follow, therefore, that the extent of such criminal activity in wartime is overestimated and that professional criminals are not caught by wiretappers.

In the face of frequent statements by Mr. Hoover and the Attorney General that the public greatly exaggerates the danger of sabotage and espionage, and that the F.B.I. has been able to reduce that danger below the 1917-1918 level,[166] the Department of Justice has made no effort to present factual or statistical evidence of any need for wiretapping in national defense cases. On the other hand, in evaluating the purposes which may be served by allowing the F.B.I. to tap wires, it would seem appropriate as in any case of a proposed grant of power to a governmental agency, to examine the mainstream of the agency's activities.

The Bulletin has previously noted the announced intention of the F.B.I. to investigate "subversive activities" and "activities possibly detrimental to the internal security"—which are not defined as crimes within the F.B.I's investigatory province.[167] A great deal has been publicly reported of the F.B.I.'s activity since that time.

It has re-instituted its "General Intelligence Division," first created in 1919 prior to the notorious "Palmer red raids."[168] The F.B.I. has used provocateurs to break up local councils of the American Youth Congress[169] and it keeps a file on the activities of that organization.[170] F.B.I. agents have warned or urged persons at their homes not to participate in the activities of peace organizations suspected by the F.B.I. of being "subversive."[171] It has taken for its files from the N. Y. Board of Elections the election petitions of minority parties.[172] It has notified a government agency, for example, that its employee has "radical tendencies leaning toward Communism," that he has "studied anthropology," that he has "visited Mexico City, Mexico, to observe the presidential election in that country."[173] It has been accused by a conservative national magazine of building "an interesting mass of dossiers on editors and writers."[174] It has requested local police to observe all meetings and to communicate knowledge thus gained to the F.B.I.[175] Its actions in matters deemed "subversive" have been carried on in spite of Mr. Hoover's acknowledgement that no violation of federal law is involved,[176] and in spite of the Attorney General's statement that there are no definite standards by which a "subversive activity" may be defined.[177]

It has done these things with an attitude of growing disregard of procedural as well as substantive rights. It has held arrested persons incommunicado for as long as six days.[178] It has prepared its own detention cells in its branch offices.[179] It has used stool-pigeons[180] and provocateurs.[181] It has claimed, through the head of the F.B.I. headquarters in a large industrial city, that followers of certain minority trends of thought "are not entitled to rights provided by the Constitution."[182]

The fear that the Department of Justice may again conduct a campaign of intimidation, mass-raids, and strike-breaking is based, however, on more than the open development of the same trends, activities, or policies. The present director of the F.B.I. himself directed these actions of 1917 and after.[183] From 1917 until the end of the period of hysteria and terror, J. Edgar Hoover served as special assistant to the Attorney General in charge of "counter-radical activities."[184] As such he shares responsibility for the strike-breaking activities of Department of Justice agents in the steel strike,[185] the coal strike,[186] and the railway strikes of that period.[187] He personally directed the raid of January 3, 1920, in which some three thousand persons were arrested simultaneously in more than a score of cities, with warrants and without warrants.[188] Many of these persons were eventually released,[189] but the brutality of their treatment, which even induced insanity and suicide,[190] is one of the blackest pages in American history. In the words of former Attorney General Cummings and a co-author, the campaign "to uproot radicalism," largely directed by J. Edgar Hoover, "seemed centered upon labor organizations."[191]

Conclusion

Against this lengthy background it should be recalled that it is now proposed to use wiretapping to investigate the commission or possible commission of sabotage and espionage.[192] The present sabotage statute makes it a crime wilfully to make defective defense material.[193] What possible check is there on any F.B.I. claim of necessity to use its wiretapping power on the telephones of workingmen and trade unions—if only to eliminate them as suspects? The present espionage statute makes it a crime to obtain any information concerning any place connected with the national defense with the purpose of using the information to injure the United States.[194] Every workingman, in a factory "connected" with the national defense, by virtue of his employment alone performs the overt acts necessary to a certification that he may be committing this crime. Very few publications are not engaged in the collection of information relating to national defense. Only the addition of an F.B.I. agent's allegation of belief that an intent exists to "injure the United States" might provide the basis for the installation of a wiretap. In fact, during the last World War, newspapers and not spies were the chief victims of the espionage law.[195] At least seventy-five publications, including the Mid-Week Pictorial and Current History,[196] were cited in one year for violation of the law.[197]

Balancing this entire background is only the "assurance of the Attorney General and his immediate subordinates that the utmost care and caution will be exercised."[198]

The Attorney General has requested that only he be given power to authorize each case of wiretapping in order to prevent "unrestrained and unrestricted wiretapping."[199] Yet he is reported to have testified in a secret session of the House Judiciary Committee "that it would not take him more than twenty minutes to grant an F.B.I. agent's request for wiretapping authority"[200] A high administration official,[201] also testifying in secret before the Committee, is said to have characterized such an authorization as a "rubber stamp."[202]

This history of the wiretapping bills now in Congress may have served to make it clear why the A.F.L., the C.I.O., the railroad unions[203] and numerous other groups,[204] have flatly opposed the enactment of any legislation to legalize wiretapping.

