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Harvard Law Record

America's Oldest Law School Newspaper

VOL. 26, NO. 4

CAMBRIDGE, MASS., THURSDAY, FEBRUARY 27, 1958

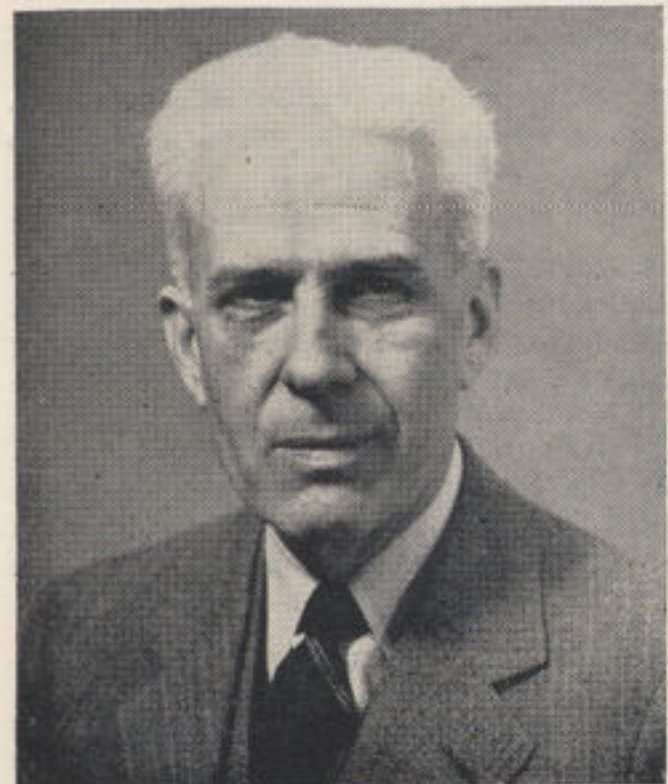
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TEN CENTS

Civil Defense Dangers Noted

The problem of assuring continuity of government in the event of an atomic attack upon this country was discussed by Professor Charles Fairman in an address before the Section on Military Law of the State Bar of Wisconsin in Milwaukee last Thursday afternoon.

Mr. Fairman pointed out that "our sprawling federal scheme of govern-



Charles Fairman

ment was not designed for an embattled nation. Our scheme of public administration... characterized by a mass of autonomous local units conducted by elective officers rather than by professional administrators... is not a scheme readily adaptable to conditions following a nuclear attack."

After noting the value of state and municipal planning, Professor Fair-

Group Studies Maritime Code

An international conference on the Law of the Sea opened last Monday in Geneva, Switzerland. The conference will meet for nine weeks to consider the recommendations for a universal maritime code submitted by the International Law Commission which has been conducting research on maritime law for several years.

It is expected that the conference will endorse the proposed World Maritime Organization to be established as a specialized agency of the United Nations, similar to the International Civil Aviation Organization.

The conference is considering problems such as the breadth of territorial waters, the right of innocent passages, the nationality of ships, penal jurisdiction in maritime collisions, slave trade, pollution of the sea, and piracy.

It is also dealing with problems related to fisheries and the conservation of sea life, the continental shelf, and exploration and exploitation rights of the sea's natural resources. Moreover, the problem of access of land-locked countries to the sea is being studied.

The conference will draft an international convention or group of conventions to be submitted to participating countries for ratification.

The conference, which is meeting in Palais des Nations, European headquarters of the United Nations, is being attended by jurists, natural scientists, and diplomats from 90 countries. Not only are UN member countries represented, but also states that belong to specialized agencies of the UN, though they are not members of the world organization. Among this second group are the West German Federal Republic, Switzerland, South Korea, South Vietnam, San Marino, and Vatican City.

Dance

The Spring series of Dormitory Association dances continues this Saturday evening with music, dancing, etc. in the Harkness ballroom beginning at 8:30 p.m. Admission is by presentation of membership tickets or payment of one dollar at the door. Setups will be provided.

Moss, Katzenbach Discuss Secrecy

"I say if you know what defense information you're looking for, you can get it. Just read *Air Magazine* or *Rockets and Missiles*," declared Dr. Edward L. Katzenbach, Jr., director of the Harvard Defense Studies Program, while discussing "Secrecy and Government Agencies" Thursday, February 20, with Representative John E. Moss (D) of California, chairman of the House Subcommittee on Government Information, at a meeting sponsored by the Boston College Law School Forum.

"But you cannot get that same information from the Government," stated Representative Moss. "Because of the timidity of the courts, and the lack of Congressional attention, the Executive has moved into the field of secrecy policy in such a way that if a certain memorandum of the Attorney General were taken literally, that branch would be in complete control. Then Congress could represent nobody but the Executive."

"We all knew about Sputnik in plenty of time," charged Dr. Katzenbach. "But the President and the Secretary of Defense were not taking in the information they were supplied with. And this weakness existed before Eisenhower."

"In 1949 Mr. (Thomas K.) Finletter, later Secretary of the Air Force, wrote a powerful letter exposing our air weaknesses. When Congress appropriated remedial funds, President Truman impounded them until the Korean War."

"We are finally going to do something about the attitude that information should be withheld unless release can be justified," rejoined Con-

(See *SECRECY* on page four)

Harry S. Ashmore

Ashmore Hits Press Failure

In the first Nieman Fellowship Lecture, given to commemorate the twentieth anniversary of the Foundation, Harry F. Ashmore, editor of the *Arkansas Gazette*, took the press to task for failure to properly report the news.

