FOR RELEASE ON DELIVERY

STATEMENT

by

HONORABLE HERBERT BROWNELL, JR.

ATTORNEY GENERAL OF THE UNITED STATES

Prepared For Testimony

before

A SUBCOMMITTEE OF THE JUDICIARY COMMITTEE

UNITED STATES SENATE

Tuesday, April 20, 1954

This Committee is deeply concerned over the shameful history of Communist espionage in Government and in other segments of our society, and of betrayal of our vital secrets. It seeks to find a new and fair solution to an old problem by its present inquiry into pending wiretap evidence proposals.

This is no easy task. The wire tapping controversy has raged for many years. The problem touches each of us. How can we best achieve a proper balance between the safety of the Nation and the precious liberties of the people?

Every Attorney General over the last twenty years has favored and authorized wire tapping by Federal officers in cases involving security. This policy adhered to by my predecessors has been taken with the full knowledge, consent and approval of Presidents Roosevelt and Truman. None of the proposals before you gives the Attorney General or any other Government official any additional power to tap wires over and beyond that which has been exercised since 1941.

Much of the evidence now available of the illegal actions of Communists and of their future plans, has been derived from wire tapping by the Federal Bureau of Investigation under supervision of various Attorneys General. Yet, as you know, wiretap evidence is not admissible in prosecutions in Federal courts.

This is so not because of any provision or right contained in the Constitution. On the contrary, the Supreme Court has held that introduction of wire tapping evidence neither violates rights against

unlawful search or seizure under the Fourth Amendment nor rights against self-incrimination under the Fifth Amendment. The only reason wire-tapped evidence is presently inadmissible in the Federal courts is that the Supreme Court has construed Section 605 of the Federal Communications Act, enacted in 1934, as a bar to admitting such evidence even when obtained by Federal officers.

Now information is not an end in itself. The knowledge gained is important to the extent that it can be used promptly to forestall threatened danger to our internal security. It is equally essential that the information we obtain be admissible in court at the proper time and place to accomplish the objective of jailing those who have offended our laws.

Under Section 605, as construed by the Supreme Court, the wiretaps might disclose that the accused has stolen and peddled important bomb secrets, or that he was plotting the assassination of a high Government official, or that he was about to blow up a strategic defense plant or commit some other grave offense. Yet neither the information obtained thereby, nor other information or clues to which the wiretaps indirectly led, could be introduced to convict this defendant. Indeed, if either all the evidence or any part of the vital evidence was obtained through this means, the defendant would go scot-free.

It was this loophole in our Federal law of evidence that led to reversal of the conviction in the Coplon case, though Judge Learned Hand, speaking for the Court of Appeals, refused to dismiss the indictment because the "guilt is plain".

It is this loophole that all of us are trying to plug so that those guilty of espionage and related offenses will no longer escape punishment merely because they resorted to the telephone to carry out their treachery.

Everyone agrees that invasion of privacy is repugnant to all Americans. But how can we possibly preserve the safety and liberty of everyone in this Nation unless we pull Federal prosecuting attorneys out of their strait-jackets and permit them to use intercepted evidence in the trial of security cases?

Let us not delude ourselves any longer. We might just as well face up to the fact that the Communists are subversives and conspirators working fanatically in the interests of a hostile foreign power. Again and again they have demonstrated that an integral part of their policy is the internal disruption and destruction of this and other free governments of the world.

It is almost impossible to "spot" them since they no longer use membership cards or other written documents which will identify them for what they are. Nor do they look like criminals or persons we would imagine would resemble the old type Bolshevik. The conspiratorial Communist is too smart to be singled out by physical traits or surface behavior. As a matter of necessity, they turn to the telephone to carry on their intrigue. The success of their plans frequently rests upon piecing together shreds of information received from many sources and many nests. The participants in the conspiracy are often dispersed and stationed in various strategic positions in government and elsewhere

throughout the country. Their operations are not only internal. They are also of an international and intercontinental character. "Thousands of diplomatic, military, scientific and economic secrets of the United States have been stolen by Soviet agents in our government and other persons closely connected with the Communists." If we are to cope with our internal enemies we must know when they will strike next, who will be their next victim, what valuable Government secret will be the subject of a new theft, where a leading fugitive conspirator is being concealed. We must also be able to use our evidence in court so that these wrongdoers will no longer continue to prey on the freedom and liberty of our Nation.

Trailing these spies and traitors or trapping them is difficult unless you can tap their messages. Convicting them is practically impossible unless you can use these wiretaps in court.