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159. See Hearings, note 149, *supra.*

160. *Ibid.* See particularly the questions of Representative Barnes in the hearings of Feb. 26, 1941.

161. See p. 101, *supra.*

162. Meyer Berger, The New Yorker, June 18, 1938, p. 41 at p. 44.

163. *American Labor Year Book of* 1919-1920, at pp. 89-96.

164. *Ibid.*

165. *Ibid.*

166. See, *e.g.*, the Annual Report of the Attorney General for 1940, p. 155: "There has been a negligible amount of sabotage during the present World War in contrast to a similar period in the first World War." Relevant to this is a consideration of the relatively gigantic size of the F.B.I. staff and appropriations as compared with the last World War period. Its current appropriation, without including supplemental or deficiency appropriations, is $13,768,000. The 1918 appropriation for the Bureau of Investigation was $1,746,223, and the 1917 appropriation was $617,534.

167. *F.B.I.-Secret Political Police?*, 8 I.J.A. Bull. 104 (April 1940). See also *Democratic Defense*, supplement to New Republic, Feb. 17, 1941, pp. 249-250.

168. Hearings before Subcommittee of House Committee on Appropriations, 76th Cong., 3rd Sess., Dept. of Justice Appropriation Bill for 1941, p. 153.

169. Worcester, Mass., Evening Gazette, Feb. 6, 1940, p. 2, and Feb. 7, pp. 8, 12; Worcester, Mass., Telegram, Feb. 5, p. 3.

170. N. Y. Times, Feb. 6. 1940, p. 1.

171. N. Y. Herald Tribune, Jan. 6, 1941.

172. N. Y. Sun, March 20, 1941, p. 3, c. 5.

173. New Republic, Dec. 30, 1940, p. 885. For the report of an incident relating to racial problems see the statement of Representative Ramspeck on the floor of Congress, Feb. 8, 1940, 86th Cong. Record, unbound, p. 1948: "Last year Mr. Hoover appeared before the subcommittee which has just left this floor this afternoon and, off the record, according to the statement made to me by the chairman of the subcommittee himself, charged the Civil Service Commission with sending white applicants to colored doctors for physical examination. There is not a word of truth in it because the Commission has no doctors. I think Mr. Hoover made that statement off the record to prejudice that committee, which was composed primarily of men from the South. It was a dastardly thing for him to do and he ought not to have done it."

174. Walter Davenport, *You Can't Say That,* Colliers, Feb. 15, 1941, p. 19 at p. 64.

175. F.B.I. press release, Sept. 9, 1939; N. Y. Times, Sept. 25, 1939, p. 9.

176. " . . . the Department of Justice, *theoretically,* has no right to investigate such ["subversive"] activities as there has been no violation of the federal laws." (Italics supplied.) Quoted in *Federal Justice* by former Attorney General Cummings and Carl McFarland, pp. 430-431.

177. " . . . the prosecutor has no definite standards to determine what constitutes a 'subversive activity,' such as we have for murder or larceny. Activities which seem helpful or benevolent to wage earners, persons on relief, or those who are disadvantaged in the struggle for existence may be regarded as 'subversive' by those whose property interests might be burdened as affected thereby. Those who are in office are apt to regard as 'subversive' the activities of any of those who would bring about a change of administration. Some of our soundest constitutional doctrines were once punished as subversive." Speech by Attorney General Jackson at Second Annual Conference of United States Attorneys, April 1, 1940, reprinted in 31 *Journal of Criminal Law and Criminology* 3, at pp. 5-6.

178. Rec. on App. at p. 145 of *Bernava* v. *U.S.*, 95 F.(2d) 310 (C.C.A. 2nd, 1938).

179. It was testified by Mr. Hoover before a Subcommittee of the House Committee on Appropriations considering the 1941 Department of Justice Appropriation Bill, at p. 160:

"Mr. Hoover. . . . In all of these field divisions we must have detention facilities installed at the expense of the lessor.

* * *

"Mr. Carter. Did you say that you have cells in some of these places?

"Mr. Hoover. For special detention purposes."

180. *Supra,* notes 48 and 50.

181. *Supra,* note 169.