Ashmore, himself a former Nieman Fellow, used the Little Rock episode, which he said was exceeded only by Sputnik in impact on the public during 1957, as an example. The failure lay, according to Ashmore, in the journalistic maxim that "what happens is news, and what doesn't isn't."

The result of this attitude in Little Rock, he continued, was the omission of the story of the "silent majority," those who disapprove of integration but who deplore the use of violence. Giving all of the space to the sensational news played into the hands of the extremists, by giving the impression that there was no middle ground.

Also neglected, said Ashmore, was the failure of the administration to prepare the South for the aftermath of the 1954 desegregation decision of the Supreme Court. Neither political pressure, nor personal popularity, nor the prestige of his office was brought to bear by the President on

(See *ASHMORE* on page four)

"Foreign Policy" Subject Of Address by Stassen

Harold E. Stassen, who resigned two weeks ago as Presidential Advisor on Disarmament, will appear at 8 p.m., February 28, at Sanders Theatre under the sponsorship of the Harvard Law School Forum. His address on the topic of American Foreign Policy will be introduced by Associate Dean David F. Cavers of the Law School.

Mr. Stassen, who in 1939 became the youngest man ever elected governor of Minnesota, has recently announced his candidacy for the governorship of Pennsylvania. He resigned as Minnesota Governor during his third term in 1943 to serve with the U. S. Navy in the Pacific.

After the war he was appointed a delegate to the San Francisco Conference of the United Nations and has since been active in Republican national politics. He resigned the presidency of the University of Pennsylvania to take the post of advisor to President Eisenhower on Disarmament and recently participated in the London Disarmament Conferences.

Mr. Stassen's term as Presidential Advisor has been punctuated by sev-

eral forays into the political arena, the most notable being his unsuccessful attempt at the 1956 Republican



Harold E. Stassen

Kalmus Selected By Law Review

In a traditionally long election lasting three days, Geoffrey M. Kalmus, 2L of Fair Haven, N. J., was named president for Volume 72 of the *Harvard Law Review*. The term of office begins with preparation of work for the November, 1958, issue. Upon election the new president then appointed his own staff of officers and editors, all second-year students.

Mr. Kalmus selected Thomas Ehrlich of Cambridge and Milton J. Grossman of Baltimore as Article Editors. Alan G. Blumberg of New York was named Treasurer.

Those appointed Note Editors were Jay A. Erens of Glencoe, Illinois, and W. David Slawson of Grand Rapids, Michigan. Case Editors named are James E. Courtney of Meadville, Pa., and Daniel A. Reznick of Troy, N. Y.

William J. Kiernan, Jr., of Lexington, Mass., will serve as the new Book Review Editor. Guy Paschal of New York will assume the position of Developments Editor.

convention to displace Richard M. Nixon as Vice-Presidential candidate.

The dynamic 50-year-old Stassen may be now engaged in a battle for his political life as he attempts to secure the Republican nomination for Governor in Pennsylvania. The indefatigable "Liberal Republican" campaigner must overcome the almost unanimous opposition of the organized Republican party in the Keystone State in order to succeed.

Tickets for this Forum can be purchased for 95c at the door or at the Forum office at 23 Everett Street.

Hogan to Speak

Speaking tonight at 8 in the large meeting room of Harkness Commons will be Henry M. Hogan who, since 1947, has been General Counsel to General Motors Corporation. Mr. Hogan, appearing before members of the Student Bar Association, will have as his topic, "Work of the General Motors Legal Staff."

Mr. Hogan is a New Englander by birth, having first seen the light of day at Torrington, Connecticut, in 1896. He has received an A.B. from Holy Cross and an LL.B. from Fordham Law School. During World War I he served with the U. S. Navy. Mr. Hogan has been admitted to the New York and Michigan bars and currently is a member of the Bar Associations of the cities of New York and Detroit. Ever since his admission to the bar he has been associated with General Motors. He became vice president of the Corporation in 1941, remaining in that position until the present time.

In addition to his duties with General Motors, Mr. Hogan is currently chairman of the Committee on Jurisprudence and Law Reform of the American Bar Association.

Admission to the program will be by SBA card or payment of 50c.

Concerts

With the repair of the HiFi set in the Wheeler Room, Holmes Hall, recorded music concerts have once again been scheduled. Sponsored by the Dorm Council, the sessions have been listed for 3-5 p.m. on the following dates: Feb. 28, March 5, March 9, March 12, and March 14.

Legalized Wire-tapping Necessary to Combat Streamlined Efficiency of Organized Crime

By Edward S. Silver

There is a great deal of fuzzy thinking about the "dirty business" of wire-tapping that sorely needs clarification. Laymen, as well as lawyers, feel a lift when they throw the cloak of Justices Holmes and Brandeis about them, and brand wire-tapping as "dirty business." When they do so it is obvious that they did not read the *Olmstead* case (277 U.S. 438 (1928)).

The *Olmstead* case involved illegal wire-tapping by federal prohibition agents in the State of Washington, where wire-tapping was declared to be a crime by a specific statute. What both great judges said was that law enforcing agents should not be permitted to violate the laws even if it succeeds in convicting criminals. This is what Mr. Justice Holmes said (p. 469), "... I think, as Mr. Justice Brandeis says, that apart from the Constitution, the government ought not to use evidence obtained, and only obtainable, by a criminal act..."