Since these enemy agents will not talk in court or speak the truth, and since Federal agents are forbidden from testifying to what they heard over the phone, the Department of Justice is blocked from proving its case and sending these spies and espionage agents to jail where they belong. The result is that many of the persons responsible for these grave misdeeds are still at large and will actually be aided in their deceptions so long as the existing law of evidence is permitted to stand.

Surely this Nation need not wait until it has been destroyed before learning who its traitors are and bringing them to justice.

We turn now to the contentions raised by the opponents to pending bills authorizing wiretapped evidence to be admitted in the Federal courts.

The principal reasons for opposition to the pending bills are that wire tapping is still "dirty business"; that we should not fight Communist spies by imitating their methods; that wiretaps will be used to harm innocent persons; that privacy will be invaded, and people will be apprehensive about using the phone; and that the authority conferred upon Federal officers to wiretap may be abused. While these arguments are persuasive on their face, they do not stand up on analysis.

First consider the claim that intercepted evidence should not be admissible in Federal courts because wire tapping is "dirty business".

Inherently, we people have little liking for eavesdropping of any kind. Fair play and freedom mean so much to us. Wiretap snooping reminds us of the methods employed by the Nazi Gestapo and the Soviet Secret Service.

While some of these people would ban such evidence, they seem to be unaware that the law presently admits evidence which is obtained by informers; by eavesdroppers at someone's keyhole or window; by an officer concealed in a closet; by installation of a recording device on the adjoining wall of a man's hotel or office; and by transmitters concealed on an agent's person. Moreover, under the law, a Government witness may testify to every word of his telephone conversation with a defendant, and his testimony may even be distorted by an imperfect memory or character. Yet the Federal Court would not admit an exact

transcription of an intercepted conversation in the form of a phonograph recording. And the Supreme Court only recently held that although evidence is unlawfully seized, it is admissible in a Federal criminal proceeding to establish that the defendant lied.

There is little, if anything, to distinguish between these approved methods of obtaining and admitting evidence, and wiretaps which are not admissible. In these modern times, society would be severely handicapped unless it could resort to these methods to combat crime and to protect itself from internal enemies.

Re-evaluation of the critical situation today makes it clear that authorized wire tapping under careful restrictions in cases involving our national security is not "dirty business" at all, but a common sense solution by Congress which will protect the liberty and security of all the people from those who wish to see it impaired.

Some opponents to wire tapping also claim that they are concerned with the protection of innocent persons who through no fault of their own may have become enmeshed with spies and subversives.

This argument has no real validity. The proposed laws will not permit the use of this evidence against innocent persons. Its use will be confined solely to criminal proceedings initiated by the Government against those criminals who seek to subvert our country's welfare. No innocent person would be hurt by legislation authorizing wiretaps to be admissible against our internal enemies. No intercepted evidence could ever be made public until a grand jury had indicted the accused for espionage, sabotage or related crimes. Even upon a trial, no conversation or evidence obtained by wiretap could

be introduced in court until a Federal judge had concluded that it was relevant, material and obtained with the approval of the Attorney General.

Testifying in recent hearings on wire tapping, Miles F. McDonald, former Assistant United States Attorney and District Attorney of Kings County, New York, declared that he had never seen any case where an innocent person was harmed by a wiretap order, and he had been at the business for 14 years.

Opponents of wire tapping also charge that it encourages invasion of the individual's liberty and privacy; that the principle is wrong; and that people would be made fearful of using the telephone.

It would be just as reasonable to claim that people are afraid of walking in the street because policemen carry clubs and guns.

Contrary to general impression, authorizing the introduction of intercepted evidence in the Federal court would not interfere in any way with telephone privacy. As the law stands now, it does not stop people from tapping wires. It is still useful to those who make private use of it for personal gain. What has been stopped is the use of such evidence to enforce the laws against the Nation's most heinous criminals. Treason and sabotage deserve no such privacy or protection. Mr. Justice Jackson observed, while Attorney General, that the decisions only protect those engaged in incriminating conversations from having them reproduced in Federal courts. These decisions merely lay down rules of evidence. He said:

"Criminals today have the free run of our communications systems, but the law enforcement officers are denied even a carefully restricted power to confront the criminal with his telephonic and telegraphic footprints."

It is also claimed that even controlled, restricted monitoring of the wires should not be permitted since the authority may be abused by irresponsible and indiscriminate use of it.

This apprehension is entirely understandable. Unfortunately, wire tapping has been brought into disrepute because of widespread abuse of it by private peepers.