182. Speech of Edward B. Conroy, head of the Newark division of the F.B.I., before Jersey City Chamber of Commerce, reported in Jersey Journal, Feb. 7, 1941, p. 1, c. 1-2.

183. *Op. cit. supra,* note 167.

184. Cummings and McFarland, *op. cit. supra* note 176 at p. 429.

185. N. Y. Times, Jan. 3, 1920, p. 2. See also *op. cit. supra,* note 167.

186. *Ibid.* See also Report of the Commission of Inquiry of the Interchurch World Movement, 1920, at p. 221 *et seq.*

187. Annual Report of the Attorney General for 1923, p. 70. See also those of 1919, 1920, 1921, and 1922.

188. *Colyer* v. *Skeffington,* 265 Fed. 17 (1920) at pp. 32-33, p. 36. See also N. Y. Times, Jan. 4, 1920, p. 1.

189. Cummings and Mc Farland, *op. cit.,* at pp. 429-430. Mr. Hoover described his case against the victims of these mass raids as "perfect." N. Y. Times, Jan. 27, 1920, p. 1

190. *Colyer* v. *Skeffington, supra,* note 188, at p. 45.

191. *Op. cit. supra,* note 176, p. 429.

192. Following a presentation of his views on the wiretapping bills to the House Judiciary Committee in a secret session on March 17, 1941, Attorney General Jackson wrote a public letter to Chairman Sumners of that Committee formally requesting that wiretapping be made legal in cases of "espionage, sabotage, kidnapping, and extortion." Letter of March 19, 1941. *Cf.* with his letter of June 19, 1940 to John L. Lewis, then president of the C.I.O.: "I am confident that at this time *some kind of wiretapping authorization* will be given and *should be given.*" (Italics supplied.) The lack of specificity as to the purpose for which the Department of Justice seeks the wiretapping power is discussed, *supra,* pp. 104-105.

193. 50 U.S.C. §103.

194. 50 U.S.C. §31, as amended Mar. 28, 1940, c. 72, Sec. 1, 54 Stat. 79.

195. *Op. cit., supra,* note 163.

196. L. M. Salmon, *The Newspaper and Authority,* p. 165.

197. Lindsay Rogers, *Freedom of Press in the United States,* Contemporary Review, Aug. 1918, pp. 177-183.

198. This language is from the report of the House Judiciary Committee recommending the passage of H. J. Res. 571, the wiretapping proposal before the 76th Cong., 3rd Sess., H. Rept., No. 2574, p. 2.

199. *Supra,* note 192.

200. Paul W. Ward, Baltimore Sun, March 22, 1941, p. 13, c. 6-7.

201. *Ibid.* The official, apparently requested to give technical information on wiretapping, was James L. Fly, Chairman of the Federal Communications Commission and of the Defense Communications Board, and former Assistant Attorney General.

202. Thomas L. Stokes, Washington Daily News, March 27, 1941, p. 15, c.1 *Cf.* with Mr. Jackson's own statement in his letter of June 19, 1940 to John L. Lewis:

"Of course this limitation [the requirement that the federal police obtain permission for each instance of wiretapping from the Attorney General] will depend very much on the attitude of the Attorney General at the time. It is very difficult to formulate controls which will not be either farcical or defeat the purpose of the wiretapping authorization."

203. In addition to the A.F.L. and C.I.O., there appeared before the subcommittee of the House Judiciary Committee representatives of the following labor groups: Brotherhood of Railway Trainmen, Railroad Labor Executives Association, Labor's Non-Partisan League, C.I.O. Maritime Committee, American Newspaper Guild, United Federal Workers of America, and the Textile Workers Union of America.

204. Among others, there appeared before the subcommittee representatives of the National Federation for Constitutional Liberties, the National Lawyers Guild, the American Labor Party of New York County, the American Civil Liberties Union, the Christian Youth Council of North America, the Descendants of the American Revolution and the Washington Committee for Democratic Action.

Book Reviews

Federal Regulatory Action and Control, by Frederick F. Blachly and Miriam E. Oatman. Washington, D. C.: The Brookings Institution, 1940, Pp. xviii, 356. $3.00.

The recent publication of the Report of the Attorney General's Committee on Administrative Law reemphasizes the value of this Brookings Institution study completed last year. Prepared at the time when the Logan-Walter Bill was the focal point of discussion of administrative law changes, the study presents the materials for a full understanding of the complexity and variation of the federal administrative machinery and the utter impossibility of any such blanket panacea as the Bill purported to offer.[1]

Along with the Logan-Walter approach—designated by the authors as "the doctrine of the judicial formula"—the study examines two alternatives: "the doctrine of executive management" and "the revisionist doctrine." With the latter the authors identify the then still functioning Attorney General's Committee as well as themselves.