Later, again governed by his distaste for evidence procured by law officers while violating a specific statute, he said (p. 471), "But if we are to confine ourselves to precedent and logic, the reason for excluding evidence obtained by violating the Constitution seems to me logically to lead

Edward S. Silver
District Attorney of Kings County
and President of the New York State
District Attorneys Association

to excluding evidence obtained by crime of the officers of the law."

Understanding now the clear and only basis for Justice Holmes' dissent, we can put the word "dirty business" in the correct light. I quote the Justice (p. 470), "For those who agree with me, no distinction can be taken between the government as

prosecutor and the government as judge. If the existing code does not permit district attorneys to have a hand in such dirty business, it does not permit the judge to allow such iniquities to succeed."

There are those who like to consider themselves as "Liberals," whatever that word really means. There is a feeling among those "Liberals" that to come within the aura of that term, they must be against wire-tapping without thinking clearly on the question of whether the wire-tapping is done according to law, or as in the *Olmstead* case, in violation of the law. Nor do they address themselves to whether wire-tapping is or is not necessary in the present day fight against crime. One can well cite Mr. Justice Brandeis in the *Olmstead* case at this point where he says (pp. 473-474) "But 'time works changes, brings into existence new conditions and purposes'."

I speak for the great majority of prosecutors, who are not only ardent advocates of civil rights, but do something about it.

It is very important to point out that the wire-tapping controversy is not between those who cherish civil liberties and those who are indifferent to them. Indeed the record shows

(See *WIRE-TAPPING* on page three)

Letters to the Editor

DEAR SIR:

In the February 20 issue of the RECORD, Mr. Herbert Brucker, Editor of the *Harvard Courant* wrote an article in which he castigated the American Bar Association for its failure to revise its attitude towards photography in the courtroom and radio and television broadcasting of court proceedings.

Mr. Brucker first mentioned that the Foundation responsible for the new, but substantially unchanged Canon 35 "conspicuously" did not include newspapermen and broadcasters. This hardly seems improper, in light of the fact that the ABA does not purport to represent newspapermen or broadcasters. Its canons can only obtain public sanction through legislative or judicial action, and in the proceedings of either the press is amply able to make itself heard.

While it is perhaps true that the reasons given in 1937 for not allowing photography and broadcasting in the courtroom are no longer applicable, it is still thoroughly justifiable to continue the ban, even assuming that all participants would be unaware of it.

Perhaps the best reason is that in the past the press has proven conspicuously unworthy of the freedom granted it by the first amendment. With a few notable exceptions, the press has dwelt exclusively on the lurid and sensational case, frequently giving the jury advance notice about the testimony, confessions and the like. No doubt some of this information was given out by lawyers who should have known better, but that is hardly an excuse.

Moreover, the sort of case that the broadcasters would most likely be interested in is the type of case in which it is most possible to prejudice the rights of the parties. Even if whether or not someone has been adversely affected by having his trial broadcast can only be determined after the fact, if it later turns out that such is the case, then, in the interest of justice, the case would have to be retried. I cannot see anything to be gained by taking the chance except the amusement of the public. This is not the function of the courts, and is not likely to be the reason that the case was brought.

Indeed, it might well be suggested that the press has far too much liberty in the courtroom now, and that the first amendment should be restricted in its scope.

Jacob W. Todd
2L

TO THE EDITOR OF THE RECORD:

It is a rare occurrence indeed when I am moved to comment upon a newspaper editorial. However, I have just read the editorial entitled "Trial and Error" in the February 13th issue of the HARVARD LAW RECORD, and I am prompted to add my "bravo" to its well-presented thoughts.

Trial practice cannot, of course, be learned at the Law School. In this field, as is the case with so many other aspects of the law, experience is the greatest teacher. Nonetheless, exposure to the subject, and a stimulation and awareness of the problems of marshalling and presenting factual material, as well as the practical application of the rules of evidence, has been long overdue in the Law School curriculum.

My own experience, and the experiences of my contemporaries, have indicated to me that the younger members of the bar are more often called upon to try cases than are their more established brethren. The older practitioner would rather leave this phase of the practice to his younger, more energetic colleagues, for he has found that protracted litigation is for the most part physically rigorous, time-consuming and relatively non-compensatory. It is, therefore, a field to which the Law School graduate is exposed early in his practice. Unfortunately, too many attorneys have no idea how to go about gathering and effectively presenting factual data. It is interesting to note that the inadequacy of presentation of factual material,

When Everett D. Green walked out of Federal District Court for the District of Columbia last December 26, he left two murder convictions and a four-year struggle in the courts behind. His final appeal to the United States Supreme Court split that bench five to four.

Green's troubles began in May 1953, with the death of one Miss Brown in a fire at his home. He was indicted on two counts: (1) arson under D.C. CODE § 22-401 (1951) and (2) murder in the perpetration of arson under D.C. CODE § 22-2401 (1951). The trial court instructed the jury that it could find Green guilty of arson, and of either first or



Hugo L. Black

second degree murder, assuming that second degree murder was here included within first degree murder. Verdicts of guilty of arson and guilty of murder in the second degree were returned. The jury made no mention of first degree murder.

