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Of Bugs and Taps

The Law Makes a Sharp Distinction Despite Many Ideas to the Contrary

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The dispute between Senator Robert F. Kennedy and J. Edgar Hoover over who had authorized electronic eavesdropping during Mr. Kennedy's tenure as Attorney General has at once obscured and confused the legal issues involved.

News Analysis

But perhaps because of the stature of the New York Democrat and the director of the Federal Bureau of Investigation, along with the political radiations that appear likely to emerge from their quarrel, the legal background has been either forgotten or misconstrued.

As a result, a number of misconceptions have become more widespread than ever. They include the following:

¶That wiretapping and bugging come under the same rules and proscriptions.

¶That the Attorney General has been properly authorized by law to permit wiretapping and bugging in national security cases and perhaps even in cases involving organized crime.

¶That the same laws necessarily apply equally to state and Federal enforcement officials.

The fact is that the laws covering wiretapping are different from those involved in bugging.

Dramatic Distinction

The most dramatic distinction is that it is a Federal crime for anyone, including state and Federal enforcement officers, to divulge at least outside their own official bodies, the contents of a wiretapped conversation.

Unlike wiretapping, a bug does not involve the direct use of telephone lines to intercept a conversation, although telephone lines have been used to carry bugged conversations to the eavesdropper.

Since there is no direct interception by wire, the Federal Communications Act of 1934, which made tapping a crime, does not apply to other electronic eavesdropping devices.

However, the fact that a wiretap does not requre the eavesdropper to trespass on private property to install the device was the basis of a controversial ruling by the Supreme Court in 1928 that placed wiretapping outside the protection of the Fourth Ammendment's prosciptions on illegal searches and seizures.

That ruling, which is still the law, has caused much of the confusion in this area because it seemed to have been contradicted by the act in 1934 making interception and divulgence of wiretapped conversations a crime.

Anonomous Situation

It has led to the anomolous situation wherein state courts are not forbidden to admit wiretaps into evidence, since no constitutional right is involved, while the very act of divulging the conversations in court is a Federal crime.

Many state courts do not admit wiretap evidence under own laws, but some, like New York, authorize it if the tap has been placed pursuant to a signed order by a judge.

In 1939 the Supreme Court ruled that wiretap evidence, or leads arising from taps, was inadmissible in Federal courts. In 1957, the Court said that to testify in court about a tapped conversation was a crime.

As a result, District Attorney Frank S. Hogan of Manhattan announced that, while his office would continue to wiretap under court order, it would not introduce the results into evidence.

Mr. Hogan explained that he would not commit a criminal offense to convict a criminal.

Some other district attorneys in New York did not take the same view, however.

Mr. Hogan's view that it was not a criminal violation to intercept conversations by wiretapping so long as the results were not divulged in court rested upon a Justice Department rationale devised by the late Robert Jackson when he was Attorney General in 1941.

Sharply Criticized

This rationale has been sharply criticized as a "fiction" by many legal commentators over the years and it indeed has a curious history.

As this history developed, it was directly tied to the idea that the Attorney General could authorize wiretapping in national security cases.

The idea that wiretapping is permissible but divulgence is a crime arises out of Mr. Jackson's interpretation—since relied on by all succeeding Attorneys General—of the Federal Communications Act of 1934.

Section 605 of the act makes it a crime to "intercept . . . and divulge . . . to any person" wired communications without the permission of the sender.

The critical words are "any person" and the Justice Department's theory is that this does not include persons inside the Government.

This position was termed a "triple incongruity" by Alan Barth in "The Loyalty of Free Men," a book published in 1951.

"In the first place," Mr. Barth wrote, "the notion that official colleagues are not 'persons' seems a transparent fiction. In the second place, the [Justice] Department has repeatedly asked Congress for legislation to authorize what it persists in pretending that it already has authority to do.

"And Congress has repeatedly declined to enact such legislation.

"In the third place the department is forced to pretend that its resort to wiretapping yields it no information of any value in the prosecution of criminals. If the information gleaned through wiretapping is really not used, the practice had much better be discontinued."

Other critics of the department's policy point out that scores of bills designed to legalize wiretapping have failed to pass Congress, both before and after 1951.

Therefore, they contend that the department has asserted the power to wiretap with no legal justification and then "limited" it to national security and internal safety cases.

For example, Prof. Yale Kamisar of the University of Michigan Law School noted in a law review article in 1964 that Attorney General Jackson conceded in 1941 that the Supreme Court had outlawed all wiretapping.

In that year, in a press release explaining why the F.B.I. had dropped wiretapping from its official manuals, Mr. Jackson said that, "under the existing state of the law and decisions," even tapping in a limited class of cases "cannot be done unless Congress sees fit to modify the existing statutes."

Mr. Jackson was alluding to the Supreme Court ruling of 1939 that banned the use of "leads" from wiretap evidence.

Professor Kamisar, in his article in the University of Minnesota Law Review, observed that the law had not changed since Mr. Jackson made his "concessions," that neither Congress nor the courts had authorized the Justice Department's interpretation of the Federal Communications Act.