Their examination of the three schools of thought, constituting less than half the total volume, is preceded and followed by descriptive material, classifying and describing the relationship governed by administrative action, the types of agencies and the forms of administrative action, procedures, enforcement and review. The categories seem in many instances rather unreal and based on conceptual distinctions without practical significance. These sections of the work nevertheless represent a substantial contribution in the compilation of data essential to a detailed and concrete survey of the component parts of the federal administrative machine. Even today, there is much in this data which merits examination along with the report of the Attorney General's committee in evaluating the latter's recommendations.

Labor Problems in America, by Stein, Davis and others; Farrar & Rinehart, Inc. N. Y. 1940. Pp. 909. $3.50.

Labor Problems in America is a welcome addition in a field which has been overburdened with many superficial, pompous works on "labor problems." Refreshing in its simplicity and lack of professorial stuffiness this book makes a real contribution to an understanding of the many profound problems concerning labor and labor relations.

After a general discussion of the problems which confront labor, such as wages and hours and unemployment, the authors provide the historical background by a condensed but informative account of the origins and growth of the labor movement in the United States. The succeeding chapters on contemporaneous labor affairs include discussions of labor leaders, the relation to each other of the two major camps of labor, the less publicized welfare, cultural and fraternal aspects of trade unionism, and participation by labor in the political life of the country. The approach of management to labor problems is considered in connection with labor costs, personnel administration and a long background of anti-unionism. The attitude of the government to labor is likewise given careful and intelligent consideration. Laws relating to injunctions, labor relations, wages and hours, health, unemployment insurance and the like, are discussed in some detail and in a manner which will delight readers of the I.J.A. Bulletin.

1. See *The Logan-Walter Bill,* 8 I.J.A. Bull. 101 (April, 1940).

Pennsylvania Alien Registration Act Unconstitutional

(*Continued from page* 97)

sistent with the new federal Alien Registration Act of 1940, and did not regard the federal law as barring consistent state action in the same field.

Although the decision thus turned on a very narrow question of law Mr. Justice Black, in the course of his discussion, took cognizance of the recognition and protection of the constitutional rights of aliens in the history of this country. In holding that states could not legislate in this field "affecting foreign relations" he wrote:

> "Legal imposition of distinct, unusual and extraordinary burdens and obligations upon aliens—such as subjecting them alone, though perfectly law-abiding, to indiscriminate and repeated interception and interrogation by public officials—thus bears an inseparable relationship to the welfare and tranquillity of all the states, and not merely to the welfare and tranquillity of one. . . .
>
> "Opposition to laws permitting invasion of the personal liberties of law-abiding individuals, or singling out aliens as particularly dangerous and undesirable groups, is deep-seated in this country. Hostility to such legislation in America stems back to our colonial history and champions of freedom for the individual have always vigorously opposed burdensome registration systems. The drastic requirements of the alien Acts of 1798 brought about a political upheaval in this country the repercussions from which have not even yet wholly subsided. So violent was the reaction to the 1798 laws that almost a century elapsed before a second registration act was passed. This second law, which required Chinese to register and carry identification cards with them at all times, was enacted May 5, 1892."

After quoting an opponent of this legislation in the Senate, Justice Black went on to say:

> "For many years bills have been regularly presented to every Congress providing for registration of aliens. Some of these bills proposed annual registration of aliens, issuance of identification cards containing information about and a photograph of the bearer, exhibition of the cards on demand, payment of an annual fee, and kindred requiremets. Opposition to these bills was based upon charges that their requirements were at war with the fundamental principles of our free government, in that they would bring about unnecessary and irritating restrictions upon personal liberties of the individual, and would subject aliens to a system of indiscriminate questioning similar to the espionage systems existing in other lands.
>
> "When Congress passed the Alien Registration Act of 1940, many of the provisions which had been so severely criticized were not included. . . . And as a part of that 'harmonious whole,' under the federal Act aliens need not carry cards, and can only be punished for wilful failure to register. Further, registration records and finger-prints must be kept secret and cannot be revealed except to agencies— such as a state— upon consent of the Commissioner and the Attorney General.
>
> " . . . The legislative history of the Act indicates that Congress was trying to steer a middle path, realizing that any registration requirement was a departure from our traditional policy of not treating aliens as a thing apart, but also feeling that the Nation was in need of the type of information to be secured. . . . When it made this addition to its uniform naturalization and immigration laws, it plainly manifested a purpose to do so in such a way as to protect the personal liberties of law-abiding aliens through one uniform national registration system, and to leave them free from the possibility of inquisitorial practices and police surveillance that might not only affect our international relations but might also generate the very disloyalty which the law has intended guarding against."

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