Green's Argument

On his first appeal to the United States Court of Appeals for the District of Columbia Circuit, Green argued that the trial court erred in instructing the jury on second degree murder, and that the jury might well have acquitted him altogether on the second count of the indictment but for the erroneous instruction. *Green v. United States*, 218 F.2d 856 (D.C. Cir., 1955). The statute governing the offense read, "Whoever, being of sound memory and discretion, kills another purposely . . . or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in section 22-401 . . . is guilty of murder in the first degree." D.C. CODE § 22-2401 (1951).

The court conceded that a defendant might be found guilty of murder in the second degree if the evidence warranted it; but when the evidence shows that the defendant committed arson and that the fire was the sole cause of the victim's death, the defendant is either guilty of murder in the first degree or he is guilty of nothing. After reviewing the relevant evidence Judge Wilbur K. Miller said, "In the present case . . . all the testimony as to what occurred in the burning house pointed to murder in the first degree and nothing else. Hence there was no reason for a second degree instruction, and giving it was at least technically erroneous." (218 F.2d at 859).

Great Risk

Recognizing that Green might have been found not guilty on the second count had the erroneous charge not been given, Judge Miller candidly wrote, "Green is manifestly taking a desperate chance. He may suffer the death penalty. At oral argument we inquired of his counsel whether Green clearly understood the possible consequence of success on this appeal, and were told the appellant, who is 64 years of age, says he prefers death to

even at the appellate level, was commented upon by Justice Stanley E. Qua, as reported elsewhere in the same issue of the RECORD.

Therefore, I hasten to add my approval to the position expressed in your editorial, to provide a course in Trial Practice to as many students as would seek it.

Theodore M. Newman
LL.B. '48

Current Case

spending the rest of his life in prison." (218 F.2d at 859).

The case was remanded for a new trial. Judge E. Barrett Prettyman dissented, feeling that even if the instruction was erroneous, the defendant had been treated more favorably than he deserved.

At the outset of the second trial Green raised the defense of former jeopardy, which was overruled. A new jury found him guilty of murder in the first degree after being instructed only on that offense. On his second appeal, the Court of Appeals sat en banc and affirmed six to three. 236 F.2d —708 (D.C. Cir., 1956).

Second Conviction

Green argued that his second trial should have been confined to the lesser offense of which he had been convicted, and should not extend to the original indictment. But the court affirmed his second conviction on the authority of *Trono v. United States*, 199 U.S. 521 (1905), where Justice Rufus W. Peckham had written, "The reversal of the judgment of conviction opens up the whole controversy and acts upon the original judgment as if it had never been. The accused by his own action has obtained a reversal of the whole judgment." (199 U.S. at 533).

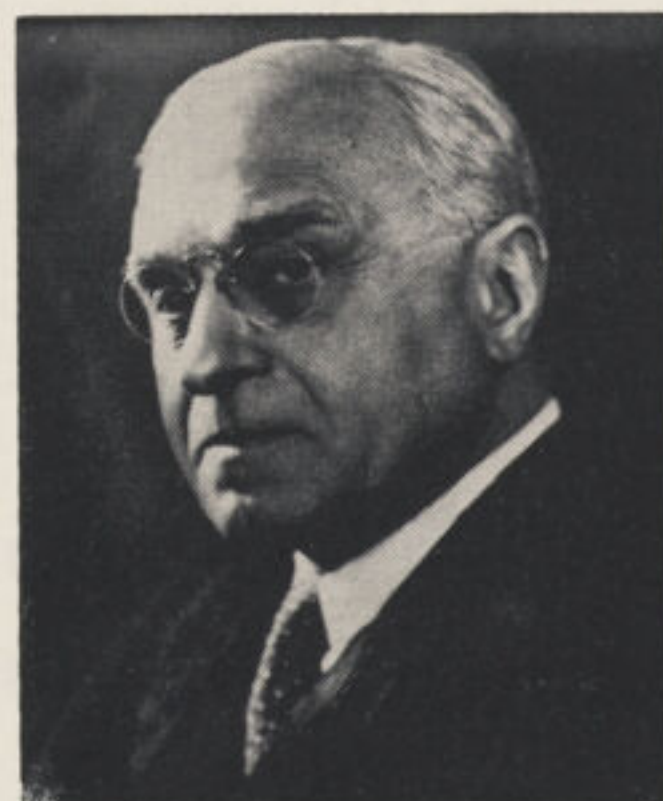
Judge David C. Bazelon's dissent held that a third trial was warranted because of the improper admission of statements by the defendant to police before arraignment. Judge Charles Fahy would have reversed on the grounds that Green did not, by appealing, waive his right against double jeopardy.

The litigation finally came to its climax last December when the United States Supreme Court reversed the conviction. 355 U.S. 184 (1957). Speaking for a majority of five, Justice Hugo L. Black said that a person can be placed once in jeopardy even without a verdict's being rendered; "a defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be tried again." (355 U.S. at 188).

Implicit Acquittal

The Justice recognized that a defendant can be tried a second time for an offense when, by appealing, he has obtained a reversal of his first conviction. But here the verdict at Green's first trial was, "under the great majority of cases in this country", an "implicit acquittal on the charge of first degree murder." (355 U.S. at 190). Therefore, the offense of first degree murder was not involved in the case.