The fact that the technique has been abused by private persons and some local enforcement officers for private benefit affords no reason for believing that it will be abused by the Federal Bureau of Investigation. Experience demonstrates that the Federal Bureau of Investigation has never abused the wiretap authority. Its record of "nonpartisan, nonpolitical, tireless and efficient service over the years gives ample assurance that the innocent will not suffer in the process of the Bureau's alert protection of the Nation's safety."

As a recent editorial said:

"We've got wiretapping now. Why not use it where it will do the most good - against our national enemies?"

This seems to be the general feeling. Chief dispute centers on the mechanics by which the technique may be made most effective without impairment of individual rights and liberties. There are two schools of thought. One believes that the technique should be resorted to only after court permission; the other that we should

continue the present system which has been in effect since 1941, namely, after authorization of the Attorney General alone.

The objections to vesting authority to permit wire tapping in the Attorney General are that he should not be allowed to police his own actions; that the authority may be abused when Government prosecutors turn out to be overzealous; that the court is more likely to be objective and curb indiscriminate wire tapping than the Attorney General; and that wire tapping is somewhat like a search into the privacy of an individual's affairs, and as in the case of a search, requires supervision by the courts.

The provision requiring an order by a Federal judge permitting wire tapping on a showing that there is reasonable cause for the order is patterned after a similar law in force in the State of New York for several years.

After hearings on similar bills before the House important objections were crystalized to the requirement of a court order as a condition to wire tapping. As a result, the House Committee on the Judiciary in reporting the Bill, said the following:

> * * *Your committee believed that the best interests of all will be served by placing the control of wiretapping in the hands of the Attorney General of the United States. Many believed that it should be deposited in the Federal Judiciary, but after weighing all the arguments advanced, your committee concluded that the nature of the crimes involved and the operation of wiretapping itself require such a high degree of secrecy if it is to be successful, that any opportunity

for a leak would best be avoided by placing it under the control of the Attorney General.

"In addition to the need for secrecy, it should be pointed out that by placing control in the Attorney General, uniformity will be assured. This is clear when one considers the several hundred Federal judges who could issue court orders. In addition, the Congress itself is in a better position to study and, if necessary, control the activities of the Attorney General than that of the Federal judiciary. Furthermore, your committee is of the opinion that it is more consistent that control be placed in the Attorney General for he is the one primarily responsible for the protection of our national security; he is in the best position to determine the need for wiretapping and he has the responsibility of prosecuting for criminal violations.

"The type of crime which this legislation encompasses is not localized, but in most instances consists of a network reaching out over the length and breadth of the land. It overlaps judicial districts and covers many points in between. To compel the enforcement agents to operate in a limited geographic area while attempting to cover a nationwide network of crime, is not feasible. Finally, there is the question of the time element. Very often, speed is of the essence and the time consumed in obtaining a court order might well result in the loss of vital evidence. Your committee feels that these

difficulties may be avoided on the one hand and the needed benefits derived on the other when the approval and control is in the hands of the Attorney General."

This was also the view of Mr. Justice Jackson while Attorney General in opposing the search warrant procedure which would authorize over two hundred Federal judges to permit wire tapping. He was not only concerned with the loss of precious time involved in obtaining a court order, but felt that probable publicity and filing of charges against persons as a basis for wire tapping before investigation was complete might easily result in great injury to such persons. He too concurred in the opinion that "a centralized responsibility of the Attorney General can easily be called in question by the Congress, but you cannot interrogate the entire judiciary."

It is also my opinion that the wiretap technique would be attended by greater secrecy, speed and better supervision by Congress if no court order was required. The need for a court order might prove to be so restrictive in practical operation as to be fatal to the primary objectives of bringing our traitors to justice. These spies are not so accommodating as to defer their scheming over the phone until we are able to hunt up a judge who will sign an order. Their conspiracy stretches out across every State in this country. It may be necessary to intercept communications at about the same time in many different parts of the country. Since a Federal judge in one district cannot grant an order for interception of a communication in another district, it will be necessary to go to a number

of judges to obtain orders. Multiply the personnel working for these judges, their assistants, court clerks, secretaries and others through whose many hands even ex parte orders are often channeled, and you can readily see that secrecy will be difficult to maintain.

For these reasons, a bill permitting designated Government agents to wiretap upon authority of the Attorney General in security cases (in other words, a continuation of the existing procedure under which all Attorneys General have operated since 1941) would, in my opinion, strike the best balance between the rights of the individual and the vital needs of the Nation.