Justice Black thought it absurd that Green should be required "to barter his constitutional protection against a second prosecution for an offense punishable by death as



Felix Frankfurter

the price of a successful appeal from an erroneous conviction of another offense for which he has been sentenced to five to twenty years' imprisonment." (355 U.S. at 193). He distinguished the *Trono* case, holding it applicable only to a peculiar situation then present in the Philippine Islands, where that case arose; and concluded that "a second trial for Green for first degree murder was contrary to both the letter and spirit of the Fifth Amendment." (355 U.S. at 198).

Dissenting Views

The dissenting opinion was written by Justice Felix Frankfurter, LL.B. '06; Justices Harold H. Burton, LL.B. '12, Tom C. Clark, and John Marshall Harlan concurred. Jus-

Harvard Law Record

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Published weekly on Thursday for twelve weeks of each term by *The Harvard Law School Record Corporation*, 23 Everett St., Cambridge 38, Massachusetts. Subscription price: \$2.00 per term, \$4.00 per year (24 issues) mailed; student subscription \$1.50 per term mailed, \$1.00 per term distributed at the Law School. Individual copies 10c each at the Law School, 20c each mailed. Business and editorial offices, 23 Everett St., Cambridge 38, Massachusetts. Telephone KIRKland 7-7600, extension 447.

Entered as second-class matter November 19, 1946, at the post office in Lexington, Massachusetts, under the Act of March 3, 1879.

Justice Frankfurter thoroughly reviewed the history of the Anglo-American tradition against double jeopardy. He felt that in deciding *Trono*, the Court had in fact dealt with the same situation now before it, and that that decision "did not turn on any surviving peculiarities of Spanish procedure, or on the fact that the plaintiffs in error relied on a statutory provision rather than on the Fifth Amendment itself." (355 U.S. at 207).

As to an implicit acquittal, Justice Frankfurter said—in words reminiscent of his many remarks on the meaning of a denial of certiorari by the Court (See, e.g., *Sheppard v. Ohio*, 352 U.S. 910 [1956])—"Surely the silence of the jury is not . . . to be interpreted as an express finding that the defendant is not guilty of the greater offense. All that can with confidence be said is that the jury was in fact silent." (355 U.S. at 214). "The jury found him guilty of all the elements necessary to convict him of the first degree felony murder with which he was charged, but the judge's erroneous instruction permitted the jury, for its own undisclosed reason, to render an irrational verdict." (355 U.S. at 215). The Justice concluded that the framers of the Bill of Rights were concerned to protect the accused; but "On the other hand, they were also aware of the countervailing interest in the vindication of criminal justice, which sets outer limits to the protections for those accused of crimes." (355 U.S. at 219).

Likely Results

The narrow division of the Court indicates the many strong arguments which can be advanced on either side of the question. One who feels that all doubts should be resolved in favor of an accused will agree with Justice Black in finding an implicit acquittal by the jury on the first degree murder charge, even though the jury said nothing one way or another. Actually, it is somewhat doubtful whether the average jury has any conception of what an implicit acquittal is. But it seems equally unrealistic to hold that an accused who has not been convicted of one offense "waives" his right not to be retried on that charge if he appeals his conviction for another offense, even if both arise from the same acts.

On the other hand, District Court Judge James R. Kirkland, releasing Green last December 26, expressed concern over the impact of the Court's decision on future cases. "It is hard to forecast what will come out of this case," Judge Kirkland said. But he intimated that in similar cases in the future, judges may hesitate to render instructions on second degree murder in doubtful cases, and juries may be less inclined to return a moderate finding. The Judge was quoted as saying that it "appears more men may go to their deaths." (Washington, D.C., Evening Star, December 26, 1957, p. A-6, col. 2).

—Oliver

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WIRE-TAPPING

(Continued from page one)

that the district attorneys are alert to protect civil rights, indeed the civil rights of those who are charged with crime. It is they who are generally in greatest need of that protection.

Let me list some bills which the New York District Attorneys' Association, not Bar Association or Civil Liberties group, advocated and introduced in the New York State Legislature to protect the rights of defendants:

1. Legislation to provide (at the cost of the State, on a court order,) indigent persons with daily copy of testimony and the cost of expert witnesses, when needed, in preparation of their defense;
2. Legislation to provide, in crimes where a second offense makes it a felony, a procedure that the prior conviction is not disclosed to the jury. (As the law is now, it is contained in the indictment and read to the jury, and we consider it unfair to the defendant);
3. Legislation to provide that, where a judgment of conviction is vacated and a sentence is thereafter imposed for a lesser term than the original sentence, any time spent by the person under the original sentence be credited to the term of any other sentence which the defendant may currently be serving. (This is not the law now);
4. Legislation making it a crime for one who fails to appear in court when the defendant is paroled in his own custody or in that of his attorney. (Such a law would enable the district attorney to parole such persons and thus not put them to the cost of procuring bail bonds for their freedom pending trial).

It should be made clear, too, that district attorneys are not in favor of granting any law enforcing agency the right to tap wires without a court order.

Testimony

On April 19, 1955, I testified before the Judiciary Committee of the House of Representatives. (See Hearings before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, 84th Congress, p. 97, etc.) In 1954, in a letter to a Senate Committee looking into the wire-tapping problem, I wrote to the same effect. I quote the parts dealing with our attitude not to permit wire-tapping without a court order:

I understand that the Attorney General does not favor a provision in the proposed bill requiring a court order, based on a showing of reasonable cause, authorizing the tap. As the District Attorney in the second largest county in the country I resort quite frequently (about forty to fifty times a year) to wire-tapping in our fight against crime. Under our state statute, I am required to get a court order and I welcome it as a reasonable restraint.

Power is a heady thing, as Mr. Justice Jackson said in *McDonald v. United States*, 335 U.S. 451, 455-456 (1948). Just preceding that wise observation he remarked, "so that an

objective mind might weigh the need . . . the right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals."

Indeed, when we think we desire to tap a wire we can have the order and affidavit ready long before we have our setting in order. We have never found the necessity to get an order an obstacle.

As a district attorney, I must not forget that at times in the zealotry to solve a crime I might be tempted to thrust aside protective procedures that have come down to us as a result of many hard fought battles. Four centuries ago Lord Coke (*Second Institutes* (1656) 48) said:

"Every oppression against law, by colour of any usurped authority is a kind of destruction . . . and it is the worst oppression that is done by the colour of justice."

I want to say that I strongly favor the Attorney General having the power to tap wires in his fight against subversives. We must get the modern tools to fight those who use the modern tools for their nefarious purposes. Yet, with this necessary power should go the objective view of the court in granting an order permitting a tap.

At this point it might be well to state, too, that the district attorneys in New York State advocated and wrote the law passed by the New York State Legislature in the 1957 session making it a felony punishable by not more than two years for any law enforcing agent to tap a wire without a court order. (See New York Code of Criminal Procedure, Section 813-b).

Enactments

Let me quote the New York State Constitution provisions and pertinent part of the enabling statute which permits wire-tapping by court order:

New York State Constitution Article 1, Section 12

... The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof. Adopted by constitutional convention of 1938; approved by the people November 8, 1938.

Code of Criminal Procedure Section 813-a

An ex parte order for the interception, overhearing or recording of telegraphic or telephonic communications may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York, upon oath or affirmation of a district attorney, or of the attorney general or of an officer above the rank of sergeant of any police department of the State or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained and identifying the particular telephone number or telegraph line and particularly describing the person or persons whose communications are to be intercepted, overheard or recorded, and the purpose thereof. In connection with the issuance of such an order the justice or judge may examine, on oath, the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based shall be delivered to and retained by the applicant as authority for intercepting, overhearing or recording, or directing the interception of the telegraphic or telephonic communications transmitted over the instrument or instruments described. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same (added L. 1942, c. 924, effective May 23, 1942; as amended L. 1957, c. 879, Sec. 1, eff. July 1, 1957).

There is a great deal of careless comment on the evils of wire-tapping.

One of the most glaring examples is a statement appearing in a book entitled *An Almanac of Liberty* by Mr. Justice Douglas of the United States Supreme Court. I quote from page 355 of this book:

During 1952, there were in New York City alone at least 58,000 orders issued which allowed wiretapping—over 150 a day every day in the year. The New York system has in practice been oppressive; it has been used as the means whereby police have obtained guarded confidences of people and used the information for corrupt purposes.

What were the facts? In 1952 all five district attorneys in New York City and the police department procured a total of 480 orders—less than 1% of what Mr. Justice Douglas asserted. Here is the breakdown:

New York County	60
Kings County	54
Bronx County	14
Queens County	12
Richmond County	2
N. Y. Police Department	338
	480

While we are on statistics, may I say that in connection with an inquiry made by a committee of the New York State Legislature figures were gathered on the number of wiretap orders procured by all the district attorneys in the state of New York. Sixty-one of sixty-two counties reported for the five year period, 1950 through 1954. These counties account for a population of 14,590,806 (total population, 1950 census, is 14,830,192). For the five years the total number of wiretap orders procured was 2,394, or an average of 479 a year, for 61 district attorneys covering a population of over 14½ million people.

Prudence Displayed

Surely it can be said that this power is used with care and restraint.

There are those who with vivid imagination conjure up dire consequences that will result from the power to tap wires with a court order. Twenty years of experience in New York State show that facts are more reliable than fiction.

It is most interesting and in a sense amusing when one reads in the year 1958 the debates by the delegates on our Constitution in 1787. They put one in mind of those who now beat their own breasts and issue dark prophecies about our liberties if wire-tapping by court order were permitted.

Patrick Henry is often quoted, approvingly, for "Give me liberty or give me death," but listen to him as a delegate from Virginia oppose the Constitution: "I would rather infinitely have a king, lords and commons, than a government so replete with such insupportable edicts."

A Delaware delegate said: "We are told that although three large states form a majority of the people of the thirteen, yet these three states will never do harm to the rest of the states. Gentlemen, I do not believe you."

Why do we need this right to tap wires with court order? Simply, to fight crime—modern crime—organized crime. Where is the sense or logic to say that those engaged in crime may use the telephone in furtherance of their iniquitous operations, and they do, without let or interference?

Federal Judge and former Secretary of War, Robert P. Patterson, speaking on the subject of organized crime before the American Bar Association on September 19, 1951, put it well when he said, in part:

The underworld of today would rate Jesse James as a small fry amateur. Crime has become big business, with campaigns planned and organized like operations in legitimate big business, with a structure of chief executives, fiscal departments, legal departments, public relations and the rest. Advantage has been taken of the most modern methods in business organization, swift communication, swift transportation. Advantage has also been taken of lagging organization of government. Law enforcement systems operating along lines good enough for 1851 or 1901 are too slow for the swifter pace of the times we are living in.

Further, in the same address, he said:

In my opinion there is pressing need also for Congress to legalize the interception of telephone communications—wire-tapping if you will—by federal enforcement officers. Federal officers, as matters stand now, have no such power and evidence so obtained is not admissible in the federal courts. Their present inability is a crowning mercy to professional law-breakers. If we are in dead earnest in insisting that organized crime be defeated, we should lose no time in putting this powerful weapon into the hands of the officers we depend on to do the necessary work. Experience in the states where interception of telephone talks by law officers is allowed proves that the liberties of decent citizens have been in no way interfered with or injured.

What must be understood and understood most clearly is that this is a right not given to the district attorneys, but rather to the people, and that the district attorneys are their agents who have sworn to carry out their obligation to the people.

Wire-tapping a Necessity

All the district attorneys of New York State, and all district attorneys that I have come in contact with in the National Association, feel most strongly that wire-tapping is absolutely necessary if they are to be able to cope with the modern criminal.

Does the public wish this right taken from its servants in this fight against crime? We believe it does not.

On December 9, 1957, the Supreme Court in *Benanti v. United States* (355 U.S. 96), though strictly speaking obiter, declared that even in a state like New York, the interception and divulgence of a telephone communication is a violation of Section 605 of the Federal Communications Act (1934). This decision is considered a serious blow to law enforcement, particularly in the fight against organized crime.

There has now been introduced in the United States Senate a bill (S. 3013—to amend Section 605 to authorize certain communications to be intercepted in compliance with state law and for other purpose) which would except from the operation of Section 605, F.C.A., district attorneys and law enforcing agencies that operate under statutes permitting wire-tapping by court order, "... if such interception was made after determination by a court of such state that probable cause existed for belief that such interception might disclose evidence of the commission of a crime." It is hoped Congress will understand the importance and urgency of this bill and move it to a successful passage with all speed.

McClellan Bill

The sponsors of this bill were Senators McClellan, Ives, Ervin, Mundt, Goldwater and Curtis. In a statement on the floor of the Senate, Senator McClellan in behalf of the bill and his sponsoring colleagues said in part:

As chairman of the Senate Select Committee investigating into improper activities in the field of labor and management, and as a member of the Judiciary Committee, I am cognizant of the problems facing prosecutors and enforcement agencies in their conscientious efforts to eliminate crime and to punish the criminals, particularly the organized criminal syndicate rings engaged in widespread criminal rackets, such as labor racketeering, narcotics, bribery and extortion rings.

The detection, investigation and prosecution of crime, particularly organized crime, will be seriously handicapped and weakened. In many cases prosecution and investigation



Although the snow is now thawing, many law students have been without the use of their cars due to the 19 inch snowfall and blizzard of Sunday, February 16. Classes, however, were held as usual with few persons absent.

of crimes would be completely thwarted and would collapse were wiretapping to be denied to the law enforcement agencies.

... Congress has never intended to permit the criminal to use the means of modern communication with impunity by enjoining law enforcement agencies from intercepting his communications. To accept such interpretation would mean that Congress intended to give criminals free license and encouragement to use communications without fear or handicap and ... grant these criminals a "privileged sanctuary."

... In the field of criminal detection and prosecution, the law enforcement agencies are constantly waging a war against criminals who attack society. To do so effectively, it is necessary and essential to intercept their communications.

Many states, such as New York State, have enacted laws to enable their enforcement agencies to intercept communications under proper safeguards and to eliminate the dangers of promiscuous and improper

(See WIRE-TAPPING on page four)

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CIVIL DEFENSE

(Continued from page one)

man emphasized that preparing for the national defense is, essentially, "a national concern." And "the National Government . . . has never given to this non-military side of defense the attention it imperatively requires. Anyone conversant with the matter recognizes the invalidity of the statute's [Federal Civil Defense Act of 1951] proposition that 'responsibility for civil defense shall be vested in the States,' while the Federal Government assumes no more than 'coordination and guidance.'"

Professor Fairman asserted that "in event of an attack upon this country there must be . . . a central channel of direction from the President and the national administration, down through regional offices to the states and thence to their local subdivisions." He emphasized the necessity of establishing a line of leadership that would be "both moral and lawful."

Professor Fairman stressed the "utter impracticability of using the Army as the agency for achieving a unified effort . . . the line of authority should be civil — not military. . . . I am convinced . . . that this is entirely a civil problem, from top to bottom."

" . . . in my judgment, there is no merit whatsoever in the idea of making Civil Defense a subdivision of the Defense Department, coordinate with the departments of Army, Navy, and Air Force . . . Civil Defense should be a separate executive department . . . only so would it receive the authority and means that the function requires."

Military Government units, Professor Fairman explained, might usefully be trained "to aid in Civil Defense — trained, that is, not for 'taking over,' but for making themselves helpful where help was needed in restoring and supporting the fabric of civil government."

Our great objective, he concluded, is to "build upon the existing lawful structure of civil government; to strengthen it and adapt it to carry on after a nuclear attack."

— Binder

SECRECY

(Continued from page one)

gressman Moss. "We are going to reverse that slogan (See 24 HARV. L. RECORD, No. 6, p. 2 [1957]). Next week we are going to ask Congress to repeal the general statutes giving 'housekeeping' secrecy authority to the government agencies. There will still be fifty or sixty statutes authorizing secrecy in specific cases affecting the national interest," he remarked.

"I cannot fully understand why we can't take our problem in," asserted Dr. Katzenbach. "But I have two ideas about it. One is national pride. Look what happened to Louis Napoleon in 1870. He was told how strong the Prussians were. But he went ahead blindly."

"We in the cold, stern reality of the academic world can understand Soviet ability. But our friends in the ivory tower of the business world, and the world of the 'businessman's government' couldn't. They looked at Russia and saw no automobiles, or washers, or dispose-alls. So they simply wouldn't believe Russian production figures, or that they were really capable of weapons production."

"Second, we have a curious lack of faith in our economic system. This goes far back. In 1787 the Constitutional Convention objected to a navy because it would encourage high taxes and dictatorship. In 1940, there was pressure in Congress to pay off the national debt before we got into the war. The height of this kind of nonsense was reached in 1938 in England, when Lord Symonds called for a cutback in fighters because the British economy needed to be balanced in case of war."

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Bull and Bear

David A. Stretch, LL.B. '33, executive vice president of the Atlas Corporation, will address the members of the Bull and Bear Club tomorrow. The meeting will be held at 1:40 p.m., in the large meeting room of Harkness Commons. Mr. Stretch's topic will be, "The Outlook for Uranium."

Atlas Corporation, a closed-end investment company, is the brain-child and the vehicle for the many corporate manipulations of its unpredictable, but highly successful president, Floyd Odum. Atlas has specialized, over the years, in investing large blocks of its portfolio in highly speculative ventures. It currently has 38% of its assets invested in uranium mines and refining properties, which fact makes Mr. Stretch well-versed in his chosen topic.

In addition to its uranium holdings, Atlas is now the controlling shareholder of Northeast Airlines, and has 13% of its portfolio invested in oil. However, on January 31 the company announced that it was selling all its oil interests to American Petrofina, Inc., and it is expected that Mr. Stretch will comment on the future use of the assets this sale will liberate.

Mr. Stretch graduated from Annapolis in 1930, and subsequently from the Harvard Law School. He was recently appointed chairman of the Tribunal for Austrian Bonds by the United States Department of State.

WIRE-TAPPING

(Continued from page three)

use. In New York, for example, the enforcement agencies must apply to the court of highest original jurisdiction for a warrant to permit the interceptions. This warrant is only granted when the court is satisfied that reasonable grounds exist that evidence of crimes will be obtained as a result of the wiretap.

Let me conclude with a piece entitled "Dirty Business" by the writer appearing in a news letter of the District Attorneys Association of the State of New York in June, 1957. It cites no cases, but puts the situation nicely:

Transcript of a telephone conversation between John "Peanuts" Doe, and Richard "The Boss" Roe.
Peanuts: Lo Boss, thisez Peanuts.
The Boss: Yeah, hello, did the shipment come in OK?
Peanuts: Sure thing, Boss, 50 horse.
The Boss: What do you mean "50 horse." I was expecting 50 kilos of Heroin. Give it to me straight.
Peanuts: Gee, Boss, dats no way to talk on the phone, you warned me y'self. I . . .

The Boss: Listen, dope, that's old stuff. My mouthpiece told me the bulls aren't allowed to stick their snoots in our private business. It's aganst the law, y'hear? It's dirty business to do such a thing.
Peanuts: Are you all right, Boss? You ain't cockeyed or something? Are you hittin the stuff y'self?
The Boss: Look, dope, I'm telling ya. Let 'em listen. The lip tells me and he gets paid to know. The more they listen, the better. It's better'n you think. There's some stuff known like the fruit of the poisonous bush, or sometin. If they grab the stuff after lissen, it's out. They 'a'n allowed to do such naughty things no more.
Peanuts: Look, Boss, should I come over? I think yuh needs me.

The Boss: Forget it, Peanuts, I'm fine, great — the boys is all with me — forget it — and say — you get another grand for the job you did yesterday. The D.A. will know his canaries can't eat lead — it's bad for their diet. Ha, ha, ha — that's pretty good, what?
Peanuts: O.K., if ya says so, ya had me worried there for a bit . . .
The Boss: And listen, I want you should give a couple of yards to the Criminal Liberties Union. Deys the main outfit dat made tappin a dirty business. Now we got a right to talk 'bout our private business, like good Americans should what the Constitution says they should.

Peanuts: Boss, that's what I call a good union — is it one of Dio's outfits?
The Boss: I don't care what outfit it is — they earn our tanks. Take care of it. Ain't you got no 'preciation? 'Bye Peanuts, keep your nose clean.
Peanuts: 'Bye' Boss.

(Those who participated in procuring the transcript must remain anonymous. To disclose their identity would subject them to criminal prosecution.)

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ASHMORE

(Continued from page one)

those in the South who could have made the transition easier.

None of these features was reported by the press, he explained, which took the attitude that the Little Rock story began when Governor Faubus called out the National Guard and ended when President Eisenhower recalled the 101st Airborne Division, despite the fact that Little Rock presented the greatest crisis of its kind since 1860. The story did not begin in September, 1957, and has not ended yet, although only occasional and casual reference is made to it in the press.

Although he stated that he had no specific cure for the problem of news reporting, Ashmore indicated that the press should not only report what

happened, but also tell *why* it happened, and give space to more than sensational events. He declared that objectivity does not mean giving equal space to the saint and the villain, and that a series of undisputed facts does not add up to the truth.

—Todd

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